MOTION TO AFFIRM

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I N D E X

TABLE OF AUTHORITIES

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-808

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

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16 (1) (c), appellees move to affirm the unanimous Order and Judgment of the court below, entered on August 25, 1976, on the grounds that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellees have no substantial quarrel with the statement of the case contained in the Jurisdictional Statement. For purposes of this motion, however, they wish to emphasize pertinent facts found by the court below and noted in its opinion.

"Section 3001(3) of the New York Education Law. . .provides that no alien may be employed to teach in the public schools of New York State. . .unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course,to become a citizen" (Opinion, p. 2a).

Appellees are lawfully admitted permanent resident aliens. They have been denied the certificates they must possess in order to teach in public schools in New York State solely because they are aliens who have decided not to apply at this time for United States citizenship (non-applicant aliens). Except for alienage, they are in all respects (including English language facility, character, educational background and professional competence) qualified to receive the necessary certificates. "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" (Opinion, pp. 2a-3a).

Appellee Norwick is a citizen of Great Britain; appellee Dachinger is a citizen of Finland (Opinion, footnote 2, p. 17a). Appellees are both married to United States citizens and both have resided in the United States for over ten years (Opinion, id.). Appellees graduated with B.A. degrees summa cum laude and cum laude from American colleges (id). Appellee Dachinger has received an M.S. degree in Early Childhood Education from Lehman College, a division of the College of the City of New York (Opinion, id), and appellee Norwick has received an M.S. degree in Developmental Reading from the State University of New York, where she compiled a straight A average.

New York requires that all public school teachers, including citizens and applicant aliens, take an oath to support the constitutions of the United States and of New York. Appellees can in good faith take that oath, and have expressly offered to do so (Opinion, p. 11a).

The challenged statute "excludes all non-applicant aliens, regardless of nationality, from all teaching positions in the public school system, regardless of grade level or subject matter" (Opinion, p. 13a; emphasis in original). But "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'" (Opinion, p. 13a).

"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)" (Opinion, footnote 14, p. 21a).

ARGUMENT

I. THE QUESTIONS RAISED ARE SO INSUBSTANTIAL THAT THEY DO NOT REQUIRE FURTHER ARGUMENT.

A. The Decision Below Was Compelled By This Court's Decision in Miranda v. Nelson.

This case is indistinguishable from Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), aff'd mem., 413 U.S. 902 (June 25, 1973). In Miranda, a three-judge court held unconstitutional on equal protection grounds an Arizona statutory scheme which, like the New York Education Law, excluded aliens from a broad range of public jobs, including teaching. One of the two plaintiffs in Miranda was specifically seeking employment as a teacher. The three-judge court found no state interest compelling enough to deny that employment to aliens, and this Court summarily affirmed.

B. The Decision Below Was Compelled By This Court's Decisions In Other Cases Involving Employment Discrimination Against Permanent Resident Aliens.

1. The challenged statute was properly reviewed under a heightened equal protection test.

Appellants contend that the court below mistakenly reviewed the challenged statute "under a heightened equal protection test" and argue that the standard of review should have been whether there was a "reasonable relation to a legitimate state

interest" (Jurisdictional Statement, pp. 3, 6). That contention is plainly insubstantial.

In Graham v. Richardson, 403 U.S. 365, 371-372 (1971), this Court ruled that "classifications based on alienage. . .are inherently suspect and subject to close judicial scrutiny." In In Re Griffiths, 413 U.S. 717 (1973), this Court ruled that "in order 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 of the classification is 'necessary. . .to the accomplishment' of its purpose or the safeguarding of its interest. . . .It is appropriate that a state bear a heavy burden when it deprives [resident aliens] of employment opportunities" (413 U.S. at 721-722, footnotes omitted). The propriety of this "heightened" or "strict scrutiny" standard of review in alien employment cases has recently been confirmed in Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, ___U.S.___, 49 L. Ed. 2d 65 (1976). See, to the same effect, Sugarman v. Dougall, 413 U.S. 634 (1973).*

*Indeed, for over ninety years this Court has been particularly sensitive to employment discrimination against resident aliens. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

Appellants contend that because they do not discriminate against applicant aliens (whom they deem the equivalent of citizens), their discrimination against non-applicant aliens should be reviewed under a lower standard of review. The only authority cited for that contention is Mathews v. Diaz, ___U.S.___, 48 L. Ed. 2d 478 (1976). Mathews is not in point. The statute at issue did not distinguish between applicant and non-applicant aliens, but between aliens who had resided in the United States for five years and those who had not. And as the Court expressly noted, it was a federal statute, and was thus properly reviewed under a lower standard of review than would have been applicable to review of a similar state statute (48 L. Ed. 2d at 490-494). See, to the same effect, Hampton v. Mow Sun Wong, ___U.S.___, 48 L. Ed. 2d 495 (1976).

Accordingly, the standard applied below was correct and raises no issue requiring review by this Court.

2. The challenged statute was not narrowly drawn and was not necessary to promote a compelling governmental interest.

Appellants' claim that the challenged statute "establishes a narrow limitation" (Jurisdictional Statement, p. 9) is plainly insubstantial. As the court below noted, the challenged statute is part of a "comprehensive statutory schema. . . prohibiting the alien from participation in a broad range of employments," including veterinarian and masseur (Opinion, footnote 14, p. 21a). And the statute

prohibits aliens from any country from teaching any course, at any grade level (Opinion, p. 13a). A Canadian citizen could not teach metal-working; a British citizen could not teach math; a French citizen could not teach French.

Furthermore, the interest which the challenged statute purports to serve is not at all "compelling" and is practically non-existent:

(a) The challenged statute applies only to teachers in public schools. If the New York legislature had considered citizenship to be an essential requirement for teaching, it could have made that requirement applicable to those who teach the thousands of New York children attending private or parochial schools. But it did not.

(b) The challenged statute provides that its citizenship requirement "shall not apply" after July 1, 1967 to alien teachers employed pursuant to whatever regulations the Commissioner of Education, appellant Nyquist, chooses to adopt. Should appellant Nyquist decide tomorrow to adopt a regulation permitting aliens to teach in public schools, or in certain grade levels, or in certain subject areas, no state statute, and no state interest, would preclude him from doing so.

(c) As the court below noted, current statutes and regulations permit "exceptions" to the citizenship requirement under which some non-applicant aliens are permitted to teach in public schools (Opinion, p. 13a, and footnote 4, p. 17a).

(d) Although it is not evident from the opinion below, appellants conceded

below that New York Education Law sections 2590-c(3) and (4), which require state citizenship but not national citizenship, permit alien parents to vote in public school board elections and to sit as elected members of such boards. Those boards are authorized by statute (Education Law section 2590-e) to hire and fire teachers, select textbooks and make the kinds of policy decisions teachers cannot and do not make. It is frivolous to contend that New York has a "compelling" interest in barring alien teachers from public schools when New York law permits aliens to run those very schools.

CONCLUSION

The Order and Judgment of the Court Below Should Be Affirmed.

Respectfully submitted,

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January 7, 1977
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*Appellees wish to express their appreciation to Wendy Benjamin, a third-year law student, for assistance in the research and preparation of this motion to affirm.