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NO. 1020601

SUPREME COURT OF THE STATE OF WASHINGTON

JEFFERY ARISTOTLE PECORARO,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

**STATE'S ANSWER IN OPPOSITION TO PETITION FOR
DISCRETIONARY REVIEW**

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I. INTRODUCTION

The Washington Legislature acted within its authority to pass Substitute Senate Bill 5753 (SSB 5753), removing the statutory U.S. citizenship requirements for appointment to several state health care regulatory boards. S.S.B. 5753, 67th Leg., Reg. Sess. (2022). Petitioner challenged the Legislature's passage of SSB 5753 under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24, asserting that he had a constitutional right to be regulated only by U.S. citizens. This argument failed in superior court, as health care provider regulatory board members are not required under the Washington State Constitution to hold U.S. citizenship. Petitioner failed to establish he has a legal right to demand the Washington State Legislature impose a U.S. citizenship requirement for membership on state health care provider regulatory boards.

The Court of Appeals affirmed the Superior Court's dismissal of Petitioner's claims.

The petition for discretionary review (Petition) does not meet any of the criteria for discretionary review under RAP 13.4(b). Review by this Court is unwarranted.

II. ISSUE PRESENTED FOR REVIEW

Did the Washington State Legislature act within its authority by removing statutorily-imposed citizenship requirements for health care provider boards and commissions when there is no constitutional requirement that these appointees hold U.S. citizenship?

III. COUNTERSTATEMENT OF THE CASE

Washington State, like all U.S. states, licenses and regulates the safe practice of health care providers. Wash. Const. art. XX, § 2. To this end, the Legislature statutorily created several health care provider boards and commissions to apply subject-matter expertise to the regulation of these professions. Petitioner, as a licensed nurse, is regulated by the Nursing Care Quality Assurance Commission (Nursing Commission), a 15-member board composed of nurses of varying levels of

education and licensure, as well as public members unconnected to the nursing profession. RCW 18.79.070. Each board member must meet minimum statutory requirements set by the Legislature, and then pass a vetting process by the Office of the Governor. *Id.* This diverse group of individuals makes consensus decisions on nursing discipline and licensure matters in compliance with the Uniform Disciplinary Act, RCW 18.130. By removing minimum requirements for appointment, the legislature enables the governor's office to select commission members from a larger pool of diverse individuals with relevant qualifications.

The Washington Legislature passed Department of Health-requested legislation, SSB 5753, in 2022, changing the member composition and compensation for several Washington health care provider regulatory boards and commissions. Additionally, the bill removed language requiring U.S. citizenship as a condition of appointment to eleven boards, commissions, and committees. This aligned these boards with

the several health care regulatory boards, commissions, and advisory committees that have never had statutory citizenship requirements.¹

Petitioner filed a complaint under the UDJA, requesting the Superior Court strike SSB 5753 in its entirety as a violation of article III, section 25 of the Washington Constitution. That section states that all “state officers” must be U.S. citizens. Defendant State of Washington moved to dismiss, noting that this Court has already held that the citizenship requirement for state officers in article III, section 25 “appl[ies] only to the elected ‘state officers’ named in Art. III, § 1,” specifically governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction,

¹ *See*, board membership requirements for Board of Naturopathy at RCW 18.36A.150; Board of Occupational Therapy at RCW 18.59.120; Board of Physical Therapy at RCW 18.74.020; Board of Hearing and Speech at RCW 18.35.150; Midwifery Advisory Committee at RCW 18.50.140.

and commissioner of public lands.” *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 864, 329 P.2d 841 (1958).

The Pierce County Superior Court granted summary judgment to Defendant State of Washington, holding there is no constitutional requirement of U.S. citizenship for appointment to the regulatory boards and commissions named in SSB 5753.

Petitioner requested direct review by the Washington Supreme Court; this Court denied and transferred the petition to Division II of the Washington Court of Appeals. That court issued an unpublished opinion, affirming the Superior Court’s grant of summary judgment in favor of the State. The Court of Appeals held that the passage of SSB 5753 was an action within the Legislature’s discretion, unrestrained by any existing constitutional requirements. *Pecoraro v. State*, No. 58058-6-II, 2023 WL 2493669, at *3 (Wash. Ct. App. Mar. 14, 2023). Petitioner moved for reconsideration of this opinion and to publish, which the Court of Appeals denied. Petitioner timely

petitions for discretionary review by the Washington Supreme Court.

IV. ARGUMENT AGAINST DISCRETIONARY REVIEW

This Court accepts a petition for discretionary review only if one of the criteria in RAP 13.4(b) is met. Petitioner offers no persuasive argument or legal authority justifying review by this Court under RAP 13.4(b) and review should be denied.

A. There is No Basis for Discretionary Review Under RAP 13.4(b)

The Washington Legislature has plenary authority to determine the content of state statutes unless a party can point to a constitutional prohibition against its policy decisions. *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 289, 174 P.3d 1142 (2007). The Legislature acted fully within that authority when setting requirements for appointment in the health professions statutes.

Petitioner alleges several grounds for discretionary review, but all fail. The decision below does not conflict with a

decision of the Supreme Court nor does it conflict with another Court of Appeals decision. RAP 13.4(b)(1) and (2). There are no unanswered significant questions of law under the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3). Nor does the Petition involve an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

1. There is no inconsistency in Washington or federal case law on this issue

Petitioner fails to demonstrate the existence of conflicting decisions on this issue. Review on this basis should be denied. RAP 13.4(b)(1) and (2). Washington and federal cases uniformly reject a legal assumption that citizenship is required for all government positions, and instead hold that a state may only bar noncitizens from government-related employment if the government has a state interest in doing so that overcomes the non-citizens' equal protection guarantees. *Sugarman v. Dougall*, 413 U.S. 634, 646, 93 S. Ct. 2842, 2849, 37 L. Ed. 2d 853 (1973).

Petitioner relies primarily on dicta in *Foley v. Connelie* and *Herriott v. City of Seattle* to support his theory that he holds an unenumerated right to bar individuals without U.S. citizenship from governmental positions. As the Court of Appeals noted, “neither of these cases establish the broad political right Pecoraro claims.” *Pecoraro* at *2.

The U.S. Supreme Court held in *Foley* that a government may impose a citizenship requirement for governmental positions (there, the police force) only if it can “justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.” *Foley v. Connelie*, 435 U.S. 291, 296, 98 S. Ct. 1067, 1070, 55 L. Ed. 2d 287 (1978). This Court held in *Herriott* that civil service positions subject to citizenship requirements did not “rise to the status of public office,” thus the state was held to a strict scrutiny standard to prove the citizenship requirement supported a legitimate state interest. *Herriott v. City of Seattle*,

81 Wn.2d 48, 63, 500 P.2d 101, 110 (1972). As summarized by the Court of Appeals:

Neither *Foley* nor *Herriott* establish that citizenship is a requirement for non-elected positions that require the execution of basic functions of government or political rights. Similarly, neither case establishes that United States citizens have the exclusive right to be governed only by United States citizens. Instead, these cases establish that participation in the function of government or exercise of political rights can justify a citizenship requirement if the legislature chooses to impose one.

Pecoraro at *3. There is no conflict between the Court of Appeals decision and a Supreme Court decision on this issue, nor has Petitioner demonstrated a conflict between the decision by Division II of the Court of Appeals and another division. Therefore, there is no basis on which to accept review under RAP 13.4(b)(1) or (2).

2. The Petition does not raise any unanswered significant questions of Constitutional law

The Petition does not identify any unanswered significant questions of law under either the Washington or U.S. Constitutions and review on this basis should be denied. RAP 13.4(b)(3). While Petitioner alleges the Court of Appeals

opinion “avoids constitutional issues raised,” this is incorrect—the Court of Appeals held that Petitioner failed to articulate a constitutional right violated by SSB 5753. *Pecoraro* at *2.

The Petition cites generally to the Fourteenth Amendment to the U.S. Constitution. Petition at 10. Neither the plain wording of this amendment, nor any case law cited in the Petition establishes a due process right to be regulated solely by U.S. citizens. U.S. Const. amend. XIV.

Nor does the Washington Constitution provide this right. Petitioner’s first-cited provision, Article I, section 30 of the Washington Constitution states, “The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.” Wash. Const. art. I, § 30. Petitioner’s implication, that the right to be regulated only by U.S. citizens is “retained by the people” is found neither in the Washington Constitution, nor in case law.

The other provision cited in the Petition, Article I, section 32 provides, “A frequent recurrence to fundamental

principles is essential to the security of individual right and the perpetuity of free government.” Wash. Const. art. I, § 32. This provision does not provide any substantive right, particularly not the right Petitioner alleges. *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42, 56 (1998).

SSB 5753 actually avoids a constitutional issue, rather than creating one as Petitioner claims. This is because a state may *only* discriminate against aliens when that government asserts a valid state interest in limiting a public office to holders of U.S. citizenship. *Nielsen v. Washington State Bar Ass’n*, 90 Wn.2d 818, 820, 585 P.2d 1191, 1192 (1978). The Legislature has clearly decided not to assert this interest for these regulatory roles. And no constitutional provision independently provides a right to be regulated only by United States’ citizens, or a right for an individual to bar the appointment of a non-United States citizen to a governmental position.

The Court of Appeals correctly rejected Petitioner’s constitutional claims and no unanswered significant legal

questions remain to be examined. There is no basis on which to accept review under RAP 13.4(b)(3).

3. The Petition raises no issue of substantial public interest that should be determined by the Supreme Court

Finally, Petitioner has not established his claims raise an issue of “substantial public interest” under RAP 13.4(b)(4). Petitioner’s argument for this ground for discretionary review is inextricably tied to his failed constitutional argument, as he alleges “SSB 5753 and the opinion by COA-II violate fundamental constitutional rights and principles that outline the requirements of citizenship for serving in various public offices. . .” Petition at 2. Because Petitioner’s constitutional argument fails, his “substantial public interest” argument fails as well. He alleges no additional basis for a substantial public interest other than personal disagreement with the Legislature’s action in passing SSB 5753. There is no basis on which to accept review under RAP 13.4(b)(4).

V. CONCLUSION

This Petition does not identify a conflict between the Court of Appeals decision below and Washington or federal case law, or present unanswered significant questions of law or issues of substantial public interest justifying discretionary review by this Court. Therefore, review should be denied.

This document contains 1912 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of July
2023.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the 5th day of July 2023, I caused a true and correct copy of the *State's Answer to Petition for Review* to be served in the above-captioned matter upon the parties herein as indicated below:

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 Email: Courtesy Copy via
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DATED this 5th day of July 2023.



DALENE MARIE MANSAPIT
Legal Assistant

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE AGRICULTURE & HEALTH
DIVISION**

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