SUBJECT INDEX.

CASES CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 478

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSY as Commissioners constituting the State Tax Commission of the State of New York,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of JAMES B. O'KEEFE,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

JAMES B. O'KEEFE, a resident of New York, was regularly employed during the year 1934, by the Home Owners' Loan Corporation at a fixed salary. He made a personal income tax return pursuant to law and paid a tax of $57.28 based on his earnings of $2,246.66 at a fixed salary from the Home Owners' Loan Corporation for the year 1934. Thereafter, he applied for a refund of the tax upon the ground that the salary earned by him as an employee of the Home Owners' Loan Corporation was specifically exempt by the Tax Law

of New York from the tax because it was earned by him as an employee of the United States, and upon the further ground that the salary so earned by him was immune from such tax because the Home Owners' Loan Corporation is an instrumentality of the United States.

The application for refund was denied but that determination was reviewed and the same was annulled on certiorari. By final order and judgment of the Supreme Court of the State of New York entered after decision by the Court of Appeals, that conclusion was affirmed.

The Attorney General on behalf of the State Tax Commission now prays for a writ of certiorari to review that final determination.

The Question Presented.

Whether the fixed salary paid to respondent as a regular employee of the Home Owners' Loan Corporation is subject to income tax imposed by the State of New York?

Statutes Involved.

Section 359 of the Tax Law of the State of New York.

Home Owners' Loan Act of 1933; Chapter 64, 48 U. S. Stat. at large, 128.

(See pages 34 to 52, Appendix to Petition for Certiorari.)

POINT I.

Although the petitioners faintly suggest that the Home Owners' Loan Act of 1933 is unconstitutional, they do not urge that point. Nevertheless, we challenge the assertion.

The title of the act expresses the national emergency purpose which prompted the creation of the instrumentality. It is entitled:

> "An act to provide emergency relief with respect to home-mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes."

The President in his message to Congress on April 13th, 1933, recommending this legislation, said, in part:

> "As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small Home Owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."

The statute is an emergency measure, highly remedial in character, with the purpose of extending the greatest measure of relief to home owners. It was an integral part of a comprehensive program enacted at the first session of the 73rd Congress and intended as a broad grant of aid.

The committee reports of Congress further demonstrate the national emergency purpose of the act. (See House Report No. 55, Senate Report No. 91, House Report No. 210, 73rd Congress, 1st Session.)

By the terms of the Act, the bonds of the corporation are exempt, both as to principal and interest, from all Federal, State, Municipal and local taxation (except surtaxes, inheritance, estate and gift taxes), and no taxes may be imposed on the Corporation, its franchise, capital, reserves and surplus, nor upon its loan and income, except that its real property is subject to taxation as other real property is taxed.

The Act was intended to supplement the Home Loan Bank System, by setting up a governmental agency to provide direct relief to home owners.

The Congress determined that the preservation of the ownership of homes was conducive to the general welfare; that home ownership, as a national objective, would be permanently injured if the thousands of foreclosures then being prosecuted should continue; that home owners should not be subject to the vicissitudes of the general money market; and that, if confidence in realty values were not restored, the credit of hundreds of towns and cities, dependent upon the collection of taxes, would be permanently injured; and that granting loans to assist owners in retaining title to their homes was a proper national emergency purpose essential to the general welfare.

The Corporation was formed to carry on this emergency refinancing, its operations being closely circumscribed by statute.

The organization, scope, functions and operations of the Home Owners' Loan Corporation are described in great detail in the Government brief on file in this Court in the case of *Kay* v. *United States,* 82 Law Ed. Adv. Op. 418, and need not be described here in order to demonstrate the national public purposes of the Corporation.

The Corporation was not created to compete with private enterprise, but on the contrary, it was formed to rescue home ownership and private business in a national catastrophe.

It is apparent that the provision of relief for distressed home owners cannot be considered competition with private business, for in the promotion of the general welfare, it fosters and encourages all enterprise.

The statutory refunding operations of this corporation cannot be said to partake of the nature of any private business or to compete with private enterprise, for whenever did or could private capital undertake the making of hazardous loans to poor risks (distressed persons). The corporation was organized and operated in a national emergency at a time when the only power that saved the people of the United States from disaster was their government and the measures taken by their government to alleviate the national distress.

In taxing and making appropriations for the general welfare, Congress is not confined within the scope of the delegated powers but must merely act in furtherance of general or national as distinguished from local purposes. *U. S.* v. *Butler,* 297 U. S. 1, 65.

If the national public purposes of the Act are within the powers conferred upon Congress by the Constitution, then it is plain that the said Act is constitutional and the Home Owners' Loan Corporation is an instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers.

United States v. *Butler, supra;*
Charles C. Steward Mach. Co. v. *Davis,* 301 U. S. 548;
Helvering v. *Davis,* 301 U. S. 619.

Within the principle laid down in these cases, the purposes of the Home Owners' Loan Act of 1933 are plainly national and a public purpose for which the public funds may be expended to promote the general welfare.

This Court recognized the national public interest in the maintenance of home ownership and well noted the severity of the economic crisis which we have but briefly described.

Green v. *Frazier,* 253 U. S. 223;
Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398;
Block v. *Hirsh,* 256 U. S. 135.

Congress has the power to judge what fiscal agencies the Government needs. Its decision of that question is not open to judicial review. Therefore, Congress, at its discretion, may create a moneyed or credit institution such as the Home Owners' Loan Corporation, equipped to provide a market, as stated in the act, for the obligations of the United States.

Congress alone has the right to judge as to the *degree* of *necessity* which exists for creating banks or other governmental fiscal agencies.

It is immaterial that the Home Owners' Loan Corporation is not a bank. For, in passing upon and upholding the power of Congress to create Federal Land Banks and Joint Stock Land Banks, in the case of *Smith* v. *Kansas City Title Co.,* 225 U. S. 180, the Supreme Court said:

> "* * * whether technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. * * *"

If, during an emergency period, the Federal Government exercises functions, derived from its delegated powers,

which it does not find necessary to exercise under normal conditions, it is not departing from the constitutional principles which are the basis of its existence.

This means that our constitutional government has the power of expanding to fit the conditions of any circumstances which might arise.

This Court has said: "The government within the Constitution has all the powers granted to it, which are necessary to preserve its existence * * *." *Ex Parte Milligan,* 4 Wall. 71. And again: "It is not lightly to be assumed that in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." *Andrews* v. *Andrews,* 188 U. S. 14; *Missouri* v. *Holland,* 252 U. S. 433. And, in another case "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." *Block* v. *Hirsch, supra.* And, in still another: "* * * Although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New,* 243 U. S. 332.

An emergency does not create power or increase granted power, or remove or diminish the restrictions imposed upon power granted or reserved, but emergency may furnish the occasion for the exercise of power.

POINT II.

The functions and activities of the Home Owners' Loan Corporation are not proprietary.

The contention to the contrary disregards the conditions which existed when the Home Owners' Loan Act was enacted and the general national purpose of the Act. It overlooks the necessity, arising out of the three-year emergency refunding operation, to service the mortgages so acquired in the emergency. Disregarding the comprehensive governmental functions which the Corporation discharged in the relief refinancing, and still performs, it looks only to activities which are subordinate to the main purpose of the Act and the Corporation.

Subordinate activities will not destroy the authority of Congress to create this Corporation.

> *Osborn* v. *United States Bank,* 9 Wheat. 738 at 860;
>
> *United States* v. *Chandler-Dunbar,* 229 U. S. 53 at 73.

The United States, being exclusively a government of delegated power, has no authority under the Constitution to engage in any form of private business except as an appropriate means of serving a national public interest.

> *Van Brocklin* v. *Tenncssee,* 117 U. S. 151, 155, 158.

The United States being a government which can exercise only those powers derived from the Constitution and not prohibited by it, all of its activities necessarily constitute governmental functions.

McCulloch v. *Maryland,* 4 Wheaton 316;
United States v. *Cruikshank,* 92 U. S. 542;
Baltimore National Bank v. *State Tax Commission of Maryland,* 297 U. S. 209.

In *Kay* v. *U. S., supra,* the defendant charged with violation of the Home Owners' Loan Act, asserted that the statute was invalid. The decision held there was no occasion to consider this broad question, but, in the course of the decision, this Court emphasizes the public governmental character of the corporation and its officers, and states:

> "* * * When one undertakes to cheat the Government or to mislead its officers, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

The Court in that case also held that the regulations of the Board of Directors of the Corporation, made pursuant to the Act, could be enforced under the penal provisions of the Act and in that connection the decision states:

> " * * * Meanwhile, the governmental operations go on, and public funds and public transactions require the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise."

When Congress determined to further exercise its authority to act in this field and created the Federal Savings and Loan Insurance Corporation, it provided by Section 204 B of the Federal Housing Act of 1934 (National Housing Act, 48 Stat. 1257, 12 U. S. C. A. Section 1726) that the Home Owners' Loan Corporation be authorized and directed to subscribe for all the stock of the insurance corporation and make payment therefor with bonds of the Corporation.

This use of the instrumentality further demonstrates the national public purposes of the Corporation. Congress, by this and other legislation, subjected the corporation and its bonds to the authority and direction of Congress. Implicit in such action is the determination that the funds of the Corporation are public funds available for public use.

Under the Home Owners' Loan Act, of 1933, the Treasury was directed to subscribe to the shares of Federal Savings and Loan Associations as part of the permanent home financing system. By subsequent Acts, the Home Owners' Loan Corporation was directed to perform the function first allotted to the Treasury (48 Stat. 128-129; 49 Stat. 293, 296). We point to this as further evidence of the disposition of Congress to use this public corporation and government instrumentality for general national and public purposes.

In *Baltimore National Bank* v. *State Tax Commission of Maryland, supra*, this Court expressed itself respecting the character of the Reconstruction Finance Corporation, as follows:

> "The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends. Act of January 22, 1932, 47 Stat. 5, act of July 21, 1932, 47 Stat. 709, 15 U. S. C. c. 14 (see 15 U. S. C. A., Sec. 601, et seq.). At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. We assume, though without deciding even by indirection, that within McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another."

POINT III.

The authority of the United States to create and use a corporation as its instrumentality to carry into effect its constitutional powers, is founded on and implied from the aggregate of all the powers conferred upon it in the Constitution.

If the instrumentality created and used by Congress to carry into effect its constitutional powers is adapted to aid it in exercising those powers, the Courts will not question or review the decision of Congress in creating and using the instrumentality. *People ex rel. Rogers* v. *Graves,* 299 U. S. 401.

In *People ex rel. Rogers* v. *Graves, supra,* the Court said:

> "The power of the Federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since McCulloch v. Maryland, 4 Wheat, 316."

The Home Owners' Loan Corporation is an agency created, owned and controlled by the United States to enable it to perform a governmental function.

The creation and operation of Home Owners' Loan Corporation is a governmental function well within the constitutional powers of Congress.

In creating this governmental agency and investing it with the broad and comprehensive national functions, Congress relied on its power to borrow and appropriate public money. The power "to borrow money on the credit of the United States" is granted without express limitations (Clauses 2, 8, Constitution; *Juilliard* v. *Greenman,* 110 U. S. 421).

The power to borrow can be subject to no greater limitation than that in its exercise Congress act in furtherance of general or national as distinguished from local purposes.

By the use of Home Owners' Loan Corporation bonds, guaranteed by it, the United States uses this instrumentality to borrow money in furtherance of general or national as distinguished from local purposes.

The allegedly local character of the welfare which is promoted by the Home Owners' Loan Corporation seems to consist merely in the fact that the home owner is a single individual, who is benefited with respect to his real property, immovably fixed to a single place. The objection does not detract from the national interest in home ownership because there can be no general welfare which is not an aggregation of individual welfares.

Congress might have determined that the government, through an administrator, carry on this emergency refunding by an exchange of government bonds for home mortgages. Congress, however, decided to use the corporation as an instrumentality or agency and to issue for the same public purposes the bonds of the corporation bearing a guarantee by the United States. Thus the corporation is the United States.

Congress regularly appropriates funds and the United States sells bonds for cash as a normal operation. Through the instrumentality of the Home Owners' Loan Corporation it issued its obligations for the public purpose, taking mortgages in exchange therefor.

Indeed, in *Commonwealth ex rel. Kelly* v. *Rouse,* 163 Va. 845, 178 S. E. 37, where Rouse was employed as District Counsel for the Home Owners' Loan Corporation, the Supreme Court of Appeals of Virginia remarked:

> "It, therefore, appears from the provisions of the Act that this Corporation was created as 'an instrumentality of the United States' solely for the purpose

of setting up a governmental agency whereby the United States Government itself might provide direct relief to home owners. In the opinion of the Attorney General hereinbefore referred to (written opinion given by the Attorney General of the United States to the President dated August 22, 1933), he further said: 'this review of the statutory provision discloses that the Home Owners' Loan Corporation is, in everything but form, a bureau or department of the Federal Government. It is regulated by Federal officials; all of its capital stock is furnished by the Government; it is given free use of the mails'.

"In view of the purposes and provisions of the Act, as above noted, we do not think there can be any doubt that Rouse's employment as attorney for the Home Owners' Loan Corporation is under the Government of the United States * * *"

POINT IV.

The Home Owners' Loan Corporation being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from State taxation except as Congress may specifically consent to such taxation.

The principle that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, are immune from State taxation, is firmly established.

McCulloch v. *Maryland, supra;*
Dobbins v. *The Commissioners of Erie County,* 16 Pet. 435;
Indian Motorcycle Co. v. *United States,* 283 U. S. 570.

The immunity rests upon an entire absence of the power to tax.

Johnson v. *Maryland,* 254 U. S. 151;
Long v. *Rockwood,* 277 U. S. 142;
People ex rel. Rogers v. *Graves, supra.*

The Home Owners' Loan Corporation, being a wholly-owned instrumentality of the United States, lawfully created and used by it to carry into effect its constitutional powers, it is immune from State taxation.

POINT V.

The Home Owners' Loan Corporation being immune from State taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from State taxation.

The rule is well established that the instrumentalities of the United States, lawfully created and used by it to carry into effect its constitutional powers, being immune from State taxation, the fixed salaries paid to its employees, in their capacity as such, are also immune from State taxation.

Dobbins v. *Commissioners of Erie County, supra;*
Indian Motorcycle Co. v. *United States, supra;*
People ex rel. Rogers v. *Graves, supra;*
Johnson v. *Maryland,* 254 U. S. 51;
Long v. *Rockwood,* 277 U. S. 142.

In *People ex rel. Rogers* v. *Graves, supra,* after holding that the Panama Railroad Company, by which the relator was employed, was a wholly-owned instrumentality of the

United States lawfully used by it to carry into effect its constitutional powers, and therefore immune from State taxation, the Court said:

> "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.
>
> In Dobbins v. The Commissioners of Erie County, 16 Pet. 435, 448-449, this court held that a state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, Indian Motorcycle Co. v. United States, 283 U. S. 570, 575, et seq., that further discussion is unnecessary."

The Attorney General of New York argues that a new rule was enunciated in the case of *Helvering* v. *Gerhardt,* 82 Law. Ed. Adv. Ops. 962, holding that the burden of a tax on employees is speculative and uncertain and therefore he concludes that this Court has ended all employee immunity.

This conclusion is not supported by that decision. The Court in that connection referred to cases interpreted at footnote 6 and stated that those cases establish principles of limitation for immunity of State instrumentalities and mark the boundaries of State immunity. This Court evidences a fixed purpose to limit the decision to the question of immunity for State instrumentalities. This appears from the reference in footnote 7 to *James* v. *Dravo,* 302 U. S. 134, emphasizing an exceptional class of cases where limitation was placed upon the immunity of contractors doing business with the Federal Government.

In *James* v. *Dravo, supra,* the Court emphasizes that the tax in question was not laid upon the Government or its property or officers nor was it laid upon an instrumentality of the United States.

And after reviewing many cases, the Court said:

> "These decisions show clearly the effort of the Court in this difficult field to apply the practical criterion to which we referred in Willcutts v. Bunn, supra, and again in Graves v. The Texas Company, supra."

In the *Panama Canal* case (*People ex rel. Rogers* v. *Graves, supra*), this Court held squarely that an income tax upon an employee's salary is a direct burden on the Government, and counsel respectfully suggests that this was the considered judgment of the Court having in mind the decision in *Willcutts* v. *Bunn,* 282 U. S. 216, from which we quote an excerpt from page 225:

> "Where no direct burden is laid upon the Government instrumentality and there is only a remote, if any, influence upon the exercise of the function of government * * *."

If the employee is taxable then the instrumentality is taxable, and the instrumentality can only be taxable because it is an unconstitutional activity of the Federal Government. If this conclusion were reached then the bonds of the Corporation would be taxable, and by the same token, the guarantee of the principle and interest of the bonds by the United States would be unconstitutional and void.

POINT VI.

Whether or not the burden of the tax upon the respondent's salary be speculative or uncertain, the State of New York has exempted it from State taxation by the Tax Law of the State of New York.

Section 359, Paragraph 2-f of the Tax Law of the State of New York excludes from gross income:

> "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

There is no reason to assume that the Legislature of the State of New York intended to differentiate between the employees in the departments of the Government and those in the wholly owned instrumentalities of the Government.

While we insist that respondent's salary is constitutionally immune, nevertheless, inasmuch as the Home Owners' Loan Corporation is but the means by which the United States acts, the salary is received from the United States and is expressly exempt by the New York statute.

See:

Commonwealth of Virginia ex rel. Kelly v. *Rouse, supra.*

POINT VII.

The immunity of Federal instrumentalities rests on a different basis from that of State instrumentalities.

A federal function must be exercised in a governmental capacity—a delegated power exercised through an appropriate means—otherwise it becomes a mere usurpation in defiance of the law. Granted that the power exists and that the means are appropriate then the immunity is complete.

The boundaries of State immunity are such that the functions shall be traditionally usual and essential.

But, by any test, we have demonstrated that the functions of the Home Owners' Loan Corporation are clearly governmental and are not in the "zone of debatable ground". (*Brush v. Commissioner,* 300 U. S. 352.)

In briefing the question here presented, petitioners regard the States and the Federal Government upon a parity with each other. That is not the position of this Court (*McCulloch* v. *Maryland, supra*), as restated in *People ex rel. Rogers* v. *Graves* (*supra*), and asserted with great emphasis in *Helvering* v. *Gerhardt* (*supra*).

In *McCulloch* v. *Maryland,* the Court recognizes a clear distinction between the extent of the power of a state to tax National agencies and that of the National Government to tax State instrumentalities.

Helvering v. *Gerhardt, supra.*

The immunity of Federal instrumentalities from State taxation rests on a different basis from that of State instrumentalities.

Helvering v. *Gerhardt,* footnote 1, *supra*;
McCulloch v. *Maryland, supra.*

The basis upon which constitutional tax immunity of a State has been supported is the protection which it affords to the continued existence of the State.

Helvering v. *Gerhardt, supra.*

The boundaries of State immunity have been marked.

Helvering v. *Gerhardt, supra.*

The State immunity has been narrowly restricted to those State functions without which a State could not continue to exist as a governmental entity.

Helvering v. *Gerhardt, supra.*

The very nature of our Federal system imposes a limitation on State immunity from taxation.

Helvering v. *Gerhardt, supra.*

The State immunity from National taxing power was narrowly limited.

Collector v. *Day,* 11 Wall. 113;
Helvering v. *Gerhardt,* footnote 6, *supra.*

The exercise of the National taxing power is subject to a safeguard which does not operate where a State undertakes to tax a National instrumentality.

Helvering v. *Gerhardt,* footnote 2, *supra.*

Federal instrumentalities are immune from non-discriminatory State taxation.

Weston v. *Charleston,* 2 Pet. 449;
Dobbins v. *Erie County, supra;*
Helvering v. *Gerhardt,* footnote 3, *supra.*

POINT VIII.

The issues in this case have been settled by decisions of this Court.

The questions involved in this case have been settled.

The fundamental doctrine that the instrumentalities of the United States are immune from State taxation must be conceded and the corrollary, that the income derived from such instrumentalities is also immune, has been adjudicated by this Court.

People ex rel. Rogers v. *Graves, supra.*

We challenge the assertion of the Attorney General of New York picturing consequences which may ensue in preserving the Federal immunity.

While some powers are divided between National and State Governments, nevertheless the United States is sovereign with regard to the objects of the powers delegated to the United States, and as to all such powers and their objects the United States has plenary authority.

The Attorney General for New York professes curiosity to know whether this Court in *Helvering* v. *Gerhardt, supra,* enunciated entirely new rules in regard to immunity of employees from income tax upon their salaries.

This Court confined its decision in the case *Helvering* v. *Gerhardt, supra,* with the statement:

> "* * * we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government."

The present inquiry should not be extended to satisfy a curiosity to know if this Court will formulate a general test which might embarrass the decision of cases in respect of activities of a different kind which may arise in the future. (*Brush* v. *Commissioner of Internal Revenue, supra.*)

Respondent respectfully requests that this case be confined to the immediate question here involved.

CONCLUSION.

Because the Attorney General of New York feels that a new rule has been enunciated in the case of *Helvering* v. *Gerhardt,* this Respondent should not be drawn into issues looking toward a re-examination of the doctrine of immunity or into a discussion as to whether this Court agrees with the interpretation of its decision contained in the study of "Taxation of Government Bondholders and Employees", referred to in Petitioners' Brief, page 16.

If the Court should grant the instant petition, counsel respectfully suggest that it be limited to the question decided by the court below.

We respectfully submit that the application for the writ of certiorari should be denied.

November 21st, 1938.

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