STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 13, 2018

Opinion No. 18-42

Alien Eligibility for Licensure from the Department of Commerce and Insurance

Question 1

Did the Eligibility Verification for Entitlements Act (EVEA), 2012 Tenn. Pub. Acts, ch. 1061 (codified at Tenn. Code Ann. §§ 4-58-101 to 4-58-110), impliedly repeal previously enacted laws requiring an applicant for licensure, registration, or certification from the Department of Commerce and Insurance to be a "citizen of the United States" or a "citizen of the United States or resident alien"?

Opinion 1

No. The EVEA can be read in harmony with laws requiring licensure applicants to be U.S. citizens or U.S. citizens or resident aliens and therefore did not impliedly repeal those laws.

Question 2

Do laws requiring an applicant for licensure, registration, or certification from the Department of Commerce and Insurance to be a "citizen of the United States" violate federal law?

Opinion 2

Yes. State laws requiring licensure applicants to be U.S. citizens are preempted to the extent they conflict with a federal law that limits States' authority to determine alien eligibility for state public benefits, including professional and commercial licenses. See 8 U.S.C. §§ 1621-1622. State laws requiring licensure applicants to be U.S. citizens also violate the Equal Protection Clause because they discriminate based on alienage and would not satisfy strict scrutiny.

Question 3

Do laws requiring an applicant for licensure, registration, or certification from the Department of Commerce and Insurance to be a "citizen of the United States or resident alien" violate federal law?

Opinion 3

State laws requiring licensure applicants to be U.S. citizens or resident aliens are preempted to the extent they conflict with a federal law that limits States' authority to determine alien eligibility for state public benefits, including professional and commercial licenses. See 8 U.S.C. §§ 1621-1622. Laws requiring licensure applicants to be U.S. citizens or resident aliens do not

violate the Equal Protection Clause, however, because they discriminate only against unlawful aliens and lawful aliens who are not permanent residents. Those categories of aliens are not a suspect class, and the laws at issue would likely satisfy rational basis review.

Question 4

If the requirements that an applicant for licensure, registration, or certification be a "citizen of the United States" or a "citizen of the United States or resident alien" violate federal law, is the Department of Commerce and Insurance required to enforce those requirements?

Opinion 4

No.

ANALYSIS

Persons who wish to engage in certain professions, businesses, or trades in Tennessee are required to obtain a license, registration, or certification from the Department of Commerce and Insurance (the "Department"). The requirements to obtain a license, registration, or certification are established by statute. As relevant here, an applicant for a funeral director's license, an embalmer's license, registration as a funeral director or embalmer apprentice, or a polygraph examiner's license must be a "citizen of the United States." Tenn. Code Ann. § 62-5-305(b)(2) (funeral director); *id.* § 62-5-307(b)(2) (embalmer); *id.* § 62-5-312(b)(2) (apprenticeship); *id.* § 62-27-107(a)(2) (polygraph examiner). And an applicant for a private investigations company license, a private investigator's license, a contract security company license, or registration as an armed or unarmed security guard must be a "citizen of the United States or a resident alien." *Id.* § 62-26-206(a)(2) (private investigations company); *id.* § 62-26-207(a)(2) (private investigator), *id.* § 62-35-106(2) (contract security company); *id.* § 62-35-117(2) (security guard).

In 2012, after these requirements had been enacted, the General Assembly passed the Eligibility Verification for Entitlements Act (EVEA), which provides that "every state governmental entity . . . shall verify that each applicant eighteen (18) years of age or older, who applies for a federal, state or local public benefit from the entity . . . is a United States citizen or lawfully present in the United States in the manner provided in this chapter." 2012 Tenn. Pub. Acts, ch. 1061, § 1 (codified at Tenn. Code Ann. § 4-58-103(a)). Moreover, every "state governmental entity" must include on "all forms . . . and all automated phone systems" a "written or verbal statement . . . [r]equiring an applicant for a federal, state or local public benefit to . . . attest to the applicant's status as either . . . [a] United States citizen" or "[a] qualified alien." Tenn. Code Ann. § 4-58-103(b)(1)(A)(i)-(ii). State governmental entities are prohibited from "provid[ing] or offer[ing] to provide any federal, state or local public benefit" in violation of these requirements. *Id.* § 4-58-106(a).

A license, registration, or certification provided by the Department is a "state or local public benefit" within the scope of the EVEA. The EVEA defines the terms "state or local public benefit" and "qualified alien" by cross-referencing federal immigration statutes. The EVEA defines "state or local public benefit" to mean "any public benefit as defined in 8 U.S.C. § 1621."

Id. § 4-58-102(7). As relevant here, 8 U.S.C. § 1621, a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2268, defines "[s]tate or local public benefit" to include a "professional license[] or commercial license provided by an agency of a State or local government." 8 U.S.C. § 1621(c)(1)(A).[1]

The EVEA defines the term "qualified alien" to mean either "[a] qualified alien as defined by 8 U.S.C. § 1641(b)" or "[a]n alien or nonimmigrant eligible to receive state or local public benefits under 8 U.S.C. § 1621(a)." Tenn. Code Ann. § 4-58-102(3). The first category is actually a subset of the second category: aliens who are eligible to receive state or local public benefits under 8 U.S.C. § 1621(a) include: "(1) a qualified alien (as defined in [8 U.S.C. § 1641]), (2) a nonimmigrant under [8 U.S.C. § 1101 *et seq.*], or (3) an alien who is paroled into the United States under [8 U.S.C. § 1182(d)(5)] for less than one year." 8 U.S.C. § 1621(a)(1)-(3).

The group of aliens who are "qualified aliens" within the meaning of the EVEA includes individuals who are neither U.S. citizens nor resident aliens.[2] For example, individuals admitted to the United States as asylees or refugees fall within the definition of "qualified alien" in 8 U.S.C. § 1641 and thus are eligible to receive state or local public benefits under 8 U.S.C. § 1621(a). But asylees and refugees are neither U.S. citizens nor permanent resident aliens. Consequently, they would not be eligible for any Department license, registration, or certification that requires the applicant to be a U.S. citizen or resident alien.

The General Assembly provided that the EVEA must be "interpreted consistently with all federal laws, including, but not limited to, federal laws regulating immigration, labor, and medicaid, and all state laws." Tenn. Code Ann. § 4-58-108. But it must not be "interpreted as limiting a state governmental entity . . . regarding its current application process for administering a federal, state or local public benefit, including, but not limited to, requesting additional information from the applicant or requiring additional verification of eligibility." *Id.* § 4-58-109(a).

1. As a general matter, "new statutes change pre-existing law only to the extent expressly declared." *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013) (internal quotation marks omitted). "[A] court will hold a later statute to have repealed an earlier statute by implication only when the conflict between the statutes is irreconcilable." *Hayes v. Gibson Cnty.*, 288 S.W.3d 334, 337-38 (Tenn. 2009). "Repeals by implication . . . are disfavored in Tennessee" and "will be recognized only when no fair and reasonable construction will permit the statutes to stand together." *Id.* at 337 (internal quotation marks omitted). A court must "assume that whenever the legislature enacts a provision, it is aware of other statutes relating to the same subject matter" and should construe even "apparently conflict[ing]" statutes "in harmony if reasonably possible." *Elliott v. Cobb*, 320 S.W.3d 246, 251 (Tenn. 2010) (internal quotation marks omitted).

[1] Certain professional or commercial licenses are excepted from the definition. *See, e.g.*, 8 U.S.C. § 1621(c)(2)(A) (excepting "any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States"); *id.* § 1621(c)(2)(C) (excepting "issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States").

[2] The term "resident alien" is not defined in the Tennessee Code, but the Department interprets that term to mean a permanent resident alien—i.e., a Green Card holder.

Under these principles, the EVEA did not impliedly repeal state laws that restrict eligibility for licensure, registration, or certification from the Department to U.S. citizens or U.S. citizens and resident aliens. The EVEA requires state entities to verify whether a benefit applicant is a U.S. citizen or qualified alien, *see* Tenn. Code Ann. § 4-58-103, and prohibits entities from providing benefits to anyone who is not verified, *see id.* § 4-58-106. But the EVEA does not prohibit entities from imposing more stringent eligibility restrictions. To the contrary, the EVEA expressly provides that it shall not be interpreted "as limiting a state governmental entity . . . regarding its current application process . . . , including, but not limited to, requesting additional information from the applicant or requiring additional verification of eligibility." *Id.* § 4-58-109(a). In other words, the EVEA establishes a floor for benefit eligibility, not a ceiling. So interpreted, the EVEA does not conflict with laws restricting eligibility for licensure, registration, or certification from the Department to U.S. citizens or U.S. citizens and resident aliens and thus does not impliedly repeal those requirements.

2. As discussed above, the EVEA cross-references federal immigration laws concerning alien eligibility for state and local public benefits. The Supremacy Clause of the U.S. Constitution "provides a clear rule that federal law 'shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting U.S. Const. art. VI, cl. 2). "Under this principle, Congress has the power to preempt state law." *Id.* The U.S. Supreme Court has identified three kinds of preemption. First, Congress "may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.* Second, state laws are preempted when they regulate "a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* Third, "state laws are preempted when they conflict with federal law." *Id.*

Under 8 U.S.C. § 1621(a), an alien is "not eligible for any State or local public benefit" unless the alien is "(1) a qualified alien (as defined in [8 U.S.C. § 1641]), (2) a nonimmigrant under [8 U.S.C. § 1101 *et seq.*], or (3) an alien who is paroled into the United States under [8 U.S.C. § 1182(d)(5)] for less than one year." 8 U.S.C. § 1621(a). However, other provisions give States authority both to grant benefits to aliens who are ineligible under § 1621(a) and to deny benefits to aliens who are eligible under § 1621(a).

Section 1621(d) provides that States may make illegal aliens, who are ineligible for benefits under § 1621(a), eligible for state and local benefits by "enact[ing] . . . a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

Section 1622(a), meanwhile, gives States authority to "determine the eligibility for any State public benefits of an alien" who would otherwise be eligible to receive benefits under § 1621(a), except for aliens enumerated in § 1622(b). 8 U.S.C. § 1622(a). Section 1622(b) provides that certain aliens, including refugees or asylees who have been in the United States for less than five years, *id.* § 1622(b)(1); permanent resident aliens with sufficient qualifying quarters of work coverage under the Social Security Act, *id.* § 1622(b)(2); and lawful aliens who are veterans or on active duty in the U.S. military, *id.* § 1622(b)(3), "shall be eligible for any State public benefits." *Id.* § 1622(b). So while it is generally up to States to determine whether the

aliens enumerated in § 1621(a) are eligible for state public benefits, States may not deny benefits to the narrower categories of aliens enumerated in § 1622(b).

State laws requiring applicants for Department licenses to be U.S. citizens directly conflict with federal law to the extent they render aliens who "shall be eligible" for state public benefits under § 1622(b) ineligible for licensure. To the extent of that conflict, the state laws are preempted. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute."). Under federal law, all the aliens enumerated in § 1622(b) must be eligible for licensure, registration, or certification from the Department.

State laws limiting licensure eligibility to U.S. citizens may also be subject to challenge on equal protection grounds. The Equal Protection Clause of the U.S. Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[3] "It has long been settled . . . that the term 'person' in this context 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). The U.S. Supreme Court has made clear that classifications based on alienage[4] are "inherently suspect and are therefore subject to strict judicial scrutiny." *Id.* at 376. Laws containing such classifications will be upheld only if the State can demonstrate that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 722 (1973) (alteration in original) (footnotes omitted).

Applying that standard, the Supreme Court has repeatedly invalidated laws requiring applicants for professional licenses to be U.S. citizens. *See, e.g.*, *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 605 (1976) (invalidating Puerto Rico law requiring applicants for engineer's license to be U.S. citizens); *In re Griffiths*, 413 U.S. at 723 (invalidating Connecticut law requiring applicants for admission to the bar to be U.S. citizens). This Office, too, has opined that statutes limiting professional licensure to U.S. citizens violate the Equal Protection Clause. *See, e.g.*, Tenn. Att'y Gen. Op. 16-46 (Dec. 22, 2016) (requirement that certified public weighers and public weighmasters be U.S. citizens); Tenn. Att'y Gen. Op. 06-026 (Feb. 7, 2006) (requirement that notaries be U.S. citizens); Tenn. Att'y Gen. Op. 82-81 (Feb. 22, 1982) (requirement that veterinarians be U.S. citizens).

If state laws requiring applicants for a license from the Department to be U.S. citizens were challenged under the Equal Protection Clause, a court would undoubtedly hold such laws unconstitutional under Supreme Court precedent. Given that other laws restricting professional

[3] The Tennessee Constitution 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); *see also* Tenn. Const. art. I, § 8; *id.* art. XI, § 8. Tennessee's equal protection guarantee is coextensive with the federal Equal Protection Clause. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

[4] Laws classifying individuals based on whether they are in the United States lawfully, by contrast, are subject only to rational basis review. *See Plyler v. Doe*, 457 U.S. 202, 223 (1982) (explaining that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'").

licensure to U.S. citizens have failed to satisfy strict scrutiny, it is highly unlikely that the State could satisfy that demanding standard for laws preventing lawful aliens from becoming funeral directors, embalmers, or polygraph examiners.

In sum, state laws restricting eligibility for licensure, registration, or certification from the Department to U.S. citizens are preempted to the extent they deny benefits to the aliens enumerated in 8 U.S.C. § 1622(b). Those state laws also violate the Equal Protection Clause under Supreme Court precedent.

3. State laws requiring applicants for a license from the Department to be U.S. citizens or resident aliens are also preempted to the extent they deny benefits to the aliens enumerated in 8 U.S.C. § 1622(b). Although some of the aliens enumerated in § 1622(b)—e.g., permanent resident aliens with sufficient qualifying quarters of work coverage under the Social Security Act, *see id.* § 1622(b)(2)—are resident aliens who would be eligible for licensure under state law, others—e.g., refugees or asylees who have been in the United States for less than five years, *see id.* § 1622(b)(1)—are not. Under federal law, all the aliens enumerated in § 1622(b) must be eligible for licensure, registration, or certification from the Department.

Unlike state laws limiting licensure eligibility only to U.S. citizens, however, state laws limiting eligibility to U.S. citizens *and resident aliens* probably do not violate the Equal Protection Clause. Laws limiting eligibility to U.S. citizens and resident aliens do not classify individuals based on alienage. Some aliens—resident aliens—are in fact eligible for licensure. As the Department construes the term "resident alien," an alien is eligible for licensure if he is a permanent resident alien. To the extent the provisions limiting licensure eligibility to U.S. citizens and resident aliens discriminate against aliens, they discriminate only against unlawful aliens and lawful aliens who are not permanent residents.

This distinction is significant because the Sixth Circuit has held that "lawful permanent residents are the only subclass of aliens who have been treated as a suspect class." *League of United Latin American Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007). In *LULAC*, the Sixth Circuit upheld under rational basis review a Tennessee law that restricted eligibility for driver's licenses to U.S. citizens and permanent resident aliens. The Court explained that the State's interest in "refraining from vouching for the identity of aliens who have not been granted permanent resident status by the federal government but whose permission to stay here is tied to a specific purpose or period of time . . . is legitimate and rationally served" by the challenged law. *Id.* at 536-37.

Similarly, in *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), the Fifth Circuit upheld under rational basis review a Louisiana law requiring applicants for admission to the Louisiana Bar to be U.S. citizens or resident aliens. The Fifth Circuit explained that "the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens," and not "law[s] affecting any other alienage classifications." *Id.* at 415-16. "Based on the aggregate factual and legal distinctions between resident aliens and nonimmigrant aliens," the Fifth Circuit concluded that "although aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny." *Id.* at 419. The Fifth

Circuit held that Louisiana's law satisfied rational basis review because the State's "ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar require[d] that it be able to locate lawyers under its jurisdiction," and the State's "determination that the easily terminable status of nonimmigrant aliens would impair these interests and their enforcement capacity [wa]s not irrational." *Id.* at 421.

Because permanent resident aliens are the only subclass of aliens who constitute a suspect class under governing Sixth Circuit precedent, Tennessee laws restricting licensure eligibility to U.S. citizens and resident aliens, if challenged, would be subject only to rational basis review. And given that the State's interests in monitoring and regulating private investigators, security companies, and security guards are similar to Louisiana's interests with respect to attorneys, a court would likely hold that those laws survive rational basis review.

In sum, state laws restricting eligibility for licensure, registration, or certification from the Department to U.S. citizens and resident aliens are preempted to the extent they deny benefits to the aliens enumerated in 8 U.S.C. § 1622(b). But those laws probably do not violate the Equal Protection Clause under Supreme Court and Sixth Circuit precedent.

4. This Office has previously opined that "a public official with discretionary functions under a state statute that has been declared to be unconstitutional by an opinion of the Attorney General with citations to supporting legal authorities, may take appropriate action based upon that legal advice to conform his or her conduct to the particular constitutional mandate, particularly if the statute appears to be 'palpably unconstitutional.'" Tenn. Att'y Gen. Op. 84-157 (May 8, 1984). This opinion was based in part on the Tennessee Supreme Court's decision in *Cummings v. Beeler*, 223 S.W.2d 913 (Tenn. 1949). There, the Court explained that the Comptroller, who was one of the parties to the declaratory judgment action at issue in that case, would have had a "duty . . . to refuse to approve" payments from the state treasury "when he kn[ew] that his official legal adviser"—the Attorney General—"ha[d] held that the Act under which [the payments] were to be issued was illegal, invalid, and unconstitutional." *Id.* at 916.

Here, the Attorney General has now opined that laws requiring applicants for licensure, registration, or certification from the Department to be U.S. citizens—Tenn. Code Ann. §§ 62-5-305(b)(2), 62-5-307(b)(2), 62-5-312(b)(2), 62-27-107(a)(2)—violate the Equal Protection Clause under U.S. Supreme Court precedent and are preempted to the extent they conflict with 8 U.S.C. § 1622(b). Given this opinion, the Department should no longer enforce those citizenship requirements. *See Cummings*, 223 S.W.2d at 916. But the Department remains obligated to enforce the EVEA, which prohibits the Department from granting a license, registration, or certification without first verifying that the applicant is either a U.S. citizen or an alien eligible to receive state benefits under 8 U.S.C. § 1621(a). *See* Tenn. Code Ann. § 4-58-106.

The Attorney General has also opined that laws requiring applicants for licensure, registration, or certification from the Department to be U.S. citizens or resident aliens—Tenn. Code Ann. §§ 62-26-206(a)(2), 62-26-207(a)(2), 62-35-106(2), 62-35-117(2)—are preempted to the extent they conflict with 8 U.S.C. § 1622(b). Given this opinion, the Department should enforce those requirements only with respect to aliens other than those enumerated in 8 U.S.C. § 1622(b).

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