No. 06-11

In the Supreme Court of the United States

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

LOUIS R. KOERNER, JR.
Koerner Law Firm
1204 Jackson Avenue
New Orleans, LA 70130
(504) 581-9569

JEFFREY W. SARLES
Counsel of Record
HANS J. GERMANN
HEATHER M. LEWIS
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statute and Regulation:

SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief responds to the Brief for the United States as Amicus Curiae. The government's reasons for recommending that the petition be denied are without merit.

1. The question at issue is whether a state should be permitted—without close judicial scrutiny—to prevent a class of aliens, whom the federal government has authorized to live and work in the United States, from engaging in their chosen profession based solely on their immigration status. The United States (at 8-10) says yes because Congress provided that aliens seeking H-1B status are not exempt from state licensing requirements otherwise applicable to a particular occupation. See 8 U.S.C. § 1184(i)(2)(A). But it takes an unwarranted leap of logic to conclude, as the government does, that Congress intended to permit states to deny the necessary license to otherwise qualified persons based solely on the applicant's federal immigration status.

A state undoubtedly may require an alien who seeks to practice as an attorney to pass a bar exam and to satisfy educational and ethical requirements. But unless it can demonstrate a compelling need, a state should not be permitted to preclude an alien who satisfies all such requirements from practicing law based solely on the very federal immigration classification that permits the alien to live and work in that state. Otherwise, a state could too readily undermine the federal policy that allows such aliens to work and reside in the United States, and there would be little or no effective check on the exercise of the type of discrimination to which foreign nationals historically have been subject. The government's view would leave "no limit

to the State's power of excluding aliens from employment." *Truax* v. *Raich*, 239 U.S. 33, 42-43 (1915).[1]

2. The government's misconstruction of Congressional intent with regard to state licensing leads it to deny that the Fifth Circuit's ruling conflicts with *Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Toll*, this Court held that federal immigration law preempted a state's imposition of "discriminatory" tuition charges "solely on account of the federal immigration classification." *Id*. at 17. The only distinction offered by the government from this case, that the visa classification at issue in *Toll* did not require a state license, again improperly assumes that the right of states to condition licenses on specified qualifications makes discrimination against lawful aliens an allowable condition. Like Maryland in *Toll*, Louisiana has imposed on nonimmigrant aliens "an ancillary 'burden not contemplated by Congress' in admitting these aliens to the United States." *Id*. at 14. That is, Louisiana is denying petitioners a license to practice law solely *because of their lawful immigration status*, not because they do not satisfy the licensing requirements applied to every other person. There is nothing to indicate that Congress intended to authorize such discriminatory treatment.

3. The government acknowledges (at 13) that the Fifth Circuit's decision directly conflicts with *Dingemans* v. *Board of Examiners*, 568 A.2d 354 (Vt. 1989), in which the Vermont Supreme Court held that states inevitably obstruct federal immigration law if they prevent otherwise qualified nonimmigrant aliens from Bar admission. See Pet. 11. The

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[1] The DHS regulation relied on by the government (at 9) actually reinforces the conclusion that Congress did not authorize states to create special licensing prohibitions for aliens seeking H-1B status. The regulation provides that a State exemption that allows an individual to engage in an occupation under supervision in lieu of the otherwise required license must encompass nonimmigrant aliens seeking H-1B status. 8 C.F.R. § 214.2(h)(4)(v)(C).

government's conclusion (at 14) that the *Dingemans* decision was "incorrect" does not obviate that conflict. Nor is it true that this conflict has no material "impact," as the government suggests (*ibid*.). Today, legislators and licensing officials in Vermont cannot prevent nonimmigrant aliens from practicing law, whereas agency officials in Louisiana, Texas, and Mississippi are free to do so. Allowing the same federal visa status to affect persons with identical qualifications depending on the state in which they happen to reside is an untenable situation that warrants this Court's intervention.

The government suggests (at 14) that the impact of the *Dingemans* decision is no different than if the Vermont Supreme Court had "interpret[ed] a rule to allow aliens who are not permanent residents to obtain a license to practice law, which it could have done." But the fact that a state court "might have, but did not, invoke state law does not foreclose" this Court's jurisdiction. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). Unlike a state court's independent construction of a state statute, a state court's judgment that a state statute violates the federal Constitution is appropriately reviewed by this Court. "[I]f the state court erred in its understanding of our cases and of the [federal Constitution], we should so declare." *Ibid*.; see also *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

4. The United States offers no viable reason why *In re Griffiths*, 413 U.S. 717, 722 (1973), which found it "appropriate that a State bear a heavy burden when it deprives [resident aliens] of employment opportunities," in particular admission to the state Bar, does not govern this case. The government (at 15-16) relies on the fact that the plaintiff in *Griffiths* was a permanent resident alien. But this Court said not a word in *Griffiths* to indicate that the permanency of her residence was a factor in its decision. The government (at 16) also references an exception to strict scrutiny for certain governmental policymaking positions, but it omits the fact that this Court held in *Griffiths* that this

exception does not apply to lawyers or to bar admission restrictions. 413 U.S. at 728. The government gains no support from its citation to *Mathews* v. *Diaz*, 426 U.S. 67, 85 (1976), which held that alienage classification by the *federal* government are subject to rational basis review, and recognized that, in contrast, such classifications by the *states* must satisfy strict scrutiny.

5. The government suggests (at 17) that nonimmigrant aliens have a reduced "claim to equal treatment" because they "do not ordinarily have the same ties to this country as permanent residents." But the touchstone for applying strict scrutiny to state alienage classifications is that such classifications are "inherently suspect" because aliens are a "prime example of a 'discrete and insular' minority." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). "[P]rejudice against discrete and insular minorities" is a "special condition" that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). It cannot be seriously maintained that aliens who reside here for three or six or ten years (see Pet. 17) are materially less subject to such prejudice. Moreover, many aliens on such long-term visas obviously do develop significant ties to this country, and thus the government's "significant ties" argument cannot rescue Louisiana's unqualified ban on their practicing law from the strict scrutiny to which such discrimination is subject under this Court's precedents.

6. The government seizes on the absolutism of Louisiana's ban on the practice of law by nonimmigrant aliens to support its view that strict scrutiny is inappropriate. It argues (at 17-18) that, because Section 3(B) also affects aliens "who apply from abroad for visas," it affects persons who "have no ties to this country." That may be, but the impact on persons living abroad is not the issue. Petitioners all resided in Louisiana at the time they sought to be admitted

to the state Bar. It is the differential impact of Section 3(B) on these state residents, who otherwise meet all state qualifications for Bar membership, that implicates the Equal Protection Clause and requires strict scrutiny.

7. The government is wrong to deny (at 18-19) that the Fifth Circuit's ruling conflicts with the Fourth Circuit's ruling in *Moreno* v. *University of Maryland*, 645 F.2d 217 (4th Cir. 1981), aff'd on other grounds, *Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Moreno*, the Fourth Circuit affirmed the district court's ruling that state classifications that burden only nonimmigrant aliens are subject to strict scrutiny. *Id*. at 220. The government has no support for its suggestion (at 19) that the Fourth Circuit might not "feel entirely bound by its affirmance" and failed to "conduct its own independent constitutional analysis." The Fourth Circuit did conduct its own independent analysis, concluding that the district court's analysis was correct and that there was therefore no reason to re-plough the same ground. Moreover, the equal protection ruling in *Toll* remains the law in the Fourth Circuit, which follows the rule that "[a] decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." *Etheridge* v. *Norfolk & W. Ry.*, 9 F.3d 1087, 1090 (4th Cir. 1993).

The United States notes (at 19) that the G-4 visa classification at issue in *Moreno* is "not at issue here." But *Moreno*'s equal protection analysis did not turn on that particular nonimmigrant alien classification. The district court held that *all* aliens who "maintain their place of general abode within the United States," including "immigrant and nonimmigrant," are "wrapped [in] the suspect classification blanket" and entitled to strict scrutiny (*Moreno* v. *Toll*, 489 F. Supp. 658, 663-664 (D. Md. 1980)), and the Fourth Circuit adopted the "reasons sufficiently stated in the opinion of the district court." *Moreno*, 645 F.2d at 220.

8. Finally, we note that the government does not comment on the impact of upholding the Louisiana rule on the transnational practice of law. See Pet. 22-24; Br. Amicus Curiae of Tulane University School of Law; Br. Amicus Curiae of Coalition of Service Industries. Allowing individual states to shun lawyers from foreign countries who are otherwise eligible to practice here sends the wrong message—or at least sends a message that should be composed only by the federal government—and can only hamper the more open exchange of services that the United States and its trading partners are attempting to negotiate under the General Agreement on Trade in Services.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LOUIS R. KOERNER, JR.
Koerner Law Firm
1204 Jackson Avenue
New Orleans, LA 70130
(504) 581-9569

JEFFREY W. SARLES
Counsel of Record
HANS J. GERMANN
HEATHER M. LEWIS
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

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