S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

February 13, 2009

Introduced by M. of A. HIKIND -- Multi-Sponsored by -- M. of A. BALL, BURLING, BUTLER, CALHOUN, ERRIGO, FINCH, FITZPATRICK, KOLB, MAYERSOHN, MILLER, QUINN, REILICH, TOWNSEND, WALKER -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to potential suspect terrorist profiles

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. Whereas the legislature notes that the Supreme Court of the United States has held in Grutter v. Bollinger, 539 U.S. 306 (2003), that factors such as race and ethnicity can, consistent with the equal protection clause of the United States Constitution, be considered in making governmental decisions provided that: (1) such consideration serves a "compelling governmental interest" and (2) that race or ethnicity is not the only factor to be considered in making the decisions. The judicial opinion in Grutter v. Bollinger involved consideration of race in college admissions, and the Supreme Court held that obtaining a diverse student body is a "compelling state interest" in that context because it produces "substantial, important, and laudable educational benefits ... including cross-racial understanding and the breaking down of racial stereotypes."

The legislature finds and declares that preventing terrorist attacks on our citizens - including not only possible deaths and injuries, but also crushing economic harm or even chaos - is an even more compelling governmental interest. It also finds and declares that since both law enforcement resources and the time necessary to make an initial decision regarding stopping and questioning are very limited, this compelling governmental interest demands the identification of potential terrorist suspects as effectively and efficiently as possible so that they may be stopped, questioned, frisked, and/or searched.

The legislature also finds and declares that experts have suggested that, while no one single factor is definitive, a wide variety of factors such as the following can help identify potential terrorism suspects: wearing heavy clothing in warm weather; carrying a briefcase,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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duffle bag or backpack with protrusions or visible wires; displaying nervousness and/or inappropriate sweating; an inability or unwillingness to make eye contact; chemical burns on clothing or stains on hands. For this reason, law enforcement personnel are often asked to look for and consider such factors in determining which persons to stop, question, frisk and/or search.

The legislature also finds and declares that, as many experts and also the history of modern terrorism has suggested, the race or ethnicity of a person can also be a very important if not crucial factor, along with others, in identifying potential terrorist suspects, and so finds that the use of race or ethnicity serves a compelling governmental interest in helping law enforcement personnel to determine effectively and efficiently, along with other factors, which persons to stop, question, frisk and/or search. In this regard the legislature notes that decisions to question or search a suspicious person have only momentary consequences for innocent persons - unlike the governmental decisions upheld in Grutter v. Bollinger which have lasting and very significant adverse consequences for applicants who would have been admitted to the college but for the use of race by admissions officers in making admissions decisions. The legislature also notes that race has been used in the past as one criteria law enforcement personnel have used in determining whom to stop, question, frisk and/or search.

Therefore, the legislature finds that, in the interest of ensuring the most effective terrorist prevention which meets United States constitutional protections, it is necessary to enact a law which will authorize law enforcement personnel to consider race and ethnicity as one of many factors which could be used in identifying persons who can be initially stopped, questioned, frisked and/or searched.

S 2. The executive law is amended by adding a new section 837-s to read as follows:

S 837-S. POTENTIAL TERRORIST SUSPECT PROFILE. 1. FOR PURPOSES OF THIS SECTION, "POTENTIAL TERRORIST SUSPECT PROFILE" SHALL MEAN MULTIPLE FACTORS WHICH DETERMINE THE EXISTENCE OF A REASONABLE INDIVIDUALIZED SUSPICION AND/OR PROBABLE CAUSE AND PROVIDE CAUSE FOR A PEACE OFFICER OR POLICE OFFICER TO LAWFULLY JUSTIFY THE STOPPING OF A MOTOR VEHICLE, THE STOPPING AND QUESTIONING OF AN INDIVIDUAL, AND/OR THE STOPPING AND FRISKING OF AN INDIVIDUAL, IN FURTHERANCE OF THE GOVERNMENT'S COMPELLING INTEREST IN DETERRING TERRORIST ATTACKS. ONE OF THESE FACTORS MAY BE THE APPARENT RACE OR ETHNICITY OF THE INDIVIDUAL.

2. NOTWITHSTANDING ANY STATE OR LOCAL LAW, RULE OR REGULATION TO THE CONTRARY, A PEACE OFFICER OR POLICE OFFICER, AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW, MAY CONSIDER THE APPARENT RACE OR ETHNICITY OF A SUSPECT AS ONE OF MANY FACTORS IN A POTENTIAL TERRORIST SUSPECT PROFILE WHICH HE OR SHE COULD USE TO IDENTIFY PERSONS WHO COULD BE STOPPED, QUESTIONED, FRISKED AND/OR SEARCHED IN FURTHERANCE OF THE GOVERNMENT'S COMPELLING INTEREST IN DETERRING TERRORIST ATTACKS; PROVIDED, HOWEVER, APPARENT RACE OR ETHNICITY MAY NOT BE THE SOLE CRITERIA UTILIZED FOR MAKING THE DECISION. RATHER, APPARENT RACE OR ETHNICITY MAY BE UTILIZED AS ONLY ONE OF SEVERAL FACTORS, AND SUCH PEACE OFFICERS OR POLICE OFFICERS SHALL ENGAGE IN A HIGHLY INDIVIDUALIZED, HOLISTIC CONSIDERATION OF EACH PERSON'S TOTALITY OF CHARACTERISTICS AND FACTORS IN CARRYING OUT HIS OR HER LAW ENFORCEMENT FUNCTIONS, INCLUDING DETERMINING WHOM TO STOP, QUESTION, FRISK AND/OR SEARCH.

S 3. This act shall take effect immediately.