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Opinion No. 12-94

Constitutionality of Charter School Staff and Reporting Requirements

QUESTION

Is Chapter 879 of the 2012 Tennessee Public Acts, effective July 1, 2012, constitutionally suspect?

OPINION

Chapter 879 is constitutionally suspect.

ANALYSIS

Chapter 879 of the 2012 Tennessee Public Acts (hereinafter "Chapter 879") amends Tenn. Code Ann. §§ 49-13-104, -107, -108, and -122, all of which pertain to charter schools in Tennessee. Section 1 of Chapter 879 adds to the "Definitions" of Tenn. Code Ann. § 49-13-104 an additional definition for "Foreign." 2012 Tenn. Pub. Acts, ch. 879, § 1. Section 2 adds a new subsection (c) to Tenn. Code Ann. § 49-13-107, which concerns the application process for charter schools. *Id.* § 2. This new subsection states:

> (c) A charter school application and any renewal application under § 49-13-122 shall include a disclosure of all donations of private funding, if any, including, but not limited to, gifts received from foreign governments, foreign legal entities and, when reasonably known, domestic entities affiliated with either foreign governments or foreign legal entities.

Id. Section 3 of Chapter 879 adds, as a new subsection (c), the following language to Tenn. Code Ann. § 49-13-108, which addresses the approval and denial of charter school applications:

> (c)(1) A chartering authority may disapprove a charter school application, if the proposed charter school plans to staff positions for teachers, administrators, ancillary support personnel or other employees by utilizing or otherwise relying on non-immigrant foreign worker H1B or J1 visa programs in excess of three and one-half percent (3.5%) of the total number of positions at any single school location for any school year.

> (2) Notwithstanding subdivision (c)(1), a chartering authority may not deny a charter school application solely because the proposed school plans to exceed the limitation in subdivision (c)(1) in employing foreign language instructors who, prior to employment, meet and, during the period for which instructors' H1B or J1 visas have been granted, will meet all Tennessee licensure requirements. If a chartering authority disapproves a charter school application under this subsection, the sponsor may appeal the decision to disapprove the application as provided in subsection (a).

Id. § 3. Section 4 of Chapter 879 amends Tenn. Code Ann. § 49-13-122(a), regarding revocation or renewal of charters, by adding the following language as a new subdivision (4), which establishes a new basis upon which a charter school agreement may be revoked:

> (4) Performed any of the acts that are conditions for nonapproval of the charter school under § 49-13-108(c).

Id. § 4.

Sections 3 and 4 of Chapter 879 collectively grant the chartering authority the discretion to deny a charter application, or revoke an existing charter school agreement, if the staff of a charter school exceeds a defined quota of employees who are non-immigrant foreign workers enrolled in H-1B or J-1 visa programs, subject to the specific exception for foreign language instructors. An H-1B visa is a non-immigrant visa authorized by the federal Immigration and Nationally Act, 8 U.S.C. 1101(a)(15)(H), allowing U.S. employers to temporarily employ foreign workers in specified occupations such as teaching. *See also* 8 U.S.C. § 1184(i)(1)(A) & B. A J-1 visa is a non-immigrant visa authorized by the Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §§ 2451 to 2463, to bring teachers, researchers, scholars, and other specified individuals into the country under temporary sponsorships.

Section 5 of Chapter 879 establishes a severability provision, providing that, if any provision of Chapter 879, or the application thereof, is held invalid, this invalidity shall not affect other provisions or applications of the Act. *Id*. § 5. Section 6 of Chapter 879 provides that all charter schools must report certain legal rulings to the Commissioner of Education, stating:

> If a court finds a violation of Title VI of the Civil Rights Act of 1964, as codified in 42 United States Code 2000(d), has occurred under the operation of this act and the court's decision has become final, the charter school that is a party to the lawsuit shall notify the Commissioner of Education of the court's ruling, who shall report the same to the Speaker of the Senate and Speaker of the House. The commissioner shall also notify all charter schools operating in this state of the court's decision.

Id. § 6. Chapter 879 is effective July 1, 2012. *Id.* § 7.

The problematic provisions of Chapter 879 from a constitutional perspective are the sections permitting the chartering authority to deny a charter application, or revoke an existing charter agreement, because a charter school exceeds a set 3.5% quota on staff who can be H-1B or J-1 visa non-immigrant foreign workers. This Office has previously opined on the criteria governing the constitutional validity of a statute that discriminates on the basis of alienage. In an opinion issued in 1986, this Office addressed the constitutional validity of a Tennessee statute that precluded the issuance of beer permits to aliens, defined as any person who is not a citizen of the United States. Tenn. Att'y Gen. Op. 86-85 (Apr. 9, 1986). This Office opined that, in the absence of a showing of a compelling State interest justifying discrimination against aliens, the statute in question would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id. See also* Tenn. Att'y Gen. Op. 88-197 (Nov. 10, 1988).

This opinion remains an accurate statement regarding the constitutional constraints on statutes that discriminate on the basis of alienage. As stated in this opinion, alien status is considered a "suspect class" for equal protection purposes, and in most cases any statute that discriminates on the basis of alienage is subject to "strict judicial scrutiny." Tenn. Att'y Gen. Op. 86-85 at 1-2. To satisfy such scrutiny, there must be evidence that the statute furthers a compelling state interest by the least restrictive means practically available. *Id.* As this Office explained in its prior opinion:

> Generally, a state statute which discriminates on the basis of alienage, an inherently suspect classification, can be sustained only if it can withstand "strict judicial scrutiny", and, to satisfy strict scrutiny, the State must show that the statute furthers a compelling state interest by the least restrictive means practically available. *Bernal v. Fainter*, 467 U.S. 216, 104 S.Ct. 2312, 2316, 2320, 81 L.Ed.2d 175 (1984); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1842, 1852, 29 L.Ed.2d 534 (1971). Accordingly, federal courts have held in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution numerous state statutes which purported to make aliens ineligible for occupational or professional licenses available to American citizens.
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> Thus, *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), struck down a Connecticut court rule adopted pursuant to a state statute whereby resident aliens were not qualified for admission to the state bar. In *Indiana Real Estate Commission v. Satoskar*, 417 U.S. 928, 94 S.Ct. 3062, 41 L.Ed.2d 661 (1974), the Supreme Court affirmed a District Court decision which had invalidated an Indiana statute precluding aliens from obtaining a real estate license. *See*, *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696, 697 7th Cir.1975), cert. den. 423 U.S. 928, 96 S.Ct. 276, 46 L.Ed.2d 256 (1975). *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), nullified a Puerto Rico

> statute which required an applicant for registration as a civil engineer in private practice to be a United States citizen. *Wong v. Hohnstrom*, 405 F.Supp. 727 (D.Minn.1975), voided a Minnesota statutory requirement of United States citizenship for examination for registration as a pharmacist. *Surmeli v. State of New York*, 412 F.Supp. 394 (S.D.N.Y.1976), cert. den. sub nom *Nyquist v. Surmeli*, 436 U.S. 903, 98 S.Ct. 2230, 56 L.Ed.2d 400 (1978), declared unconstitutional a New York statute and rules and regulations promulgated thereunder which required that a physician, to be licensed to practice medicine in New York, must either be a citizen of the United States or file a declaration of intent to become a citizen and which further provided for termination of license upon an alien physician's failure to become a citizen within ten years of licensure. *Kulkarni v. Nyquist*, 446 F.Supp. 1269 (N.D.N.Y.1977), held invalid a New York statute imposing a United States citizenship requirement for the licensing of a physical therapist. *Szeto v. Louisiana State Board of Dentistry*, 508 F.Supp. 268 (E.D.La.1981), ruled unconstitutional a Louisiana statute prohibiting aliens from being licensed to practice dentistry.

Tenn. Att'y Gen. Op. 86-85 at 1-2. *See also* Gregory A. Scopino, Note, *A Constitutional Oddity of Almost Byzantine Complexity*: *Analyzing the Efficiency of the Political Function Doctrine*, 90 Cornell L. Rev. 1377, 1389-93 (July 2005).

The United States Supreme Court, however, has recognized "a 'narrow exception' to the rule that discrimination in a state statute based on alienage triggers 'strict scrutiny.'" Tenn. Att'y Gen. Op. 86-85 at 3. This exception, labeled the "political" or "governmental" function exception, applies to "laws that exclude aliens from positions intimately related to the process of democratic self-government." *Id.* (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)). This exception to strict scrutiny review includes "persons holding state elective or important nonelective executive, legislative, or judicial positions, . . . [or] officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). Exclusions or limitations that fall within this exception, if challenged, would be evaluated under the more lenient "rational basis" standard. *Id.* at 648; *Foley v. Connelie*, 435 U.S. 291, 296 (1978). Under this standard, a showing of "some rational relationship between the interest sought to be protected and the limiting classification" is all that need be established to uphold the law. *Foley v. Connelie*, 435 U.S. at 296. *See also* Scopino at 1394-1400.

A state may justify its exclusion of aliens under the political function exception by demonstrating that the position in question involves "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Foley v. Connelie*, 435 U.S. at 296. The United States Supreme Court has applied the political function doctrine to uphold state laws that bar aliens from being police or probation officers. *See id.* at 299-300 (police officers); *Cabell v. Chavez Salido*, 454 U.S. 432, 438-47 (1982) (probation officers). The United States Supreme Court has declined to extend this exception to a Texas statute that

required a notary public be a United States citizen, finding that the statute was subject to strict judicial scrutiny and under that test the statute violated equal protection. *Bernal v. Fainter*, 467 U.S. 216, 220-27 (1984). This Office also has previously opined that the political function exception did not apply to aliens applying for beer permits and that a state law prohibiting the issuance of beer licenses to aliens would not withstand strict scrutiny. Tenn. Att'y Gen. Op. 86-85 at 2-3; Tenn. Att'y Gen. Op. 88-197 at 1-3.

Most pertinent to Chapter 879, the United States Supreme Court applied the governmental function exception to school teachers in *Ambach v. Norwick*, 441 U.S. 68 (1979). In that case, the Court examined a New York law excluding from employment as public school teachers aliens who had not declared an intent to become citizens. The Court in *Ambach* found that teaching in public schools constitutes a governmental function, noting that, *inter alia*, teachers "play a critical part in developing students' attitude toward government and [their] understanding of the role of citizens in our society," *Ambach*, 441 U.S. at 78, and that teachers exercise wide discretion in carrying out their educational duties. *Id*. at 79.

Nonetheless, since the *Ambach* decision, the United States Supreme Court has emphasized that the governmental function exception is "a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny." *Bernal v. Fainter*, 467 U.S. at 220. The exception is accordingly limited to those positions that relate "to the process of democratic self-government," *id.*, and does not retreat "from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny." *Id.* at 221 (quoting *Cabelll v. Chavez-Sulido*, 454 U.S. at 439).

Applying these standards to Chapter 879, Sections 3 and 4 of Chapter 879 appear to be constitutionally suspect as violative of equal protection. Sections 3 and 4 provide a chartering authority may refuse to grant a charter school application, or revoke an existing charter, "if the proposed charter school plans to staff positions for teachers, administrators, ancillary support personnel or other employees by utilizing or otherwise relying on non-immigrant foreign worker H1B or J1 visa programs in excess of three and one-half percent (3.5%) of the total number of positions at any single school location for any school year." Chapter 879 provides a limited exception to this provision when the 3.5% is exceeded due to the planned employment of foreign language instructors. Even though Chapter 879 only grants the chartering authority the option to deny a charter application, or revoke an existing charter, when the 3.5% quota is exceeded, the ability to exercise such discretion could constitute a chilling effect upon a charter school retaining non-immigrant foreign workers with H-1B or J-1 visas since exceeding the 3.5% quota could jeopardize the charter school's application or its continued existence. Thus, while the power granted the chartering authority by Chapter 879 is discretionary and not mandatory, Chapter 879 nonetheless has a potentially discriminatory impact on aliens–here non-immigrant foreign workers with H-1B or J-1 visas.

Because Chapter 879 potentially has a discriminatory impact, the initial question is whether the alienage restrictions of Chapter 879 should be evaluated under the "strict scrunity" standard or the more lenient rational basis test. In *Ambach*, the United States Supreme Court applied a rational basis test to the New York law excluding from employment as public school teachers aliens who had not declared an intent to become citizens and ultimately upheld the law

as constitutional. *Ambach*, 441 U.S. at 78-9. Chapter 879, unlike the New York statute in *Ambach*, extends the quota for non-immigrant foreign workers with H-1B or J-1 visas to *all* staff positions at a charter school, not just teachers. The governmental function exception of *Ambach* would appear to apply to the teachers' positions identified in Section 3 of Chapter 879 and would arguably apply to administrators who play a role in setting curriculum in the school. It is doubtful, however, whether the same exception would apply to "ancillary support personnel." And, it is highly unlikely that the exception would apply to "other employees," a category which would appear to include positions such as custodians and food service workers. As the United States Supreme Court observed, in determining that notaries did not fall within the governmental function exception:

> To be sure, considerable damage could result from the negligent or dishonest performance of a notary's duties. But the same could be said for the duties performed by cashiers, building inspectors, the janitors who clean up the offices of public officials, and numerous other categories of personnel upon whom we depend for careful, honest service. What distinguishes such personnel from those to whom the political-function exception is properly applied is that the latter are invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Neither of these characteristics pertains to the functions performed by Texas notaries.

Bernal v. Fainter, 467 U.S. at 225-26.

The broad inclusion of all staff in the 3.5% quota created by Chapter 879 likely would subject Sections 3 and 4 of Chapter 879 to strict scrunity review. To satisfy strict scrunity, the State would be required to demonstrate that these provisions further "a compelling state interest by the least restrictive means practically available." *Id.* at 228. During the legislative debate of Chapter 879, one reason advanced for this quota was to keep foreign visa holders from taking teaching jobs from United States citizens. Hearings on S.B. 3345 before the Senate Education Comm., 107th Gen. Assembly, 2nd Sess. (comments of Sen. Ketron) (Tenn. March 21 and 28, 2012). The courts, however, have rejected such a rationale as a legitimate basis for making invidious distinctions between classes of persons protected by the equal protection clause. *See Graham v. Richardson*, 403 U.S. 365, 371-76 (1971) (recognizing that lawfully admitted resident aliens are persons entitled to equal protection, and that a state cannot preserve limited welfare benefits by conditioning benefits on citizenship and imposing durational residency requirements on resident aliens). Denial of a charter school application, or revoking an existing charter school due to exceeding the 3.5% quota on legal foreign workers would consequently likely run afoul of the Equal Protection Clause of the Fourteenth Amendment.

Moreover, even if Chapter 879 were subject to the more lenient rational basis test, Chapter 879 likely would still be invalid under the Equal Protection Clause. The rationale for using 3.5% of employees, as opposed to some other percentage, as the benchmark for the permissible number of foreign workers is not readily apparent. Similarly, Chapter 879 provides

no apparent rational basis for applying the limitation to charter schools and not to public schools generally. *See, e.g.*, Tenn. Code Ann. § 49-5-101; *see also*, Tenn. Comp. R. & Regs. 0520-02-03 (Teacher Education and Licensure) and 0520-02-04 (Teacher Licensure). Indeed, the rules governing teachers at public schools specifically provide for licensure of foreign exchange teachers to teach in Tennessee public schools for up to three years. Tenn. Comp. R. & Regs. 0520-02-04-.01(11).

In addition, these broad restrictions by Chapter 879 on the employment of non-immigrant foreign workers legally admitted to the United States by the federal H-1B and J-1 visa programs are constitutionally suspect under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. The United States Supreme Court has recognized the "preeminent role of the Federal Government with respect to the regulation of aliens within our borders, and that this federal role places "substantial limitations upon the authority of the States in making classifications based upon alienage." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). *See also Chamber of Commerce of United States v. Whiting*, ___ U.S. ___, 131 S.Ct. 1968, 1973 (2011); *Graham v. Richardson*, 403 U.S. 365, 376-80 (1971). Accordingly, "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Toll*, 458 U.S. at 13 (quoting *DeCanas v. Bica*, 424 U.S. 351, 358, n. 6 (1976)).

These principles led the United States Supreme Court to declare unconstitutional an Arizona law that required any employer of more than five workers to employ not less than 80% "qualified electors or native-born citizens of the United States or some subdivision thereof." *Truax v. Raich*, 239 U.S. 33, 35-43 (1915). As the Court reasoned:

> It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

Truax, 239 U.S. at 42 (quoted by *Graham*, 403 U.S. at 379-80).

Chapter 879, if applied to limit the employment in Tennessee of non-immigrant foreign workers admitted to this country through federal visa programs, would likely be found, like the

Arizona law in *Truax*, to unconstitutionally interfere with the federal government's regulation of legal aliens residing in this country.

This Office finds no constitutional infirmity with the remaining provisions of Chapter 879, which primarily establish new reporting and notice requirements for charter schools. Given the severability clause contained in Chapter 879, these provisions would remain in effect should any other provisions of Chapter 879 be elided as unconstitutional. *See Lowe's Companies, Inc. v. Cardwell*, 813 S.W.2d 428, 430-31 (Tenn. 1991).

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