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Opinion No. 13-29

Requiring Persons Admitted to Polling Places to Be United States Citizens

QUESTION

Does House Bill 985/Senate Bill 549 of the 108th General Assembly, 1st Sess. (2013) ("HB985") which requires poll watchers or any other person admitted to a polling place during an election to be a United States citizen, violate the Equal Protection Clause of the Fourteenth Amendment?

OPINION

HB985 is constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment.

ANALYSIS

HB985 as originally proposed was amended by both the Tennessee House and Senate. Copies of both the original bill and the amendment are attached to this opinion, and this opinion addresses HB985 as amended (hereinafter referenced as "HB985"). This Office is unaware of any further amendments to HB985.

HB985 would amend Tenn. Code Ann. § 2-7-103(a) to provide that only citizens of the United States are to be admitted to a polling place during an election. The bill would further amend Tenn. Code Ann. § 2-7-104(a) to require that all appointed poll watchers be citizens of the United States.

In an opinion issued in 1986, this Office addressed the constitutional validity of a Tennessee statute that precluded the issuance of beer permits to aliens, defined as any person who is not a citizen of the United States. Tenn. Att'y Gen. Op. 86-85 (Apr. 9, 1986). This Office opined that, in the absence of a showing of a compelling state interest justifying discrimination against aliens, the statute in question would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* *See also* Tenn. Att'y Gen. Op. 12-94 (Oct. 8, 2012) (concluding that act permitting disapproval of charter-school application or permitting revocation of charter agreement where school staff exceeds quota for nonimmigrant foreign workers would be constitutionally suspect under Fourteenth Amendment); Tenn. Att'y Gen. Op. 88-197 (Nov. 10, 1988) (concluding that statute prohibiting issuance of beer permit to

resident alien or conditioning issuance of permit on United States citizenship violates Fourteenth Amendment).

Opinion 86-85 remains an accurate statement regarding the constitutional constraints on statutes that discriminate on the basis of alienage. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)). Since the Supreme Court's decision in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), aliens who have been lawfully admitted are considered "persons" within the meaning of the Fourteenth Amendment and thus entitled to the equal protection of the laws. Accordingly, the Supreme Court has held as a general matter that classifications by a state that are based on alienage are "inherently suspect and subject to close judicial scrutiny." *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Examining Board v. Flores de Otero*, 426 U.S. 572, 601-602 (1976); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973)). In order to withstand such strict scrutiny, a law must advance a compelling state interest by the least restrictive means available. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

Nevertheless, the Supreme Court has recognized a narrow exception to the rule that discrimination in a state statute based on alienage triggers "strict scrutiny." This exception, labeled the "political" or "governmental" function exception, applies to "laws that exclude aliens from positions intimately related to the process of democratic self-government." Tenn. Att'y Gen. Op. 86-85 at 3 (quoting *Bernal,* 467 U.S. at 220). Exclusions or limitations that fall within this exception, if challenged, are evaluated under the more lenient "rational basis" standard. *Sugarman*, 413 U.S. at 648; *Foley v. Connelie*, 435 U.S. 291, 296 (1978). Under this standard, a showing of "some rational relationship between the interest sought to be protected and the limiting classification" is all that need be established to uphold the law. *Foley*, 435 U.S. at 296. *See also* Gregory A. Scopino, Note, *A Constitutional Oddity of Almost Byzantine Complexity: Analyzing the Efficiency of the Political Function Doctrine*, 90 Cornell L. Rev. 1377, 1394-1400 (July 2005).

To determine whether a restriction based on alienage fits within this narrow political-function exception, the United States Supreme Court has established a two-part test.

> First, the specificity of the classification will be examined: a classification that is substantially over inclusive or under inclusive tends to undercut the governmental claim that the classification serves a legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government."

Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982). Thus, a state may justify its exclusion of aliens under the political-function exception by demonstrating that the position in question involves the exercise of "broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community." *Bernal*, 467 U.S. at 224.

When these standards are applied to HB985, the provisions of this bill appear on their face to be constitutionally suspect as violative of the Equal Protection Clause.[1] Tennessee Code Ann. § 2-7-103(a) currently provides that "[n]o person may be admitted to a polling place while the procedures required by this chapter are being carried out except election officials, voters, persons properly assisting voters, the press, poll watchers appointed under § 2-7-104 and others bearing written authorization from the county election commission." Tennessee Code Ann. § 2-7-104(a) governs the appointment of poll watchers and provides that "[e]ach political party and any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise may appoint poll watchers." HB985 would amend these statutes to provide that any persons present in a polling place during an election, including appointed poll watchers, must be United States citizens. HB985 thus would have a discriminatory impact on aliens.

Because HB985 would have a discriminatory impact, the initial question is whether the alienage restriction of the bill should be evaluated under the "strict scrutiny" standard or the more lenient rational-basis test. While the political-function exception could arguably apply to election officials because of the role that they play in conducting elections, Tennessee law already requires that election officials be United States citizens. Tenn. Code Ann. § 2-5-106(a) (requiring all officers of elections, judges, machine operators, precinct registrars and assistant precinct registrars to be registered voters).[2] However, HB985 would also prohibit aliens from providing assistance to voters,[3] from serving as members of the press, and from obtaining written authorization from the county election commission to observe an election. It would further prohibit aliens from serving as appointed poll watchers on behalf of "any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise." Given that Tennessee's election laws invest no policymaking responsibility or discretion in these persons, it is doubtful that the political-function exception would apply to these categories of persons. As the United States Supreme

[1] This Office cannot anticipate all possible factual situations in which HB985, if enacted, might be applied or "as applied" constitutional challenges that might develop. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.

[2] Tennessee, like other states, limits the voting franchise to United States citizens. *See* Tenn. Code Ann. § 2-2-102 (providing that qualified voter must be "citizen of the United States"). Exclusion of non-citizens from voting has been upheld from equal protection challenge using the rational-basis test. *See, e.g., Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), app. dismissed, 430 U.S. 961 (1977).

[3] Where the voter is physically disabled or illiterate, such assistance may be provided "by any person of the voter's selection." Tenn. Code Ann. § 2-7-116.

Court observed, in determining that notaries did not fall within the governmental-function exception:

> To be sure, considerable damage could result from the negligent or dishonest performance of a notary's duties. But the same could be said for the duties performed by cashiers, building inspectors, the janitors who clean up the offices of public officials, and numerous other categories of personnel upon whom we depend for careful, honest service. What distinguishes such personnel from those to whom the political-function exception is properly applied is that the latter are invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals. Neither of these characteristics pertains to the functions performed by Texas notaries.

Bernal, 467 U.S. at 225-26.

Thus, the broad inclusion of these other categories of persons in the alienage restrictions of HB985 would likely subject the bill to strict-scrutiny review. To satisfy strict scrutiny, the State would be required to demonstrate that these provisions further "a compelling state interest by the least restrictive means practically available." *Id*. at 228.

One possible rationale for this bill is to protect the integrity of the polling place. The United States Supreme Court consistently has found that states have a compelling interest in maintaining the integrity of the voting place, preventing voter intimidation and confusion, and preventing election fraud. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). The crucial issue, then, is whether this bill is narrowly tailored to accomplish this compelling state interest.

As previously discussed, HB985 would broadly prohibit aliens, including legal permanent residents,[4] from being present in the polling place during elections, regardless of their purpose for being present (e.g., member of the press, appointed poll watcher, providing voter assistance). It is not apparent that protection of the integrity of the polling place is a rationale for this citizenship requirement, particularly when state law does not otherwise require a person to be a registered voter to perform any of these functions in the polling place. Consequently, the alienage restriction contained in HB985 would likely be held not to advance a compelling state interest and thereby violate the Equal Protection Clause of the Fourteenth Amendment.

[4] The Sixth Circuit Court of Appeals has distinguished between nonimmigrant aliens and aliens with legal permanent residence status ("LPR") and held that nonimmigrant aliens are not a suspect class for purposes of the Equal Protection Clause. *See League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). However, unlike the statute at issue in LULAC, HB985 makes no distinction between nonimmigrant aliens and LPRs but applies to all aliens.

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