

In the

**ORIGINAL**

**Supreme Court of the United States**

JOHN S. TOLL, PRESIDENT,

UNIVERSITY OF MARYLAND, ET AL.,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.

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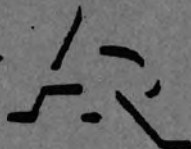
No. 80-2178

Washington, D. C.

Tuesday, March 2, 1982

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**ALDERSON**



**REPORTING**

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1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3       JOHN S. TOLL, PRESIDENT,                   :  
4       UNIVERSITY OF MARYLAND, ET AL.,               :  
5   Petitioners,               :  
6   v.                               :  
7   No. 80-2178  
8       JUAN CARLOS MORENO ET AL.                   :  
9       -----  
10

11   Washington, D. C.

12   Tuesday, March 2, 1982

13                   The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:05 o'clock a.m.

16 APPEARANCES:

17 ROBERT A. ZARNOCH, ESQ., Assistant Attorney General of  
18 Maryland, Annapolis, Maryland; on behalf of the  
19 Petitioners.

20 JAMES R. BIEKE, ESQ., Washington, D.C.; on behalf of  
21 the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments  
next in Toll against Moreno.

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

ORAL ARGUMENT OF ROBERT A. ZARNOCH, ESQ.,  
ON BEHALF OF THE PETITIONERS

MR. ZARNOCH: Mr. Chief Justice, and may it  
please the Court, this is the second time this case has  
been here, the second time this Court has been called  
upon to examine the constitutionality of the University  
of Maryland's policy of denying in-state benefits to  
non-immigrant aliens.

The last time this case was here, it was  
complicated by an unresolved issue of state law and of  
concerns over the University's basis for treating  
non-immigrant aliens differently, issues that have  
caused this case to be certified, the question to be  
certified to the court of appeals of Maryland, and  
ultimately the case to be remanded back down to the  
district court.

These questions are now behind us. This time  
around, however, the case raises additional and perhaps  
more significant constitutional questions evidenced, I  
think, by the fact that for the first time in this



1 Court's history, all 50 states are participating here as  
2 amici and unified behind a single position, namely,  
3 urging the reversal of the Fourth Circuit's decision and  
4 overruling of Vlandis versus Kline.

5           Of the four constitutional questions raised in  
6 this case, the foremost issue, we think, is the question  
7 of whether the University's policy denies equal  
8 protection to non-immigrant aliens. We think that if we  
9 prevail on this ground, many of the other issues in the  
10 case could quickly fall by the wayside.

11           Now, the equal protection issue here, we  
12 think, calls into play the very rationale for labeling  
13 certain alien classifications suspect and for according  
14 them strict scrutiny, a rationale we say that focuses in  
15 on the burdens permanent resident aliens share with  
16 citizens, and which non-immigrant aliens as a class  
17 conspicuously lack. Although resident aliens may be  
18 saddled with disabilities, we suggest that non-immigrant  
19 aliens, on the other hand, are blessed with privilege.

20           At the outset, it is important to understand  
21 what is at stake here, how many persons are affected by  
22 the University's policy, and the nature of the  
23 disadvantaged class. First, all we are talking about  
24 here is the tuition differential. At one time, the  
25 University did have a disparate charge with respect to

1 certain fees, for example, dorm fees. That is no longer  
2 the policy of the University. Only in tuition is there  
3 a difference with respect to in-state and out-of-state  
4 students.

5               Secondly, we are not talking about  
6 scholarships, state scholarships, that is. The state of  
7 Maryland does not deny state scholarships to  
8 non-immigrant aliens as a class, assuming they can show  
9 financial need.

10              It is also important to note how many people  
11 are affected by the University's policy. According to  
12 the record in this case, during the years 1978 and 1979,  
13 there were anywhere from 1,000 to 1,200 permanent  
14 resident aliens attending the University of Maryland.

15              QUESTION: Annually?

16              MR. ZARNOCH: Annually. And during that  
17 period, approximately 95 percent of those permanent  
18 resident aliens qualified for the in-state -- were  
19 classified in-state and received the benefit. On the  
20 other hand, there are half as many non-immigrant aliens,  
21 as few as 497, I believe, in 1978.

22              QUESTION: In what category?

23              MR. ZARNOCH: These are non-immigrant aliens  
24 who are classified as out-of-state. In terms of  
25 potential student population, the figures -- the ratio

1 is even greater. There are seven times as many  
2 permanent resident aliens in Maryland as there are  
3 non-immigrants.

4 QUESTION: Well, the 497 non-resident aliens,  
5 fill that in a little bit. Who are the --

6 MR. ZARNOCH: Exactly.

7 QUESTION: What is that group composed of?

8 MR. ZARNOCH: Well, the class -- well, it is a  
9 much smaller -- it is a much smaller universe than the  
10 class of non-immigrants generally. The class of  
11 non-immigrants generally consists of diplomats, foreign  
12 visitors, foreign students, and employees of  
13 international organizations and their families, and --

14 QUESTION: Well, do all of them have the  
15 non-immigrant G-4 visas?

16 MR. ZARNOCH: No, all of them have a  
17 non-immigrant visa, but not a G-4 visa.

18 QUESTION: Well, this case involves only the  
19 G-4 visa people?

20 MR. ZARNOCH: Well, this case involves a  
21 classification that disadvantages all non-immigrant  
22 aliens.

23 QUESTION: I see.

24 MR. ZARNOCH: All holders of those particular  
25 visas. But to answer your question, Mr. Chief Justice,

1 all those -- all those particular non-immigrant  
2 categories are not represented in the class that the  
3 University -- primarily they are A visa holders and J  
4 visa holders who are foreign students or cultural  
5 exchange students. There is also the G-4 aliens, about  
6 70 G-4 aliens roughly in that number, and diplomats.

7 QUESTION: Let me ask you, because I am a  
8 little puzzled, you say there are 70 G-4 aliens in the  
9 class that are paying the higher tuition?

10 MR. ZARNOCH: Yes, during those years in  
11 question, 1978 and 1979, roughly about 65 to 70.

12 QUESTION: Does this case involve anything but  
13 those people?

14 MR. ZARNOCH: Well, the persons who brought  
15 the challenge fall into that category. The  
16 classification challenge involves the whole category of  
17 non-immigrant aliens, and in fact both the lower court  
18 and the Fourth Circuit held that it violated -- the  
19 policy violated equal protection because it  
20 disadvantaged the entire class of non-immigrant aliens.

21 QUESTION: Do they all have the same tax  
22 exemption that the G-4 people do?

23 MR. ZARNOCH: No, no.

24 QUESTION: But then your rationale doesn't  
25 apply to them.



1 MR. ZARNOCH: Well, Your Honor, they --

2 QUESTION: I am puzzled. I don't know what --  
3 now I am really --

4 MR. ZARNOCH: Well, Your Honor, I think, you  
5 know, the focus here, the policy itself disadvantages a  
6 class, an entire class of non-immigrant aliens. Now,  
7 the rationale we have offered in justification of that  
8 policy focuses in to an extent on tax contributions of  
9 that class.

10 QUESTION: If I understand you correctly, your  
11 justification applies to 70 people in a class of 497.

12 MR. ZARNOCH: No, Your Honor. No, it  
13 doesn't. In fact, all non-immigrant aliens are treated  
14 differently with respect to taxes other than -- treated  
15 differently than citizens and resident aliens. It so  
16 happens that G-4's can point to a particular tax  
17 exemption that hurts their case, but, for example --

18 QUESTION: Well, does the record tell us about  
19 the tax exemption of the other 427 people?

20 MR. ZARNOCH: Yes, it is basically a matter of  
21 a question of law. For example, most non-immigrant  
22 aliens, for example, are not taxed on foreign source  
23 income.

24 QUESTION: Is this in the briefs, all this?

25 MR. ZARNOCH: Yes, it is, Your Honor. Yes, it

1 is. In terms of foreign source income, most  
2 non-immigrants do not pay taxes on foreign source  
3 income. Citizens and resident aliens do, on the other  
4 hand. There are many other categories of non-immigrants  
5 that are treated better, more advantageously with  
6 respect to taxes. For example, a foreign student from  
7 Japan who would attend the University of Maryland has a  
8 \$2,000 exemption on a portion of his compensation.  
9 There are various treaties that confer a privileged tax  
10 status on various non-immigrants. There is even, for  
11 example, federal law confers a tax break on all  
12 international organization employees, not just the  
13 particular banks who are in this case.

14               So, we contend as a general matter  
15 non-immigrant aliens are treated differently for  
16 purposes of taxation. They do not pay their full share  
17 of taxes, the class as a whole, and G-4's in particular.

18               In terms of the legal protection question  
19 here, we say this Court's earlier decisions in terms of  
20 alienage have all focused in on a number of  
21 characteristics when it decided to accord strict  
22 scrutiny to the classification at issue. It looked at  
23 taxes. This Court has indicated a number of times that  
24 resident aliens are taxed precisely like citizens. They  
25 pay their full share of taxes. Non-immigrant aliens, as

1 I have tried to suggest, do not. There are a number of  
2 non-immigrant aliens who are simply not here long enough  
3 to contribute much in the way of taxes or anything else  
4 in terms of the state's economy. Another --

5 QUESTION: When you say they pay all --  
6 resident aliens pay all taxes, you mean federal and  
7 state income taxes?

8 MR. ZARNOCH: That's true, Your Honor.

9 QUESTION: And all property taxes?

10 MR. ZARNOCH: That's true, Your Honor.

11 QUESTION: And sales taxes?

12 MR. ZARNOCH: There is absolutely no --  
13 federal law draws no distinction between resident aliens  
14 and citizens. There is no difference.

15 QUESTION: Is there any category that has  
16 access, for example, to tax-free stores equivalent to  
17 our post exchanges in other countries?

18 MR. ZARNOCH: I'm not sure, Your Honor. I  
19 don't know.

20 QUESTION: None in Maryland, at any rate?

21 MR. ZARNOCH: Not as far as I know, Your Honor.

22 QUESTION: No.

23 MR. ZARNOCH: In terms of the other criteria  
24 this Court has looked at in terms of strict scrutiny, it  
25 is also emphasized that resident aliens serve in the

1 military. I think you ought to note here that the  
2 non-immigrant aliens are excluded from -- were excluded  
3 when we had a draft, and presently are not subject to  
4 draft registration, so they are not obliged to serve in  
5 the military.

6           The Court has also noted on occasions that  
7 resident aliens are required to obey all of our laws.  
8 Well, here, certain categories of non-immigrants are not  
9 completely obliged to obey all our laws. For example,  
10 diplomats are one class that because of either  
11 diplomatic immunity or statutory immunity are not fully  
12 liable for violation of certain laws, and the same is  
13 true of employees of international organizations, who by  
14 statute have a certain immunity that relieves them from  
15 the obligations of complying with all the country's laws.

16           QUESTION: That is by federal statute, is it?

17           MR. ZARNOCH: That is by federal statute.

18           QUESTION: I take it you are going to address  
19 the pre-emption argument here, too.

20           MR. ZARNOCH: I certainly will, Your Honor.

21           QUESTION: Of course, many of the things you  
22 are talking about seem to me bear on the pre-emption  
23 question, don't they?

24           MR. ZARNOCH: That is true, Your Honor.

25           QUESTION: Yes.



1           MR. ZARNOCH: Well, at your urging, I will  
2 move on to that question.

3           QUESTION: May I ask you a question first  
4 about this class again?

5           MR. ZARNOCH: Sure.

6           QUESTION: Of these 497 people, how many of  
7 them are eligible for domicile?

8           MR. ZARNOCH: Well, I think so far our court  
9 of appeals has only held that G-4 aliens are capable of  
10 acquiring --

11          QUESTION: And you still exclude  
12 non-domiciliaries independently, regardless of whether  
13 they are --

14          MR. ZARNOCH: That is true, Your Honor. We  
15 exclude non -- so we exclude citizens --

16          QUESTION: So we don't know how many of these  
17 497 will be excluded from the in tuition rate because  
18 they are not eligible to be domiciled?

19          MR. ZARNOCH: Your Honor, the policy excludes  
20 them anyway. The policy doesn't look into the  
21 particular domicile of any non-immigrant. The policy  
22 simply excludes them as a class. You know, whether or  
23 not they are capable of acquiring domicile or not,  
24 because of the cost equalization rationale that we --

25          QUESTION: Now, that is the amended policy, is

1 it not?

2 MR. ZARNOCH: Your Honor, the policy never was  
3 amended, in terms of the operation and effect.

4 QUESTION: Oh.

5 MR. ZARNOCH: There was a resolution issued in  
6 June of 1978 that --

7 QUESTION: But there was a time when domicile  
8 was important. That is why we sent it back, was it not?

9 MR. ZARNOCH: Your Honor, this case was  
10 argued, it was argued to the district court on the  
11 grounds that, in 1976, that is, on the grounds that G-4  
12 aliens could not acquire a domicile --

13 QUESTION: Yes.

14 MR. ZARNOCH: -- and therefore couldn't meet  
15 the test anyway. We have also argued consistently since  
16 then certainly that the policy is independently  
17 supported by a rational basis of cost equalization. In  
18 fact, the students when they were informed by the  
19 University president that they were not going to be  
20 accorded state status, were given two reasons, first,  
21 the cost equalization tax notion, and secondly the fact  
22 that they couldn't acquire domicile.

23 Now, that issue is no longer a question. The  
24 court has -- our court of appeals has held that G-4  
25 aliens can be domiciled. The rationale on that decision

1 doesn't say what other categories of non-immigrant  
2 aliens could or might or may not be domiciled in the  
3 state of Maryland, and we don't --

4 QUESTION: We should judge this case as though  
5 all of the group that are involved here --

6 MR. ZARNOCH: Could be domiciled.

7 QUESTION: -- could acquire domicile.

8 MR. ZARNOCH: That's true, Your Honor.

9 QUESTION: Yes.

10 MR. ZARNOCH: I think you could.

11 QUESTION: Mr. Zarnoch, then the class  
12 includes more than the G-4 aliens.

13 MR. ZARNOCH: Yes, Your Honor. I think so. I  
14 think --

15 QUESTION: And we are dealing with all  
16 non-immigrant aliens.

17 MR. ZARNOCH: That's true, Your Honor.

18 QUESTION: Is that right?

19 MR. ZARNOCH: That's true.

20 QUESTION: And they are all excluded from  
21 these tuition -- the tuition break.

22 MR. ZARNOCH: That's true, Your Honor.

23 QUESTION: Regardless of whether they are  
24 domiciliaries.

25 MR. ZARNOCH: That's true, Your Honor. The

1 policy --

2 QUESTION: Based on the fact that they don't  
3 pay state income tax.

4 MR. ZARNOCH: Yes. Well, Your Honor, that's  
5 true. Well, it's not just state income tax.

6 QUESTION: Is that right?

7 MR. ZARNOCH: It is just that that class,  
8 viewed -- viewing the general characteristics of that  
9 class, they don't particularly contribute fully to the  
10 support of the University of Maryland, which, as we have  
11 indicated in our brief --

12 QUESTION: Through the income tax.

13 MR. ZARNOCH: That is the chief concern,  
14 because the University --

15 QUESTION: Because they would be paying state  
16 sales taxes if you have them or other taxes.

17 MR. ZARNOCH: Yes, that is true, Your Honor,  
18 but many of the taxes cited by the G-4's as paying, they  
19 don't particularly fund the costs of the education at  
20 the University of Maryland. For example, property taxes  
21 don't pay for -- motor vehicle taxes, none of those  
22 things pay for the University education.

23 QUESTION: In your view, does this Court have  
24 to overrule Vlandis versus Kline to uphold Maryland's  
25 scheme?



1           MR. ZARNOCH: No, we have indicated in our  
2 brief at least three possible ways the Court would not  
3 have to overrule Vlandis versus Kline to uphold the  
4 policy. One would be simply to -- if the Court  
5 concludes that the policy does not violate equal  
6 protection, and finds a rational basis -- finds our  
7 basis for the policy rational, that is enough to survive  
8 a due process challenge. For example, in Vlandis versus  
9 Kline, this Court noted that aside from an interest in  
10 administrative certainty, there was no rational basis  
11 for Connecticut's treatment of non-residents. If, for  
12 example, if the Court does find a rational basis here,  
13 it is not invalid, even for Vlandis as it existed.

14           QUESTION: Well, what about the back tuition?  
15 How about the refund? Don't you have to overrule  
16 Vlandis if you --

17           MR. ZARNOCH: Well, Your Honor, as I am  
18 saying, if it decides, you know, as I say, and the Court  
19 can address the due process question and simply say that  
20 we have a rational basis under the policy. That is  
21 enough to meet Vlandis as modified by Salfi or whatever  
22 else. I think --

23           QUESTION: You mean, even on the refund?

24           MR. ZARNOCH: Well, Your Honor, I -- well --

25           QUESTION: I thought that -- Didn't the Court

1 say your former policy was invalid?

2 MR. ZARNOCH: That's true. It said --

3 QUESTION: Under Vlandis against Kline?

4 MR. ZARNOCH: It said it was invalid from the  
5 period 1976 through 1978.

6 QUESTION: Yes. Well, what about that period?

7 MR. ZARNOCH: Your Honor, we are asking the  
8 Court to reach the due process question. The question  
9 asked by Justice O'Connor was whether you have to  
10 overrule Vlandis versus Kline to do that. We certainly  
11 are asking the Court to address that due process  
12 question. One way that we say to do it is, if you find  
13 a rational basis for the policy under equal protection,  
14 it is obviously rational under due process.

15 QUESTION: Well, I understand that. I  
16 understand that about the prospective validity of your  
17 policy, but how about the refund for that period that  
18 the Court has already held violated Vlandis against  
19 Kline?

20 MR. ZARNOCH: Your Honor, it would be -- the  
21 policy has not changed in effect with respect to  
22 non-immigrant aliens. I mean, non-immigrant aliens were  
23 denied before 1978 and after 1978. If the policy was  
24 rational now, and in terms of its operation and effect,  
25 why wouldn't it have been rational since 1976? Why

1 wouldn't the due process conclusion of the Court, even  
2 for that particular period, fall by the wayside?

3 QUESTION: Well, then, so you do say --

4 MR. ZARNOCH: I say you have to address the  
5 issue. You just don't have to overrule Vlandis versus  
6 Kline to do it. I think if you find a rational basis,  
7 you know, you have sustained the policy.

8 QUESTION: All right.

9 MR. ZARNOCH: We have also argued a number of  
10 grounds for getting around Vlandis versus Kline, but we  
11 do ask the Court, and we -- as all 50 states do, to  
12 overrule Vlandis versus Kline, because we do think the  
13 case is really a dead letter in the law.

14 To turn to the supremacy clause for a moment,  
15 there are really two separate supremacy clause  
16 arguments. One was basically premised upon an  
17 impermissible state attempt to regulate immigration, and  
18 the lower court held the policy invalid on that ground  
19 solely because it found an invidious discrimination  
20 under the equal protection clause. No other basis was  
21 given. So, as a practical matter, if we -- if that  
22 theory prevails, we should be -- if the Court finds it  
23 okay under equal protection, it should find the policy  
24 okay under the supremacy clause, under that aspect of  
25 the supremacy clause.

1           There is a second supremacy clause argument  
2 made here, and that was made as an alternate ground, and  
3 this was the one that was rejected by the lower court.  
4 That argument is made that the University -- the  
5 rationale of the University's in-state policy, that  
6 rationale somehow conflicts with the rationale of the  
7 international agreements conferring a tax advantage on  
8 the bank employees.

9           Now, the lower court rejected this purported  
10 class of rationales as too attenuated to amount to a  
11 supremacy clause violation, and we suggest that at least  
12 in this respect the lower court was right, that what the  
13 University's policy does is simply include G-4 aliens in  
14 a group of non-immigrant aliens who, for a particular  
15 reason, and it is not just, you know, this particular  
16 treaty tax exemption or a tax exemption flowing from an  
17 international agreement, for a variety of reasons do not  
18 contribute the way citizens and permanent resident  
19 aliens do to the cost of University education. We don't  
20 pick out an international agreement or a treaty. In  
21 fact, in some cases we don't even focus -- you know, we  
22 don't focus in on the individual tax situation of  
23 anybody. We simply drew a line, and the G-4 aliens are  
24 on the wrong side of the line for purposes of acquiring  
25 the in-state tuition.



1 QUESTION: May I ask one other question?

2 MR. ZARNOCH: Sure.

3 QUESTION: To what extent do you pursue the  
4 argument that you can treat these people differently?  
5 Could you deny them, say, garbage collection services,  
6 or police protection, without charging them a special  
7 fee for it, say?

8 MR. ZARNOCH: Your Honor, I think in terms of  
9 the cost equalization rationale, it is particularly  
10 appropriate when you are talking about a university  
11 education that is funded by primarily tax, income tax  
12 remedies.

13 QUESTION: So are you other state services.

14 MR. ZARNOCH: But -- well, most of them are --  
15 for example, police protection is funded by local  
16 property tax. The garbage collection would be, too.  
17 There really is no disability, as I understand it, from  
18 any of the -- any non-immigrants from contributing their  
19 full share of property taxes. So, what I am suggesting  
20 is that the rationale, our rational basis that we are  
21 asserting here may not hold water if you are trying to  
22 justify that kind of restriction.

23 QUESTION: You mean, because they pay property  
24 taxes --

25 MR. ZARNOCH: Yes.

1 QUESTION: -- as opposed to income taxes.

2 MR. ZARNOCH: Yes. For example -- yes. That  
3 is right.

4 QUESTION: Does your budget -- Your  
5 University's budget is derived entirely from income tax,  
6 is it?

7 MR. ZARNOCH: Well, Your Honor, it is  
8 basically from three sources. In terms of state dollars  
9 being pumped in, it is largely income tax.

10 QUESTION: None of the property taxes go for  
11 that purpose?

12 MR. ZARNOCH: No. Local property taxes pay  
13 for primary and secondary education. State property  
14 taxes pay state bond issues. So property taxes really  
15 aren't at issue.

16 QUESTION: They also use federal funds.

17 MR. ZARNOCH: Yes, we certainly do use federal  
18 funds, but the primary source of the revenues of the  
19 state are still the income tax and the general funds in  
20 the treasury.

21 QUESTION: Counsel, the class includes more  
22 than the G-4 aliens.

23 MR. ZARNOCH: That's true, Your Honor.

24 QUESTION: And does the federal policy  
25 concerning non-liability for income tax for the G-4's

1 extend to the other non-immigrants?

2 MR. ZARNOCH: Your Honor, in terms of being  
3 treated differently for income tax purposes, yes, the  
4 federal government treats most non-immigrants  
5 differently with respect to payment of foreign source  
6 income for -- payment of tax on foreign source income.  
7 The federal government doesn't tax them on that, and the  
8 state of Maryland doesn't -- the state of Maryland  
9 doesn't either.

10 QUESTION: So we should assume that everyone  
11 in the class under the federal tax structure would not  
12 be in --

13 MR. ZARNOCH: Well, there may be a few, and I  
14 am going to say it is not perfect, but it doesn't have  
15 to be perfect. There may be a few classes of  
16 non-immigrants who, for example, are -- don't have a tax  
17 exemption and may be classified as a resident alien for  
18 purposes of the federal income tax, which means they are  
19 treated the same. A few might be in that category, but  
20 we suggest, judging the class by its general  
21 characteristics, only a few. The majority of people  
22 don't.

23 QUESTION: Okay, and Maryland's primary  
24 concern is the fact that these people aren't  
25 contributing --

1 MR. ZARNOCH: To the cost --

2 QUESTION: -- state income taxes.

3 MR. ZARNOCH: To the costs of the education.

4 QUESTION: And does that mean that we do have  
5 some kind of a supremacy clause problem of some  
6 significance because the policies appear to be in  
7 opposition?

8 MR. ZARNOCH: Well, Your Honor, as I indicated  
9 before, that, you know, there are a few that, for  
10 example, don't have a tax break. They simply may be  
11 classified as a resident alien for income tax purposes,  
12 but --

13 QUESTION: Okay, but you have just told us to  
14 ignore that.

15 MR. ZARNOCH: But they are still disqualified,  
16 because they are included in the broad class of  
17 non-immigrant aliens. We don't evaluate the individual  
18 tax situation of non-immigrant aliens. What we do is,  
19 we are including every member of that class. You know,  
20 they are disadvantaged by the policy, without a focus in  
21 on the particular source of their tax break, be it state  
22 law, be it federal law, be it treaty, no matter where.  
23 That is part and parcel of the general characteristics  
24 of non-immigrant aliens, and we suggest that having  
25 drawn the line there, we are not picking out, for



1 example, a federal treaty problem or a federal tax  
2 benefit.

3 For example, I don't know if there is any law  
4 that requires the state of Maryland to exempt foreign  
5 source income from -- the payment of taxes on foreign  
6 source income. That federal law does not require a tax  
7 on that, but I don't know if there is any particular  
8 requirement that the states not tax that kind of  
9 income. But in any event, the state doesn't tax it, and  
10 that is another distinguishing characteristic of a large  
11 number of members of the class.

12 QUESTION: General, do you have any figure on  
13 what percentage of the costs tuition is?

14 MR. ZARNOCH: Well, I could give you some  
15 rough figures in terms of percentages.

16 QUESTION: Is it in the record, or not?

17 MR. ZARNOCH: No, it is not. It is not in the  
18 record. But in terms of the general funds of the --  
19 roughly the University got about \$160 million in a  
20 recent year. In terms of -- roughly about \$30 million  
21 comes in by way of tuition and fees, and that money is  
22 appropriated back to the University by our General  
23 Assembly each year.

24 QUESTION: Do you think the total cost of --  
25 What about an undergraduate at the University of

1 Maryland? You must have some figure as to what your  
2 cost of educating an undergraduate for --

3 MR. ZARNOCH: No, I don't -- I'm sorry. I  
4 don't have that, Your Honor.

5 QUESTION: But there is a substantial subsidy,  
6 is there?

7 MR. ZARNOCH: Oh, yes, Your Honor. I mean, as  
8 I said, in terms of tuition --

9 QUESTION: How about for out-of-state?

10 MR. ZARNOCH: Well --

11 QUESTION: Out-of-state tuition? Would  
12 out-of-state tuition almost, or not quite --

13 MR. ZARNOCH: No, Your Honor.

14 QUESTION: -- or not even close?

15 MR. ZARNOCH: Absolutely not. In terms of the  
16 tuition receipts by the University of Maryland, roughly  
17 \$30 million. In terms of general funds being pumped  
18 back into the University, \$160 million, five times as  
19 much.

20 QUESTION: Yes.

21 MR. ZARNOCH: It is clearly a subsidy, you  
22 know. It is tax subsidized.

23 QUESTION: What is the tuition differential  
24 for a resident and a non-resident?

25 MR. ZARNOCH: It is -- it has gone up since

1 the time of the figures stated in the Court's opinion.

2 It is now \$900 a semester, is the differential.

3 QUESTION: What are the two figures?

4 MR. ZARNOCH: The two figures, I believe, are  
5 roughly -- well, in terms of yearly figures, \$700 for  
6 resident and \$2,500 for non-resident.

7 QUESTION: \$1,800 a year.

8 MR. ZARNOCH: \$1,800 a year.

9 QUESTION: What is your income tax rate in  
10 Maryland?

11 MR. ZARNOCH: The income tax rate is -- it is  
12 5 percent, roughly 5 percent over --

13 QUESTION: So somebody earning \$20,000 a year  
14 would pay \$1,000 in taxes? He wouldn't pay as much as  
15 the differential, would he?

16 MR. ZARNOCH: Well, Your Honor, I think, you  
17 know, focusing in on non-immigrant aliens, and  
18 particularly the G-4's, for instance, you know, all the  
19 parents of the plaintiffs, for instance, here are  
20 professional employees of World Bank, making salaries  
21 well in excess of \$20,000. Even the record indicated  
22 the salaries were in the \$30,000 and \$40,000 range, even  
23 when this case was argued back in 1976. So, you know,  
24 G-4's are a particularly appropriate class to contend  
25 that, you know, they are being disadvantaged with

1 respect to an income tax contribution rationale, but,  
2 you know, the rationale goes a little further than  
3 simply contributions during the period in question.

4 For example, if you stay in the state for a  
5 period of time, for example, an alien with a tax  
6 exemption, or a non-immigrant alien with a tax  
7 exemption, you are likely to stay here for a number of  
8 years, you know, just beyond the four years that a  
9 student might be in college. For example, the G-4  
10 aliens here, many of them stick around until retirement  
11 age, having escaped income tax on their salaries for  
12 maybe 15, 20 years.

13 QUESTION: Does the University derive income  
14 from the state sales tax?

15 MR. ZARNOCH: Yes, the University does derive  
16 income or funds from the sales -- the state sales tax,  
17 but in terms of --

18 QUESTION: What percentage of the state's  
19 budget comes from income taxes as compared with sales  
20 taxes?

21 MR. ZARNOCH: Well, the -- in terms of total,  
22 total revenues, the total revenue picture, about a  
23 quarter comes from income tax, half as much comes from  
24 the sales tax. There is twice -- there is twice as many  
25 income tax -- as much income tax revenue as there are



1 sales tax revenues. The sales tax in fact is not even  
2 the second biggest item. Federal funds are the second  
3 item in terms of the top draw on the budget.

4           Your Honor, if I may, I would like to turn to  
5 the Vlandis versus Kline question, unless there are any  
6 further questions on the other issues. We have set  
7 forth a number of reasons why we think Vlandis should be  
8 overruled, and the foremost of which is whether the  
9 Vlandis versus Kline doctrine represents a separate  
10 analysis any more. Typically, when a suit is brought  
11 challenging a state policy under the irrebuttable  
12 presumption doctrine, it also is challenged under an  
13 equal protection theory, and invariably lower courts,  
14 taking its key, I think, from both Salfi and Your  
15 Honors' opinion in Usery versus Turner Elkhorn Mining  
16 Company, have concluded that it doesn't matter if the  
17 state enactment is premised in the form of a  
18 presumption, as long as its operation and effect are  
19 permissible.

20           For example, if under equal protection there  
21 is a rational basis that supports it, we need look no  
22 further under due process, and the lower courts, the  
23 circuit courts have simply -- they treat an equal  
24 protection issue first, and then automatically it is  
25 okay under due process. So, the question is really, is

1   there a separate analysis there any more.

2               Also, there is a real question as to whether a  
3   court should be inquiring, demanding more than a  
4   rational basis on -- as apparently was the case in  
5   Vlandis versus Kline. There is also a debate among the  
6   courts as to where the irrebuttable presumption doctrine  
7   belongs. Is it equal protection? Is it substantive due  
8   process? Is it procedural due process? And frankly, is  
9   not in sync with any of those particular theories.

10              And lastly, I think in terms of the -- it  
11   really doesn't demand the rationality of a measure any  
12   more. The way the doctrine is presently formulated, all  
13   you really need is to articulate some particular basis,  
14   an additional basis, more than one basis for your  
15   particular policy, and order them in a sufficient  
16   fashion, whether that is primary or secondary. It  
17   doesn't demand, at least in the way it is presently  
18   formulated, that a policy be rational, and we suggest  
19   that is what the Court should be looking for, and that  
20   is really the only inquiry a court should engage in when  
21   the issue is whether a due process violation has  
22   occurred.

23              Unless there are any further questions, I  
24   would like to reserve the rest of my time for rebuttal.

25              CHIEF JUSTICE BURGER: Very well.

1 Mr. Bieke?

2 ORAL ARGUMENT OF JAMES R. BIEKE, ESQ.,

3 ON BEHALF OF THE RESPONDENTS

4 MR. BIEKE: Mr. Chief Justice, and may it  
5 please the Court, there can be no question that the  
6 University's policy establishes a classification based  
7 on alienage, for on its face it allows citizens and  
8 immigrant aliens who are domiciled in Maryland to obtain  
9 in-state status upon a showing of their domicile, but it  
10 totally excludes all non-immigrant aliens from doing so  
11 even if they are likewise domiciled in Maryland, and it  
12 is equally clear that this policy, this classification  
13 treats unequally only the non-immigrants who can be and  
14 are domiciled in Maryland.

15 Contrary to what the Assistant Attorney  
16 General said, this is not at all all non-immigrants.  
17 This Court's opinion in the Elkins case held  
18 specifically that most non-immigrants, and it listed a  
19 number of the visa categories, were precluded by the  
20 terms of their visas under federal law from establishing  
21 domicile in this country.

22 Obviously, these people are not discriminated  
23 against by the University's policy, because even if they  
24 were treated like citizens and immigrants, they would  
25 fail to qualify. The only non-immigrants treated

1 unequally by the policy are those such as G-4's and a  
2 few other categories who are capable of being domiciled  
3 in Maryland under state and federal law.

4 QUESTION: Were the named parties to this case  
5 all G-4's?

6 MR. BIEKE: Yes, indeed, Your Honor.

7 QUESTION: Was there any objection from either  
8 party when the district court certified a broader class  
9 than G-4?

10 MR. BIEKE: No, the class certified, Your  
11 Honor, consisted only of G-4's.

12 QUESTION: So that the only issue we have  
13 before us then is G-4's?

14 MR. BIEKE: Yes, Your Honor. In fact -- but I  
15 was trying to make a different point. That's true. The  
16 only issue involved in this case is G-4's. That's the  
17 class we represent, the only class certified by the  
18 district court. And the --

19 QUESTION: So you disagree with the Attorney  
20 General's characterization of the class.

21 MR. BIEKE: Yes, Your Honor, and that would be  
22 -- it is made clear by the fact that most non-immigrants  
23 aren't hurt by the policy. All we are --

24 QUESTION: Well, Mr. Bieke, I am not sure your  
25 colleague said the class before the Court. He said the



1 class to which the University's policy applies.

2 MR. BIEKE: That's true.

3 QUESTION: You don't disagree with him on  
4 that, do you?

5 MR. BIEKE: Your Honor --

6 QUESTION: I mean, on its face, it applies to  
7 all non-immigrant aliens, whether they are discriminated  
8 against or not.

9 MR. BIEKE: On its face, it applies to all  
10 non-immigrants, but all non-immigrants are not treated  
11 unequally by the policy.

12 QUESTION: I said whether or not. That's true.

13 MR. BIEKE: Right.

14 QUESTION: Right.

15 MR. BIEKE: That is true. The --

16 QUESTION: Putting it a little differently, if  
17 you win this case, only a handful of people will get a  
18 benefit, namely, the G-4's and two or three others. Is  
19 that right?

20 MR. BIEKE: That's correct.

21 QUESTION: The rest of this 497 will still be  
22 ineligible for the lower rate because they are not  
23 eligible to be domiciled?

24 MR. BIEKE: That's correct.

25 QUESTION: Yes.

1 MR. BIEKE: Now, this --

2 QUESTION: Can you tell us how many people,  
3 then, you say are in the category which will be affected  
4 by this Court's determination?

5 MR. BIEKE: Mr. Zarnoch correctly said that in  
6 the years around 1978, 1979, there were around 70 G-4's  
7 at the University. The only other non-immigrant  
8 categories that we believe are capable of establishing  
9 domicile in this country are E's, who are treaty  
10 traders, and I's, who are foreign media  
11 representatives. There is no indication that -- we  
12 don't know how many of those were at the University, but  
13 not very many. Most of them were -- are people who are  
14 students who come to this country solely to go to  
15 school, and this Court in Elkins made clear that those  
16 people cannot be domiciled in this country.

17 QUESTION: So we are really dealing only with  
18 about 70 people?

19 MR. BIEKE: Yes, Your Honor.

20 QUESTION: In some of the --

21 MR. BIEKE: Per year.

22 QUESTION: All right. Some of the amicus  
23 briefs indicate that in fact the difference of the  
24 tuition is being paid by the companies that employ these  
25 people, and the students who are constituting the class

1 are not out of pocket anything. If that be the case,  
2 how do they have standing?

3 MR. BIEKE: That is not the case, Your Honor.  
4 We of course represent G-4, all G-4 visa holders, and  
5 these are employees of different kinds of organizations,  
6 so it is a different question for different  
7 organizations. For the Interamerican Development Bank,  
8 their policy is to reimburse their employees one-half  
9 the tuition and fees up to \$3,500, so obviously if they  
10 pay a higher rate they pay half of the higher rate.

11 And for the World Bank, they do have a  
12 reimbursement policy that is in the Joint Appendix, but  
13 that policy was adopted after the district court issued  
14 its initial decision and stay, and for the purpose of --  
15 the period of the stay, for the purpose of this  
16 litigation. At the time the class was certified, the  
17 G-4 people themselves had paid the difference, and so at  
18 the time the class was certified, they represented the  
19 class, and they had been harmed.

20 And there are a number of organizations, and  
21 we don't know -- have no reason to believe that they  
22 have any policy of reimbursement, the other -- the  
23 people for the other organizations.

24 Now, the University's policy here, as I said,  
25 treats the non-immigrants who are domiciled in Maryland

1 differently from citizens and immigrants domiciled,  
2 because they are the only ones, the non-immigrants are  
3 the only ones who are excluded from in-state status  
4 without reference to their domicile. This is a  
5 classification that is based on their alienage, or more  
6 specifically, on their immigration or visa status, which  
7 is something that has been set by Congress.

8           In fact, the University's main justification  
9 for this discriminatory treatment, which is that they  
10 are exempt from taxes on their salaries, is also  
11 something based on a federally granted right. In our  
12 view, this discriminatory treatment violates both the  
13 equal protection clause and the supremacy clause.

14           For equal protection purposes, the  
15 classification made by the universities under the  
16 Nyquist case, one based on alienage because it is  
17 directed at aliens and harms only aliens, and we believe  
18 that this classification should be subject to the same  
19 strict scrutiny that the Court has applied to other  
20 classifications based on alienage. The reason why  
21 strict scrutiny has been established as a protective  
22 measure is that aliens are a prime example of a discreet  
23 and insular minority who have no voice in the political  
24 process and may be discriminated against by the majority  
25 unless specially protected by the courts.



1               QUESTION: How about welfare payments? Would  
2 they be eligible for welfare?

3               MR. BIEKE: Yes, Your Honor, I believe they  
4 are.

5               QUESTION: Medicare and Medicaid, all the --

6               MR. BIEKE: Medicare, there is a federal  
7 statute that precludes -- that draws a distinction that  
8 excludes not only non-immigrants but some permanent  
9 resident aliens, some immigrants, and that was upheld in  
10 Mathews versus Diaz on the specific ground that the  
11 federal government has power to distinguish among aliens  
12 that the states don't have.

13              But the non-immigrants here, that is, the  
14 rationale of strict scrutiny that I said applies equally  
15 to non-immigrants living in this country, residing in  
16 this country, as it does to immigrants. The University  
17 would have you apply to this classification, which is  
18 concededly based on alienage and singles out a class of  
19 aliens for discriminatory treatment the same lenient  
20 rational basis standard that has been applied in the  
21 economic area to classifications which don't  
22 discriminate against any particular class that has been  
23 the object of heightened judicial solicitude, but that  
24 is inconsistent with the Court's whole history of  
25 concern for aliens, and also, I should say -- I will get

1 to this later -- with the principles under the supremacy  
2 clause.

3 Now, Mr. Zarnoch makes a point of the fact  
4 that this Court has sometimes in prior opinions referred  
5 to certain attributes of immigrant aliens. Generally  
6 speaking, however, those references were made in the  
7 context of applying strict scrutiny, not in determining  
8 whether strict scrutiny should be applied, but in any  
9 case.

10 But in any case, the non-immigrants who are  
11 disadvantaged, the non-immigrants who are treated  
12 unequally by this policy, as I said, are those who are  
13 domiciled in the state, and these are not very different  
14 from immigrant aliens. They live in the state for many  
15 years. They must obey all their laws, all the state's  
16 laws, and I might say, incidentally, they do not have  
17 diplomatic immunity, as Mr. Zarnoch implied. They are  
18 assimilated into their communities. They participate in  
19 their communities, and they pay all taxes except those  
20 on which they have a specific exemption established by  
21 international agreement, over which they have no  
22 control, and these taxes include not only sales taxes  
23 and property taxes, but income taxes on all other income  
24 except those salaries. If their spouses work, full  
25 income taxes on their spouses' salaries. If they get

1 any other income from investments and so on, they pay  
2 full income taxes on that.

3           These people have made the state their home.  
4 That is the meaning of domicile. They are not going to  
5 return to some foreign country some time. They live  
6 here, and they intend to live here permanently. And at  
7 least when the state is treating such a class of its own  
8 domiciliaries differently from its other domiciliaries,  
9 solely on the ground that they are a particular kind of  
10 alien, that classification should be subject to the same  
11 scrutiny that this Court has applied to classifications  
12 harming immigrant aliens.

13           Now, the University makes a great deal of the  
14 fact that these people don't pay the full range of  
15 taxes, but as I said, that is not a reason for  
16 lowering --

17           QUESTION: Counsel --

18           MR. BIEKE: Sorry.

19           QUESTION: -- if we were to determine that the  
20 non-immigrant aliens were not entitled to strict  
21 scrutiny, would you concede that the Maryland policy  
22 would meet the rational basis test?

23           MR. BIEKE: No, Your Honor. The -- Even if  
24 the Court would decide that strict scrutiny did not  
25 apply, nevertheless there is no getting around the fact

1 that this is a classification which singles out aliens  
2 for discriminatory treatment, and shouldn't be subject  
3 to the same rational basis test that has been applied  
4 to, say, social security classifications. At least some  
5 form of heightened scrutiny should be required, and we  
6 don't think that could be met.

7 QUESTION: No, but get back to my question.  
8 Assume for purposes of answering this question only that  
9 we do not apply any kind of heightened scrutiny to this  
10 class. Then how do you have your rational basis?

11 MR. BIEKE: Well, there is one other thing I  
12 have to say.

13 QUESTION: And do you have to rely on Vlandis  
14 versus Kline to do that?

15 MR. BIEKE: No. We can rely on the supremacy  
16 clause. Even if the Court should decide --

17 QUESTION: Well, that is a whole different --

18 MR. BIEKE: It is a whole different thing.  
19 Yes. But it requires that there -- when there is a  
20 classification, a discrimination against aliens who are  
21 lawfully admitted to this country when the state is  
22 imposing discriminatory burdens on them, the supremacy  
23 clause, too, requires something more than rational  
24 basis, but -- and we have argued in our brief that even  
25 apart from all of that, even apart from any strict

1 scrutiny or any heightened scrutiny, and apart from the  
2 supremacy clause, the classification is not rational.

3 Now, that is a hard argument, and we don't  
4 think we would have to reach it, because of all the  
5 reasons I gave for why the scrutiny should be stronger.  
6 But still, it is not rational. In fact, these people do  
7 pay all taxes except those on which they have the  
8 exemption. They pay sales taxes, property taxes, and  
9 income taxes on any other income, and over the course of  
10 the years, then, they may have made substantial  
11 contributions to the state.

12 QUESTION: What if the federal government as a  
13 matter of statutory law provided that G-4's should not  
14 have to pay any federal or state taxes, and the  
15 University of Maryland accordingly adopted the policy it  
16 has? Would you say that that policy couldn't survive  
17 rational scrutiny, rational basis?

18 MR. BIEKE: If the federal government's policy  
19 was, they didn't have to pay any taxes?

20 QUESTION: Yes.

21 MR. BIEKE: Well, that would be harder for a  
22 rational basis. It would be better for the supremacy  
23 clause.

24 QUESTION: Yes. I am just asking about  
25 rational basis.



1           MR. BIEKE: That would be a -- it is not our  
2 case. It would be a harder question. But there is  
3 still the fact that the University does not apply this  
4 cost equalization tax payment justification to citizens  
5 and immigrants. There is still that aspect of the  
6 irrationality, and there are a number --

7           QUESTION: Well, but they presumably pay some  
8 taxes. Your people have a very good deal in that regard.

9           MR. BIEKE: Not all of them. There can be --  
10 there are a number of sources of state income that go to  
11 citizens or immigrants on which -- which are exempt from  
12 state taxes. For example, immigrant visa holders  
13 working for these same international organizations, and  
14 there are hundreds of them, are likewise exempt from  
15 taxes on their salaries, and yet they are entitled to  
16 in-state status upon a showing of domicile.

17          QUESTION: Are the immigrant visa holders  
18 exempt by virtue of the place where they work?

19          MR. BIEKE: By virtue of the international  
20 agreements establishing the organizations for which they  
21 work. That's right.

22          QUESTION: Mr. Bieke, which -- is the  
23 supremacy issue here? It is, isn't it?

24          MR. BIEKE: Yes, indeed.

25          QUESTION: Which -- if you were going to win,

1    which ground would you prefer?

2               MR. BIEKE: Your Honor, I think that they are  
3    both entirely sufficient to win.

4               QUESTION: Yes, I think they may be  
5    sufficient, but there are certainly different  
6    consequences, I suppose.

7               MR. BIEKE: There are some different  
8    consequences.

9               QUESTION: So I ask you again, which would you  
10   prefer?

11              MR. BIEKE: I think that I can only say that  
12   I --

13              QUESTION: Which is better? Which is best for  
14   your clients?

15              MR. BIEKE: They both have exactly the same  
16   results. Our clients who are -- as I say, all we are  
17   seeking here is equal treatment with citizens and  
18   immigrants.

19              QUESTION: Well, suppose we decide on the  
20   supremacy clause basis, and then Congress, instead of  
21   saying the aliens should be exempt from further taxes,  
22   say that, and furthermore, the states may charge  
23   non-immigrants out-of-state tuition?

24              MR. BIEKE: If Congress said that, then we  
25   would -- the supremacy clause ground would be gone, of

1 course.

2 QUESTION: Yes, and so -- but if we decide it  
3 on equal protection grounds, like you suggest, Congress  
4 couldn't say that.

5 MR. BIEKE: Congress could not say that, but  
6 Congress could say that they could no longer -- they  
7 could reach the same result by saying that they could  
8 change the domicile point and say that we are now going  
9 to treat them just like most non-immigrants, say they  
10 can't be domiciled.

11 QUESTION: Well, I know, but Congress couldn't  
12 -- Congress then, they might say, get rid of the  
13 supremacy clause, but they couldn't get rid of the equal  
14 protection problem.

15 MR. BIEKE: Yes, they could, in the way I  
16 said. The supremacy clause only requires that people be  
17 equally treated. Most non-immigrants are not being  
18 treated unequally by this because they can't be  
19 domiciled here under federal law. Congress could say  
20 that these non-immigrants --

21 QUESTION: Well, that is --

22 MR. BIEKE: -- could not be domiciled here  
23 under federal law either.

24 QUESTION: Yes. Yes.

25 MR. BIEKE: They haven't done that, and they

1 haven't done anything like what you suggest for  
2 supremacy clause.

3 QUESTION: Yes.

4 MR. BIEKE: I think that both --

5 QUESTION: Well, of course, there are 50  
6 states in here.

7 MR. BIEKE: Yes, there are.

8 QUESTION: Fifty states, and this judgment is  
9 going to control not just the few handful of people that  
10 you suggest who live in Maryland, but all over the  
11 country, I suppose.

12 MR. BIEKE: This judgment is going to control  
13 only those non-immigrants who are capable --

14 QUESTION: Yes, yes.

15 MR. BIEKE: -- of being domiciled in this  
16 country --

17 QUESTION: Yes, but there are more --

18 MR. BIEKE: -- and there aren't very many of  
19 them. There -- most of the G-4's live in -- around  
20 Washington and New York, because that is where the  
21 international organizations are. There aren't a lot of  
22 people throughout the country and the states.

23 QUESTION: Well, there are going to be more  
24 than live in Maryland, though.

25 MR. BIEKE: Yes, that's true.

1 QUESTION: Yes.

2 MR. BIEKE: Now, let me --

3 QUESTION: This will embrace all of the UN  
4 personnel and the subsidiary agencies, will it not?

5 MR. BIEKE: Yes. Yes, Your Honor, and they  
6 live mostly around New York.

7 Now, let me address the supremacy clause  
8 issue. Under this Court's decisions in the cases of  
9 Takahashi, Graham against Richardson, DeCanas against  
10 Bica, it is established that it is up to the federal  
11 government to decide the terms and conditions upon which  
12 aliens will be admitted to this country and will reside  
13 in this country, and once it has done so, the states may  
14 not impose additional discriminatory burdens on them --  
15 excuse me -- not contemplated by Congress, and they  
16 especially may not do so on account of their immigration  
17 status assigned by Congress.

18 Here, Congress has assigned the various  
19 classes of immigrants and non-immigrants, and has  
20 decided on the restrictions applicable to them, and as  
21 this Court held in Elkins, Congress has deliberately  
22 decided that the G-4 visa holders and a few other  
23 categories are entitled to be domiciled in this country,  
24 unlike most non-immigrants. In this situation, the  
25 states may not rely on their immigration status to impos



1 restrictions not imposed on other domiciliaries of the  
2 state. To do that is to impose on their residents in  
3 this country discriminatory burdens not contemplated by  
4 Congress.

5           This may be justified, but only in the most  
6 exceptional circumstances, such as, for example, where  
7 the state is regulating in the area of traditional state  
8 sovereignty, defining qualifications for voting or for  
9 holding elective offices. There that -- there may be a  
10 good reason for what the state has done, but nothing  
11 like that is involved here.

12           Here, Congress has decided that these  
13 non-immigrants can be domiciled here, as a matter of  
14 federal immigration law. And but for their status under  
15 the federal immigration law, they would be entitled to  
16 these benefits. In this situation, the state cannot on  
17 account of their immigration status deny them the  
18 benefits that it grants to all other domiciliaries.  
19 That is inconsistent with Congress's decision in  
20 admitting them. That is an encroachment on the  
21 exclusive federal authority over immigration, and is in  
22 violation of the supremacy clause.

23           QUESTION: I don't know that I follow that  
24 argument completely. I mean, isn't the state entitled  
25 to take the factual situation which confronts it as

1 brought about by the Act of Congress and deal with that  
2 accordingly?

3 MR. BIEKE: Certainly there are situations in  
4 which the state may rely on the federal decision. For  
5 example, here, the federal decision is that most  
6 categories of non-immigrants can't be domiciled in this  
7 country, and there is nothing wrong with the states  
8 relying on that to exclude them from in-state status,  
9 assuming that citizens and immigrants were treated on  
10 the basis of domicile, but here, the only difference  
11 between these non-immigrants and immigrants is their  
12 immigration status, and --

13 QUESTION: Well, also the fact they don't pay  
14 state income tax, I take it.

15 MR. BIEKE: Your Honor, that is true, but that  
16 is also based on a federally granted right.

17 QUESTION: Right, and the state isn't trying  
18 to collect state income tax. It is just saying that for  
19 people who don't pay state income tax, we are going to  
20 treat them differently than people who do. That doesn't  
21 strike me as anything very arbitrary.

22 MR. BIEKE: That -- well, it is not -- it is  
23 not saying that completely. That is, it is not applying  
24 that cost equalization justification to immigrants and  
25 citizens. As I said, some immigrants and citizens are

1 exempt from taxes, and yet the University is allowing  
2 them to obtain in-state status upon a showing of  
3 domicile.

4           The real crucial difference between these  
5 people, non-immigrants domiciled in the state and  
6 immigrants domiciled in the state, and citizens, is  
7 their immigration, their visa status, and that, the  
8 University cannot rely on because it is imposing  
9 additional discriminatory burdens not contemplated by  
10 Congress. But even if the University says no, that is  
11 not why we are treating them differently, we are  
12 treating them differently because they don't pay taxes,  
13 that is no good either. That is a violation of the  
14 supremacy clause as well, because for most G-4's, those  
15 employed by the organizations listed in our Addendum A  
16 to our brief, they have been granted by the  
17 international agreements which have established them --

18           QUESTION: What if Maryland were to conduct a  
19 lottery, and the only way you could get into the lottery  
20 was by filing a receipt for your income tax return last  
21 year, so that in effect the lottery was limited to  
22 people who paid Maryland income tax. Now, these people  
23 obviously couldn't participate in the lottery. Would  
24 you --

25           MR. BIEKE: Most of them could if they --

1 because most of them pay income tax, on other than their  
2 salary.

3 QUESTION: Well, take the example of those few  
4 who don't pay an income tax on their salary, or whose  
5 salary is their only income, so that they would be  
6 disqualified. Would you say that the lottery violates  
7 the supremacy clause?

8 MR. BIEKE: Well, I don't know. That would be  
9 an interesting question. The principle -- but the  
10 principle is -- I would have to think about that for a  
11 minute. Let me -- The principle is that the state, even  
12 -- there need not be a direct conflict between the  
13 language of the policy and the language of the  
14 international agreements. It is established that the  
15 state may not penalize them on account of something  
16 granted by -- an exemption granted by federal law, and I  
17 think they might have an argument in that case.

18 Certainly they have an argument here that the  
19 objective of the international agreements is that these  
20 people are supposed to have an income tax exemption, and  
21 that carries with it the implication that they are not  
22 to be penalized by the state, not to be subjected to  
23 burdens by the state on account of their federally  
24 granted income tax exemption.

25 QUESTION: Mr. Bieke, until now, at least,

1 this Court has not applied a supremacy clause analysis  
2 to cases involving aliens, has it?

3 MR. BIEKE: Oh, yes, Your Honor, in many  
4 cases, starting with --

5 QUESTION: Relying on the supremacy ground, in  
6 your view?

7 MR. BIEKE: The Graham against Richardson  
8 relied on both grounds. The Takahashi case also both  
9 grounds.

10 QUESTION: There is some language in it to  
11 that effect, but do you think we can really say they  
12 were based on that argument?

13 MR. BIEKE: Well, they were -- certainly  
14 appeared to be independent grounds, and the DeCanas  
15 case, DeCanas against Bica, was a case that upheld a  
16 classification that harmed illegal aliens, but that case  
17 made clear the principles, and that was only a supremacy  
18 clause case, and said specifically that it is up to  
19 Congress to decide the conditions on which aliens will  
20 be admitted to this country, and that states may not  
21 impose additional discriminatory burdens not  
22 contemplated by Congress, and we believe that principle  
23 applies here.

24 QUESTION: Has the Court applied, in your  
25 view, heightened scrutiny to cases of non-immigrant



1 aliens?

2 MR. BIEKE: No, the cases in fact that this  
3 Court has decided to date have all applied strict  
4 scrutiny, but none have involved only non-immigrants.

5 QUESTION: Right.

6 MR. BIEKE: They have involved either all  
7 aliens or permanent resident aliens. But as I said,  
8 these people are not very different from permanent  
9 resident aliens.

10 QUESTION: I suppose your position would be  
11 the same with respect to a non-resident hunting license,  
12 for example.

13 MR. BIEKE: It would depend on --

14 QUESTION: Suppose they charge \$50 to go duck  
15 hunting in Maryland, but \$100 for non-residents.

16 MR. BIEKE: That would be okay, if they  
17 treated citizens and immigrants the same as  
18 non-immigrants.

19 QUESTION: No, citizens, \$50, your category,  
20 your class of people \$100.

21 MR. BIEKE: Citizens of the United States  
22 resident in Virginia pay \$50, and so do immigrants.  
23 Non-immigrants resident of Virginia, even if domiciled  
24 there, pay \$100. I think that there would be a strong  
25 argument in that case that they would not be treating

1 them equally. It would depend on the justification in  
2 that case. If it was that they didn't pay taxes, we  
3 would have a problem. Now, there is a case --

4 QUESTION: What if Maryland had a rule that  
5 people who don't pay the income tax shall pay a slightly  
6 higher property tax?

7 MR. BIEKE: I think that would be penalizing  
8 them on account of something granted by the federal  
9 government. Now, there is a good case not cited in our  
10 brief on this point, a case called Perez against  
11 Campbell. It is in 402 of the United States Reports.  
12 That case involved the Federal Bankruptcy Act, which  
13 allowed people to obtain full discharges in bankruptcy,  
14 and the Court there held that it was a violation of the  
15 supremacy clause for the state to have a statute which  
16 required suspension of their driver's licenses for  
17 non-payment of judgments arising from auto accidents,  
18 even when there had been a discharge in bankruptcy, and  
19 the reason was that that penalized them on account of  
20 something granted by federal law.

21 QUESTION: You mean, penalized them as  
22 compared with other people.

23 MR. BIEKE: Yes, indeed, penalized them as  
24 compared to other people.

25 QUESTION: So you don't -- if Maryland said,

1 well, we will just start taxing these people on their  
2 foreign source income?

3 MR. BIEKE: That wouldn't be -- that wouldn't  
4 be penalizing them if that was true of other people as  
5 well.

6 QUESTION: Well, I know, but wouldn't -- say  
7 they just, people who are not, who are exempt from  
8 federal income tax, we are going to start charging,  
9 taxing their foreign source income.

10 MR. BIEKE: I think that it would be -- if  
11 they were being treated differently than citizens and  
12 immigrants, and on account of the fact that they had a  
13 federal tax exemption, then that would not be something  
14 that would be consistent with the federal tax  
15 exemption. Congress --

16 QUESTION: But if they taxed the foreign  
17 source income of all aliens. Of course, they do tax  
18 foreign source income of citizens now, I suppose.

19 MR. BIEKE: They do in most situations.

20 QUESTION: Yes. Yes. But if they taxed the  
21 foreign source income of all aliens, you wouldn't have  
22 much of a beef.

23 MR. BIEKE: Well, they might have a  
24 classification there that would be treating all aliens  
25 differently, which we know is subject to strict

1 scrutiny. But the --

2 QUESTION: As compared to whom?

3 MR. BIEKE: As compared to citizens.

4 QUESTION: Well, they are getting a --

5 MR. BIEKE: If citizens were being taxed --

6 QUESTION: We are going to -- well, citizens

7 do pay taxes.

8 MR. BIEKE: Well, then, they would not --

9 QUESTION: On foreign source income.

10 MR. BIEKE: Then we would have no beef.

11 QUESTION: Yes.

12 MR. BIEKE: Now, it is not -- we don't know

13 exactly which ground the university ultimately relies

14 on. It appears to say that these G-4 visa holders

15 domiciled in Maryland are treated differently from other

16 domiciliaries because of their immigration status. It

17 is not that it just appears to be so. That is what the

18 policy says. The only difference between them is their

19 immigration status, and that is something that is

20 treating them differently on account of their visa

21 status, which is assigned by Congress, and that they

22 can't do. They cannot impose discriminatory burdens on

23 them on account of that. And if their reliance is on

24 the tax ground, the fact that they don't pay full taxes

25 on their salaries, then that must fall, too, for the

1 same reason. They are being penalized on account of  
2 their tax exemption.

3 Here, the University's discriminatory  
4 treatment of G-4 visa holders who are domiciled in  
5 Maryland is inconsistent with the federal judgment that  
6 they are entitled both to be domiciled in this country  
7 and to have a tax exemption. All we are seeking, in  
8 other words, is equal treatment with citizens and  
9 immigrants, and the University's failure to provide that  
10 violates the equal protection clause and the supremacy  
11 clause.

12 Thank you.

13 ORAL ARGUMENT OF ROBERT A. ZARNOCH, ESQ.,

14 ON BEHALF OF THE PETITIONERS - REBUTTAL

15 MR. ZARNOCH: Your Honor, I will just be very,  
16 very brief. First --

17 CHIEF JUSTICE BURGER: You have four minutes  
18 remaining.

19 MR. ZARNOCH: Four minutes, Your Honor?

20 Your Honor, in terms of the assertion that  
21 most spouses of G-4 aliens pay some tax, the record --  
22 the only record references to the actual payment of tax  
23 would show that two out of the three parents of the  
24 named plaintiffs do not have spouses earning income  
25 tax. The record would rebut that contention.



1           Your Honor, in terms of the class affected,  
2 the question here that we are only dealing with a small  
3 number of non-immigrant aliens, first, diplomats, A visa  
4 holders, aren't any different than G visa holders.  
5 There are 72 of them at the University of Maryland  
6 during the period in question. So you would add another  
7 72 on. There are additional classes that really aren't  
8 terribly different than G-4's in terms of not having a  
9 federal disability.

10           Moreover, the question of whether any of the  
11 categories of non-immigrant aliens can be domiciled in  
12 Maryland is a question for the Maryland courts to  
13 decide, as this Court indicated itself in Elkins versus  
14 Moreno the first time this case was here. The courts  
15 across the country differ widely on visa categories,  
16 whether they are able to acquire domicile in a  
17 jurisdiction for a particular purpose. There is  
18 absolutely no consistency, no guarantee that the court  
19 of appeals wouldn't find every category of non-immigrant  
20 capable of being domiciled in the state of Maryland.

21           Moreover, the class struck down by the Fourth  
22 Circuit and by the lower court included all  
23 non-immigrant aliens. If you judge the class --

24           QUESTION: Well, but the part of the  
25 submission here is that -- on the supremacy clause

1 ground is that Maryland may not deny them domicile.

2 MR. ZARNOCH: Your Honor, if all Maryland does  
3 is --

4 QUESTION: I mean, isn't that their  
5 submission, part of it?

6 MR. ZARNOCH: May not deny them domicile?

7 QUESTION: Yes. The federal government --

8 MR. ZARNOCH: Well --

9 QUESTION: The federal government says they  
10 may be domiciled in this country.

11 MR. ZARNOCH: But in terms of their -- their  
12 position is they can't be denied the benefit, rather  
13 than domicile. But even if you assume all categories of  
14 non-immigrant aliens can be domiciled here, you know, we  
15 suggest that the cost equalization rationale cuts across  
16 that line. We don't pick out G-4 aliens, their treaty  
17 benefits. We focus on simply the status of being  
18 non-immigrant, and we think that is justifiable.

19 Thank you, Your Honor.

20 QUESTION: May I ask one --

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
22 The case is submitted.

23 (Whereupon, at 12:02 o'clock p.m. the case in  
24 the above-entitled matter was submitted.)

25

CERTIFICATION

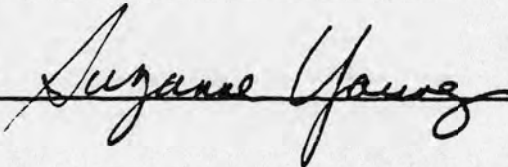
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John S. Toll, President, University of Maryland, Et Al., Petitioners,  
v. Juan Carlos Moreno Et Al. No. 80-2178

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