In the

Supreme Court of the United States

WILSON H. ELKINS, President,
University of Maryland,
Petitioner,

--vs--

JUAN CARLOS MORENO, et al.,
Respondent.

Number: 77-154

Washington, D. C.
February 22, 1978

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Washington, D. C.

Wednesday, February 22, 1978

The above-entitled matter came on for argument at 2:04 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DAVID H. FELDMAN, ESQ., Assistant Attorney General, Chief of Litigation, 1400 One South Calvert Bldg., Baltimore, Maryland 21202, for the Petitioner.

ALFRED L. SCANLAN, ESQ., 734 Fifteenth Street, N.W., Washington, D. C. 20005, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 77-154, Elkins against Moreno.

Mr. Feldman, I think you may proceed when you are ready.

ORAL ARGUMENT OF DAVID H. FELDMAN ON BEHALF OF PETITIONER

MR. FELDMAN: Mr. Chief Justice, and may it please the Court: In the case now before you, the petitioner, the president of the University of Maryland, urges this Court to preserve the rational system of assigning tuition to students that prevails at most public colleges and universities across the Nation. Following the 1973 decision of this Court in Vlandis v. Kline public institutions of higher education adopted new policies for determining students' admission, tuition rates and other charges. The policies adopted by the University of Maryland and most other publicly supported schools look not only to the domicile of the students in granting preferential in-state status, but also are predicated on a number of legitimate grounds for according differential consideration in defining who is entitled to the benefit of lower fees. Thus, while the policy at the University of Maryland generally looks to who is financially responsible for bearing a student's educational and other costs and then looks to the domicile of that person, whether it be the student,

his parent, or spouse, in order to accommodate the legitimate interest served by the policy, it recognizes that variations from general applications are both necessary and appropriate.

For example, both resident students and permanent resident aliens can and do qualify for in-state status at the University of Maryland. By contrast nonresident citizens and non-immigrant aliens are denied preferential treatment. Similarly, the university's policy denies its benefits to a group of citizens whose association with and contributions to the State are likely to be minimal and transitory, specifically to those members of the armed forces who come to the university not by choice but by assignment for educational purposes.

In May 1975 respondents, three undergraduate students at the University of Maryland, filed this action for declaratory and injunctive relief in the United States District Court for the District of Maryland. Each was financially dependent on his father, an employee of an international bank in Washington, D.C., who held, as did his child, a non-immigrant G-4 visa. G-4 non-immigrant visas are given to officers or employees of international organizations and the members of their immediate families. As one seeking to be a non-immigrant alien, a person applying for a G-4 visa must state under oath the purpose and length of his intended stay in the United States, can be admitted for only such time and under such conditions as the Attorney General may by regulations prescribe and is required

by the applicable regulations to agree to abide by all the terms and conditions of his mission and to depart at the expiration of the period of his admission or the abandonment of his authorized non-immigrant status. Such non-immigrants are decisively disqualified by Federal law from establishing a permanent residence in this country because the Immigration and Naturalization Act accords the privilege of residing permanently in the United States only to aliens lawfully admitted for permanent residence.

In the district court, represented by counsel retained by the international bank for which their fathers worked, respondents urged that the university's policy of denying in-state status to the holders of G-4 non-immigrant visas or those financially dependent on the holders of G-4 --

QUESTION: What do you mean by "permanent residence"? That is a term of our immigration laws. That means you can stay as long as you -- forever, if you wanted.

MR. FELDMAN: That is correct. That is a reference to Section 1101(a)(20) of title XX of the United States Code.

QUESTION: You will get to it. But that probably doesn't have too much connection with domiciles.

MR. FELDMAN: If the Court please, I think it has been suggested, both by the Court's majority opinion in Nyquist v. Mauclet last term and particularly by Mr. Justice Rehnquist's dissent in that case that aliens who are non-

immigrants are under a disability from being domiciled in this country or at least most categories of aliens who are non-immigrants, and for that matter, that is a factor which is conceded by the respondents in this case, as I will note later during the argument.

Respondents urged in the district court that the university's policy of denying in-state status to them violated the due process and equal protection clauses of the 14th amendment. The district court held in July 1976 that the university's policy as applied to G-4 non-immigrant visa holders created a permanent irrebuttable presumption of non-domicile in violation of the due process clause and thus the district court did not reach the equal protection claim now reasserted here by the respondents.

QUESTION: Your position is that the United States has never admitted these people for permanent residence.

MR. FELDMAN: That is correct.

QUESTION: Only temporary.

MR. FELDMAN: I think that is clear from the conditions of their admission to this country, both by virtue of their non-immigrant status and by virtue of the regulations prescribed by the Attorney General requiring them to depart at the conclusion of their authorized admission.

QUESTION: Are they authorized to become citizens? Could they apply for citizenship while they are in this status?

MR. FELDMAN: They would not be authorized to apply for citizenship while in the status. They would be required to adjust their status to that of an alien lawfully admitted for permanent residence and then they would be subject to the five-year requirement.

QUESTION: They could always apply, but they could not become citizens, you say, while they are in this status.

MR. FELDMAN: That is correct.

The district court relied upon Vlandis v. Kline in its unvarnished state, that is, without reference to this Court's numerous decisions dealing with State classifications where other irrebuttable presumptions not affecting fundamental rights --

QUESTION: Mr. Feldman, you say Vlandis in its unvarnished state. At least your alternate position here, is it not, is that this case is different from Vlandis v. Kline?

MR. FELDMAN: Yes, it is our position in this case that even if Vlandis had not been reinterpreted by Weinberger v. Salfi and subsequent decision of this Court, that the presumption said to be at issue in this case, one, is not permanent in the sense of Vlandis v. Kline, and, two, entirely apart from that, that the presumption said to be at issue is universally true and therefore not prohibited under Vlandis v. Kline.

QUESTION: In other words, you would be saying that for purposes of Maryland in-state tuition regulations, a non-

immigrant alien simply by definition can't qualify.

MR. FELDMAN: That is correct. That is the position --

QUESTION: And if you made your entitlement by domicile, by definition Maryland can say that you can never be domiciled here because of the Federal law.

MR. FELDMAN: That is our position.

QUESTION: Therefore, a Vlandis type inquiry, at least under this hypothesis, would shed no light on anything that the State uses in making its decision.

MR. FELDMAN: Well, I think the Vlandis type inquiry does not preclude the State from showing that there are legitimate policy objectives of the State in constructing its policy and in essentially defining domicile in such a way as to preclude these persons consistent with Federal law.

QUESTION: The presumption is always true -- as my Brother Rehnquist says, presumption is always true, so there is no violation.

MR. FELDMAN: That is --

QUESTION: When I said Vlandis type inquiry, I meant the type of inquiry mandated in Vlandis to consider individual circumstances. Your position is that nothing that such an inquiry would turn up would do these particular respondents any good because they are by rule forbidden from acquiring in-state tuition status.

MR. FELDMAN: That would be true only so long as those

persons did not adjust their status to that of an alien lawfully admitted for permanent residence.

QUESTION: Mr. Feldman, in that connection, I want to be sure I understand your position. As I understood your brief, you indicate that the university's policy simply tracks the State law of domicile, the Maryland law of domicile, that under Maryland law a G-4 alien or somebody in his family could not be domiciled in Maryland because they could never have the necessary intent required by Maryland law to be a domiciliary thereof.

Now, if it were shown by an authoritative decision of the Maryland courts that the Maryland law is other than what you understand it to be and represent it to be, would the university change its policy to conform to the then clear Maryland law or would it persist in continuing in the present policy?

MR. FELDMAN: I think it is entirely possible that the university would change its policy. However, I think petitioner's position in the matter would be that the university would still not be required to change the policy, the reason being that there are other legitimate objectives of the policy such as cost equalization and according preferential treatment only to those who are liable for payment of the full spectrum of State taxes.

QUESTION: Then you would have a Vlandis case.

If the university purports to differentiate a tuition between domiciliaries and nondomiciliaries and if it were shown that G-4s could become domiciliaries of Maryland and if nonetheless you prevented any G-4 from ever having the lower tuition rates, you would clearly have a Vlandis case, wouldn't you?

MR. FELDMAN: That would be true only if the university's only objective in having its policy was determining domicile. The point that I have been trying to make to your Honor is that there are other legitimate policy objectives which are taken into account in the university's construction of it's policy.

QUESTION: Did I misapprehend your brief when I thought you were saying that you no more than were following the law of Maryland as to domicile and that under that law a G-4 could never become a domiciliary of Maryland?

MR. FELDMAN: That is the position of the university, but it is further the position of petitioner in this case that that is not the only basis on which the university's policy rests.

QUESTION: May I go back a moment, Mr. Feldman. You don't give us any Maryland judicial decisions, at least any dispositive, which hold that G-4s can't establish Maryland domicile, do you?

MR. FELDMAN: There are no Maryland decisions one way or the other.

QUESTION: Did you resist the effort to certify to your court of appeals that question?

MR. FELDMAN: No. On the contrary, in the district court and further briefed in the Court of Appeals of the Fourth Circuit, the university took the position that the Federal courts should abstain on the question of whether persons holding G-4 visas were in fact capable of acquiring Maryland domicile in favor of a decision of the Maryland court.

QUESTION: Do you persist with that position in this Court? I gather your certification rule, notwithstanding what happened in the lower courts we could still certify it.

MR. FELDMAN: Yes, this Court could do that.

QUESTION: What is your position about that? Should we or should we not?

MR. FELDMAN: I am not urging the Court to do that principally because I think the university's --

QUESTION: Do you object to our doing it?

MR. FELDMAN: Certainly not.

QUESTION: Mr. Feldman, if there were to be certification, should the question be what is the general Maryland law of domicile or what policy is the university permitted to adopt with respect to in-state tuition fees under the law of Maryland?

MR. FELDMAN: I think it should probably be the latter question because the policy of the university does try

to take account of other factors in addition to domicile in determining who appropriately is entitled to the benefit of lower tuition fees. I think the difficulty, however, that is potentially raised with certifying the second question is that it essentially asks the Court of Appeals of Maryland to make what I would suggest to the Court is a policy decision which is more properly entrusted to the regents of the university.

QUESTION: But wouldn't the certification simply ask the Maryland Court of Appeals whether the regents had the authority under Maryland law to make that decision?

MR. FELDMAN: If that were the question certified to the court, I would submit that that would be entirely appropriate.

QUESTION: Mr. Feldman, let me just clarify one thing in my own mind. You suggest that the present rule may rest either on the domicile test or on these other considerations, such as paying the full range of taxes. Is it not correct that the rule that is actually at issue is one based on domicile only?

MR. FELDMAN: If the Court please, and if your Honor, Mr. Justice Stevens please, that is not entirely the case, and the proof of that is seen by reference to the university's general policy which is reprinted in the brief of petitioner at page 7. And first I might note that it is the general

policy which is described there,not only the focused sole reason for what the policy is. But in that regard I would refer the Court to paragraph 1, subsection d , which in a list of classes to which in-state status is accorded, indicates that such status is available where a student who is a member of the armed forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

I would submit that such a student assigned for educational purposes to the University of Maryland might well himself have been before entering the service and while in the service a domiciliary of Maryland, but the regents have taken the position in that case that since the Federal Government is bearing the cost of the student's education and in particular a military department of the Federal Government, that in that instance it is not appropriate to accord in-state fees without reference to domicile. I think that is a --

QUESTION: I was under the impression, and I may not have completely followed that, that every person who could establish that he or she was a domiciliary of Maryland would be treated as an in-state applicant.

MR. FELDMAN: That is only correct insofar as the general classification is concerned. It is not true in the

instance of those military assigned for educational purposes rather than coming by choice. It is further not true in the case of non-immigrant aliens, the overwhelming majority of which, if not all of which, we believe to be under a legal disability from being domiciled in the State.

But the basis with respect to non-immigrant aliens is as to those, for example, on student visas, who are on other transitory stays in the United States, that their relationship to the State and their liability for the full payment of State taxes, if any, will be fleeting at most so that in the long run their contribution to the university will not be particularly great.

In the case of G-4 non-immigrant visa holders and diplomats, for example, who would be a similar category, such persons are under no liability to pay Federal or State income taxation, and because of their non-liability for payment of the full spectrum of taxes, their contributions to the university in the long run would be minimal as well.

QUESTION: Let me put the question just a little differently. If we did certify to the domiciliary issue to the Court of Appeals in Maryland and they came back with an answer that a person with a G-4 visa is capable of forming the requisite attempt to establish domicile, what would happen in this case?

MR. FELDMAN: I think the odds are reasonably high

that the case would become moot because the university would change its policy, but that judgment is one that would be made by the regents, and I have suggested previously and I would again that I think it is well within the discretion of the regents in terms of --

QUESTION: You say you could change its policy. Wouldn't it just apply its existing policy and say that some of these people would then be eligible to be considered?

MR. FELDMAN: It would not, because the existing policy specifically precludes from eligibility persons not United States citizens or aliens lawfully admitted for permanent residence. That preamble to the language is part of the first paragraph of the general policy as currently written. The general policy as currently written says it is the policy of the university to grant in-state status for admission, tuition and charge-differential purposes to United States citizens and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases, and then they are listed. So there still would be a requirement of the policy being amended.

I tried to suggest previously by one of my remarks that we believe Vlandis v. Kline not to be the same case as it was in 1973 in any event and that the university's policy's premises need not be universally true or perfect and --

QUESTION: Mr. Feldman, I am sorry to take so much time, but really, I don't understand. I read paragraph 1.a. of that paragraph, and why, if the Maryland court told us that the parents were domiciled and the child, why doesn't 1.a. entitle the student to admission?

MR. FELDMAN: Because 1.a. is a specific subcategory of 1. which limits a. and specifically says it is only a policy with respect to United States citizens and to immigrant aliens lawfully admitted for permanent residence, and the G-4s are neither of those categories.

QUESTION: Oh, I see. I am sorry.

MR. FELDMAN: As this Court indicated last term in Califano v. Jobst, State classifications are not gauged properly by focusing on selected atypical examples of the class. Starting with Weinberger v. Salfi in 1975, two years before, a long unbroken line of this Court's decisions makes clear that State classifications not affecting fundamental rights do not create unconstitutional irrebuttable presumptions or otherwise violate the Due Pocess Clause if rationally related to legitimate governmental objectives. Obviously a claim of a preferred tuition rate, whether or not the excess is paid by a parent's international bank employer, does not involve a basic human liberty or fundamental constitutional right and thus the many legitimate grounds proffered by petitioner in this case are more than sufficient.

Before discussing these rational bases, perhaps a word or two should be said about Salfi. Salfi involved an irrebuttable presumption in the Social Security Act which effectively held marriages lasting less than nine months to be shams and denied benefits. Absent from the Court's opinion was any language of strict scrutiny or least restrictive alternative, and the focus was upon Starns v. Malkerson where the Court said what we believe should be restated in this case, benefits here are available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexis with underlying policy objectives to be used as a test for eligibility.

Like the plaintiffs in Starns, appellees are completely free to present evidence that they meet the specified requirements. Failing in this effort, their only constitutional claim is that the test that they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy the test. And in the Usery v. Turner case a year later, the Court indicated that whether or not a classification stated an irrebuttable presumption on its face was irrelevant when its operation and effect were completely permissible.

Similarly, in Califano v. Jobst and the Massachusetts Board of Retirement v. Murgia cases of last year and the year before, the Court sustained what were obvious facial or

otherwise irrebuttable presumptions despite the fact that in Murgia an administrative device existed but was not used in annual physical examination to inquire into the factual matter that was presumed, namely, that policemen were unfit to serve at age 50. Just how little is left of the irrebuttable presumption doctrine was made clear by Mr. Justice Blackmun opinion for a unanimous Court in Ohio Bureau of Employment Services v. Hadori from last term, a case not cited in any of the briefs before this Court in this case but one which we now believe to be particularly relevant. There a three-judge court had invalidated on equal protection and due process grounds an Ohio statute denying unemployment compensation other than because of a lockout of an employer. In reversing the district court, this Court noted the legitimate interests of the State in preserving the integrity of its fund and dismissed the irrebuttable presumption claim in a footnote stating, "This argument requires several assumptions. First, appellee must assume that the purpose of the statute is to measure innocence. Then he must assume that the disqualification provision represents a presumption that any person laid off due to a strike is not innocent. If the statute is designed to serve any purpose other than measuring innocence, appellee's implication of an irrebuttable presumption fails."

As we discussed below, the statute clearly has purposes other than measuring innocence of the disqualified

worker.

Similarly, the policies of the University of Maryland and of most other public institutions of higher education which deny in-state status to non-immigrant aliens had a number of purposes other than the measure of domicile. These policies effect a reasonable decision to equalize the cost of college and university training between those with continuing liability to support public higher education by paying the full spectrum of State taxes and those, such as non-immigrant employees of the international banks,who do not have that obligation. Tuition payments at public institutions of higher education represent only a portion of true costs and the amount available for state-subsidized educational benefits is not limitless.

QUESTION: Mr. Feldman, did the district court find what the Maryland law was with respect to domicile?

MR. FELDMAN: The district court took the position that under the Maryland law of domicile, G-4s were not precluded from --

QUESTION: The district court has already answered the question that there has been a suggestion that should be certified to the Maryland courts?

MR. FELDMAN: It has answered the first question that Mr. Justice Rehnquist suggested was a possibility, namely, whether as a matter of theory G-4s could be so classified. It did not answer his second question, which I think he suggested was

the preferred question.

QUESTION: The district court, though, says as it understands Maryland law, G-4s are not forbidden or not precluded from becoming domiciliaries.

MR. FELDMAN: That was the district court's conclusion, that is correct.

QUESTION: And you disagree with that interpretation of Maryland law I take it.

MR. FELDMAN: That is also correct, your Honor.

QUESTION: Let's assume we were just bound to take the district court's view of Maryland law, we should just affirm, shouldn't we?

MR. FELDMAN: No, I don't believe that to be the case. And that is the point I am trying to make now, namely, that the university's policies serve many purposes other than measuring domicile, and I am trying to get to those in the few brief seconds that I have.

QUESTION: Did the district court -- it didn't reach those questions.

MR. FELDMAN: That is right, because on the district court's finding, it determined that there was a permanent irrebuttable presumption under Vlandis that was not universally true without reference to the later cases which cast doubt on those requirements.

QUESTION: Wasn't your position also that the

university's rule is not necessarily the same as the Maryland law of domicile?

MR. FELDMAN: That is entirely correct, Mr. Justice Rehnquist. That is our position, because the policy serves other purposes, is clearly intended to serve other purposes.

QUESTION: And the district court didn't treat that aspect, did they?

MR. FELDMAN: No, the district court never reached those questions because --

MR. CHIEF JUSTICE BURGER: You have only about four minutes left now to make that point. You better proceed to it.

MR. FELDMAN: Thank you, Mr. Chief Justice.

The university's policy in addition to favoring those with continuing liability to support public higher education by the payment of the full spectrum of state taxes also encourages the even-handed and efficient administration of its in-state determination and appeals process, limiting hearings for its 550 non-immigrant students to the objective criterion of changes in their immigration status and reducing the need for full-blown hearings, many inquiring interpreters. If respondents' arguments are accepted, the university's rational dividing line will give way principally in favor of employees described recently by a Senate committee as possessors of cinecures where extraordinarily high salaries are common place and pursuit of fringe benefits has been raised to a form of art.

It is the less fortunate categories of G-4 aliens that would be left out in the cold if respondents' arguments are accepted. The university's policy and those of most other public institutions serve all the purposes noted. They do not measure domicile only or view it in a vacuum --

QUESTION: Mr. Feldman, I don't understand how it serves the policy of encouraging the payment of taxes. These people are not going to pay taxes no matter what the university does.

MR. FELDMAN: The university's policy as a general matter --

QUESTION: Do you think someone is going to pay or not pay his taxes depending on the result of this case?

MR. FELDMAN: No. The point that I am trying to make, Mr. Justice Stevens, is that those persons who are given preferential treatment by the university are those liable for the full spectrum of State taxes, whereas those who are not favored, out-of-staters, non-immigrant aliens, those who pass through the State for short periods or, in the case of the G-4s, are not liable for taxes, don't receive the benefit for that reason, because the State is already subsidizing them by not charging them income taxes.

QUESTION: In the case of any permanent resident alien or any citizen, the question of whether or not he pays any taxes is totally irrelevant to your standards of whether he is

admitted, isn't that true?

MR. FELDMAN: It is not totally irrelevant because it is generally those persons who are liable for the full spectrum of taxes who are given the preferential treatment. It is true that the policy does not look in individual cases as to whether an individual has in fact paid those taxes or is in fact liable for them because he has made enough money.

QUESTION: Have not our cases taken note of the fact that they are liable for taxes, liable for military duty if they are here as permanent residents?

MR. FELDMAN: Yes, that is specifically the point that was made in Nyquist v. Mauclet.

QUESTION: Would these people be subject to compulsory military service if we --

MR. FELDMAN: No, these people would not be --

QUESTION: We don't know; we don't know what the law would be. We don't have it.

MR. FELDMAN: These people I think it is clear --

QUESTION: If we require Congress to enact another law and we don't know what that law could possibly be, how could we possibly know?

QUESTION: On the basis of the past law you are certainly entitled to make that representation if that's your view of the matter.

MR. FELDMAN: I think it is clear that under the

present law, persons who are here on G-4 visas are not liable for military service or not liable for Federal or State --

QUESTION: There is no compulsory military service now, of course.

MR. FELDMAN: That would be true even if --

QUESTION: Your position is that on the law as it last was before the change, they would not be liable for military service.

MR. FELDMAN: That is correct.

I believe my time is up. I am sorry that I haven't gotten to the one or two other points that I hoped to make, but I would be happy to respond to your questions.

QUESTION: Am I under a misapprehension, but are there not immigrant aliens who enjoy income tax immunity and nevertheless able to qualify as in-state students in Maryland?

MR. FELDMAN: I think it is true that there are immigrant aliens who enjoy income tax liability. As an example, if the G-4 --

QUESTION: Income tax immunity.

MR. FELDMAN: I am sorry, I didn't hear you.

QUESTION: Who enjoy income tax immunity.

MR. FELDMAN: I misspoke myself, I am sorry. I think it is true there are immigrants who enjoy immunity and in fact in this particular case, it is the position of respondents that even were they to adjust their status to that

of lawfully admitted for permanent residence, that if they continue to work for the international banks, they would still not be subject to Federal or State income taxation. And I think the only point to be made with respect to that is that if you focus in on that, you are focusing in on the atypical examples which this Court indicated were not pertinent in Califano v. Jobst, and as a general matter non-immigrants are subject to the full spectrum of taxes.

MR. CHIEF JUSTICE BURGER: Mr. Scanlan.

ORAL ARGUMENT OF ALFRED L. SCANLAN ON BEHALF OF RESPONDENTS

MR. SCANLAN: Mr. Chief Justice, and may it please the Court: The three young students at the University of Maryland and their family, I think, who were named as plaintiffs in this case and respondents in this Court are typical of most of the members of the class for which I speak today. Their parents have owned property in Maryland ranging from 7 to 15 years. They pay every single tax levied by the State of Maryland except the income tax on their salaries which they cannot do because by international agreement, treaty, if you will, that income is exempt from Federal and State income taxation. They have lived here many years. In two of the three cases they have attended elementary schools and secondary schools, public and parochial, without interruption.

One of them has a mother who is an American citizen

and can vote in American elections. They have no property -- their parents, I mean -- no property back home, with one exception. There is a small bank account in England that pays insurance.

QUESTION: Would it make any difference to this case if they had a million dollar estate out in the country somewhere?

MR. SCANLAN: Well, I could see where there would be a difference in the ability to show domicile if you had a chateau in Bolivia and returned there every year. But all we are asking for, your Honor, is the opportunity, just the opportunity, to prove domicile.

The university says, "No, you are not going to have that opportunity; you have a G-4 visa, and that's the end of the matter."

Now, prior to September 1973 the policy was a rational policy. If you owned and occupied real estate in the State of Maryland, you satisfied the test. But since 1973 the test has been the domicile test. Despite the embellishments my adversary would like to lay upon that test, from the beginning to the end, in all their briefs, they said domicile is the test, not alien, but domicile.

Assistant Attorney General Feldman's argument was consumed in trying to convince you that Vlandis is inapplicable or Vlandis should be thrown aside. And he did not reach another issue that we argued and that he concedes, not only

in the district court but in the Fourth Circuit, the equal protection issue. We have a class of aliens here. We think that this Court's holding of last June in Nyquist v. Mauclet is very much in point. I need not recite the facts of that case for you. You will recall provisions of the New York Education Act which gave tuition grants and scholarships and low-interest loans to American citizens, to people who had applied for citizenship, and to people who were willing to certify in writing that they would apply for citizenship was struck down. It's the subcategory of aliens, despite New York's argument that it only discriminated against a heterogeneous class, despite that argument in New York, this Court held the subcategory of aliens was a suspect class. I think it said something along the lines that the policy in that case, the New York education aid, in this case the implication of non-residency and non-domicile, is directed at aliens only and only aliens are harmed by it. The fact that it doesn't cut against the whole category of aliens didn't save it in Nyquist v. Mauclet and it shouldn't save the situation here.

QUESTION: May I ask, Mr. Scanlan, do you think we ought to certify this to the Court of Appeals of Maryland to find out whether or not G-4 immigrants can acquire domicile in Maryland?

MR. SCANLAN: No, Mr. Justice Brennan, I don't, for the following reasons: In the court below, they asked the

district court to abstain primarily on the ground that it would also support certification. The district court went ahead and decided the Maryland domicile question. The law is clear, he said, the policy is clear. They said in their briefs, "We tracked the Maryland law of domicile."

Now, the Maryland law of domicile, your Honors, is the traditional law of domicile. It's an intent permanently, indefinitely to live in Maryland.

Now, these G-4s come for duration of status. As long as they are employed by the Bank, as I said, in one case --

QUESTION: But that isn't permanent.

MR. SCANLAN: Oh. Yes, it's an intent permanently and indefinitely to live in the United States and not to repair elsewhere.

QUESTION: How could it be permanent if it's subject to being withdrawn at any time?

MR. SCANLAN: Well, there are many times when you --

QUESTION: How can it be permanent?

MR. SCANLAN: It can be permanent in the sense that at the present time you intend to live in this place --

QUESTION: It can be permanent because at the present time. Permanent and present are two different words.

MR. SCANLAN: As among the categories of aliens, Mr. Justice Marshall, among the category of non-permanent aliens-- there are a number of categories. Many of them have

to sign the fact -- the visas that they have say they have to maintain a residence abroad which they have no intention of abandoning.

Our aliens, and a few others like corporate executives and the foreign media and I believe the treaty traders, don't have to say that, so they can have an intention to stay permanently in the United States even though they should lose their job.

QUESTION: Suppose the Bank closes up tomorrow?

MR. SCANLAN: I don't know how likely that is, but if --

QUESTION: What would happen to that permanent?

MR. SCANLAN: Well, --

QUESTION: It would be the end of the permanent, wouldn't it?

MR. SCANLAN: If --

QUESTION: It would be the end of the permanent.

MR. SCANLAN: Well, if a fire occurred where I live now, I might have to move, but that's an unlikely contingency. At the present time I want to stay where I am, and I think all these people want to show -- I'm not saying all of them are domiciles.

QUESTION: I suppose the middle-level IBM executive, for example, who has moved 10 times in the last 10 years and expects to move 10 times more, he comes to reside in Maryland,

he thinks probably his hitch there will be two years.

MR. SCANLAN: He is domiciled in Maryland.

QUESTION: They are probably going to give him in-state tuition, aren't they?

MR. SCANLAN: Yes, that's right. He is domiciled in Maryland.

These international civil servants, your Honor, are very much like some of our Federal employees. They come here from Idaho and Nebraska. Some of them maintain voting residence back in Idaho and Nebraska. Most of them don't. They come here and they live. And that's what these people do.

Now, the university says, "We are not discriminating against aliens. Our policy falls with equal hand on all non-domiciliaries of Maryland, citizens and aliens alike."

They miss the point. We are not complaining about domicile as the test. What we are complaining about is that we, only we and other non-permanent aliens are excluded from taking it. As a matter of fact, they even give us a hearing. I represented two of these young people at hearings, the same hearing anyone else got. They just don't pay any attention to our evidence, because we have a G-4 visa. Domicile, not alien, is the test, they say. But in the end they are excluding a suspect class who are able to show their domicile here. I mean, the classic definition of domicile that comes into my mind is Justice Holmes' observation that the critical fact

that raises a change of abode to a change of a domicile is the intention not to reside anywhere. He epigramatically summed up the law of domicile. Under that definition, these people can show domicile.

QUESTION: The intention not to reside anywhere else.

MR. SCANLAN: That's right. The intention not to reside -- I'm sorry, your Honor. In Williamson v. Ossington.

QUESTION: I think that was the quotation -- else.

MR. SCANLAN: Now, I turn to -- passing the equal protection point, which I -- let me put it this way: If the Court is going to overturn the irrebuttable presumption doctrine or the Court is going to say that somehow Vlandis is not applicable to this case -- residence there, domicile here, I don't see the difference -- but assume that the Court says for some reason that eludes me that Vlandis is not applicable or should be overturned, the Court must still face up to the fact that Nyquist v. Mauclet says you can't discriminate against a subclass of aliens, and we have a subclass of aliens. As a matter of fact, our people probably could have passed the test of Nyquist v. Mauclet. All they would have to do is sign a paper that when they are eligible for citizenship, they would apply.

QUESTION: But so far as this record shows, they will never be eligible.

MR. SCANLAN: I don't know, your Honor. When they

reach the --

QUESTION: So far as this record goes.

MR. SCANLAN: I am not sure about that, your Honor.

QUESTION: I thought that was what you were complaining about, you didn't get a chance to make a record.

MR. SCANLAN: Oh, I see, the general record, your Honor, at least in the arguments to this Court and in the briefs. I am sorry, I confused the record specifically and the record generally. It is perfectly clear that when these men -- people in this class, when they reach retirement age at the Bank, then can petition for adjustment to permanent status, because at that time, in that event, when they are about to retire and they have a pension coming, they don't have to secure a labor certification form.

That brings me to a point that the university has made from the beginning. Just change your status, that is all you have to do, become a permanent alien. What's so tough about that?

We pointed out from the beginning to them what they call our imaginary roadblocks, namely, the international organizations by treaty must give due regard -- in the geographical selection of the staff, the banks must give due regard -- in the selection of staff, the banks must give due regard for geographical selection.

Secondly, the Congress has established the category

of visa for these people. It's the G-4 visa. The Congress has spoken. It's the Congress who said they can stay here definitely as long as they are on the job.

And then, finally --

QUESTION: Is that any different from saying that the children of the Ambassador of France can stay here as long as father is an Ambassador? Is that any different?

MR. SCANLAN: Well, the ambassadorial status, Mr. Chief Justice, is a different category --

QUESTION: It's different, but they are both derived from treaties or conventions, are they not?

MR. SCANLAN: Yes, but the ambassador status is like a Cabinet officer, it's of temporary duration. When he fulfills his assignment -- although the chap from, where is it, Nicaragua has been here a long time; that is probably the exception that proves the rule. But generally high-ranking diplomats serve for a shorter period. They are not international civil servants. They have much broader diplomatic privileges, if I might add on that subject -- Mr. Feldman referred to my client class as privileged aliens. They have functional privileges, yes. They are exempt from income taxation on their salaries, they would not be liable to be taken in the draft, they are exempt from alien registration, they are entitled to be repatriated if necessary in times of international crisis, and they are free from duty on their personal possessions when they

first come to this country. That's all the privileges they have. These are functional privileges necessary in connection with the work of their organization.

May I turn to Vlandis.

QUESTION: Aren't all those things indications of the transitory nature of the abode, or whatever term you want to pick, short of the dispositiveness?

MR. SCANLAN: Well, I think the functional privileges are necessary for them to perform their functions as international civil servants serving in international agencies. But the critical thing in domicile always is the intention.

Your Honor, we have a case that we didn't cite to this Court, but we did cite it to the Fourth Circuit. It I think has -- Resitorsky v. Resitorsky, at 296 Atlantic 2d, 431. There there was an alien on a cultural exchange program, which is one of those categories, your Honors, where you are going to maintain a residence abroad that you have no intention of abandoning. His status had run out, but the D.C. Court of Appeals said he had the intention to be domiciled in the District of Columbia for the purposes of securing divorce.

And we had the Seren case that was relied on, I think on our opponent's side; I think we did, where a University of Colorado foreign student, an F visa, which again the recipient of that visa has to say that he has no intention of abandoning his residence. This fellow applied for in-state tuition out at

Colorado. His status ran out and he petitioned for an adjustment of status. The Colorado court, quite properly I think, said, as long as he was in that particular status where he had to maintain another domicile, he couldn't be domiciled in Colorado for in-state tuition status, but when that status expired, he could have the intention to stay.

It seems to me this is an a fortiori case, the present case. These people that I am speaking for, many of them are Marylanders in every sense of the word. They go to school, to church. The only thing they don't get, they can't vote in Maryland because they are not citizens, and the University of Maryland --

QUESTION: Mr. Scanlan, can I interrupt you for a moment?

You rely on the Nyquist case rather heavily. There, of course, the discrimination was against all aliens. It was held that only a particular class were the victims of an illegal or a nonconstitutional discrimination, but as I remember it, all aliens were denied the opportunity to get the student loans and the like.

MR. SCANLAN: Oh, no, your Honor. All aliens were allowed who would do two things, who were in the category of being eligible for citizenship, who would sign a piece of paper which said when they were eligible, they would apply. No, no, it applied to a subcategory of aliens; i.e., those who were not

eligible for citizenship and would not sign the piece of paper.

In our case the subscategory is non-permanent aliens, specifically in our case the G-4 aliens.

I am not saying, your Honor, that everybody in all these other categories --

QUESTION: Let me pursue it just a moment, if I may. I had in mind the Diaz case a couple of years ago where the Court said that you don't have to treat all aliens as citizens, but you may draw a line somewhere along the spectrum of alien agency. Some are close enough to being citizens that we will let them in, and you just have to pick a line somewhere.

Now, you would not say -- I take it you are saying your people are enough like permanent residents so they ought to be treated that way, but you don't say the children of Ambassadors are or a little farther down the line wouldn't have to be.

Isn't it true that the university is entitled to draw some line and when you get real close to that line, it's going to have an appearance of arbitrariness.

MR. SCANLAN: Well, the university is entitled to draw the line that is drawn, namely, domicile. What it is not entitled to do --

QUESTION: Why isn't it entitled to draw the line at permanent resident just the way the first paragraph of their general policy does? Immigrant aliens lawfully admitted for

permanent residence.

MR. SCANLAN: Because then you are right back on the equal protection point. The Mathews v. Diaz case, written by your Honor, involved the Federal power. And the Court, speaking through you, Mr. Justice Stevens, made it perfectly clear in that case and again in Nyguist the Federal Government can have powers of classification over aliens and subclasses of aliens that is denied the States, because the Federal power is also based on the foreign relations policy of this country, which is none of the business of the States, much less the University of Maryland.

QUESTION: That really doesn't quite respond to the question, because I think you would concede that the university would not have to admit all aliens, say, illegal aliens or persons here on temporary visas. You wouldn't contend that.

MR. SCANLAN: No. I would concede there are classes of aliens that the university would be entitled to say, "Well, on your face you cannot show your domicile is here. Your visa says you have an intention --

QUESTION: But the Constitution doesn't require domicile to be the test. You don't say that the Constitution --

MR. SCANLAN: Oh, no. I'm not saying the Constitution. But when a legislative body --

QUESTION: But they have not used -- I was under a misapprehension before the argument started. The State did not

use domicile as the test.

MR. SCANLAN: Oh, that isn't so, your Honor. They bragged about that from the beginning. This is a belated after-thought of theirs when they realized they are hooked between aliens and domicile, and they went --

QUESTION: Is this general policy quoted on page 7 of the brief?

MR. SCANLAN: Yes, that is the general policy.

QUESTION: That doesn't use domicile, does it?

MR. SCANLAN: Your Honor, I am relying on Dr. Elkins himself speaking in answering a letter, I think it was from me, I can't remember for sure, in the Appendix, your Honor, at page 21a. I am sorry.

QUESTION: If we have to choose between a statement of written general policy and a letter from Dr. Elkins as to what is the university policy, which do you think we should choose?

MR. SCANLAN: Well, I think the policy as stated maybe doesn't spell out the fact that domicile is the key factor except that the policy contains a definition of domicile --

QUESTION: His letter on page 22a says, "The tuition rate is determined mainly by domicile."

MR. SCANLAN: Yes, then he tries to tell us cost equalization factor. The cost equalization factor, your Honor, doesn't hold up in this case, because they have admitted that

if any of our people did change, or could change their status, as they urge we do, they still wouldn't pay tax on their income, but they still would be domiciled in the University of Maryland.

QUESTION: But you would say -- let me just be sure I understand your argument. You would say that if the general policy as written applied to citizens, immigrant aliens lawfully admitted for permanent residence, and G-4 visa people, then it would be constitutional.

MR. SCANLAN: No, I wouldn't even stop there. I would say that as long as the policy -- Here, let me put it this way: There is a policy primarily based or exclusively based on domicile. There is a hearing procedure provided. Everybody gets a hearing, except one category, the non-permanent immigrants, including the G-4s, cannot -- whatever evidence they offer on the basic facts, the critical facts that the hearing is all about, i.e., are you domiciled in Maryland, our proof means nothing, no matter how close the ties to Maryland they are able to demonstrate in a particular case. That is what we are complaining about. That's unfair. It seems to us that is analogous to an implication of procedural due process. The fact that they could have had a different policy that did it a different way which didn't involve making a fact critical and then having a procedural shortcut to the determination of that --

QUESTION: Why wouldn't it have been equally unfair to the Nicaraguan Ambassador?

MR. SCANLAN: Oh, you mean the fellow who has been here a long time?

QUESTION: Yes.

MR. SCANLAN: Well, I -- let me put it this way. The Ambassador class, the diplomatic class, their privileges and their presence in this country is based on two theories: the representative theory and the extraterritoriality theory. One, they represent the sovereign, their sovereign, Nicaragua; or, two, they are an extension of Nicaraguan territory.

QUESTION: Including their car.

MR. SCANLAN: Including their car. I would say --

QUESTION: As they run into my car.

MR. SCANLAN: Pardon?

QUESTION: As they run into my car.

MR. SCANLAN: Oh. Yes, they are --

QUESTION: They are territorial, too?

MR. SCANLAN: But if one of these plaintiffs, I mean, one of these respondents or their fathers or their mothers hit anybody with their car in Maryland or anywhere else and they were liable, they would pay. They don't have that -- they don't have any diplomatic immunity. They are a different category.

QUESTION: You say there is a constitutional

difference between diplomatic immunity for tort liability and bank employee immunity for tax liability, that Maryland can't draw the line right there.

MR. SCANLAN: Well, yes, I am saying that.

QUESTION: When you have had these hearings, Mr. Scanlan, what section of the general policy is it that you have offered evidence on that you comply with, the general policy on page 7 of the petitioner's brief.

MR. SCANLAN: We have offered evidence about car registrations -- We couldn't obviously satisfy the whole criteria.

QUESTION: Well, you couldn't satisfy the criterion that they were immigrant aliens lawfully admitted for permanent residence, could you?

MR. SCANLAN: That's correct, but we offered evidence on the other criteria. They still gave us a hearing even though -- it was a Catch 22 situation, of course. We could have had a hearing until Doomsday, but it would be meaningless.

QUESTION: That's like saying that if a tax driver's statute that requires a minimum age of 21, your client is 18, you go in for a hearing, and they don't listen to the evidence of his qualifications because they find out he's not 21.

MR. SCANLAN: Well, it's also like the hearing in Stanley -- not the hearing in Stanley -- in the Burson v. Bell where there was a pre-suspension of license hearing, but that

hearing was meaningless in the case of a non-insured driver, and the Court held having made the fact of liability critical in that case, it was unfair, violated due process, call it an irrebuttable or conclusive presumption, if you will, and that was wrong.

I am not saying there are many cases. It's only in a case where the conclusive presumption is apparent; in Vlandis on the face of the statute and here in the obvious administration of the policy by the university where it is apparent on the face. In that case, yes. I am not urging that the Court go ferret out irrebuttable presumptions. That would be indeed substantive interference masquerading in a procedural dress, and I am not urging it where the course of individual determinations would be prohibitive or costly. That isn't the case here. We already had the hearings.

We are only talking about my small class, 53 children at the University of Maryland, 53. That 500 figure obviously involves student visa people who have to maintain a residence that they have no intention of abandoning. And I am not saying we should have irrebuttable presumptions that are wrong when there is no other better alternative way to determine the matter. I think it is perfectly valid to have age classifications for driving license, voting rights, and drinking rights and maybe bar examinations for testing lawyers. And I am not saying that we should have irrebuttable presumptions where

that wouldn't be any better qualified method to determine the ultimate fact, like your Honor mentioned in Salfi, the marital intent, the life expectancy, knowledge of terminal illness. We are all uncertain with respect to those matters, perhaps no better determined in an individual hearing than by an irrebuttable presumption.

But leaving those situations aside, I say that the Vlandis type of irrebuttable presumption is proper; I say we come four-square within Vlandis. If the Court is going to jettison Vlandis, that is another matter. I don't think they should. I think the irrebuttable presumption, contrary to the charge made about our analysis of it, is not dishonest. It's a principal constitutional analysis that has applicability and can reconcile the cases that this Court has decided.

But, finally, after all that about Vlandis, whether Vlandis controls, doesn't control, or is to be overruled, I say Nyquist v. Mauclet controls and the alienist problem is in this case, has been in it from the beginning. We are entitled to raise it here, have raised it here.

I thank you.

QUESTION: Mr. Scanlan, one question on the interpretation of Maryland law. Do we have to do that?

MR. SCANLAN: No, your Honor. Let me answer that question. The district --

QUESTION: Going by what you have just accepted as --

MR. SCANLAN: Well, by the same reasoning we accepted --

QUESTION: It's not a State court.

MR. SCANLAN: Well, this Court held in Bishop v. Wood that where you had a district court interpretation in a district where he was familiar with the law and that interpretation affirmed by the circuit court -- there, by a divided court. We have here an interpretation by a district court judge on a matter of Maryland law which seems clear on its face, the domicile test, and we have that affirmed by the Second Circuit. I say the same reasoning --

QUESTION: By the Fourth Circuit.

MR. SCANLAN: Fourth Circuit, I am sorry. The same reasoning you assigned in Bishop v. Wood applies with special force here because the Fourth Circuit was not divided.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3 p.m., oral arguments in the above-entitled matter were concluded.)