

In the

ORIGINAL

# Supreme Court of the United States

MIDDLESEX COUNTY ETHICS COMMITTEE

ETC.,

Petitioner,

v.

GARDEN STATE BAR ASSOCIATION ET AL.

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No. 81-460

Washington, D. C.

Wednesday, March 31, 1982

Pages 1 thru 52

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Washington, D.C.  
Wednesday, March 31, 1982

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
1:01 p.m.

APPEARANCES:

MS. MARY ANN BURGESS, ESQ., Assistant Attorney  
General of New Jersey, Trenton, New Jersey; on  
behalf of the Petitioner.

MORTON STAVIS, ESQ., Hoboken, New Jersey; on behalf  
of the Respondent.

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C O N T E N T S

2 ORAL ARGUMENT OF

PAGE

3 MS. MARY ANN BURGESS, ESQ.,  
on behalf of the Petitioner

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4 MORTON STAVIS, ESQ.,  
5 on behalf of the Respondent

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6 MS. MARY ANN BURGESS, ESQ.,  
on behalf of the Petitioner -- rebuttal

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER:   Ms. Burgess, you may  
3 proceed whenever you're ready.

4                    ORAL ARGUMENT OF MS. MARY ANN BURGESS, ESQ.,  
5                                    ON BEHALF OF THE PETITIONER

6                    MS. BURGESS:   Mr. Chief Justice, and may it  
7 please the Court:

8                    The present case involves a strong public  
9 policy consistently fostered by this Court against  
10 interference with state proceedings by federal courts  
11 either by way of injunction or declaratory remarks.

12                   The court below declined to follow this policy  
13 and interfered in an ongoing state bar disciplinary  
14 process, thereby inserting itself into the delicate  
15 relationship between a state judiciary and attorney's  
16 license to practice before it.   The case therefore  
17 provides this Court with an opportunity to consider the  
18 application of the policy of noninterference articulated  
19 in Younger and amplified by its progeny to attorney  
20 disciplinary proceedings, and to firmly establish the  
21 appropriateness of federal noninterference to such  
22 proceedings which involve such significant and important  
23 state concerns.

24                   It must be underscored that what this case  
25 does not involve is the constitutionality of particular

1 disciplinary rules or whether an attorney violated those  
2 rules. What is at stake is whether the State Supreme  
3 Court can articulate and develop standards governing  
4 attorney discipline and discipline attorneys who have  
5 been charged with violating those standards free and  
6 unfettered from federal intervention. However, in order  
7 to fully appreciate the issues that this raises it is  
8 necessary to briefly discuss the factual setting in  
9 which it arose.

10           The case has its origin in the criminal trial  
11 of Joanne Chesimard who was charged with the murder of a  
12 New Jersey state trooper. During the jury selection  
13 process in this trial Lennox Hinds, an attorney in New  
14 Jersey, called a press conference concerning the conduct  
15 of that trial, and more particular, that of the trial  
16 judge.

17           Reports of the press conference --

18           QUESTION: Had there been any advance -- had  
19 there been any advance indication from the judge  
20 directing all counsel not to have any public statements?

21           MS. BURGESS: It is my understanding, Chief  
22 Justice, that there was an order of some type directed  
23 to the counsel in the case, and I believe that during  
24 the press conference Mr. Hinds indicated that he was  
25 speaking on behalf of the counsel in the case because

1 they had been gagged by the trial court judge. That was  
2 report in the news article which appeared in the New  
3 York Daily News and the Newark Star Ledger. The report  
4 --

5 QUESTION: He was not himself of counsel, is  
6 that right?

7 MS. BURGESS: He was not of counsel in that  
8 particular trial, yes, Chief Justice.

9 It was reported in these articles that Mr.  
10 Hinds had called the proceeding a travesty, had  
11 indicated that Judge Appleby, the trial judge, was  
12 without judicial temperament or racial sensitivity to  
13 sit as an objective judge in this particular trial. It  
14 was reported that he called the -- that he accused the  
15 judge of asking self-serving questions which was leading  
16 to the creation of a hangman's court.

17 David Foley, a member of the Middlesex County  
18 Ethics Committee, brought these articles to the  
19 attention of the committee. He was authorized to  
20 investigate the matter and determine whether there were  
21 any possible infractions of the New Jersey disciplinary  
22 rules.

23 He communicated by letter with Mr. Hinds and  
24 asked for an opportunity to meet with him and discuss  
25 the reports that had been circulated, had been reported

1 in the papers. Mr. Hinds declined to meet with Mr.  
2 Foley, and although the attorney disciplinary process is  
3 a private, confidential process, he disclosed that  
4 initial communication at a press conference, and it was  
5 widely publicized in the papers.

6           In order to protect the jury trial that was  
7 still in process the committee determined not to proceed  
8 with the investigation until the trial itself had been  
9 concluded. When it was concluded, the investigation was  
10 reactivated and Mr. Foley again attempted to meet with  
11 Mr. Hinds to discuss the matter. After several  
12 unsuccessful attempts, the investigation went on without  
13 Mr. Hinds' cooperation. When it was concluded, Mr.  
14 Foley recommended that a statement of charges be filed  
15 against Mr. Hinds.

16           QUESTION: Ms. Burgess, I wonder if you'd try  
17 to speak just a little louder, would you?

18           MS. BURGESS: Certainly. Indicating that he  
19 had been -- had violated Disiplinary Rule 1-102(A)(5) in  
20 that the statements were prejudicial to the  
21 administration of justice; and secondly, that these  
22 statements violated DR 7-107(D) in that they were made  
23 during the jury selection process and were reasonably  
24 likely to interfere with a fair trial in that they were  
25 intended to influence the taking of prospective jurors.

1           The latter disciplinary rule had been adopted  
2 by the Supreme Court of New Jersey following the  
3 decision of this Court in *Shepherd v. Maxwell* wherein  
4 the Court urged all state courts to adopt rules designed  
5 to protect the criminal trial process from prejudicial  
6 outside interferences in order to assure a fair trial  
7 guaranteed by the Sixth Amendment.

8           In accordance with the recommendations of Mr.  
9 Foley the committee did in fact issue a statement of  
10 charges against Lennox Hinds. However, instead of  
11 answering those charges, Mr. Hinds initiated -- Mr.  
12 Hinds, together with three organizations of minority  
13 attorneys, initiated a complaint in federal district  
14 court.

15           In that action they sought to enjoin the  
16 ethics -- the processing of the ethics complaint and  
17 also to obtain a declaratory judgment that the  
18 disciplinary rules under which he was charged were  
19 unconstitutional. Significantly, the complaint never  
20 alleged that Mr. Hinds could not adjudicate these  
21 constitutional claims within the context of the New  
22 Jersey attorney disciplinary process. Rather, it  
23 suggests -- actually it states that these -- both the  
24 Ethics Committee and the Supreme Court were somehow  
25 biased and that they could not objectively review the

1 constitutionality of the rules that had been adopted by  
2 the Supreme Court.

3           The district court dismissed the complaint  
4 under Younger abstention, concluding that principles of  
5 comity and federalism dictate that the federal court  
6 abstain so that the state court could consider the  
7 constitutionality of its disciplinary rules free from  
8 federal intervention. It therefore rejected the claims  
9 that both the Ethics Committee and the Supreme Court  
10 were somehow biased tribunals to determine the  
11 constitutionality of their own regulations.

12           Plaintiffs moved to amend for the limited  
13 purpose of permitting the plaintiffs to -- the  
14 opportunity to demonstrate either the bad faith or  
15 harassment which would operate as an exception to the  
16 Younger abstention doctrine.

17           There was extensive discovery and two days of  
18 hearings before the trial judge. A supplemental opinion  
19 -- in a supplemental opinion the district court  
20 concluded that the plaintiffs had totally failed to meet  
21 their burden of demonstrating either the bad faith or  
22 harassment which would operate as an exception to  
23 Younger abstention.

24           The plaintiffs appealed and moved for a stay  
25 before the trial court, which was granted. So, in fact,

1 the processing of the disciplinary matter before the  
2 Ethics Committee was stayed in April of 1980.

3           In its decision below, the Third Circuit  
4 concluded that the district court had abused its  
5 discretion when it dismissed on Younger absention  
6 grounds. This decision represents a radical departure  
7 from the well-established tradition of federal  
8 noninterference in pending state attorney disciplinary  
9 proceedings. The Third Circuit posits a very novel  
10 basis for justifying federal intrusion into the delicate  
11 and unique relationship between the Supreme Court and  
12 attorneys' license to practice before it.

13           The court initially fragmented the Ethics  
14 Committee segment of a unitary disciplinary process or  
15 the remainder of that process.

16           QUESTION: Ms. Burgess, in that connection may  
17 I ask, is it still the practice to have the record made  
18 by the local committee but the actual decision to be  
19 made on that record only by the Supreme Court?

20           MS. BURGESS: Mr. Justice Brennan, it would  
21 depend on the actual conclusion or finding at the Ethics  
22 Committee level. It is true that it is only the Ethics  
23 Committee that develops a record in a particular --

24           QUESTION: Yes.

25           MS. BURGESS: They are the arm that hears the

1 matter for the court. There are three areas in which  
2 they can make final determinations. If they find that  
3 there is no indication of unethical conduct they can  
4 dismiss. They can do that either before the  
5 investigation when they got the initial complaint or  
6 after the hearing they determine there is no unethical  
7 conduct. So in two instances they can dismiss. Those  
8 would be final determinations.

9           They could make a final --

10           QUESTION: Are they reviewable by the Supreme  
11 Court now?

12           MS. BURGESS: They could be on motion of the  
13 -- if a complainant comes, makes a --

14           QUESTION: I'm away from this a long time, but  
15 --

16           MS. BURGESS: If a complainant raises a  
17 problem with an attorney and the Ethics Committee  
18 reviews it and finds no basis to file charges, that  
19 individual can go the next step and seek a review of  
20 that determination.

21           QUESTION: Yes.

22           MS. BURGESS: So the Disciplinary Review Board  
23 does review, has an appellate function with regard to  
24 certain actions of the Ethics Committee. If the Ethics  
25 Committee reviews the record and considers the evidence

1 that has been produced, it can determine that there is  
2 unethical conduct but it only warrants what is called  
3 minor discipline, a private reprimand. That also is a  
4 final judgment by the committee and can be reviewed  
5 again by the Disciplinary Review Board.

6           If after a hearing on notice of evidence,  
7 consideration of the factors that have been developed,  
8 they determine that there is significant -- potential  
9 significant violation of ethical conduct, they can  
10 recommend that what is called major discipline be  
11 taken. They cannot impose that major discipline. And  
12 that triggers the process which was discussed by  
13 respondents called presentment. Actually, a presentment  
14 is --

15           QUESTION: And that goes to this --

16           MS. BURGESS: -- Is a finding of fact and a  
17 recommendation of major discipline.

18           QUESTION: But that goes to the Supreme Court  
19 then.

20           MS. BURGESS: That's -- well, it would go to  
21 the Disciplinary Review Board which would review it,  
22 make a determination which can only be imposed by the  
23 Supreme Court.

24           QUESTION: And then is there still oral  
25 argument before the Supreme Court?

1 MS. BURGESS: Yes. Yes, Mr. --  
2 QUESTION: In open court?  
3 MS. BURGESS: Yes, Mr. Justice.  
4 QUESTION: And every issue that -- legal or  
5 otherwise that's raised --  
6 MS. BURGESS: That's right.  
7 QUESTION: -- May then be decided by the  
8 Supreme Court.  
9 MS. BURGESS: It would be legal argument. The  
10 only record, though, the factual record, would be that  
11 record which had been held by the --  
12 QUESTION: Had been made.  
13 MS. BURGESS: -- Ethics Committee.  
14 The Third Circuit in fact fragmented the  
15 Ethics Committee from the totality of the disciplinary  
16 process, concluding that when a matter is pending before  
17 the Ethics Committee it is not pending before the  
18 Supreme Court. Looking at it in this very isolated  
19 fashion, they felt -- they concluded that an attorney  
20 charged with a violation could not raise constitutional  
21 issues and have them adjudicated by the Ethics  
22 Committee, which is correct. It could not be  
23 adjudicated at that level. It could be raised at that  
24 level and ultimately adjudicated. They could be raised  
25 at that level, and through either a motion to the

1 Supreme Court there could be a review prior to a final --

2 QUESTION: Incidentally, when the Supreme  
3 Court does this and decides finally a case, does it stil  
4 publish opinions?

5 MS. BURGESS: Yes, Mr. Justice Brennan.

6 QUESTION: By name of attorney and so forth?

7 MS. BURGESS: Yes.

8 QUESTION: But would be it be fair -- is it --  
9 would we be fair in understanding that only what might  
10 be called serious cases get that far?

11 MS. BURGESS: To the Supreme Court? Yes,  
12 Chief Justice. They would be the ones involving major  
13 discipline: disbarment, temporary suspension,  
14 something of that nature. A private reprimand, unless  
15 the attorney involved or the complainant involved felt  
16 it should go any higher, would probably not prosecute it  
17 any higher than that.

18 QUESTION: Well, now, in this case the Supreme  
19 Court certified to itself the whole proceeding, did it  
20 not?

21 MS. BURGESS: Everything is pending in our  
22 Supreme Court.

23 QUESTION: And does that suggest that the  
24 Supreme Court's considering this as a major disciplinary  
25 matter?

1 MS. BURGESS: No. That would suggest that the  
2 constitutional issues involved warranted review by the  
3 court.

4 QUESTION: Right. But it -- everyone else is  
5 now out of this proceeding except the Supreme Court, is  
6 it not?

7 MS. BURGESS: The matter is still pending in  
8 the district court level. After the --

9 QUESTION: No, no. I mean as far as New  
10 Jersey.

11 MS. BURGESS: Oh.

12 QUESTION: As New Jersey is concerned. Only  
13 the Supreme Court has cognizance of this case now.

14 MS. BURGESS: That's right.

15 QUESTION: Does it not?

16 MS. BURGESS: That's right. It was prosecuted  
17 on behalf of the Ethics Committee by the attorney who is  
18 in charge of ethics within the court system; so she was  
19 the prosecuting agent, Mr. Hinds was defendant and  
20 respondent to that charge.

21 But it's pending now. It has been -- the  
22 constitutional issues have been fully briefed. There  
23 has been oral argument, and we're pending and waiting  
24 for the results.

25 QUESTION: There has been no decision in the

1 Supreme Court as yet.

2 MS. BURGESS: There has been no decision.

3 QUESTION: Well, Ms. Burgess, what exactly is  
4 the question before us? Is it the question of whether  
5 the district court should have abstained as of the  
6 factual situation before the district court at the time  
7 it acted, or whether the district court should have  
8 abstained in the factual context of what we now know  
9 about the situation, because there has been a factual  
10 change.

11 MS. BURGESS: There has been a factual  
12 change. It was our position that the district court --  
13 which it did do, it did abstain from interfering in the  
14 process; that that was a proper act for the district  
15 court. When it was appealed to the Third Circuit, they  
16 felt that was an abuse of discretion.

17 We petitioned for a rehearing. It was at that  
18 point that the State Supreme Court indicated its  
19 willingness, being apprised of this particular matter,  
20 that it would hear the constitutional claims of Lennox  
21 Hinds.

22 We apprised the Third Circuit in our petition  
23 for rehearing of that fact. The Third Circuit said that  
24 what was of importance was the factual situation at the  
25 time the complaint arose, not as of the time that they

1 were reviewing it at that point, which was about a  
2 two-year lapse. So they felt that when the complaint  
3 was filed Mr. Hinds could not have an adjudication of  
4 his constitutional rights before the Ethics Committee.  
5 They refused to vacate or reconsider their decision  
6 because even though the matter was now fully before the  
7 Supreme Court -- and I don't think there's any question  
8 that Mr. Hinds has ample opportunity to have his  
9 constitutional claims adjudicated by that body, which  
10 certainly constitutes a competent tribunal to adjudicate  
11 these constitutional -- federal constitutional claims.

12           QUESTION: Do I correctly understand that the  
13 Third Circuit is not interfering with the ongoing  
14 consideration by the New Jersey court now?

15           MS. BURGESS: In its decision, sir, petition  
16 for rehearing, they indicated they had no trouble or  
17 problem with concurrent proceedings, one in the District  
18 Court, one before the New Jersey Supreme Court, which  
19 it's our view runs seriously counter to the notions of  
20 comity and federalism; that it is quite possible that in  
21 this duplicitous, duplicative process that the Supreme  
22 Court of New Jersey will come to one conclusion on the  
23 constitutionality in its adjudication of those issues,  
24 and let's assume Mr. Hinds is not satisfied with that,  
25 rather than bringing that final determination of the

1 Supreme Court to this Court, he has the opportunity and  
2 the option -- it's clearly contemplated in the Third  
3 Circuit opinion -- to go to the district court and to  
4 have his claims adjudicated by that court, which would  
5 really cast serious doubt on the objectivity and the  
6 ability of the Supreme Court of New Jersey to  
7 objectively and adequately resolve constitutional  
8 issues. And I think that really --

9           QUESTION: I am puzzled about that. How would  
10 affect what the Supreme Court of New Jersey might do? I  
11 don't quite understand that.

12           MS. BURGESS: It's not what -- it does not  
13 affect it at this point.

14           QUESTION: Ms. Burgess, excuse me. Would you  
15 stay close to those microphones? We're having  
16 difficulty hearing you.

17           MS. BURGESS: I'm sorry.

18           It is not, in effect, precluding the Supreme  
19 Court at this point from adjudicating those claims. The  
20 possibility is that the federal district court will be  
21 reviewing that final determination or will be reviewing  
22 those issues and reaching a contrary result if Mr. Hinds  
23 is dissatisfied with the results in the New Jersey  
24 Supreme Court.

25           QUESTION: May I ask one other question? If

1 this suit had not -- federal action had not been filed,  
2 as I understand you, only major matters get to the New  
3 Jersey Supreme Court, and I don't know whether this is a  
4 major matter within the meaning of that test or not.

5           Is there a strong likelihood that had the  
6 federal suit not been filed, this case never would have  
7 reached the Supreme Court of New Jersey?

8           MS. BURGESS: With regard to the imposition of  
9 discipline it's correct that only the major matters  
10 would get to the Supreme Court where there would be  
11 possible disbarment. But with regard to the issue of  
12 whether the disciplinary rule under which an individual  
13 is charged is constitutional or not, it's quite possible  
14 that through a motion practice, a motion made to the  
15 Supreme Court to review that issue before there was any  
16 significance, either a hearing at the Ethics Committee  
17 level or something of that nature, it could well have  
18 reached the Supreme Court.

19           There has been a history in our court of a  
20 very flexible procedure with regard to attorney  
21 disciplinary matters. So that while a matter is pending  
22 before an Ethics Committee there can be motions made to  
23 the Supreme Court to resolve procedural issues or  
24 perhaps constitutional challenges. And, in fact, this  
25 flexible procedure has been memorialized in a new court

1 rule which provides that when a matter is initiated,  
2 when there is a disciplinary matter initiated, the  
3 individual can move the Supreme Court for direct  
4 resolution of constitutional issues which may be  
5 implicated. It's interlocutory. There's a motion for  
6 leave to resolve those issues.

7           If the court does not take it -- and that  
8 would, of course, depend on the seriousness of the  
9 constitutional challenge, the individual is required to  
10 preserve his constitutional challenge in the answer to  
11 the disciplinary charges. And if the matter does  
12 proceed to formal discipline, it would be resolved  
13 within that context. So it would always be -- the  
14 ability to raise the constitutional challenge would  
15 always be there to be decided by the court.

16           QUESTION: Well, the one thing that puzzled  
17 me, as to one of the rules -- I can't remember -- one of  
18 the rules I thought only applied to counsel of record in  
19 a case. And conceivably at the preliminary stage it  
20 might have just found no merit to the charge at all.

21           MS. BURGESS: That's right. It's quite  
22 possible that in reviewing the application of the rule  
23 that Mr. Hinds may not have fallen within the ambit of  
24 it. That's a possibility. I couldn't say. It doesn't  
25 talk about counsel. It says associated with the defense

1 or prosecution of a particular matter. So the question  
2 is what does associated with the defense or prosecution  
3 mean; does it mean of counsel or does it mean something  
4 broader than that and something less than that?

5 QUESTION: What position does your client take  
6 on that issue? Does associated with the defense include  
7 people who are not participants in the litigation?

8 MS. BURGESS: It could well include --

9 QUESTION: I mean isn't that a yes or no?

10 MS. BURGESS: There hasn't been any definitive  
11 rules on that. That is the issue --

12 QUESTION: But I mean don't you have a  
13 position on the issue that you're maintaining in that  
14 proceeding?

15 MS. BURGESS: In our Supreme Court proceeding?

16 QUESTION: Yes.

17 MS. BURGESS: In the Supreme Court they did  
18 argue that it was broader than of counsel.

19 QUESTION: I see.

20 MS. BURGESS: That it could extend to  
21 individuals who had certain contacts --

22 QUESTION: And it does specifically extend to  
23 this particular person.

24 MS. BURGESS: That's the position. As I said,  
25 it hasn't been resolved by the court as yet.

1 QUESTION: Ms. Burgess, I misunderstood you.  
2 Didn't you start off by saying the merits weren't before  
3 us?

4 MS. BURGESS: That's true, Mr. Justice.

5 QUESTION: Well, isn't that the merits, and  
6 you're now answering them.

7 QUESTION: Well, I asked the question.

8 MS. BURGESS: It's my fault.

9 QUESTION: It's my fault.

10 QUESTION: Let me just --

11 QUESTION: Well, what would happen if the  
12 Supreme Court this afternoon decides that this case is  
13 without merit and dismisses it?

14 MS. BURGESS: Well --

15 QUESTION: Could they do that?

16 MS. BURGESS: What's before them is the  
17 constitutionality --

18 QUESTION: Could they do that?

19 MS. BURGESS: They could dismiss the charge  
20 against Mr. Hinds, yes. They could find that he is not  
21 --

22 QUESTION: What would that do to this case?

23 MS. BURGESS: It would still leave the  
24 application or the failure to apply Younger abstention  
25 in this particular case, where rather than dismissing

1 the complaint in the district court and permitting the  
2 state court to go forward unfettered in adjudicating the  
3 complaint --

4 QUESTION: I don't understand it at all.

5 QUESTION: Well, why isn't the case over if  
6 that happens?

7 QUESTION: I don't see -- the case is over,  
8 isn't it?

9 MS. BURGESS: Well, that's assuming --

10 QUESTION: This case and all cases.

11 MS. BURGESS: That's assuming that the court  
12 in effect finds its rules unconstitutional and --

13 QUESTION: Well, whatever -- my brother  
14 Marshall's question was if the New Jersey Supreme Court,  
15 having addressed the merits, dismisses the charge  
16 against Mr. Hinds, isn't that the end of this whole  
17 business?

18 MS. BURGESS: There would still be the  
19 pendency of the complaint in the federal district  
20 court. Rather than having dismissed that, it permitted  
21 the New Jersey Supreme Court to proceed on adjudication  
22 of these complaints. There is still that determination.

23 QUESTION: Well, wouldn't that case be mooted?

24 MS. BURGESS: And I think -- excuse me.

25 QUESTION: Wouldn't that case be mooted if

1 they dismissed all the proceedings that underlie this?

2 MS. BURGESS: Well, if this Court would return  
3 or vacate the judgment below and dismiss the complaint.

4 QUESTION: Well, we might vacate the opinion,  
5 but that has nothing to do with the continuance of the  
6 case.

7 MS. BURGESS: The case involving Lennox Hinds  
8 would be over.

9 QUESTION: Let me take you back to the nature  
10 of this proceeding. In this Court, as you know, both in  
11 original cases and in others we have inherent and  
12 constitutional authority to appoint a special master to  
13 undertake some inquiry.

14 Now, is the proceeding in New Jersey roughly  
15 comparable to that, that the court has delegated to this  
16 body the function of an inquiring master or a special  
17 master to develop the facts?

18 MS. BURGESS: It could be analogized to  
19 precisely that type of situation.

20 QUESTION: So it is a judicial proceeding.

21 MS. BURGESS: It certainly is a judicial  
22 proceeding. The court itself has characterized it as a  
23 judicial proceeding, and it utilizes the Ethics  
24 Committees to hear matters for it. That is precisely  
25 their function.

1           QUESTION: It used to be, Ms. Burgess, that in  
2 some cases rather than have local committees do the  
3 fact-finding job the Superior Court judges used to do it  
4 -- I used to do it -- at the direction of the Supreme  
5 Court.

6           Is that still so?

7           MS. BURGESS: Not to my knowledge, Justice  
8 Brennan. I believe it is totally within the ambit now  
9 of the Ethics Committees. And in New Jersey this is  
10 particularly significant since the Supreme Court has  
11 plenary and exclusive jurisdiction over both admission  
12 to the bar and disciplining attorneys by way of express  
13 constitutional provision. So, that is, really the  
14 people who through their constitution have permitted  
15 total control over admission to the bar and discipline of  
16 members to the bar to the Supreme Court. So that when  
17 the Third Circuit failed to permit the Supreme Court to  
18 fulfill that function unfettered by federal  
19 intervention, it was in fact not only thwarting -- it  
20 was in fact thwarting the will of the people to have  
21 that precise function fulfilled by the body that had  
22 been designated to do it.

23           I will reserve the rest of my time for  
24 rebuttal.

25           Thank you.

1 CHIEF JUSTICE BURGER: Mr. Stavis, at the  
2 outset do you agree that this is a judicial proceeding  
3 in the State of New Jersey?

4 ORAL ARGUMENT OF MORTON STAVIS, ESQ.,  
5 ON BEHALF OF THE RESPONDENT

6 MR. STAVIS: No, sir, Your Honor. It is not a  
7 judicial proceeding.

8 QUESTION: How do you describe it then?

9 MR. STAVIS: Any more than Consumers Union  
10 against the Supreme Court of Virginia.

11 QUESTION: Well, hasn't the Supreme Court of  
12 New Jersey authorized this body to do what it was doing?

13 MR. STAVIS: Yes. It adopted --

14 QUESTION: It delegated --

15 MR. STAVIS: -- Rules which authorize this  
16 body to do what it was doing, but --

17 QUESTION: Delegated to them a fact-finding  
18 function.

19 MR. STAVIS: It delegated to them -- not quite  
20 that, Your Honor. At the stage where this litigation  
21 was commenced we were not at the fact-finding, period.  
22 At the stage where the federal litigation was commenced  
23 they were at the pre-prosecutive portion of their  
24 responsibilities. In other words, what was to happen as  
25 of the time that this federal court proceeding was

1 commenced was that a hearing was to be held not for the  
2 purpose of finding facts for the Supreme Court of New  
3 Jersey but for the purpose of determining whether Mr.  
4 Hinds was to be prosecuted. And we laid that out quite  
5 clearly --

6 QUESTION: Prosecuted by whom?

7 MR. STAVIS: -- As did the Court of Appeals.

8 QUESTION: Prosecuted by whom?

9 MR. STAVIS: Prosecuted by the district Ethics  
10 Committee, and he would be prosecuted by the district  
11 Ethics Committee before the Disciplinary Review Board.  
12 In other words, there was a mechanism in our structure  
13 whereby at this particular stage the body holds  
14 hearings. At the conclusion of those hearings they  
15 don't adjudicate nor do they even present it to the  
16 Supreme Court. They merely decide whether to present  
17 the matter to the Disciplinary Review Board.

18 And so that's precisely why the Court of  
19 Appeals for the Third Circuit said that at this  
20 particular juncture the district Ethics Committee was  
21 functioning purely in the prosecutive level.

22 May I point out, Mr. Chief Justice, that when  
23 you asked the question with respect to a master, when a  
24 master is appointed, the court appointing the master has  
25 made a judicial determination that the issue that is

1 presented requires fact-finding; and there has been some  
2 preliminary judicial determination as to the legal  
3 questions, as to the constitutional questions.

4           Here, nothing happened other than David Foley  
5 said I'd like to investigate, and the committee said you  
6 can investigate. Nothing further happened other than  
7 that, and we're in the process at this particular point  
8 where we go into court where the consequence of them  
9 going ahead is there may or may not be a prosecution.

10           Now, that's not the point at which abstention  
11 applies. That's not the point at which Younger  
12 abstention applies. In fact, so far as I know, there's  
13 case after case after case in this Court which says that  
14 prosecutors -- I'm thinking of Consumers Union --  
15 prosecutors are natural objects of injunctive and  
16 declaratory relief, and the Younger abstention doesn't  
17 apply. I'm thinking of Steffel against Thompson, an  
18 opinion by Mr. Justice Brennan. I'm thinking of the  
19 Doran case, an opinion by Mr. Justice Rehnquist.

20           Down the line, before there has been a  
21 prosecutive determination, before the matter has been  
22 put in the hands of a body which has the power to make a  
23 judicial determination and which has the power, more  
24 particularly, which has the power to adjudicate the  
25 federal constitutional claims. And that's the essence

1 of the Gibson against Berryhill standard.

2           QUESTION: Mr. Stavis, you agree, I think,  
3 that the thing is factually somewhat different now than  
4 it was when it was first brought to the attention of the  
5 district court. Do you think that the factual  
6 differences are irrelevant for legal purposes?

7           MR. STAVIS: Well, I think that those factual  
8 -- and I appreciate the sharpness with which you made  
9 the point during the argument of my adversary that there  
10 really are two distinct issues here. One was the issue  
11 as presented to the district court and adjudicated by  
12 the Court of Appeals. And what the Court of Appeals  
13 decided, consistent with its prior decision and  
14 consistent with the decision of this Court in Lockport,  
15 that issues of abstention are determined as of the time  
16 that the federal court action is commenced. Federal  
17 court jurisdiction once having properly attached, the  
18 subsequent bringing of a state court action, which may  
19 conceivably provide the possibility of satisfying the  
20 Gibson against Berryhill standard -- and that was  
21 Lockport -- that doesn't alter the situation.

22           That was the situation at the district court  
23 level. That was the situation at the level of the Court  
24 of Appeals before the Third Circuit. That was the  
25 question on which a petition for writ of certiorari was

1 filed in this Court. Those were the questions presented  
2 in the petition for writ of certiorari.

3 QUESTION: Well, this is an equitable action,  
4 isn't it?

5 MR. STAVIS: I'm sorry.

6 QUESTION: Isn't this an equitable action?

7 MR. STAVIS: Oh, of course.

8 QUESTION: And isn't equity as of the time of  
9 judgment, in contrast to law as the time the case is  
10 filed?

11 MR. STAVIS: Well, I believe that --

12 QUESTION: Isn't that the long way back to  
13 understanding? I know laws change a lot, but wasn't  
14 that the way it always used to be, that equity speaks as  
15 of the time of judgment?

16 MR. STAVIS: Well, in the abstention area, in  
17 the abstention area, and in the equity area I'd like to  
18 say this, too -- in the abstention area you've settled  
19 it. In the abstention area you've settled that the  
20 subsequent change as to the availability of a state  
21 court forum doesn't alter the jurisdiction of the court.

22 I might say, if the Court will allow, in the  
23 equity area, too, the fact that after equity court  
24 jurisdiction has attached and the remedy at law appears  
25 to be adequate -- there's an opinion by Mr. Justice

1 Cardoza that deals exactly with that question -- the  
2 jurisdiction of the court isn't vacated.

3           Now, there is -- there isn't any doubt that  
4 there is a question with respect to subsequently  
5 developed facts; but my suggestion with respect to that  
6 is that doesn't go to the jurisdiction of the federal  
7 court. That may go to a wholly different kind of  
8 question.

9           You've got a case -- and this sort of thing  
10 occurs quite often -- you have a Pullman abstention.  
11 The case is begun in the United States District Court.  
12 The United States District Court decides to send it out  
13 into the state court for adjudication of state issues,  
14 and then it comes back to the district court. England  
15 against Louisiana Medical Examiners. While it's in the  
16 state court the state court determines not only state  
17 issues but federal constitutional issues. It comes back  
18 to the district court. What's the consequence of those  
19 facts on its subsequent handling in the district court?

20           Now, when this matter was submitted to the  
21 Supreme Court of New Jersey, we put into our brief the  
22 express kind of reservation which this Court referred to  
23 in England against Louisiana Board of Medical  
24 Examiners. We said we're here before the state court  
25 because we've been ordered to be here, but we had made

1 an original choice of forum in the federal court and  
2 want to make sure that we preserve that.

3           When this court gets back to the district  
4 court -- when this case comes back to the district  
5 court, the consideration -- the court may very well give  
6 consideration to whether those facts which subsequently  
7 develop may alter the status of the case.

8           QUESTION: Well, not if the Court of Appeals  
9 is reversed. There won't be anything for the district  
10 court to do.

11          MR. STAVIS: If the Court of Appeals is  
12 reversed, there will be nothing for the district court  
13 to do. But if the court is affirmed, if the Court of  
14 Appeals is affirmed on the grounds that -- on the only  
15 grounds that they passed upon. The only grounds that  
16 they passed upon was whether or not the district court  
17 had jurisdiction as of the time the action was  
18 commenced. And on a --

19          QUESTION: Well, can't the factual  
20 developments -- putting aside the Younger abstention and  
21 the Pullman abstention to which you refer -- be used to  
22 at least give us some insight into the nature of the New  
23 Jersey proceeding that we might not have had if it had  
24 just been pending before the Ethics Committee?

25          MR. STAVIS: Yes, you can certainly have

1 insight into the New Jersey proceeding, but let me  
2 suggest, Justice Rehnquist, as to why it is that you  
3 can't really adjudicate based upon that for the  
4 following several reasons.

5           First of all, as of this time you haven't the  
6 faintest idea what the New Jersey Supreme Court may do.  
7 You don't know whether the New Jersey Supreme Court is  
8 going to adjudicate this simply upon some of the grounds  
9 --

10           QUESTION: Well, Mr. Stavis, suppose it did  
11 before we get around to deciding this case?

12           MR. STAVIS: Well, you'd have to look at what  
13 they did.

14           QUESTION: Well, what happens? Suppose they  
15 evaluate all of your constitutional questions and they  
16 agree or disagree, as the case may be, and they enter a  
17 judgment.

18           MR. STAVIS: Yes, sir.

19           QUESTION: If the judgment's adverse to your  
20 client, I take it you have review here, do you not?

21           MR. STAVIS: We have discretionary review here.

22           QUESTION: That may be, but you do have --  
23 that's where you go, isn't it?

24           MR. STAVIS: No. Under the Court of Appeals  
25 decision we'd be back in the district court.

1 QUESTION: No matter what the Supreme Court of  
2 New Jersey had done and whether or not we granted cert?

3 MR. STAVIS: I'm sorry.

4 QUESTION: Whether or not we granted cert?

5 MR. STAVIS: Well, I doubt that I would be  
6 doing two things at the same time. I doubt that I would  
7 be presenting a petition for writ of certiorari to this  
8 court and at the same time litigating in the United  
9 States district court. I think that would be a  
10 foolhardy undertaking on our part.

11 But certainly if this Court should reach out  
12 and grant cert, obviously the constitutional issues  
13 would be decided here. But otherwise, as soon as --

14 QUESTION: And then you'd have everything that  
15 your client seeks.

16 MR. STAVIS: If you -- if you granted cert, of  
17 course, but that's quite an "if." You might very well  
18 decide that you --

19 QUESTION: Well, how about the other "if?" If  
20 the Supreme Court of New Jersey says we dismiss this  
21 complaint for every one of the reasons that you asked  
22 for, then what action would you have?

23 MR. STAVIS: I think I'd relax at that point.

24 QUESTION: I thought so.

25 MR. STAVIS: And that might be the end of the

1 case.

2 QUESTION: And we could, too, couldn't we?

3 QUESTION: Might be, Mr. --

4 MR. STAVIS: Everybody could relax at that --

5 QUESTION: Might be, you say, Mr. Stavis?

6 MR. STAVIS: I'm sorry.

7 QUESTION: You say that might be the end of

8 the case?

9 MR. STAVIS: I think it would be the end of

10 the case.

11 QUESTION: Yes.

12 MR. STAVIS: If we won hands down on all the

13 issues. But let me point out --

14 QUESTION: Well, the Court of Appeals would

15 have said forget everything that's happened since the

16 complaint was filed. Decide the case on the facts that

17 exist at the time the complaint was filed. That's what

18 the court said.

19 MR. STAVIS: Well, excuse me, Your Honor. The

20 facts that are being asserted here, these new facts, are

21 following the Court of Appeals decision.

22 QUESTION: Exactly, exactly.

23 MR. STAVIS: So that the Court of Appeals in

24 fact never had --

25 QUESTION: Yes, but people presented --

1 attempted to present facts to the Court of Appeals that  
2 had occurred since the district court decided, and the  
3 Court of Appeals said no, we will not take cognizance of  
4 those facts. We shall decide the case based on the  
5 facts that existed at the time the complaint was filed.

6 MR. STAVIS: Forgive me, but I beg to differ.  
7 There was not a presentation of new facts before the  
8 Court of Appeals. Quite the contrary. All that  
9 happened --

10 QUESTION: Well, whether there was -- even if  
11 there had -- suppose there had been, though, that the  
12 Court of Appeals said -- you do agree they said even if  
13 there had been new facts, we won't take cognizance of  
14 them. They at least said they.

15 MR. STAVIS: Yes. Following, following your  
16 own decision in Lockport. And that's a position that  
17 you stated in Lockport. But let me state what actually  
18 happened before the Court of Appeals.

19 There were no new facts. There was an offer.

20 QUESTION: So that if they were wrong on their  
21 rule, it doesn't make any difference. If they were  
22 wrong on saying they shouldn't take cognizance of new  
23 facts, it doesn't make any difference because there  
24 weren't any new facts.

25 MR. STAVIS: There weren't any new facts, Your

1 Honor. There was an offer by the Supreme Court of New  
2 Jersey in saying we would like, if we're permitted to,  
3 we would like to consider this case. The Court of  
4 Appeals responded positively to that and said fine, you  
5 want to consider the constitutional issues now, do so.  
6 I think they were responding to the kind of comment that  
7 recently I read in the Chief Justice's dissenting  
8 opinion in Wisconsin against Constantino.

9           Now, the Court of Appeals responded to that  
10 and said if you want to consider these issues, do so,  
11 but, but since that would change the circumstances from  
12 the state of facts when these folks went to the United  
13 States District Court and established their  
14 jurisdictional foundation, we're not prepared to say  
15 that if you do so that will defeat jurisdiction which  
16 once properly attached. Now -- and that's the most  
17 consistent application of settlor that I know of.

18           Now, that's not to say, that's not to say that  
19 when the case comes back we don't have a consideration  
20 of new facts, and that's England against Louisiana  
21 Medical Board. And whether or not whatever the Supreme  
22 Court did should subsequently determine what happens,  
23 there will be certainly time to consider this.

24           But this Court can't consider that question,  
25 and I should like to point out one other consideration

1 which hasn't been mentioned as yet which I think is  
2 quite important.

3           The plaintiffs in this case in the district  
4 court were not only Lennox Hinds but the three  
5 organizations of black lawyers. These three  
6 organizations of black lawyers said we very seriously  
7 are concerned with these disciplinary rules on their  
8 face and as being applied because we're in the business  
9 of educating people in New Jersey and elsewhere as to  
10 what we consider to be racist practices in the courts,  
11 and we want the freedom to address ourselves in that  
12 respect.

13           Now, whatever the Supreme Court of New Jersey  
14 may do with respect to Lennox Hinds, that doesn't affect  
15 the standing of these bar associations to object to  
16 these rules on their face and as applied.

17           Now, if, to pick up Mr. Justice Marshall's  
18 comment, that the Supreme Court of New Jersey should  
19 decide down the line these rules are completely invalid  
20 and unconstitutional, we're going to appoint a committee  
21 to write some new rules and consider them by the bar,  
22 well, I guess there would be nothing left on their part  
23 either and the case would be over with.

24           QUESTION: Could I ask you something, please?  
25 Suppose while the case was pending in the district court

1 -- suppose when the case was filed in the district court  
2 the New Jersey Supreme Court had already taken to its  
3 bosom the constitutional issues that had been -- that  
4 were being presented, and so there was a case pending in  
5 the Supreme Court with the very constitutional issues in  
6 it that were being presented to the district court.

7           I suppose you would say this would still not  
8 be a Younger abstention case. It is just a civil case  
9 that -- to which Younger doesn't apply, or would you  
10 argue that?

11           MR. STAVIS: I'm not at all so sure I would  
12 take the position that you suggest, if before we had  
13 filed our action in the district court there was a case  
14 pending in the Supreme Court of New Jersey in which we  
15 were a party and which we had a right to litigate.

16           QUESTION: Well, there certainly is pending  
17 there now a case with --

18           MR. STAVIS: There is pending as to Lennox  
19 Hinds. There is not pending as to the three  
20 organizations of black lawyers. And there isn't any  
21 doubt, there isn't any doubt that the factual situation  
22 has changed in that respect following the decision of  
23 the Court of Appeals in the Third Circuit.

24           QUESTION: So what -- how should we view the  
25 case then?

1           MR. STAVIS: I think you should view this case  
2 now --

3           QUESTION: As though the district court -- as  
4 the district court should have viewed it if the case had  
5 been pending when the case was filed or not?

6           MR. STAVIS: Well, of course, one of the  
7 things that I suggested some time ago before, beforehand  
8 was that the petition should be dismissed as  
9 improvidently granted --

10          QUESTION: Yes.

11          MR. STAVIS: For precisely some of these  
12 reasons. But not doing that, I think that you should  
13 view it in the following terms: that you are asked to  
14 reverse a decision of the Court of Appeals establishing  
15 that the district court had jurisdiction as of the time  
16 the action was commenced.

17          QUESTION: Well, what if we're just being  
18 asked to vacate it?

19          MR. STAVIS: You're being asked to --

20          QUESTION: We don't reverse it. We just say  
21 you might have been right, but there are some things  
22 that have happened since then that make your decision  
23 improvident.

24          MR. STAVIS: And I'd like to suggest that if  
25 you consider that question that you ought to come to the

1 conclusion that whatever happened subsequently does not  
2 make improvident the judgment of the circuit Court of  
3 Appeals when it was rendered.

4           QUESTION: Well, we wouldn't say it was  
5 erroneous. We'd just say it's no longer appropriate to  
6 review it.

7           MR. STAVIS: But you asked me what I would  
8 propose.

9           QUESTION: Yes. All right.

10          MR. STAVIS: And what I would propose is  
11 something quite different, namely that the Court of  
12 Appeals decision be affirmed because it was correct, and  
13 it sustains and supports and applies this Court's  
14 decision in Lockport.

15          Now, there's nothing to say --

16          QUESTION: Well, what if we thought it was  
17 wrong?

18          MR. STAVIS: What's that?

19          QUESTION: What if we thought it was wrong?  
20 Do you think we ought to go ahead and say so, or  
21 wouldn't you rather we just vacated it?

22          MR. STAVIS: Well, no. I can't believe that  
23 you would think that the decision was wrong in the light  
24 of Lockport. I mean all I can do is apply the law, ask  
25 you to apply the law as we know it to exist.

1           I do not think that there need be any question  
2 but that in connection with further proceedings on this  
3 case, if there are to be any, before the district court  
4 that the district court, and in due course the Court of  
5 Appeals, would consider the impact, if any, of the  
6 subsequent determinations.

7           Let me point out something to you. Some years  
8 ago you decided the case called American Trial Lawyers  
9 Association against the New Jersey Supreme Court. And  
10 of course all New Jersey lawyers are very familiar with  
11 that case because it had something to do with something  
12 very dear to their hearts, namely the fees that they  
13 were authorized to charge.

14           And you insisted in that case in reversing,  
15 reversing a district court decision which dismissed  
16 jurisdiction; it dismissed jurisdiction in a Pullman  
17 abstention case. You remanded it and directed the  
18 district court to retain jurisdiction. And obviously  
19 when the district court retained jurisdiction, when it  
20 got back there, the question of what the Supreme Court  
21 of New Jersey did in that case would be considered.  
22 Ultimately, ultimately there were no further proceedings  
23 in the district court because at the conclusion of the  
24 decision by the Supreme Court of New Jersey that was the  
25 end of it. And Justice Marshall has suggested that that

1 could possibly be the case here, and it might very  
2 well. But I do not believe that at this juncture this  
3 Court can determine the facts as they're developed  
4 subsequently.

5           And certainly, Justice White, the Court of  
6 Appeals said that on remand the district court would  
7 have to consider the separate interests of the  
8 organizations, which --

9           QUESTION: Well, the district court certainly  
10 under cases like Will v. Calvert Fire Insurance Company  
11 where you've got one of several party plaintiffs  
12 litigating in a state court certainly has jurisdiction  
13 under broad comity principles. Say if one party is  
14 barred, the others can certainly wait until we find out  
15 what the state court is going to decide.

16           MR. STAVIS: Well, I would certainly assume  
17 that everybody is going to wait until the state court  
18 decides. There is no question about it. And whether or  
19 not under Will and any other cases other parties will be  
20 bound by what the Supreme Court of New Jersey may have  
21 decided with respect to Lennox Hinds remains to be seen.

22           Let me point out to you a very real  
23 possibility. A very real possibility is for the Supreme  
24 Court of New Jersey to say several things. It could say  
25 that obviously Lennox Hinds wasn't counsel in the case;

1 this issue, this matter shouldn't have been prosecuted  
2 because he wasn't counsel, and that's the end of it.

3           The Court of Appeals -- the Supreme Court of  
4 New Jersey could decide that Rule 8102, which is a rule  
5 that specifically deals with criticism of judges, should  
6 have been the rule applicable instead of DR 7-107.

7           Well, supposing it decides that. Then the  
8 organizations come along and say but the court hasn't  
9 adjudicated the question of the facial  
10 unconstitutionality of the statute. And that's an issue  
11 which remains and an issue which we as three black  
12 organizations are very seriously concerned about.

13           QUESTION: Well, you'd have to show separate  
14 standing in that case, though.

15           MR. STAVIS: Well, yes. And the Court of  
16 Appeals expressly pointed out that there wasn't a record  
17 upon which it could decide that particular question.  
18 I'm referring particularly to the Doran case. There  
19 wasn't a kind of record at which you could determine  
20 whether or not there was a separate entrance. And  
21 that's an issue that will have to be returned to the  
22 Court of Appeals, to the district court.

23           But you can't decide that now. You have no  
24 more record on that than the Court of Appeals for the  
25 Third Circuit; so that even if you were to decide, as

1 you press, Justice White, that maybe we could make a  
2 decision on this with respect to the Hinds case, you  
3 can't make a decision with respect to the interests of  
4 the other organizations; and they have an interest and a  
5 constitutional interest in this matter which far  
6 transcends the immediate question of Mr. Hinds.

7           QUESTION: On that basis the abstention  
8 doctrine could be completely nullified by having  
9 independent organizations come into litigation in the  
10 federal courts.

11           MR. STAVIS: I do not think it could be  
12 suggested for one moment that Justice Rehnquist  
13 nullified the abstention doctrine or this court  
14 nullified it in the opinion of Mr. Justice Rehnquist in  
15 the Doran case. I really don't think so, nor in the  
16 Steffel case, nor in a whole series of cases where you  
17 recognized that there was a sharp distinction between  
18 threatened prosecution and actual prosecution.

19           QUESTION: Mr. Stavis, regarding that, does  
20 everybody agree here that the posture of the case is  
21 what the Third Circuit said it was, that the Ethics  
22 Committee accepted the recommendation and voted to  
23 prepare a formal statement of charges against Hinds  
24 which was served on January 3, 1978?

25           MR. STAVIS: There was a statement of charges.

1 QUESTION: Which really corresponds to an  
2 indictment, I suppose.

3 MR. STAVIS: Precisely not. Precisely not.

4 QUESTION: How is it different?

5 MR. STAVIS: Well, if you look at the --

6 QUESTION: I mean other than this is an  
7 administrative proceeding.

8 MR. STAVIS: No, no. No, no. I'm leaving  
9 aside the question as to whether it's an administrative  
10 proceeding. Because under the rules of discipline in  
11 New Jersey, after the statement of charges there is a  
12 hearing at which the District Ethics Committee  
13 determines whether to make a charge. I'm sorry. I  
14 think it's extremely important that that distinction be  
15 absolutely. That is not the presentment. It is not the  
16 charges. It is an internal consideration of the matter  
17 within the district Ethics Committee.

18 QUESTION: Well, why is it served on the  
19 respondent then?

20 MR. STAVIS: Yes. It's a letter of the  
21 prosecutor to an individual saying I'm thinking of  
22 making a charge against you under such and such a  
23 statute, and I'd like you to come in and talk to me  
24 about it, and at the conclusion of talking to me about  
25 it I will decide whether to file an indictment. It is

1 not an indictment. It is not a presentment. It is in  
2 that precise prosecutive stage that I suggested, and  
3 that's what the rules say and that's what the Court of  
4 Appeals of the District of Columbia found.

5           Now, I just want to conclude by making what I  
6 think is the most fundamental point here, and that is  
7 that when the Congress adopted the Civil Rights Act and  
8 adopted 1331 and 1343, it provided, intended to provide  
9 that the litigants would have the choice of forum in  
10 adjudicating federal constitutional issues.

11           You decided Monroe against Pape. You've never  
12 departed from Monroe against Pape. And that is that  
13 litigants who feel threatened in the exercise of their  
14 federal constitutional rights have the option of going  
15 to the federal or the state courts to have those matters  
16 adjudicated.

17           I do not believe that there is a prayer of a  
18 suggestion that Younger against Harris applied to this  
19 case at the time that the case started in the federal  
20 district court.

21           Now, federal jurisdiction is not a shell  
22 game. Federal jurisdiction is not something that here  
23 you see it and here you don't. Federal jurisdiction --

24           QUESTION: Well, neither is state -- neither  
25 is state jurisdiction over its lawyers.

1           MR. STAVIS: Nor is state jurisdiction over  
2 its lawyers. And the Court of Appeals for the Third  
3 Circuit was singularly sensitive to that point and said  
4 to the Supreme Court of New Jersey do your thing. It  
5 may very well be that you'll limit this whole matter,  
6 and this whole case may disappear.

7           But not for that reason, not for that reason  
8 does it seem to me that the original choice of forum  
9 made by the litigant in accordance with Monroe against  
10 Pape is to be dismissed. And the Third Circuit said  
11 that we have to be, we have to determine this on the  
12 basis of that choice of forum made on the facts that  
13 that's what you've --

14           CHIEF JUSTICE BURGER: Your time is expired  
15 now.

16           MR. STAVIS: Thank you very much.

17           CHIEF JUSTICE BURGER: Do you have anything  
18 further, Ms. Burgess?

19           ORAL ARGUMENT OF MS. MARY ANN BURGESS, ESQ.,  
20           ON BEHALF OF THE PETITIONER -- Rebuttal

21           MS. BURGESS: Yes, Mr. Chief Justice. I would  
22 like to respond initially to the --

23           QUESTION: Will you keep your voice up? We're  
24 having difficulty --

25           MS. BURGESS: -- To the characterization --

1                   QUESTION: You can stay right in the center.  
2 Just keep your voice up.

3                   MS. BURGESS: -- To the characterization of  
4 the issuance of the statement of charges. In the Hinds  
5 case an initial complaint had been received. An  
6 investigation had been authorized. A report was made to  
7 the entire committee, and they then in fact authorized  
8 the official issuance of a statement of charges which  
9 was served upon Mr. Hinds in that matter. That  
10 generated what we view as the adjudicative part of the  
11 process.

12                  A hearing would result, and a determination  
13 based on the facts elicited at that hearing would lead  
14 to a recommendation either to dismiss, to impose minor  
15 discipline, or to forward the matter on for major  
16 discipline.

17                  So it is our contention that we are not in a  
18 pre-prosecutorial stage but rather the judicial portion  
19 of it had been commenced by the official filing of  
20 charges.

21                  QUESTION: Ms. Burgess, what's your answer to  
22 the argument that whatever may be true of the Hinds  
23 case, that doesn't affect the standing of the three  
24 organizations?

25                  MS. BURGESS: That precise issue is not

1 briefed in the Third Circuit.

2           QUESTION: Well, are the claims of these three  
3 organizations, constitutional or otherwise, before the  
4 New Jersey Supreme Court?

5           MS. BURGESS: It is my understanding that  
6 there was -- that Mr. Hinds certainly has participated  
7 in the Supreme Court. There was an application by  
8 another group, which is in none of the groups involved,  
9 in the district court, a federal matter, to participate  
10 as amicus. So these three groups are not involved in  
11 the state court proceeding. However, it is our position  
12 that their rights are merely derivative or so  
13 intertwined with Mr. Hinds' rights that they cannot  
14 interfere with that ongoing state proceeding.

15           QUESTION: Well, even if they aren't parties,  
16 are the issues -- the issues are the same.

17           MS. BURGESS: They are precisely the same.

18           QUESTION: Precisely the same issues.

19           MS. BURGESS: Precisely.

20           QUESTION: And even if it's in the  
21 prosecutorial stage, if a constitutional issue is raised  
22 at this stage, whatever it is, that happens at the same  
23 time to be pending in the New Jersey Supreme Court, that  
24 does pose a Younger question.

25           MS. BURGESS: Certainly.

1 QUESTION: Regardless of the stage of the  
2 proceeding.

3 MS. BURGESS: Certainly. And they could be  
4 remitted to resolve that issue within the pending state  
5 proceeding, certainly, because the state Supreme Court  
6 does permit the participation of amicus groups.

7 QUESTION: Because there's nothing tentative  
8 -- there's nothing tentative about what's going on in  
9 the New Jersey Supreme Court.

10 MS. BURGESS: No, Your Honor. It's very real,  
11 and there should be some sort of resolution to our claim.

12 I would just like to emphasize --

13 QUESTION: But on page 10 of your brief you  
14 say specifically that it was "to bring the  
15 constitutional claim of Lennox Hinds, Esq. directly  
16 before the Supreme Court. It doesn't say anything about  
17 --

18 MS. BURGESS: Your Honor, it was the charge  
19 involving Lennox Hinds which was before the district  
20 Ethics Committee. Certainly --

21 QUESTION: Well, I gathered from this --

22 MS. BURGESS: -- That was the only -- was the  
23 only individual involved in the New Jersey proceeding.

24 QUESTION: So the two --

25 MS. BURGESS: There are non -- that's right --

1 there are non-state/federal litigants in this matter.

2 QUESTION: The other organization -- the  
3 organizations are not included.

4 MS. BURGESS: That's right, Your Honor. But  
5 they could move to participate in the matter. They  
6 could be remitted to participate in the --

7 QUESTION: Well, I could, too, make a motion  
8 to participate.

9 QUESTION: May I ask another question about  
10 your procedure? Would it be consistent with New  
11 Jersey's procedures just as a possible disposition of  
12 the case pending in the New Jersey Supreme Court for  
13 that court to say, number one, there's no merit to the  
14 charges against Mr. Hinds for whatever reason might be;  
15 number two, even though there's no controversy  
16 remaining, we will now give an advisory opinion that we  
17 think our rule is a perfectly valid constitutional rule?

18 MS. BURGESS: Yes.

19 QUESTION: That would be possible.

20 MS. BURGESS: Yes.

21 QUESTION: And then nobody could review that  
22 determination up here.

23 MS. BURGESS: That's right. That's right.  
24 The Supreme Court has original jurisdiction to review  
25 the constitutionality of either its disciplinary rules

1 or its court rules absent an actual disciplinary  
2 proceeding, and our brief indicates instances where in  
3 fact it has done that. It will entertain a petition for  
4 review. And if they segregated the Lennox Hinds' matter  
5 as applied from that, they could still move on to  
6 adjudicate the constitutionality of those particular  
7 rules.

8 QUESTION: Thank you.

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

11 (Whereupon, the case in the above-entitled  
12 matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Middlesex County Ethics Committee Etc., Petitioner v. Garden State Bar Association Et Al. -- No. 81-460

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Agnew Connelley

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