STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 22, 2016

Opinion No. 16-46

Licensure as Certified Public Weigher and Public Weighmaster

Question 1

Does the citizenship requirement for licensure under Tennessee Code Annotated § 47-26-804 comport with the equal protection guarantees of the Tennessee and U.S. Constitutions?

Opinion 1

The citizenship requirement for licensure under Tennessee Code Annotated § 47-26-804 likely violates the equal protection guarantees of the Tennessee and U.S. Constitutions.

Question 2

Does the citizenship requirement for licensure under Tennessee Code Annotated § 47-26-1004 comport with the equal protection guarantees of the Tennessee and U.S. Constitutions?

Opinion 2

The citizenship requirement for licensure under Tennessee Code Annotated § 47-26-1004 likely violates the equal protection guarantees of the Tennessee and U.S. Constitutions.

Question 3

May the Commissioner of Agriculture issue a certified public weigher license or public weighmaster license to an applicant who is not a citizen of the United States?

Opinion 3

Yes, provided the applicant is otherwise qualified and provided that issuing the license does not violate any applicable federal law.

ANALYSIS

Producers and suppliers of crushed stone, sand, gravel, cement, and asphalt related to highway construction must employ at least one certified public weigher who is responsible for accurately weighing trucks and other vehicles that carry these products over public roads. Tenn. Code Ann. § 47-26-803. Similarly, certain agricultural producers who sell commodities in bulk

must have their products weighed by a licensed public weighmaster. Tenn. Code Ann. § 47-26-1011. The Commissioner of the Department of Agriculture is responsible for issuing licenses for certified public weighers and public weighmasters. Tenn. Code Ann. § 47-26-804; § 47-26-1004.

Among other requirements, certified public weighers and public weighmasters must be citizens of the United States to qualify for licensure. Tenn. Code Ann. § 47-26-804(a)(1); § 47-26-1004(3). By thus conditioning the issuance of a license on the applicant's U.S. citizenship, these statutes distinguish between persons who are U.S. citizens and persons who are otherwise legally in the United States and legally entitled to work in the United States but who are not citizens of the United States.

The federal Equal Protection Clause provides that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Tennessee Constitution, article I, section 8, and article XI, section 8, also "guarantee[s] equal privileges and immunities for all those similarly situated." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Tennessee's equal protection guarantee is coextensive with the equal protection provisions of the United States Constitution. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

States generally may impose regulations for public safety purposes pursuant to their inherent police powers, but they may not do so in violation of a person's federal constitutional rights. *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 618 (6th Cir. 1997). In the equal protection context, "person" "encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

When a state limitation is challenged as violative of a person's equal protection rights, both Tennessee and federal courts will apply one of three levels of scrutiny depending on the nature of the right asserted: strict scrutiny; intermediate scrutiny; or "rational basis" scrutiny. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153. Equal protection analysis "requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race)." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152.

Aliens (non-United States citizens) are a "suspect class" for equal protection purposes, and, with narrow exceptions not applicable here, laws that discriminate on the basis of alienage are subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Like classifications based on alienage, classifications based on national origin are also subject to strict judicial scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

The citizenship requirements of Tenn. Code Ann. § 47-26-804(a)(1) and § 47-26-1004(3) discriminate on the basis of alienage and national origin, each a "suspect class." Accordingly, any equal protection challenge to the statute would be subject to strict scrutiny.

To survive strict scrutiny, the classification must be justified by a compelling state interest. If the state cannot show that it has a compelling interest in the discriminatory classification, that ends the inquiry and the discriminatory law fails. If there is a compelling interest, the state must then show that the challenged law furthers that interest by the least restrictive means practically available. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Even if there is a compelling state interest to justify the discriminatory law, if the law is not narrowly tailored to further that interest, then the law will be struck down as unconstitutional. *Id.*

In light of the precedent discussed below, it is unlikely that the State would be able to show that it has a compelling interest sufficient to justify the citizenship requirement for weighers and weighmasters. And even if there is a compelling state interest in requiring certified public weighers and public weighmasters to meet the citizenship requirements, the State would have to show that the requirements are the least restrictive means of achieving the compelling interest. Case precedent also suggests that the State would be hard pressed to show the requisite "narrow tailoring."

For example, the U.S. Supreme Court struck down a state rule that excluded resident aliens from admission to the state bar. *In re Griffiths*, 413 U.S. 717 (1973). Although the state had a substantial interest in ensuring that persons admitted to the practice of law were qualified, the state failed to show that the classification based on alienage was necessary to promote or safeguard that interest. *Id*. at 727. A statutory requirement of United States citizenship for registration as a pharmacist has been struck down as an equal protection violation. *Wong v. Hohnstrom,* 405 F. Supp. 727 (D. Minn. 1975) (holding the law unconstitutional on its face and reasoning that, if there is no compelling state purpose in denying law licenses to resident aliens as held in *Griffiths*, there can be no compelling interest in denying pharmaceutical licenses based on alienage.) *See also Kulkarni v. Nyquist,* 446 F. Supp. 1269 (N.D.N.Y. 1977) (holding that the state's purported interest of "effecting political involvement in the community by the professional [physical therapist] assuring his or her technical ability and financial responsibility" had no causal relationship to citizenship, and thus, even if the state had a compelling interest in a physical therapist's financial and technical ability, requiring U.S. citizenship was not sufficiently narrowly tailored to overcome the discriminatory effect of the requirement.)

The Supreme Court also nullified a Puerto Rico statute that required an applicant for registration as a civil engineer to be a United States citizen. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). The purported justifications for the discriminatory statute were: (1) "to prevent the 'uncontrolled' influx of Spanish-speaking aliens into the field in Puerto Rico," (2) "to raise the prevailing low standard of living," and (3) "to provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses within 10 years of construction." *Id*. at 605. The Court held the first justification discriminatory on its face. *Id.* The second justification had some legitimacy, but "the means drawn to achieve the end are neither necessary nor precise." *Id.* The Court rejected the third justification as too broad in both purpose and execution, reasoning that citizenship was not related to the future financial responsibility of the engineer, and that the government could ensure financial responsibility of engineers without discriminating against a particular group of otherwise qualified professionals. *Id.*

A state limit on the issuance of a license to sell beer based on alienage has also been found to violate equal protection. A permanent resident (non-U.S. citizen) brought an equal protection challenge to a statute that limited licenses to sell beer to U. S. citizens. The statute did not survive strict scrutiny. The city "failed to meet its heavy burden of justification" since it could not show that the statute had a constitutionally permissible purpose which the classification was necessary to accomplish. *Karla v. State of Minnesota*, 580 F. Supp. 971, 973 (D. Minn.1983).

Based on such precedent, this Office has opined that various Tennessee statutes preventing aliens from obtaining professional licenses violate the right to equal protection. *See* Tenn. Att'y Gen. Op. 77-308 (Sept. 7, 1977) (aliens may not be excluded from tenured teaching positions at state universities); Tenn. Att'y Gen. Op. 78-1A (Jan. 3, 1978) (statute conditioning a permit to sell alcoholic beverages on citizenship is unconstitutional); Tenn. Att'y Gen. Op. 81-407 (July 10, 1981) (statute conditioning a permit to sell beer and light alcoholic beverages on citizenship is unconstitutional); Tenn. Att'y Gen. Op. 82-81 (Feb. 22, 1982) (aliens may not be barred from obtaining veterinary licenses); Tenn. Att'y Gen. Op. 86-85 (Apr. 9, 1986) (right to equal protection is violated by statute prohibiting a non-U.S. citizen from holding a beer permit in the absence of proof of a compelling state interest in discriminating based on alienage); Tenn. Att'y Gen. Op. 88-197 (Nov. 10, 1988) (statute prohibiting aliens from obtaining permits to sell beer or owning a business that sells beer is unconstitutional); Tenn. Att'y Gen Op. 94-120 (Oct. 10, 1994) (statute prohibiting non-citizens from obtaining permits to sell beer is unconstitutional); Tenn. Att'y Gen. Op. 06-026 (Feb. 7, 2006) (the state may not require that notaries be U.S. citizens); Tenn. Att'y. Gen. Op. 13-29 (Mar. 27, 2013) (statute prohibiting non-United States citizens from being present in polling places is constitutionally suspect and "Opinion 86-85 remains an accurate statement regarding the constitutional constraints on statutes that discriminate on the basis of alienage."); Tenn. Att'y Gen. Op. 16-09 (Mar. 4, 2016) (state may not refuse to issue a license to sell beer based on alienage).

Thus, if challenged, the citizenship requirements for weighers and weighmasters will almost certainly be held unconstitutional unless the State can show a compelling interest in prohibiting non-citizens—who are otherwise lawfully in the country and legally allowed to work—from being licensed as weighers or weighmasters. We are not aware of any such compelling state interest. Neither the statutes nor their respective legislative histories identify any interest the State may have in limiting licensure of weighers or weighmasters to United States citizens. There does not appear to be any reason the job cannot be performed by otherwise qualified individuals who are not citizens.

One might argue that the State has an interest in ensuring compliance with federal immigration law by making sure it does not authorize employment of individuals who are not authorized to work in the United States. *See League of United Latin American Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). However, even if that interest is sufficiently compelling to justify the discrimination based on alienage, it is highly doubtful that the statutes would be viewed as the least restrictive means of furthering that interest. The citizenship requirement is not the least restrictive way to promote an interest in ensuring compliance with federal law. It reaches too broadly; it excludes not only those non-citizens who are not permitted to work in the U.S. but also excludes non-citizens—such as lawful permanent residents—who may be authorized to work here.

The statutes discriminate not only on the basis of alienage, but also on the basis of national origin, which is, like alienage, a "suspect" classification. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Like the classification based on alienage, it would be subject to strict judicial scrutiny if challenged. Like the classification based on alienage, it is almost certain to succumb to that scrutiny.

In sum, the citizenship requirements imposed by Tenn. Code Ann. § 47-26-804(a)(1) and § 47-26-1004(3) are unlikely to pass constitutional muster. By discriminating based on alienage and national origin the statutes raise equal protection concerns. If challenged, they would be subject to strict judicial scrutiny since they target members of a "suspect class." And because the statutes do not appear to serve a compelling state interest, they are likely to be found violative of the equal protection guarantees of both the Tennessee and the United States Constitutions. Even if the statutes could be justified as furthering a compelling state interest, they are not sufficiently narrowly tailored to survive a constitutional challenge.

It is well-established that the Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985). State law is nullified to the extent compliance with both federal and state law is a physical impossibility. *Id.* In the circumstances described here, it appears that the Commissioner cannot simultaneously comply with federal law (by granting a license to otherwise qualified non-citizens who are legally in the country and legally permitted to work under federal law) and state law (by refusing a license to otherwise qualified non-citizens solely on the basis of alienage or national origin). Moreover, a decision by the Commissioner to refuse a license solely on the basis of non-citizenship might be inconsistent with the Congressional determination that the particular individual is permitted to work in the United States.

Accordingly, in this context, the citizenship requirements of Tenn. Code Ann. § 47-26-804(a)(1) and § 47-26-1004(3) may be treated as nullified and the Commissioner may issue licenses to otherwise qualified applicants who are not United States citizens as long as the non-citizen is legally in the country and is legally authorized to accept employment. However, the Commissioner may not issue a license to any non-citizen if doing so would violate any applicable federal law, which can only be determined on a case-by-case basis, since there are various categories of non-citizens and many employment and non-employment categories for non-citizens, each with different requirements and conditions.

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