just because a teacher already here has the requisite minimal qualifications.

In short, Congress has legislated with extreme precision regarding the admissibility of alien teachers. Since 1976, aliens admitted for the purpose of teaching have been admitted on the basis of a federal determination that they are better qualified to teach than any willing and available teacher already present. Thus § 3001(3) is in direct conflict with federal law regarding the admission and employment of alien teachers. And if allowed to stand, § 3001(3) might subject public school students to instruction by teachers who have been found by the federal government to be less qualified than the alien teachers.

2. Alien teachers admitted for temporary residence or as part of Congressionally authorized teacher exchange programs.

Drawing on the exclusive federal power over the field of foreign relations, Congress has comprehensively authorized and encouraged the international exchange of teachers. The Mutual Cultural and

Education Act of 1961 (Fulbright-Hays Act), P.L. 87-256, as amended, 22 U.S.C. §§2451-52, is specifically designed to encourage the employment of alien teachers in this country.[63/] The International Education Act of 1966, 20 U.S.C. § 1173, authorizes the Secretary of Health, Education, and Welfare to support a variety of teacher exchange programs, including programs under which aliens may work and study here concurrently, 20 U.S.C. § 1173(a)(5), and may visit American institutions as faculty, 20 U.S.C. § 1173(a)(6). The Education Amendments of 1976, Pub. Law 94-482, 20 U.S.C. § 512a authorizes federal grants "to stimulate locally designed educational programs to increase the understanding of students in the United States about the cultures and actions of other nations in order to

63/ Pursuant to that act, in 1973-1974 the federal government expended $738,538 in grants to 320 teachers from 44 countries to enable them to teach in the United States. Library of Congress Congressional Research Source, "Authority, Operation and Administration of the Fulbright-Hays Program of International Educational Exchange" (May 5, 1976).

better evaluate the international and domestic impact of major national policies." And the Peace Corps has proceeded on the explicit Congressional finding that the free exchange of teachers furthers our foreign policy interests by advancing mutual understanding.64/

In addition, the United States has entered into a series of bilateral treaties and conventions designed to encourage the exchange of teachers by minimizing taxation on the income of alien teachers. See generally, Historical Note, Treaties and Conventions, following 26 U.S.C.A. § 871, and treaties and conventions listed therein. See also CCH, Income Tax Treaties 57-120-57. The United States is a party to treaties encouraging international teacher exchange with both the United Kingdom and Finland, Appellees' countries of citizenship. These treaties indicate the comprehensive interest

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64/ Knowledge and skill projects, involving various forms of education, comprise 31% of Peace Corps activities, and since its inception have represented its most common effort. Project Record System, Peace Corps Office of Management (May 31, 1978).

Congress has taken in this area, an interest which precludes inconsistent state involvement. Implicit in a Congressional promise to give tax benefits to alien teachers is a Congressional promise that aliens can find employment as teachers, and a Congressional finding that alien teachers will not corrupt the nation's youth.

These statutes and programs reflect a comprehensive determination by Congress that the widespread exchange of teachers is in the interests of our foreign policy.[65/] They also embody a Congressional

65/ The purpose of the Fulbright-Hays Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange, to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other
(FN 65 continued on next page)

determination that the extensive exchange of teachers would contribute to the education of American students and to healthy and robust debate on a wide range of issues it is the function of the First Amendment to protect.66/ Congress has power to promote or even require such education exchanges pursuant to its commerce powers, foreign affairs powers, and

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countries of the world." 22 U.S.C.A. § 2451. The preamble to the International Education Act of 1966 provides: "Congress hereby finds and declares that a knowledge of other countries is of the utmost importance in promoting mutual understanding and cooperation between nations; that strong American education resources are a necessary base for strengthening our relations with other countries;... and that it is therfore both necessary and appropriate for the Federal Government to assist in the development of resources for international study and research." 20 U.S.C.A. § 1171.

66/ For example, Congress declared in the International Education Act, its purpose "that this and future generations of Americans should be assured ample opportunity to develop to the fullest extent possible their intellectual capacities in all areas of knowledge pertaining to other countries, people, and cultures." 20 U.S.C. § 1171.

powers to enforce the First and Fourteenth Amendments.[67]

Federal programs supporting the placement of alien teachers in local schools throughout the nation represent an extraordinary statement of the importance Congress attaches to the relaxation of barriers erected by local interests again the free exchange of educational resources.[68] The breadth of Congressional concern, and the evident importance Congress has placed on such exchanges, compels the conclusion that although Congress has left to the states general responsibility over teacher certification and employment, the states may not deny

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67/ The sources of Congressional power affirmatively to support the system of free expression are analyzed in Emerson, The System of Freedom of Expression (1970), at 627-633, 671-673.

68/ Education Law § 3005 permits non-declarant aliens to teach in public schools in New York, but only as part of a one-for-one exchange, and only under conditions (the domestic teacher must have taught for five years in the designated school, etc.) which discourage the free exchange of educational resources.

such employment solely on the basis of alienage. "[T]he nature of the...subject matter permits no other conclusion." De Canas v. Bica, 424 U.S. at 356, quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). Congress having determined that the national interest is served by the employment of otherwise qualified alien teachers, the exclusion of aliens per se is in clear conflict with the "central aim of federal regulation." San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959), cited in De Canas v. Bica, 424 U.S. at 359.

Finally, even if the Congressional treaties, conventions, programs, and statements of purpose left some room for state legislation, § 3001(3) is nevertheless unconstitutional because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." De Canas v. Bica, 424 U.S. at 363; Hines v. Davidowitz, 312 U.S. at 67; Florida Lime & Avocado Growers v. Paul, 373 U.S. at 141. The Congressional presence plainly leaves to state regulation only the smallest possible scope consistent with compelling state objectives.

Those objectives can be met far more precisely than by the present blunderbuss exclusion of alien teachers, despite their personal qualifications, from all schools, at all grade levels, in all subjects. See generally, supra, Point II.D.

IV. EDUCATION LAW § 3001(3) VIOLATES THE DUE PROCESS CLAUSE.

The statute violates the due process clause of the Fourteenth Amendment because it creates an irrebuttable presumption that all non-declarant aliens are not qualified to be teachers, and because it authorizes exceptions to be granted or withheld within the standardless discretion of Appellants.

A. The Statute Impermissibly Creates An Irrebuttable Presumption.

When, as here, constitutionally preferred rights are at stake, this Court has required an individualized determination before the right can be abridged, and has ruled invalid statutory presumptions which preclude the opportunity for individual-

ized determination.[69/] This rule against irrebuttable presumptions applies to protect aliens, a suspect class, even when they are not seeking to exercise a fundamental right. See Elkins v. Moreno, ___ U.S. ___, 55 L. Ed. 2d 614 (1978).

Although many aliens, including Appellee Norwick, have taught with distinction and with allegiance to the principles of democracy in New York private schools, and would be superbly qualified teachers in the public schools (see Statement of Facts, and Point III.B.1. supra), they have been denied the opportunity to prove their qualifications and allegiance. In their answer, Appellants "admit that they have not made an individual determination of [Appellees'] competence to teach" except that required by existing law. A 12-13.

The effect of the challenged provision is to create a conclusive and irrebuttable presumption that non-declarant aliens are not qualified to be teachers.

69/ E.g., Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

They are presumed to lack the necessary allegiance to this country (A 34):

> [A]liens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation...are not appropriate teachers....

To thus raise the factual issue of allegiance, but to deny permanent resident aliens the opportunity to prove their allegiance, violates the due process clause.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court held invalid a statutory definition of "resident" which denied to persons seeking to meet its test the opportunity to show factors clearly bearing on the issue. 412 U.S. at 452. The Court reaffirmed the Vlandis rule in Weinberger v. Salfi, 422 U.S. 749, 772 (1975), insofar as a presumption would deny to Appellees the right to prove a fact which the state has put at issue.[70/]

70/ Distinguishing the statutory scheme before it from the law overturned in Vlandis, the Weinberger Court said: "Unlike the statutory scheme in Vlandis, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona
(FN 70 continued on next page)

More recently, in Elkins, the Court noted the invalidity of a statute which "purports to be concerned with" a factual issue, but then "denied to one seeking to meet" the statutory test "the opportunity to show factors clearly bearing on that issue." 55 L. Ed. 2d at 625, quoting from Weinberger.

B. The Statutory And Regulatory Scheme Authorize Exceptions Within The Standardless Discretion of Appellants.

If he chooses to do so, Appellant Ambach can authorize any alien to teach. There are no legislative standards to limit his discretion, and the regulatory standards issued by his office are so broad as to

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fides inadmissable." Weinberger v. Salfi, 422 U.S. at 772.

Here, of course, the state has purported to speak in terms of allegiance, e.g., A 34, but forbids Appellees from proving they have such allegiance. Appellees would also prevail under the more difficult rationality standard set forth in Weinberger because the objective criterion here (citizenship or declaration), as has been demonstrated, supra, does not "bear a sufficiently close nexus with the underlying policy objectives" (allegiance), to justify its use as a test for eligibility. Id.

permit unchecked discretion.[71/]

"Precision of regulation must be the touchstone" when First Amendment or other fundamental rights are at stake. Keyishian, 385 U.S. at 603-604, quoting NAACP v. Button, 371 U.S. 415 (1965); U.S. v. Robel, 389 U.S. 258, 274-275 (1967) (Brennan, J., concurring). The Court has repeatedly struck down schemes in which state officials had unchecked discretion to decide whose views were acceptable and entitled to be heard. E.g., Niemotko v. Maryland, 340 U.S. 268, 271-272 (1951); Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); South Eastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Kunz v. New York, 340 U.S. 290, 294 (1951). Such arrangements are overbroad because they permit officials to achieve indirectly, through selective enforcement, censorship that would clearly be unconstitutional if achieved directly. The liklihood of

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71/ The absence of legislative standards impermissibly allows an "isolated segment" of government to subject a disadvantaged class to arbitrary and additional disadvantages. See note 32 supra and accompanying text.

selective enforcement is particularly apparent where, as here, the state asserts as its very interest a test of political acceptability.

Appellants "may" issue certificates to aliens unable to become declarants (i.e., any alien who is not a permanent resident), 8 N.Y.C.R.R. 80.2(i)(2), or possessing skills or competencies not readily available, 8 N.Y.C.R.R. 80.2(i)(1).[72/] There are no standards to guide the exercise of their discretion. Such license, in a field so directly affecting a suspect class, academic freedom, and the right to work in the common occupations of the community, is not constitutionally permissible.

72/ As noted supra Point III.B.1., since 1976, the federal government has determined that aliens admitted for the purpose of teaching have skills or competencies superior to those of available teachers already present. If applied consistenly with that federal determination, § 80.2(i)(1) would authorize the employment of permanent resident alien teachers. Instead, Appellants inform us that it is not applied at all. Appellants' Brief at 7 and 28.

V. REMAND FOR AN EVIDENTIARY HEARING IS NOT REQUIRED.

Appellants have stipulated that in all respects except alienage, Appellees are qualified to teach in public schools. A 25; A 35. At the oral argument on Appellees' motion for summary judgment, counsel for Appellants expressly stated she was not aware of any fact that would prevent disposing of the case on summary judgment, did not dispute the material facts specificied by Appellees pursuant to a local court rule, and thought summary judgment was appropriate, though for Appellants, not for Appellees.[73/] Almost ten weeks thereafter, Appellants filed an offer of proof. A 33-34. The Court did not reject the offer of proof. Compare, Appellants' Brief at 32. Instead, the court accepted the offer of proof but found as a matter of law that it was insufficient, even if believed, to preclude summary judgment for Appellees. A 47-48.

Accordingly, a remand for an evidentiary hearing is not necessary. How-

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73/ Transcript of oral argument on February 11, 1976, pp. 29-30.

ever, should the Court conclude that § 3001(3) is not on its face unconstitutional as a matter of law, Appellees would respectfully request an opportunity for an evidentiary hearing to demonstrate that the statute is, as applied to them, unconstitutional.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED

Dated: New York, New York
September 5, 1978

Respectfully submitted,

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