STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 17-53

Proposed Legislation Granting State Institutions of Higher Education the Authority to Determine Eligibility for In-State Tuition

Question

House Bill 660/Senate Bill 635, 110th Gen. Assem. (2017) (the "proposed legislation") would grant the governing body of each state institution of higher education the authority "to determine the qualifications that students must possess to be eligible for payment of in-state tuition and fees." Under the proposed legislation, would each state institution of higher education be able to determine on its own whether to offer in-state tuition to unlawful aliens? If so, what impact would the decision of one or more state institutions to offer in-state tuition to unlawful aliens have on other state institutions who have not chosen to do so and on statewide programs such as the Hope Scholarship and Tennessee Promise?

Opinion

The proposed legislation would not permit individual state institutions of higher education to make unlawful aliens eligible for in-state tuition. That action would remain prohibited by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1621.

ANALYSIS

The proposed legislation, House Bill 660/Senate Bill 635, 110th Gen. Assem. (2017), would add a new section to title 49 granting "[t]he governing body of each public institution of higher education" the authority "to determine the qualifications that students must possess to be eligible for payment of in-state tuition and fees." Sections 2, 3, and 4 of the proposed legislation would delete the existing Code provisions defining which students are eligible for in-state tuition, *see* Tenn. Code Ann. §§ 49-8-102, 49-8-104, 49-9-105, and replace them with declarations that the "board of regents and each state university board" and the "board of trustees of the University of Tennessee" shall each "have the authority to determine the qualifications that students must possess to be eligible for payment of in-state tuition and fees." Section 5 of the bill would amend the Code's definition of a "State or local public benefit" to exclude a state institution's decision to make an individual eligible to pay in-state tuition. *See* Tenn. Code Ann. § 4-58-102(7).

Federal law limits the authority of state governments to provide public benefits, including in-state tuition, to unlawful aliens. Most relevant here, 8 U.S.C. § 1621, a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA), Pub. L. No. 104-193, provides that an alien who is not (1) a qualified alien (2) a nonimmigrant, or (3) an alien who is paroled into the United States for less than a year, under the applicable provisions of the immigration code, is "not eligible for any State or local public benefit." 8 U.S.C. § 1621(a).

In-state tuition is a "public benefit" within the meaning of § 1621(a). A "public benefit" is defined, in part, as "any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or *any other similar benefit for which payments or assistance are provided* . . . by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* §1621(c)(1)(B) (emphases added). Under the plain meaning of the terms, in-state tuition constitutes a "postsecondary education" benefit and, if not, at least constitutes a "similar benefit for which payments or assistance are provided." *See Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010) (assuming in-state tuition is a public benefit); *Saenz v. Roe*, 526 U.S. 489, 518 (1999) ("[I]n-state tuition rates are cash subsidies provided to a limited class of people[.]"); Col. Att'y Gen. Op. 12-04 (June 19, 2012) (finding "little doubt" reduced tuition constitutes a "public benefit" within the meaning of § 1621); Letter from Douglas E. Gansler, Attorney General of Maryland, to Martin O'Malley, Governor of Maryland (May 9, 2011) ("It is my view that an exemption from out-of-state tuition or out-of-county tuition is a benefit within the meaning of [§ 1621].").

Section 1621, however, also grants states the authority to override its prohibition on providing public benefits to unlawful aliens if they so choose:

> A state may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."

8 U.S.C. § 1621(d). As one court has explained the operation of these provisions, "[i]n passing the PRA, Congress effectively invalidated all existing state laws, regulations, or executive orders that extended state or local benefits to unlawful aliens, based on Congress's asserted interest in 'remov[ing] the incentive for illegal immigration provided by the availability of public benefits.'" *Kaider v. Hamos*, 975 N.E.2d 667, 673 (Ill. Ct. App. 2012) (second alteration in original) (quoting 8 U.S.C. § 1601(6)). This prohibition is "not absolute, however," because "Congress recognized a need to give the states autonomy—or as the title of [§] 1621(d) describes it, 'authority'—to provide benefits to aliens not lawfully present in the United States. *Id.*

To exercise its authority under § 1621(d), a state must "enact[]" a "State law" that "affirmatively provides" for the eligibility of unlawful aliens for a public benefit. 8 U.S.C. § 1621(d). Every court to have addressed this provision has interpreted it to require the state legislature to enact legislation expressly making unlawful aliens eligible for public benefits, including in-state tuition. In *Martinez*, the California Supreme Court held that, to meet the "affirmatively provides" requirement, state legislation did not have to expressly reference § 1621 but did have to "expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its benefits may include undocumented aliens." 241 P.3d at 867-68. Similarly, the Florida Supreme Court concluded that unlawful aliens were prohibited from admission to the Florida bar by § 1621(a) because the state legislature had not enacted a law that affirmatively provided for their eligibility. *Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar*, 134 So. 3d 432, 434-35 (Fla. 2014). The courts agree that the requirements of § 1621(d) are satisfied only by a "state law that conveys a positive expression of legislative intent to opt out of section 1621(a) by extending state or local benefits to unlawful aliens." *Kaider*, 975 N.E.2d at 674.

In short, state action that does not constitute an "enactment of a State law" or that confers eligibility for a benefit generally, without expressly mentioning unlawful aliens, does not satisfy the requirements of § 1621(d).

The proposed legislation does not satisfy the requirements of § 1621(d). The bill lacks any "affirmative" expression of legislative intent to opt out of the prohibition in § 1621(a) and does not expressly make unlawful aliens eligible for in-state tuition at any Tennessee institution of higher education. In contrast to the California law found to satisfy the requirements of § 1621(d), the proposed legislation does not mention aliens at all, let alone "specify[] that its beneficiaries may include undocumented aliens." *Martinez*, 241 P.3d at 868. Accordingly, the proposed legislation does not "affirmatively provide" for the eligibility of unlawful aliens within the meaning of § 1621(d). *See* Col. Att'y Gen. Op. 12-04 (concluding a similar Colorado law that gave an individual state institution authority to set tuition rates did not satisfy § 1621(d) because "[n]o state law in Colorado 'affirmatively provide[d]' for tuition benefits to students who are unable to establish their lawful presence in the United States").

If the proposed legislation were enacted, actions taken by an individual state university to make unlawful aliens eligible for in-state tuition also would not satisfy § 1621(d), which requires the "*enactment* of a State law." (Emphasis added); *see Branch v. Smith*, 538 U.S. 254, 264 (2003) ("An 'enactment' is the product of legislation[.]"). As the Florida Supreme Court recognized, "[t]he plain language of the statute and case law indicate the phrase 'enactment of a State law' requires a state legislature to address this appropriations-related issue and pass legislation, which the governor must either approve or permit to become the law of the State." *Fla. Bd. of Bar Exam'rs*, 134 So.3d at 435. In so holding, the Florida Supreme Court rejected the argument that "non-legislative forms of 'State law' could meet the requirements" of § 1621(d). *Id.* Accordingly, as the Colorado Attorney General has recognized, § 1621(d) "requires an affirmative choice *by the state legislature* to provide benefits to individuals who cannot prove their lawful presence in the United States." Col. Att'y Gen. Op. 12-04 (emphasis added). A choice by one or more state institutions of higher education to provide such benefits would not satisfy the requirements of § 1621(d).

The proposed legislation therefore would not permit individual state institutions of higher education to make unlawful aliens eligible for in-state tuition and fees. That action would remain prohibited by § 1621(a). Accordingly, the proposed legislation would not implicate or affect other provisions of federal or state law related to unlawful aliens or postsecondary education benefits, including the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623,[1] and the Hope Scholarship[2] and Tennessee Promise programs.[3]

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[1] Section 1623 provides: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

[2] Tenn. Code Ann. § 49-4-901 et seq.

[3] Tenn. Code Ann. § 49-4-708.