

10-4397-cv
PAIDI v. MILLS

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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8 August Term, 2011
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10 (Argued: January 9, 2012 Decided: July 10, 2012)
11

12 Docket No. 10-4397-cv
13

14
15 VENKAT RAO DANDAMUDI, NAVEEN PARUPALLI, SUNITHA TALLURI,
16 NAREEN ADUSUMELLI, JITENDRA KUMAR PATEL, LAVANYA AKULA,
17 HAREEN KARRA, HOLLY ELIZABETH BENOIT, YECHAM KUMARASWAMY,
18 GRACE CHAN, HERNG YIH LAI, JITENDRA KESHAVLAL PATEL,
19 SUMIRKUMAR S. TALATI, SIREESH K. THUMMALAPALLY, KAICHUAN
20 YEH,

21
22 *Plaintiffs-Appellees,*
23

24 VISHNU AKULA, BALAJI DUDDUKURU, MURALI KOTHURI,
25 ALANNA FARRELL,
26

27 *Consolidated Plaintiffs-Appellees,*
28

29 LAKSHMAN RAO PAIDI, NITASHA KHURANA, YOUNG MEE LEE, XUAN
30 UYEN NGHIEM, SIRISHA PARUPALLI, YVONNE MAY PERRY, HARINATH
31 TALAMPALLY, RAVI KUMAR CHENNA, GETU NAGASA, PHUONG GIANG,
32 NGOC BUI, SEONG MI SEO KIM, KRISHNA KISHORE INAPURI,
33

34 *Plaintiffs,*
35

36 -v.-
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38 MERRYL H. TISCH, Chancellor of the New York State Board of
39 Regents, DAVID STEINER, Commissioner of Education,
40

41 *Defendants-Appellants,*
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2 RICHARD P. MILLS, Commissioner of Education, NEW YORK STATE
3 DEPARTMENT OF EDUCATION, ROBERT M. BENNETT, Chancellor of
4 the New York State Board of Regents, NEW YORK STATE BOARD OF
5 REGENTS,
6

7 *Defendants.*
8

9
10 Before:

11 WESLEY, HALL, *Circuit Judges*, UNDERHILL, *District Judge*.^{*}
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13 Appeal from an order of the United States District
14 Court for the Southern District of New York (Holwell, J.),
15 entered on September 30, 2010, granting plaintiffs' motions
16 for summary judgment and enjoining defendants from applying
17 or enforcing New York Education Law § 6805(1)(6) against
18 plaintiffs.
19

20 AFFIRMED.
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23
24 ANDREW B. AYERS, Assistant Solicitor General
25 (Barbara D. Underwood, Solicitor General,
26 Denise A. Hartman, Assistant Solicitor
27 General, *on the brief*), for Eric T.
28 Schneiderman, Attorney General of the State of
29 New York, Albany, NY, for *Defendants-*
30 *Appellants*.
31

32 MARGARET A. CATILLAZ (Jeffrey A. Wadsworth, *on the*
33 *brief*), Harter Secrest & Emery LLP, Rochester,
34 NY, for *Plaintiff-Appellee Alanna Farrell*.
35

36 KRISHNAN CHITTUR, Chittur & Associates, P.C., New
37 York, NY, for *remaining Plaintiffs-Appellees*.
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40

*Judge Stefan R. Underhill, of the United States
District Court for the District of Connecticut, sitting by
designation.

1 WESLEY, *Circuit Judge*:

2 This case involves a state regulatory scheme that seeks
3 to prohibit some legally admitted aliens from doing the very
4 thing the federal government indicated they could do when
5 they came to the United States—work. Plaintiffs-Appellees
6 are a group of nonimmigrant aliens who have been authorized
7 by the federal government to reside and work as pharmacists
8 in the United States. All currently reside in New York and
9 are licensed pharmacists there. Plaintiffs obtained
10 pharmacist’s licenses from New York pursuant to a statutory
11 waiver to New York Education Law § 6805(1)(6)’s requirement
12 that only U.S. Citizens or Legal Permanent Residents
13 (“LPRs”) are eligible to obtain a pharmacist’s license in
14 New York. The waiver provision was set to expire in 2009.
15 In response, plaintiffs sued various state officials¹
16 responsible for enforcing the law in the United States
17 District Court for the Southern District of New York.

18

¹ Although we recognize that the State of New York is not explicitly named as a party to this case, the arguments made by appellants here are clearly made on behalf of the state and the statute at issue was defended on appeal by the Solicitor General’s Office of the State of New York. We think it appropriate, therefore, to refer to the parties bringing the appeal collectively as “the state” or “New York.”

1 Plaintiffs allege that § 6805(1)(6) is unconstitutional
2 because it violates the Equal Protection and Supremacy
3 Clauses of the United States Constitution. In a thorough
4 and well-reasoned opinion, the district court granted
5 plaintiffs' motion for summary judgment and permanently
6 enjoined defendants from enforcing the law. See *Adusumelli*
7 *v. Steiner*, 740 F. Supp. 2d 582 (S.D.N.Y. 2010).

8 On appeal, New York asks us to abrogate the Supreme
9 Court's general rule that state statutes that discriminate
10 based on alienage are subject to strict scrutiny review.
11 The state argues that the statute at issue here, which
12 discriminates against nonimmigrant aliens should be reviewed
13 only to determine if there is a rational basis that supports
14 it. In our view, however, a state statute that
15 discriminates against aliens who have been lawfully admitted
16 to reside and work in the United States should be viewed in
17 the same light under the Equal Protection Clause as one
18 which discriminates against aliens who enjoy the right to
19 reside here permanently. Applying strict scrutiny,
20 therefore, and finding, as the state concedes, that there
21 are no compelling reasons for the statute's discrimination
22 based on alienage, we hold the New York statute to be

1 unconstitutional. We affirm the district court's grant of
2 summary judgment for plaintiffs.

3 I. BACKGROUND

4 Most of the plaintiffs have H-1B temporary worker
5 visas. Under the Immigration and Nationality Act ("INA"),
6 H-1B visas may be given to aliens who come "temporarily to
7 the United States to perform services . . . in a specialty
8 occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). The

9 remaining plaintiffs have what is known as "TN" status.

10 "TN" status is a temporary worker status created by federal

11 law pursuant to the North American Free Trade Agreement

12 ("NAFTA"). NAFTA permits "a citizen of Canada or Mexico who

13 seeks temporary entry as a business person to engage in

14 business activities at a professional level" to enter the

15 United States and work here pursuant to the requirements of

16 the TN status. 8 C.F.R. § 214.6(a).

17 These provisions technically grant plaintiffs admission

18 to the United States for a finite period. Because

19 plaintiffs' status grants them the right to reside and work

20 in the United States only temporarily, plaintiffs are part

21 of the group of aliens the immigration law refers to as

22 nonimmigrants. 8 U.S.C. § 1101(a)(15). And, although

1 plaintiffs had to indicate that they did not intend to stay
2 here permanently to obtain their visas, the truth is that
3 many (if not all) actually harbor a hope (a dual intention)
4 that some day they will acquire the right to stay here
5 permanently. The BIA and the State Department both
6 recognize this doctrine of dual intent, which allows aliens
7 to express an intention to remain in the United States
8 temporarily (to satisfy the requirements of their temporary
9 visas) while also intending to remain permanently, which
10 allows them to apply for an adjustment of status. *Matter of*
11 *Hosseinpour*, 15 I. & N. Dec. 191 (BIA 1975); 70 No. 42
12 Interpreter Releases 1444, 1456-58 (Nov. 1, 1993).

13 For purposes of both the H1-B and TN visas, the initial
14 period during which the visa-holder can legally remain and
15 work in the United States is three-years. 8 C.F.R.
16 §§ 214.2(h)(9)(iii)(A)(1) (H1-B visa), 214.6(e) (TN status).
17 Each visa status also permits a three-year extension of the
18 initial period. *Id.* at §§ 214.2(h)(15)(ii)(B), 214.6(h).
19 But an alien with an H1-B visa is limited to one such
20 extension, essentially restricting H1-B status to a six-year
21 period.² *Id.* at § 214.2(h)(15)(ii)(B)(1). In practice,

²Although not applicable in the instant case, an H-1B visa holder who is involved in a "DOD research and development or co-

1 however, federal law permits many aliens with TN or H1-B
2 status to maintain their temporary worker authorization for
3 a period greater than six years. All plaintiffs in this
4 case, for example, have been *legally authorized* to reside
5 and work in the United States for more than six years. And,
6 six plaintiffs have been authorized to reside and work in
7 the United States for more than ten years.

8 Several factors contribute to the difference between
9 the technical limitations on H1-B and TN status and the
10 length of time these aliens remain authorized to reside and
11 work in the United States. Many aliens who receive
12 temporary worker authorization are former students who
13 entered the United States with a student visa and who have
14 made their home in the United States for many years before
15 entering the professional world.³ Many nonimmigrant aliens
16 are also often eligible to apply for LPR status. This
17 process is typically quite slow, and the federal government
18 therefore regularly issues Employment Authorization

production project" may maintain his H-1B visa status for a total
of 10 years. 8 C.F.R. § 214.2(h)(15)(ii)(B)(2).

³ Initially entering the United States on a student visa
extends the amount of time a nonimmigrant alien can remain in the
United States because the time limitations for H1-B status and TN
status are not impacted by time previously spent residing in the
United States pursuant to a student visa.

1 Documents ("EADs"), which extend the time period during
2 which these aliens are eligible to work in the United States
3 while they await their green cards. 8 C.F.R.
4 § 274a.12(c)(9).

5 Twenty-two plaintiffs have applied for Permanent
6 Resident status.⁴ Sixteen have received EADs because they
7 have exhausted the six-year maximum authorization provided
8 by H1-B status.

9 Based on their visa status, all plaintiffs currently
10 reside in the United States legally and have permission to
11 work here. All are pharmacists who were granted a
12 pharmacist's license (albeit a "limited" one) pursuant to a
13 previous version of the New York statute at issue here.⁵
14 Section 6805(1)(6), in its current incarnation, provides

⁴During the pendency of this appeal, plaintiff-appellee Gutu Nagasa was granted a green card, making the appeal moot as to him. And, in a previous case, we dismissed an appeal raising identical issues with regard to New York's analogous law restricting professional veterinarian licenses to citizens and LPRs because the plaintiff-appellee was granted permanent resident status while the appeal was pending. See *Kirk v. N.Y. State Dep't of Educ.*, 644 F.3d 134, 136 (2d Cir. 2011).

⁵A previous version of the statute included a three-year waiver of the citizenship/LPR requirement for otherwise qualified pharmacists. It also permitted a one-year extension of that waiver. The waiver provision expired in October 2006. Pursuant to the expiration requirement, plaintiffs' pharmacist's licenses were set to expire in 2009 and were not eligible for renewal. Plaintiffs' licenses were renewed pending the outcome of this litigation.

1 that to be eligible for a pharmacist's license in New York,
2 an applicant must be either a U.S. Citizen or a LPR.⁶ The
3 statute bars all other aliens, including those with work-
4 authorization who legally reside in the United States, from
5 becoming licensed pharmacists.

6 II. DISCUSSION

7 New York argues that neither the Equal Protection
8 Clause nor the Supremacy Clause prevents a state from
9 prohibiting a group of aliens who are legally authorized to
10 reside and work in the United States from working in certain
11 professions. The state relies principally on two decisions
12 from our sister circuits. See *League of United Latin Am.*
13 *Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 531-34, 536-37
14 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th
15 Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (2006).⁷ The
16 Fifth and Sixth Circuits viewed nonimmigrant aliens as

⁶Similar provisions of the New York Education Law preclude non-LPR aliens from other professions. See N.Y. Educ. Law §§ 6524(6) (physicians), 6554(6) (chiropractors), 6604(6) (dentists), 6609(6) (dental hygienists), 6704(6) (veterinarians), 6711(6) (veterinary technicians), 6955(1)(6) (midwives), 7206(1)(6) (engineers), 7206-a(1)(6) (land surveyors), 7324(1)(6) (landscape architects), 7504(1)(6) (certified shorthand reporters), 7804(5) (massage therapists).

⁷The plaintiffs in *LeClerc* were aliens with J-1 student visas and H1-B worker visas. 419 F.3d at 410-12.

1 distinct from aliens with LPR status and applied a rational
2 scrutiny test to determine if the state statutes in question
3 ran afoul of the Equal Protection Clause. In both cases,
4 the courts "decline[d] to extend" the protections of LPRs to
5 certain nonimmigrants. *LULAC*, 500 F.3d at 533; *LeClerc*, 419
6 F.3d at 419. We disagree; the Supreme Court has repeatedly
7 affirmed the general principle that alienage is a suspect
8 classification and has only ever created two exceptions to
9 that view. We decline to create a third in a case where the
10 statute discriminates against aliens who have been granted
11 the legal right to reside and work in the United States.
12 Under a strict scrutiny analysis, § 6805(1)(6) of the New
13 York Education Law violates the Equal Protection Clause.

14 *The Equal Protection Clause*

15 The Fourteenth Amendment provides that states may not
16 "deny to any person within its jurisdiction the equal
17 protection of the laws." U.S. Const. amend. XIV, § 1.
18 Under the Fourteenth Amendment, a law that "impermissibly
19 interferes with the exercise of a fundamental right or
20 *operates to the peculiar disadvantage of a suspect class*" is
21 reviewed under the strict scrutiny standard. *Mass. Bd. of*
22 *Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (emphasis added)

1 (footnote omitted); see *Weinstein v. Albright*, 261 F.3d 127,
2 140 (2d Cir. 2001).

3 There is no question that the Fourteenth Amendment
4 applies to all aliens. See, e.g., *Plyler v. Doe*, 457 U.S.
5 202, 215 (1982). Indeed, the Supreme Court has long held
6 that states cannot discriminate on the basis of alienage.
7 "Aliens as a class are a prime example of a discrete and
8 insular minority," the Court reasoned in *Graham v.*
9 *Richardson*, "[and] the power of a state to apply its laws
10 exclusively to its alien inhabitants as a class is confined
11 within narrow limits." 403 U.S. 365, 372 (1971) (internal
12 quotation marks omitted).

13 In *Graham*, the Court struck down two state statutes
14 that prevented immigrants from receiving public assistance.
15 *Id.* at 376. The statutes erected different barriers—a
16 Pennsylvania law barred non-citizens from a welfare program,
17 while an Arizona law required that aliens reside in the
18 state for fifteen years before they could collect money from
19 the state—both achieved the same result. *Id.* at 367-68.
20 Thus, aliens were denied access to a benefit available to
21 citizens. *Graham* held this "two class" system
22 unconstitutional. *Id.* at 371.

1 *Graham* is considered the lodestar of the Court's
2 alienage discrimination doctrine, but the opinion invokes a
3 case decided decades before. In *Takahashi v. Fish and Game*
4 *Commission*, the Supreme Court struck down a California
5 statute that denied fishing licenses to any "person
6 ineligible [for] citizenship." 334 U.S. 410, 413 (1948).
7 The law originally targeted Japanese fishermen, but the
8 state legislature feared that such a clearly discriminatory
9 classification might run afoul of the Equal Protection
10 Clause and amended the statute to prohibit immigrants
11 "ineligible [for] citizenship" from obtaining fishing
12 licenses. *Id.*; see also *id.* at 422-27 (Murphy, J.,
13 concurring). The provision drew a distinction between
14 groups based solely on the members' immigration status
15 without any mention of race or nationality. The Court held
16 that treating groups differently based on the members'
17 alienage was akin to discriminating against a group because
18 of their race or color. "The protection of [the Fourteenth
19 Amendment] has been held to extend to aliens as well as to
20 citizens," the Court reasoned, "[and] *all persons lawfully*
21 *in this country* shall abide . . . on an equality of legal
22 privileges with all citizens." *Id.* at 419-20 (emphasis
23 added).

1 The *Graham* Court saw Pennsylvania and Arizona's
2 restrictions on welfare as exacting the same toll as
3 California's unconstitutional fishing-license regime; the
4 Court thus followed *Takahashi* to hold that the welfare
5 statutes were subject to strict scrutiny. *Graham*, 403 U.S.
6 at 372.

7 In the years after *Graham*, the Court continued to apply
8 strict scrutiny to statutes discriminating on the basis of
9 alienage. It invalidated a New York statute that prohibited
10 immigrants from working in the civil service, *Sugarman v.*
11 *Dougall*, 413 U.S. 634, 642-43 (1973), a Connecticut statute
12 that barred immigrants from sitting for the bar, *In re*
13 *Griffiths*, 413 U.S. 717, 721-22, 729 (1973), a Puerto Rico
14 law that denied licenses to immigrant engineers, *Examining*
15 *Board of Engineers, Architects and Surveyors v. Flores de*
16 *Otero*, 426 U.S. 572, 601-06 (1976), and a New York law that
17 required immigrants to pledge to become citizens before they
18 could receive financial aid, *Nyquist v. Mauclet*, 432 U.S. 1,
19 7, 12 (1977). In each case, the Court began its discussion
20 by reasserting its commitment to the holding in *Graham*: laws
21 that single out aliens for disparate treatment are
22 presumptively unconstitutional absent a showing that the

1 classification was "necessary" to fulfill a constitutionally
2 "permissible" and "substantial" purpose. *In re Griffiths*,
3 413 U.S. at 721-22.⁸

4 The Court has recognized only two exceptions to
5 *Graham's* rule. The first exception allows states to exclude
6 aliens from political and governmental functions as long as
7 the exclusion satisfies a rational basis review. In *Foley*
8 *v. Connelie*, the Court upheld a statute that prohibited
9 aliens from working as police officers. 435 U.S. 291, 295-
10 96. For a democracy to function, the Court reasoned, a
11 state must have the power to "preserve the basic conception
12 of a political community," and states can limit certain
13 "important nonelective executive, legislative, and judicial
14 positions [to] officers who participate directly in the
15 formulation, execution, or review of broad public policy."
16 *Id.* at 296 (internal quotation marks omitted).

17 The second exception crafted by the Court allows states
18 broader latitude to deny opportunities and benefits to
19 undocumented aliens. *See, e.g., Plyler*, 457 U.S. at 219;

⁸ Each of these cases was a facial challenge: Plaintiffs argued that the statutes were unconstitutional on their face because they drew explicit distinctions between citizens and non-citizens, not just because a state had interpreted a statute to deny benefits to a group of aliens.

1 see also *DeCanas v. Bica*, 424 U.S. 351 (1976), superseded by
2 statute on other grounds as stated in *Chamber of Comm. v.*
3 *Whiting*, 131 S. Ct. 1968 (2011). In *Plyler*, the Court
4 declined to apply strict scrutiny to a statute that
5 prohibited undocumented alien children from attending public
6 school. 457 U.S. at 223. The Court acknowledged that
7 *Graham* placed a heavy burden on state statutes targeting
8 lawful aliens, but reasoned that undocumented aliens fell
9 outside of *Graham's* reach because "their presence in this
10 country in violation of federal law is not a 'constitutional
11 irrelevancy.'" *Id.* (citations omitted). The Court held
12 that the plaintiffs' unlawful status eliminated them from
13 the suspect class of aliens generally; nevertheless, the
14 Court applied a *heightened* rational basis standard to the
15 Texas law denying free public education to undocumented
16 alien children and found the law unconstitutional.⁹ *Plyler*,
17 457 U.S. at 230 (holding that the state had to show that the
18 statute furthered "some substantial goal of the state").

19 Thus, statutes that deny opportunities or benefits to
20 aliens are subject to strict scrutiny unless they fall

⁹ In *Plyler*, the Court explained that undocumented aliens are not a suspect class, but noted that it was reluctant to punish undocumented alien children for their parents' decision to break the law. *Id.* at 219-20.

1 within two narrow exceptions. The first allows states to
2 exclude aliens from certain civic roles that directly affect
3 the political process. The second acknowledges that people
4 who reside in the United States without authorization may be
5 treated differently than those who are here legally.

6 The state acknowledges that neither exception applies
7 here. Without an existing basis for distinguishing *Graham's*
8 requirement that such statutes are strictly scrutinized, New
9 York proposes a third exception—the Fourteenth Amendment's
10 strongest protections should apply only to virtual citizens,
11 like LPRs, and not to other lawfully admitted aliens who
12 require a visa to remain in this country. Defendants argue
13 that the Supreme Court's strict scrutiny analysis of
14 classifications based on "alienage" is inapplicable to
15 classifications of nonimmigrant aliens and that only
16 rational basis review of the statute is required.

17 The state reasons that the Supreme Court has never
18 explicitly applied strict scrutiny review to a statute
19 discriminating against nonimmigrant aliens. That is true,
20 but that argument ignores the underlying reasoning of the
21 Court in its prior decisions as well as the fact that the
22 Court has never held that lawfully admitted aliens are

1 outside of *Graham's* protection. Indeed, the Court has never
2 distinguished between classes of *legal* resident aliens.¹⁰
3 The state's argument that suspect class protection extends
4 no further than to LPRs simply has no mooring in the High
5 Court's prior ventures into this area.

6 New York disagrees and urges us to follow the lead of
7 the Fifth and Sixth Circuits, both of which drew a
8 distinction between LPRs and citizens, on the one hand, and
9 other lawfully admitted aliens, on the other. In *LeClerc*,
10 the Fifth Circuit upheld a Louisiana Supreme Court rule that
11 required applicants for admission to the Louisiana State Bar
12 to be citizens or LPRs. 419 F.3d at 422. The majority
13 noted that "[l]ike citizens, [permanent] resident aliens may
14 not be deported, are entitled to reside permanently in the
15 United States, may serve . . . in the military, . . . and
16 pay taxes on the same bases as citizens." *Id.* at 418.

¹⁰ Notably, it was in his dissent in *Toll v. Moreno*, 458 U.S.
1, 44-45 (1982) (Rehnquist, *J.*, dissenting), that Justice
Rehnquist pointed out such a distinction. There he wrote:

In each case in which the Court has tested state
alienage classifications . . . the question has
been the extent to which the States could
permissibly distinguish between citizens and
permanent resident aliens. . . . [T]he need for
strict scrutiny simply does not apply to state
policies that distinguish between permanent
resident aliens and nonimmigrants.

1 In *LULAC*, the Sixth Circuit upheld a Tennessee law that
2 conditioned issuance of a driver's license on proof of
3 United States citizenship or LPR status. 500 F.3d at 533.
4 The Sixth Circuit, like the Fifth, held that nonimmigrant
5 aliens are not a suspect class because, unlike citizens and
6 LPRs, they "are admitted to the United States only for the
7 duration of their authorized status, are not permitted to
8 serve in the U.S. military, are subject to strict employment
9 restrictions, incur differential tax treatment, and may be
10 denied federal welfare benefits." *Id.*; see also *LeClerc*,
11 419 F.3d at 418-19. The state would have us join these
12 courts and narrow *Graham's* holding to reach only those
13 aliens who are indistinguishable from citizens. This
14 argument, however, misconstrues both law and fact.

15 Ultimately, for three reasons, we reject the state's
16 argument that this Court should follow the rationale of the
17 Fifth and Sixth Circuits. First, the Supreme Court's
18 listing in *Graham* of the similarities between citizens and
19 aliens refuted the state's argument that it did have a
20 compelling reason for its law, but this language does not
21 articulate a test for determining when state discrimination
22 against any one subclass of lawful immigrants is subject to

1 strict scrutiny. Second, nonimmigrant aliens are but one
2 subclass of aliens, and the Supreme Court recognizes aliens
3 generally as a discrete and insular minority without
4 significant political clout. Third, even if this Court were
5 to determine that the appropriate level of scrutiny by which
6 to analyze the discrimination should be based on the
7 nonimmigrant aliens' similarity (or proximity) to citizens,
8 we would still apply strict scrutiny in this case because
9 nonimmigrant aliens are sufficiently similar to citizens
10 that discrimination against them in the context presented
11 here must be strictly scrutinized.

12 Despite the fact that the Supreme Court has never
13 cabined its precedent in this area to distinguish between
14 discrimination against LPRs and discrimination against other
15 lawfully present aliens and has never distinguished
16 *Takahashi*, the Fifth and Sixth Circuits justified narrowing
17 *Graham* by resting their analysis on the closing words of
18 *Graham's* discussion of the Equal Protection Clause. In that
19 passage, the Court noted: "Aliens like citizens pay taxes
20 and may be called into the armed forces. Unlike the
21 short-term residents in *Shapiro*, aliens may live within a
22 state for many years, work in the state and contribute to

1 the economic growth of the state." *Graham*, 403 U.S. at 376
2 (internal quotation marks omitted).¹¹

3 Viewing that language from *Graham* as an analytical
4 tool, however, reveals the danger of separating the words of
5 an opinion from the context in which they were employed.
6 *Graham* drew a comparison between LPRs and citizens to refute
7 the states' arguments that there was a compelling interest
8 in the restrictive legislation—the states had limited funds
9 and the benefits in question should go to citizens to the
10 exclusion of LPRs. *Id.* The states contended that they had
11 a legitimate interest in preserving welfare funds for their
12 citizens—individuals who participated in economic activity
13 within the state and thereby generated tax revenue that
14 supported the benefits. The Court was quick to reply that
15 "a State's desire to preserve limited welfare benefits for
16 its own citizens is inadequate to justify [the state's
17 discriminatory laws]." *Id.* at 374. It noted that legal
18 aliens are in many ways indistinguishable from citizens and

¹¹ We see no connection between practicing law in Louisiana or driving a car in Tennessee and military service, restricted job opportunities, or differences in taxation. Neither did Louisiana or Tennessee as neither state statute restricted the privileges in question to those citizens who had served in the military, worked, or paid taxes. The classifications in question focused on a distinct and identifiable minority even though there was no constitutionally relevant reason for the distinction.

1 then provided a few examples of that fact:

2 [T]he justification of limiting expenses is particularly
3 inappropriate and unreasonable when the discriminated
4 class consists of aliens. Aliens like citizens pay taxes
5 and may be called into the armed forces. Unlike the
6 short-term residents in *Shapiro*, aliens may live within
7 a state for many years, work in the state and contribute
8 to the economic growth of the state.

9
10 *Id.* (internal quotation marks omitted).

11 The Court in essence pointed out that, because LPRs
12 and citizens have much in common, treating them differently
13 does not pass muster under the Fourteenth Amendment. The
14 converse of this rationale, however, does not become a
15 litmus test for determining whether a particular group of
16 aliens is a suspect class. A group of aliens need not be
17 identical or even virtually identical to citizens to be
18 fully protected by the Fourteenth Amendment. Indeed,
19 citizens and aliens may be sufficiently similar merely
20 because they are both lawful residents. Nor do we think
21 that the list of similarities is meant as a litmus test for
22 lower courts to apply to a subclass of lawfully admitted
23 aliens for purposes of determining how similar they are to
24 citizens before applying strict scrutiny—the greatest level
25 of Fourteenth Amendment protection—to analyze discrimination
26 against that subclass.

1 Nothing in the Supreme Court's precedent counsels us to
2 "judicially craft[] a subset of aliens, scaled by how [we]
3 perceive the aliens' proximity to citizenship." *LeClerc v.*
4 *Webb*, 444 F.3d 428, 429 (5th Cir. 2006) (Higginbotham, J.,
5 dissenting from the denial of reh'g en banc).¹² Rather, the
6 Court's precedent supports drawing a distinction among
7 aliens only as between lawfully admitted aliens and those
8 who are in the United States illegally.¹³ *See Plyler*, 457

¹² Neither are we persuaded by the state's claim that the statute must be reviewed under a rational basis framework because it only discriminates against a subset of aliens. The Court roundly rejected such an argument in *Nyquist*, 432 U.S. at 7-9. There, the Court explained that the mere fact that the legislature distinguished "only within the heterogenous class of aliens and . . . not . . . between citizens and aliens vel non" did not remove the statute from strict scrutiny review because the important consideration was that the statute was "directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 8-9 (internal quotation marks omitted).

¹³ That aliens are a suspect class not merely because they bear all, or most, of the responsibilities of citizenship is evident from the Court's other pronouncements regarding why aliens are a suspect class. The Supreme Court noted in *Flores de Otero*, for example, that

The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first, based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment and in the Due Process Clause of the Fifth Amendment, recognizes that "(a)liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate. The second, grounded in the

1 U.S. at 223 (utilizing a heightened rational basis review
2 for a state law discriminating against *undocumented* alien
3 children).

4 Any other distinction ignores that the Fourteenth
5 Amendment is written broadly as protecting *all persons* and
6 that aliens necessarily constitute a "discrete and insular"
7 minority because of their "impotence in the political
8 process, and the long history of invidious discrimination
9 against them." *LeClerc*, 419 F.3d at 428-29 (Stewart, J.,
10 dissenting) (citing *Plyler*, 457 U.S. at 218 n.14). Notably,
11 the bedrock of the Supreme Court's decisions in this area is
12 the fact that although lawfully admitted aliens and citizens
13 are not constitutionally distinguishable, aliens constitute
14 a discrete and insular minority because of their limited
15 role in the political process. *LeClerc*, 419 F.3d at 428-29
16 (Stewart, J. dissenting) (citing *Plyler*, 457 U.S. at 218
17 n.14; Erwin Chemerinsky, *Constitutional Law* 618-19 (1997));
18 see also *Foley*, 435 U.S. at 294. Certainly, nonimmigrant
19 aliens cannot be said to suffer less from these limitations

Supremacy Clause, Const., Art. VI, cl. 2, and in the
naturalization power, Art. I, § 8, cl. 4, recognizes the
Federal Government's primary responsibility in the field of
immigration and naturalization.
426 U.S. at 602 (quoting *Graham*, 403 U.S. at 372).

1 than LPRs and indeed, likely are “more powerless and
2 vulnerable to state predations—more discrete and insular.”
3 *See Constitutional Law - Equal Protection - Fifth Circuit*
4 *Holds that Louisiana Can Prevent Nonimmigrant Aliens from*
5 *Sitting for the Bar*, 119 Harv. L. Rev. 669, 674 (2005)
6 (internal quotation marks omitted).

7 But even if the state’s argument—that Supreme Court
8 precedent allows for a distinction based on a subclass’s
9 similarity to citizens—had some traction, we conclude strict
10 scrutiny still applies. Nonimmigrants do pay taxes, often
11 on the same terms as citizens and LPRs, and certainly on
12 income earned in the United States. See 26 U.S.C.
13 § 7701(b); see also *LeClerc*, 419 F.3d at 427 n.1 (Stewart,
14 *J.*, dissenting). Further, any claimed distinction based on
15 permanency of residence is equally disingenuous. Although
16 it is certainly true that nonimmigrants must indicate an
17 intent not to remain permanently in the United States, this
18 ignores the dual intent doctrine—nonimmigrant aliens are
19 lawfully permitted to express an intent to remain
20 temporarily (to obtain and maintain their work visas) as
21 well as an intent to remain permanently (when they apply for
22 LPR status). *LeClerc*, 419 F.3d at 429 (Stewart, *J.*,

1 dissenting). And the final distinction—limited work
2 permission—is wholly irrelevant where, as here, the state
3 seeks to prohibit aliens from engaging in the very
4 occupation for which the federal government granted the
5 alien permission to enter the United States.¹⁴

6 Because most of the distinctions the state would have
7 us make between LPRs and nonimmigrants are either
8 inapplicable or without constitutional relevance, we agree
9 with the district court that the state’s argument “boil[s]
10 down to one potentially important difference—nonimmigrants
11 have not yet obtained permission to reside in the United
12 States permanently—and a slew of other differences of
13 uncertain relevance.” *Adusumelli*, 740 F. Supp. 2d at 592.

14 The core of the state’s argument (and the analytical
15 pivot of *LeClerc* and *LULAC*) is “transience.” The state
16 argues that the nonimmigrant’s transient immigration status
17 distinguishes nonimmigrant aliens from LPRs and introduces
18 legitimate state concerns that would allow for rational

¹⁴ Some of the other distinctions relied on by the Fifth and Sixth Circuits (military service and ineligibility for federal benefits) simply lack legislative relevance. Certainly the federal government, which bears the constitutional responsibility of regulating immigration, has much broader latitude to distinguish among subclasses of aliens. But this latitude does not give states carte blanche to do the same. See *Takahashi*, 334 U.S. at 420.

1 basis review of the statute. This focus on transience is
2 overly formalistic and wholly unpersuasive. The aliens at
3 issue here are "transient" in name only. Certainly the
4 status under which they were admitted to the United States
5 was of limited duration. But the reality is quite
6 different. A great number of these professionals remain in
7 the United States for much longer than six years and many
8 ultimately apply for, and obtain, permanent residence.¹⁵
9 These practicalities are not irrelevant. They demonstrate
10 that there is little or no distinction between LPRs and the
11 lawfully admitted nonimmigrant plaintiffs here. Therefore,
12 even if the Supreme Court's precedent were read to require a
13 determination that the subclass of aliens at issue is
14 similar to LPRs or citizens, strict scrutiny would apply.

15 Finally, creating a third exception to strict scrutiny
16 analysis for statutes discriminating against lawfully
17 admitted aliens would create odd, some might say absurd,
18 results. If statutes discriminating against *lawfully*

¹⁵ This fact is borne out by the realities of the case before us as well as the previous appeal in *Kirk*. Here, one of the plaintiffs was granted permanent resident status during the pendency of this appeal. And, in *Kirk*, we held the appeal moot because the plaintiff was granted permanent resident status during the pendency of the appeal. *Kirk*, 644 F.3d at 136. As much as the state wants to lump nonimmigrants in the same category as tourists such a classification makes no sense.

1 admitted nonimmigrant aliens were reviewed under a rational
2 basis framework that would mean that a class of *unlawful*
3 aliens would receive greater protection against state
4 discriminatory statutes than those *lawfully* present. See
5 *Plyler*, 457 U.S. at 202. In *Plyler* the Court applied a
6 *heightened* rational basis test to invalidate a Texas statute
7 excluding *undocumented* immigrant children from public
8 schools. *Id.* at 230. We see no reason to create an
9 exception to the Supreme Court's precedent that would result
10 in such illogical results that clearly contradict the
11 federal government's determination as to which individuals
12 have a legal right to be here.

13 The Supreme Court has repeatedly announced a general
14 rule that classifications based on alienage are suspect and
15 subject to strict scrutiny review. As Judge Gilman
16 advocated in his *LULAC* dissent, we should "tak[e] the
17 Supreme Court at its word." 500 F.3d at 542. Neither the
18 state's reasoning nor that of the Fifth and Sixth Circuit
19 majority opinions' persuades us that creating a third
20 exception to the general rule that alienage classifications
21 are suspect is warranted here. Therefore, we hold that the
22 subclass of aliens known as nonimmigrants who are lawfully

1 admitted to the United States pursuant to a policy granting
2 those aliens the right to work in this country are part of
3 the suspect class identified by *Graham*. Any discrimination
4 by the state against this group is subject to strict
5 scrutiny review.

6 The statute here, which prohibits nonimmigrant aliens
7 from obtaining a pharmacist's license in New York, is not
8 narrowly tailored to further a compelling government
9 interest. As noted above, appellants concede that New York
10 has no compelling justification for barring the licensed
11 pharmacist plaintiffs from practicing in the state.
12 Further, we agree with the district court that there is no
13 evidence "that transience amongst New York pharmacists
14 threatens public health or that nonimmigrant pharmacists, as
15 a class, are in fact considerably more transient than LPR
16 and citizen pharmacists." *Adusumelli*, 740 F. Supp. 2d at
17 598. Citizenship and Legal Permanent Residency carry no
18 guarantee that a citizen or LPR professional will remain in
19 New York (or the United States for that matter), have funds
20 available in the event of malpractice, or have the necessary
21 skill to perform the task at hand.¹⁶

¹⁶ In *Flores de Otero*, defendants contended that the statute preventing alien engineers from engaging in private practice was

1 The statute is also far from narrowly tailored. As the
2 Court in *Flores de Otero* pointed out, there are other ways
3 (i.e., malpractice insurance) to limit the dangers of
4 potentially transient professionals. 426 U.S. at 606. As
5 such, the statute unconstitutionally discriminates against
6 plaintiffs in violation of their Fourteenth Amendment
7 rights.

8 *The Supremacy Clause and Preemption*

9 In addition to challenging the New York statute on
10 Fourteenth Amendment grounds, plaintiffs raise Supremacy
11 Clause and preemption concerns. Although, for the reasons
12 stated below, we are constrained to decide this case on
13 Equal Protection grounds, we nonetheless address these
14 arguments. We agree with the district court that
15 § 6805(1)(6) "is even more clearly unconstitutional [under
16 the principles of the Supremacy Clause] than under the Equal

warranted because of the aliens' transience, which results in their tenuous connection to the United States. 426 U.S. at 605-06. Defendant's claimed that the classification provided engineering clients "an assurance of financial accountability if a building for which the engineer is responsible collapses within 10 years of construction." *Id.* at 605. The Court flatly rejected any such rationale, observing that: "United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility." *Id.* at 606 (citations omitted).

1 Protection Clause." *Adusumelli*, 740 F. Supp. 2d at 600.

2 "The federal power to determine immigration policy is
3 well settled. Immigration policy can affect trade,
4 investment, tourism, and diplomatic relations for the entire
5 Nation, as well as the perceptions and expectations of
6 aliens in this country who seek the full protection of its
7 laws." *Arizona v. United States*, 567 U.S. ____, 2012 WL
8 2368661, *5 (June 25, 2012). Because "discretionary
9 decisions [about immigration] involve policy choices that
10 bear on this Nation's international relations," the Supreme
11 Court in *Arizona v. United States* recently reaffirmed that
12 the federal power over immigration is extensive and
13 predominant. *Id.* at *6.

14 When Congress occupies an entire field, "even
15 complementary state regulation is impermissible." *Id.* at
16 *9. But even if Congress does not occupy an entire field,
17 the Court has confirmed the "well-settled proposition that a
18 state law is preempted where it 'stands as an obstacle to
19 the accomplishment and execution of the full purposes and
20 objectives of Congress.'" *Id.* at *12 (quoting *Hines v.*
21 *Davidowitz*, 312 U.S. 52, 67 (1941)). Specifically in the
22 lawful alien context, the Court has held that "state

1 regulation not congressionally sanctioned that discriminates
2 against aliens lawfully admitted to the country is
3 impermissible if it imposes additional burdens not
4 contemplated by Congress." *DeCanas*, 424 U.S. at 358 n.6
5 (1976).

6 The state contends that § 6805(1)(6) does not impose
7 additional burdens not sanctioned by Congress because
8 although the federal immigration law controls the
9 determination of which aliens should be lawfully admitted
10 for the purpose of working in a specialty occupation, it
11 leaves to the states the determination of what
12 qualifications are required to practice that profession.
13 New York cites to the portion of the regulation that
14 provides that "[i]f an occupation requires a state or local
15 license for an individual to fully perform the duties of the
16 occupation, an alien . . . seeking [a temporary visa to
17 work] in that occupation must have that license prior to
18 approval of the petition." 8 C.F.R. § 214.2(h)(4)(v)(A).
19 It argues that this language contemplates, and leaves room
20 for, the state to determine whether an individual is
21 qualified for the profession; according to the state,
22 immigration status can be one such qualification.

1 The state's argument misunderstands the nature of this
2 licensure provision. Federal law recognizes that states
3 have a legitimate interest in ensuring that an individual
4 applicant has the necessary educational and experiential
5 qualifications for the position sought. But that
6 traditional police power cannot morph into a determination
7 that a certain subclass of immigrants is not qualified for
8 licensure merely because of their immigration status. That
9 view makes no sense. As the district court pointed out, it
10 would make "the federal laws creating H-1B and TN visa
11 status . . . advisory" because the federal law at once
12 "indicate[s] that nonimmigrants should be admitted to the
13 country to practice speciality occupations, . . . [and]
14 allow[s] the states to decide whether nonimmigrants (as a
15 class, not as individuals) should be permitted to practice
16 speciality occupations." *Adusumelli*, 740 F. Supp. 2d at
17 600.

18 New York's law "stands as an obstacle to the
19 accomplishment and execution of the full purposes and
20 objectives of Congress." *Freightliner Corp. v. Myrick*, 514
21 U.S. 280, 287 (1995) (quoting *Hines*, 312 U.S. 67). Through
22 the INA, Congress exercised its immigration power to permit

1 non-LPRs and non-citizens to become lawful residents of the
2 United States and to participate in certain occupations so
3 long as they are *professionally qualified* to engage in the
4 particular speciality occupation they seek to practice. 8
5 U.S.C. § 1184(i)(2)(A). By making immigration status a
6 professional qualification, and thereby causing the group of
7 non-citizens and non-LPRs Congress intended to allow to
8 practice specialty occupations to be ineligible to do so,
9 the New York statute has created an obstacle to the
10 accomplishment and execution of the INA.

11 We are also unpersuaded by the state's other arguments:
12 that the statute does not regulate who may be admitted to
13 the country and that *Toll's* prescription that states may not
14 be prohibited from imposing additional burdens "when
15 Congress has done nothing more than permit a class of aliens
16 to enter the country temporarily" applies here. *Toll*, 458
17 U.S. at 12-13. The state's reliance on *Toll* is misplaced.
18 The Court there only questioned whether a state could impose
19 additional burdens if Congress only permitted aliens to
20 enter temporarily. It did not hold that states were
21 definitively allowed to impose such burdens. In this case,
22 Congress *has* done more than merely allow the nonimmigrants

1 to enter temporarily. It has granted them permission to
2 work in certain occupations. That alone takes this case out
3 of *Toll*'s potential exception. Ultimately, because of the
4 obstacles posed by the state statute to accomplishing the
5 purposes of the INA, there are serious Supremacy Clause and
6 preemption problems at issue. See *Arizona*, 2012 WL 2368661,
7 at *6-18.

8 Yet, while we recognize the preemption and Supremacy
9 Clause issues in this case and also the Court's preference
10 that Supremacy Clause issues be decided before Equal
11 Protection Clause claims, see generally *Toll*, 458 U.S. at 9-
12 10, we must decide this case on Equal Protection grounds.
13 The plaintiffs with TN status cannot argue that the state
14 law is preempted because the NAFTA Implementation Act allows
15 only the United States to bring actions against state laws
16 inconsistent with NAFTA. See 19 U.S.C. § 3312(b)(2).

17 In summary, we agree substantially with the district
18 court's well-reasoned opinion below, the dissenting opinions
19 filed in the panel decisions in *LeClerc* and *LULAC*, and the
20 dissent from denial of rehearing *en banc* in *LeClerc*. We
21 find no reason to create a third exception to the rule that
22 alienage is a suspect classification.

