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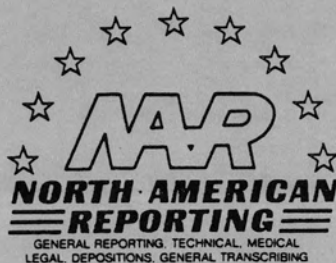
Supreme Court of the United States

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WESTERN AND SOUTHERN LIFE :
INSURANCE COMPANY, :
:
Appellant, :
:
v. : No. 79-1423
:
STATE BOARD OF EQUALIZATION :
OF THE STATE OF CALIFORNIA, :
:
Appellee. :
:
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Washington, D.C.
January 12, 1981

Pages 1 through 45

ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WESTERN AND SOUTHERN LIFE :
4 INSURANCE COMPANY, :

5 Appellant, :

6 v. :

No. 79-1423

7 STATE BOARD OF EQUALIZATION :
8 OF THE STATE OF CALIFORNIA, :

9 Appellee. :
10 - - - - - :

11 Washington, D. C.

12 Monday, January 12, 1981

13 The above-entitled matter came on for oral ar-
14 gument before the Supreme Court of the United States
15 at 1:08 o'clock p.m.

16 APPEARANCES:

17 ALAN R. VOGELER, ESQ., Frost & Jacobs, 2500 Central
18 Trust Center, 201 East Fifth Street, Cincinnati,
19 Ohio 45202; on behalf of the Appellant.

20 TIMOTHY G. LADDISH, ESQ., Deputy Attorney General,
21 State of California, 6000 State Building, San
22 Francisco, California 94102; on behalf of the
23 Appellee.
24
25

C O N T E N T S

ORAL ARGUMENT OF

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ALAN R. VOGELER, ESQ.,
on behalf of the Appellant

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TIMOTHY G. LADDISH, ESQ.,
on behalf of the Appellee

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ALAN R. VOGELER, ESQ.,
on behalf of the Appellant -- Rebuttal

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MILLERS FALLS
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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in the case of Western and Southern Life Insurance Company v. California. Mr. Vogeler, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN R. VOGELER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. VOGELER: Thank you, Mr. Chief Justice. May it please the Court:

The Western and Southern Life Insurance Company is one of 1,957 legal reserve life insurance companies that as of January 1, 1980, were licensed to do business in one of the 50 states or the District of Columbia. Western and Southern was incorporated as a stock company in 1888 and in 1948 became a mutual company. At January 1 of 1981 it had assets in excess of \$3 billion, and life insurance in force of over \$14 billion, and thus according to Best's Insurance Reports, it ranks 25th in size of companies and 45th of companies in size of life insurance in force. It's licensed to do business in 41 states, including the State of California.

It obtained the certificate of authority to do business in California as of July 1, 1956, and has carried on its business under that certificate of authority granted in 1956 for the last 25 years. The California constitutional provisions and the retaliatory tax laws of California, when Western

1 and Southern became qualified to do business there, levied a
2 tax upon out-of-state insurers which was called a retaliatory
3 tax if the state from which the foreign insurer to California
4 came levied a higher tax on California insurers doing business
5 in those foreign states than it did upon its own insurers.
6 And when the State Legislature implemented that statute in
7 1959, Western and Southern went to court, and it was deter-
8 mined in the Los Angeles County Superior Court in 1962 that no
9 retaliatory tax could be assessed against Western and Southern
10 under the California constitutional provision and law then in
11 effect because the State of Ohio did not levy higher taxes on
12 foreign insurance companies doing business in Ohio than they
13 did on foreign insurance companies coming into the State from
14 outside.

15 However, in November, 1964, the California constitu-
16 tion was amended to authorize a retaliatory tax on out-of-state
17 insurers in California merely when the state of origin of that
18 insurance company levied a tax on foreign insurance companies
19 that was higher than California levied.

20 QUESTION: Now, in using this term retaliatory
21 throughout, how would you distinguish that from the traditional
22 reciprocity statute?

23 MR. VOGELER: Reciprocity, Your Honor, is a situation
24 in which one state recognizes and defers to legislation or
25 some comity in another state.

1 QUESTION: Well, as it's typically, we'll treat your
2 corporations the same way you treat ours, isn't it?

3 MR. VOGELER: That's correct, Your Honor. That is
4 not what our situation here is, because California does not
5 lower its tax if a foreign state has a lower tax. It merely
6 raised their tax up to a foreign state's tax. There is no
7 reciprocity. But this is what, of course, the Attorney General
8 of California would like this Court to believe. We will ex-
9 pand on the fact that this is not reciprocity, this is not
10 comity. California taxes, whether or not Ohio discriminates
11 on California corporations, and levies a higher tax on the
12 foreign insurance company doing business in California.

13 The California constitutional amendment in 1964 had
14 the effect of levying this tax on out-of-state insurers when
15 the out-of-state, the foreign state of origin of the company
16 doing business in California had a higher tax rate than
17 California did. Now, California's tax rate, actually, is
18 higher than 32 other states. But Ohio's tax rate is higher
19 than California's. So the question of the validity of this
20 California retaliatory tax is therefore at issue in this case.
21 We claim, and the Los Angeles County Superior Court found,
22 that this kind of a tax, which he referred to as a comparative
23 retaliatory tax where the tax burdens of different states were
24 compared, is unconstitutional.

25 QUESTION: Mr. Vogeler?

1 MR. VOGELER: Yes, Mr. Justice Rehnquist?

2 QUESTION: In the opinion of the California Court
3 of Appeal, the taxes are variously referred to as discrimina-
4 tory, comparative, and now you characterize it as retaliatory.

5 MR. VOGELER: Yes, Your Honor. The discriminatory
6 tax is one which levies a tax when the foreign state discrimi-
7 nates. The retaliatory tax, the comparative retaliatory tax,
8 is one that is levied when the foreign state merely levies
9 a higher burden. The discriminatory tax is one which is
10 aimed at the foreign state which levies higher taxes on for-
11 eign companies than on its own companies. That is the anti-
12 discriminatory retaliatory tax. That is no longer the tax we
13 have in California, Your Honor. We have the comparative tax,
14 the comparative retaliatory tax which merely measures the
15 comparative tax burdens in Ohio and California. And this is
16 the tax which is in effect in most of the states of the Union.
17 We claim that this tax in California is invalid, violating not
18 only the Interstate Commerce Clause, but also the Due Process
19 and Equal Protection of the Law. And this is also what the
20 judge found in the trial court.

21 Now, the Court of Appeal reversed that. The Court
22 of Appeal reversed it on the basis of its understanding of the
23 decisions by this Court in Prudential v. Benjamin and Pruden-
24 tial v. Hobbs.

25 QUESTION: but it is only one tax that we're talking

1 about?

2 MR. VOGELER: It is one tax, Your Honor. It is a
3 retaliatory tax. A return is filed and an amount is paid.
4 It is a retaliatory tax. It is not the premiums tax which
5 all insurance companies pay. It is not the real property tax,
6 which all of the insurance companies pay. It is a retaliatory
7 tax determined by the use of a retaliatory form which measures
8 the tax burden of California against the tax burden of the
9 state of origin of the incoming company.

10 QUESTION: Well, what if the tax in the other juris-
11 diction on California companies is lower? California still
12 keeps its tax the way it is?

13 MR. VOGELER: California still levies its normal tax.
14 It does not reciprocate, Your Honor.

15 Now, there is another issue in this case and that's
16 another provision of California law in which California grant-
17 ed, a law that is now repealed as of 1977, granted a credit
18 against the premiums tax for all California insurers for
19 their real property taxes that they paid on their home office
20 buildings in California. They also granted a credit to foreign
21 companies against their gross premium tax if the foreign com-
22 pany had an office in California and occupied 75 percent or
23 more of the office.

24 QUESTION: But that washes out if the other one goes
25 one way?

1 MR. VOGELER: That is correct, Your Honor. That is
2 what the California Court of Appeal has said, but that is not,
3 however, Your Honor, what the local court, the Los Angeles
4 Superior Court, said.

5 QUESTION: But that's been repealed, hasn't it?

6 MR. VOGELER: It has been repealed, but in all of
7 the years in issue in this case it's presently in effect. It
8 affects the years we have before the Court.

9 QUESTION: It affects the judgment in this case?

10 MR. VOGELER: Yes, Your Honor. The Los Angeles
11 Superior Court also found that that was an undue discrimina-
12 tion, it violated due process, and it violated equal protec-
13 tion for the California companies to get this credit against
14 their premiums tax and for a company like Western and Southern
15 who did have an office building -- it's a lovely office build-
16 ing on Wilshire Boulevard which it spent a lot of money for
17 and pays a lot of taxes for, but it doesn't get the same credit
18 that the California companies get, because Western and Sou-
19 thern didn't occupy 75 percent of the building, and therefore
20 was limited to a credit equal to the percentage of its real
21 property taxes, equal to the percentage of the building occu-
22 pied by itself.

23 Now, as Mr. Justice Blackmun has stated, the Court
24 of Appeal of California reversed the Los Angeles County
25 Superior Court, and it is the validity of that reversal which

1 we are concerned with today.

2 Now, the legal issues we think are twofold. One,
3 did this Court in Prudential Insurance Company v. Benjamin
4 and Prudential Insurance Company v. Hobbs in 1945 give free
5 rein in 1946 to the states to levy whatever burden they wanted
6 to on insurance companies doing business in interstate com-
7 merce? And if that question is answered in the affirmative,
8 then did those two cases also authorize the states to violate
9 the due process of law and equal protection as guaranteed by
10 the Fourteenth Amendment to the Constitution? We submit --

11 QUESTION: Well, the equal protection issue was in
12 Benjamin, wasn't it?

13 MR. VOGELER: I'm sorry; I did not hear, Your Honor.

14 QUESTION: There was an equal protection issue in
15 Benjamin.

16 MR. VOGELER: Well, I will explain where I think --

17 QUESTION: All right.

18 MR. VOGELER: -- where I think that there may not
19 have been the equal protection issue that is before Court.

20 QUESTION: The words were there, anyway.

21 MR. VOGELER: The words may have been there, Your
22 Honor. Correct.

23 QUESTION: And Congress does have power under
24 Section 5 of the Fourteenth Amendment to enact legislation
25 carrying out the Amendment, does it not?

1 MR. VOGELER: That is correct, Your Honor, but this
2 Court has said it has not done that in the McCarran-Ferguson
3 Act. There isn't any question that the trial court found this
4 California retaliatory tax to be discriminatory, and nobody
5 says that it isn't discriminatory. Neither the appellee, the
6 Attorney General of California, nor any of the amici on their
7 side say that this isn't discriminatory. What they say is that
8 this Court authorized this discrimination when it interpreted
9 the McCarran-Ferguson Act in 1946.

10 Now, what they say really is that this type of dis-
11 crimination was approved by this Court in Hobbs, Prudential
12 Insurance Company v. Hobbs. Now, the Hobbs case, decided on
13 June 10, '46, before any of the members of this Court had come
14 to the Court either as Justices or as clerks, said as follows:

15 "The entire case -- "

16 QUESTION: But not long, though.

17 MR. VOGELER: A couple of years.

18 "Appeals for the Supreme Court of Kansas. June 10,
19 1946. Per curiam, the judgments are affirmed. Prudential
20 Insurance Company v. Benjamin, 328 U.S. 408; Robertson v.
21 California, 328 U.S. 440."

22 That's the entire language of this Court. Now, let's
23 go down below to the Kansas Supreme Court. There were 16
24 insurance companies who had cases involved in the court
25 entitled, "In re Kansas, in re insurance tax cases, at 160

1 Kansas 300." There were three types of taxes involved. They
2 were a fireman's relief fund tax, a premiums tax, and a retal-
3 iatory tax. None of the companies subject to the retaliatory
4 tax had qualified to do business in Kansas before the retalia-
5 tory tax was enacted. And what did the Kansas Supreme Court
6 say with respect to all of these laws? Here's what they said
7 in their own syllabus:

8 "(1) Our statutes pertaining to insurance were not
9 rendered void by the decision of the Supreme Court of the
10 United States in United States v. Southeastern Underwriters
11 Association." That was their first premise of law.

12 Second, "Congress did not exceed its powers in
13 passing Public Law No. 15 of the 79th Congress, First Session."
14 That's the McCarran-Ferguson Act.

15 And third, "Mandamus will not be allowed to compel
16 an executive officer" -- they wanted a license to be issued.
17 "Mandamus will not be allowed to compel an executive officer
18 to do something contrary to a statute unless it is clear
19 that the statute is void."

20 So the memorandum opinion issued by this Court in
21 Hobbs could do no more than affirm the foregoing propositions
22 of law.

23 QUESTION: What did the jurisdictional statement
24 raise as an issue?

25 MR. VOGELER: My jurisdictional -- ?

1 QUESTION: No, no, in Hobbs?

2 MR. VOGELER: Well, they -- they --

3 QUESTION: What were the questions presented here?

4 MR. VOGELER: The questions presented in Hobbs, Your
5 Honor, were whether or not the Kansas laws were valid.

6 QUESTION: Including the --

7 MR. VOGELER: -- retaliatory law.

8 QUESTION: Retaliatory?

9 MR. VOGELER: Retaliatory tax.

10 QUESTION: There was a retaliatory tax there?

11 MR. VOGELER: There was a retaliatory tax, Your
12 Honor, absolutely. However, the Kansas Supreme Court said in
13 its decision, "We find no evidence that the tax burden on the
14 foreign states doing an insurance business in Kansas
15 are any higher than they are on the Kansas insurance companies
16 who are doing business as native companies." So there is no
17 retaliation, there is no discrimination -- pardon me, Your
18 Honor. There is no discrimination that was found to be
19 existing in the Kansas Supreme Court.

20 QUESTION: Are you sure there weren't discrimina-
21 tions among foreign companies?

22 MR. VOGELER: The Kansas Supreme Court, Your Honor,
23 in that case --

24 QUESTION: No, that isn't what you said just now.
25 I'll put it to you another way. Would all foreign insurance

1 companies doing business in Kansas pay the same tax under that
2 law?

3 MR. VOGELER: No, Your Honor, because the tax is
4 somewhat the same --

5 QUESTION: Well, then, there is discrimination in
6 the case.

7 MR. VOGELER: Your Honor, the cases -- there were
8 only -- the only companies in the Kansas cases which paid a
9 retaliatory tax were Texas companies. There were three of
10 them. They were the only ones that were subject to the
11 retaliatory law. And there was no evidence that those com-
12 panies paid a higher tax than Kansas companies paid.

13 QUESTION: But there's evidence that they paid more
14 than some other companies paid.

15 MR. VOGELER: Well, there is no --

16 QUESTION: Non-Kansas and non-Texas companies. Other
17 foreign insurance companies paid a lower tax than the Texas
18 companies did.

19 MR. VOGELER: Yes, Your Honor.

20 QUESTION: Yes.

21 MR. VOGELER: Yes, Your Honor. The question is not
22 whether there is discrimination --

23 QUESTION: And the Supreme Court of the United States
24 said that was quite legal to do.

25 MR. VOGELER: It has been interpreted that way,

1 Your Honor, and it's certainly urged in that way by the
2 California Attorney General, Your Honor.

3 QUESTION: Mr. Vogeler, in the Hobbs jurisdictional
4 statement, was there an equal protection issue raised?

5 MR. VOGELER: To my best knowledge, Your Honor, it
6 was not.

7 QUESTION: And you said earlier in response to
8 Justice White that there was an equal protection issue in
9 Benjamin. What equal protection issue was raised in Benjamin?

10 MR. VOGELER: Well, Your Honor, that's a --

11 QUESTION: You were going to get to that, so go
12 ahead.

13 MR. VOGELER: What I wanted to say about both Benja-
14 min and Hobbs is that in the Benjamin case we were dealing with
15 a South Carolina premium statute. We were not dealing in
16 Benjamin with a retaliatory statute. So there was no question
17 in the Benjamin case of the validity of retaliatory tax laws.

18 QUESTION: No, but there was a tax which for purposes
19 of decision was assumed to discriminate against interstate com-
20 panies as opposed to South Carolina companies, because it was
21 levied only on the premiums paid or collected by the out-of-
22 state companies.

23 MR. VOGELER: That is correct, Your Honor. However --

24 QUESTION: But that was done in an interstate com-
25 merce context.

1 MR. VOGELER: That is also true, Your Honor. The
2 doctrine of Lincoln Life Insurance Company v. Read was still
3 in effect, and the question is whether or not a corporation
4 could be charged coming into a state a different fee or a
5 different tax than a creature of that own state. When a com-
6 pany is coming into a state standing on the threshold, it may
7 be valid for a corporate tax to be placed on that corporation
8 which is higher or different from the tax that is levied on
9 the local corporation. Now, we are getting into somewhat of a
10 discussion of the unconstitutional conditions doctrine which
11 this Court I believe is now fostering, and it may be that the
12 Lincoln Life Insurance Company case v. Read may not again be
13 decided in the same way that it was decided at that time.

14 But this is the concept that was involved in the
15 Benjamin case, namely, a company coming into the State of
16 Carolina was subjected to a higher tax than Carolina companies.

17 QUESTION: Was it argued in that case that that
18 violated the Equal Protection Clause? I thought you suggested
19 to Mr. Justice White that it was so argued, and I'm not sure
20 it was.

21 QUESTION: Well, whether it was or not, didn't Mr.
22 Justice Rutledge say it didn't violate the Equal Protection
23 Clause either?

24 QUESTION: Did he say that or did he say the
25 McCarran Act didn't violate the Equal Protection Clause?

1 MR. VOGELER: I think he said that the McCarran Act
2 did not, Your Honor.

3 QUESTION: And --

4 MR. VOGELER: And I urge --

5 QUESTION: And, therefore?

6 MR. VOGELER: Therefore that there could be discrimi-
7 nation?

8 QUESTION: No; and therefore there wasn't any Equal
9 Protection violation here on this statute, either.

10 MR. VOGELER: Well, I think that is what he said,
11 Your Honor; yes.

12 QUESTION: Yes.

13 MR. VOGELER: I confess to the Court that my position
14 is stronger with my second point which is, on the Fourteenth
15 Amendment, Due Process, and Equal Protection of the Laws.
16 In any event, we suggest that this Court is the final arbiter
17 of the meaning and effect of its decisions. As I say, we be-
18 lieve the California Court of Appeal interpreted Prudential
19 v. Benjamin and Prudential v. Hobbs incorrectly, but if we are
20 wrong we urge this Court to reexamine those cases and to dis-
21 tinguish them on the basis that the McCarran-Ferguson Act
22 does not authorize discriminatory taxation against interstate
23 commerce where such discrimination constitutes a denial of
24 Equal Protection of Laws. Apart from the Commerce clause,
25 Equal Protection of Laws. Then as our second --

1 QUESTION: You're not asking us to reconstrue or
2 reexamine the construction of the McCarran-Ferguson Act, but
3 simply to say, contrary to what we said some years ago, that
4 that Act does constitute any violation of Equal Protection of
5 the Laws?

6 MR. VOGELER: No, Your Honor, I am saying that I
7 want you to distinguish your former treatment of the McCarran-
8 Ferguson Act so that it does not apply to the other constitu-
9 tional guarantees. I feel that if the McCarran-Ferguson Act
10 takes away all protections to foreign insurance companies of
11 the Interstate Commerce Clause, which is what the Attorney
12 General of California would have you say and what you may al-
13 ready have said, then it seems to me it is particularly im-
14 portant that this Court be zealous in reserving and protecting
15 the only remaining rights that there are to these foreign in-
16 surance companies under the Constitution, and those are the
17 rights guaranteed to them under the fourteenth Amendment: Due
18 Process, Equal Protection --

19 QUESTION: Mr. Vogeler, in your equal protection ar-
20 gument, has the California statute had any impact on tax laws
21 in Ohio, to reduce them or -- ?

22 MR. VOGELER: I believe it has not, Your Honor.

23 QUESTION: Are they the same tax, same rate of tax,
24 whether it's a domestic or foreign corporation?

25 MR. VOGELER: Oh, no, Your Honor. Ohio levies on

1 foreign companies coming into the State a premiums tax of
2 2.5 percent. California levies a tax of 2.35 --

3 QUESTION: Well, what's Ohio do as to domestic cor-
4 porations?

5 MR. VOGELER: With request to domestic corporations,
6 Your Honor, there is a complicated formula and it --

7 QUESTION: Different from the foreign?

8 MR. VOGELER: -- has been held that the use of that
9 formula, in three different cases, meant that Ohio did not
10 discriminate against foreign insurance companies in Ohio.

11 QUESTION: But the California laws had no impact on
12 reducing the tax rates for either domestic or foreign corpo-
13 rations?

14 MR. VOGELER: No, Your Honor. No, Your Honor. And
15 that is, of course, one of the things that we discuss here,
16 because we feel that contrary to what the Attorney General
17 would have you believe, and contrary to what the amici in sup-
18 port of the California statute would have you believe, this
19 type of legislation, this retaliatory legislation does not
20 promote comity. It doesn't promote equalhanded treatment,
21 evenhanded treatment. It doesn't promote even taxation of
22 foreign corporations.

23 Let's look at the California law. They say that
24 17 states only levy higher taxes on foreign insurance companies
25 than California, and therefore it indicates that there's a

1 great leveling of taxes on foreign corporations. But 31
2 states levy a lower tax on foreign insurance companies than
3 California does, so that when those companies which are
4 created in California come into any one of the other 32 states
5 they have a retaliatory tax to pay. So there's nothing magic
6 about what California's doing. The only time you've got
7 comity is because you've got Oklahoma. In Oklahoma that's the
8 highest tax of all, four percent. So every Oklahoma company
9 that does business in any other state pays a retaliatory tax.
10 In California, Western and Southern pays a tax of the
11 difference between 2.35, the California rate, and the Ohio
12 rate, 2.5, or 0.15 of a percent of their premium income.
13 Oklahoma pays a 1.65 percent, companies from Oklahoma pay a
14 1.65 percent of premium tax, eleven times what Ohio pays.

15 QUESTION: I don't follow you now, Mr. Vogeler.
16 Oklahoma companies that go into California don't pay any --

17 MR. VOGELER: Oklahoma companies have a four per-
18 cent --

19 QUESTION: Because they have the highest tax, you
20 said?

21 MR. VOGELER: They have a four percent tax levied
22 in Oklahoma on a foreign insurance company.

23 QUESTION: Right.

24 MR. VOGELER: And, consequently, when they go into
25 California, which levies only a 2.35 percent tax, the

1 retaliatory tax picks up --

2 QUESTION: It's 1.65, I see.

3 MR. VOGELER: The 1.65, eleven times higher than
4 Ohio pays.

5 QUESTION: I see.

6 MR. VOGELER: If we look at the Exhibit B in the
7 Jerome Hellerstein brief which lists all the tax rates of all
8 the states, we could come up with all sorts of combinations
9 of what kinds of taxes are paid by the various companies from
10 different states doing business in other states.

11 QUESTION: And your due process argument emphasizes
12 what, Mr. Vogeler?

13 MR. VOGELER: The due process argument, Your Honor,
14 emphasizes that the mere incorporation of a state in another
15 state is no warrant or authority for the imposition of dis-
16 criminatory taxation. And you, Mr. Justice Brennan, said
17 that yourself in the Allied Stores case and I think your
18 language discussed the matter of our federalism, the comity that
19 we have between states, and you said, our Constitution is an
20 instrument of federalism. You referred to the common and
21 continuing problem of constitutional interpretation, of ad-
22 justing the demands of individual states to regulate and tax
23 enterprises in light of the multi-state nature of our
24 federation. The Equal Protection Clause, among its other
25 roles, operates to maintain this principle of federalism.

1 And you pointed out that the Wheeling Steel case held a tax
2 law unconstitutional because it discriminated against an out-
3 of-state company, whereas the Allied Stores case was held
4 valid because Ohio was discriminating against its own citi-
5 zens in favor of a foreign corporation.

6 I would like to reserve five minutes.

7 MR. CHIEF JUSTICE BURGER: Mr. Laddish.

8 ORAL ARGUMENT OF TIMOTHY G. LADDISH, ESQ.,

9 ON BEHALF OF THE APPELLEE

10 MR. LADDISH: Mr. Chief Justice, and may it please
11 the Court:

12 I think first we should clear the record as to one
13 question which I do not think is determinative of this case
14 or actually, strictly relevant to the case. But it's been
15 raised many times by the other side and in an effort to ap-
16 parently color the case in the favor of Western and Southern,
17 and that is the question as to whether Ohio law itself dis-
18 criminate against foreign insurers.

19 Now, from the presentation we have heard today and
20 the presentation in the briefs, one would understand that Ohio
21 does not discriminate against out-of-state insurers when they
22 come in. This is not the case.

23 I would draw attention to the brief filed by the
24 American Insurance Association and their fellow associations,
25 and particularly the Appendix A of that brief. There is set

1 forth the Ohio statutes which set forth what Mr. Vogeler has
2 characterized as this complex formula as far as Ohio domestic
3 insurers. It's clear, as Mr. Vogeler says, that foreign
4 insurance companies coming into Ohio will be taxed at a rate
5 of 2.5 percent of their premiums' measure. That's certainly
6 clear under Section 5729.03. That's on page 2a of this
7 Appendix.

8 For domestic insurers, Sections 5725.18 and .19
9 cover the tax that is to be charged. There there is a choice --
10 excuse me, it's not a choice; there are alternatives given as
11 far as how the tax will be computed for an Ohio insurance
12 company. One of those alternatives is the alternative, the
13 only basis upon which California companies or any other
14 state's companies will be taxed. It works out so that if you
15 multiply the revenue, the premiums measured by the $8\frac{1}{3}$
16 figure that's given in subparagraph (b) of 5725.18, multiply
17 the premiums measure by that $8\frac{1}{3}$, and then multiply that
18 result again by the .03 that is given in the 5725.19, you end
19 up with exactly the same 2.5 percent rate that's charged out-
20 of-state insurers. That's only one of the alternatives that's
21 given to the domestic companies.

22 5725.18 says you shall take the lesser of two alter-
23 natives. The other alternative is based on the surplus and
24 capital of the company. You arrive at a figure and multiply
25 that by the .03 that is given in Section 5725.19.

1 QUESTION: But in any event you've told us that the
2 Ohio tax is irrelevant?

3 MR. LADDISH: They are irrelevant, Your Honor.

4 QUESTION: What we're concerned with here is the
5 California tax?

6 MR. LADDISH: California tax; that is true.
7 My point, however, Your Honor, I think it's as important in
8 that it colors the arguments from the other side, including
9 the Solicitor General's brief, emphasizes in its question pre-
10 sented and several times during the course of the brief, in-
11 cluding four separate times on page 10 of its brief, that the
12 Ohio tax is nondiscriminatory and there is a very serious
13 question in my mind from reading in that brief as to whether
14 the Solicitor General would be in this case if he understood
15 what Ohio law actually provides.

16 QUESTION: But General Laddish, is it not true that
17 the discrimination in Ohio is between domestic companies and
18 all foreign insurance companies?

19 MR. LADDISH: That is true.

20 QUESTION: Whereas in California the discrimination
21 is, say, between an Oklahoma insurance company and an Ohio
22 insurance company and a Georgia insurance company; might pay
23 three different tax rates?

24 MR. LADDISH: Yes, Your Honor.

25 QUESTION: Quite a different problem.

1 MR. LADDISH: Right.

2 QUESTION: That is, the former claim that we had
3 in the Benjamin case.

4 MR. LADDISH: But, Your Honor, I think where we need
5 to keep things straight is the fact of whether we're talking
6 about the basic premiums tax law or talking about the retaliatory
7 tax law. Here, the Ohio law I'm referring to is the
8 basic Ohio law.

9 QUESTION: I understand. But the issue we have, as
10 I understand the equal protection issue we have, is whether
11 California may treat a group of insurance companies from different
12 states differently because they're from different
13 states, not a distinction between local and foreign corporations?
14

15 MR. LADDISH: That's correct, Your Honor, and I will
16 move on to the --

17 QUESTION: And while I've interrupted you, would the
18 issue be the same if, say, we thought of it in terms of individual
19 income tax and the State of Virginia used a retaliatory
20 scheme against, say, Maryland and West Virginia, and so that
21 a Maryland citizen working in Virginia paid one tax rate to
22 Virginia and a West Virginia citizen working across the,
23 commuting across, might pay a different rate. Is that the
24 same issue?

25 MR. LADDISH: Well, it would certainly be a different

1 case, Your Honor, because there's --

2 QUESTION: But in equal protection terms, would it
3 be the same issue?

4 MR. LADDISH: Equal protection terms, when we get
5 into that, it would be --

6 QUESTION: The idea being that --

7 MR. LADDISH: -- very similar, and yet you cannot
8 ignore the fact that here we have an interstate business, that
9 the business of insurance is an interstate, is in interstate
10 commerce, where the Congress has removed the Commerce Clause
11 -- upon the state.

12 QUESTION: I'm assuming the McCarran Act has taken
13 all the Commerce Clause issues out of the case. We just have
14 an equal protection issue.

15 MR. LADDISH: But remaining, Your Honor, is what is
16 left, and what can the states do to perhaps take up the slack
17 a bit and protect this interstate commerce on their own be-
18 half? And there is where you find a very strong interest here
19 of the retaliatory tax in trying to encourage interstate in-
20 surance commerce and in trying to keep the rates somewhat uni-
21 form and --

22 QUESTION: California is trying to encourage inter-
23 state insurance commerce by charging out-of-state companies
24 more?

25 MR. LADDISH: That's what I have to convince you of,

1 Your Honor, and I think --

2 QUESTION: Well, may I ask --

3 QUESTION: I just want to just leave one question,
4 and then I'll be still. Is it the same -- would you contend
5 that it would not violate the Equal Protection Clause for
6 Virginia to discriminate between Maryland and West Virginia
7 nonresidents working in Virginia, for the same purpose under-
8 lying the statute, to try and induce those states to lower
9 their income tax rates?

10 MR. LADDISH: Your Honor, I have not considered
11 that out of the current context of the case, which I think is
12 a very special case. And we, of course, under those circum-
13 stances there are privileges and immunities would also be
14 applying, and this sort of thing. But in the equal protection
15 standard, I think this is a very special case because of the
16 Commerce Clause facts, which I will refer to.

17 QUESTION: Mr. Laddish, I just want to be clear in
18 your response to my brother Stewart a moment ago. Is it your
19 position that appellant's equal protection argument is neither
20 helped nor hurt by whatever the situation may be in Ohio?

21 MR. LADDISH: Your Honor -- for purposes of the
22 California tax, it is not a part of the mechanism that there
23 must be a determination in Ohio. That was changed in 1964.

24 QUESTION: Well, the reason I asked --

25 MR. LADDISH: I think it is to the opinion of

1 this Court as to whether or not -- it certainly, the retaliatory
2 tax is certainly more than one purpose, which I will be
3 getting to. One of the purposes is to counteract discrimination
4 where it exists. The point I was making right now was
5 that it does indeed exist --

6 QUESTION: Well, what that means to me, Mr. Laddish,
7 is that California's purpose is, if possible, to get Ohio --
8 since we're dealing with Ohio corporations doing business in
9 California -- so to adjust its tax structure as to -- over it,
10 so that you don't have to charge the higher rate, is that
11 right?

12 MR. LADDISH: That's part of it, Your Honor, yes,
13 sir. And the -- also, it's to keep the lid on from Ohio doing
14 anything more and charge any higher charges upon the California
15 companies.

16 QUESTION: Well, Mr. Vogeler suggested that he did
17 not think that the California tax had had any impact whatever
18 on the Ohio tax structure, to change it in any way. Do you
19 agree with that?

20 MR. LADDISH: There has not been a change in the
21 Ohio tax since the current California retaliatory tax statutes
22 came into effect. Now, whether it has kept the lid on and
23 kept Ohio from doing more and increasing its insurance tax
24 rate, I would say that's a very, very good question as to
25 whether or not Ohio's insurance tax rate on foreign companies

1 might be quite a bit greater.

2 QUESTION: Well, do you think it's a sufficient de-
3 fense for the California tax if the only purpose were to try
4 to get other states to lower theirs?

5 MR. LADDISH: Yes, Your Honor.

6 QUESTION: You think that's enough of a defense
7 against --

8 MR. LADDISH: Well, excuse me, Your Honor, I sprang
9 to that answer. What I mean is, I do not think that discrimi-
10 nation, internal discrimination in the other state, is neces-
11 sary to support a tax such as ours. There are these other
12 issue, Your Honor, other than just the reducing. The point
13 I -- and I'll get off this now, as far as the Ohio taxes go,
14 the Court is -- the past practice of the Court has been to
15 take judicial notice of matters in appeals from state courts
16 that that state appellate court could take judicial notice of,
17 and in the current case, I would cite the Court to Section
18 452(a) for taking judicial notice of the -- this is Evidence
19 Code of the State of California -- taking judicial notice of
20 the Ohio laws, and also Section 452 (c) which permits
21 California courts to take judicial notice of the official acts
22 of the executive department of the states involved. I mention
23 that one because the amicus, American Insurance Association,
24 has also lodged with the Court in this document the tax forms
25 upon which the examiner for the Superintendent of Insurance

1 of Ohio, pursuant to the Ohio statute, to 5725.9, has computed
2 Western and Southern's tax liabilities for the past few years.
3 If one follows through this form, one will easily see that
4 Western and Southern itself has paid only 36 percent of the
5 taxes due Ohio that a California company would pay to Ohio
6 under the basic Ohio insurance tax.

7 Now, Western and Southern has mentioned in its
8 briefs the stipulation that we reached as to these earlier
9 California trial court decisions about Ohio law. I would just
10 merely point out that the mechanics of the California retaliatory
11 tax means that those decisions were reached on the basis
12 of the level of business Western and Southern was doing in
13 California at that time, and presumably this lower alternative
14 was not available to Western and Southern, would not be available
15 to Western and Southern under those facts for years 1959
16 and 1960. Until now there's been nothing in the record to show
17 any later years after 1960.

18 Now, I'll move on from what I have said that's irrelevant
19 to begin with. The purpose of the California retaliatory
20 tax is not to raise revenue. That, as the California courts
21 have recognized, is purely incidental. Any revenue that is
22 raised is purely incidental. In fact, the more successful the
23 tax is -- as Mr. Justice Brennan pointed out -- the less revenues
24 will be raised in that if it were successful those foreign
25 taxes will tend to lower.

1 Now, that is true because the true purpose, which is
2 a multi-faceted purpose of this tax, is to help California
3 insurance companies attain evenhanded tax treatment when they
4 do business in the other states. If this is fully achieved,
5 everyone's tax level will be the same --

6 QUESTION: Are you arguing now Equal Protection or
7 Commerce or both?

8 MR. LADDISH: Right now I am trying to -- I will tie
9 in all the rules. I really would -- I'm presenting in
10 abstract what the purpose is and what the mechanics are. And
11 I think if we understand that, then the constitutional rules
12 and standards are easily applied to show the constitutionality
13 of the tax.

14 The purpose that I mentioned as fully achieved -- if
15 it is, then there is no retaliatory tax collectible, and I
16 would point out that the California premiums tax, the basic
17 tax California applies to all insurers, would only have to be
18 raised 0.01 percent from 2.35 percent to 2.36 percent in order
19 to take up the slack, if the retaliatory tax were repealed.
20 So the revenue is purely incidental.

21 The further purposes of the tax are to counteract
22 discrimination between -- internal discrimination of other
23 states that California companies might experience, such as
24 could be experienced in Ohio. They are to encourage -- retalia-
25 tory taxes are to encourage uniformity of tax burdens throughout

1 the United States and thus to encourage interstate insurance
2 commerce.

3 Now, this is not the purpose that one normally finds
4 behind a state tax, although as pointed out in the briefs
5 there are other state statutes and there are federal statutes
6 in the Internal Revenue Code that have similar purposes.
7 The existence of that purpose as being the valid purpose in
8 this case and the relative effectiveness with which it is
9 carried out is demonstrated here by who is supporting the
10 State of California in this case as to the insurance tax that
11 is at issue. In addition to the --

12 QUESTION: Mr. Laddish, you have dealt at some
13 length with the purpose of the Ohio tax.

14 MR. LADDISH: No, this is the purpose of the
15 California retaliatory tax.

16 QUESTION: Or of the California tax, and ordinarily
17 in a state tax case it's presumed, you know, one state may
18 tax income at ten percent, another at 30 percent, and we don't
19 inquire into why one state chose to tax at ten percent and
20 another at 30 percent. So, why is your purpose argument rele-
21 vant here?

22 MR. LADDISH: Well, it certainly will become clear
23 when we get to the equal protection argument, Your Honor, and
24 also it is I think quite important here because I don't know if
25 your reaction was the same as mine when I first heard of the

1 California retaliatory tax. It was imposed upon some foreign
2 insurers, and not upon California insurers. My reaction was,
3 that sounds like it might be a rather touchy issue. I am
4 trying to show that the retaliatory tax is in fact an equaliz-
5 ing tax. It does have reciprocal -- reciprocity elements, very
6 strong reciprocity elements. It does have this purpose that
7 it is not a revenue purpose. Now, as I was pointing out,
8 the states have joined us -- Tennessee; Arizona; Wisconsin,
9 as you might expect; New York has come in against us for rea-
10 sons I will mention in a little bit. But very significant and
11 emphatic amicus support comes to the State for this state tax
12 by the nationwide insurance industry. The bulk of the life
13 insurers, the bulk of the property and casualty insurers,
14 and the largest casualty, property and casualty insurer in
15 the United States, have all come in in favor of this state
16 tax, which to me illustrates that they recognize that the
17 elimination of this tax will indeed disrupt the relative uni-
18 formity that we now have amongst state tax burdens in the
19 insurance area, and will soon result -- if the retaliatory
20 tax were to be abolished -- in a significant increase in
21 their tax bills.

22 QUESTION: But we're not candidates for honorary
23 membership in any of those amicus organizations. We have to
24 decide according to the law, I take it.

25 MR. LADDISH: Well, I know, Your Honor, but there

1 have been questions as to whether or not the California stated
2 purpose, whether it actually works is just pie-in-the-sky
3 rhetoric? I say, showing who is supporting us -- I'm not
4 trying to impress you by the personages that are supporting
5 us, I am trying to indicate that these are companies that have
6 their own auditors and they work things out as far as what is
7 to their benefit. You don't often have insurance companies
8 coming in and say, please save this insurance tax.

9 QUESTION: Well, how many states have taxes similar
10 to yours?

11 MR. LADDISH: There are -- I count 49 states that
12 have taxes similar to ours. North Carolina has the statutory
13 discretion as to whether or not it's going to be applied and
14 it does not apply it. Forty-eight states have taxes similar
15 to ours. That would include New Mexico which has a retaliatory
16 tax it imposes upon brokers and agents, not upon the
17 companies.

18 QUESTION: Do you think if you lose this case, all
19 of those laws will --

20 MR. LADDISH: Yes, Your Honor. I see no reason why
21 it would not. The appellant has tried to indicate that since
22 we reimposed the retaliatory tax after appellant received an
23 indefinite term of a license to do business, that that might
24 somehow distinguish. I'm sure that attempt at distinguishing
25 this case would fall by the wayside soon if this Court were to

1 knock down the California tax. It's clear that this tax con-
2 forms with all constitutional standards, and it's also clear
3 that the California license involved was conditioned upon
4 continuing to conform with the law.

5 QUESTION: General Laddish, I was unsuccessful with
6 regard to the income tax. Would the principle that underlies
7 this tax, namely motivating other legislatures to keep their
8 tax rates down, also apply to say, a sales tax, where we're
9 talking about sales by out-of-state corporations, and you
10 might -- could you have a retaliatory sales tax that would be
11 equally justified, or is there something special about the
12 insurance -- ?

13 MR. LADDISH: Under the Equal Protection law, Your
14 Honor, yes. I'm not sure how long it would survive under
15 the Commerce Clause. I am not arguing here, although my
16 sister state Tennessee does argue in its brief that this tax
17 would be valid under the Commerce Clause without the McCarran
18 Act, so I don't feel as if I can concede that point and argue
19 against my co-state. However --

20 QUESTION: But you're not arguing that there's
21 anything unique about insurance, other than the history with
22 the McCarran Act? So, in terms of equal protection, it would
23 be the same with an automobile business or steel business or
24 whatever it might be?

25 MR. LADDISH: It depends on exactly what we're

1 grouping in the McCarran Act milieu there. I think it's im-
2 portant to remember that with the Commerce Clause not applying
3 in this area, then if these California insurance companies
4 are to avoid this sort of discriminatory taxes that this
5 Court affirmed in Prudential v. Benjamin, where it assumed
6 that the tax was discriminatory against interstate commerce,
7 if they're going to try and keep a lid on that it's going to
8 be up to the states to do it. And it's important to realize
9 that this does create a special context even in the equal
10 protection issue in that if the Equal Protection Clause is
11 seen as having a federalistic element, this is a tax that is
12 trying to keep that sort of discrimination and an overburdening
13 of the insurance industry down.

14 QUESTION: As I understand the Equal Protection
15 principle, it is that that discrimination that would otherwise
16 be impermissible may be justified as rational if the motiva-
17 tion of it is to motivate the legislature of the state from
18 which the nonresident comes to take some special action.
19 You discriminate against residents of California and Ohio be-
20 cause you want to put pressure on that legislature to take
21 favorable action.

22 MR. LADDISH: Yes, Your Honor, it's very similar to
23 the case of Hawkins v. Moss that is cited on page 27 of the
24 American Insurance Association brief. There was a case where
25 we will not require your candidates for the bar to take a law

1 exam, bar exam, if you will reciprocate. And that is cer-
2 tainly putting a burden on those individuals saying, you have
3 to take a bar exam --

4 QUESTION: That's giving a -- excusing a requirement,
5 that you make them take a six-hour exam when nobody else did
6 because they had a six-hour exam elsewhere.

7 MR. LADDISH: I don't see any difference, Your
8 Honor, between saying you have to take this exam, and saying
9 you have to take a six-hour exam. I think if two people walk
10 in, one from West Virginia and one from Colorado, and the
11 Clerk was there and says, let's see your law. You have to
12 take the exam; you don't have to take the exam. I think it's
13 exactly the same sort of point we have here. It is also the
14 same concern and same purpose and same sort of mechanisms that
15 you have in the federal cases, or federal statutes, under the
16 Internal Revenue Code where there are at least five statutes
17 set forth in the American Insurance Association brief that in-
18 dicate that if you -- that as to foreign countries, other
19 sovereigns, the Congress by imposing burdens or withholding
20 benefits -- they go both ways on those statutes -- they attempt
21 to achieve evenhanded tax treatment for those U.S. citizens and
22 corporations under the other sovereign's laws and they're --
23 although these are set forth, by the way, at pages 23 though
24 26 of the American Insurance Association brief. There the
25 equal protection standards under the Fifth Amendment would

1 apply to the Federal Government giving the rights to aliens
2 and yet the Federal government has done this. One of the
3 statutes in original form was enacted in 1918, and the Federal
4 Government in at least one of those statutes, 896(b), talks
5 about -- excuse me; it was 896(a) -- is triggered by exactly
6 the same thing, more burdensome taxes, not discrimination or
7 anything else, but more burdensome taxes. Another one of the
8 statutes, 896(b), is the result or the action as being, we
9 will impose the same tax that you're imposing on our people.
10 So we have other sections and other statutes, including these
11 federal statutes in the Internal Revenue Code.

12 The mechanics of the tax, I think, are relatively
13 simple. We take -- and this is what happened in this case.
14 Western and Southern is an Ohio corporation, and so once the
15 California basic premiums tax liability is computed, we look
16 to Ohio and see what a California company doing the level of
17 business done by Western and Southern in California and doing
18 the same type of business, being the same type of company as
19 Western and Southern, what its burden in Ohio would be.

20 Now, if that burden is less or the same, there is
21 no retaliatory tax on Western and Southern. If that burden is
22 more, which the record is clear and there's no dispute here,
23 the Ohio burden would be more on the California company, then
24 there is the tax, but only to the extent that the burden would
25 be more.

1 If Western and Southern were to convince Ohio to
2 lower the burden on the California insurers, say to the -- or
3 give the California insurers the same alternatives that
4 they're giving to the domestic insurers in Ohio, then the
5 California retaliatory tax, as long as that Ohio burden was
6 the same or below what California's burden would be, would
7 disappear. And I say this is reciprocal action.

8 QUESTION: In other words, it wouldn't be enough, as
9 I understand it, to prevent the application of the California
10 tax that Ohio increased the rate for both domestic and foreign
11 companies to the same level, but higher than California?

12 MR. LADDISH: That's correct, Your Honor.

13 QUESTION: You'd still tax the Ohio corporation in
14 California on the difference.

15 MR. LADDISH: That's correct, Your Honor, because of
16 the purposes, in addition to discrimination, it's to --

17 QUESTION: So the only thing that would satisfy
18 California is if your tax law had the impact of compelling
19 the Ohio Legislature or leading them, in any event, to reduc-
20 ing the tax on at least the foreign corporation below the
21 California tax?

22 MR. LADDISH: Or below. That's when the retaliatory
23 tax would disappear.

24 QUESTION: It would be satisfactory if Ohio only
25 reduced the tax on California companies?

1 This has not happened.

2 As to the Equal Protection Clause, we have a valid
3 state purpose. I don't think anybody would contest the fact
4 that the purpose I have outlined is a valid purpose.

5 QUESTION: I take it that your argument on the
6 Equal Protection Clause is wholly aside from the McCarran Act.
7 If the McCarran Act had never been passed, your case would be
8 -- in here would be exactly the same.

9 MR. LADDISH: It's slightly different, Your Honor,
10 in that Prudential v. Benjamin pointed out that here the
11 states and Congress have acted together and that it would add
12 even more strength to the presumption that the state tax
13 statute is constitutional as against an equal protection chal-
14 lenge or any other constitutional challenges.

15 QUESTION: Well, but that's -- it barely mentioned
16 equal protection.

17 MR. LADDISH: They do mention, Your Honor --

18 QUESTION: I know. I'm saying, barely. Barely.

19 MR. LADDISH: They barely mention --

20 QUESTION: But it wasn't one of the questions even
21 raised and presented in the state courts or here.

22 MR. LADDISH: It was not raised by Prudential; no,
23 Your Honor. But the Court did take care to say, "No conceiv-
24 able violation of the Commerce Clause in letter or in spirit
25 is presented nor is contravention of any other limitation" --

1 MR. LADDISH: It would be satisfied if Ohio reduced
2 the tax on California companies --

3 QUESTION: Not on foreign corporations? If they
4 pick California companies out --

5 MF. LADDISH: Well, they could. But, Your Honor,
6 remember we have 96 percent of the states having the same
7 retaliatory taxes.

8 Now, if I could just run through, as far as the
9 constitutional standards that need to be applied, Western and
10 Southern and its supporters have often cited authorities from
11 the Privileges and Immunities Clause. Now, obviously, those do
12 not apply here; we're dealing with a corporation. As to the
13 Commerce Clause, I submit that Prudential v. Benjamin is
14 entirely clear, the McCarran Act is entirely clear, and the
15 application of Prudential and the McCarran Act to a substan-
16 tially similar retaliatory tax is clear through the decision
17 in Prudential v. Hobbs. So I leave to my briefs the arguments
18 as to the Commerce clause, unless there are questions of the
19 Court.

20 One point is that Congress, if it were unhappy with
21 the Prudential v. Benjamin case or Hobbs case, or if it were
22 unhappy with what the states were doing now as to retaliatory
23 taxes, could change the system at any time by amending the
24 McCarran Act or repealing it, or taking over the field itself
25 of state regulation and taxation of insurance companies.

1 This is on page 436.

2 QUESTION: Yes, I know.

3 MR. LADDISH: It does not -- I'm sure you and I are
4 both aware -- but I am not relying upon Benjamin for --

5 QUESTION: Nor the McCarran Act.

6 MR. LADDISH: Nor the McCarran Act, Your Honor, di-
7 rectly. I think, as I have pointed out with Mr. Justice
8 Stevens, that the context of the McCarran Act is quite impor-
9 tant. But here, with the Equal Protection Clause, you have
10 the purpose and you have the classification, which is certainly
11 reasonably related to the attaining of that purpose. This is
12 not a classification where all foreign insurers are lumped
13 together and suffer discrimination.

14 QUESTION: And it's only the rationale of the level
15 of scrutiny that applies.

16 MR. LADDISH: Yes, Your Honor. There has been no
17 claim that this is in the special level. Here only those
18 companies whose home states would discriminate or would
19 raise a higher burden against California insurers will suffer
20 the retaliatory tax. And as soon as that burden is adjusted
21 down to the California level, the retaliatory tax will dis-
22 appear.

23 QUESTION: But the tax depends on residence? Is that
24 it? Citizenship?

25 MR. LADDISH: Yes, Your Honor, the state of

1 incorporation.

2 QUESTION: It doesn't make any difference where the
3 principal office is?

4 MR. LADDISH: That issue has never arisen, Your
5 Honor, and it does not arise in this case. We have an Ohio
6 company with its home office in Ohio.

7 QUESTION: Well, I don't know why it wouldn't arise,
8 if you're talking about equal protection, if you're talking
9 about rationality to have your tax determined on just where you
10 happen to be incorporated. I'm sure you insist that's a
11 rational basis for discriminating between foreign corporations.

12 MR. LADDISH: I think, Your Honor, you'll find that
13 that's usually the case with insurance companies. I do not
14 know. I have not -- there is no study in this case.

15 QUESTION: That's the -- I suppose you say that is
16 the determining factor in all these 49 laws?

17 MR. LADDISH: I believe so, Your Honor; yes. In this
18 case we have an Ohio company with an Ohio office. May it
19 please the Court, I believe that if the briefs are fully fol-
20 lowed through with the standards, the regular standards that
21 are applied in equal protection cases, I think it is very
22 clear that there is a reasonable basis and a reasonable basis
23 for classification made in this case. I submit that the deci-
24 sion of the Court of Appeal should be affirmed.

25 MR. CHIEF JUSTICE BURGER: Thank you. Do you have

1 anything further, Mr. Vogeler?

2 MR. VOGELER: Yes.

3 MR. CHIEF JUSTICE BURGER: You have three minutes
4 remaining.

5 ORAL ARGUMENT OF ALAN R. VOGELER, ESQ.,

6 ON BEHALF OF THE APPELLANT -- REBUTTAL

7 MR. VOGELER: Thank you. First, let me say that
8 if we are in error about the Ohio law not discriminating
9 against foreign corporations, it is an error that has been
10 propounded by the California courts which on three different
11 occasions in suits to levy taxes upon Western and Southern
12 because of the Ohio law, found that the Ohio law did not dis-
13 criminate, and those cases are referred to in our brief.

14 Now, I don't know what the purpose is for talking
15 about Western and Southern's income taxes are, and the material
16 which has been submitted by the brief for the property
17 insurers are obviously not Western and Southern tax returns
18 but they are workups from, perhaps those returns, by employees
19 of the Ohio Department of Insurance.

20 The question of discrimination is obvious in this
21 legislation. Not only do we have discrimination between
22 states, we have discrimination within states. For example,
23 under the California retaliatory tax law a life insurance
24 company from Virginia doing business in California pays no
25 retaliatory tax at all, but a property insurance company from

1 Virginia doing business in California pays a 0.4 percent of
2 premium retaliatory tax. Is that equal protection?

3 QUESTION: What do you do with sun belt non-reci-
4 procitative admissions to the bar? You can't get admitted
5 to the bar in California or Arizona or Florida without taking
6 a test, although in most other states, if you've been admitted
7 to practice in one of them, you can get admitted to the other
8 simply on motion.

9 MR. VOGELER: Yes, Your Honor. As in every case,
10 in every state with respect to attorneys, the jurisdiction of
11 the supreme court of the state which has the right to control
12 the practice of law within that state. So I don't think
13 that the same principle is involved.

14 QUESTION: Well, but we're talking about state power
15 whether it's exercised by a court or by a legislature.

16 MR. VOGELER: That's correct, Your Honor. But
17 we're talking about in that case, I say, police power where
18 there is a particular interest within the state. Now what
19 interest does the State of California have as to what a tax
20 levy is in the State of Ohio? I say to you that no state
21 should have to conform its own revenue statutes to the configu-
22 ration of another state. And this Court has said so also, in
23 Austin v. New Hampshire. No state should try to impose its
24 insurance tax structure on another state. A state should be
25 free to levy its insurance taxes on insurance companies in

1 accordance with its own needs, not because the State of
2 California wants to equalize the taxes all over the country,
3 or wants to equalize taxes among companies that are going to
4 be doing business there but are from California.

5 The discrimination inherent in retaliatory taxation
6 found to exist in the unchallenged findings of the Superior
7 Court of California that it is unconstitutional should be
8 upheld by this Court. It is fundamentally wrong.

9 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 2:09 o'clock p.m. the case in the
12 above-entitled matter was submitted.)

CERTIFICATE

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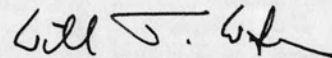
WESTERN AND SOUTHERN LIFE INSURANCE COMPANY

V.

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

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