Nos. 05-1645 and 06-11

In the Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW, PETITIONERS

v.

PASCAL F. CALOGERO, JR., CHIEF JUSTICE, SUPREME COURT OF LOUISIANA, ET AL.

KAREN LECLERC, ET AL., PETITIONERS

v.

DANIEL E. WEBB, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state bar rule that allows citizens and permanent resident aliens to become members of the bar, but that precludes aliens who are not permanent residents from becoming members, is preempted by federal immigration law.

2. Whether that state rule violates the Equal Protection Clause of the Fourteenth Amendment.

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision below is correct and does not warrant the Court's review.

STATEMENT

1. The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens. Immigrant aliens have been "lawfully accorded the privilege of residing permanently in the United States," 8 U.S.C. 1101(20), and are not legally restricted in the activities they may pursue. Nonimmigrant aliens are granted temporary admission to the

United States for specific purposes. 8 U.S.C. 1101(a)(15) (2000 & Supp. IV 2004). Nonimmigrant aliens must abide by the conditions of their admission and stay as determined by the Secretary of Homeland Security. 8 U.S.C. 1184(a)(1); 8 C.F.R. 214.1(a)(3)(i).

a. An H-1B nonimmigrant is an alien who has come "temporarily" to the United States "to perform services" in, *inter alia*, a "specialty occupation." 8 U.S.C. 1101(a)(15)(H)(i)(B) (Supp. IV 2004). For an alien to obtain H-1B status, a prospective employer must file a petition with the Department of Homeland Security (DHS) on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). The application must establish that the alien possesses the minimum requirements necessary to be engaged in a speciality occupation and that the position the alien intends to fill is a speciality occupation. *Ibid.* The practice of law can qualify as a "specialty occupation." 8 C.F.R. 214.2(h)(4)(ii). If a state license is required to practice the speciality occupation, the alien must obtain such a license before seeking classification in that occupation. 8 U.S.C. 1184(i)(2)(A); 8 C.F.R. 214.2(h)(4)(v)(A). The petitioner must also obtain a certification from the Department of Labor on wages and working conditions, and that certification must be submitted together with an H-1B petition. 8 C.F.R. 214.2 (h)(4)(i)(B)(*2*).

If DHS approves the employer's petition, an alien may then apply for an H-1B visa. If the alien is abroad, that application may be made at the consular post. 8 C.F.R. 214.2(h)(2)(iv). The alien must satisfy the consular officer that he or she is admissible to this country and otherwise meets the requirements for the issuance of a visa. If issued an H-1B visa, the alien must then apply to DHS for admission at a port-of-entry, and DHS will then specify the terms and conditions of admission. *Ibid.* If the alien is already in the United States in a lawful nonimmigrant status, DHS "may,"

subject to certain exceptions, authorize a change from that nonimmigrant status to another, including H-1B status. 8 U.S.C. 1258; 8 C.F.R. Pt. 248.

An alien who has obtained H-1B status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(9). An approved H-1B petition may be valid for up to three years, 8 C.F.R. 214.2(h)(9)(iii)(A)(*1*). Ordinarily, an "alien's total period of stay may not exceed six years." 8 C.F.R. 214.2(h)(15)(ii)(B)(*1*).

b. The J-1 exchange visitor visa may be granted to an alien "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States as a participant in a program * * * for the purpose of," *inter alia*, "studying." 8 U.S.C. 1101(a)(15)(J). Aliens admitted to the United States in J-1 status may work only when such activities are part of the specific exchange program in which they are participating. 22 C.F.R. 62.16(a).

c. An L-1 nonimmigrant is an alien who has worked abroad "in a capacity that is managerial, executive, or involves specialized knowledge" and who has transferred temporarily to the United States to work in a similar capacity for the same employer or a qualifying subsidiary or affiliate. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). An employee who is transferred to work as a manager or executive may remain in the United States in L-1B status for a maximum of seven years, while an alien who is transferred to the United States to work in a specialized knowledge capacity may remain in the United States in L-1B status for a maximum of five years. 8 C.F.R. 214.2(*l*)(15)(ii). An alien who attains L-1 status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(12). An L-2 visa may be issued to the spouse or a child of a person who has attained L-1 status. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). Spouses and children who are admitted in L-2 status are "subject to the

same period of admission and limits" as the person in L-1 status. 8 C.F.R. 214.2(*l*)(7)(ii). "Neither the spouse nor any child may work unless he or she has been granted employment authorization." *Ibid.* The statute directs DHS to authorize the alien spouse to engage in employment in the United States and to issue the spouse an "appropriate work permit," 8 U.S.C. 1184(c)(2)(E) (Supp. IV 2004), but it does not require that the spouse be authorized to work in any particular occupation.

2. Supreme Court of Louisiana Rule XVII, Section 3(B) limits admission to the Louisiana Bar to citizens of the United States and resident aliens. For purposes of that rule, resident aliens include only aliens who have "permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). Nonimmigrant aliens therefore may not become members.

Petitioners are nonimmigrant aliens who want to be admitted to the Louisiana Bar, but are precluded from being admitted by Section 3(B). Pet. App. 3a, 7a.[1] Petitioners in No. 06-11 (the Leclerc petitioners) are Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck. *Id.* at 3a. Leclerc and Jarry are French citizens who were admitted to the United States in J-1 nonimmigrant status; Boulord is a French citizen who was admitted to the United States on a J-1 visa, but who now holds an H-1B visa; and Affleck is a Canadian citizen admitted to the United States as an L-2 spouse. *Id.* at 3a-4a; Pet. 5. All of the Leclerc petitioners hold degrees from foreign law schools. Pet. App. 4a.

In March 2003, the Leclerc petitioners filed suit in the United States District Court for the Eastern District of Louisiana, seeking a declaration that Section 3(B) is preempted by

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[1] Unless otherwise noted, all references to "Pet. App" are to the appendix to the petition in No. 06-11.

federal immigration law and violates the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 5a-6a. The district court rejected both claims. *Id.* at 6a.

Petitioners in No. 05-1645 (the Wallace petitioners) are Caroline Wallace and Emily Maw. Pet. App. 7a. They are British citizens who were admitted to the United States in H-1B nonimmigrant status. *Ibid.* Wallace is licensed as an attorney in England and Wales and is currently performing non-attorney legal work in the United States. *Ibid.* Maw holds a law degree from Tulane University and is performing paralegal work in the United States. *Ibid.*

In May 2005, the Wallace petitioners filed their own suit in the United States District Court for the Eastern District of Louisiana, raising the same preemption and Equal Protection challenges to Section 3(B) as the Leclerc petitioners. Pet. App. 8a. The district court rejected the preemption claim, but held that Section 3(B) violates the Equal Protection Clause. *Ibid.*

3. Appeals were taken in both cases. After consolidating the appeals, Pet. App. 8a, the court of appeals rejected petitioners' preemption and equal protection challenges to Section 3(B). *Id.* at 1a-42a.

The court of appeals first held that Section 3(B) is not subject to strict scrutiny. The court noted that this Court has applied strict scrutiny to state laws affecting "permanent resident aliens," but it has never applied strict scrutiny "to a state law affecting any other alienage classifications." Pet. App. 13a-14a. The court concluded that strict scrutiny applies to alienage classifications that affect permanent residents because such classifications are "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*," *id.* at 15a (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978)), and because permanent resident aliens "are similarly situated to citizens in their economic, social and

civic (as opposed to political) conditions." *Id.* at 17a (footnote omitted). The court concluded that those rationales do not support application of strict scrutiny to classifications that apply only to aliens who do not have permanent status in the United States. *Id.* at 19a-21a.

Applying rational basis review, the court held that Section 3(B) is rationally related to the State's legitimate interest in ensuring that lawyers "provide continuity and accountability in legal representation." Pet. App. 23a. The court explained that the State's "ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction," and that the State could rationally determine that "the easily terminable status of nonimmigrant aliens would impair these interests." *Id.* at 23a-24a. In particular, if a nonimmigrant alien chose to leave the country, "such an attorney would be utterly beyond the reach of the Louisiana Bar." *Id.* at 24a.

The court of appeals also held that Section 3(B) is not preempted by federal immigration law under *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982). Pet. App. 29a-31a. The court concluded that "Section 3(B) does not succumb to the *Toll* infirmity of proscribing by state law what Congress expressly permits by federal statute." *Id.* at 30a. The court explained that nonimmigrant aliens may obtain H-1B status to participate in certain legal activities without a license, *id.* at 31a, and federal law "does not itself mandate domestic professional licensing." *Id.* at 32a.

Judge Stewart dissented. Pet. App. 33a-42a. He agreed that Section 3(B) is not preempted by federal immigration law. *Id.* at 33a. He concluded, however, that Section 3(B) should be subjected to strict scrutiny, and that, in any event, Section 3(B) fails to satisfy rational basis review. *Id.* at 33a-42a.

A petition for rehearing en banc was denied. Pet. App. 85a-89a. Judge Higginbotham, joined by six other judges, would have granted rehearing en banc. *Id.* at 86a-88a.

DISCUSSION

I. THE QUESTION WHETHER SECTION 3(B) IS PREEMPTED BY FEDERAL IMMIGRATION LAW DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 11-15; Leclerc Pet. 18-21) that the Louisiana bar rule's limitation of bar membership to citizens and permanent resident aliens is preempted by federal immigration law. That contention does not warrant review. The court of appeals correctly held that the limitation in Section 3(B) is not preempted by federal immigration law, and the Vermont Supreme Court's erroneous contrary conclusion regarding a similar Vermont rule does not provide a basis for granting review in this case.

A. Section 3(B) Is Not Preempted By Federal Immigration Law

1. a. Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that federal law preempts Section 3(B) as applied to aliens seeking H-1B status to practice law. That contention is without merit. While the power to regulate immigration is exclusively a federal power, the Court has wisely resisted the conclusion that every state enactment that affects aliens is a regulation of immigration and therefore preempted. *De Canas* v. *Bica*, 424 U.S. 351, 354 (1976). Rather, federal immigration law preempts state law when "the nature of the regulated subject matter permits no other conclusion," *id.* at 356 (citation omitted), when "Congress has unmistakably so ordained," *ibid.* (citation omitted), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 363 (citation

omitted). Section 3(B) is not preempted under those standards.

An alien may be admitted to the United States in H-1B status in order to work in a "speciality occupation," 8 U.S.C. 1101(a)(15)(H)(i)(b) (Supp. IV 2004), and the practice of law can be a speciality occupation, 8 C.F.R. 214.2(h)(4)(ii). But in order to obtain H-1B status to practice law, an alien must *first* obtain a license from the State in which he or she intends to practice if the State requires such a license. See 8 U.S.C. 1184(i)(2)(A) (requiring "full state licensure to practice the occupation, if such licensure is required to practice in the occupation"); 8 C.F.R. 214.2(h)(4)(v)(A) ("If an occupation requires a state or local license for an individual to fully perform the duties of the occupation," an alien "must have that license prior to approval" of the H-1B visa.). By expressly incorporating a *state law* license as a *precondition* for obtaining permission to come to this country for a temporary period of time to practice law, and by failing to set any limitations on the standards a State may establish for obtaining such a license, Congress left the States largely free to determine those standards.

Thus, when the State where an alien seeks to practice permits an alien seeking H-1B status to obtain a license to practice law in the State, and the alien obtains such a license, that alien satisfies one of the federal law preconditions for obtaining H-1B status. But when the State decides that an alien's temporary status makes him or her ineligible to obtain a license to practice law in the State, and declines to issue a license on that basis, the alien has failed to satisfy one of the federal law prerequisites for obtaining H-IB status.[2]

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[2] Different considerations would be present if a State allowed aliens from some countries and not others to be admitted to the bar. Such a rule could threaten to intrude into the federal government's conduct of

Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that Congress's decision to make a state law license a precondition for H-1B status to practice law shows that Congress intended to require States to allow aliens seeking H-1B status to be eligible to obtain a state license. That reading of the statutory scheme gets matters backwards. Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status. Congress has required aliens to obtain a state law license before becoming eligible for H-1B status.

Another feature of federal immigration law reinforces that conclusion. A section of a DHS regulation entitled "*Duties without licensure*" states that "[i]n certain occupations which generally require licensure, a statute may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation." 8 C.F.R. 214.2(h)(4)(v)(C). The regulation directs that "[i]f the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted." *Ibid.* That regulation reflects the understanding that an alien's ability to obtain H-1B status depends on the State's choice of licensing standards, not that a State must alter its licensing standards so that a person may become eligible for H-1B status.

That interpretation of the statutory scheme is also consistent with Congress's background understanding that States have important interests that are implicated in their licensing schemes. While many States may conclude that those interests would not be compromised by issuing licenses to those who will be present only temporarily, there is no evidence

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foreign relations. Cf. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

that Congress intended to preclude other States from reaching a different judgment.

It is particularly unlikely that Congress would seek to displace traditional state licensing authority when aliens seeking H-1B status may include persons residing in foreign countries who have no ties to the United States. Aliens who have already been admitted temporarily to the United States in another status may apply for a change of status to H-1B, and persons admitted to this country in an H-1B status may apply for an extension of that status in order to practice law. But there is no indication that Congress intended that such persons, merely by virtue of their presence in this country, would have any greater opportunity to obtain an H-1B status to practice law than persons applying from abroad. DHS's discretionary authority under 8 U.S.C. 1258 to permit certain aliens in the United States to change from one nonimmigrant status to another, like its authority under 8 U.S.C. 1255 (2000 & Supp. IV 2004) to permit certain aliens in the United States to adjust their status from nonimmigrant to permanent resident alien, is essentially a venue provision that enables the government to afford the alien an alternative to leaving the country and applying for a visa from a consulate abroad. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

Congress's decision to allow States to determine whether to issue a license to a person seeking H-1B status also accords with the nature of the other preconditions for that status. In particular, for an alien to obtain H-1B status, a prospective employer must file a petition on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). Just as Congress has made an alien's ability to obtain H-1B status dependent on an employer's judgment that the alien has the necessary qualifications, Congress has made the alien's ability to obtain H-1B status dependent on a State's judgment on whether the alien meets the standards necessary for a license.

b. In support of their contention that federal immigration law preempts Section 3(B) as applied to applicants for H-1B status, petitioners rely (Wallace Pet. 13-14; Leclerc Pet. 19) on *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982). Petitioners' reliance on *Toll* is misplaced.

In *Toll*, the Court held that a policy of the University of Maryland that denied in-state tuition to the dependent children of employees of the World Bank holding G-4 status was preempted by federal law. The court reasoned that Maryland's denial of in-state status to G-4 nonimmigrants directly conflicted with Congress's judgment that G-4 nonimmigrants are permitted to establish domicile in the United States. 458 U.S. at 14. The Court also concluded that Maryland's decision to use tuition as a replacement for lost tax revenue conflicted with Congress's decision to grant G-4 nonimmigrants favorable tax treatment. *Id.* at 16.

The situation here is different from *Toll* in every relevant respect. In *Toll*, the State denied a benefit to aliens that Congress had decided to admit into this country. Here, by contrast, Congress has incorporated state law licensing requirements as a precondition for obtaining H-1B status in the first place. In *Toll*, the state law rule directly conflicted with congressional judgments relating to the G-4 classification. Here, there is no conflict relating to the H-1B classification. Congress allowed each State to make its own determination on whether an alien seeking H-1B status may qualify for the practice of law in that State.[3]

2. In addition to arguing that Section 3(B) is preempted as applied to applicants for H-1B status, petitioners also appear to argue that Section 3(B) is preempted as applied to

[3] At least two of the petitioners have H-1B status to work as paralegals. Pet. App. 7a. Because that work does not require a state license to practice law, there is no inconsistency between Section 3(B) and the federal authorization to work as a paralegal.

aliens who have J-1 or L-2 status. That claim is also without merit.

Neither the J-1 program nor the L-2 program refers to state licensing requirements. That silence hardly suggests an intent to preempt state licensing authority. Indeed, given that Congress failed to preempt state licensing authority when it specifically focused on state licensing in the H-1B program, it would be difficult to attribute to Congress an intent to preempt such authority through programs that do not mention state licensing at all.

Aliens in the J-1 and L-2 programs are authorized to work in certain circumstances. But the petitioners who have J-1 and L-2 status have not shown that their authorizations preempt state licensing authority. An alien admitted in a J-1 status to participate in an exchange program may work only when that activity is part of the exchange program, 22 C.F.R. 62.16(a), and the petitioners who have J-1 status do not claim that their exchange program includes the licensed practice of law. An alien who holds an L-2 visa may work when authorized by DHS, 8 C.F.R. 214.2(*l*)(7)(ii), and the sole petitioner with an L-2 status has a general work authorization. But a general work authorization is not intended to supersede applicable licensing requirements. Thus, just as Section 3(B) is not preempted as applied to applicants for H-1B status, Section 3(B) is not preempted as applied to the petitioners who have J-1 or L-2 status.

3. For the reasons discussed above, DHS interprets the federal scheme to allow each State to decide the extent to which aliens who seek only temporary residence in the United States will be eligible for bar membership in that State, where, as here, there is no interference with the alien's visa or federal work authorization. That reasoned judgment by the agency with primary authority over the visa and work authorization program is entitled to considerable weight. Cf.

Geier v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-496 (1996).[4]

B. The Erroneous Decision Of The Vermont Supreme Court Does Not Provide A Basis For Granting Review In This Case

Petitioners contend (Wallace Pet. 15; Leclerc Pet. 11-12) that review is warranted on the preemption question because the decision below conflicts with *Dingemans* v. *Board of Examiners*, 568 A.2d 354 (Vt. 1989). In that case, the Supreme Court of Vermont held that a rule that limited admission to the state bar to citizens and permanent resident aliens was preempted by federal law. The court acknowledged that the "state has the ultimate interest in assuring the requisite qualifications of persons licensed to practice law within its jurisdiction," and that "the requirement that applicants for H-1 visas have all necessary licenses prior to the issuance of a visa, * * * is a reflection of the federal government's respect for this state prerogative." *Id.* at 356. The court nonetheless concluded that Vermont's limitation on bar membership "impose[d] a burden on the federal immigration program that could not have been intended by the Congress." *Id.* at 357.

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[4] The State contends (Br. in Opp. 16 n.43) that 8 U.S.C. 1622 specifically grants it authority to deny nonimmigrant aliens eligibility for a state license. That contention is incorrect. A State's authority under Section 1622 is limited to "means-tested" public benefits. H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 384 (1996). In arguing otherwise, the State relies (Br. in Opp. 16 n.43) on 8 U.S.C. 1621(c). But Section 1621(c) defines the meaning of "State or local public benefit" in Section 1621, not the meaning of "State public benefits" in Section 1622. The term "State or local public benefit" in Section 1621 is used to describe the state or local benefits for which certain categories of aliens (principally aliens present illegally) are ineligible as a matter of federal law. See 8 U.S.C. 1621(a).

For reasons discussed above, that analysis is incorrect. Congress has allowed each State to reach its own judgment on whether an alien's temporary status should affect eligibility for admission to the bar in that State; it did not intend to remove such authority. No other court has adopted the view expressed by the Supreme Court of Vermont, and an erroneous 18-year old decision by a single state supreme court is not a sufficient basis for granting review in this case.

The Supreme Court of Vermont's decision, while incorrect, also does not have an impact that creates a need for review in this case. The result is no different from a Vermont decision interpreting a rule to allow aliens who are not permanent residents to obtain a license to practice law, which it could have done.

Review is also unwarranted because the Supreme Court of Vermont did not have the benefit of DHS's views in resolving the preemption question. Now that DHS has expressed its view on that issue, the nature of the preemption question must be evaluated in a different light. It should now be clear to Vermont that if it wishes to bar aliens who are not permanent residents from bar membership, federal immigration law does not preclude that course. On the other hand, to the extent that Vermont's 18-year experience with admitting such aliens leads it to conclude that there is no reason to alter its current rule, Vermont may leave matters unchanged. Either way, there is no reason for the Court to grant plenary review based on the conflict between the Supreme Court of Vermont and the decision below.

II. THE QUESTION WHETHER SECTION 3(B) IS SUBJECT TO STRICT SCRUTINY DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 5-11; Leclerc Pet. 12-17) that the court of appeals erred in failing to apply strict scrutiny to Louisiana's rule that only citizens and permanent resi-

dent aliens may become members of the Louisiana bar. Review of that contention is also not warranted. The court of appeals correctly held that Section 3(B) is not subject to strict scrutiny, and that conclusion does not conflict with any decision of this Court or with the holding of any other court of appeals.

A. Section 3(B) Does Not Trigger Strict Scrutiny

For several reasons in combination, Section 3(B) does not trigger strict scrutiny. First, while petitioners rely primarily on *In re Griffiths*, 413 U.S. 717 (1973), as support for their strict scrutiny argument (see Wallace Pet. 5-10; Leclerc Pet. 13), *Griffiths* involved a bar rule that limited membership to citizens only and therefore excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law. 413 U.S. at 719. Moreover, the person challenging the rule in *Griffiths* was herself a permanent resident alien. *Id.* at 718. Louisiana's rule, by contrast, permits permanent resident aliens to become members of the bar; it excludes from eligibility only aliens who are not permanent residents. The Court's holding that the bar rule in *Griffiths* was subject to strict scrutiny therefore does not establish that Louisiana's rule is subject to strict scrutiny.

Petitioners point (Wallace Pet. 5) to the statement in *Griffiths* that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." 413 U.S. at 721 (quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971)). And, in reliance on *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977), they argue (Wallace Pet. 8-10; Leclerc Pet. 14-15) that Louisiana's bar rule classifies based on alienage because it is directed at aliens and only aliens are adversely affected by it.

In cases decided after *Griffiths*, however, the Court has made clear that *Griffiths* did not establish that strict scrutiny

applies to all classifications based on alienage. For example, in *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978), the Court held that state law classifications based on alienage are not subject to strict scrutiny when they restrict aliens from employment in government jobs that involve "discretionary decision-making, or execution of policy, which substantially affects members of the political community." And in *Mathews* v. *Diaz*, 426 U.S. 67, 81-84 (1976), the Court held that Acts of Congress that classify on the basis of alienage are subject to a narrow standard of review akin to rational basis review, rather than to strict scrutiny. As those cases illustrate, the statement in *Griffiths* that alienage classifications are subject to strict scrutiny cannot be divorced from the context in which it appeared. And a crucial part of that context was that the state law at issue excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law; *Griffiths* itself involved only a challenge by a permanent resident.

The same is true of all the other cases cited by petitioners. All of those cases involved state laws that adversely affected permanent resident aliens. See, *e.g.*, *Nyquist*, *supra*; *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572 (1976); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham*, *supra*. Indeed, in *Foley*, the Court expressly noted it had applied strict scrutiny to alienage classifications only when the state laws were "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." 435 U.S. at 295 (emphasis added).

Second, basic equal protection principles do not support the conclusion that strict scrutiny applies to all state classifications that adversely affect nonimmigrants simply because strict scrutiny applies to many state classifications that disadvantage permanent resident aliens. The Equal Protection Clause's core command is that "persons similarly circumstanced should be treated alike." *Plyler* v. *Doe*, 457 U.S. 202,

216 (1981) (citation omitted). At the same time, the Equal Protection Clause "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Ibid.* (citation omitted).

Because permanent resident aliens have been formally granted the privilege under federal law of living in the United States on a lasting basis, see 8 U.S.C. 1101(20), and they typically have strong ties to the United States, they may be viewed as similarly situated to citizens in many respects. Nonimmigrants, by contrast, have not been granted that distinct legal status under federal law; they are present only temporarily and subject to restrictions, and they do not ordinarily have the same ties to this country as permanent residents. They therefore do not, as a rule, have the same claim to equal treatment. Cf. *Mathews,* 426 U.S. at 80 (as an alien's ties to the United States grow stronger, so too does his claim to equal treatment).

Third, the claim for equal treatment is particularly unpersuasive here because Section 3(B) affects all aliens who are not permanent resident aliens, and that group includes persons who apply from abroad for visas or work authorizations and have no ties to this country and no claim under the Constitution to equal treatment. See, *e.g., Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950). To be sure, that group also includes nonimmigrant aliens who were admitted into this country for a limited period and for a different purpose. But as previously discussed, such persons have limited work rights, and they are in no stronger position to obtain H-1B status or broader employment opportunities than aliens applying from abroad. A provision for nonimmigrants to adjust or change their status or work rights is merely a "*procedural mechanism* by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601

(B.I.A. 1992) (emphasis added); see *Elkins*, 435 U.S. at 667; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964). Such aliens are far more similarly situated to persons applying for such status from abroad than they are to permanent resident aliens and citizens.

Finally, as previously discussed, Congress has expressly incorporated state law licensing requirements as a precondition for the granting of H-1B status to practice law. Because Congress has broad power over immigration matters, federal laws that classify based on alienage do not trigger strict scrutiny. Instead, they are subject only to review that is akin to rational basis review. *Mathews,* 426 U.S. at 81-84. It follows that, absent circumstances not present here (see note 2, *supra)*, when Congress expressly incorporates a state law requirement as a precondition for the grant of a visa, strict scrutiny of that federally incorporated state law requirement is not warranted. Similar considerations apply to the petitioners who are in J-1 or L-2 status, because federal law does not preempt the application of Section 3(B) to them. See pp 7-16, *infra*; *Toll*, 458 U.S. at 11 n.16 (suggesting that the Court's equal protection cases involving aliens may be better explained as preemption cases). The court of appeals therefore correctly concluded that strict scrutiny is not applicable in the specific context presented here.

B. There Is No Conflict In The Circuits On Whether Strict Scrutiny Applies Here

Petitioners contend (Wallace Pet. 10; Leclerc Pet. 10) that the court of appeals' failure to apply strict scrutiny to Section 3(B) conflicts with the Fourth Circuit's decision in *Moreno* v. *University of Maryland*, 645 F.2d 217 (1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). There is, however, no conflict.

In *Moreno*, the district court applied strict scrutiny and held that Maryland's rule denying in-state tuition to G-4 nonimmigrants violated the Equal Protection Clause. The court alternatively ruled that Maryland's policy was preempted by federal law. *Moreno* v. *Toll*, 489 F. Supp. 658 (D. Md. 1980), aff'd *sub nom. Moreno* v. *University of Md.*, 645 F.2d 217 (4th Cir. 1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). The Fourth Circuit affirmed the district court's rulings stating only that "[f]or reasons sufficiently stated in this opinion of the district court, we agree that the University's 'In-State' status policy * * * is invalid under the Constitution." *Moreno*, 645 F.2d at 220. This Court affirmed the judgment, but solely on the ground that Maryland's policy was preempted by federal law. *Toll*, 458 U.S. at 9-10.

It is unclear whether the Fourth Circuit would feel entirely bound by its affirmance of the district court's constitutional analysis in *Moreno*, when this Court resolved the case solely on preemption grounds, and the Fourth Circuit did not conduct its own independent constitutional analysis. But even if it would, the district court's equal protection ruling in *Moreno* does not conflict with the holding below that Section 3(B) is not subject to strict scrutiny.

Moreno involved the equal protection rights of G-4 nonimmigrants, a classification not at issue here. And *Moreno* involved an additional burden on aliens that conflicted with the conditions under which they were admitted into the country, not a congressionally-sanctioned state-law precondition for obtaining a particular nonimmigrant status in the first place, or a federal work status that does not specifically authorize the practice of law. Because the decision below is the first case to address whether strict scrutiny applies in the present context, and because the court below correctly concluded that it does not, this Court's review of the question is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007