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Expert Analysis

SECOND CIRCUIT REVIEW

Applying Strict Scrutiny to Laws Discriminating Against Nonimmigrants

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This month, we discuss *Dandamudi v. Tisch*,[1] in which the U.S. Court of Appeals for the Second Circuit, applying strict scrutiny, held that a New York statute barring persons who were neither U.S. citizens nor legal permanent residents from obtaining a pharmacist's license is unconstitutional and violates the Equal Protection Clause. The court's opinion, written by Judge Richard Wesley and joined by Judge Peter Hall and Judge Stefan Underhill of the U.S. District Court for the District of Connecticut, sitting by designation, creates a circuit split with the Fifth and Sixth circuits, both of which have upheld similar provisions after applying a rational basis test.

Background

Under American immigration law, nonimmigrants are aliens legally allowed to live and work in the United States for a limited period of time only. Plaintiffs, all of whom are pharmacists, either obtained H-1B temporary worker visas, allowing them to "come 'temporarily to the United States to perform services in a specialty occupation,'" or held "TN status," a temporary worker status created pursuant to the North American Free Trade Agreement (NAFTA) which allows Canadian and Mexican citizens to enter the United States temporarily to engage in business activities at a professional level. Nonimmigrant aliens holding H1-B and TN visas are only allowed to stay in the United States for an initial three-year period, but the government frequently extends this authorization for a much longer amount of time.[2]

To obtain either type of visa, applicants must state that they do not intend to stay in the United States permanently. However, the Board of Immigration Appeals and the State Department recognize a "dual intent" doctrine, which allows aliens to represent that their intent is to stay in the country temporarily in order to obtain a visa while also intending to apply for an adjustment of status allowing them to take up permanent residence.[3] Many nonimmigrants hope to obtain permanent status eventually.

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Under New York law, only U.S. citizens and legal permanent residents may obtain a license to practice as a pharmacist in the state.[4] A prior version of the pharmacist-licensing law offered limited licenses, which waived the citizen/legal permanent resident requirement for three years, with a one-year extension. The limited license program was set to expire in 2009. To prevent that from happening, plaintiffs brought suit in the Southern District of New York against the Commissioner of Education and Chancellor of the Board of Regents, arguing that enforcement of the law should be enjoined because, inter alia, it violated the Equal Protection and Supremacy clauses of the U.S. Constitution. The parties filed cross-motions for summary judgment.

In a series of cases, the Supreme Court has held that state classifications based on alienage are subject to strict scrutiny, due to aliens' status as a discrete and insular minority. The court has recognized two narrow exceptions to this general rule: one applying rational basis review to state statutes excluding aliens from certain political and governmental functions, such as working as police officers, and another applying heightened rational basis review to statutes discriminating against undocumented aliens.[5] To survive strict scrutiny, a classification must be narrowly tailored and further compelling governmental interests.

Before plaintiffs filed their suits, the Fifth and Sixth circuits had already addressed similar questions. In *LeClerc v. Webb*, nonimmigrant aliens argued that a Louisiana Supreme Court rule which required applicants for admission to the Louisiana Bar to be either citizens or legal permanent residents violated the Equal Protection, Due Process, and Supremacy clauses.[6] In *League of United Latin American Citizens v. Bredesen*, the Sixth Circuit considered a challenge, under the Equal Protection Clause and the right to travel, of a Tennessee law which limited issuance of a driver's license to citizens and legal permanent residents.[7]

In each case, the court noted that the leading Supreme Court precedent on discrimination based on alienage, *Graham v. Richardson*, 403 U.S. 365, provided a list of similarities between citizens and legal permanent residents, namely that both groups pay taxes, may be drafted into the armed forces, can live within a state for many years, and work in the state. Divided panels in each circuit found that nonimmigrants do not share these similarities, as, among other things, they pay taxes differently, cannot serve in the military, do not have the right to remain

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in the country indefinitely, cannot work in a field of their choosing.

Based on the aggregate distinctions between legal permanent residents and nonimmigrants, both courts 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."[8] The *LeClerc* panel also rejected the plaintiffs' arguments under the Due Process and Supremacy clauses, and the *LULAC* panel rejected the right to travel argument. The plaintiffs in *LeClerc* sought rehearing en banc, and filed a petition seeking a writ of certiorari. Both were denied.

In its opinion ruling on plaintiffs' summary judgment motions in *Dandamudi*, the district court declined to follow *LeClerc* and *LULAC*. The court granted summary judgment in favor of plaintiffs, finding that the pharmacist-licensing statute violated both the Equal Protection Clause and the Supremacy Clause. In considering plaintiffs' Equal Protection Clause argument, the district court ruled that the statute failed under either strict or intermediate scrutiny, and declined to choose between them.[9]

The Second Circuit's Decision

On appeal, the state largely relied on the *LeClerc* and *LULAC* decisions, arguing that the court should apply only rational basis review and uphold the licensing statute. Specifically, the state contended that "the Fourteenth Amendment's strongest protections should apply only to virtual citizens, like [legal permanent residents], and not to other lawfully admitted aliens who require a visa to remain in this country."[10]

The Second Circuit began its analysis by reviewing the history of 14th Amendment cases on discrimination based on alienage. The panel observed that the Supreme Court had repeatedly held that laws singling out aliens for disparate treatment are subject to strict scrutiny. The court noted that defendants had agreed that neither of the two exceptions to this general rule previously acknowledged by the Supreme Court applied to this case.

The panel then considered whether there should be a third exception to the general rule. The court rejected the distinction drawn by the *LeClerc* and *LULAC* panels. It noted that the Supreme Court had never distinguished between classes of legal resident aliens, as opposed to lawful aliens and undocumented aliens. The list of similarities between citizens and legal permanent residents was not "meant as a litmus test for lower courts to apply to a subclass of lawfully admitted aliens for purposes of determining how similar they are to citizens before applying strict scrutiny," the court found.[11] Instead, the panel ruled, Supreme Court precedent only distinguishes between aliens who are legally admitted and those who are not. Moreover, the court noted, if anything, nonimmigrants are an even more discrete and insular minority than legal permanent residents.

The court also observed that at least two of the distinctions drawn by the other circuits are inaccurate, as nonimmigrants pay taxes and the dual intent doctrine allows nonimmigrants to seek a temporary visa while also intending to stay in the country permanently. The court also noted that nonimmigrants' limited work options are irrelevant, as plaintiffs are trying to work in the field that they were granted permission to enter to pursue.

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The court found that even if Supreme Court precedent allowed distinctions to be drawn between subclasses of aliens, the nonimmigrants at bar were sufficiently similar to legal permanent residents and citizens that strict scrutiny would still apply. In essence, the court observed, the state argued that nonimmigrants were different because they were transient. In reality, however, nonimmigrants are admitted to the United States for a period of time longer than the limit of their visas and many ultimately obtain permanent status. The court also noted that applying only a rational basis test would create absurd results, because, under the second exception to the use of strict scrutiny in alienage cases, statutes discriminating against unlawful aliens are reviewed under a heightened rational basis standard.

The court held that the statute failed the strict scrutiny test. The court noted that appellants had conceded that the state had no compelling interest in keeping out nonimmigrant pharmacists, and found that "there is no evidence that transience among New York pharmacists threatens public health or that nonimmigrant pharmacists, as a class, are in fact considerably more transient than LPR [legal permanent residents] and citizen pharmacists." In addition, the court ruled, the statute was not narrowly tailored, as there are many other ways to ward off dangers associated with transient professionals, such as requiring malpractice insurance.[12]

Finally, the panel considered plaintiffs' Supremacy Clause arguments. Relying in part on the Supreme Court's recent decision in *Arizona v. United States*,[13] the court ruled that the pharmacy-licensing law was "even more clearly unconstitutional under the principles of the Supremacy Clause than under the Equal Protection Clause."[14] Specifically, the panel found that the New York statute created an obstacle to Congress' decision to permit nonimmigrants to participate in specialty occupations. However, the court found that plaintiffs with TN status could not challenge the statute under the Supremacy Clause as the act implementing NAFTA allows only the United States to make such a challenge, and thus, the panel was required to decide the case on Equal Protection grounds.[15]

Conclusion

The Second Circuit's decision in *Dandamudi* calls into serious doubt the constitutionality of a number of other New York statutory provisions limiting various professions to citizens and legal permanent residents. More importantly, however, it creates a split with other circuits over the level of review which should be applied to statutes that discriminate against a specific subclass of aliens. In the current heightened climate surrounding immigration-related issues, it will be interesting to see if the Supreme Court steps in to resolve the split.

1. Docket No. 10-4397-cv, 2012 WL 2763281 (2d Cir. July 10, 2012).
2. 2012 WL 2763281, at *1-2 (quoting 8 U.S.C. §1101(a)(15)(H)(i)(b) (alteration omitted) and (citing 8 C.F.R. §214.6(a)).
3. Id. at *2 (citing *Matter of Hosseinpour*, 15 I.&N. Dec. 191 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456-58 (Nov. 1, 1993)).
4. N.Y. Educ. Law. §6805(1)(6)
5. Among other cases, the court has applied strict scrutiny in *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) and *Graham v. Richardson*, 403 U.S. 365 (1971). The court found exceptions to this general rule in *Foley v. Connelie*, 435 U.S. 291 (1978) (civic roles), and *Pyler v. Doe*, 457 U.S. 202 (1982) (undocumented aliens).
6. *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005), reh'g en banc denied, 444 F.3d 428 (2006).
7. *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 526 (6th Cir. 2007).
8. *LeClerc*, 419 F.3d at 418-19; *LULAC*, 500 F.3d at 533.
9. *Adusumelli v. Steiner*, 740 F.Supp.2d 582, 598, 600 (S.D.N.Y. 2010).
10. 2012 WL 2763281, at *5.
11. Id. at *7.
12. Id. at *5, 8-9 (internal quotation marks omitted).
13. 132 S.Ct. 2492 (2012).
14. 2012 WL 2763281, at *9.
15. Id. at *10-11.