S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 02-041

Constitutionality of amending Tenn. Code Ann. §55-50-321 to Require the Issuance of Temporary "Driver's Certificates" to Otherwise Qualified Applicants Who Have Not Been Issued a Social Security Number

QUESTION

A legislator has posited a hypothetical amendment of Tennessee's driver license issuance law, Tenn. Code Ann. §55-50-321, to require the issuance of a driver's certificate, rather than a driver's license, to any otherwise qualified applicant who has never been issued a social security number. The amendment would provide that the certificate would be of a different size and/or color, would have to be renewed more often, and would require a higher fee than would be the case for a driver's license. The legislator asks the following questions:

1. Would such an amendment violate the Equal Protection Clauses of the United States or Tennessee Constitutions?

2. Would such an amendment violate any other constitutional provisions?

OPINION

1. Yes. A law requiring the issuance of such a driver's certificate rather than a driver's license to any otherwise qualified applicant who has never been issued a social security number would, as applied to persons religiously exempted from obtaining a social security number, likely violate the Equal Protection Clause of the United States Constitution, Amend. XIV, and the Equal Protection clauses of the Tennessee Constitution, article I, section 8, and article XI, section 8, unless construed by a reviewing court to accommodate such persons.

2. Yes. A law requiring the issuance of such a driver's certificate rather than a driver's license to any otherwise qualified applicant who has never been issued a social security number would, as applied to persons religiously exempted from obtaining a social security number, likely be constitutionally suspect under the Free Exercise Clause of the Tennessee Constitution, Article I, § 3. As to undocumented aliens, such a law would also be constitutionally suspect under the Supremacy Clause of the United States Constitution, article VI, clause 2, as an attempted exercise by the state of the uniquely federal power to regulate immigration, deportation, and naturalization of aliens under article I, section 8, clause 4.

ANALYSIS

INTRODUCTION

Tennessee's driver's license law was amended in 2001 to provide that persons who do not possess social security numbers, but who otherwise qualify for a driver's license, may obtain a driver's license by executing an affidavit affirming that they have never been issued a social security number. Tenn. Code Ann. §55-50-321(c)(1)(A) and (B).[1] The license issued to such persons would be the same as licenses issued to all other qualified drivers.

This office has been asked to examine whether a further amendment to the law that provided that such otherwise qualified persons could only receive a "driver's certificate" rather than a driver's license would be constitutional. The office has been informed that although this certificate would confer the same driving privileges as are conferred by a driver's license, the certificate would be different in significant ways from the driver's license issued to other applicants. The certificate would differ from the standard issue driver's license in size and/or color. Such a certificate would also have to be renewed more often[2] than driver's licenses, and a higher fee would be assessed for issuance.

Although there is no fundamental constitutional right to a driver's license,[3] the proposed amendment must be analyzed with regard to the treatment it accords to different sets of individuals, and the effect it has on any fundamental constitutional rights.

1. EQUAL PROTECTION

Legal standard

The hypothetical amendment treats persons who do not have a social security number differently than persons who do have such a number. The Equal Protection Clause of the United States Constitution requires states to afford similar treatment to similarly situated individuals. *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996). Whenever statutes provide for different treatment of different classes of individuals, courts will subject those statutes to varying levels of scrutiny, depending on the nature of the affected class or character of the affected right. In *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220 (6th Cir. 1997), the court described the various levels of scrutiny, stating:

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[1] 2001 Tenn. Pub. Acts, ch. 158 (effective May 3, 2001). Previous law had required all applicants to provide a social security number in order to obtain a license.

[2] Under the hypothetical amendment, such certificates would have to be renewed on an annual basis. Standard licenses remain valid for a period of five (5) years. Tenn. Code Ann. § 55-50-337.

[3] *State v. Crain*, 972 S.W.2d 13 (Tenn. Crim. App. 1998) (Driver's license is not a fundamental right for equal protection purposes). *See also, State v. Booher*, 978 S.W.2d 953 (Tenn. Crim. App. 1997), *perm. app. denied* (1998).

> The general rule in equal protection analysis is that state action is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest. *See Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). That rule gives way, however, where a state classifies by race, alienage or national origin, or where a state impinges on personal rights protected by the Constitution; such action is subjected to strict scrutiny and will be sustained only if suitably tailored to serve a compelling state interest. *See McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

Valot, at 1229. *See also, State v. Robinson*, 29 S.W.3d 476 (Tenn. 2000); *and Jaami v. Conley*, 958 S.W.2d 123 (Tenn. Ct. App.), *perm. app. denied* (1997).[4]

The amendment's legislative distinction between those who have social security numbers and those who don't does not discriminate against aliens per se. Some aliens have social security numbers, and others who don't have them would be eligible if they applied.[5] The legislative distinction only prevents those aliens who are ineligible for a social security number from obtaining one. Those aliens, often referred to as "undocumented aliens," are not a suspect class. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2398, 72 L.Ed. 786 (1982). Therefore no compelling interest would be required to justify the legislative distinction as to these persons.

Impingement on Fundamental Right to Free Exercise of Religion

The class of persons who do not have social security numbers includes not only undocumented aliens but also other persons who are eligible for social security numbers but belong to a religious organization whose doctrine rejects participation in the social security system on religious grounds. As to this subclass of persons, the legislative distinction would have the effect of impinging upon the fundamental right to free exercise of religion.

Generally speaking, persons who work in the United States or who wish to receive social security benefits are required by federal statute to obtain a social security number.[6] As noted by this

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[4]In *Robinson*, the court stated that strict scrutiny applies to an equal protection challenge only when the classification: (1) operates to the peculiar disadvantage of a suspect class, or (2) interferes with the exercise of a fundamental right. *Id.* at 481. *Jaami* was an equal protection case finding that classifications based upon religion are "inherently suspect distinctions." *Id.* at *126, quoting New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[5]The classes of persons who may obtain social security numbers are identified in 20 C.F.R. § 422.104. Aliens who are lawfully in this country for both work and non-work related purposes may obtain a social security number. 20 C.F.R. §§ 422.104(a)(2) and (a)(3).

[6]This requirement, which is subject to a number of exceptions, comes from the Federal Income Contribution Act and the regulations of the Social Security Administration promulgated pursuant to that act. *See, e.g.*, 26 U.S.C. §3102 (requiring deduction of social security tax from wages) and 20 C.F.R. § 404.469 (requiring a social security number for payment of benefits). The disclosure and use of social security numbers by states are regulated by the

office in Op. Atty Gen. 99-132 (July 7, 1999), certain persons are members of religious groups that oppose, on religious grounds, participating in the social security system or accepting any benefits from the system.[7] Such persons are exempt by federal statute from the requirement to obtain such a number for purposes of collection of the social security tax on wages.[8] Such persons cannot be required, by either state or federal law, to provide a social security number on an application for a driver license. The hypothetical amendment makes no exception to enable such persons to obtain a license rather than a certificate. By forcing such persons to choose between their religious beliefs and the more onerous requirements of the certificate, the hypothetical amendment would impinge on a fundamental "personal right protected by the Constitution"-- freedom of religious belief under the First Amendment.

Under the United States and Tennessee constitutions, equal protection analysis requires "strict scrutiny" when a legislative "classification interferes with the exercise of a 'fundamental right . . . .'" *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) *quoting San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973). Strict scrutiny requires that the law be suitably tailored to serve a compelling state interest. *Valot*, at 1229. *See also, Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (The state can impinge on fundamental constitutional rights through different treatment only if there is a compelling state interest in such different treatment and the means employed are narrowly tailored to protect that interest).

Two compelling state interests spring to mind in connection with the distinction implicit in the hypothetical amendment. The first is safety of drivers on the public highway system. The second is public safety and security generally.

The state undoubtedly has a compelling interest in ensuring the safety of the motoring public.[9] However, a reviewing court would likely find that the means chosen, which impinge on religious free exercise, are not narrowly tailored to this end. It is hard to see how the distinction between persons who have social security numbers and those who don't would advance driver safety. Driver safety is achieved by the requirements that apply to both license holders (those who have a social security number) and certificate holders (those who don't). By definition, all certificate holders must be "otherwise qualified" for a standard license, with the exception of being able to provide a social security number. Those other qualifications include training, testing,

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Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909 (1974), as codified at 5 U.S.C.§552(a).

[7] As also noted in that opinion, persons who obtained a certificate of exemption from the Social Security Administration on religious grounds were exempted from the social security number requirement. Any application of the prior statute requiring such persons to furnish a social security number would violate the Supremacy Clause of the United States Constituion. A copy of the opinion is attached.

[8]Generally, issuance of such a number is required, but the Social Security Administration is authorized to provide exemptions from this requirement under certain circumstances. One such circumstance is when the wage earner holds a bona fide religious belief making him or her conscientiously opposed to participation in the social security system. 26 U.S.C. §1402(g).

[9]*See State v. Crain*, 972 S.W.2d 13 (Tenn. Crim. App. 1998)(State has a compelling interest in maintaining the safety of the motoring public).

identification, past driving record and financial responsibility — all of which relate directly to safety. Issuance of a social security number has no rational connection to driver safety. There is no rational reason to conceive that issuing a different colored and sized card, requiring more frequent renewal, and collecting higher renewal fees from those with no social security number would make those persons any safer as drivers. Thus a reviewing court would likely find that the proposed amendment is not narrowly tailored to serve the state's legitimate interest in driver safety.

As to the second state interest, the state obviously has a legitimate interest in ensuring public safety and security. It is rational to conceive that a more ready means of identification of potential wrongdoers would serve that interest, and that issuance of a different colored and sized card which has to be renewed more frequently would make it easier to identify those who did not have social security numbers. However, there appears to be absolutely no rational basis to conceive that persons who don't have social security numbers are any more of a threat to public security and safety than any other group of persons. Thus the distinction is not narrowly tailored to serve the legitimate state interest in general security and safety. Therefore the proposed amendment would, if construed to apply to persons whose religious beliefs cause them to be conscientiously opposed to participation in social security, violate the Equal Protection clauses of the United States and Tennessee Constitutions

The proposed amendment may nonetheless survive a constitutional challenge on this ground. In 1999 Op. Atty. Gen. 99-132, the office concluded that the previous law, requiring all persons to provide a social security number on their license application, could not be construed to deny issuance of a license to persons who hold an exemption from the Social Security Administration. Similarly, a reviewing court could uphold the hypothetical amendment on the ground that it could not be construed to apply to persons holding a religious exemption from the Social Security Administration.[10] Under such a construction, persons holding a religious-based exemption from the Social Security Administration would be eligible, if otherwise qualified, to obtain a driver's license rather than a certificate.

Undocumented aliens

A judicially implied exception for persons holding an exemption issued by the Social Security Administration would not address the class of persons who cannot obtain a Social Security number or exemption by virtue of their status as aliens who are illegally in the United States.[11] Instead, in order to drive legally in Tennessee, these persons would have to comply with the more onerous requirements of the certificate.

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[10]*See State v. Hudson*, 562 S.W.2d 416 (Tenn. 1978). (Irreconcilable conflicts may result in judicial findings of exceptions or amendments by necessary implication).

[11]Such persons can obtain a social security number for a non work purpose if such a number is required to receive a federally funded benefit to which the alien is legally entitled. 20 C.F.R. § 422.104(b). From the language and context of the statute in question, it is apparent that obtaining a driver's license is not a government benefit to which a person illegally present in the United States is entitled.

Legislative imposition of more onerous requirements on a class of persons is not per se unconstitutional. The question is what level of state interest the requirements serve, and what rational connection there is between the interest and the means taken to achieve the interest. Although courts continue to say that "classifications" by race or alienage are subject to strict scrutiny, *e.g.*, *Valot*, 107 F.3d at 1229, the real question is whether the group subjected to more onerous requirements by virtue of the classification is itself a suspect class. As noted above, undocumented aliens are not a suspect class, *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2398, 72 L.Ed. 786 (1982). Therefore even though the amendment would in effect classify people by alienage, or a type of alienage, the state would not have to show a compelling interest in treating undocumented aliens differently than other persons. Instead, the state would only have to show a rational basis for the different treatment, leading to the accomplishment of a legitimate state interest. *Valot,* at 1229, citing *Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

As noted above, the state undoubtedly has compelling interests in ensuring the safety of the motoring public and in safety and security persons living within its borders. However, a reviewing court would likely find no rational basis on which the amendment could be found to serve this interest. In *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997), the Court described the application of the rational basis test, stating

> Under this standard, "if some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld."

Riggs, at 53.

If the purpose of the distinction between undocumented aliens and others is to advance driver safety, it is hard to see how this purpose would be achieved by the hypothetical amendment. As noted above, the proposed certificates would only be issued after the applicant has demonstrated the same minimum level of competence as must be shown before a driver's license will be issued to a person who possesses a social security number. Issuance of a social security number thus has no rational connection to driver safety and the issuance of a special certificate, as opposed to a drivers license will not make anyone a safer driver.

As to the second state interest, public safety and security, it is conceivable that the amendment would facilitate improved identification of undocumented aliens by law enforcement and the general population. A reviewing court would likely take judicial notice that driver's licenses are commonly used as a means of identification for various purposes.[12] It is rational to conceive that a person showing a certificate of a different size and color to gain access to such facilities would be more readily identified as an undocumented alien than if such a person simply showed a standard driver's license.

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[12]Drivers licenses are often used as identification in connection with air and train travel, automobile rentals, gaining access to buildings and making payments with checks.

As to singling out aliens without social security numbers, a reviewing court would likely take judicial notice that some undocumented aliens have inflicted substantial harm upon public safety and security in the past. It is rational to think that some might do so again in the future. Although the same could be said of documented aliens and citizens, it is conceivable that the proportion of undocumented aliens that pose such a threat may be higher than the proportion of citizens and legal aliens who might pose such a threat.

It is also rational to conclude that identification information on undocumented aliens might be kept more current by requiring more frequent renewal of certificates than licenses. It would be reasonable to conclude that more up to date information could lead to easier location of such persons if necessary for interviewing or apprehending them in connection with threatened or actual breaches of public safety and security. A reviewing court could conceive of less intrusive or onerous methods to achieve these results, but under the rational basis test there is no requirement that the state choose such less intrusive methods. Therefore such a law would likely survive equal protection scrutiny as applied to undocumented aliens.

2. OTHER CONSTITUTIONAL PROVISIONS

First Amendment: Free Exercise of Religion

As noted above, it is unlikely that a reviewing court would find any compelling interest in subjecting members of certain religious groups to more onerous licensing requirements than non-members. Therefore it is unlikely a reviewing court would find it necessary to reach the free exercise issue as distinct from the equal protection issue. If a reviewing court were to reach the free exercise issue, however, the amendment would likely be considered constitutionally suspect. As set forth recently by the Court of Appeals for the Sixth Circuit, the current standard is as follows:

> A state law that is rationally related to a legitimate state purpose will be upheld against a free exercise claim . . . so long as the law is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions."

McKay v. Thompson, 226 F.3d 752, 756 (6th Cir.), *rhg and rhg en banc denied* (2000), *cert. denied, 532 U.S. 906* (Mar 05, 2001). In interpreting the Tennessee free exercise provisions, the Tennessee Supreme Court has for the most part followed in step with the federal courts.[13] The most current Tennessee case on the subject, decided after *McKay*, is *State v. Medicine Bird Black Bear White*

[13]The *Eagle* court also recognized the potential for a "stronger" interpretation of the Tennessee Free Exercise Clause in comparison to the federal clause, thus providing a broader guaranty of religious freedoms. *Eagle*, at 761. By its denial of permission to appeal in *Eagle,* the Tennessee Supreme Court has declined to take a stronger interpretation .

Eagle, 63 S.W.3d 734 (Tenn. Ct. App.), *perm. app. denied* (2001).[14] Under the Tennessee free exercise clause, a strict scrutiny standard must be applied to any law that impinges on the right to believe and profess whatever religious doctrine one desires. *Id.* at *762.*

As to laws that infringe on the right to act, or refrain from acting, in a manner consistent with one's religious beliefs, a variable standard is applied. *Id. at 762.* Strict scrutiny is applied when the law has no purpose other than to prohibit a particular religious practice, to discriminate against all or some religious beliefs, or is interpreted, applied or enforced a discriminatory manner. *Id.* at 763. However, the court provides that state enforcement of a "facially neutral and uniformly applicable law that only incidentally burdens religious practice will be upheld if the government demonstrates that the law is a reasonable means for promoting a legitimate public interest." *Id.* at 763.

The proposed amendment is constitutionally suspect because a reviewing court could view the law as not uniformly applicable. On the one hand, a reviewing court could find that the law is uniformly applicable and is a reasonable means of promoting public safety and security. On the other hand, a reviewing court could find that the law is not uniformly applicable because in effect it requires those who are religiously opposed[15] to participation in the social security program to refrain from acting in a manner consistent with their religious belief or accept the more onerous driver's certificate. A reviewing court could find that unlike the law requiring a social security number to register to vote, upheld in *McKay*, or the law making use of peyote illegal, upheld in *Smith*,[16] the hypothetical amendment would essentially single out certain religious groups for disparate treatment. Thus the amendment could be subject to the strict scrutiny test rather than the rational basis test. Under strict scrutiny, it is doubtful that the imposition of additional requirements upon persons of certain religious beliefs would be found by any court to be narrowly tailored to the state interests at stake. *See generally*, *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).[17] Thus an amendment of the driver's license law to require that such

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[14]The court struck down the free exercise clause claims of an Indian tribe who objected to the widening of a highway across burial grounds. *Eagle*, at 775.

[15]In cases too numerous to cite here, courts have established tests designed to ensure that a sham claim of religious belief is not a ticket to an easy exemption from the requirements of any law to which the alleged believer is opposed. Congress has incorporated the guiding principles of those cases in the language of the statute providing for exemptions from the requirements of the Social Security Act. The Social Security Administration may issue and exemption to "any individual who is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance . . . ." 26 U.S.C. §1402(g).

[16]The law of general application in *McKay* was a Tennessee voter registration law that was administratively determined to disqualify anyone who did not provide a social security number. The law was applied equally to anyone without a social security number and did not impose additional requirements upon any particular group of people. *McKay*,, at 754. Another example of a law of general application appears in the *Smith* case cited to in *McKay*. In *Smith*, the law in question was a criminal statute making the use and/or possession by any person of the drug peyote a criminal offense. *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

[17] In *Yoder*, the court struck down a Wisconsin law requiring school attendance until age 16. The court found the law did not serve a compelling state interest when weighed against the Free Exercise rights and beliefs of the Amish religion.

otherwise qualified persons must obtain driver's certificates rather than licenses would likely be constitutionally suspect under the free exercise clauses of the Tennessee and United States constitutions.

Supremacy Clause

The Supremacy Clause provides that federal statutes enacted pursuant to the United States Constitution are the supreme law of the land. If a state law conflicts with any particular federal statute, the state law is preempted. *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980). Under U.S. Const., art I, §8(4), Congress has the authority to regulate immigration and naturalization. Once Congress has so acted, states are preempted from enacting statutes or regulations on the same subject. *Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931).

In Op. Tenn. Atty. Gen. No. 02-018 (February 13, 2002) this office opined that Chapter 158 of the Public Acts of 2001, which amended Tenn. Code Ann. § 55-50- 321(c) to authorize the Department of Safety to issue driver's licenses to applicants who do not possess social security numbers, did not violate the Supremacy Clause of the United States Constitution. [18] Nothing in the 2001 amendment conflicted with federal statutes regulating immigration and citizenship. It applied generally to all classes, and did not purport to regulate any aspect of immigration or the conduct of aliens. Although the amendment perhaps made it easier for some undocumented aliens to avoid federal enforcement efforts, that effect was incidental to the accomplishment of a legitimate state interest, ensuring trained and qualified drivers. Since the effect was incidental, and since the state has no obligation to fashion its legislation in such a way as to assist the federal government in enforcing federal laws against illegal employment of undocumented aliens, the amendment did not violate the Supremacy Clause.[19]

By contrast, the hypothetical amendment imposes special requirements upon undocumented aliens and therefore comes closer to attempting to regulate immigration and naturalization in violation of the Supremacy Clause. *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed2d 581(1941), is instructive. In that case, the court held that Pennsylvania's statute requiring resident aliens to register with the state Department of Labor and Industry and carry a special state issued identification card violated the Supremacy Clause. *Hines,* at 56. In striking down the state statute, the Court held that the statute was preempted by federal legislation.[20] In addition, the Court found

[18] A copy of that opinion is attached.

[19] The amendment manifestly did not attempt to regulate immigration and naturalization or otherwise alter or interfere with the federal legislative scheme.

[20] 312 U.S. at 69,74; 61 S.Ct. at 405, 408. An examination of the code today likewise reveals extensive federal legislation on aliens and citizenship. *See, e.g.,* 8 U.S.C. §§ 1151 (a) (identification of classes of immigrants who may lawfully be issued immigrant visas); 1151 (d) (immigrants who may be issued work visas); 1152 (immigration quotas); 1182 (classes of aliens who are not eligible to enter the U.S.); 1202 (procedures for visa applications and registration of resident aliens) and 1252 (procedures for deportation of aliens). All of this legislation, today and at the time of *Hines*, was based on the authority accorded Congress under the Constitution, article VI, clause 2, to regulate immigration and

that the statute was unconstitutional because it singled certain aliens out for unwarranted special treatment.[21]

A reviewing court might distinguish the hypothetical amendment from the statute struck down in *Hines.* The state law struck down in *Hines* did not involve a modification of a pre-existing state law requirement applicable to all persons. Nor did the state statute there restrict itself to undocumented aliens; it included substantially all aliens within its sway.[22] A reviewing court might distinguish the hypothetical law on the grounds that Tennessee has not created a separate registration requirement applicable only to undocumented aliens, and that Tennessee has not lumped documented and undocumented aliens together into one group.

On the other hand, a reviewing court might find that the hypothetical law, like Pennsylvania's statute, singles out some aliens for special treatment by requiring the issuance of special driver's certificates which must be renewed more frequently and at greater expense than standard issue driver's licenses. A reviewing court would have to decide whether the legislature was attempting to regulate aliens, or was simply enhancing public safety and security with a resulting incidental effect on undocumented aliens. Thus although the amendment would not necessarily be held unconstitutional, there is enough uncertainty in this area that the hypothetical amendment would at least be constitutionally suspect under the Supremacy Clause of the United States Constitution.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

naturalization.

[21]The Court alluded to the Equal Protection Clause in dicta, but did not rely upon the clause in holding the Pennsylvania statute invalid.

[22]The exceptions were aliens who were the father or mother of a son or daughter who served in the military during a war, aliens who resided continuously in the U.S. since 1908 without acquiring a criminal record, and aliens who had already filed an application for citizenship. *Hines* at 56.

ERIC R. MCLENNAN
Assistant Attorney General

Requested by:

Senator Rosalind Kurita
State of Tennessee
6 Legislative Plaza
Nashville, TN 37243-0022