STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 4, 2016

Opinion No. 16-09

Constitutionality of 2015 Tenn. Pub. Acts, ch. 29, imposing durational citizenship/residency requirement for issuance of beer permits

Question

Does 2015 Tenn. Public Acts, ch. 29 (SB 185/HB 145, 109th Gen. Assem. (2015)), which amended Tenn. Code Ann. § 57-5-103(a) to prohibit local governments from issuing a permit for the resale of beer to an applicant who has not been a citizen or a lawful resident of the United States for at least one year violate the federal or Tennessee Constitution?

Opinion

Yes. The durational citizenship/residency requirement imposed by Chapter 29 for the issuance of a beer permit is unlikely to pass constitutional muster. By discriminating based on alienage and national origin the amended statute raises equal protection concerns. If challenged, it would be subject to strict judicial scrutiny since it targets members of a "suspect class." And because the statute does not appear to serve a compelling state interest, it is likely to be found violative of the equal protection guarantees of both the Tennessee and the United States Constitutions. Even if the statute could be justified as furthering a compelling state interest, it is not sufficiently narrowly tailored to survive a constitutional challenge.

ANALYSIS

Tennessee Code Ann. § 57-5-103 governs the issuance of permits for purchases of beer for resale. Section 57-5-103(a) was amended by 2015 Tenn. Public Acts, ch. 29, to add the following new subdivision:

> After July 1, 2015, a city or county shall not issue a permit under this chapter unless the applicant has been a citizen or lawful resident of the United States for not less than one (1) year immediately preceding the date upon which the application is made to the city or county.

By thus conditioning the issuance of a beer permit on the duration of the applicant's U.S. citizenship or the applicant's lawful residency in the U.S., Tenn. Code Ann. § 57-5-103(a) , as amended, discriminates against persons who have been U.S. citizens or lawful residents in the U.S. for less than a year. In other words, the statute discriminates in the first instance against a certain class of citizens and in the second instance against a certain class of lawful residents.

The federal Equal Protection Clause provides that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV. The Tennessee Constitution, article I, section 8, and article XI, section 8, also "guarantee[s] equal privileges and immunities for all those similarly situated." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Tennessee's equal protection guarantee is coextensive with the equal protection provisions of the United States Constitution. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

States generally retain, in addition to their inherent police powers, broad powers under the Twenty-first Amendment to the United States Constitution to regulate the sale of alcoholic beverages within their borders, but they may not do so in violation of a person's federal constitutional rights. *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 618 (6th Cir. 1997). In the equal protection context, "person" "encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

When a state limitation is challenged as violative of a person's equal protection rights, both Tennessee and federal courts will apply one of three levels of scrutiny depending on the nature of the right asserted: strict scrutiny; intermediate scrutiny; or "rational basis" scrutiny. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153. Equal protection analysis "requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race)." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152.

Aliens (non-United States citizens) are a "suspect class" for equal protection purposes, and, with narrow exceptions not applicable here, laws that discriminate on the basis of alienage are subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Like classifications based on alienage, classifications based on national origin are also subject to strict judicial scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

To survive strict scrutiny, the state must show that it has a compelling state interest justifying the discrimination. If there is no compelling interest, that ends the inquiry and the discriminatory law fails. If there is a compelling interest, the state must then show that the challenged law furthers that interest by the least restrictive means practically available. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Even if there is a compelling state interest to justify the discriminatory law, if the law is not narrowly tailored to further that interest, then the law will be struck down as unconstitutional. *Id*.; *see also* Tenn. Att'y Gen. Op. 86-85 (Apr. 9, 1986); Tenn. Att'y Gen. Op. 12-94 (Oct. 8, 2012).

The residency and citizenship requirements of Chapter 29 discriminate on the basis of alienage and national origin, each a "suspect class." Accordingly, any equal protection challenge to the statute would be subject to strict scrutiny.

To survive strict scrutiny, the durational citizenship requirement and the lawful residency requirement for beer permits would each have to be justified by a compelling state interest. In light of the precedent discussed below, it is unlikely that the State would be able to make that showing. And even if there is a compelling state interest in requiring beer permit holders to meet

the citizenship/residency requirements, the State would have to show that the requirements are the least restrictive means of achieving the compelling interest. Case precedent also suggests that the State would be hard pressed to show the requisite "narrow tailoring."

For example, the U.S. Supreme Court struck down a state rule that excluded resident aliens from admission to the state bar. *In re Griffiths*, 413 U.S. 717 (1973). Although the state had a substantial interest in ensuring that persons admitted to the practice of law were qualified, the state failed to show that the classification based on alienage was necessary to promoting or safeguarding that interest. *Id*. at 727. A statutory requirement of United States citizenship for registration as a pharmacist has been struck down as an equal protection violation. *Wong v. Hohnstrom*, 405 F. Supp. 727 (D. Minn. 1975) (holding the law unconstitutional on its face and reasoning that, if there is no compelling state purpose in denying law licenses to resident aliens as held in *Griffiths*, there can be no compelling interest in denying pharmaceutical licenses based on alienage.) *See also Kulkarni v. Nyquist*, 446 F. Supp. 1269 (N.D.N.Y. 1977) (holding that the state's purported interest of "effecting political involvement in the community by the professional [physical therapist] assuring his or her technical ability and financial responsibility" had no causal relationship to citizenship, and thus even if the state had a compelling interest in a physical therapist's financial and technical ability, requiring U.S. citizenship was not sufficiently narrowly tailored to overcome the discriminatory effect of the requirement.)

The Supreme Court also nullified a Puerto Rico statute that required an applicant for registration as a civil engineer to be a United States citizen. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). The purported justifications for the discriminatory statute were: (1) "to prevent the 'uncontrolled' influx of Spanish-speaking aliens into the field in Puerto Rico," (2) "to raise the prevailing low standard of living," and (3) "to provide the client of a civil engineer an assurance of financial accountability if a building for which the engineer is responsible collapses within 10 years of construction." *Id.* at 605. The Court held the first justification discriminatory on its face. *Id*. The second justification had some legitimacy, but "the means drawn to achieve the end are neither necessary nor precise." *Id*. The Court rejected the third justification as too broad in both purpose and execution, reasoning that citizenship was not related to the future financial responsibility of the engineer, and that the government could ensure financial responsibility of engineers without discriminating against a particular group of otherwise qualified professionals. *Id*.

A state limit on the issuance of a license to sell beer based on alienage has also been found to violate equal protection. A permanent resident (non-U.S. citizen) brought an equal protection challenge to a statute that limited licenses to sell beer to U. S. citizens. The statute did not survive strict scrutiny. The city "failed to meet its heavy burden of justification" since it could not show that the statute had a constitutionally permissible purpose which the classification was necessary to accomplish. *Karla v. State of Minnesota*, 580 F. Supp. 971, 973 (D. Minn.1983).

This Office, too, has opined that various Tennessee statutes preventing aliens from obtaining professional licenses violate the right to equal protection. *See* Tenn. Att'y Gen. Op. 77-308 (Sept. 7, 1977) (aliens may not be excluded from tenured teaching positions at state universities); Tenn. Att'y Gen. Op. 82-81 (Feb. 22, 1982) (aliens may not be barred from obtaining veterinary licenses); Tenn. Att'y Gen. Op. 06-026 (Feb. 7, 2006) (the state may not require that notaries be U.S. citizens).

In particular, this Office has repeatedly opined that a citizenship requirement for a permit to sell beer and alcoholic beverages violates the right to equal protection. *See, e.g.* Tenn. Att'y Gen. Op. 78-1A (Jan. 3, 1978) (statute conditioning a permit to sell alcoholic beverages on citizenship is unconstitutional); Tenn. Att'y Gen. Op. No. 81-407 (July 10, 1981) (statute conditioning a permit to sell beer and light alcoholic beverages on citizenship is unconstitutional); Tenn. Att'y Gen. Op. No. 86-85 (Apr. 9, 1986) (Tenn. Code Ann. § 57-5-103 violates the right to equal protection by prohibiting a non-U.S. citizen from holding a beer permit in the absence of proof of a compelling state interest in so discriminating based on alienage); Tenn. Att'y Gen. Op. 88-197 (Nov. 10, 1988) (statute prohibiting aliens from obtaining permits to sell beer or owning a business that sells beer is unconstitutional); Tenn. Att'y Gen Op. 94-120 (Oct. 10, 1994) (statute prohibiting non-citizens from obtaining permits to sell beer is unconstitutional); Tenn. Op. Att'y. Gen. No. 13-29 (Mar. 27, 2013) (statute prohibiting non-United States citizens from being present in polling places is constitutionally suspect and "Opinion 86-85 remains an accurate statement regarding the constitutional constraints on statutes that discriminate on the basis of alienage.").

In short, absent a showing of a compelling state interest in prohibiting lawful residents of less than one year from holding a beer permit, Chapter 29 will likely be held unconstitutional, if challenged. Even if there is a compelling state interest to justify the discrimination based on alienage, it is highly doubtful that the statute would be viewed as the least restrictive means for furthering that interest.

Chapter 29 discriminates not only on the basis of alienage, but also on the basis of national origin, which is, like alienage, a "suspect" classification. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The prohibition on the issuance of permits to persons who have been citizens for less than one year is, in effect, discrimination against naturalized citizens. A birthright citizen would not be affected by the statute because he or she would satisfy the one-year durational citizenship requirement at age one. Since a beer permit holder must be well over a year old, the statue would not in practice burden a birthright citizen with a durational citizenship requirement.

This classification based on national origin is a good candidate for invalidation. Like the classification based on alienage, it would be subject to strict judicial scrutiny if challenged. Like the classification based on alienage, it is likely to succumb to that scrutiny.

For example, a statute imposing a ten-year citizenship requirement for Foreign Service applicants was invalidated because the durational requirement had the effect of discriminating against naturalized citizens, as does Chapter 29. *Faruki v. Rogers*, 349 F. Supp. 723 (D.C. D. C. 1972). In analyzing the issue, the court explained the discriminatory effect of a durational citizenship requirement:

> [H]ere the Government grants citizenship to an immigrant and then, solely on the basis of his original foreign status, proceeds to give him second-class, more burdensome treatment. Classifications of this sort have the defect of denying the promise of equal opportunity which this country has traditionally and proudly held open to the millions of immigrants who have literally built America in the hope that they could share fairly in its benefits. Worse, in our mind, such classifications, like those based on race, have about them an odor of prejudice against and oppression of poorly represented minority groups.

Id. at 729. The government had a strong interest, namely one of insuring that its Foreign Service officers were "highly competent." *Id.* at 730. But the court held that the statute was not narrowly tailored to serve that interest, because the durational requirement had no nexus to the individual's qualifications for the Foreign Service and the objective could be served by less restrictive means, for example, through a competitive examination process. *Id.* at 731.

We are not aware of and cannot conceive of a compelling state interest in discriminating between naturalized citizens and birthright citizens, or for that matter between naturalized citizens who have been citizens for 366 days and naturalized citizens who have been citizens for 364 days for the purposes of selling beer. Absent a compelling state interest to justify the discriminatory effects, the one-year U.S. citizenship requirement of Chapter 29 would not survive an equal protection challenge under either the federal or the Tennessee Constitution.

In sum, the durational citizenship/residency requirement imposed by Chapter 29 for the issuance of a beer permit is unlikely to pass constitutional muster. By discriminating based on alienage and national origin the amended statute raises equal protection concerns. If challenged, it would be subject to strict judicial scrutiny since it targets members of a "suspect class." And because the statute does not appear to serve a compelling state interest, it is likely to be found violative of the equal protection guarantees of both the Tennessee and the United States Constitutions. Even if the statute could be justified as furthering a compelling state interest, it is not sufficiently narrowly tailored to survive a constitutional challenge.

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