No. 06-11

In the Supreme Court of the United States

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

LOUIS R. KOERNER, JR.
Koerner Law Firm
1204 Jackson Avenue
New Orleans, LA 70130
(504) 581-9569

JEFFREY W. SARLES
Counsel of Record
HANS J. GERMANN
HEATHER M. LEWIS
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONER

Respondents offer no valid reason why this Court should not review the questions presented.

I. The Court Should Review The Fifth Circuit's Equal Protection Ruling.

1. Petitioners do not contend that all nonimmigrants are "entitled to the same treatment" as citizens and immigrants, as respondents assert (at 18). Instead, petitioners challenge a state's exclusion of all nonimmigrant aliens from the practice of law. As the petition explains (at 12-17), such a categorical ban is an alienage classification subject to strict scrutiny.

Respondents fail to acknowledge the breadth of § 3(B). It categorically excludes *all* nonimmigrant aliens from Bar admission, including those satisfying Louisiana's eligibility criteria. Thus, § 3(B) excludes not only lawyers educated abroad but also foreign nationals with JD degrees from ABA-accredited law schools in the U.S., such as *Wallace* petitioner Emily Maw, who received a JD from Tulane University.

2. The Fifth Circuit's rejection of strict scrutiny conflicts with the Fourth Circuit's ruling in *Moreno* (see Pet. 10). Respondents (at 15) seek to deny that conflict by pointing to the Fourth Circuit's recognition of differences between the G-4 visas at issue in *Moreno* and other nonimmigrant visas. But those differences played no role in the Fourth Circuit's equal protection analysis, which it adopted from the district court. After thoroughly analyzing the issue, the district court held that all aliens who "maintain their place of general abode within the United States," including "immigrant and nonimmigrant," are "wrapped [in] the suspect classification blanket" and entitled to strict scrutiny. *Moreno* v. *Toll*, 489 F. Supp. 658, 663-664 (D. Md. 1980). The Fifth Circuit's rejection of strict scrutiny in this case conflicts with the Fourth Circuit adoption of that analysis, which this Court did not disturb in affirming on preemption grounds. Furthermore,

G-4 visa holders, as nonimmigrant aliens, fall within the exclusionary scope of § 3(B) just as petitioners do.

3. Respondents (at 12) deny that this Court's alienage precedents require strict scrutiny of state discrimination *among* aliens as opposed to discrimination *against* aliens in favor of citizens. Respondents disregard the Court's express rejection, in *Nyquist*, 432 U.S. at 8, of the notion that a state could circumvent those strict scrutiny precedents merely by "distinguish[ing] only within the heterogeneous class of aliens" and "not * * * between citizens and aliens *vel non*."

4. Respondents (at 12) also reject strict scrutiny on the ground that nonimmigrant aliens are not a suspect class. They cite no authority for that proposition other than (at 12) a 1923 decision that preceded by decades the Court's adoption of the strict scrutiny standard for state alienage classifications. Since adopting that standard, the Court repeatedly has reaffirmed that courts must strictly scrutinize state alienage classifications (see Pet. 12), including those governing Bar admission requirements. See *Griffiths*, 413 U.S. at 721. As the petition demonstrates (at 12-13), none of this Court's precedents requiring strict scrutiny of alienage classifications rests on a distinction between immigrant and nonimmigrant aliens. Respondents (at 14) attempt to distinguish *Griffiths* on the ground that the Bar admission rule struck down in that case "totally excluded" all aliens from Bar admission. Yes, and § 3(B) "totally excludes" all nonimmigrant aliens from Bar admission. As in *Griffiths*, that categorical exclusion should be closely scrutinized to ensure that it is narrowly tailored to serve a compelling state interest.

To be sure, the Court has not directly addressed whether a state may ban nonimmigrant aliens from Bar admission. If it had, the circuits would not be in conflict over that question, the district courts in *Leclerc* and *Wallace* would not have reached opposite conclusions, the Fifth Circuit panel would

not have divided 2-1, and there would not have been an 8-7 split over whether to grant rehearing en banc.

5. Respondents (at 7-8) also rely on supposed differences between immigrant and nonimmigrant aliens to support their call for a lesser standard. None overcomes the rationale for strict scrutiny—the history of discrimination suffered by aliens and their inability to resist it by exercising the vote. See Pet. 15-16. Moreover, the purported differences are nonexistent or immaterial. For example, respondents contend (at 7-8) that nonimmigrant aliens "do not pay taxes like citizens" or immigrant aliens. But their own footnote (Br. 8 n.16) shows that all nonimmigrant aliens pay taxes on income earned in the U.S. just as citizens and immigrants do, and in fact many nonimmigrants, including petitioners, pay U.S. taxes on income earned outside the U.S. as well.

6. Respondents suggest (at 7-10) that governmental discrimination against nonimmigrant aliens is too common to warrant strict scrutiny. But their citations do not support that thesis. They cite (at 9 n.25) New York and Colorado cases for their assertion that some states categorically deny unemployment benefits to nonimmigrant aliens. But the New York court held only that one applicant's immigration status "legally barred [him] from working in the United States" and thus made him "ineligible for benefits." *Zapata*, 50 A.D.2d at 682. And the issue before the Colorado court was "whether an *illegal alien* is entitled to unemployment compensation benefits." *Duenas-Rodriguez*, 606 P.2d at 439 (emphasis added). Respondents' reliance (at 9) on *Carlson* v. *Reed*, 249 F.3d 876 (9th Cir. 2001), also is unavailing. *Carlson* held that *some* nonimmigrant visa holders cannot qualify for domicile under California law, but it recognized that other nonimmigrant visa holders may do so and thereby become eligible for tuition benefits. *Id.* at 878-883. These cases say nothing about the constitutionality of denying benefits to nonimmigrant aliens as a class.

Respondents (at 17 n.46) cite only one case for their assertion that some states deny welfare benefits to nonimmigrant aliens. But *Soskin* v. *Reinertson*, 353 F.3d 1242, 1257 (10th Cir. 2004), actually shows why the proper level of scrutiny needs to be clarified. In *Soskin*, the Tenth Circuit held, over a strong dissent, that a state's removal of nonimmigrant alien Medicaid benefits, pursuant to a federal statute giving states discretion over alien qualifications for such benefits, was subject only to rational basis scrutiny. In doing so, the Tenth Circuit expressly disagreed with the New York Court of Appeals which had held, in upholding an equal protection challenge under the U.S. Constitution, that a state's removal of nonimmigrant alien Medicaid benefits was subject to strict scrutiny. *Id.* at 1252-1256 (rejecting *Aliessa* v. *Novello*, 754 N.E.2d 1085 (N.Y. 2001)). This conflict underscores the need for the Court's guidance on the proper level of scrutiny when states discriminate against nonimmigrant aliens.

Respondents also observe (at 9-10) that some states deny visa holders the right to practice medicine and dentistry. But they cite no decision from this Court upholding such classifications, and the New York statute they cite authorizes the ban to be waived for up to nine years based on individual factors (unlike the absolute ban of § 3(B)). N.Y. Educ. Law § 6524(6). Respondents further rely on Iowa's ban on agricultural property ownership by nonimmigrants. But no court has determined whether that restriction is subject to strict or rational basis scrutiny. See Iowa Code Ann. § 9I.3. Moreover, this Court has questioned (without deciding) the validity of state laws barring aliens from owning land. See *Takahashi*, 334 U.S. at 422 (citing *Oyama* v. *California*, 332 U.S. 633 (1948)). Respondents' reliance on such state laws, which arose due to "xenophobic" hostility directed at particular nationalities (Keith Aoki, *No Right to Own: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37, 40 (1998)), highlights why

the Court should revisit the constitutional limits on a state's power to deny benefits to broad categories of lawfully admitted aliens.

Respondents (at 8) try to support their argument by pointing to *federal* alienage provisions. But it is well settled that federal—unlike state—alienage classifications are subject only to rational basis scrutiny. *Mathews*, 426 U.S. at 85. Respondents' confusion on this point is exemplified by their reliance (at 10) on *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). *Landon* addressed only the power of Congress—not the states—to distinguish among aliens. Respondents' claim that states are authorized by 8 U.S.C. §§ 1621-1622 to decide alien eligibility for public benefits fails to note that § 1621(c)(2) expressly *excludes* a "professional license" issued to various classes of nonimmigrant aliens from the definition of "State or local public benefit."

7. Respondents do not contend that § 3(B) satisfies strict scrutiny. Nor could they plausibly do so. States have no compelling reason to forbid *all* otherwise qualified non-immigrant aliens from practicing law. Respondents, in arguing (at 21-23) that the Louisiana rule is rational, identify only one purported state interest: preventing nonimmigrant alien lawyers from abandoning the U.S. and thereby leaving their clients in the lurch and the Louisiana Supreme Court to pick up the pieces. Such a concern might be valid if § 3(B) applied solely to 60-day tourist visas, but no one is seeking to have tourists practice law. As the petition explained (at 17), many categories of non-immigrant visas authorize stays of three, ten, or more years. Those are not short-term stays but durations comparable in length to the practices of many citizen and immigrant lawyers in a particular jurisdiction.

Louisiana does not condition a citizen's or immigrant alien's Bar admission on a commitment to practice for decades in-state. Citizens and immigrant aliens may (and frequently do) leave the state, leave the country, die

suddenly, change professions, stop working to raise a family, or otherwise cease practicing law in-state shortly after being admitted to the Bar. States presume that attorneys will practice ethically and not simply abandon their clients if they leave the jurisdiction or cease practicing law. Nonimmigrant alien attorneys as a class possess no "distinguishing characteristics" (Br. 19) that would rebut that assumption and justify a state's categorical ban on their practicing law. Of course, a particular nonimmigrant alien may be unsuitable for Bar admission. But the same is true of citizens and immigrant aliens, and Louisiana (like all other states) has appropriate screening devices to protect the integrity of the legal profession and ensure proper client representation. Respondents do not suggest that, prior to adopting its new construction of § 3(B) in 2002, Louisiana experienced any client representation or discipline problems associated with nonimmigrant alien lawyers.

Even if any concerns about the suitability of some nonimmigrant aliens to practice law were valid, § 3(B) prevents consideration of particular factors that may weigh in favor of admission. Louisiana's Bar authorities retain no means to make an informed judgment about whether a particular nonimmigrant applicant is likely to pass through the state quickly or instead practice in-state for an extended time. See *Griffiths*, 413 U.S. at 725 (states retain "wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law"). For example, any accountability concerns should be reduced if an applicant has an offer from an established law firm. The categorical nature of § 3(B) is what makes this case an ideal vehicle for clarifying the proper level of scrutiny.

8. The fact that other states have not adopted such a categorical ban undermines respondents' attempt to portray nonimmigrant attorney transiency as a serious problem. They contend without citation (at 12 n.35) that Rhode Island similarly bars nonimmigrant aliens from the practice of law.

In fact, Rhode Island requires only that a Bar applicant be "a citizen of the United States or legal resident,"[1] with no suggestion that nonimmigrant aliens legally residing in the U.S. are not "legal residents." Respondents also note (*ibid.*) that "New Hampshire limits bar admission to 'domiciliaries of the United States.'" It is far from clear that this rule bans *all* nonimmigrant aliens from Bar membership—both H-1B and L visa holders may be domiciled in the U.S. pursuant to the "dual intent" doctrine (see Pet. 17) —but if it does, all the more reason why the Court should grant the petition.

To be sure, the states' Bar admission requirements exhibit considerable variety. "[T]he rules governing the practice rights of foreign lawyers in the U.S. are so varied, complex and opaque as to present a sticky web of barriers." Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 Nw. J. Int'l L. & Bus. 487, 509 (2003). Although only Louisiana now expressly excludes all nonimmigrant alien lawyers from its Bar, Vermont and Michigan did so in the recent past and there is a serious risk that other states will follow suit. Accordingly, resolving the proper level of scrutiny of a state's categorical exclusion of nonimmigrant aliens is urgently required.

II. The Court Should Review The Fifth Circuit's Preemption Ruling.

1. The preemption question presented does not challenge, as respondents assert (at 24), the states' authority over "attorney licensing, oversight and discipline." The issue is whether specific federal laws allowing certain nonimmigrant aliens to work in the U.S. restrict the states' reserved power to disqualify all nonimmigrant aliens from working as lawyers. As explained in *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941), a state's "power to restrict, limit, [and] regulate * * * aliens [is] subordinate to supreme national law."

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[1] http://www.courts.state.ri.us/Supreme/bar/bar-rules.pdf.

Contrary to respondents (at 26), no "substantial deference" is warranted here. "States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225.

2. Respondents contend (at 26) that petitioners identify no "actual conflict" between § 3(B) and federal immigration law. That is not so. The petition (at 20-21) sets forth several direct conflicts. In addition, Department of Homeland Security regulations list numerous categories of aliens, including "nonimmigrant" aliens, who "are authorized to be employed in the United States *without restrictions as to location or type of employment* as a condition of their admission." 8 C.F.R. § 274a.12(a)(6), (9), (15), (16) (emphasis added). Yet, the Louisiana rule at issue expressly restricts the "type of employment" to which such nonimmigrant aliens are eligible. That is a direct conflict.

3. As the petition explains (at 11), the ruling below directly conflicts with the Vermont Supreme Court's holding in *Dingemans* that a state rule excluding Bar applicants "strictly on grounds [of] alien status" was preempted. Respondents do not mention *Dingemans*, nor *Andrade* (Pet. 11-12), which explained that a state's categorical exclusion of benefits to nonimmigrant aliens would be preempted by federal law. The ruling below also conflicts with *Rogers* v. *Larson*, 563 F.2d 617, 618-619, 622 (3d Cir. 1977), which held that a statute requiring "the replacement of alien nonimmigrant workers [with] United States citizens or permanent resident aliens," stood "as an obstacle to the execution" of federal immigration law and was therefore preempted.

4. Respondents (at 25-26) can obtain no support from the clear statement canon. Petitioners do not challenge Louisiana's regulatory authority over Bar admission and attorney conduct but rather the interference with federal immigration law caused by Louisiana's categorical exclusion of a class of persons that federal law authorizes to live and

work in the U.S. The clear statement rule did not prevent this Court in *Toll* from holding a state education law preempted (see Pet. 19). Indeed, respondents disregard the conflict between *Toll* and the Fifth Circuit's decision in this case.

5. Respondents reliance (at 27-28) on *DeCanas*, which addressed a restriction on *illegal* aliens, is misplaced. Moreover, *DeCanas* made clear that "state regulation *not congressionally sanctioned* that discriminates against aliens *lawfully admitted* to the country is impermissible if it imposes *additional burdens* not contemplated by Congress." 424 U.S. at 358 (emphasis added). Congress has not sanctioned a state ban on nonimmigrant lawyers, and Louisiana may not sweepingly impose such additional burdens on this lawfully admitted class of aliens.

6. Respondents suggest (at 27) that nonimmigrant attorneys work as paralegals. But federal immigration law would be severely undermined if lawfully admitted persons qualified to practice as lawyers were forced to do subordinate work. The practice of law is one of the "common occupations of the community [that] is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax*, 239 U.S. at 41. States have no authority to deny "those lawfully admitted to the country under the authority of the acts of Congress * * * the privileges conferred by the admission." *Id.* at 42.

7. It is particularly important that the Court address the limits on state regulation of lawfully admitted aliens at a time when the federal government is strengthening its control over our borders (and non-citizens within those borders) and when the globalization of legal services is expanding rapidly. As Justice Jackson put it, treatment of aliens "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

Granting the petition would allow the Court to protect those policies from state measures like § 3(B).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LOUIS R. KOERNER, JR.
Koerner Law Firm
1204 Jackson Avenue
New Orleans, LA 70130
(504) 581-9569

JEFFREY W. SARLES
Counsel of Record
HANS J. GERMANN
HEATHER M. LEWIS
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

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