FILED

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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THE REPUBLIC OF PALAU, JOHNSON TORIBIONG, in his official capacity as the President of the Republic of Palau, THE BUREAU OF IMMIGRATION, and JENKINS MARIUR, in his official capacity as the Director of the Bureau of Immigration,	CIVIL APPEAL NO. 11-010 (Civ. Action No. 10-158)
Appellants,	
v.	
BERNADETTE CARREON, on behalf of herself and others similarly situated,	**OPINION**
Appellee.	

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Decided: March 30th, 2012

Counsel for Appellants: Attorney General Ernestine Rengiil and G. Patrick Civille
Counsel for Appellees: David W. Shipper

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

The Republic of Palau and other government defendants appeal the determination by the Trial Division that the Regulation Amending the *Immigration Regulations, 2006*

Version ("Amended Regulation" or "§ 706") is unconstitutional. The trial court held that the Amended Regulation (1) violates the Palau Constitution's Equal Protection Section insofar as it excludes non-citizens from the United States, the Federated States of Micronesia ("FSM"), and the Republic of the Marshall Islands ("RMI") from its registration requirements, *see* Palau Const. art IV, § 5; and (2) violates the Constitution's requirement that taxes be levied by the Olbiil Era Kelulau ("OEK"), *see* Palau Const. art. IX, § 5. The Republic appeals both holdings. We reverse in part and affirm in part.

I. BACKGROUND

On June 16, 2010, the Office of the President promulgated the Amended Regulation, which added § 706 to the 2006 Immigration Regulations. The amendment provides, in relevant part:

> Section 706. Annual Alien Registration.
>
> (a) [E]ach August of every year . . . every alien present in the Republic at any time during the first seven (7) calendar days of August . . . shall, during the month of August . . . register with the Director of the Bureau of Immigration or his designee. . . . For the purposes of this section, "alien" means a person who is not a citizen of Palau, excluding the aliens enumerated below.
> . . .
>
> (b) Registration shall be at a place and on a form designated by the Director. The form shall require the alien to state his or her full name and any aliases, date of birth or age, physical and mailing addresses in the Republic, telephone numbers, and current immigration status, and to submit satisfactory proof thereof. . . .
>
> (c) The following aliens shall be exempt from registration hereunder:
> . . .
> 2. Aliens who are citizens of the United States; Federated States of Micronesia; and the Republic of the Marshall Islands;

(d) There shall be paid to the Director for registration a fee of twenty-five dollars ($25.00) per alien.

(e) Any alien who fails to register as provided above . . . in addition to any other penalties provided by law or regulation, shall be subject to a fine of five dollars ($5.00) per day for each day that the alien is in the Republic without having registered or been registered.

According to Appellant President Johnson Toribiong, the law was passed for several reasons. First, data indicated that "there are more foreign workers employed in Palau than there are Palauans, and that there are fewer Palauans living in Palau now" than in 2005. The President contended in his affidavit that this problem was exacerbated by lax enforcement of immigration laws. A presidential task force investigation revealed that many foreign workers currently in Palau are undocumented and are not being taxed.

Second, the President cited Palau's relationship with the United States as a basis for the law. According to President Toribiong, a senior United States official told him that "Palau must rectify its growing reliance on cheap foreign labor if Palau expects the United States to continue providing it with economic assistance." Additionally, President Toribiong stated that other confidential briefings with United States officials revealed "potential security threats" in Palau stemming from lax immigration enforcement. Thus, according to the President, the Amended Regulation was promulgated in part in order to ensure Palau's relationship with the United States under the Compact of Free Association ("the Compact").

The President then explained the exception to § 706 for citizens of FSM, RMI, and the United States. He said that "such citizens are not causing . . . any of the problems

outlined" earlier in his affidavit. Additionally, he noted the "cultural and/or political relationship" among Palau, the United States, FSM, and RMI, which, for example, is the basis for special visas for citizens from those countries. President Toribiong again invoked the Compact, stating that Palau has treaty obligations to the United States under § 142 of the Compact.

Finally, the President opined that the $25.00 fee "is neither excessive nor disproportional" and was "calculated to recover the Republic's cost of implementing and enforcing the Regulation."

Bernadette Carreon filed a complaint, on behalf of herself and other non-citizens affected by § 706, against President Toribiong, the Republic of Palau, Director of the Bureau of Immigration Jenkins Mariur, and the Bureau of Immigration (collectively "the Government" or "the Republic"). She claimed that (1) § 706 violates the Equal Protection Section of the Palau Constitution by discriminating among non-citizens on the basis of place of origin; (2) § 706 is arbitrary and capricious and in violation of the Due Process Clause of the Constitution; (3) the $25 registration fee is an unconstitutional tax because it was not levied by the OEK as required by Art. IX, § 5; (4) the promulgation of § 706 usurped legislative power in violation of separation of powers principles; and (5) the amendment violated Palau's administrative rule-making procedures.

At the Trial Division's behest, both parties filed cross motions for summary judgment. The court granted both Carreon's and the Republic's motions in part. With respect to Carreon's equal protection claim, the Trial Division held that § 706 discriminates on the basis of national origin, that such discrimination is subject to strict

scrutiny, and that § 706 does not satisfy strict scrutiny. Decision and Order, *Carreon v. ROP*, No. 10-158, slip op. at 14 (Tr. Div. Feb. 22, 2011). The court also held that the $25 "fee" is an unconstitutional tax. *Id.* at 22. However, the court rejected Plaintiffs' argument that the promulgation of § 706 usurped legislative power or violated administrative procedures. *Id.* at 23. The Trial Division did not rule on the due process claim because Plaintiffs succeeded on the equal protection claim.

The Government timely appealed. On appeal, it argues that the Trial Division erred in granting summary judgment on the equal protection and unconstitutional tax claims.

II. STANDARD OF REVIEW

We review a Trial Division order granting summary judgment *de novo*, *Senate v. Nakamura*, 8 ROP Intrm. 190, 192 (2000), and consider all evidence presented and inferences therefrom "in the light most favorable to the non-moving party," *Mesubed v. ROP*, 10 ROP 62, 64 (2003). On *de novo* review of a grant of summary judgment, we may affirm the Trial Division on any basis supported by the record. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2716 (3 ed. 1998); *see also Shell Co. v. Los Frailes Serv. Station*, 605 F.3d 10, 24 (1st Cir. 2010).

III. ANALYSIS

A. Equal Protection

Article IV of the Palau Constitution enumerates fundamental rights. Specifically, Article IV, section 5 of the Palau Constitution provides in relevant part:

> Every person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens . . . .

A plaintiff alleging a violation of this section must show that a law treats her differently than other similarly situated individuals. If such disparate treatment is based on a protected classification, the burden shifts to the Government to show that the law advances its interests. The burden the Government bears depends on the level of scrutiny applicable to the classification.

Appellees argue that the Amended Regulation discriminates on the basis of citizenship, a protected classification, and is thus subject to heightened scrutiny under § 5.[1]

1. Appellees' claim is cognizable.

At the outset, we address two of Appellants' threshold claims. The Republic contends that Appellees' equal protection claim must fail because non-citizens from the unexempted countries are not "similarly situated" to those from the FSM, RMI, and the United States. Appellants further argue that Appellees must show that they were denied equal protection with respect to a fundamental right in order to raise a claim under that section.

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[1] The parties and case law also refer to citizenship discrimination as "alienage" discrimination. We use the terms interchangeably. This form of discrimination is distinct, under the Palau Constitution, from permissible discrimination on the basis of Palauan citizenship. *See* Palau Const. art IV, § 5.

To maintain an equal protection claim, a plaintiff must show that she is in a class of people similarly situated to a group that is treated differently under the law. Thus, "equal protection does not require identical treatment of persons who are not similarly situated." *Ngerur v. Sup. Ct. of the ROP*, 4 ROP Intrm. 134, 137 (1994). In *Ngerur*, we rejected an equal protection claim alleging that individuals arrested without a warrant were treated differently from those arrested with a warrant. *Id.* The Court reasoned that the Equal Protection Section was not offended because the two comparative groups were not similarly situated. *Id.* If the only difference between the two groups is a protected classification, however, the disadvantaged group may raise an equal protection claim. The Ninth Circuit put it succinctly: "[t]he goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (quotation omitted).

The Republic contends that the Compact and other laws create a valid distinction between citizens of the United States and former Trust Territories on the one hand and all other nationalities on the other. However, § 706 and the laws cited by the Republic, draw distinctions based on citizenship, the very classification Appellees argue is suspect. But for their privilege as citizens of the FSM, RMI, and United States, individuals from those countries would be subject to the same laws as all other non-citizens. In other words, these privileged non-citizens are the "control group." *See Freeman*, 68 F.3d at 1187. In all other meaningful respects, non-citizens in Palau are similarly situated. The Compact and the historical relationship among the Trust Territories may provide the basis for an

argument that the discriminatory treatment is justified, but it does not render Appellees' equal protection claim uncognizable.

Appellants' second argument, that Appellees must show the denial of a fundamental right in addition to a denial of equal protection, also fails. Equal protection is a fundamental right in and of itself. Article IV of the Palau Constitution enumerates fundamental rights afforded all individuals. Among these rights is the equal protection guarantee of § 5. By its plain language the Equal Protection Section allows "no action" that discriminates on the basis of a protected classification. ROP Const. art IV, § 5. Yet the Republic argues that the Equal Protection Section applies only to unequal treatment implicating another fundamental right. This novel contention is based on a misreading of the Trial Division's decision in *Perrin v. Remengesau*, 11 ROP 266 (Tr. Div. 2004). *Perrin*'s analysis focused almost exclusively on the Due Process Section of Article IV and the burden placed on a government employee attempting to raise a due process claim for wrongful termination. *Id.* at 267-70. In support of its holding, *Perrin* cited primarily cases concerning due process and mentioned equal protection cases only in passing. *Id.* at 269-70 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S. Ct. 2701, 2709 (1972) and *Randall v. Buena Vista Cnty. Hosp.*, 75 F. Supp. 2d 946, 954-55 (N.D. Iowa 1999)). Finally, as Appellees point out, *Perrin* makes clear that strict scrutiny is appropriate whenever "constitutional rights have been violated *or when governmental action creates 'suspect' classifications, such as those based on race or national origin.*" *Perrin*, 11 ROP at 269 (emphasis added).

The plain language of § 5 makes equal protection a fundamental right. *Perrin* did not hold otherwise. Appellees need not show a violation of an *additional* fundamental right in order to raise their equal protection claim.

2. Citizenship is a protected classification.

In determining whether a law violates the Equal Protection Section, we must determine the appropriate level of judicial scrutiny. This Court has applied two levels of review in evaluating whether a law is unconstitutional under § 5. *Perrin*, 11 ROP at 269. In cases implicating a suspect classification, such as race, we have applied strict scrutiny. *Id.* Under this level of review, the burden is on the government to show that a discriminatory law is narrowly tailored to meet a compelling governmental interest. The Trial Division concluded and Appellees argue that this is the appropriate level of review in cases involving discrimination based on citizenship. Alternatively, in cases that do not concern a suspect classification, we apply rational basis review. *Id.* Under this highly deferential standard, we will uphold a law unless a plaintiff is able to show that it is not reasonably related to a legitimate state interest. *Id.* Appellants contend that only rational basis review is required. Finally, although this Court has never done so, courts in the United States apply intermediate scrutiny to some suspect classifications. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-99, 97 S. Ct. 451, 457 (1976) (applying intermediate scrutiny and holding unconstitutional an Oklahoma law restricting eighteen- to twenty-year-old men from drinking alcohol but permitting women in the same age group to do so); *see also* Erwin Chemerinsky, *Constitutional Law Principles and Policies* 529 (1997).

Intermediate scrutiny places the burden on the government to show that a discriminatory law is substantially related to an important state interest. *Id.*

The appropriate level of judicial scrutiny turns, in part, on whether citizenship is a suspect classification. *See Perrin*, 11 ROP at 269. Section 5 enumerates several protected categories, including "sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens." Appellees argue that "place of origin" includes citizenship; the Republic counters that the phrase is narrow and limited to ethnicity or ancestry.

The Constitution does not define "place of origin." In the absence of an express definition of a word in the Constitution, we first attempt to determine whether the word has a plain and obvious meaning. *See Yano v. Kadoi*, 3 ROP Intrm. 174, 182-83 (1992). As articulated at oral argument by counsel for the Republic, the plain meaning of "place of origin" is simply "where [someone] is from." This definition, rather than providing clarity, illustrates the ambiguity of the phrase. Depending on the context, where someone is from may be where someone lives (e.g., "I am from Airai."); it may be a foreign country of which the person is a citizen (e.g., "I am from the Philippines."); or it may be the country from which someone's ancestors came (e.g., "My ancestors came from China."). Thus, "place of origin" is ambiguous.

The Appellate Division has never determined the meaning of "place of origin."[2] But the Trial Division has, on at least one occasion, discussed the phrase. In *Governor of Kayangel v. Wilter*, the Trial Division stated a hypothetical: "allegations of action taken to discriminate against one state [of Palau], if proven, would be unconstitutional 'place of origin' discrimination." 1 ROP Intrm. 206, 211 (1985). This speculative dicta from the Trial Division, while afforded some weight, does not control our analysis. Further, even if "place of origin" includes one's state of residence within Palau, such an interpretation does not exclude a broader understanding of the phrase including ancestry or citizenship.

Given the ambiguity of the phrase and the lack of Palauan case law, we next look to the structure and history of § 5 to determine the intent of the drafters. *See Tellames v. Congressional Reapportionment Comm'n*, 8 ROP Intrm. 142, 144 (2000). One indicator of intended meaning is the exception for preferential treatment of Palauan citizens. Generally, the exclusion of one implies the inclusion of others. If discriminatory treatment in favor of Palauan citizens is explicitly allowed, this suggests that other forms of citizenship discrimination are forbidden; otherwise, the exception is unnecessary. Additionally, although sparse, there is some relevant drafting history from the first Constitutional Convention. The committee that submitted the first draft of § 5 included

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[2] Appellants appeal to *Yano*, 3 ROP Intrm. at 183-88, for the proposition that citizenship is not included in the phrase "place of origin," and laws discriminating based on citizenship are subject only to rational basis review. *Yano* contains no such holding. In *Yano*, the issue was whether the term "population" for reapportioning of voting districts meant "citizen population." *Id.* at 184. This Court looked to § 5, which explicitly allows laws that favor citizens, to determine that "population" was meant to exclude non-citizens. *Id.* at 184-85. *Yano* says nothing about the meaning of "place of origin" or the permissibility of discrimination among groups of non-citizens based on their country of citizenship.

the list of protected categories and stated that it sought "to include all bases of discrimination." Comm. on Civ. Liberties & Fundamental Rights, Standing Committee Report 11 6-7 (Feb. 20, 1979). Only later was the exception for discrimination in favor of Palauan citizens added. The version of the amendment that was ultimately adopted contained the same list of protected categories. Therefore, both the structure and history of § 5 suggest that "place of origin" should be read broadly.

The Republic urges this Court to turn, in the absence of Palauan case law, to United States law. On Constitutional matters, we may look to analogous United States law for guidance. *Yano*, 3 ROP Intrm. at 189. However, we are "not bound to mechanically embrace United States case law" and may freely "adopt the rationale set forth if we find it persuasive." *Id.* at 184.

Appellants rely primarily on *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88, 94 S. Ct. 334, 336 (1973), in which the United States Supreme Court interpreted the phrase "national origin" to mean "the country where a person was born, or, more broadly, the country from which his or her ancestors came." However, *Espinoza* was not a case of constitutional interpretation. There, the Court sought to determine whether Title VII of the Civil Rights Act of 1964 prohibited discrimination in favor of United States citizens by private employers. *See* 42 U.S.C. § 2000e-2(a)(1). In reaching its conclusion, the Court relied heavily on the legislative history of Title VII, which contained strong indicators that Congress did not intend to prohibit citizenship discrimination. *Id.* at 89. Justice Douglas vigorously dissented from the Court's conclusion. *Id.* at 96 (Douglas, J., dissenting). To him, citizenship was too bound up with ancestry to disaggregate the two.

He stated, "[a]lienage results from one condition only: being born outside" the nation. *Id.* Thus, "discrimination on the basis of alienage *always* has the effect of discrimination based on national origin." *Id.* at 97 (emphasis in original).

Espinoza did not address the question of whether the Equal Protection Clause of the United States Constitution prohibited discrimination based on citizenship. When the United States Supreme Court did reach that issue, it concluded that citizenship was a protected category. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971). State laws examined in *Graham* conditioned welfare eligibility on citizenship, excluding resident non-citizens. *Id.* at 366. The Court held that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect" and subject to strict scrutiny analysis.[3] *Id.* at 372. Earlier, in *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143 (1948), the Court suggested the same conclusion when it rejected a California law that denied Japanese nationals fishing licenses. As the Court stated in that case, the Equal Protection Clause protects "'all persons' against state legislation bearing unequally upon them either because of alienage or color." *Id.*

The dissent in *Espinoza* and the logic in *Graham* are more persuasive than the *Espinoza* majority. First, *Espinoza*'s conclusion, based as it was on the legislative history of an American statute, is simply inapplicable to our task of interpreting the Palau Constitution. The framers of § 5 sought to create a broad rule against discrimination, and

[3] In holding that states could not discriminate on the basis of citizenship, the Court also noted that the federal government was subject to different rules by virtue of its foreign policy powers. *Graham*, 403 U.S. at 377-78. This distinction is discussed further in the next section, but is tangential to the purpose of determining whether § 5 protects individuals discriminated against on the basis of citizenship.

their later inclusion of an exception for Palauan citizenship strongly suggests that citizenship is a protected category. Further, *Espinoza* interpreted the phrase "national origin" not "place of origin." Finally, as Justice Douglas concluded, citizenship is so often coterminous with ancestry or race that to deny the relationship between the two is simply disingenuous.[4] This relationship renders citizenship discrimination inherently invidious. *Graham*, 403 U.S. at 376.

We determine that the phrase "place of origin" includes citizenship as well as ancestry, and, thus, citizenship is a suspect classification. Our conclusion is based primarily on the broad intent of the framers of § 5 and the structure of § 5. This conclusion is also consistent with the body of American law we find most persuasive and applicable.

3. Intermediate scrutiny applies to citizenship discrimination in the area of immigration or foreign affairs.

Generally, if a law discriminates based on a suspect classification, we apply strict scrutiny. *Perrin*, 11 ROP at 269. However, Appellants' most forceful and persuasive argument is that, even if a law implicates a classification enumerated in § 5, this Court should apply only rational basis review because immigration laws and edicts must be insulated from judicial review. While we depart from the Trial Division and agree that some deference is due, we decline the Republic's invitation to abdicate completely our

[4] This understanding of "place of origin" is consonant with the concepts of ancestry and citizenship found elsewhere in the Palau Constitution. Article III defines the parameters of Palauan citizenship. In order to be a Palauan citizen, one must be of some Palauan ancestry or have been a citizen under the Trust Territory. Palau Const. art. III, §§ 1, 4.

duty to ensure that immigration laws passed or promulgated comport with the Palau Constitution, *see* Palau Const. art. X, §§ 1, 5 (describing the judicial power). We conclude that intermediate scrutiny is the appropriate level of review for laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.

The Republic argues that discrimination based on citizenship is a sovereign prerogative to be exercised by the national government in its pursuit of foreign policy goals. This is generally consistent with the laws of the United States, but such deference has not been adopted in Palau. The crux of this issue is whether the primacy of fundamental rights enumerated in the Palau Constitution must yield to the President's ability to engage in foreign policy as he sees fit.

Again, the Republic relies on American law in the absence of Palauan law on the matter. However, the United States and Palau Constitutions are not identical in terms of their equal protection guarantees. Unlike its United States counterpart, the Palau Equal Protection Section explicitly limits the conduct of the national government—allowing "no action" that violates the fundamental right to equal protection. Palau Const. art IV, §5. Although an equal protection guarantee has been imposed on the United States federal government by implication based on the Fifth Amendment's Due Process Clause, there is no textual basis in the United States Constitution for doing so. Thus, though the United States Supreme Court had little difficulty eschewing the equal protection limitation on federal immigration policy, we are more constrained by the text of our Constitution.

While the Equal Protection Clause of the United States Constitution protects non-citizens from *state* discrimination based on their country of citizenship, *see Graham*, 403 U.S. at 372, the Supreme Court of the United States has permitted such discrimination by the *federal* government. The Court carved out the federal immigration exception because such discrimination is viewed as part and parcel of the foreign relations power. As such, the Supreme Court determined that it must defer to the political branches on immigration matters.

The United States Supreme Court first deferred and permitted federal discrimination in a case concerning Chinese nationals. In *Ping v. United States* ("the Chinese Exclusion Case"), 130 U.S. 581, 9 S. Ct. 623 (1889), the Court considered the validity of the Chinese Exclusion Act, which was "in effect an expulsion from the country of Chinese laborers." *Id.* at 589. The Court concluded that the Act was not subject to judicial review because Congress had plenary power over matters of immigration. *Id.* at 603-04. In reaching this conclusion, the Court reasoned that a sovereign nation must have complete control over its own territory because "[i]f it could not exclude aliens, it would be to that extent subject to the control of another power." *Id.* at 604. Thus, in a later case in which a Chinese national challenged his deportation, the Court held that federal treatment of aliens raised questions that the court was not competent to address. *Ting v. United States*, 149 U.S. 698, 713, 13 S. Ct. 1016, 1022 (1893). This logic was extended to include outright racial discrimination in the name of immigration policy: "Congress may exclude aliens of a particular race from the United

States . . . without judicial intervention." *Yamataya v. Fisher*, 189 U.S. 86, 97, 23 S. Ct. 611, 613 (1903).

This body of early American case law takes as a given that an "essential attribute[] of sovereignty" is the ability of the national government to control non-citizens within the nation's borders. *Ping*, 130 U.S. at 607. However, this tenet of American immigration law has not been adopted by all other sovereign nations. Germany, for example, "has not viewed national sovereignty as requiring a power over migration unfettered by constitutional limitations or judicial review." Gerald L. Neuman, *Immigration and Judicial Rev. in the Fed. Rep. of Germany*, 23 N.Y.U. J. Int'l L. & Pol. 35, 36 (1990). Indeed, scholars on American law have leveled the criticism that, far from being an inherent aspect of a sovereign nation, judicial refusal to enforce the civil rights of non-citizens is aberrant in light of international law and norms. *See, e.g.*, Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 Asian L.J. 13, 33-35 (2003); Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 Yale L.J. 2335, 2345 (1991).

In spite of their tenuous foundation, the Chinese Exclusion Case and its progeny have become the foundation for the United States courts' approach to immigration. The United States Supreme Court itself acknowledged that the principles espoused in the early immigration cases were out of place in the mid-twentieth century, which heralded expansion of due process and equal protection jurisprudence. The Court noted that "were we writing on a clean slate, . . . the Due Process clause [would] qualif[y] the scope of

political discretion heretofore recognized as belonging to Congress in regulating the . . . deportation of aliens . . . . But the slate is not clean." *Galvan v. Press*, 347 U.S. 522, 530-31, 74 S. Ct. 737, 742-43 (1954) (allowing the deportation of a non-citizen due to his Communist beliefs even though he had resided legally in the United States for thirty-six years). The Court ultimately determined that it was bound by *Yamataya* and other early cases involving the deportation of non-citizens from Asian countries. *Id.* at 531-32.

Thus, even after the dictates of the Fourteenth Amendment were incorporated into Fifth Amendment jurisprudence and applied to the federal government, United States courts have continued to defer to the federal government when it discriminates based on citizenship. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883 (1976); *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979). *Mathews* upheld a length-of-residency requirement imposed on non-citizens seeking social security benefits. 426 U.S. at 69. The United States Supreme Court reiterated the logic of the Chinese Exclusion Case and held that Congress may decide which "guests" with whom to share America's "bounty." *Id.* at 80. Even though the question in that case did not involve national security, the Court held that because foreign relations *might* be implicated, the matter was best left to the political branches. *Id.* at 81.

In *Narenji*, the Circuit Court of Appeals for the District of Columbia upheld heightened procedures involving Iranian nationals and concluded that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." *Id.* at 747. The court stated that "any policy toward aliens is . . . interwoven with . . . foreign relations, the war power, and . . . matters . . . exclusively entrusted to the

political branches [and] largely immune from judicial inquiry or interference." *Id.* at 748 (quotation omitted). In *Rajah*, the Second Circuit similarly concluded that the right to expel aliens is a political one and that national security justified increased scrutiny of individuals from predominantly Muslim countries. 544 F.3d at 438-39.

The century of case law from the Chinese Exclusion Case to War on Terror cases, such as *Rajah*, has been widely criticized. Judicial deference and the political branches' plenary power in immigration are seen by some scholars as end-runs around constitutional protections including due process, freedom of speech and religion, and equal protection. *See* Saito, *supra* at 24; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 861 (1987). Compounding the problem, a policy of rational basis review can set the stage for more direct restrictions on access to the courts, such as jurisdiction-stripping laws. Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem. L. Rev. 295, 298 (1999). Judicial deference, then, may create a situation in which there is little to no judicial check on abuses of non-citizens. As one scholar put it, judicial deference on matters of immigration "must be seen as an invitation to [the political branches] to act capriciously without significant concern for the legitimate interest of resident aliens." Chemerinsky, *Constitutional Law*, *supra* at 622 (quoting Professor Gerald Rosberg).

Jurists, as well as scholars, have pointed out the dangers of rational basis review in the immigration context. Justice Douglas, in two spirited dissents, lamented unchecked "molest[ation] by the government" of non-citizens, *Galvan*, 347 U.S. at 534, and stated

that judicial deference to discrimination is "inconsistent with the philosophy of constitutional law which we have developed," *Harisiades v. Shaughnessy*, 342 U.S. 580, 598, 72 S. Ct. 512, 523 (1952) (Douglas, J., dissenting). In *Narenji*, in a dissent from denial of rehearing en banc, Chief Judge Wright, writing for several appellate judges, highlighted the importance of judicial review: "the question [of whether the Executive may target Iranian nationals for investigation] requires close scrutiny, and [the] answer must reflect careful consideration of fine, and often difficult, questions of value." *Narenji v. Civiletti*, 617 F.2d 754, 755 (D.C. Cir. 1979) (Wright, J., dissenting from denial of review en banc) (quotation omitted).

The decision whether to adopt the United States courts' deference on immigration is no doubt a difficult question of value. *Id.* The Republic argues that the Executive must have the flexibility to respond to security threats and diplomatic necessities by changing policies with respect to particular nationals residing in Palau. It refers to the decision in the trial court as "judicial second-guessing and policy-making." Numerous immigration laws favor citizens of particular countries, usually the United States, and the Government implies that these laws may be important to cementing Palau's relationship with the United States and former Trust Territories.

On the other side of the scale, Appellees point to the ability of unchecked political actors to abuse subsets of non-citizens, a politically powerless and often economically

vulnerable group.[5] They cite United States case law, not as precedent, but as a cautionary tale. Judicial deference in the United States has resulted in closing the courthouse doors to Chinese and Japanese nationals seeking to avoid deportation, Iranian students facing heightened scrutiny by authorities, and residents from predominantly Muslim countries, all of whom contended that their deportations or heightened surveillance were the result solely of their race or religion. *See Ping*, 130 U.S. 581; *Narenji*, 617 F.2d 745; *Rajah*, 544 F.3d 427.

Further, as discussed above, the Equal Protection Section of the Palau Constitution explicitly limits the ability of the national government to discriminate based on a protected classification, unlike the Equal Protection Clause of the United States Constitution. This difference in Constitutional text and approach militates against uncritical incorporation of United States constitutional jurisprudence on discrimination. However, our Constitution, like the United States', imbues the legislature and the executive with power over immigration and foreign affairs. *See* Palau Const. art. VIII, § 7, cl. 2 & art. IX, § 5, cl. 4. And the judicial branch must not lightly intrude on areas entrusted to the political branches.

Thus, neither rational basis review nor strict scrutiny is appropriate. Either test would exact too high a price, on either the separation of powers or the civil liberties of non-citizens. In light of the competing constitutional imperatives implicated in this case, we conclude that intermediate scrutiny is appropriate.

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[5] Indeed, as *Yano* explains, political actors in Palau have "absolutely no duty to respond to the needs and aspirations" of non-citizen non-voters. *Yano*, 3 ROP Intrm. at 187.

Intermediate scrutiny lies "between the[] extremes of rational basis review and strict scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914 (1988). In the United States, intermediate scrutiny is applied to classifications based on sex and legitimacy. In *Craig v. Boren*, the Court considered an Oklahoma statute that set the drinking age at twenty-one for men and eighteen for women. 429 U.S. at 197. The Court had previously heightened its scrutiny of sex-based classifications because of the pervasiveness and perniciousness of sex-based discrimination in the United States. *See Frontiero v. Richardson*, 411 U.S. 677, 684-85, 93 S. Ct. 1764, 1769 (1973). In *Craig*, Oklahoma proffered statistical evidence indicating that young men were significantly more likely than young women to drink and drive. 429 U.S. at 200-03. However, the Court applied intermediate scrutiny to determine that, in spite of such evidence, "the relationship between gender and traffic safety was far too tenuous to satisfy [the] requirement that the gender-based difference be substantially related to the achievement of the statutory objective." *Id.* at 204.

Clearly, the rationale for and danger of discrimination against women is not perfectly analogous to discrimination based on citizenship. Yet in the immigration context, intermediate scrutiny provides a sound middle road between rational basis review and strict scrutiny. It acknowledges that there are some legitimate and important, if not compelling, interests that justify differential treatment of groups of non-citizens. However, intermediate scrutiny starts from the assumption that such discrimination is invidious, providing stronger protection for a politically vulnerable group.

When a law is passed or promulgated pursuant to the immigration or foreign relations power, the Government must show that such law is substantially related to an important government interest. If the Government is able to show that the challenged aspects of the law are each substantially related to a legitimate foreign policy goal, for example, such a showing should suffice to meet the important government interest prong. Further, the Government need not show that the challenged law is the *only* means to accomplish the important objective but must show that it is substantially tailored to achieve the important interest. A law that discriminates based on citizenship and only tangentially relates to an important government interest is unconstitutional.

Intermediate scrutiny best balances the text of the Equal Protection Section, which prohibits any action in violation of its guarantee, against the powers granted in the same document to the OEK and the President to create immigration laws and conduct foreign affairs as they see fit.[6] The Trial Division applied strict scrutiny to the evidence before it. Thus, we must reverse and remand for further findings and conclusions regarding whether the Republic has met its burden to show that § 706 and its exception are substantially related to an important government interest.

B. The $25.00 charge is an unconstitutional tax.

The Palau Constitution provides that only the OEK may levy a tax. Palau Const. art. IX, §5, cl. 1. The Trial Division determined that the $25.00 "fee" provided for in

[6] Appellees contend that the Executive is entitled to no deference because the OEK is given power over immigration in the Palau Constitution. However, the Executive has primary power over foreign relations, which is closely intertwined with immigration law. Provided he does not act in contravention of an act of the OEK, we afford the President's actions on immigration similar deference to that we give legislative acts in the area.

§ 706 was unconstitutional because the charge constituted a tax, and it was levied by the President rather than the OEK. We have never considered the factors that distinguish an unconstitutional tax from a permissible fee. The Trial Division and the parties turned to United States law for guidance.

Appellants rely on a case arising out of Hawaii, which, like Palau, has a constitutional provision reserving the power to tax for the legislature. *Hawaii Insurers Council v. Lingle*, 201 P.3d 564, 572 (Haw. 2008) ("The power of taxation is essentially a legislative power." (quotation omitted)). *Lingle* considered whether assessments issued by the state's insurance regulatory agency were, in reality, taxes. *Id.* at 567. The Hawaii legislature delegated to the commissioner of the agency the power to "make assessments against insurers" and established criteria for doing so. *Id.* at 568. It also set up a special fund to receive the revenue collected by the insurance commissioner. *Id.* at 567. *Lingle*, adopting a test applied in a different context by the First Circuit, determined that a charge issued by the government is a regulatory fee rather than a tax if:

> (1) a regulatory agency assesses the fee, (2) the agency places the money in a special fund, and (3) the money is not used for a general purpose but rather to defray the expenses generated [by enforcement and administration of the regulation].

Id. at 578 (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 686 (1st Cir. 1992)). Although *Lingle* held that the assessments passed this test, the court determined that the transfer of money from a special assessments fund to the general fund amounted to an unconstitutional violation of separation of powers. *Id.* at 582.

Appellants would have this Court adopt a less stringent test. Specifically, the Republic argues that the charge should be considered a fee as long as it is assessed by a regulating entity and "bears some relation to the costs associated with the enforcement or regulatory duties of the agency, and not whether it is actually held in a special fund or actually used for the specific regulatory and/or enforcement purposes." The Republic purports to base its test on *San Juan Cellular*, which described a "spectrum," along which charges by the government may be closer to a pure tax or a pure fee. 967 F.2d at 685-86. But *San Juan Cellular* is the very case on which *Lingle* relied to create a concrete test; the factors that determined the outcome in *San Juan Cellular* became the elements in *Lingle*. *Lingle*, 201 P.3d at 578. Additionally, *San Juan Cellular* was not attempting to determine whether a particular charge was constitutional; instead, it was considering whether a particular charge was a tax or a fee to determine the applicability of a federal statute. *San Juan Cellular*, 967 F.2d at 686-87. Finally, and most importantly, the Republic's test would require a charge only to "bear some relation" to the administrative duties. It is difficult to imagine how this would preserve the separation of powers protected by Art. IX, § 5.

Appellants also argue that the *Lingle* test is inappropriate for Palau and, thus, that a modified version should be deployed. They contend that the second and third prongs "cannot be applied literally under Palau law" because the Palau Constitution requires non-tax revenue be deposited into the National Treasury, and therefore an agency cannot set up a special fund. Palau Const. art. XII, § 1. However, this rule is not unique to Palau. Indeed, in both Hawaii and Puerto Rico, the jurisdictions involved in *Lingle* and

San Juan Cellular, all funds collected by any government agency must be deposited into the general treasury fund, unless the legislature sets up an alternative fund. *See* Haw. Rev. Stat. § 37-52.3 (Only the legislature may set up a special fund.); P.R. Laws Ann. tit. 3, § 283f(a)-(b) (Treasury Department collects "all public funds . . . no matter what their source" and then may place money in a special fund if it is already "allotted by law."). Similarly, in Palau, although Article XI requires that funds be deposited in the Treasury, the OEK has provided, within the Treasury, ear-marked funds for specific types of revenue. *See, e.g.,* 8 PNC § 112 (Airport Trust Fund); 9 PNCA § 201 (Palau Agricultural Fund); 22 PNC § 117 (Palauan Educational Textbook Development and Sales Fund).

Although Appellants lament that *Lingle* would require OEK action every time an agency administers a fee, this restriction is precisely what the Constitution requires. The thrust of Art. IX, § 5, cl. 1, is that the OEK alone will have the power to make laws for the collection of general revenue. For the President or an agency within the Executive to do so, absent express delegation, violates not only the Taxation Clause, but basic principles of separation of power. *See Lingle*, 201 P.3d at 582-83 (discussing distinct legislative and executive roles in the taxation process). Accordingly, we adopt the test used in *Lingle* to determine whether a charge by the government is a regulatory fee or an unconstitutional tax.

Applying the *Lingle* test, it is apparent that the "fee" levied by § 706 is an unconstitutional tax. The charge likely passes muster under the first factor. Although *Lingle* uses the term "agency," the President in this case was delegated the authority to

issue immigration regulations.[7] *See* 13 PNC § 1002(b). Thus, § 706 satisfies the first factor. However, the President's affidavit, even when viewed in the most favorable light, does not support the inference that the money collected will be placed in an ear-marked fund or used to enforce or administer § 706. Although the *Lingle* test is not a strict conjunctive test, the second and third factors are indicators of whether the OEK's power to tax has been intruded upon by the Executive. President Toribiong's affidavit was the only evidence presented by the government to show that the fee satisfied the *Lingle* test. His affidavit states that the President determined "that this fee is neither excessive nor disproportional" and was "calculated to recover the Republic's costs of implementing and enforcing the Regulation." In determining the amount of the fee, the President "also considered other fees charged by the Republic in relation to immigration matters," such as "the fee to renew various visas." However, Appellants provided no evidence that the funds collected would be deposited into a separate fund and segregated from money used for general appropriations. Because there is no genuine issue of material fact as to the second or third *Lingle* prong, we determine that § 706's "fee" is an unconstitutional tax.

[7] The President does not cite any specific grant of authority from the OEK giving him the authority to levy a fee. Even if he were explicitly given that authority, if the money generated were transferred to the general fund for general use, it might still violate the *Lingle* test. *Lingle*, 201 P.3d at 582-83 (explaining that such an action blurs the lines between the branches and constitutes a violation of the separation of powers).

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's conclusion that § 706(d) is an unconstitutional tax. We **REVERSE** the Trial Division's determination regarding § 706(c)(II) and **REMAND** on this issue alone for proceedings consistent with this Opinion.

KATHLEEN M. SALII
Associate Justice

ALEXANDRA F. FOSTER
Associate Justice

KATHERINE A. MARAMAN
Part-Time Associate Justice