

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-1274

**TITLE** METROPOLITAN LIFE INSURANCE COMPANY, ET AL., Appellants  
v. W. G. WARD, JR., ET AL.

**PLACE** Washington, D. C.

**DATE** October 31, 1984

**PAGES** 1 thru 50



(202) 628-9300

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x  
METROPOLITAN LIFE INSURANCE :  
COMPANY, ET AL., :  
Appellants :  
v. : No. 83-1274  
W. G. WARD, JR., ET AL. :  
- - - - -x

Washington, D.C.  
Wednesday, October 31, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:52 o'clock a.m.

APPEARANCES:

MATTHEW J. ZINN, ESQ., Washington, D.C.;  
on behalf of Appellants.  
WARREN B. LIGHTFOOT, ESQ., Washington, D.C.;  
on behalf of Appellees.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MATTHEW J. ZINN, ESQ.,	
on behalf of Appellants	3
WARREN E. LIGHTFOOT ESQ.,	
on behalf of Appellees	22
MATTHEW J. ZINN, ESQ.,	
on behalf of Appellants - rebuttal	46

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

2                    CHIEF JUSTICE BURGER: Mr. Zinn, you may  
3 proceed whenever you're ready.

4                    ORAL ARGUMENT OF MATTHEW J. ZINN, ESQ.

5                    ON BEHALF OF THE APPELLANTS

6                    MR. ZINN: Mr. Chief Justice, and may it  
7 please the Court:

8                    This case is here on appeal from the Supreme  
9 Court of Alabama. At issue is the validity of Alabama's  
10 domestic preference tax statute under the equal  
11 protection clause of the Fourteenth Amendment. Alabama  
12 grants a tax preference to domestic life insurance  
13 companies by imposing a tax of one percent on their  
14 gross premiums, while imposing a tax of three percent or  
15 three times that amount on the gross premiums of  
16 out-of-state life insurance companies.

17                   Alabama grants a tax preference to domestic  
18 property casualty insurance companies by imposing a tax  
19 on their gross premiums of one percent and imposing a  
20 tax on the gross premiums of out-of-state property  
21 casualty companies of four times that amount or four  
22 percent.

23                   So in its basic structure the Alabama domestic  
24 preference tax statute provides for taxing out-of-state  
25 life companies at triple the rate of domestic life



1 companies and providing for taxing out-of-state property  
2 casualty companies at quadruple the rate of domestic  
3 companies.

4 The Alabama domestic preference tax statute  
5 also contains a so-called investment incentive  
6 provision. Under this provision, an out-of-state  
7 company can reduce its tax by one-tenth of one percent  
8 for each one percent of its total assets that it invests  
9 in Alabama.

10 However, there's a limitation on the amount of  
11 the reduction. The maximum reduction cannot exceed one  
12 percentage point, and this occurs if an out-of-state  
13 company invests ten percent or more of its total assets  
14 in Alabama. What this means is that if an out-of-state  
15 company takes maximum advantage of the investment  
16 incentive, if it's a life insurance company it can then  
17 reduce its tax rate four four percent -- from three  
18 percent to two percent, or double the rate of a domestic  
19 company; and if it's a property casualty insurance  
20 company, it can then reduce its tax rate from three  
21 percent to two percent -- four percent to three percent,  
22 or triple the rate of a domestic company.

23 Now, these suits for refund were brought in  
24 the Circuit Court of Montgomery County for refund of the  
25 discriminatory taxes. The Appellants here are a number

1 of out-of-state insurance companies that do a nationwide  
2 business, including business in Alabama. The Appellees  
3 are the insurance commissioner of Alabama, who denied  
4 Appellants' claims for refund, and several Alabama  
5 insurance companies which intervened in these  
6 proceedings below.

7 The ultimate issue here is whether Alabama's  
8 domestic preference tax statute satisfies the rational  
9 basis test of equal protection review. In holding that  
10 it did, the courts below found that at least two of the  
11 17 purposes advanced by the Appellees were legitimate  
12 state purposes that justified the discrimination  
13 inherent in the statute. These were: first,  
14 encouraging the formation of new insurance companies in  
15 Alabama; and second, encouraging capital investment in  
16 Alabama by out-of-state companies.

17 Our position is that in the context of this  
18 case involving domestic preference taxation neither  
19 these two purposes nor any of the other purposes  
20 advanced by Alabama are legitimate state purposes as  
21 that term has been interpreted by this Court.

22 QUESTION: In its equal protection cases?

23 MR. ZINN: Pardon me?

24 QUESTION: In its equal protection cases?

25 MR. ZINN: Yes, Justice Rehnquist.

1 We believe that three major considerations  
2 should guide decision in this case. The first of these  
3 is that this precise issue has been considered by this  
4 Court on seven occasions and on each of those seven  
5 occasions domestic preference taxation has been held to  
6 violate equal protection.

7 Now, the Appellees contend that these cases  
8 were really commerce clause cases and that the purposes  
9 that they are putting forward were not put before the  
10 Court in these seven cases. So there is a difference of  
11 opinion as to whether these cases are on point. A great  
12 deal of discussion of the cases in the briefs of the  
13 parties --

14 QUESTION: Well, Mr. Zinn, I take it you have  
15 to concede that in this case protectionist purposes in  
16 light of the commerce clause, the fact you can't rely on  
17 the commerce clause, are permissible for the state?

18 MR. ZINN: Oh, yes. We rely exclusively on  
19 the equal protection clause, Justice Rehnquist. But  
20 these seven cases that we rely upon were all equal  
21 protection cases.

22 QUESTION: Well, but just arguing perhaps from  
23 the point of view of res nova or whatever you want to  
24 call it, you know, something that hadn't been decided  
25 before, if you can't claim that a protectionist purpose

1 is illegitimate under the commerce clause, any  
2 legislative purpose is legitimate, virtually, under the  
3 equal protection clause.

4 MR. ZINN: Well, we would say that that is the  
5 position the Appellees are putting forward.

6 QUESTION: Well, what's the matter with it as  
7 a matter of logic?

8 MR. ZINN: Well, if you state the purpose at a  
9 level of generality, such as a purpose to encourage  
10 rural insurance, to pick one of the 17 purposes that the  
11 Appellees have identified -- that is one of their 17.  
12 They say that there is a lack of insurance in rural  
13 areas.

14 If you say that that's the purpose and then  
15 the statistics show that domestic companies are  
16 servicing rural areas, therefore you're furthering the  
17 purpose, then it seems to us that the equal protection  
18 clause falls between the two-pronged test that this  
19 Court is applying.

20 QUESTION: Well, that's what rational basis is  
21 all about. Isn't it a very easily satisfied  
22 requirement?

23 MR. ZINN: Our stress here -- yes, I think  
24 that is. But our stress here is on the legitimacy of  
25 the purpose, and what we are saying is -- let me see if



1 I can put a hypothetical, Justice Rehnquist. Suppose  
2 instead of the statute that we were dealing with, we had  
3 a statute that started all property casualty insurance  
4 companies out at a four percent rate, but that provided  
5 that if you sold a lot of rural insurance then you would  
6 be reduced to a one percent rate. And suppose also that  
7 that opportunity for reduction to one percent was  
8 available only to domestic companies.

9 Now, we would submit in that situation that,  
10 sure, you've passed the rationality test, but that the  
11 only reason for confining the incentive to domestic  
12 companies is local favoritism, and that favoritism has  
13 always been held in violation of equal protection.

14 QUESTION: Well, but isn't this business of  
15 the commerce clause and not the equal protection clause  
16 to protect against local favoritism?

17 MR. ZINN: Yes. I think also there is a  
18 purpose here to treat people that are similarly  
19 circumstanced in the same way. There is no reason --

20 CHIEF JUSTICE BURGER: We will resume there at  
21 1:00 o'clock, Mr. Zinn.

22 (Whereupon, at 12:00 o'clock noon, argument in  
23 the above-entitled matter was recessed, to resume at  
24 1:00 o'clock p.m. the same day.)

1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: You may continue, Mr.  
4 Zinn.

5 ORAL ARGUMENT OF MATTHEW J. ZINN, ESQ.

6 ON BEHALF OF APPELLANTS - RESUMED

7 MR. ZINN: Mr. Chief Justice and may it please  
8 the Court:

9 Prior to the noon recess, Justice Rehnquist  
10 had asked a question as to why it isn't okay to help  
11 domestic companies. I guess our answer is that if that  
12 is the ultimate purpose of the statute it's not okay  
13 because it simply restates the discrimination.

14 Now, if it's not the ultimate purpose of the  
15 statute, as is suggested by the state's 17 purposes in  
16 this case, and you look at those 17 purposes, you will  
17 find that foreign companies can contribute to those  
18 goals just as domestic companies can. And I put the  
19 hypothetical before the noon recess of a statute that  
20 imposed a four percent tax on both foreign companies and  
21 domestic companies, but which allowed a reduction to one  
22 percent if, for example, a large number of rural  
23 policies were sold, but limited that possibility to  
24 domestic companies.

25 In that situation we think it's clear that the

1 only purpose of that statute could be to favor domestic  
2 companies, because there's no reason other than that  
3 that could explain the discrimination inherent in the  
4 statute.

5 Seven times this Court has had this issue  
6 before it and seven times it has held that domestic  
7 preference taxes violate the equal protection clause of  
8 the Constitution. As we discussed prior to the noon  
9 recess, the Appellees contend that these cases are not  
10 on point for two reasons.

11 First, they say they're commerce clause cases;  
12 and second, they say that the purposes they are putting  
13 forward, these 17 purposes, were never put forward  
14 before. Both of these contentions, we submit, are  
15 without merit. There is long discussion in all of the  
16 briefs of these 17 cases -- of these seven cases, and I  
17 will just touch on a few highlights.

18 Southern Railway versus Greene was the first  
19 of the seven cases, and the Appellees make much of the  
20 fact that in that 1910 decision two commerce clause  
21 cases were cited. But those two cases were cited only  
22 on the question of whether the privilege tax doctrine  
23 was applicable.

24 Once the Court decided that the privilege tax  
25 doctrine was not applicable, the rest of the discussion

1 in Southern Railway versus Greene was equal protection.  
2 In fact, the Court said in that case, 75 years ago, that  
3 for a classification to be valid under the equal  
4 protection it must bear "a reasonable and just relation  
5 to the things in respect of which such classification is  
6 imposed."

7 QUESTION: Mr. Zinn, do you think those cases  
8 that are pre-McCarran-Ferguson Act and don't deal with  
9 insurance are really relevant here?

10 MR. ZINN: Absolutely. This is the eighth  
11 case that's come up in this line of cases, Justice  
12 Rehnquist. Half of them have been insurance cases and  
13 half have not. But in every one of them, insurance or  
14 not, the Court has always framed its decision on the  
15 equal protection clause.

16 The next two cases, the next two cases in this  
17 line, the Hanover Fire and Concordia Fire cases in 1926  
18 and 1934, were decided at a time when this Court did not  
19 consider the business of insurance to be commerce. They  
20 could only be -- they could only have rested on the  
21 equal protection clause.

22 And the Reserve Life case, which came on in  
23 1965, was after this Court's decision in the  
24 Southeastern Underwriters case had held that the  
25 business of insurance was commerce, and after Congress



1 had then enacted the McCarran Act and lifted all  
2 commerce clause restraints. They're not explainable  
3 except on equal protection.

4 QUESTION: But was that all spelled out in the  
5 Reserve Life case, the 1965 case, that although the  
6 commerce clause doesn't apply because of  
7 McCarran-Ferguson, we nonetheless --

8 MR. ZINN: The Appellees have argued that we  
9 are placing too much weight on the Reserve Life case,  
10 because it didn't spell all this out. That we think  
11 might be fair criticism if this were the only case in  
12 this line, Justice Rehnquist. But it's one of seven.

13 And I would point out that, although there  
14 were dissents in some of these seven cases, not one  
15 dissent in all of these seven cases ever rested on the  
16 basis that this classification was reasonable, not one  
17 dissent. Seven times since 1910 and not a single  
18 Justice that has heard these seven cases has ever said  
19 the classification was reasonable.

20 I think it's also particularly significant,  
21 Justice Rehnquist, that the Reserve Life case came after  
22 Wheeling Steel in the sequence of cases. Wheeling Steel  
23 was decided in 1949, and I think it's a notable decision  
24 of this Court for various reasons. The case was decided  
25 by a seven to two vote.

1           The dissent in that case was written by  
2 Justice Douglas and Justice Black joined in it. The  
3 dissent was on the ground that the equal protection  
4 clause did not apply to corporations. Justice Jackson  
5 wrote for the majority in that case and he also, in an  
6 unusual procedure, filed a separate statement dealing  
7 exclusively with the views of the dissenting Justices.

8           In his opinion for the Court, in which the  
9 domestic preference tax issue and classification was  
10 raised, he made what I think is the clearest statement  
11 of what the rule of this Court has been for 75 years.  
12 He said that in the area of taxation "the federal right  
13 of a non-resident is the right to equal treatment."

14           With that clear statement in the prior case,  
15 it seems to us understandable that the Court felt  
16 comfortable in disposing of the Reserve Life case as it  
17 did, in a per curiam opinion. Moreover, we would point  
18 out --

19           QUESTION: And just citing --

20           MR. ZINN: Wheeling Steel versus Glander.

21           QUESTION: But if that's the correct state of  
22 the law, then the McCarran-Ferguson Act is almost  
23 meaningless, because although you can't -- they've  
24 lifted the commerce, Congress has lifted the commerce  
25 clause bar to state regulation of insurance, the equal

1 protection clause in your view kicks in and does just  
2 the same thing as the commerce clause.

3 MR. ZINN: We would not agree with that.  
4 There are two major taxes that apply to the insurance  
5 industry, state taxes. One is the domestic preference  
6 tax that's in issue in this case. We would agree that  
7 in this particular situation the equal protection clause  
8 would do what the commerce clause would do.

9 But three years ago this Court considered  
10 retaliatory taxes and it held that they passed equal  
11 protection review. On the other hand, in that case I  
12 think it's clear that they would not pass commerce  
13 clause review. In fact, the Appellees conceded that.  
14 So we would have to disagree that the tests simply  
15 coincide and that the McCarran Act doesn't mean  
16 anything.

17 I want to mention again that the seventh case  
18 in the line of cases that we are relying upon was the  
19 WHYY case, which came three years after Reserve Life,  
20 and in that case as well the Court felt comfortable with  
21 a per curiam opinion, and it cited the Reserve Life case  
22 along with Wheeling Steel and several of the other cases  
23 in this line.

24 So we don't think there could be any question,  
25 really, that these seven cases are dead on point, and

1 that if the Court is going to affirm the judgment below  
2 in this case it's going to have to overrule seven of its  
3 own precedents, dating back to 1910.

4 Now, going again to the question of  
5 whether --

6 QUESTION: Well, even if the McCarran Act --  
7 even if the equal protection clause would make the  
8 McCarran Act irrelevant in this case, it would just do  
9 it for taxation. The McCarran Act would still have a  
10 terrific bite in other areas.

11 MR. ZINN: Absolutely, and one of the  
12 arguments that the Appellees make in this case is that  
13 they say it is more difficult to regulate out-of-state  
14 companies than it is domestic companies. We don't agree  
15 with that. But even if it's true, it doesn't follow  
16 from that that you can tax out-of-state companies more  
17 for that reason. There's no relationship between the  
18 two.

19 Let me turn again to the Reserve Life case,  
20 because I think it is very instructive. We have in an  
21 appendix to our jurisdictional statement submitted the  
22 brief that Ohio filed in the Reserve Life case, and we  
23 have also lodged with the Clerk of this Court the  
24 transcript of the oral argument in the Reserve Life  
25 case, and we have excerpted that transcript, the



1 relevant portions of it, in the appendix to our brief on  
2 the merits on pages 13a to 16a.

3 Now, in this case the court below found that  
4 one of the primary -- one of the two purposes that  
5 justified domestic preference taxation in Alabama was  
6 "encouraging the formation of domestic insurance  
7 companies in Alabama." That's at page 9a of the  
8 appendix to our jurisdictional statement. Now, on page  
9 59a of the same appendix appears the Ohio brief, and  
10 Ohio argued that its purpose was "to encourage the  
11 location of insurance companies in Ohio" -- almost the  
12 same words.

13 And the oral argument is to the same effect.  
14 On page 15a of the appendix to our brief on the merits,  
15 the counsel for Ohio argued that the State of Ohio had  
16 "a desire to foster the development and creation of  
17 insurance companies within the state." And then at the  
18 bottom of the same page he said "the State of Ohio, in  
19 seeking to encourage the location and development of  
20 insurance companies in the State of Ohio." And then  
21 finally, on the bottom of page 16a, the last page that  
22 we excerpt, counsel said the legislature of the State of  
23 Ohio intends "to encourage the location of insurance  
24 companies in the State of Ohio."

25 This case is, we submit, a replay of the

1 Reserve life case. The same arguments that were made by  
2 Ohio in that case were made by Alabama here. We think  
3 it gives much too little credit to all of the Justices  
4 who heard all of these seven cases for Alabama to  
5 suggest that the purpose to encourage the location of  
6 companies in Alabama is something that nobody ever  
7 thought of in the prior seven cases. That's the most  
8 obvious purpose in the world. If you give a domestic  
9 preference to a local company, of course it's going to  
10 encourage the location of companies in your state.

11 And as far as the remaining purposes that  
12 Alabama relies on, the 17 purposes, those are purposes  
13 that any company, foreign or domestic, can accomplish.  
14 There's no inherent characteristic of a domestic company  
15 that makes it better suited to sell policies in rural  
16 areas, or to sell small policies rather than big ones,  
17 or industrial policies, or any of the other types of  
18 advantages that the state contends those companies are  
19 offering.

20 So the first critical point, we think, in the  
21 resolution of this case is recognition by this Court  
22 that these seven cases are right on point. And this  
23 brings me to the second major consideration which we  
24 think should guide the decision here, and that is the  
25 concerns that we think the Court has felt in reaching

1 its conclusions in these seven cases.

2 The first concern it seems to us is that we're  
3 talking here about unlimited discrimination. In this  
4 case we're talking triple and quadruple taxation of  
5 out-of-state companies. But there is no suggestion that  
6 that relationship has any bearing whatsoever to the  
7 goals that Alabama is seeking to achieve.

8 Now, we recognize that mathematical precision  
9 is not required under the equal protection clause. We  
10 don't think that total imprecision is the goal, either,  
11 and it just seems to us that these numbers have nothing  
12 to do with the goals and they're possibly unlimited.

13 I think another factor that has influenced the  
14 Court in these seven cases is that out-of-state  
15 companies have no representation in the legislature of  
16 Alabama and there is no protection for them whatsoever.  
17 Going back to Justice Jackson's statement --

18 QUESTION: Do you mean, Mr. Zinn, that only  
19 domestic companies have lobbyists?

20 MR. ZINN: I would suggest obviously not, Mr.  
21 Chief Justice. But given the pattern of discrimination  
22 that we see, with 33 states having these laws, those  
23 lobbyists may have not been effective.

24 We find the same type of policy concept, I  
25 think, in the diversity jurisdiction, where state of

1 incorporation and principal place of business are  
2 concerns that bear on whether diversity jurisdiction  
3 exists. So we think that, while they may have  
4 lobbyists, obviously these statutes have persisted over  
5 a long period of time, much to the detriment of  
6 out-of-state companies.

7 QUESTION: You said, at least I thought I  
8 heard you say, that obviously, or generally, this type  
9 of tax would encourage companies to come into the  
10 state. If that's so, there must be some empirical data  
11 on the subject.

12 MR. ZINN: Well, the empirical data has been  
13 offered by the Appellees in this case, Mr. Chief  
14 Justice. Our point is, even if it's so, it is not a  
15 justification for discrimination under the equal  
16 protection clause.

17 Another consideration that we think is --

18 QUESTION: The point I was curious about is  
19 that you seem to concede that. You think it's not  
20 relevant?

21 MR. ZINN: We think we're entitled to summary  
22 judgment in this case, regardless of all the evidence  
23 that the State has entered through its experts. We  
24 think that's simply an impermissible purpose. That  
25 purpose, as indicated previously, was obviously present



1 in each one of those seven cases. You couldn't miss it,  
2 and as I indicated previously it gives too little credit  
3 to all of the Justices that sat in those cases to assume  
4 that they didn't see that that purpose was there.

5 So we say, even if the evidence is there, the  
6 purpose is impermissible and the Court ought to rule as  
7 a matter of law that we're entitled to a summary  
8 judgment in this case.

9 QUESTION: Mr. Zinn, how about the purpose of  
10 assuring greater security in-state for Alabama residents  
11 covered by insurance?

12 MR. ZINN: We have no quarrel with that  
13 purpose, Justice O'Connor. If the state said that every  
14 out-of-state company had to keep a percentage of its  
15 reserves on Alabama risks in Alabama, we couldn't  
16 quarrel with that. But what they're saying is that --

17 QUESTION: Or having certain assets within the  
18 state?

19 MR. ZINN: Yes.

20 QUESTION: And certainly that's a portion of  
21 the effect of the tax scheme.

22 MR. ZINN: But those purposes here -- the  
23 state is trying to accomplish those purposes through  
24 taxation, and what we're saying is that that is not the  
25 proper way to accomplish them. In the Metropolitan

1 Casualty case --

2 QUESTION: Well, it does seem to have a  
3 rational basis and not be an invalid purpose. That's  
4 all I'm saying.

5 MR. ZINN: But the purpose has to relate to  
6 the particular means by which the state is seeking to  
7 accomplish its goals. In the Metropolitan Casualty  
8 case, which involved a similar issue, Justice O'Connor,  
9 this Court in 1935 said that it was permissible for a  
10 domestic company to provide by contract for a slightly  
11 shorter statute of limitations than a foreign company --  
12 security.

13 That case was decided in 1935. That was just  
14 one year after this Court had decided in 1934 in the  
15 Concordia Fire case by a vote to eight to nothing on  
16 this point that domestic preference taxation was  
17 invalid. And in the Metropolitan Casualty case, I think  
18 that the quotation from that case most clearly explains  
19 the difference between the two:

20 "The ultimate test of validity," the Court  
21 said, "is not whether foreign corporations differ from  
22 domestics, but whether the differences between them are  
23 pertinent to the subject with respect to which the  
24 classification is made."

25 When you're talking about security and statute

1 of limitations, it was pertinent, the Court found. When  
2 you're talking about taxation, it was not pertinent.

3 Our ultimate point here is we do not seek a  
4 free ride in Alabama or any other state. We ask only  
5 for a chance to be equal and to be taxed equally if we  
6 contribute to the state's goals. If we provide rural  
7 policies, if we sell small policies, if we provide jobs  
8 in the state, if we put assets in the state, then we  
9 think we ought to be taxed the same way as domestic  
10 companies are taxed.

11 In 1910 when this Court first considered this  
12 issue in the Southern Railway case, it concluded that  
13 domestic preference taxation "does violence to the  
14 federal Constitution." Nothing has occurred in the last  
15 75 years to change this. We urge, therefore, that the  
16 judgment of the Supreme Court of Alabama in this case be  
17 reversed.

18 Mr. Chief Justice, I'd like to reserve my  
19 remaining time for rebuttal.

20 CHIEF JUSTICE BURGER: Mr. Lightfoot.

21 ORAL ARGUMENT OF WARREN B. LIGHTFOOT, ESQ.,

22 ON BEHALF OF APPELLEES

23 MR. LIGHTFOOT: Mr. Chief Justice and may it  
24 please the Court:

25 This is a case of first impression. This

1 Court has never considered a discriminatory tax against  
2 foreign insurance companies in which the state has  
3 presented this Court with a record to show you the  
4 difference in benefits conferred on the citizens of that  
5 state by the domestic companies as opposed to the  
6 foreign companies. Even in Western & Southern, as the  
7 dissent pointed out, there was no difference shown  
8 between domestic companies and foreign companies insofar  
9 as the State of California was shown.

10 It's a case of first impression, but under the  
11 tests that this Court has framed repeatedly -- such as,  
12 is there a legitimate state purpose, and are the means  
13 rationally related to achieving that purpose -- our  
14 statute passes muster.

15 The foreign insurance companies say that we  
16 are discriminating here on the basis of a political  
17 difference, that is state of incorporation, and simply  
18 we are raising revenue at the expense of out-of-state  
19 corporations. The fact is our statute discriminates on  
20 the basis of benefits to the State of Alabama.

21 Not only must you incorporate in the State of  
22 Alabama; you must also locate in the State of Alabama.  
23 And if you don't do either of those, you will have to  
24 pay a higher tax, which may be reduced by investing in  
25 assets in the State of Alabama, specified assets.



1 QUESTION: Doesn't that offset the whole  
2 burden?

3 MR. LIGHTFOOT: No, sir, it never will, Mr.  
4 Chief Justice. The discrimination is four to one for  
5 foreign property and casualty insurers and it's three to  
6 one for life insurers. It can be reduced to three to  
7 one for property and casualty and two to one for life.

8 It can never be the same, and the reason for  
9 that is because domestic insurers are different. They  
10 perform a different service to Alabama and to the  
11 insureds in Alabama.

12 The burden we say here is on the foreign  
13 insurance companies to show the Court that every  
14 conceivable purpose that could be behind our statute and  
15 to negative those purposes. If they fail in that  
16 burden, our statute is due to be upheld.

17 Even if you apply a lesser burden here and say  
18 what is the actual purpose, we submit to you that you  
19 can get the actual purpose of our statute from reading  
20 it on its face. It encourages the formation of  
21 insurance companies in Alabama. It encourages  
22 investment in Alabama. And we say those are legitimate  
23 state purposes.

24 This Court has said that. This Court most  
25 recently said it in Western & Southern. The Court said

1 it is a legitimate state purpose to promote a local  
2 industry.

3 Now, the foreign insurers say you must take it  
4 one more step and say, you can promote that local  
5 industry if you do it in interstate competition. That's  
6 not what this Court said. This Court said to promote a  
7 local industry. It so happens that in Western &  
8 Southern those California insurance companies were  
9 benefited in the interstate market. It so happens in  
10 our case the Alabama companies are benefited in their  
11 intrastate market and in their early formative years,  
12 when they need a tax shelter, we submit to this Court,  
13 and the evidence is before you that this is true.

14 The Western & Southern case is the test that  
15 this Court has given us, and we passed that test by  
16 looking for a legitimate state purpose -- promotion of a  
17 local industry -- and have we used a reasonable means to  
18 get there.

19 The commerce clause is designed to promote  
20 federalism. The equal protection clause has never been  
21 an instrument of federalism. This Court has said the  
22 equal protection clause has never been given that  
23 characteristic. It is simply to assure equal treatment  
24 for those entities in the same classification.

25 So you come to the matter of classification

1 here, and this Court has repeatedly said the states are  
2 free to classify as they see fit, especially in the area  
3 of taxation. The states have the widest possible  
4 latitude to classify in the area of taxation.

5 And the burden is here on the foreign  
6 insurance companies to show you that the classification  
7 is not rational, is not reasonable. In fact, this Court  
8 has said from time to time the burden is on them to show  
9 you that it's palpably arbitrary, that it has no  
10 rational basis, and it's not reasonably related to  
11 achieving the purpose that we have here.

12 Really, it's a higher burden on them than  
13 that. They're supposed to show you that our legislature  
14 couldn't rationally have believed that classification  
15 would accomplish the purpose.

16 If you assume in the abstract that promotion  
17 of local industry and encouraging investment are  
18 legitimate state purposes, with all the benefits  
19 attendant on those two goals, then you come to whether  
20 the means chosen by our legislature are rationally  
21 related to that. And they've said you must incorporate,  
22 locate your principal place of business there, or else  
23 pay a higher tax, unless you reduce it by investments.

24 As to whether those means, those  
25 classifications, are reasonably related to achieving our

1 purpose, we have about 120 pages of facts that have been  
2 stipulated to by the foreign insurance companies. They  
3 say it --

4 QUESTION: Your basic purpose, though, is to  
5 benefit local industry, isn't it?

6 MR. LIGHTFOOT: That's it, that's the basic  
7 purpose.

8 QUESTION: And so you're just saying that the  
9 discrimination is justified because we want to  
10 discriminate.

11 MR. LIGHTFOOT: We're saying that they're  
12 different, Justice White, that they're different in what  
13 they do.

14 QUESTION: I know, but all you have to do is  
15 move into the state and become a resident and the  
16 discrimination ends.

17 MR. LIGHTFOOT: Under the facts that are  
18 before you, that are admitted by the foreign insurers,  
19 domestic insurance companies perform differently. They  
20 sell different kinds of insurance, they sell it in  
21 different areas. They get in the rural parts of Alabama  
22 and sell it, where the foreign companies won't operate.  
23 They don't have the agents in those rural counties that  
24 the domestic ones do. The domestic companies sell  
25 smaller policies. They sell industrial insurance.



1           The system is working. Alabama has more  
2 insurance per capita, more industrial insurance, than  
3 any state in the Union.

4           QUESTION: But you still say, we're entitled  
5 to discriminate in favor of local companies?

6           MR. LIGHTFOOT: Because there is a distinction  
7 in the benefits to the State of Alabama and to the  
8 marketplace. The system -- we say to you the system is  
9 working.

10          The foreign insurance companies have a  
11 dominant share of the market in Alabama. They have 75  
12 percent of the life market and 87 percent of the  
13 casualty market. So they're doing well. It's not as  
14 though we were excluding them at the state line.

15          Maybe our tax is not accomplishing what we  
16 might like it to, but we have, as a result of the  
17 statute and as a result of this tax shelter to these  
18 young companies who cannot make it without a tax  
19 shelter, we have a healthy competitive mix. And the  
20 marketplace benefits from having that mix of foreign  
21 insurers and a healthy domestic insurance industry.

22          QUESTION: Why can't they make it without that  
23 special protection?

24          MR. LIGHTFOOT: It's because of the economies  
25 of scale and because of the capital requirements, and

1 these facts are all admitted by the foreign insurance  
2 companies. They say it doesn't matter, but they went on  
3 and admitted these facts.

4 And we've had a computer model run in the  
5 appendix, and it shows that a domestic company that  
6 doesn't have this tax shelter, this advantage in its  
7 early years, probably won't make it.

8 QUESTION: Are you suggesting, with reference  
9 to the industrial insurance, that because traditionally  
10 that's not a very profitable business that the domestic  
11 companies are willing to carry that burden, but the  
12 foreign companies shy away from it?

13 MR. LIGHTFOOT: I think that the domestic  
14 companies can tailor their sales force and their  
15 policies to the needs of the local populace. And I  
16 think that's what Congress said when they passed  
17 McCarran-Ferguson. I think they said the business of  
18 insurance is local and is suited to local regulation and  
19 taxation. They didn't just say regulation, of course;  
20 they said taxation and regulation.

21 And it is local. The insurance industry is  
22 different, it's unique. It depends on getting out and  
23 serving the public. Industrial insurance policies, as  
24 Your Honor may know, are sold by door to door  
25 solicitation and collection, and the big companies won't

1 do that, for one reason or another. Some of them do,  
2 but primarily the foreign insurance companies won't do  
3 that.

4 QUESTION: Does Metropolitan no longer handle  
5 industrial insurance?

6 MR. LIGHTFOOT: I don't know the answer to  
7 that. I do know that far more industrial coverage  
8 results from our domestic companies. That statistic is  
9 in the appendix.

10 QUESTION: Surely Metropolitan did at one  
11 time, if it doesn't now, sell industrial insurance?

12 MR. LIGHTFOOT: I could find that statistic.  
13 It's in the facts, but I don't know right now whether  
14 Metropolitan does it still or not.

15 What happens is this. We have a domestic  
16 industry that's fostered by this tax shelter and we get  
17 the payrolls that a domestic industry, that a healthy  
18 domestic industry brings. We get the multiplier effect  
19 of those payrolls. We get investment in the state, we  
20 get bank accounts. All of those facts are given in this  
21 case and all of them are in the appendix.

22 If we see that -- if we have the foreign  
23 insurers concede that insurance coverage is a good  
24 thing, we see that Alabama has far more policies per  
25 capita than the rest of the nation as a whole; that new

1 insurance companies are being formed in the states with  
2 discriminatory statutes far more rapidly than in those  
3 states without discriminatory statutes.

4 There are 32 states like us in varying  
5 degrees, and this comes from the foreign insurers'  
6 appendix. 32 states have this system in one form or  
7 another. It discriminates. It's in those  
8 discriminatory statute states that insurance companies  
9 are choosing to incorporate, and it must be because of  
10 the tax shelter that's offered. In the last 20 years,  
11 we've had 500, a net gain of 500 insurance companies.  
12 89 percent of those have chosen to locate in states with  
13 discriminatory tax statutes.

14 So we get the benefit of the niches of the  
15 local populace being served that would otherwise go  
16 unserved. We get the investment in the state. We get  
17 the payrolls and bank accounts. And yet at the same  
18 time we can have a prospering foreign insurance  
19 industry. They're doing extremely well. They just want  
20 to do better.

21 The last statistic bears on the reasonableness  
22 of our statute. It's four to one and it's three to one,  
23 and counsel for the foreign insurers says that like it's  
24 a terrible discrimination, and it may be. But we submit  
25 to you it's reasonable and rational and it's working.



1 QUESTION: Mr. Lightfoot, what does the  
2 McCarran-Ferguson Act say?

3 MR. LIGHTFOOT: As I read it, Your Honor, it  
4 takes the business of insurance out from under the  
5 protection of the commerce clause.

6 QUESTION: Well, it can only do so by giving  
7 Congressional consent to discriminate against interstate  
8 commerce. It can't by fiat say it isn't interstate  
9 commerce, can it?

10 MR. LIGHTFOOT: It gave, as I understand it,  
11 the states the power to tax and regulate.

12 QUESTION: So that Congress says that in  
13 insurance it's perfectly reasonable to discriminate  
14 against interstate commerce, didn't it? Isn't that what  
15 it said?

16 MR. LIGHTFOOT: Yes, sir, it did say that.

17 QUESTION: And do you suggest that that kind  
18 of a Congressional policy ought to be taken into  
19 consideration in deciding whether something is  
20 reasonable under the equal protection clause?

21 MR. LIGHTFOOT: I think this Court has said on  
22 occasion that it would look at Congressional enactments  
23 for public policy. I think it does state a public  
24 policy. I think it's evidence to you that the insurance  
25 industry is different, or at least Congress views it as

1 different and unique.

2 QUESTION: And you think maybe the Court has  
3 just made a mistake in Reserve Life? How about -- what  
4 was the case that that case cited? It cited what?

5 MR. LIGHTFOOT: It cited Wheeling Steel versus  
6 Glander.

7 QUESTION: When was that, '46?

8 MR. LIGHTFOOT: Wheeling Steel was '49.  
9 Reserve Life against Bowers was '59.

10 QUESTION: And that was before  
11 McCarran-Ferguson?

12 MR. LIGHTFOOT: That was after.

13 QUESTION: After.

14 MR. LIGHTFOOT: Both of those are after.

15 QUESTION: So we made -- so the Court you say  
16 really stumbled twice?

17 MR. LIGHTFOOT: Not at all. No mistake was  
18 made. The job wasn't done. The guidance was not given  
19 to this Court by the states.

20 QUESTION: Oh, no, no. I think you have to be  
21 awfully blind not to see what a state is doing when it  
22 discriminates on the basis of residence.

23 MR. LIGHTFOOT: Residence and location. I  
24 would have a harder argument to make, Your Honor, if we  
25 just said, wherever you incorporate, we'll determine

1 your tax. They must not only incorporate, they must  
2 locate. We want them in there.

3 And I can distinguish those seven cases, and I  
4 don't want to do it if you don't want me to. But the  
5 Wheeling Steel against Glander said, the purpose of our  
6 statute is to encourage reciprocity. This Court said:  
7 You've given us your purpose; we don't find it to be a  
8 legitimate one, we strike it down.

9 Reserve Life against Bowers, here's what  
10 happened. The Court of Appeals of Ohio found the tax in  
11 Ohio --

12 QUESTION: You would say that a tax law that  
13 says, we tax all non-resident insurance corporations X  
14 and all resident corporations, all insurance companies  
15 incorporated in Alabama, by half X, you would say that's  
16 unconstitutional under the equal protection clause?

17 MR. LIGHTFOOT: I would say it would be a  
18 harder case than the one I have here, because --

19 QUESTION: How would you decide it?

20 MR. LIGHTFOOT: Sir?

21 QUESTION: You say it would be a harder case,  
22 but would it be controlled by Reserve or not?

23 MR. LIGHTFOOT: No, I don't think Reserve  
24 would control that, for this reason: The lower courts  
25 in Reserve found the statute to be non-discriminatory.

1 QUESTION: Well, would it control -- would  
2 Wheeling cover it?

3 MR. LIGHTFOOT: Wheeling was an ad valorem  
4 tax. It was not in the insurance --

5 QUESTION: Would it or not?

6 MR. LIGHTFOOT: Wheeling would not control,  
7 because the statute there was to encourage reciprocity.  
8 We don't say that. We say we have a valid distinction  
9 between domestic and foreign, and that you've got  
10 evidence before you that none of the other courts had.

11 In the Greene case he's talking --

12 QUESTION: Well, Wheeling didn't even involve  
13 insurance.

14 MR. LIGHTFOOT: That's right. It was a  
15 manufacturing company and out-of-state receipts,  
16 accounts receivable, were taxed at a higher rate than  
17 in-state accounts receivable.

18 The Greene case is the first case that they  
19 like to cite. The Greene case Court looked five times  
20 to see if there was a distinction between out-of-state  
21 railroads and in-state railroads. Five time the Greene  
22 Court looked and five times the Court said: No  
23 distinction has been shown. They are in the identical  
24 business. They perform it in precisely the same  
25 manner. Another time they said exactly the same



1 manner. The Court was searching for a distinction on  
2 which a classification could be based, and it found  
3 none.

4 The same thing was true in the two insurance  
5 cases, Hanover Fire and Concordia. The State of  
6 Illinois came in with a discriminatory statute against  
7 insurance companies, 1926. This Court struck it down,  
8 because it received no guidance from the State of  
9 Illinois as to why a distinction existed. Was one  
10 better than the other for the citizens of Illinois? And  
11 this Court was not shown any difference and it struck it  
12 down.

13 Eight years later, he talks about Concordia.  
14 This Court again considered Illinois, same state, and  
15 they hadn't learned anything in the interim. They came  
16 in and gave you a statute and they said, we discriminate  
17 against foreign companies in favor of domestic, and they  
18 gave you no reasons why. They gave you no  
19 distinctions.

20 This Court said in Concordia: No distinction,  
21 no reasonable basis for such discrimination, is  
22 suggested and none is perceived. The Court was  
23 searching for the distinctions that we have before you  
24 in this case, and this is the first time it's been  
25 done.

1           This Court in Glassboro, WHHY against  
2           Glassboro, same questions came up. They said, is there  
3           a difference in New Jersey's relation to the decisive  
4           transaction? Three times the Court asked in WHHY  
5           against Glassboro: Is there any distinction between the  
6           two? It was a non-profit corporation that was taxed if  
7           it was from out-of-state and New Jersey didn't tax its  
8           own non-profit corporations.

9           This Court said no distinction is shown in the  
10          benefits to the State of New Jersey. Another time it  
11          said, no one has advanced any difference, so we find  
12          none. They said this is not a case where a difference  
13          in benefits is shown to exist. So Glassboro is the same  
14          thing.

15          Bethlehem against Flynt is another case that's  
16          cited in their seven cases. In that case, the North  
17          Carolina statute was held to reach too far. It was  
18          irrational. The North Carolina statute said an  
19          out-of-state corporation must come in and, in order to  
20          relieve itself of the tax, invest 75 percent of its  
21          assets in the State of North Carolina.

22          Even the Attorney General of North Carolina  
23          said that's a futile and unworkable plan, and this Court  
24          agreed with him. There was no rational basis shown  
25          there in what the State of North Carolina was trying to

1 accomplish.

2 So we think the cases are consistent, that the  
3 cases can be reconciled. We think the test is given in  
4 Western & Southern. We say you would not be departing  
5 from precedent if you uphold Alabama's tax. You  
6 wouldn't be flying in the face of those seven decisions  
7 cited by the foreign insurance companies.

8 The policy announced by McCarran-Ferguson was  
9 that uniformity in the taxation of insurance companies  
10 is not desirable, it's not in the public interest. And  
11 the legitimacy of our state statute lies partly in that  
12 uniqueness of the insurance industry and what we have,  
13 what we want to achieve.

14 32 states have found it a workable system. 20  
15 of those states have come in and filed an amicus brief  
16 with you saying: Don't change the system. We have one,  
17 it works; don't change it.

18 Various members of the insurance industry have  
19 come in. Allstate and State Farm, two of the largest  
20 insurance companies in the world, have come in and filed  
21 as amici on our side, saying: Don't change it. We pay  
22 that four to one when we go to Alabama. We're  
23 discriminated when we go into Alabama. It's a good  
24 system; don't change it.

25 The Florida Association of Insurance

1 Companies, the National Association of Insurance  
2 Companies has come in. That's 521 members. They say it  
3 works, don't change it.

4 QUESTION: What do you mean, it works?

5 MR. LIGHTFOOT: The system works.

6 QUESTION: Well, what do you mean, it works?

7 MR. LIGHTFOOT: It works because we encourage  
8 domestic companies --

9 QUESTION: What do you mean by it works?

10 MR. LIGHTFOOT: We have a healthy domestic  
11 insurance industry that serves one segment and certain  
12 types of insurance needs, and we have a very, very  
13 healthy foreign industry that serves other needs. There  
14 is a difference, there is a distinction.

15 QUESTION: Why do you suppose the Northeastern  
16 states are against it?

17 MR. LIGHTFOOT: Well, as I understand it,  
18 Connecticut has the big companies incorporated in  
19 Connecticut and they tax domestics more than foreigners,  
20 and they don't want to see -- they'd like our law  
21 changed so their domestic companies can compete better.  
22 They're looking after their domestic carriers, too. And  
23 I don't blame them for coming in on that side.

24 32 states feel the same way we do, and 20 of  
25 them are here before you.



1           The Intervencors in this case, those are five  
2 domestic carriers. Now, they're penalized when they go  
3 outside the state in interstate commerce. When they go  
4 outside in interstate competition, they are hurt because  
5 of retaliatory taxes. But they get the benefit of our  
6 taxes at the early years when they otherwise couldn't  
7 survive. That tax shelter enables them, when they are  
8 fledgling companies, to make it, and that's the only way  
9 some of them can make it.

10           Five of those domestic carriers are here  
11 before you as Intervencors.

12           QUESTION: Counsel, should I advise you that  
13 we don't have a computer that'll do all of that for us,  
14 who's on what side?

15           MR. LIGHTFOOT: Yes, sir, I'm not trying to  
16 come up with --

17           QUESTION: I just want you to know --

18           MR. LIGHTFOOT: -- a weight of numbers.

19           QUESTION: -- I don't have one in my office.

20           QUESTION: Well, it's getting close to the  
21 election. We count votes.

22           MR. LIGHTFOOT: Well, on that point, Your  
23 Honor, the foreign insurance companies say they get  
24 taxed without representation in Alabama. They have a  
25 lot more agents in Alabama than the domestic carriers

1 do. They've got the votes and they've got the  
2 lobbying. They're not being unrepresented down there.

3 Justice Marshall, the only reason I cite those  
4 statistics is to say to you that we have a reasonable  
5 system. It's a rational system. If we taxed them 20 to  
6 one it would be irrational and unreasonable. It'd be  
7 like Bethlehem against Flynt. It wouldn't give you that  
8 healthy competitive mix that you have in the Alabama  
9 marketplace.

10 QUESTION: My only point is, I for one don't  
11 decide cases on the number of amicus that are on one  
12 side or the other. That's all I'm trying to advise you  
13 of.

14 MR. LIGHTFOOT: Yes, sir. And all I say on  
15 that point is, we feel it's reasonable and we're not  
16 alone in feeling that it's a reasonable system, and it's  
17 a system that's widespread and seems to be working not  
18 only in Alabama but in other locations.

19 The foreign insurance companies really are  
20 asking this Court to repeal McCarran-Ferguson. What  
21 they're saying is use the equal protection scrutiny,  
22 which is minimal scrutiny, as this Court has said  
23 repeatedly, use that scrutiny to enhance interstate  
24 competition. And that is not what this Court has said.

25 In Allied Stores against Bowers, this Court

1 upheld an Ohio statute that discriminated against  
2 non-residents -- that discriminated against residents in  
3 favor of non-residents. And in the concurring opinion,  
4 Justice Brennan, in Allied Stores against Bowers you  
5 said the only way to reconcile this decision with  
6 Wheeling Steel against Glanders is if equal protection  
7 is used as an instrument of federalism.

8 And then you cited that concurring opinion in  
9 footnote 21 of Western & Southern and said that view has  
10 never been endorsed by this Court, this Court has never  
11 said that equal protection is to be used as a tool of  
12 federalism. And that I take it is the view of this  
13 Court.

14 QUESTION: I wasn't alone in Allied Stores, I  
15 don't think.

16 MR. LIGHTFOOT: Sir?

17 QUESTION: I wasn't alone in Allied.

18 MR. LIGHTFOOT: In Allied Stores, I know.  
19 Justice Harlan joined with you, I believe.

20 And I think this Court has drawn the  
21 distinction between equal protection scrutiny and  
22 commerce clause analysis, and this Court has never said  
23 that you intrude -- that you put commerce clause  
24 analysis into an equal protection scrutiny.

25 To do so is to confuse the two different

1 analyses, one being to enhance commerce interstate and  
2 the other being to ensure equal treatment for persons in  
3 the same classification. And it's our job to tell you  
4 that the classification here has a basis, a rational,  
5 reasonable basis, and it's done on a distinction that's  
6 admitted. The classification is admittedly rational and  
7 reasonable by stipulation of the other side.

8 They want you to change the system, the system  
9 in Alabama that is working and that has created jobs,  
10 payrolls, and insurance coverage. They want you to  
11 change that and give them a more dominant market share.  
12 They want more than the 75 and the 87 percent that they  
13 presently have.

14 And the domestic insurance industry is asking  
15 you not to change it, and the domestic insurance  
16 carriers cannot survive unless they have a statute that  
17 aids them like this one does.

18 QUESTION: How does this aid them? What it  
19 does is increase the costs and the premiums of the  
20 foreign insurers?

21 MR. LIGHTFOOT: No, I don't think it does. I  
22 think it gives a tax break to the --

23 QUESTION: Well, I know. It just means that  
24 they pay less taxes than the foreign insurer.

25 MR. LIGHTFOOT: Yes.



1 QUESTION: Well, how does that help them?

2 MR. LIGHTFOOT: Because in the early years  
3 they have enormous capital requirements. The two  
4 barriers to entry are capital requirements and economies  
5 of scale. They don't have either one of those in those  
6 early years. The foreign insurers do. By the time they  
7 come into the Alabama marketplace, they're bigger.

8 QUESTION: Well, I know. But the foreign  
9 insurers are still going to meet the competition, aren't  
10 they? They're going to have the same, have to charge  
11 the -- they're certainly not going to be undercut on  
12 their premiums.

13 MR. LIGHTFOOT: That's right, and what that  
14 does is benefit the marketplace.

15 QUESTION: How does it help the local  
16 industry?

17 MR. LIGHTFOOT: It helps the consumer. That  
18 fact is stipulated in the joint appendix, that you get  
19 more attractive rates by a healthy domestic industry  
20 that doesn't have to pay that four percent and that  
21 three percent. They can charge lower premiums and the  
22 foreign insurers have to meet that.

23 QUESTION: Well, all right, so the foreign  
24 insurers meet it.

25 MR. LIGHTFOOT: And the consumer --

1 QUESTION: So why can they sell any more?

2 MR. LIGHTFOOT: I don't know the answer to  
3 that, except that they're doing very well. Apparently  
4 they can meet it.

5 QUESTION: Well, if you don't know the answer  
6 to it I don't know why it's a rational purpose.

7 MR. LIGHTFOOT: The answer is they are able to  
8 overcome that, that advantage. We admittedly give an  
9 advantage to the domestic carriers, but the foreign  
10 carriers are able to overcome it and to even --

11 QUESTION: If they just meet whatever premiums  
12 the locals establish, I don't know how the locals are  
13 benefited at all by the tax preference.

14 MR. LIGHTFOOT: The consumer is benefited by  
15 having more attractive rates. If the domestic industry  
16 can sell at cheaper rates and the foreigners have to meet  
17 that, the consumer is benefited.

18 QUESTION: So it really isn't the domestic  
19 industry that's being protected?

20 MR. LIGHTFOOT: Ultimately it's the Alabama  
21 citizens.

22 QUESTION: We're switching to the consumer  
23 now.

24 MR. LIGHTFOOT: Well, I think that's part of  
25 the same purpose. Obviously, if we have --

1 QUESTION: Well, the only time you talked  
2 about the consumer before was the country consumer.

3 MR. LIGHTFOOT: I think all of the Alabama  
4 marketplace.

5 QUESTION: You've got a new argument now.

6 MR. LIGHTFOOT: Those are one of our 17. We  
7 gave you 17 purposes, and part of that is the insured  
8 himself.

9 QUESTION: Well, that's a real piano you're  
10 playing.

11 MR. LIGHTFOOT: There are a number of --  
12 that's what this Court has said, that they must play  
13 that piano and negative every one of those keys, and I  
14 think that's the burden you've put on them in your  
15 previous decisions. And I don't think they've met that  
16 here, and they've stipulated to some facts that in fact  
17 show you the very contrary.

18 Thank you.

19 CHIEF JUSTICE BURGER: You have three minutes  
20 remaining, Mr. Zinn.

21 REBUTTAL ARGUMENT OF MATTHEW J. ZINN, ESQ.

22 ON BEHALF OF APPELLANTS

23 MR. ZINN: Mr. Chief Justice and may it please  
24 the Court:

25 The Reserve Life case is still the critical

1 case here, and my brother Lightfoot has misstated the  
2 holding of that case. He said the holding was that  
3 there was no discrimination. I would like to quote from  
4 the opinion of the Court of Appeals of Ohio of Hamilton  
5 County at 196 Northeastern Reporter Second at page 118.  
6 The court said:

7 "Accordingly, it is the opinion of the court  
8 that the taxing distinction existing between domestic  
9 and foreign insurance companies is neither an  
10 unreasonable classification of taxpayers nor can it be  
11 said to discriminate either in favor of or against the  
12 two types of insurance companies."

13 In other words, there were alternative  
14 holdings in that case.

15 QUESTION: And what happened?

16 MR. ZINN: And this Court reversed.

17 QUESTION: Reversed, citing?

18 MR. ZINN: Wheeling Steel versus Glander.

19 Mr. Lightfoot conceded during his argument  
20 that 20 to one would be irrational. I would call the  
21 Court's attention to the opinion of the trial court of  
22 North Dakota, which is included on page 38a of the  
23 appendix to our jurisdictional statement, in which that  
24 trial court held unconstitutional North Dakota's  
25 domestic preference tax statute.



1           There are some samples in that opinion of the  
2           magnitude of the discrimination. On page 42a, under the  
3           North Dakota domestic preference statute a 2-1/2 percent  
4           gross premiums tax is imposed on out-of-state companies  
5           and an income tax is imposed on North Dakota companies.

6           In the case of Massachusetts Mutual Life  
7           Insurance Company, on page 42a, the discrimination is  
8           more than four to one. In the case of Prudential  
9           Property & Casualty Insurance Company, it's infinite.  
10          In the case of Prudential Life Insurance Company, it's  
11          more than seven to one. In the case of Metropolitan,  
12          it's more than seven to one.

13          The Oklahoma statute is very instructive  
14          also. That statute imposes a four percent gross  
15          premiums tax on out-of-state companies and a four  
16          percent income tax --

17          QUESTION: Mr. Zinn, it may be -- let's assume  
18          you're right about Reserve Life. But I take it your  
19          colleague on the other side is at least implicitly  
20          saying that, whatever Reserve might be, whatever it  
21          might mean, it should be disregarded in this case.

22          What do you say about the argument that the  
23          McCarran Act is a statement of Congressional purpose  
24          that a state may disregard the commerce clause and  
25          including that it can discriminate, despite the commerce

1 clause it can discriminate, against insurance  
2 companies?

3 MR. ZINN: Well, I think the Court dealt  
4 precisely with that issue in the Western & Southern  
5 case, Justice White. It said that the McCarran Act  
6 lifted commerce clause restraints, but it did not lift  
7 equal protection restraints. And we rely solely on --

8 QUESTION: Well, that's true, but I'm asking  
9 you why you wouldn't take into consideration the  
10 Congressional policy in determining whether something is  
11 reasonable under the equal protection clause?

12 MR. ZINN: In the legislative history of the  
13 McCarran Act, Congress specifically stated -- and this  
14 was quoted in Justice Brennan's opinion in Western &  
15 Southern -- that all other constitutional provisions  
16 were to continue unaffected --

17 QUESTION: Well, I agree.

18 MR. ZINN: -- by the --

19 QUESTION: Nobody says that the equal  
20 protection clause was lifted by the McCarran Act. I'm  
21 just asking you, why shouldn't you consider that  
22 Congressional policy in deciding whether there's a  
23 rational purpose in this case?

24 MR. ZINN: Because, as we indicated before, it  
25 may be --

1 QUESTION: It's true, the Court has decided  
2 otherwise in the past, but I'm still asking you that  
3 question.

4 MR. ZINN: I guess the reasons are, anything  
5 goes if you say that. There is no protection for  
6 out-of-state companies. It's limitless discrimination  
7 and I think this Court has never been prepared to  
8 countenance that.

9 Mr. Chief Justice, Metropolitan still does  
10 handle industrial insurance and it's one of its most  
11 profitable lines.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
13 The case is submitted --

14 QUESTION: Mr. Zinn, a long time ago when I  
15 was a youngster, Metropolitan would have small  
16 insurance, life insurance policies, ten cents a week.  
17 And the collector would go about picking that dime up.  
18 Do they still sell that kind of thing?

19 MR. ZINN: They still do, and all they want is  
20 the opportunity to do that in Alabama on an equal basis  
21 with Alabama companies.

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

24 (Whereupon, at 1:50 p.m., argument in the  
25 above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#83-1274 - METROPOLITAN LIFE INSURANCE COMPANY, ET AL., Appellants v.  
W. G. WARD, JR., ET AL.

---

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



RECEIVED  
SUPREME COURT U.S.  
MARSHAL'S OFFICE  
84 NOV -7 P3:22