1980 S.C. Op. Atty. Gen. 17 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-7, 1980 WL 81891

Office of the Attorney General

State of South Carolina
Opinion No. 80-7
January 21, 1980

***1 Subject: College and Universities—Students—Tuition**

(1) The proposed bill to require all alien students in South Carolina's institutions of higher education to pay for the full cost of their education would most probably violate the Constitution of the United States in several particulars.

(2) Resident immigrant aliens are entitled to the same due process guarantees under the Fourteenth Amendment to the United States Constitution as accorded United States citizens.

(3) Nonimmigrant aliens, entering the United States pursuant to student visas, probably cannot form the requisite intent to become domiciled in South Carolina for purposes of in-state tuition.

To: State Senator

Question Presented:

Does a proposed bill, requiring aliens attending South Carolina's public institutions of higher learning to pay the actual cost of such attendance, violate the United States Constitution?

Statutes and Cases:

§ 59–112–10, et seq., Code of Laws of South Carolina, 1976; Constitution of the United States of America, Art. I, Art. II, Art. VI; 8 U.S.C.S. §§ 1101–1503; Johns v. Redeken, 406 F.2d 878 (8th Cir. 1969); Clarke v. Redeken, 259 F. Supp. 117 (S.D. Iowa 1966); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L. Ed.2d 63 (1973); Graham v. Richardson, 403 U.S. 365, 81 S.Ct. 1848, 29 L. Ed.2d 534 (1971); Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L. Ed. 1478 (1948); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, L. Ed.2d 600 (1969); Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L. Ed.2d 63 (1977); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L. Ed.2d 853 (1973); In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L. Ed.2d 910 (1973); Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974); Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978); Mathews v. Diaz, 425 U.S. 67, 96 S.Ct. 1883, 48 L. Ed.2d 478 (1976); Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979); Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978); Toll v. Moreno, 441 U.S. 458, 99 S.Ct. 2044, 60 L.Ed.2d 354 (1979); Phillips v. S.C. Tax Commission, 195 S.C. 472, 12 S.E.2d 13 (1940); Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L. Ed.2d 544 (1975).

Discussion:

The purpose of this opinion is to review proposed legislation, hereinafter the Bill, concerning tuition charges for aliens attending this state's public institutions of higher learning, to determine the probable constitutionality of such proposed law. The Bill itself is simple and straight forward, stating in pertinent part:
SECTION 1. Commencing with the 1980 fall term, all state supported institutions of higher learning and technical centers in this State shall charge persons from foreign countries who are not United States citizens the actual cost to the State of South Carolina, as determined by the State Budget and Control Board, for attending any such institution.

***2** SECTION 2. The provisions of this act shall not apply to any such person who has been a resident of the United States for at least four years.

The Bill, which would take effect upon approval by the Governor, is premised upon proposed findings by the General Assembly that attendance of aliens in South Carolina's state supported institutions of higher learning is at the great expense of the state's taxpayers and that such tax monies could be used for more worthy purposes in view of the foreigners' lack of appreciation.

Presently, the only law controlling tuition fees for state schools is codified at § 59–112–10, et seq., Code of Laws of South Carolina, 1976, as amended. These statutes authorize state schools to charge tuition at a greater rate for persons not domiciled in South Carolina. No distinction is made in the statutes as to foreign students; therefore, at present, aliens presumably may qualify for either 'in-state rates' or 'out-of-state rates', depending upon the facts peculiar to each individual student. The Bill would alter the present law, so that § 59–112–10, et seq., would be irrelevant in determining the proper tuition for alien students.

Little, if any doubts exists today that South Carolina's public colleges may lawfully charge out-of-state residents higher tuition than in-state residents. The United States Court of Appeals for the Eighth Circuit affirmed this view, pointing out the state interest, necessitating and supporting the tuition differential in Johns v. Redeken, 406 F.2d 878 (8th Cir. 1969):

> A substantial portion of the funds needed to operate the Regents' schools are provided by legislative appropriations of funds raised by taxation of Iowa residents and property. Nonresidents and their families generally make no similar contribution to the support of the schools. A reasonable additional tuition charge against nonresident students which tends to make the tuition charged more nearly approximate the cost per pupil of the operation of the schools does not constitute an unreasonable and arbitrary classification violative of the equal protection.

See also, Clarke v. Redeken, 259 F. Supp. 117 (S.D. Iowa 1966); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970). The United States Supreme Court, in Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L. Ed.2d 63 (1973), recognized the legitimacy of the principle of preferential tuition for bona fide residents in a given state while striking down a provision which irrebuttably presumed that an out-of-state resident would maintain that status during the entire period at the state schools in question.

So, what is the status of 'foreigners' studying in South Carolina's public colleges? To determine this, one must initially refer to the United States Constitution. Article I of the Constitution grants to the Federal government, specifically to Congress, the power to regulate commerce with foreign nations and to declare war, and denies to the States authority to enter into treaties, alliances, and confederations. Similarly, the President, in Article II, is given authority in foreign affairs. Finally, Article VI, § 2, states:

> ***3** This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

This section, referred to as the 'supremacy clause', enforces the preemption by the Federal government of authority, vis-à-vis the States, in areas of a specific grant of authority. Matters involving foreign countries and citizens thereof are matters within the sole authority of the Federal government.

Congress has undertaken to regulate aliens in their contacts with the United States. See generally 8 U.S.C.S. §§ 1101–1503. These statutes create classifications of aliens and provide a thorough system concerning immigration, issuance of entry documents, exclusion, deportation, registration, and naturalization. This comprehensive body of law leaves little operating room for State legislatures.

Hereafter, this opinion will deal with two general categories of aliens. The first category consists of immigrant aliens, who, generally speaking, are residents, if not domiciliaries, of the United States and some state thereof. The status of immigrant aliens is different from that of the second general category, nonimmigrant aliens. The second category includes most foreign students studying in the United States and are deemed nonimmigrants and identified at 8 U.S.C.S. § 1101(a)(15)(F)(i), as follows:

> (f) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and miner children of any such alien if accompanying him or following to join him. . . .

The Supreme Court has addressed questions of aliens rights and responsibilities under federal and state law in numerous cases, and perhaps the most referenced of such cases is Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L. Ed.2d 534 (1971). This case involved the rights of aliens under the Fourteenth Amendment to the United States Constitution to obtain state welfare benefits. Such benefits were conditioned upon either United States citizenship or residence in the United States for a specified number of years. The Court struck down those restrictions, stating, '. . . the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny', and pointed out a shift in application of the Fourteenth Amendment to aliens, quoting from Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L. Ed. 1478 (1948), "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' or on equality of legal privileges with all citizens under non-discriminatory laws." The states sought to justify the restrictions to protect its citizens; however, the Court countered this argument as follows:

***4** First, the special public interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be dependent upon citizenship.' But this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' Second, as the Court recognized in Shapiro: '[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification.'

Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro. (citations omitted).

The Court summed up its reasoning with language that is directly apposite to immigrant aliens, finding that:
Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state. There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State.

Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specific number of years violate the Equal Protection Clause.

The application of this reasoning to nonimmigrant aliens is open to question, and will be more fully addressed hereafter.

Finally, the Court, in Graham, supra, held that the restrictions in question operated to discourage entry and continued residency in the state in question. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, L. Ed.2d 600 (1969). This action was not only violative of the Constitution but contrary to exclusive Federal power, exercised in Federal immigration and naturalization statutes.

Generally, an alien accorded immigrant status is a resident of some state of the United States, and with only very limited exception, resident immigrant aliens may not be discriminated against by operation of state law. See generally Eclavea, 'Validity of State Laws Denying Aliens Living in United States, Rights Enjoyed By Citizens', 47 L. Ed.2d 876. In Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L. Ed.2d 63 (1977), the Supreme Court struck down a provision in a New York statute restricting state financial assistance for higher education to citizens and aliens who have applied for or evidenced an intention to apply for citizenship. Following the precedent laid down in Graham v. Richardson, supra, the Court subjected the New York statute to 'close judicial scrutiny', according to the following standard:

***5** In undertaking this scrutiny, 'the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.'

The State of New York, in defense of its statute in Nyquist offered its contention that 'some 'degree of national affinity", constituted a valid purpose. The Court dismissed this view as impermissible on grounds that a state did not possess authority, stating, 'Control over immigration and naturalization entrusted exclusively to the Federal government, and a state has no power to interfere.' Further, the Court noted that New York's justification was inadequate, even on the assumption that the state had authority, delineating an important distinction between matters involving the 'political community' and matters outside of 'the formulation, execution, or review of board public policy.' Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L. Ed.2d 853 (1973). Finally, the Court relied on In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L. Ed.2d 910 (1973), wherein the Court had invalidated a Connecticut court rule restricting the practice of law to citizens, even though the Court has recognized the 'vital public and political role of attorneys.'

Also of interest is Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974), in which a Federal District Court ruled unconstitutional a Mississippi statute that classified all aliens as nonresidents for tuition purposes at state schools. The plaintiffs, though aliens, were bona fide residents of Mississippi, therefore, the Court concluded that the statute would fail, unless the state could demonstrate a compelling interest to justify the classification. The State proffered 'sound state economic policy' as a compelling interest, but this position was rejected in accordance with Graham v. Richardson, supra.

To illustrate the extreme to which the principles in Graham have been applied, reference is made to Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978). There, a Texas Federal District Court held that the state could not discriminate against aliens, in charging them tuition in secondary schools or requiring a minimum residency requirement where none existed for citizens. Finding that the Texas law lacked rationality, the court stressed the conflict with federal law, as follows:

While none of these federal laws or policies precisely and expressly prohibits the state conduct complained of in this case, that is not dispositive of the preemption challenge, '[f]or when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed.' Savage v. Jones, 225 U.S. 501, 533, 32 S.Ct. 715, 726, 56 L. Ed. 1182 (1912). The Texas statute challenged here defeats the clear implications of federal law covering both illegal aliens and education of disadvantaged children.

***6** Although the school children in Doe v. Plyler were illegal aliens and improperly residing within the United States, preemption of federal law prevented the state from discrimination, absent a compelling governmental interest.

The cases discussed hereinabove are concerned with state action, as opposed to alien classifications created by federal statute or regulation. The Supreme Court drew a clear line of demarcation between state and federal actions in Mathews v. Diaz, 425

U.S. 67, 96 S.Ct. 1883, 48 L. Ed.2d 478 (1976). Congress may constitutionally enact laws prescribing varying rights and duties between citizens and aliens and among the various alien classifications, as noted in Mathews:

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the catetory of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

The authority of a state to regulate aliens is not totally limited, however, as indicated in the recent opinion in Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed.2d 49 (1979). There, the Supreme Court, in a five to four decision, upheld a New York statute, forbidding school teacher certification to non-citizens who had not manifested an intention to seek United States citizenship. In retaining the 'public interest doctrine', the Court found, 'Although our more recent decisions have departed substantially from the public interest doctrine of Truax's day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government.' State action excluding aliens from a governmental function must, however, be reviewed by the 'rational basis standard' and not the more demanding standard of a compelling state interest. The principle in Ambach is applicable to resident immigrant aliens and nonimmigrant aliens alike.

Turning to the second class of aliens, nonimmigrant aliens, states arguably possess greater discretion in determining whether such aliens may share in privileges granted to their citizens and residents. The Supreme Court almost, but not quite, resolved the issue in Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L. Ed.2d 614 (1978). This case involved a challenge by nonimmigrant aliens of the tuition policy of the University of Maryland, which policy denied the aliens 'in-state' tuition status. 'In-state' tuition status depended on the ability to establish domicile in Maryland. Generally, the University took the position that the plaintiffs, as holders of G–4 visas; were incapable of acquiring the intent necessary to establish a Maryland domicile. The Court, prior to addressing the constitutional claims raised, certified a question to the Maryland Court of Appeals, to determine whether, under Maryland law, a holder of a G–4 visa was incapable of establishing domicile in that state. The Maryland Court of Appeals replied in the negative, but the Supreme Court remanded the case to the District Court, because the University meanwhile altered its tuition policy so that domicile was not the major consideration. Toll v. Moreno, 441 U.S. 458, 99 S.Ct. 2044, 60 L. Ed.2d 354 (1979). As of the date of this opinion, the Federal District Court in Maryland has not ruled; even though, the opinion in Elkins v. Moreno is instructive.

***7** The Court did hold that determination of state domicile is a matter properly left to the individual states, as noted:

> First, the question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged member of the policy of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens fully in its governance. Second, the status of the many foreign nations living in Maryland is of great importance to Maryland because it potentially affects Maryland's relations with the Federal Government, other state and local governments in the greater District of Columbia area, and foreign nations. In a federal system, it is obviously desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts.

Elkins v. Moreno, supra, at pp. 626, 627, n. 16. The Court then gave a hint as to its probable holding following response to the certified question, stating:

If G–4 aliens cannot become domiciliaries, then respondents have no due process claim under either Vlandis or Salfi for any 'irrebuttable presumption' would be universally true. On the other hand, the University apparently has no interest in continuing to deny in-state status to G–4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G–4 aliens were the Maryland Courts to hold that G–4 aliens can have the requisite intent.

Thus, if nonimmigrants' incapability of becoming domiciled in a given state is 'universally true, as opposed to an 'irrebuttable presumption', then the reasoning of the case of Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L. Ed.2d 544 (1975), as it modifies Vlandis v. Kline, supra, prevails, and states may possess authority to discriminate against nonimmigrants. The Court, however, did not expressly rule in this question. Two final quotations from the dissenting opinion of Mr. Justice Rehnquist are helpful and appear to be the best predictor of the Court's probable position on the merits:
If the Court of Appeals of Maryland decides that nonimmigrant aliens holding G–4 visas cannot establish Maryland domicile for tuition purposes. Starns v. Malkerson, 326 F. Supp. 234 (Minn. 1979), summarily afford, 401 U.S. 985, 28 L. Ed. 2d 527, 91 S. Ct. 1231 (1971), clearly establish that the University of Maryland can deny such nondomiciliaries lower in-state tuition rates without violating the Equal Protection Clause of the Fourteenth Amendment. If the Court of Appeals decides that holders of G–4 visas can establish Maryland domicile, on the other hand, resolution of respondents' equal protection claim may rest on the proper interpretation of Nyquist v. Mauclet, 432 U.S. 1, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977).

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***8** Unlike the situation in Nyquist, the University of Maryland does not discriminate against resident aliens, Cf. 432 U.S. at 2, 4, 5–6, and nn 6, and 12, 53 L. Ed. 2d 63, 97 S. Ct. 2120. There thus would not appear to be any issue of suspect class and the University's in-state tuition policy need only be shown to be rationally related to a legitimate state interest. The University's concern with cost equalization alone would seem sufficient to support the line drawn by the University. See Starns v. Malkerson, supra.

Elkins v. Moreno, supra, at p. 635, n.6. However, one strong caveat is in order, Id. p. 624, n.7, wherein the Court states, 'the respondents also argue that the University's policy is invalid under the Supremacy Clause since control over aliens and over foreign relations is vested exclusively in the Federal Government. We have no need to reach this argument at this time.'

Apparently, the South Carolina Supreme Court has not has occasion to consider whether nonimmigrant aliens may become domiciled in this state; however, the general law of domicile is well established. Our court, in Phillips v. S.C. Tax Commission, 195 S.C. 472, 12 S.E. 2d 13 (1940), found, 'One of the essential elements to constitute a particular place as one's domicile or principal place of residence is an intention to remain permanently, or for an indefinite time, in such place.' In Toll v. Moreno, supra, the Maryland Court of Appeals found that nonimmigrants, holding G–4 visas were capable of establishing domicile in Maryland. Unfortunately, the Maryland Court merely responded to the question certified from the United States Supreme Court with a simple 'no' and did not elucidate upon that response. Whether our State Supreme Court would reach the same conclusion is open to question, however, most nonimmigrant students in South Carolina likely are here pursuant to G–5, not G–4 visas. There is a significant difference. 8 U.S.C.S. § 1101(a)(15)(F)(i), supra, clearly states that nonimmigrant students are' . . . an alien having a residence in a foreign country which he has no intention of abandoning . . ..' The G–4 students in Elkins v. Moreno, supra, are governed by 8 U.S.C.S. (a)(15)(G)(i), concerning representatives of foreign governments and their families, and contain no language dictating residence or intention to abandon a residence. Therefore, the South Carolina court could well find that nonimmigrant student, pursuant to 8 U.S.C.S. (a)(15)(F)(i), may not be domiciled in this state as a matter of universal truth rather than presumption.

Obviously, the question herein as to nonimmigrants is not free of uncertainty; however, South Carolina can likely charge nonimmigrant aliens greater tuition if such aliens cannot establish domicile in this state. This position can be strengthened

by also predicating the tution differential upon a necessity to equalize the burden between tax-paying residents and non-tax-paying aliens.

Conclusion:

***9** Based upon the foregoing discussion, the opinion of this Office is that the proposed bill, as currently drafted, would violate both the Supremacy Clause and the Fourteenth Amendment to the United States Constitution. South Carolina may not discriminate against immigrant aliens, which aliens, however, are subject to the provisions of § 59–112–10, et seq. A statute may be enacted to require nonimmigrant aliens to bear the full cost of education if such aliens are legally incapable of establishing a domicile in South Carolina.

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