TABLE OF CONTENTS

CASES CITED

Statutes, Rules Cited

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Appellants,

against

SUSAN M.W. NORWICK,

Appellee,

TARJA U.K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The Commissioner of Education of the State of New York and the other public officers above-named appeal from an Order and Judgment of a three-judge district court entered in the Southern District on August 25, 1976. The Order and Judgment declared New York Education Law § 3001(3) unconstitutional and permanently enjoined its operation on the ground that the statute's exclusion of aliens who had not applied for citizenship from the class of

individuals eligible for permanent teaching certificates denied the excluded aliens the equal protection of the laws under the Fourteenth Amendment.

Opinion Below

The decision of the three-judge district court is reported at 417 F. Supp. 913. It is reproduced in Appendix A, pp. 1a-21a, to this Jurisdictional Statement.

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court was entered on August 25, 1976. It is reproduced in Appendix B, p. 22a, to the Jurisdictional Statement.

The Notice of Appeal was filed on October 13, 1976. It is reproduced in Appendix C, pp. 23a-24a, to this Jurisdictional Statement.

State Statute Involved

New York Education Law § 3001 states in part:

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> * * *
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an

alien teacher employed pursuant to regulations adopted by the Commissioner of Education permitting such employment."

Questions Presented

1. Should New York Education Law § 3001(3) be reviewed under a heightened equal protection test because it limits permanent teaching certificates to citizens and aliens who have applied for citizenship?

2. Does the classification established by § 3001(3) between citizens and aliens who have applied for citizenship and aliens who have not applied for citizenship reasonably and substantially relate to New York's interests in teaching American citizenship to its youth?

Statement of the Case

Appellees Norwick and Dachinger, plaintiffs below,* are permanent resident aliens (2a, 17a n. 2). Appellee Norwick is a citizen of Great Britain. She has resided in the United States since 1965 and is married to an American citizen (*Ibid.*). She has decided to retain her British nationality indefinitely (2a). Appellee Dachinger is a citizen of Finland (17a n. 2). She has resided in the United States since 1966 and is also married to an American citizen (*Ibid.*). She has decided to retain her Finnish nationality indefinitely (2a).

Appellees applied to the New York Education Department for certificates evidencing their qualifications to teach in the public schools of the state. Their applications were denied because they were not citizens or aliens applying citizenship as required by New York Education Law

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* Appellee Dachinger intervened as a plaintiff with the consent of the defendants-appellants (3a).

("NYEL") § 3001(3) and because they did not come within any exceptional category, i.e., NYEL § 3001-a (authorizing temporary certificates for aliens unable to become permanent residents because of over-subscribed quotas) and 8 New York Code, Rules and Regulations ("NYCRR") § 80.2(i) (authorizing provisional certificates who possess unique skills or are disabled from applying for citizenship) (2a, 17a n. 4).*

Appellees commenced this action for declaratory and injunctive relief on June 27, 1974 (2a). They challenged NYEL §§ 3001 and 3001-a and 8 NYCRR § 80.2(i) as violating their rights to equal protection of the laws and due process of law under the Fourteenth Amendment and as conflicting with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the Supremacy Clause, Article VI, of the United States Constitution. Compl't ¶¶ 18, 19 and 20; Intervenor Compl't ¶¶ 19, 20 and 21; 3a. Jurisdiction was alleged under 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. § 1343(3) and (4). Compl't ¶ 1; Intervenor Compl't ¶ 1; 3a. A three-judge court was convened with the consent of appellants, and the action was determined on appellees' motion for summary judgment (3a).**

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* Appellee Dachinger applied for a permanent certificate. Intervenor Compl't ¶ 13. Her application was denied on April 23, 1975. *Id.* at ¶ 14. Appellee Norwick applied initially for provisional certification. Compl't ¶ 12. Her application was denied on March 19, 1974 on the ground that she did not meet the requirements of 8 NYCRR § 80.2(i) and upon the additional grounds that she was not a citizen or applicant for citizenship within the meaning of NYEL § 3001(3). *Id.* at ¶ 13.

** A temporary restraining order was entered on August 14, 1974, with appellants' consent, preventing appellants from denying appellee Norwick's application for certification solely on the ground of his alien status. The restraining order continued in effect until the Order and Judgment was entered by district court on August 25, 1976. Appellee Dachinger did not request any interim relief.

The three-judge court limited its holding to appellees' equal protection claim against NYEL § 3001(3) (3a, 19a n. 6, 6a-15a). Although both citizens and aliens may qualify for teaching certificates under NYEL § 3001(3), the district court found that the statute created a suspect classification requiring a showing of necessary relation to a compelling state interest to support its validity. See district court opinion, pp. 6a-10a, relying principally on *Graham* v. *Richardson,* 403 U.S. 365, 372-375 (1971), *Sugarman* v. *Dougall,* 413 U.S. 634, 641 (1973), and *In re Griffiths,* 413 U.S. 717, 719-722 (1973). Turning to the state interests supporting statute, the district court described the vital role of the teacher in educating young people in American political traditions and the significant relationship between the "classroom" and the state's acknowledged power to " 'define its political community.' " District court opinion, pp. 10a-11a, quoting *Sugarman* v. *Dougall, supra* at 643, in part. The court held, however, that NYEL § 3001(3) could not be sustained under a heightened equal protection test because it was imprecise. The statute's application to all non-applicant aliens and all public school teaching positions was cited as examples of its over- and under-inclusiveness (13a). The exception in favor of provisional certificates for aliens with unique skills, 8 NYCRR § 80.2(i)(1), and citizenship requirements for other professions as well the absence of such requirements were also cited (13a-14a, 21a n. 14). The district court rejected appellees' offer of the testimony of Dr. Anthony E. Terino, then Director of the Division of School Supervision of the Department of Education, because it could not affect the outcome of the case (15a). If called, Dr. Terino would have testified that instruction and training in American citizenship are included in the curriculum of New York's public schools; that in addition to instructing in particular subjects, a teacher serves as a model for his students and influences their attitudes and behavior; and that an alien who voluntarily refuses to apply for citizenship is not an

appropriate teacher in a curriculum that imposes such demands (14a, 15a).

Reasons in Support of Plenary Consideration

New York Education Law § 3001(3) and related provisions advance substantial interests involved in educating the state's youth in principles and practices of American citizenship and defining and preserving its political community. Since both citizens and aliens can obtain permanent teaching certificates under NYEL § 3001(3), the statute should have been reviewed under the traditional reasonable relation test. See *Mathews* v. *Diaz*, ——U.S. ——, 44 U.S.L.W. 4748 (June 1, 1976). The district court's reliance on *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973), as supporting a heightened equal protection test was error given that the classifications in those cases distinguished between citizens and aliens *vel non*. However, even if a strict equal protection test is applied, NYEL § 3001(3) must be sustained. The statute is not imprecise because it focuses on public rather than private or parochial education or because temporary certificates may be issued to some aliens.

A. The equal protection test applicable to NYEL § 3001(3) is one of reasonable relation to a legitimate state interest.

NYEL § 3001(3) authorizes the issuance of permanent teaching certificates to citizens and aliens who apply for citizenship and timely complete the naturalization process.*

* Teaching certificates available to aliens under exceptions to § 3001(3) are not permanent certificates. See NYEL § 3001-a (temporary certificates for aliens unable to become permanent residents because of over-subscribed quotas); § 3005 (temporary certificates for foreign teachers); and 8 NYCRR § 80.2(i) (provisional certificates for aliens with unique teaching skills and those under federal statutory disabilities). The district considered the exceptional categories only with respect to the precision of NYEL § 3001(3) (3a, 18a n. 6, 11a-15a).

The two classes so established consist of citizens and certain aliens—applicants for citizenship—who are identically situated with respect to the benefit provided by the statute and of certain aliens—non-applicants—who are disadvantaged. The statute does not distinguish between citizens and aliens *vel non.*

Given the inclusion of both citizens and aliens in the benefited class, NYEL § 3001(3) does not warrant "close judicial scrutiny." *Graham* v. *Richardson, supra* at 372. As this Court held with respect to a similarly drawn classifying statute applicable to the Medicare program, "the real question presented . . . is not whether discrimination between citizens and aliens is permissible; . . . [but] whether the statutory discrimination *within* the class of aliens . . . is permissible." *Mathews* v. *Diaz, supra* at 4452 (June 1, 1976) (Emphasis original).* The Court then applied the Fifth Amendment analogue of the reasonable relation test stating that the burden of demonstrating the invalidity of the statute is on the party challenging its constitutionality and consists of the party's advancing reasoning which will "at once invalidate" the classification "yet tolerate a different line separating some aliens from others." *Mathews* v. *Diaz, supra* at 4453. Compare *Examining Board of Engineers, Architects and Surveyors* v. *de Otero,* —— U.S. ——, 44 U.S.L.W. 4890, 4899-4901 (June 17, 1976) (applying "strict judicial scrutiny" to citizenship requirements to practice engineering, architecture and surveying); *In re Griffiths,* 413 U.S. 717 (1973) (applying same standard to citizenship requirement to practice law); and *Sugarman* v. *Dougalt, supra* (applying same standard to citizenship requirement for permanent civil service employment).

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* 42 U.S.C. § 1395o(2)(B) was in issue in *Diaz, supra.* The statute authorized Medicare benefits for aliens with five years permanent residence.

Graham v. *Richardson, supra,* is consistent with this view. In support of the application of a heightened equal protection test to a classification "based on alienage," this Court referred to aliens as a "prime example of a 'discrete and insular' minority." *Graham* v. *Richardson, supra* at 372, quoting *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4 (1938), in part. However, if aliens are included with citizens, as they are under NYEL § 3001(3), the resulting classification cannot be *based* on alienage, and the alien cannot claim minority status to support special or heightened judicial concern.

Even if NYEL § 3001(3) is considered as a classification "based on alienage" under *Graham* v. *Richardson, supra* at 372, the reasonable relation test is applicable. Notwithstanding its reliance on the strict scrutiny standard in *Sugarman* v. *Dougall, supra,* this Court recognized that there were certain alienage classifications for which the reasonable relation test continued. If a state requires citizenship as a qualification "in an appropriately defined class of positions" with respect to "matters firmly within . . . [its] constitutional prerogatives," "scrutiny will not be so demanding," i.e. the reasonable relation test applies. Id. at 647, 648. NYEL § 3001(3) is such a classification. As further appears from the discussion at Subpoint B, NYEL § 3001(3) is limited to teaching certificates in the state public schools, a matter firmly within the state's regulatory power and affecting the definition of its own "'political community'". *Ibid.* quoting *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972).

B. New York's interests in educating its youth in the principles and practices of American citizenship are legitimate and substantial. In denying permanent teaching certificates to aliens who refuse American citizenship, NYEL § 3001(3) establishes a narrow limitation which is consistent with the achievement of those intrests.

"Our public educational system is the genius of our democracy. The needs of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends on it." *Keyishian* v. *Board of Regents of the State of New York,* 385 U.S. 589, 623 (1967) (CLARK, J. dissenting). "It is the very foundation of good citizenship." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). See also *Adler* v. *Board of Education,* 342 U.S. 485, 508 (1952) (DOUGLAS, J., dissenting).

Education in "good citizenship" is not limited to instruction about American political institutions but includes the transmission of social, cultural and political values, attitudes and behaviors. *Brown* v. *Board of Education, supra;* See Note, *Alien's Right to Teach: Political Socialization and the Public Schools,* 85(1) Yale Law Journal, 90, 99-103 (1975) (hereinafter, "Alien's Right to Teach, p. ——").

The public school teacher has a unique responsibility in this process because his instruction consists of his own example as well as the particular subject matter he imparts. Alien's Right to Teach, pp. 102-105. The State may, therefore, require him to be "especially qualified." *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923). In permitting the applicant alien to assume this responsibility on a permanent basis and excluding the non-applicant alien, NYEL § 3001(3) attains a perfect congruence between the teaching function and the qualifications of individual teachers. The alien who has affirmatively identified himself with the heritage he must transmit is eligible; the alien who volun-

tarily refuses that undertaking, preferring to retain his primary identification with and allegiance to a different national heritage is not eligible. See *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1937); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (1952) (FRANKFURTER, J. concurring). The suggestion that aliens should be qualified for permanent positions on a case by case basis inapposite. See district court opinion, p. 15a. It is the alien's refusal to undertake procedures for naturalization which makes him peculiarly unsuited for a permanent position, and no individualized determination would affect the basis for the disqualification. tion.

That NYEL § 3001(3) does not apply to the certification of teachers in private and parochial schools does not make it imprecise.* Compare district court opinion, p. 13. A State may consider its publicly funded schools as the institutions principally concerned with transmitting American societal values. It may also permit parents to choose those cultural and religious values they wish to impart to their children. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The several exceptional categories which authorize teaching certificates for non-applicant aliens do not frustrate the purposes of NYEL § 3001(3) or provide a basis for finding it imprecise. See NYEL §§ 3001-a and 3005; 8 NYCRR § 80.2(i). The common factor in all the exceptional categories is that they authorize only temporary certificates and thus operate without impairing the purposes of § 3001(3).

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* NYEL § 3001(3) is also limited to elementary and secondary schools since the State Education Department does not perform any certification functions for teachers in public or private universities and colleges. To the extent that *Kay* v. *Board of Higher Education of the City of New York*, 173 Misc. 943, 18 N.Y.S. 2d 821 (Sup. Ct. Monroe Co.), aff'd 259 App. Div. 879, app. den. 259 App. Div. 1000, 284 NY 578 (1940), implies the contrary, it is in error.

The largest of the exceptional category consists of aliens whose federally imposed disabilities prevent their applying for American citizenship. NYEL § 3001-a and 8 NYCRR § 80.2(i)(2). Their evident purpose is to provide access to the teaching profession for those aliens who cannot meet the requirements of § 3001(3) through no fault of their own.

NYEL § 3005 refers to the temporary licensing of alien teachers who are in the United States on various exchange programs and whose participation in the public schools is sought for the very purpose of providing instruction in and examples of the political, social cultural traditions of other nationalities. Compare district court opinion, p. 15a.

8 NYCRR § 80.2(i)(1) is a limited waiver provision which authorizes the certification of aliens with unique skills on a temporary basis. The regulation thus permits the public educational system to meet its pedagogical needs. It need not decline to give a particular course because an individual who meets the qualifications of NYEL § 3001 (3) is not avialable. However, this exceptional category is not comparable to the waivers considered in *Sugarman* v. *Dougall, supra.* Therein, the alien who entered the competitive civil service on waivers could obtain a permanent position. Not so the teacher under 8 NYCRR § 80, 2(i)(1). The continuance of his license is within the discretionary authority the Commissioner of Education, and he cannot become permanent except upon compliance with NYEL § 3001(3).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, December 10, 1976.

Respectfully submitted,

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APPENDIX A

Opinion of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798 (WCC)

OPINION

SUSAN M. W. NORWICK,

Plaintiff,

TARJA U. K. DACHINGER,

Intervenor Plaintiff,

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education, VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Defendants.

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BEFORE:

WILFRED FEINBERG, United States Circuit Judge, Second Circuit

LAWRENCE W. PIERCE, United States District Judge

WILLIAM C. CONNER, United States District Judge

CONNER, D. J.:

This action represents yet another chapter in the expanding volume of cases involving constitutional challenges to State statutes and regulations designed to limit certain types of employment to citizens, thereby excluding, among others, permanent resident aliens.[1] In the present case, plaintiffs[2] contest the validity of Section 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York State (the public schools), unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen.[3]

Plaintiffs, aliens who have elected to retain their native citizenship (non-applicant aliens), have both applied for certification to teach in the public schools. However, because they do not fit within the limited exceptions to Section 3001(3), plaintiffs have been denied certification.[4] It is undisputed that, in both cases, the denial of certification has borne no relation to plaintiffs' general character or

qualifications, but rather, is solely the product of their status as non-applicant aliens.

On June 27, 1974, plaintiff Norwick commenced this action for injunctive and declaratory relief. She asserts, in addition to other claims, a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343. With the consent of defendants,[5] the Court entered orders dated September 9, 1975 and December 18, 1975, convening a three-judge constitutional court pursuant to 28 U.S.C. §§ 2281 and 2284 and granting plaintiff Dachinger's motion to intervene.

Presently before the Court is plaintiffs' motion, pursuant to Rule 56 F.R.Civ.P., for a summary judgment declaring Section 3001(3) unconstitutional and enjoining its further enforcement.

I.

It is beyond reasonable dispute that the power of New York, or any other state, to promulgate regulatory legislation such as Section 3001(3) is qualified by various provisions of the United States Constitution. In this case, plaintiffs claim that the ban of Section 3001(3)[6] on certification of non-applicant aliens for teaching positions in the public schools offends the Equal Protection and Due Process Clauses of the fourteenth amendment and the Supremacy Clause of Article VI.

We are not insensible of the Supreme Court's admonition that a three-judge court should consider constitutional challenges to State statutes only if non-constitutional "statutory" Supremacy Clause issues, within the jurisdiction of a single judge, prove not to be dispositive. *Hagans* v. *Lavine,* Nonetheless, it should be stressed that *Hagans* has neither expanded nor diminished the basic jurisdictional authority of either single-judge or three-judge district courts. To the contrary, the *Hagans* ruling is ad-

dressed to procedure only. Thus, the *Hagans* Court, in the interests of judicial economy and in light of " 'the constrictive view of * * * three-judge [court] jurisdiction which [the Supreme Court] has traditionally taken'," concluded and directed that the single judge should exhaust all potentially dispositive claims within his jurisdiction before resort to a three-judge court. Hence, where constitutional claims over which a three-judge court would have exclusive jurisdiction coincide with non-constitutional claims reviewable by a single judge, *Hagans* directs the single judge, before convention of a three-judge court, to do no more than the latter would itself be required to do, *i.e.,* to dispose of the litigation on non-constitutional grounds, if possible, pursuant to the well settled rule that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans* v. *Lavine, supra,* at 546-47.

Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with specific federal statutory or regulatory provisions, *e.g., Holley* v. *Lavine,* 529 F.2d 1294, 1296 (2d Cir. 1976); *Roe* v. *Norton,* 522 F.2d 928 (2d Cir. 1975); *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975); *Brown* v. *Beal,* 404 F.Supp. 770 (E.D.Pa. 1975). In such cases, it is the single judge's office merely to "interpret[] the [applicable] statute and * * * regulation," *Holley* v. *Lavine, supra* at 1296, and to determine whether there is a conflict with federal enactments addressed to the same subject matter. It is axiomatic that, should the reviewing judge identify such a conflict, under the Supremacy Clause the State statute must defer to the federal. It was that type of question, resting upon a statutory comparison, that *Hagans* denominated a "Supremacy Clause ('statutory')" issue. *Hagans* v. *Lavine, supra,* at 545. Although, within such a context, a State statute or regulation may be declared "unconstitutional," *i.e.,* violative of the Supremacy Clause, see, *e.g.,*

DeCanas v. *Bica*, 44 U.S.L.W. 4235, 4236 (U.S. February 25, 1976), the judge can decide the issue without having to interpret the Constitution.

This is a very different case. Here, despite plaintiffs' sweeping citation to the bulk of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., the purported conflict underlying plaintiffs' Supremacy Clause argument is not between Section 3001(3) and any specific enactment of Congress, but rather, betweeen Section 3001(3) and the exclusive power to regulate immigration and naturalization vested in the federal government by Article 1, Section 8, clause 4 of the United States Constitution. Unlike the clearly "statutory" Supremacy Clause argument in *Hagans*, the Supremacy Clause argument in this case derives exclusively and directly from the Federal Constitution rather than from federal legislation, entails an immediate resort to the Constitution and, if "substantial," see *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973), requires the convention of a three-judge court.

The conclusion that the present Supremacy Clause argument is "constitutional" rather than "statutory" is supported inferentially, by a number of similar cases. Thus, in *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Supreme Court ruled in favor of the alien plaintiffs on *both* equal protection and Supremacy Clause grounds. In *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), the Supreme Court elected to affirm the lower court on equal protection grounds, ignoring the Supremacy Clause argument that had been adopted by the court below. Although these decisions are pre-*Hagans*, they by no means pre-date the doctrine that constitutional rulings are to be avoided whenever possible. More recently, in a post-*Hagans* decision, Judge Gurfein, writing for a three-judge panel in the Eastern District of New York, ruled New York Labor Law Section 222 unconstitutional on both equal protection and Supremacy Clause grounds, *C.D.R. Enterprises, Ltd.* v. *Board of Education*

of the City of New York, 75 Civ. 1172 (E.D.N.Y. 1976), without any discussion of *Hagans*.

We therefore believe that the Supremacy Clause claim herein is more properly viewed as a true "constitutional" argument which was thus beyond the convening court's jurisdiction. In any event, the determination whether it is constitutional or statutory is at least sufficiently troublesome that *Hagans'* stated objective of judicial efficiency would seem better served not by the extensive digression which such determination would require but by proceeding directly to the clearly constitutional equal protection argument which we find dispositive.

For reasons outlined in considerable detail below, this Court concludes that Section 3001(3) violates the Equal Protection Clause of the fourteenth amendment. Thus, plaintiffs' motion for summary judgment must be granted and we need not consider plaintiffs' due process and Supremacy Clause arguments.

II.

At the threshold of any equal protection analysis, a reviewing court must of course identify the standard of judicial scrutiny that is appropriate to the case before it. Under familiar principles, if a regulation impinges upon a "fundamental right," *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), or creates an inherently "suspect classification" such as race, nationality or alienage, the challenged provision will be subjected to "close judicial scrutiny," requiring the State to establish a "compelling interest in its enactment. See, *e.g., Graham* v. *Richardson*, supra, at 372-75 (1971). As the Supreme Court has recently observed, a State that employs

> "a suspect classification, 'bears a heavy burden of justification,' * * *, a burden which, though variously

> formulated requires [a] State to * * * show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (footnotes omitted).

If, on the other hand, the regulation does not affect a fundamental right or create a suspect classification, it has traditionally been accorded a presumption of constitutionality that may not be disturbed unless the enactment is shown to rest on grounds "wholly irrelevant to the achievement of [a legitimate] state[] objective." *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961); see also *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955); *Metropolis Theater Co.* v. *City of Chicago*, 228 U.S. 61 (1913).[7]

In an effort to avoid the "heavy burden" imposed upon those seeking to establish a compelling state interest in a particular legislation, defendants refer us to the several Supreme Court decisions that have measured the constitutionality of a number of state statutes against the more lenient "rational relationship" standard. *Schware* v. *Board of Law Examiners of New Mexico*, 353 U.S. 232, 239 (1957); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947).[8]

Defendants correctly observe that the cited cases, like that at bar, involve constitutional challenges to State statutes regulating professions or trades invested with a strong public interest. On the basis of that kinship, defendants urge us to adopt here the same standard of review. We cannot do so. The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation cre-

ates. Since none of the Supreme Court decisions cited above involved a statute affecting any fundamental right or creating any suspect classification, application of the rational relationship test was there indicated. That is not the situation here.

Ninety years ago, the Supreme Court first ruled that an alien is a "person" entitled to the safeguards afforded by the Due Process and Equal Protection Clauses of the fourteenth amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886). See also In re *Griffiths, supra,* at 719-20; *Sugarman* v. *Dougall,* 413 U.S. 634, 641 (1973); *Graham* v. *Richardson, supra,* at 371; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Traux* v. *Raich,* 239 U.S. 33, 39 (1915); *Wong Wing* v. *United States,* 123 U.S. 228, 238 (1896). Those safeguards were subsequently ruled to protect aliens seeking employment "in the common occupations of the community,"[9] *Traux* v. *Raich, supra,* at 41; *Sugarman* v. *Dougall, supra* at 641. Indeed, the power "to apply [State] laws exclusively to * * * alien[s] * * * as a class [has been steadily] confined within narrow limits." *Takahashi* v. *Fish & Game Commission, supra,* at 420. However, the precise standard for judicial review of statutes creating classifications based on alienage remained undefined until this decade. Finally, in the landmark case of *Graham* v. *Richardson, supra,* the Supreme Court, in striking down a State statute denying welfare benefits to resident aliens, ruled that

> "classifications based on alienage * * * are inherently suspect and subject to close judicial scrutiny." *Id.* at 372.

Writing for the Court, Justice Blackmun observed that

> "[a]liens as a class are a prime example of a 'discrete and insular' minority * * * for whom such heightened judicial solicitude is appropriate." *Id.* at 372.

In subsequent decisions, the Supreme Court has applied the rationale of *Graham* to its review of State statutes foreclosing aliens from a variety of public and non-public jobs.

Thus, in *Sugarman* v. *Dougall, supra,* the Supreme Court considered an equal protection challenge to Section 53 of the New York Civil Service Law, which denied aliens the right to hold positions in New York's "competitive civil service." Section 53 did not survive the *Sugarman* Court's strict scrutiny. Having indicated that Section 53 was both overinclusive and underinclusive, the Court rested its ruling on the statute's fatal imprecision.

Decided the same day as *Sugarman* was In re *Griffiths, supra,* in which the Supreme Court condemned a Connecticut statute that excluded aliens from the practice of law. Earlier this year, Judge Weinfeld, in striking down Section 6524(b) of New York's Education Law,[10] offered the following précis of the *Griffiths* decision:

> "The Court premised its judgment upon basic constitutional concepts: first, that a lawfully admitted resident alien is a 'person' within the Fourteenth Amendment's prohibition against denial 'to any person within its jurisdiction the equal protection of the laws'; second, that the 'right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'; third, that 'classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny'; fourth, that a state which adopts a suspect classification 'bears a heavy burden of justification'; and fifth, that 'to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its

> use is "necessary * * * to the accomplishment" of its purpose or the safeguarding of its interest'." *Surmeli* v. *New York,* 75 Civ. 4520 (S.D.N.Y. April 7, 1976) (footnotes omitted).

It is the opinion of this panel that *Graham, Sugarman* and *Griffiths* establish, beyond peradventure, that any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-à-vis citizens must withstand the rigors of close judicial scrutiny.[11] Thus, the deprivation protested by plaintiffs herein can be justified only if Section 3001(3) is shown to be a *necessary* implement of a *compelling* state interest. We "therefore look to the substantiality of the State's interest in enforcing [Section 3001(3)], and to the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra,* at 642.

III.

In attempted justification of Section 3001(3), defendants assert that, "Given the vital role of the educational system in the American democracy," the State has a compelling interest in the assurance that those who minister to the educational needs of its young are qualified, both by profession and example, to transmit the American heritage to their students. Thus, defendants argue, in furtherance of this interest,

> "it * * * does not offend the equal protection rights of aliens to require that in order to obtain teaching positions within that system, they act affirmatively to identify themselves with that democracy. By obtaining declarant status (and timely completing the naturalization process), the alien has provided objective evidence that he in fact believes in the American

heritage which he in turn is obliged to transmit to his students."

Defendants urge that the State-required oath of allegiance, in which plaintiffs expressly stand ready to join, is an inadequate badge of identification with the United States.[12] Section 3001(3), defendants conclude, "is certainly an appropriate if not the 'least drastic means' for effectuating" the interest it was enacted to support.

To be sure, a "teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Accordingly, "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools * * *," *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1965) (footnote omitted), and there is "no requirement * * * that a teacher's classroom conduct be the sole basis for determining * * * fitness." *Beilan* v. *Board of Education,* 357 U.S. 399, 406 (1958). Moreover, in a somewhat different context, the Supreme Court has acknowledged that the "State's broad power to define its political community" might include "requir[ing] citizenship" in "an appropriately defined class of positions." *Sugarman* v. *Dougall, supra,* at 642-43, 646-47.

Thus aware that the Supreme Court has recognized a strong nexus between the classroom and the political community and that it has at least intimated its approval of citizenship requirements for jobs bearing a relationship to the State's ability to "define its political community," one might infer that teaching fits within the narrow area of allowable discrimination discussed in Sugarman.[13]

This Court must be no less aware, however, of *Sugarman's* ultimate stricture: when a State seeks to vindicate even a compelling interest, through discrimination, "the

means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 653. Even if Section 3001(3) had safely negotiated all of the other shoals, on this rock it clearly founders.

Defendants have attempted to justify the sweeping breath of Section 3001(3) by exhuming an argument laid to rest in *Griffiths* and *Sugarman,* contrasting the undivided allegiance which a citizen presumptively bears to this country with a resident alien's potential conflict of loyalties. On the basis of this supposed conflict, defendants would have us conclusively presume that all those who elect not to seek U.S. citizenship, regardless of their nation of birth, the academic subject they seek to teach, the nature and strength of their ties to this country or their willingness to pledge allegiance to it, are unqualified for such responsibilities.

The Supreme Court rejected a like "undivided allegiance" argument advanced by the defendants in *Sugarman* because, in that case,

> "the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose.
>
> * * * *
>
> [Section 53's] imposed ineligibility may apply to the 'sanitation man, class B,' Perotta v. Gregory, 4 Misc. 2d 769, 158 N.Y.S. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.* at 642-42.

As with the statute challenged in *Sugarman,* Section 3001(3) is damned by its imprecision. It excludes *all* non-applicant aliens, regardless of nationality, from *all* teaching positions in the public school system, regardless of grade level or subject matter.[14] It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring "skills or competencies not readily available among teachers holding citizenship."

In *Griffiths,* the undivided allegiance argument was labeled "unconvincing" and the Supreme Court declared the possibility that some aliens might be unsuited to a particular profession no "justification for a wholesale ban." *Id.* at 725; *cf. Hampton* v. *Mow Sun Wong,* 44 U.S.L.W. 4737, 4745 (U.S. June 1, 1976). The applicability of the reasoning of *Griffiths* to the statute challenged here is apparent from the following quotation from that opinion, substituting appropriate references to the State and profession involved:

> "Although, as we have acknowledged, a State does have a substantial interest in the qualifications of those [certified to teach in the public schools], the arguments advanced by the [defendants] fall short of showing that the classification established by [Section 3001(3)] is necessary to the promoting or safeguarding of this interest. [New York] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to [teach]. * * * [New York] can * * * require appro-

> priate training and familiarity with [the subject matter to be taught]. Apart from such tests of competence, it requires a new [teacher] to take [an oath] to 'support the constitution of the United States, and the constitution of the State of [New York].' [Plaintiffs have] indicated [their] willingness and ability to subscribe to the * * * oath[], and [New York] may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." *Bond* v. *Floyd,* 385 U.S. 116, 132.' *Law Students Research Council* v. *Wadmond,* 401 U.S. at 164. Moreover, [teachers] are subject to continuing scrutiny by [their superiors] * * *. In sum, [defendants] simply [have] not established that [the State] must exclude all aliens from the [teaching profession] in order tc vindicate its undoubted interest * * *." In re *Griffiths, supra,* at 725-26 (footnotes omitted).

The question remains whether, via an evidentiary hearing, the State might establish a necessary connection between Section 3001(3) and the public interest herein involved. In this context, and at the request of the Court, defendants' counsel has submitted, in affidavit form, an offer of proof requesting an opportunity to call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education. It is represented that Dr. Terino would testify that 1) teachers are required to convey principles of American citizenship to their students; 2) the function of a teacher is not limited to imparting particular subject matter; the teacher also serves as an example for his students "from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns" and 3) aliens who

voluntarily refuse naturalization "are not appropriate teachers in a curriculum that requires imparting principles of American citizenship."

In our opinion, the further delay that would be occasioned by an evidentiary hearing would be unjustified. It is inconceivable that defendants could establish, on the basis of the proposed testimony of Dr. Terino, that a broad exclusion of *all* non-applicant aliens from *all* teaching positions is necessary to the advancement of New York's claimed interest.

No doubt teachers and their students may engage in exchanges reaching beyond the scope of a particular course of instruction. Nevertheless, defendants' position that, regardless of his other attributes, the non-applicant alien's voluntary decision to retain his native citizenship necessarily renders him, by example, a negative influence, and thus inherently unqualified to teach, is unsupported by anything in the present record. Nor would such a conclusion be supported by the proposed testimony of Dr. Terino. Indeed, New York's attempt to exclude all non-applicant aliens from its academic community seems repugnant to the very heritage the State is seeking to inculcate. As the Supreme Court recognized, albeit in a somewhat different context, statutes which "cast a pall of orthodoxy over the classroom" are ultimately destructive.

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). (citations omitted).

We conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined.

Plaintiffs' motion for summary judgment is granted. Submit order on notice.

Dated: New York, New York, July 20, 1976.

WILFRED FEINBERG
Wilfred Feinberg,
United States Circuit Judge

LAWRENCE W. PIERCE
Lawrence W. Pierce,
United States District Judge

WILLIAM C. CONNER
William C. Conner,
United States District Judge

FOOTNOTES

[1] See, *e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Foley v. Connelie, 75 Civ. 4548 (S.D.N.Y. July 8, 1976); Surmeli v. New York, 75 Civ. 4520 (S.D.N.Y. April 7, 1976); C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York, 75 Civ. 1172 (E.D.N.Y. March 1976); Mauclet v. Nyquist, 75 Civ. 73 (E.D.N.Y. February 11, 1976).

[2] Plaintiff Susan M. W. Norwick was born in Dundee, Scotland and is a British subject. Married to a United States citizen, she is a federally registered resident alien and has resided in this country since 1965. Ms. Norwick is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree *summa cum laude*. She is presently a full-time graduate student in Developmental Reading at the State University of New York at Albany, where she has compiled a straight A average. Since 1960, Ms. Norwick has been periodically employed as a teacher both in this country and in Great Britain.

Intervenor-plaintiff Tarja U. K. Dachinger was born in Turku, Finland and remains a citizen of that country. Ms. Dachinger majored in German at Lehman College, from which she received a B.A. degree *cum laude* and an M.S. degree in Early Childhood Education. She is married to a U. S. citizen and has resided in this country since 1966.

[3] Section 3001(3) provides, *inter alia:*

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> * * *
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien [who] make[s] due application to become a citizen and thereafter within the time prescribed by law shall become a citizen."

[4] The only exceptions to Section 3001(3) are contained in Section 3001-a of the New York Education Law and Section 80.2(i) of 8 New York Code of Rules and Regulations.

New York Education Law § 3001-a provides:

> "A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a)(1) of the immigration and nationality act [8 U.S.C.A. § 1153(a)(1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturaliza-

tion service, that he is unable to adjust his status to that of a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon propor application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Section 80.2(i) of 8 New York Code of Rules and Regulations provides:

> *"Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons."

[5] The individual defendants, public officials serving within the New York State Department of Education, are responsible for the implementation and enforcement of the statutes and regulation challenged herein.

[6] Although the complaints filed in this action refer to "Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State

of New York," it is clear that a ruling on the constitutionality of Section 3001(3) will be dispositive of this entire case. None of the other subdivisions of Section 3001 has been challenged in this action. Sections 3001-a and 80.2(i), which provide limited exceptions to Section 3001(3), are challenged only to the extent that as exceptions to a disallowance they might imply the existence of a disallowance. This Court need only note that, should we find it necessary to invalidate Section 3001(3), Sections 3001-a and 80.2(i) could not conceivably operate to deny plaintiffs the certification they require to teach. Accordingly, we restrict our review to Section 3001(3). See In re Griffiths, 413 U.S. 717, 726 n.17 (1973).

[7] In recent years, the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed. The Court has indicated that a statute creating any classification must at least "be reasonable, not arbitrary, and must rest upon some ground or difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis added).

See generally Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1 (1972); Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972). See also Massachusetts Bd. of Retirement v. Murgia, 44 U.S.L.W. 5077, 5081 (U.S. June 25, 1976) (Marshall, J., dissenting).

[8] Defendants also direct the Court to Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) and United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). In Wadmond, the Supreme Court considered a challenge, on first amendment vagueness and overbreadth grounds, to New York's system for screening applicants for admission to the Bar. United Public Workers involved a first amendment challenge to the so-called "Hatch Act," which statute prohibited federal employees from taking "any active part in political management or in political campaigns." Suffice it to say that we have read both cases and are at a loss to determine their relevance to our present inquiry.

[9] To the extent that defendants would invoke the authority of Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915), this Court need only note that—whatever the constitutional status of public employment in 1915—more recent decisions make it clear that the States owe all of their lawful

residents, whether aliens or citizens, equal access to public as well as private employment, absent the necessity for restrictions designed to promote compelling state interests. Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365, 370-75 (1971). See Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 44 U.S.L.W. 4890 (U.S. June 17, 1976).

[10] Section 6524(b) required citizenship, or the declared intention to become a citizen, as a condition of retaining a license to practice medicine.

[11] On June 17, 1976, the Supreme Court, reconfirming the standards established by Graham, Sugarman and Griffiths, struck down a Puerto Rico statute that prohibited aliens from engaging in the private practice of engineering. Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 44 U.S.L.W. 4890 (U.S. June 17, 1976).

It is also noteworthy that Justice Rehnquist, though critical of the rule, recognized in his dissent in Sugarman that

> "[t]he Court in [Sugarman and Griffiths] holds that an alien is not really different from a citizen, and that any legislative classification on the basis of alienage is 'inherently suspect'." *Id.* at 649.

[12] In *In re* Griffiths, 413 U.S. 717 (1973), the Supreme Court noted:

> "We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution. We note that all persons inducted into the Armed Services, including resident aliens, are required by 10 U.S.C. § 502 to take the following oath:
>
> 'I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.'
>
> If aliens can take this oath when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely connot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith." *Id.* at 726 n.18.

[13] On the same day that it decided Sugarman v. Dougall, *supra*, and *In re* Griffiths, *supra*, the Supreme Court summarily affirmed a District of Arizona decision that had invalidated, on equal protection grounds, a State statutory and constitutional scheme excluding aliens from a broad range of public jobs, numbered among which was teaching. Miranda v. Nelson, 351 F.Supp. 735 (1973), *aff'd*, 413 U.S. 902 (1973). Whatever the weight of precedential authority accorded summary affirmances of the Supreme Court, see Hicks v. Miranda, 422 U.S. 332, 343-46 (1975); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); Edelman v. Jordon, 415 U.S. 651, 671 (1974); Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir.), *cert. denied sub nom.* Doe v. Brennan, 414 U.S. 1096 (1973); Note, Aliens' Right to Teach; Political Socialization and the Public Schools, 85 Yale L.J. 90, 99 n.45 (1975), Miranda's relevance to this case should not be overestimated.

Although one of the named plaintiffs in Miranda was a teacher, the case involved, as noted above, a broad-based challenge to an Arizona policy that precluded aliens from public employment in general. The Miranda defendants' arguments, as well as the court's analysis, centered upon the "special public interest" doctrine. The opinion affirmed by the Supreme Court did not focus upon—or, indeed, allude to—the State's peculiar and particular interests in regulating the teaching profession. Thus, the Supreme Court's summary affirmance in Miranda would provide an unsteady foundation upon which to rest a decision in the present case.

[14] Defendants have taken pains to depict Section 3001(3) as a carefully circumscribed legislative effort to promote continued patriotism among our citizenry. They have chosen to ignore the fact that Section 3001(3) is but one aspect of a rather comprehensive statutory schema, embodied in the Education Law, prohibiting the alien from participation in a broad range of employments—including that of physician (§ 6524), physical therapist (§ 6534), chiropractor (§ 6554), dentist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), professional engineer (§ 7206), landscape architect (§ 7324), shorthand reporter (§ 7504), and masseur (§ 7804). The Education Law, however, specifically provides that citizenship is not a qualification for licensure in the following professions: professional and practical nursing (§§ 6904 and 6905), podiatry (§ 7004), optometry (§ 7104), ophthalmic dispensing (§ 7124), architecture (§ 7304), certified public accountancy (§ 7404), psychology (§ 7603) and social work (§ 7704).

APPENDIX B

Order and Judgment of the Three-Judge District Court.

[Entered August 25, 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Based upon the opinion of this Court dated July 20, 1976, and all prior proceedings, it is ORDERED, ADJUDGED AND DECREED:

1. Section 3001(3) of the New York Education Law is hereby declared unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

2. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana, their agents, successors and employees, and all persons having actual notice of this order, are hereby permanently enjoined and restrained from enforcing § 3001(3) of the New York Education Law;

* * * * * *

4. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana are hereby ordered to pay to plaintiffs their reasonable costs to be taxed expended in this action.

Dated: New York, New York
Aug. 23, 1976

WILFRED FEINBERG
Wilfred Feinberg
United States Circuit Judge

LAWRENCE W. PIERCE
Lawrence W. Pierce
United States District Judge

WILLIAM C. CONNER
William C. Conner
United States District Judge

APPENDIX C

Notice of Appeal.

[Filed October 13, 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the defendants, Ewald Nyquist, individually and as Commissioner of the New York State Education Department, Vincent Gazzetta, individually and as Director of the Division of Teacher Certification of the New York State Education Department, and Thomas Malina, individually and as Acting Director of the Division of Professional Conduct of the New York State Education Department, and their successors in office, hereby appeal to the Supreme Court of the United States from the Order and Judgment of the three judge district court, entered on August 25, 1976, declaring New York Education Law § 3001(3) unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoining its enforcement and from each and every part of that Order and Judgment.

Notice of Appeal.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
October 13, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
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