95-5533

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February 16, 1995

The Honorable Harry F. Cato
Chairman, Labor, Commerce and Industry Committee
House of Representatives
407 Blatt Building
Columbia, South Carolina 29211

Dear Chairman Cato:

You have asked whether proposed Bill H.3041 is constitutional. The Bill seeks to amend the Contractors' Licensing Law, Section 40-11-10 et seq. of the Code (1976 as amended), by adding Section 40-11-105 in pertinent part as follows:

> Section 40-11-105. A resident of another state who performs work as a general contractor or as a mechanical contractor, as those terms are defined in Section 40-11-10, shall, before engaging in or performing any such work in South Carolina, remit to the South Carolina State Licensing Board for Contractors amounts equaling the contractor registration, licensing or certification fees and privilege taxes or fees which are charged by such person's state of residence to a South Carolina resident general contractor or mechanical contractor who enters such other state to perform contracting work there.

Currently, it is unlawful in South Carolina to engage or offer to engage in general or mechanical contracting, as defined, without having first obtained a license from the State Licensing Board for Contractors. Section 40-11-100. Licensure first requires the submission of a written application for examination, accompanied by payment of a contractor's license fee. Section 40-11-130. A satisfactory application enables the applicant to take the examination, see Section 40-11-130, and satisfactory completion of the examination results in licensure to do business as a general or mechanical contractor

in South Carolina. Section 40-11-140. A financial statement is required for any contractor above Group 1, Section 40-11-160, and the Board is empowered to classify and limit a certificate based upon the applicant's past performance and reputation for reliability. Section 40-11-170.

Each year, a general or mechanical contractor engaging in business as a prime contractor must pay an annual bidders' fee. Section 40-11-200. Bidders' and contractors' licenses may be renewed without examination at any time during the month of January following license expiration for a fee, together with the filing of the renewal application. Section 40-11-230.

To our knowledge, heretofore, neither the governing contractors' licensing statutes, nor regulations promulgated pursuant thereto, have made any distinction between residents and nonresidents with respect to fees charged. You advised that the Board currently exempts nonresidents from the examination (because of licensure in the resident state), but the payment of all fees required for licensure in South Carolina are imposed upon the nonresident. Now however, the proposed amendment would differentiate on the basis of residency for purposes of the fees paid to do business as a general or mechanical contractor in South Carolina. Nonresidents would be required to remit to the Board "amounts ... which are charged by such person's state of residence to a South Carolina resident general contractor or mechanical contractor who enters such other state to perform contracting work there."

Law/Analysis

If H.3041 were enacted, a reviewing court would presume its constitutionality. The Court would not declare any Act void unless the Act's unconstitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County 190 S.C. 270, 2 S.E.2d 777 (1939). All doubt is resolved in favor of the statute's validity. While this Office can give its view of the constitutionality of particular legislation, only the courts are empowered to strike down such legislation. Op. Atty. Gen., February 18, 1992.

It is well-settled that:

> ... license legislation that discriminates against nonresidents of the State ... either by refusing to grant licenses to such nonresidents or by granting them on different terms, such as by charging nonresidents a higher fee or adding other burdens, where not required under the police power of the State for the

> protection of local citizens is void as violating Art. IV, § 2 of the Federal Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," or § 1 of the 14th Amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ...."

51 Am.Jur., Licenses, § 31. There is "no hard and fast rule" governing a distinction based upon residency, but "the question is simply one of degree." 53 C.J.S., Licenses, § 27.

Courts in the past have struck down a variety of provisions deemed to be discriminatory against nonresidents. See e.g., Lipkin v. Duffy, 119 N.J.L. 366, 196 A. 434 (1938) [nonresident excluded from obtaining a license]; In re Irish, 122 Kan. 33, 250 P. 1056, 61 A.L.R. 332 (1926) [license fee of $150 per year for nonresidents selling bakery products in city, void]; Ex Parte Robinson, 68 Cal. App. 744, 230 P. 175 (1924) [similar]. An act imposing a license fee on nonresident contractors for the privilege of doing business has been held to be discriminatory and violative of the Constitution. State v. Board of Equalization, 403 P.2d 635 (Mont. 1965).

The United States Supreme Court has described the purpose of the Privileges and Immunities Clause:

> in any State, every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

Hague v. CIO, 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). This constitutional provision "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." Hicklin v. Orbeck, 437 U.S. 518, 525, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), quoting Ward v. Maryland, 12 Wall. 418, 20 L.Ed. 449 (1871).

"Basic" or "fundamental" rights have been deemed central by the Court in its Privileges and Immunities analysis. For example, in Baldwin v. Montana Fish and Game Comm. 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), it was noted that common callings, property transfers and access to the courts were basic rights, clearly protected by

the Clause. On the other hand, the sport of elk hunting was not "sufficiently basic to the livelihood of the Nation that the states may not interfere with a nonresident's participation therein ...." Thus, Montana was able validly to charge nonresidents considerably higher fees for hunting elk and other game.[1]

In contrast, the Court held in Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), that a South Carolina statute mandating that nonresidents pay license fees one hundred times higher to engage in commercial fishing violated the Privileges and Immunities Clause. Noting that while the Clause "does not preclude disparity in treatment in the many situations where there are perfectly valid independent reasons for it," the Court concluded that the Clause "does bar discrimination where there is no substantial reason for the discrimination beyond the fact they are citizens of other states." 334 U.S. at 396. For such discrimination to stand, noncitizens must constitute "a peculiar source of the evil" sought to be eliminated. See also, Tangier Sound Waterman's Assoc. v. Pruitt, 4 F.3d 264 (4th Cir. 1993).

Similarly, the Court struck a statute penalizing nonresidents seeking to earn a livelihood in Mullaney v. Anderson, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952). There, Alaska charged a $5 commercial fishing fee for residents and a $50 fee for nonresidents. Relying upon the analysis in Toomer, the Court conceded that a State is even empowered to charge nonresidents a differential "to compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." Still, the total amount payable by nonresident fishermen to Alaska was far in excess of what would have been needed for enforcement. Thus, the Alaska statute was found to be unconstitutionally discriminatory.

In Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), the Court reviewed yet another provision dealing with the right to pursue an occupation, the licensure to practice law. The Supreme Court of New Hampshire licensed only residents to its Bar. The majority observed that the Privileges and Immunities Clause does not forbid discrimination against nonresidents (1) where there is a substantial reason for the difference in treatment and (2) the discrimination practiced against nonresidents bears a substantial relation to the State's objective. The availability of less restrictive means is a strong measure of whether any discrimination is substantially related to the States object in requiring the disparity in treatment, concluded the Court. New Hampshire argued that limiting its Bar to residents promoted a number of substantial

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[1] Of course, the State always retains the right to require as a condition to vote or hold elective office that the person be a resident. Baldwin, supra.

state interests: increasing familiarity with local rules by the Bar's attorneys, as well as insuring their ethical behavior, their availability for court and their performing pro bono work. Nevertheless, the Court found none of these met the test of substantiality. The means chosen -- excluding nonresidents -- did not bear the necessary relationship to the State's objective. See also, Supreme Court of Va. v. Friedman, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988) [Virginia's residency requirement for admission to the Bar, albeit a "discretionary" admission on motion decision, is violative of Privileges and Immunities Clause].

The United States Supreme Court decision, Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975), is particularly relevant. In Austin, New Hampshire had imposed a tax on nonresidents' income earned in that State exceeding $2,000 at 4%, but if the nonresident's state imposed a lesser tax on income earned there, the New Hampshire rate would equal that of the nonresident's state. On the other hand, no resident's income derived in another State, nor domestic income of New Hampshire residents, was taxed by New Hampshire.

The Court held the New Hampshire Commuters Income Tax violative of the Privileges and Immunities Clause, rejecting the State's argument that a receipt of a tax credit of nonresidents from their own State for tax paid to New Hampshire, sufficiently offset the nonresidents to render the statute valid. To the argument that Maine could simply repeal the credit provision as to New Hampshire, while retaining it for the remaining states, the Court responded:

> ... New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it.
>
> A similar though much less disruptive invitation was extended by New York in support of the discriminatory personal exception at issue in Travis [v. Yale and Towne Mfg. Co., 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920)]. The Statute granted the nonresident a credit for taxes paid to his State of residence on New York-derived income only if that state granted a substantially similar credit to New York residents subject to its income tax. New York contended that it thus "looked forward to the speedy adoption of an income tax by the adjoining States," which would eliminate the discrimination "by providing similar exemptions similarly conditioned." To this the Court responded in terms fully

applicable to the present case. Referring to the anticipated legislative response of the neighboring States, it stated:

> This, however is wholly speculative; New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situations .... A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the Constitution.

420 U.S. at 667.

The South Carolina Supreme Court has likewise determined that such "retaliatory" statutes are unconstitutional as violative of the Privileges and Immunities Clause. In Spencer v. South Carolina Tax Commission, 281 S. C. 492, 316 S.E.2d 386 (1984), aff'd, 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed.2d 62 (1985) nonresident taxpayers from North Carolina paid their South Carolina income taxes under protest and brought an action for a refund. The plaintiff was employed in Greenville and attacked the validity of § 12-7-750 which provided that "a nonresident individual shall not be permitted to apportion and allocate his nonbusiness deductions between this State and his state of principal residence unless his state of principal residence also permits similar apportionment and allocation of nonbusiness deductions by nonresident individuals filing returns in that State."

The Court first determined "whether the statute burdens one of the privileges and immunities protected by the Clause." Reasoning that "[o]ne of the most fundamental privileges which the Clause guarantees to citizens of a state is that of doing business in another State on terms of substantial equality with the citizens of that State ...", the Court concluded that "[t]he discrimination against nonresident taxpayers in the case at bar clearly burdens their privilege of earning a living in the neighboring state of South Carolina." 316 S.E.2d at 388.

Next, the Court founded its analysis upon "the more difficult question of whether substantial reasons justify the discrimination and whether the degree of discrimination bears a close relationship to those reasons." Id. The burden rests upon the State to show

that nonresidents "are a peculiar source of the evil at which the statute is aimed." Pursuant to the Privileges and Immunities Clause, "the classification must fall if it has the effect of retaliating against citizens of other States who have no representation in the taxing state's legislative halls." 316 S.E.2d at 388.

The State argued that the proviso was not retaliatory, but designed to encourage other states to enact legislation favorable to South Carolinians. Nevertheless, the Court dismissed this justification:

> ... [T]he goal of encouraging other states to enact reciprocal legislation does not bear a substantial relationship to the result of penalizing taxpayers like the Spencers who live in North Carolina and work in South Carolina. These taxpayers are not the source of the evil sought to be remedied by our legislature.
>
> The Privileges and Immunities Clause was intended to prevent retaliation and promote federalism. Therefore, denying nonresidents nonbusiness deductions initially allowed by the first paragraph of § 12-7-750 and allowed for South Carolina residents who work in the State violates the Privileges and Immunities Clause.

Id See also, Private Truck Council v. Oklahoma Tax Comm., 806 P.2d 598, 605 (Okl. 1991) [Oklahoma's "mirror" taxes on nonresident motor carriers whose vehicles are registered in States that impose similar "third tier" taxes on heavy trucks registered in Oklahoma, is violative of Commerce Clause. "Retaliatory legislation, designed to motivate a sister State to cease its alleged unconstitutional tax burden on interstate commerce, has no legitimate State purpose and is a wholly unacceptable legislative remedy."]

In Dept. of Revenue v. Private Truck Council, 531 So.2d 367 (Fla. App. 1 Dist. 1988), the Court emphatically answered in the negative the State's assertion that a statute imposing on any motor carrier registered in Florida, the same third structure tax imposed by the motor carrier's base state on Florida-based carriers simply induced other states not to impose third-structure taxes on Florida-registered vehicles. Florida contended such action by itself secured reciprocity, but the Court saw it much differently:

> That is not reciprocity. Reciprocity is the voluntary exchange of reciprocal benefits of two or more states. Retaliatory measures, like Florida's, however, are quite different. They

> do not grant reciprocal privileges to carriers from other states to operate free from any requirements or taxes imposed by Florida law on its own residents; instead, through such measures, Florida is simply saying to other states: "We will impose a burden on carriers which we do not otherwise impose on any carrier, including our own, unless you refrain from imposing such a burden on carriers operating in your state." This unilateral retaliation bears no resemblance to mutual reciprocity; it is simply retaliation and is manifestly discriminatory.

531 So.2d at 370. Accord, American Trucking Association, Inc. v. Conway, 566 A.2d 1323 (Vt. 1989); Private Truck Council of America, Inc. v. Secretary of State, 503 A.2d 214 (Me. 1986), cert. den. 476 U.S. 1129, 106 S.Ct. 1997, 90 L.Ed.2d 677.[2]

Finally, the Attorney General of Texas has concluded that a retaliatory licensure provision would violate the Privileges and Immunities Clause. There, the proposed license to fish commercially in Texas was to be limited in the same way that Arkansas limited its licenses for Texas residents. The Texas Attorney General ruled that "[r]etaliation against another state for apparent discrimination against Texas residents does not constitute the required substantial reason ..." necessary to uphold such retaliatory legislation. Tex. Atty. Gen. Op. JM-298.

For the same reasons set out in the cases above, we believe that H.3041 would not survive constitutional scrutiny in the courts. Over the course of many years, South Carolina has treated residents and nonresident contractors alike in terms of the fees charged. Now, the proposed Bill would treat nonresidents working in South Carolina differently, charging them the same fees their states charge South Carolinians working in that state for the privilege of working in South Carolina. Certainly, the cases cited above

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[2] The Privileges and Immunities Clause, of course, is inapplicable to corporations. Hague v. CIO, supra; W & S Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981). Even so, the foregoing cases indicate that a "retaliatory" statute would violate the Commerce Clause. Moreover, as indicated above, this is not akin to the reciprocity cases such as Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), cert. den., 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 400 (1975). A true reciprocity provision, see 14 A.L.R. 4th 7, does not discriminate between residents and nonresidents. Ricci v. State Board of Law Examiners, 427 F.Supp. 611 (E.D.Pa. 1977), vacated on other grounds, 569 F.2d 782 (3d Cir. 1978).

are similar in scope because they virtually all deal with the right to pursue a given occupation.

The clear intent of the Bill is to induce other states to charge lower fees on South Carolina contractors working in those states. However, as our Supreme Court wrote in Spencer, "... the goal of encouraging other states to enact reciprocal legislation does not bear a substantial relationship to the result of penalizing taxpayers ... who live in ... [o]ther states] and work in South Carolina. These taxpayers are not the source of the evil sought to be remedied by our legislature." Supra.

It may be that in enacting this Bill, if the Legislature so chooses, the General Assembly can establish "substantial reasons" which justify the disparate treatment of nonresidents such as to compensate the state for additional enforcement, etc. However, from the face of the Bill as presently written, no such justifications appear. The fees charged nonresidents are simply to coincide with those charged South Carolinians in other states. Moreover, the legislation would have to be defended in court on the basis that the degree of disparity bears a close relation to the reasons justifying the legislation. See, Op. Atty. Gen., November 7, 1967; April 28, 1967. Absent any apparent basis for the Bill's meeting that test, it is our belief that the Bill would not survive a test of constitutionality in the courts.

Based upon the time constraints noted in your request letter, the foregoing does not constitute a formal opinion of the Attorney General's Office, but represents the research of the undersigned attorney.

Very truly yours,

Robert D. Cook
Deputy Attorney General

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