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TAKING THE NATION OUT OF ALIENATION: *DANDAMUDI v. TISCH* AFFIRMS THAT NONIMMIGRANT ALIENS ARE ENTITLED TO SUSPECT CLASS PROTECTION

Abstract: On July 10, 2012, in *Dandamudi v. Tisch*, the U.S. Court of Appeals for the Second Circuit struck down New York Education Law section 6805(1)(6), reasoning that it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The law explicitly denied legal, nonimmigrant aliens the ability to apply for a license to practice as a pharmacist in New York. The Second Circuit's decision diverged from those of other circuits that have held similar laws targeting nonimmigrant aliens to be constitutional. This Comment argues that the Second Circuit's decision in *Dandamudi* faithfully comports with Supreme Court Equal Protection Clause precedent. Further, it asserts that the *Dandamudi* court's ruling is a much-needed affirmation of nonimmigrant aliens' right to work and contribute productively to American society.

Introduction

Every year, the United States admits millions of aliens across its borders to visit, work, and live.[1] For purposes of classification, these aliens are divided into two categories: immigrant aliens and nonimmigrant aliens.[2] Immigrant aliens receive authorization to reside in the United States indefinitely as legal permanent residents ("LPRs").[3] Nonimmigrant aliens may reside in the United States only temporarily

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[1] *See* Randall Monger, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Nonimmigrant Admissions to the United States: 2011, at 1 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2011.pdf; Randall Monger & James Yankay, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., U.S. Legal Permanent Residents: 2011, at 1 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf. An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006).

[2] *See* Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, Modern Am., Spring 2011, at 12, 13.

[3] *See* 8 U.S.C. § 1101(a)(20); Storch, *supra* note 2, at 13. According to the DHS, the United States authorized roughly one million people for LPR status in 2011. *See* Monger, *supra* note 1, at 2.

and for a specific purpose.[4] Although all nonimmigrant aliens are limited to temporary visas, many nonimmigrants utilize extension provisions to continue living in the United States for longer periods.[5]

Despite the United States' national immigration policy that welcomes millions of LPR and nonimmigrant aliens each year, individual states frequently seek to restrict the activities of aliens living within their borders.[6] State laws restricting aliens from receiving state benefits, working in certain professions, and even attaining an education exemplify state alienage legislation that stretches from the late nineteenth century to the present day.[7]

The U.S. Supreme Court's jurisprudence concerning the constitutionality of state laws affecting aliens has changed drastically over time.[8] The bedrock of the Court's modern jurisprudence, however, is the no-

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[4] *See* 8 U.S.C. § 1101(a)(15) (2006 & Supp. V 2011). Nonimmigrants include tourists, students, diplomats, workers, and professionals who come to the United States on temporary visas. *Id.* The DHS estimates that 159 million nonimmigrants were admitted to the United States in 2011. *See* MONGER, *supra* note 1, at 1. Although 87% of these nonimmigrants were admitted temporarily for business and pleasure, 6.4% were admitted temporarily as workers and 3.4% were admitted temporarily as students. *See id.*

[5] *See* Dandamudi v. Tisch, 686 F.3d 66, 70 (2d Cir. 2012) (noting that, in practice, federal law permits many aliens to maintain temporary worker authorization for a period exceeding six years); 8 C.F.R. § 214.2(h)(B)(15)(ii) (2012).

[6] *See* Michael Cornelius Kelly, Note, *A Wavering Course: United States Supreme Court Treatment of State Laws Regarding Aliens in the Twentieth Century*, 25 GEO. IMMIGR. L.J. 701, 701 (2011); *see also* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1429 (1995) (noting several factors that combine to expose alien residents to governmental neglect or even hostility).

[7] *See* Kelly, *supra* note 6, at 702–04 (noting that the Court's earliest decision on alienage legislation was in the 1886 case, *Yick Wo v. Hopkins*); *see, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (holding unconstitutional a New York statute restricting financial aid benefits for students attending higher education institutions); *In re* Griffiths, 413 U.S. 717, 721–22 (1973) (holding unconstitutional a Connecticut statute restricting non-resident aliens from taking the state bar); Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (holding unconstitutional a New York statute imposing a citizenship requirement for state civil service employment).

[8] *See* Cabell v. Chavez-Salido, 454 U.S. 432, 436 (1982) (noting that "[the] Court has many times considered state classifications dealing with aliens . . . [and] those cases 'have not formed an unwavering line over the years'"). Specifically, the Supreme Court has shifted from giving deference to state laws targeting aliens to protecting aliens from state discrimination. *See* Kelly, *supra* note 6, at 703 (arguing that the competing goals of protecting traditional state power and protecting politically powerless alien minorities from discriminatory legislation have played a role in shaping the Court's wavering jurisprudence); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 788 (4th ed. 2011) (stating that prior to 1971, the Court was extremely deferential to laws discriminating against aliens). *But see* Tamra M. Boyd, Note, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 323 (2001) (noting the current Court's dwindling interest in protecting aliens from discrimination).

tion that aliens constitute "a discrete and insular minority" and therefore are entitled to rights as a suspect class under the Equal Protection Clause of the Fourteenth Amendment.[9] Consequently, the Court generally subjects state laws that target aliens to the highest level of judicial review: strict scrutiny.[10] Using this level of review, the Court has consistently struck down state laws that target aliens as unconstitutional violations of the Equal Protection Clause.[11]

The Court's jurisprudence, however, is constrained to examining laws that deal with legal aliens generally, as opposed to nonimmigrant aliens specifically.[12] As such, the Court has yet to rule explicitly that nonimmigrant aliens, in particular, are a "discrete and insular minority" entitled to suspect class status and the protection of strict scrutiny review.[13] The Court's silence on this issue has led the Fifth and Sixth Cir-

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[9] *See* U.S. CONST. amend. XIV, § 1; Adam Bryan Wall, Comment, *Justice for All?: The Equal Protection Clause and Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 766 (2010). In the 1886 case, *Yick Wo v. Hopkins*, the Supreme Court held for the first time that aliens are entitled to Equal Protection Clause rights. 118 U.S. 356, 373–74 (1886). Later, in the 1971 case, *Graham v. Richardson*, the Court classified aliens as a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate." 403 U.S. 365, 372 (1971) (citation omitted) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[10] *See* CHEMERINSKY, *supra* note 8, at 790; *see, e.g.*, *Nyquist*, 432 U.S. at 8–12; *Sugarman*, 413 U.S. at 642–43. Strict scrutiny review, described by some scholars to be "strict by design and fatal in fact," requires a showing that the law is narrowly tailored to meet a compelling government purpose. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1973); *see* Wall, *supra* note 9, at 762. As a result, strict scrutiny review almost always leads courts to strike down the challenged legislation. *See* CHEMERINSKY, *supra* note 8, at 554; Wall, *supra* note 9, at 762.

[11] *See* CHEMERINSKY, *supra* note 8, at 790; *see, e.g.*, *Nyquist*, 432 U.S. at 8–12; *Sugarman*, 413 U.S. at 642–43. The Court, however, has chosen not to apply strict scrutiny in cases in which legislation targets undocumented aliens or restricts aliens from employment in political functions. *See* Plyler v. Doe, 457 U.S. 202, 219 (1982) (striking down, under intermediate scrutiny, a Texas statute that withheld state education funds and authorized schools to deny entry to undocumented aliens); Foley v. Connelie, 435 U.S. 291, 295 (1978) (upholding, under rational basis review, a New York law excluding aliens from the police force). Rational basis review is the lowest level of judicial review. CHEMERINSKY, *supra* note 8, at 552. Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government purpose. *Id.* Intermediate scrutiny is the middle tier of judicial scrutiny. *Id.* Under the intermediate scrutiny test, a law will be upheld if it is substantially related to an important government purpose. *Id.*

[12] *See, e.g.*, *Dandamudi*, 686 F.3d at 74; LeClerc v. Webb, 419 F.3d 405, 415 (5th Cir. 2005). In many cases in which the Court has considered the constitutionality of a state law that discriminated against legal aliens, the law affected both nonimmigrant and LPR aliens. *See, e.g.*, *Nyquist*, 432 U.S. at 2 (applying strict scrutiny to a law barring resident aliens from receiving financial aid); *Sugarman*, 413 U.S. at 635 (applying strict scrutiny to a law limiting employment in a civil service position to citizens). Additionally, the Court has applied strict scrutiny review only in cases with LPR plaintiffs. *See LeClerc*, 419 F.3d at 415.

[13] *See Dandamudi*, 686 F.3d at 74; *LeClerc*, 419 F.3d at 415.

cuits to conclude that nonimmigrant aliens are not entitled to suspect class status and are entitled only to the lowest level of judicial scrutiny, rational basis review.[14] In 2012, in *Dandamudi v. Tisch*, however, the Second Circuit declined to follow the U.S. Courts of Appeals for the Fifth and Sixth Circuits.[15] Instead, the Second Circuit held that nonimmigrant aliens are a suspect class, and that laws targeting them therefore are subject to strict scrutiny review.[16]

Part I of this Comment first examines the New York law that led to the Second Circuit's decision in *Dandamudi* and then discusses the factual and procedural history of the case.[17] Part II examines the split between the Second Circuit and the Fifth and Sixth Circuits regarding the constitutional analysis of state laws targeting nonimmigrant aliens.[18] Finally, Part III argues that *Dandamudi* more faithfully comports with Supreme Court precedent than the Fifth and Sixth Circuits' decisions, advances the policy goals of the Equal Protection Clause, and fosters the ability of nonimmigrant aliens to contribute to the U.S. economy.[19]

I. *Dandamudi v. Tisch*: An Equal Protection Challenge to New York's Education Law

In 1982, New York State adjusted the citizenship provision for New York Education Law section 6805(1)(6), a statute that laid out the state's requirements for obtaining a pharmacy license.[20] The state legislature changed the requirement that an applicant for a pharmacy license be a U.S. citizen—which disqualified all aliens—to a slightly less stringent requirement that an applicant be a citizen or LPR—thereby disqualifying only nonimmigrant aliens.[21] A waiver provision in the law

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[14] *See* League of United Latin Am. Citizens v. Bredesen (LULAC), 500 F.3d 523, 533 (6th Cir. 2007); *LeClerc*, 419 F.3d at 419; Chemerinsky, *supra* note 8, at 552.

[15] *See Dandamudi*, 686 F.3d at 74–75.

[16] *See id.*

[17] *See infra* notes 20–35 and accompanying text.

[18] *See infra* notes 36–72 and accompanying text.

[19] *See infra* notes 73–88 and accompanying text.

[20] Brief for Appellant at 5–6, *Dandamudi*, 686 F.3d 66 (No. 10-4397-cv); *see* N.Y. Educ. Law § 6805 (McKinney 2010).

[21] *See* N.Y. Educ. Law § 6805(1)(6); Brief for Appellant, *supra* note 20, at 5–6. New York changed its education law in June 1982 as a response to the U.S. Supreme Court's holdings in the *Graham* line of cases, which held that laws targeting LPR aliens are entitled to strict scrutiny review. *See Graham*, 403 U.S. at 372; Adusumelli v. Steiner, 740 F. Supp. 2d 582, 597 n.11 (S.D.N.Y. 2010), *aff'd sub nom.* Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012). The same month that New York changed its law, Justice William Rehnquist suggested in his dissent in *Toll v. Moreno* that laws that target nonimmigrant aliens should not be subject to heightened scrutiny. *See* 458 U.S. 1, 44–45 (1982) (Rehnquist, J., dissenting).

postponed the implementation of the citizenship/LPR requirement until 2006 and allowed nonimmigrant aliens to continue acquiring licenses until that time.[22] When the citizenship/LPR requirement went into effect in 2006, many nonimmigrant aliens living in New York found their employment, and subsequently their visa statuses, in jeopardy.[23] Specifically, nonimmigrant aliens who had obtained licenses pursuant to the waiver provision could no longer renew their licenses and continue to work as licensed pharmacists.[24]

In 2009, in *Adusumelli v. Steiner*, twenty-six of these nonimmigrant pharmacists challenged the constitutionality of New York Education Law section 6805(1)(6) in the U.S. District Court for the Southern District of New York.[25] The district court ruled for the plaintiffs and struck down the law.[26] New York appealed this decision to the Second Circuit in *Dandamudi*.[27]

In *Dandamudi*, the plaintiff pharmasists again argued that New York Education Law section 6805(1)(6) violated the Equal Protection Clause of the Fourteenth Amendment.[28] They asserted that the law targeted a suspect class—nonimmigrant aliens—and therefore warranted

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[22] *Dandamudi*, 686 F.3d at 71 n.5; Brief forAppellant, *supra* note 20, at 6–7. The New York Senate intended the statutory waiver to provide nonimmigrant aliens engaged in the process of changing their statuses to LPR with the opportunity to continue working as pharmacists. *See* S. 7405-B, 2005 Leg., 229th Sess. (N.Y. 2006). In justifying the waiver, the New York Senate also expressed concerns that there was a shortage of pharmacists in New York. *See id.*

[23] *See Dandamudi*, 686 F.3d at 69 (calling New York Education Law section 6805 "a state regulatory scheme that seeks to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work").

[24] *Adusumelli*, 740 F. Supp. 2d at 586.

[25] *Id.* at 585–87. All but two of the plaintiffs had lived in the United States for more than six years. *Id.* at 586–87. Twenty-two plaintiffs had applied for green cards, thus expressing their intent to immigrate. *Id.* at 587.

[26] *Id.* at 587. The court applied "heightened scrutiny" to strike down the law, reasoning that the State failed to prove that its discriminatory means were substantially related to its governmental objectives. *See id.* at 598. Concluding that the law triggered a higher form of scrutiny than rational basis review, however, the court declined to articulate whether intermediate scrutiny or strict scrutiny applied. *See id.* Instead, the court stated that the choice between the two heightened levels of scrutiny was irrelevant because the law would not survive scrutiny under either standard. *Id.*

[27] 686 F.3d at 70.

[28] *Id.* The plaintiffs also contended that the law was preempted by federal immigration law and violated nonimmigrants' rights to interstate travel. *See* Brief for Plaintiff-Appellee Alanna Farrell at 11, *Dandamudi*, 686 F.3d 66 (No. 10-4397-cv) [hereinafter Farrell Brief]; Brief for Plaintiffs-Appellees at 7, 12, 25, *Dandamudi*, 686 F.3d 66 (No. 10-4397-cv). This Comment does not discuss these issues in depth. *See infra* notes 29–88 and accompanying text.

strict scrutiny review.[29] The plaintiffs further contended that, under strict scrutiny, the court should strike down the law because it was not narrowly tailored to meet a compelling state interest.[30] Conversely, the State cited case law from the Fifth and Sixth Circuits, and argued that nonimmigrant aliens are not a suspect class.[31] Accordingly, the State urged the court to apply rational basis review and hold the law constitutional because it was rationally related to a legitimate government purpose.[32]

On July 10, 2012, the Second Circuit affirmed the district court's judgment and struck down New York Education Law section 6805(1)(6).[33] In its reasoning, the Second Circuit held that nonimmigrant aliens are a suspect class and that state legislation that unfairly targets nonimmigrant aliens is subject to strict scrutiny review.[34] In doing so, the *Dandamudi* court split significantly from the Fifth and Sixth Circuits that apply rational basis review to laws targeting nonimmigrant aliens.[35]

II. Splitting the Circuits: Classifying Nonimmigrant Aliens Under the Equal Protection Clause

The split between the circuits concerning how to treat legislation targeting nonimmigrant aliens arises from differing interpretations of U.S. Supreme Court precedent.[36] The U.S. Courts of Appeals for the Second, Fifth, and Sixth Circuits all acknowledge the bedrock of the Supreme Court's jurisprudence for applying the Equal Protection Clause to aliens: "aliens constitute a discrete and insular minority" for

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[29] *See* Farrell Brief, *supra* note 28, at 13, 15, 27–30; Brief for Plaintiffs-Appellees, *supra* note 28, at 33–34.

[30] *See* Farrell Brief, *supra* note 28, at 39–45. The plaintiffs also argued, in the alternative, that the law could have been struck down under the more deferential standard of rational basis review. *See id.* at 44.

[31] *See Dandamudi*, 686 F.3d at 72; Brief for Appellant, *supra* note 20, at 15–16.

[32] *See* Brief for Appellant, *supra* note 20, at 30. The State argued that the law satisfied rational basis review because it protected the health, safety, and welfare of New York's citizens by eliminating the risk of nonimmigrant alien pharmacists fleeing the country when sued for malpractice. *See id.* at 31–33.

[33] *See Dandamudi*, 686 F.3d at 79.

[34] *See id.* at 78–79.

[35] *Compare id.* at 74 (holding that nonimmigrant aliens are a suspect class, and that laws targeting them should be given strict scrutiny review), *with LULAC*, 500 F.3d at 533 (holding that nonimmigrant aliens are not a suspect class, and that laws targeting them should be subject to rational basis review), *and LeClerc*, 419 F.3d at 420 (same).

[36] *See infra* notes 37–40 and accompanying text.

whom strict scrutiny is appropriate.[37] The circuits disagree, however, on the question of who exactly constitutes an "alien" under the Supreme Court's standard.[38] The Fifth and Sixth Circuits interpreted the Supreme Court's statement as narrowly referring to only LPR aliens.[39] The Second Circuit, by contrast, interpreted the Supreme Court's statement to broadly apply to all legal aliens, both LPR and nonimmigrant.[40]

These two competing interpretations of precedent are crucial because they determine the scope of aliens' suspect class protection.[41] Section A of this Part examines the Fifth and Sixth Circuits' narrow interpretation.[42] Then, Section B examines the Second Circuit's broad interpretation.[43] Both Sections address the reasoning underlying the circuits' approaches, as well as the ramifications of their interpretations.[44]

A. *The Fifth and Sixth Circuits' Approach: A Narrow Alien Suspect Class*

In 2005, in *LeClerc v. Webb*, the Fifth Circuit explained why a narrow interpretation of the Court's suspect class status for aliens is appropriate.[45] The *LeClerc* court reasoned that the Supreme Court had two factors in mind when it deemed aliens "a discrete and insular minority": (1) lack of political clout and (2) similarity to citizens.[46] The Fifth Cir-

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[37] Graham v. Richardson, 403 U.S. 365, 371–72 (1971); *see* Dandamudi v. Tisch, 686 F.3d 66, 72 (2d Cir. 2012); League of United Latin Am. Citizens v. Bredesen (LULAC), 500 F.3d 523, 533 (6th Cir. 2007); LeClerc v. Webb, 419 F.3d 405, 417 (5th Cir. 2005).

[38] *Compare Dandamudi*, 686 F.3d at 77 (holding that legal aliens constitute a "discrete and insular" minority because of their impotence in the political process and the long history of discrimination against them), *with LULAC*, 500 F.3d at 533 (holding that only LPR aliens constitute a discrete and insular minority because of their similarity to citizens, but their inability to participate in the political process), *and LeClerc*, 419 F.3d at 417–18 (reasoning that the Court classified LPR aliens as "discrete and insular" because of (1) their inability to exert political power in their own interest despite their status as virtual citizens, and (2) the similarity of LPR aliens to citizens).

[39] *See LULAC*, 500 F.3d at 533; *LeClerc*, 419 F.3d at 419.

[40] *See Dandamudi*, 686 F.3d at 77.

[41] *See* Wall, *supra* note 9, at 776–78.

[42] *See infra* notes 45–60 and accompanying text.

[43] *See infra* notes 61–72 and accompanying text.

[44] *See infra* notes 45–72 and accompanying text.

[45] *See* 419 F.3d at 417.

[46] *See id.* The *LeClerc* court reasoned that the Supreme Court characterized aliens as a discrete and insular minority to reconcile the breadth of rights and responsibilities that aliens enjoy with their lack of political capacity. *See id.* To support its interpretation, the court relied on observations made by the Supreme Court in the 1973 case, *In re Griffiths*, concerning the similarities between resident aliens and citizens. *See id.* (citing *In re* Griffiths, 413 U.S. 717, 722 (1973)). In *In re Griffiths*, the Court applied strict scrutiny review to a state law restricting employment opportunities for aliens. *See In re Griffiths*, 413 U.S. at

cuit explained that because these factors are inherent to LPR aliens, but not to nonimmigrant aliens, only LPR aliens should be afforded suspect class status.[47]

Specifically, the Fifth Circuit determined that LPRs meet both factors of "a discrete and insular minority" because they are "virtual citizens"; conversely, nonimmigrants do not because they are not "legally entrenched" in society.[48] The court concluded that LPRs are "virtual citizens," because despite having permanent status and a broad degree of rights and privileges like citizens, they lack the ability to vote.[49] The court determined that LPRs' characteristics as "virtual citizens" make them "a prime example of a 'discrete and insular minority'" warranting strict scrutiny protection.[50] In contrast, the court concluded that nonimmigrant aliens are not "legally entrenched" enough in American society to be a discrete and insular minority.[51] The court reasoned that nonimmigrant aliens have only a temporary connection to the United States and are generally not afforded as many privileges and rights as citizens or LPRs.[52] Thus, the court held that nonimmigrants are not sufficiently similar to citizens to entitle them to suspect class status.[53]

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722. The *In re Griffiths* Court observed that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society," and concluded that "[i]t is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." *Id.*

[47] *See LeClerc*, 419 F.3d at 417. To bolster its rationale, the court noted that the Supreme Court has applied strict scrutiny only to cases concerning LPR plaintiffs. *See id.* at 415, 419.

[48] *Id.* at 417.

[49] *Id.*

[50] *Id.* (reasoning that this characterization of a discrete and insular minority "reconciles the breadth of rights and responsibilities [LPRs] enjoy with their lack of political capacity").

[51] *Id.* Additionally, the court reasoned that the numerous variations among nonimmigrant aliens' admission statuses would make it inaccurate to describe nonimmigrant aliens as a single discrete and insular class. *See id.*

[52] *See id.* at 417–18. Specifically, the court noted that nonimmigrant aliens are admitted to the United States only for the duration of their visa, may not serve in the U.S. military, are subject to employment restrictions, incur differential tax treatment, may be denied federal welfare benefits, and must stipulate that they have no intention of abandoning their native citizenship. *See id.*

[53] *See LeClerc*, 419 F.3d at 418–19. Furthermore, the *LeClerc* court expressed hesitancy to apply strict scrutiny analysis to a group to which the Supreme Court itself has never afforded strict scrutiny. *See id.* The court noted that although the Supreme Court had an opportunity to apply strict scrutiny review to a law that targeted nonimmigrant aliens in *Toll v. Moreno* in 1982, it "shied away" from applying an Equal Protection Clause analysis. *Id.* at 416, 419; *see* Toll v. Moreno, 458 U.S. 1, 11 n.16, 16–17 (1982). In *Toll*, the Supreme Court declared unconstitutional the University of Maryland's policy of denying nonimmigrant students domiciled in Maryland the status of in-state students for purposes of tuition. *See*

Following this analysis, the *LeClerc* court applied rational basis review and upheld a Louisiana law that forbid nonimmigrant aliens from taking the state bar exam.[54]

In 2007, two years after the *LeClerc* decision, the U.S. Court of Appeals for the Sixth Circuit in *League of Latin American Citizens v. Bredesen* (*LULAC*) adopted the *LeClerc* court's interpretation of Supreme Court precedent.[55] In *LULAC*, the Sixth Circuit applied rational basis review and upheld a Tennessee law that forbid nonimmigrant aliens from gaining state-issued driver's licenses.[56] The *LULAC* court relied extensively on the *LeClerc* court's reasoning in its decision.[57] As *LULAC* demonstrates, courts that follow the Fifth Circuit's holding that nonimmigrant aliens are not a suspect class would apply rational basis review to analyze state laws targeting such individuals.[58] Thus, those courts would uphold state laws that target nonimmigrant aliens as long as they are rationally related to a legitimate government purpose.[59] Because rational basis review is a comparatively easy standard to meet, its use would result in more state laws being upheld.[60]

B. *The Second Circuit's Approach: Reaffirming a Broad Alien Suspect Class*

In *Dandamudi*, the Second Circuit rejected the Fifth and Sixth Circuits' narrow interpretation of Supreme Court precedent.[61] The Second Circuit reasoned that the Fifth and Sixth Circuits' view that similarity to citizenship is a requirement for suspect class status was based on an erroneous reading of precedent.[62] In contrast to the Fifth and Sixth Cir-

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Toll, 458 U.S. at 17. The Court did so, however, because the policy was federally preempted; it did not address the policy's constitutionality under the Equal Protection Clause. *See id.* at 11–12 & nn.16–17.

[54] *See LeClerc*, 419 F.3d at 421–22 (reasoning that Louisiana's law barring nonimmigrants from becoming attorneys was rationally related to a public purpose because of an increased risk that nonimmigrant attorneys would leave the country to the detriment of their clients).

[55] *See LULAC*, 500 F.3d at 533.

[56] *See id.* at 536–37 (holding that Tennessee's law denying driver's licenses to nonimmigrant aliens was rationally related to serving the state's policy of not vouching for the identity of aliens not granted LPR status).

[57] *See id.* at 533.

[58] *See id.*

[59] *See id.* at 421; Kristin L. Beckman, Comment, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 Loy. L. Rev. 139, 143 (2005) (noting that the rational basis test is "fairly easy to pass").

[60] *See* Beckman, *supra* note 59, at 143.

[61] *See Dandamudi*, 686 F.3d at 75–76.

[62] *See id.* at 75. The Second Circuit criticized the Fifth and Sixth Circuits for resting much of their analysis on the closing words of *In re Griffiths*, a case in which the Supreme

cuits, the Second Circuit in *Dandamudi* concluded that the Court should be taken "at its word" when it broadly characterized aliens as a discrete and insular minority.[63] Supporting its broad interpretation, the Second Circuit reasoned that it was the common characteristics of *all* legal aliens—the lack of political clout and Fourteenth Amendment rights, and a long history of being victimized by invidious discrimination—that led the Court to extend *all* legal aliens suspect class status.[64] Moreover, the Second Circuit stressed that nonimmigrant aliens' status made them even more powerless and vulnerable to state predations than LPRs, thus making them even more of a discrete and insular minority.[65]

In addition to holding that nonimmigrant aliens should be treated as a suspect class by virtue of a broad interpretation of Supreme Court precedent, the *Dandamudi* court further reasoned, in dicta, that nonimmigrant aliens would be entitled to suspect class status even under the Fifth and Sixth Circuits' test.[66] The court noted that nonimmigrants pay taxes, may indicate an intent to become LPRs, and some may remain in the United States to work professionally for a period exceeding six years.[67] Thus, under Fifth and Sixth Circuits' test—which hinges on the premise that only aliens sufficiently similar to citizens be afforded suspect class status—the court reasoned that nonimmigrants should be afforded suspect class status.[68]

Under its broad interpretation of Supreme Court precedent, the *Dandamudi* court applied strict scrutiny and struck down a New York law that forbid nonimmigrants from acquiring pharmacy licenses.[69] Courts following the Second Circuit's holding that nonimmigrants are entitled to suspect class status would apply strict scrutiny to state laws targeting nonimmigrant aliens.[70] Thus, courts using this interpretation will strike down state laws that target nonimmigrant aliens unless the state shows that the law is narrowly tailored to achieve a compelling

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Court reasoned that the similarities between aliens and citizens supported aliens' suspect class status. *Id.*; *see In re Griffiths*, 413 U.S. at 722. Specifically, the Second Circuit concluded that aliens' similarities to citizens were not intended to be a litmus test for suspect class status. *See Dandamudi*, 686 F.3d at 75.

[63] *Dandamudi*, 686 F.3d at 78.

[64] *See id.* at 76.

[65] *See id.* at 77.

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See Dandamudi*, 686 F.3d at 77.

[70] *See id.* at 76–77; Beckman, *supra* note 59, at 145.

purpose.[71] Because this is a very difficult standard to prove, more laws would be struck down under the Second Circuit's interpretation.[72]

III. Dandamudi: An Affirmation of Nonimmigrant Aliens' Rights

The Second Circuit's approach in *Dandamudi* is preferable to the Fifth and Sixth Circuits' approach for three reasons.[73] First, the *Dandamudi* decision more faithfully comports with Supreme Court precedent.[74] Unlike the Fifth and Sixth Circuits, the Supreme Court has never held that nonimmigrant aliens should be outside suspect class status.[75] In fact, the Court's repeated affirmation that "aliens constitute a discrete and insular minority" that warrants suspect class status suggests that nonimmigrant aliens, a subset of aliens, are entitled to suspect class status.[76] Thus, the Second Circuit's placement of nonimmigrant aliens within the broader alien suspect class is consistent with Supreme Court precedent.[77]

Second, the Second Circuit's ruling stays faithful to the objectives of the Equal Protection Clause.[78] The Equal Protection Clause prohibits any state from denying any person in its jurisdiction "the equal protection of the laws."[79] The Supreme Court has stated that this clause was

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[71] *See* Chemerinsky, *supra* note 8, at 554; Beckman, *supra* note 59, at 145.

[72] *See* Chemerinsky, *supra* note 8, at 554; Beckman, *supra* note 59, at 145.

[73] *See infra* notes 74–88 and accompanying text.

[74] *See* Dandamudi v. Tisch, 686 F.3d 66, 76–77 (2d Cir. 2012); Wall, *supra* note 9, at 774–76 (arguing that classifying nonimmigrants as a suspect class comports with Supreme Court precedent).

[75] *See Dandamudi*, 686 F.3d at 77; League of United Latin Am. Citizens v. Bredesen (LULAC), 500 F.3d 523, 541–42 (6th Cir. 2007) (Gilman, J., dissenting); LeClerc v. Webb, 419 F.3d 405, 428–29 (5th Cir. 2005).

[76] *See Dandamudi*, 686 F.3d at 78; Wall, *supra* note 9, at 775 (noting that the Court has made this general pronouncement despite its familiarity with distinction between LPR and nonimmigrant aliens); *see also LULAC*, 500 F.3d at 542–43 (Gilman, J., dissenting) (reasoning that the majority's holding ignored the Supreme Court's general rule that aliens constitute a suspect class, thus creating a more specific rule for nonimmigrant aliens where no rule otherwise existed).

[77] *See Dandamudi*, 686 F.3d at 78–79. The *Dandamudi* court refused to create an exception to the Supreme Court's general rule applying strict scrutiny review to state legislation targeting aliens. *See id.* Additionally, the *Dandamudi* court's reasoning that suspect class status was extended by the Supreme Court to all legal aliens because of their political powerlessness and the history of discrimination against them has found wide-ranging support among academics. *See, e.g.*, Chemerinsky, *supra* note 8, at 791; Boyd, *supra* note 8, at 343; Wall, *supra* note 9, at 722.

[78] *See Dandamudi*, 686 F.3d at 77; Boyd, *supra* note 8, at 328, 339 (arguing that there is evidence that the Fourteenth Amendment's drafters intended it to protect aliens and to eradicate anti-alien legislation); Wall, *supra* note 9, at 778.

[79] U.S. Const. amend. XIV, § 1.

intended to achieve "nothing less than the abolition of all caste-based and invidious class-based legislation."[80] For years, the Court has classified aliens as a suspect class in order to abide by this principle and protect aliens against discriminatory state legislation.[81] Therefore, by classifying nonimmigrant aliens as a suspect class, the Second Circuit's holding in *Dandamudi* affirms this principle of protecting society's most vulnerable members.[82]

Third, the *Dandamudi* decision better allows nonimmigrants to contribute to the U.S. economy.[83] Removing nonimmigrant aliens from suspect class status, as the Fifth and Sixth Circuits have done, invites states to pass discriminatory employment restrictions that impede not only the ability of nonimmigrants to live in the United States, but also the ability of U.S. citizens to benefit from nonimmigrant services.[84] Nonimmigrant aliens contribute to the U.S. economy in a number of ways.[85] Most prominently, they offer skilled labor to employers, skilled

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[80] Plyler v. Doe, 457 U.S. 202, 213 (1982); *see* Boyd, *supra* note 8, at 328. Senator Jacob Howard of Michigan, one of the Fourteenth Amendment's sponsors, stated that the amendment was designed to "*abolish*[] all class legislation in the States" by extending equal protection "*not merely* [to] *a citizen* of the United States, but [to] *any person*, whoever he may be" CONG. GLOBE, 39TH CONG., 1ST SESS. 2766 (1866) (emphasis added).

[81] *See Dandamudi*, 686 F.3d at 78–79; *LULAC*, 500 F.3d at 540–41 (Gilman, J., dissenting); Wall, *supra* note 9, at 765; *see, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Examining Bd. v. Flores de Otero, 426 U.S. 572, 601–05 (1976); Graham v. Richardson, 403 U.S. 365, 378 (1971) (applying strict scrutiny to a discriminatory state statute and stating that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under nondiscriminatory laws'"(quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948))).

[82] *See Dandamudi*, 686 F.3d at 77; Boyd, *supra* note 8, at 338, 339, 341–43 (noting that alienage is properly regarded as a suspect class because alienage legislation is frequently racially motivated, reflective of xenophobia, and perpetuated without the political input of aliens, who lack the power to vote); Wall, *supra* note 9, at 778.

[83] *See Dandamudi*, 686 F.3d at 69, 78; Storch, *supra* note 2, at 16 (noting the policy benefits that the employment of nonimmigrants brings to the United States).

[84] *See LULAC*, 500 F.3d at 542 (Gilman, J., dissenting); *LeClerc*, 419 F.3d at 428 (Stewart, J., dissenting); Storch, *supra* note 2, at 16 (noting that restrictive state licensure laws deny opportunities to foreign workers who can benefit the U.S. workforce); *Constitutional Law—Equal Protection—Fifth Circuit Holds That Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*—LeClerc v. Webb, *419 F.3d 405 (5th Cir. 2005)*, 119 HARV. L. REV. 669, 676 (2005) (arguing that upholding *LeClerc*'s restrictive interpretation could have far-reaching consequences); Wall, *supra* note 9, at 778 (arguing that excluding nonimmigrants from the protections of suspect class status could perpetuate new waves of social and political discrimination).

[85] *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., REPORT NO. RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS 1–3 (2011); Rachel Feltman, *Undocumented Workers in the United States: Legal, Political, and Social Effects*, 7 RICH. J. GLOBAL L. & BUS. 65, 85 (2008); Anna C. Tavis, Note, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1630 (2010).

expertise to clients, and tax payments to the U.S. government.[86] Therefore, from a policy perspective, the Second Circuit's affirmation that nonimmigrants are a suspect class inhibits states from discriminating against, and hindering, nonimmigrants' ability to contribute to society.[87] For all of these reasons, other circuits should follow the Second Circuit's lead and hold that nonimmigrant aliens constitute a suspect class.[88]

Conclusion

In *Dandamudi*, the Second Circuit split with the Fifth and Sixth Circuits by holding that nonimmigrant aliens constitute a discrete and insular minority deserving suspect class protection. The Second Circuit's decision in *Dandamudi* more faithfully comports with Supreme Court precedent. Although the Supreme Court has not ruled explicitly on the status of nonimmigrant aliens, it has repeatedly declared that legal aliens warrant suspect class status because "aliens constitute a discrete and insular minority" due to their political impotence and their long history of facing discrimination in the United States. Because nonimmigrant aliens are a subset of legal aliens that face these same obstacles, the Second Circuit's decision in *Dandamudi* reaffirms Supreme Court precedent. Additionally, the Second Circuit's approach in *Dandamudi* advances both the policy goals of the Fourteenth Amendment and the economic goals of the nation by reigning in the power of states to discriminate against a susceptible class in American society. Consequently, other circuits should follow the Second Circuit's lead in holding that nonimmigrant aliens constitute a suspect class.

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[86] *See* Feltman, *supra* note 85, at 85.

[87] *See Dandamudi*, 686 F.3d at 69, 79; Wasem, *supra* note 85, at 2–3; Wall, *supra* note 9, at 762.

[88] *See supra* notes 73–87 and accompanying text.