OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1273

TITLE REGENTS OF THE UNIVERSITY OF MICHIGAN, Petitioner V. SCOTT E. EWING

PLACE Washington, D. C.

DATE October 8, 1985

PAGES 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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REGENTS OF THE UNIVERSITY OF MICHIGAN,

Petitioner

V. No. 84-1273

SCOTT E. EWING

- x

Washington, D.C.

Tuesday, October 8, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

RODERICK K. DAANE, ESQ., Ann Arbor, Michigan; on behalf of the Petitioner.

MICHAEL M. CONWAY, ESQ., Chicago, Illinois; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Regents of the University of Michigan against Ewing.

Mr. Daane, you may proceed whenever you are ready.

ORAL ARGUMENT OF RODERICK K. DAANE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DAANE: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the Sixth Circuit, which concluded that the University of Michigan had treated the Respondent unconstitutionally when it denied him two chances to take a test that he had flunked in the University's Medical School.

For purposes of this argument, I shall assume the existence of a constitutionally protectible property right in Respondent's continued enrollment in the University's Medical School while on what might be termed good academic behavior.

I shall argue that the Sixth Circuit erred in its decision that the University arbitrarily and capriciously deprived Mr. Ewing --

QUESTION: May I ask why you make that assumption?

MR. DAANE: Because, Justice Powell --

QUESTION: You don't concede it, do you?

MR. DAANE: I just assume it as the Court did in Horowitz because I believe it is not essential to reach that issue in order to decide this case on the narrower ground of whether Mr. Ewing was treated by the University in an arbitrary and capricious way.

QUESTION: So, you simply make an assumption?

MR. DAANE: I am assuming for the purposes of the argument the existence of the protectible property interest.

QUESTION: What if we disagree with you on your argument though? What happens to the property interest issue? We just affirm them or not?

MR. DAANE: Most certainly not, Justice White. I think you would be able to find that Mr. Ewing was not treated in an arbitrary and capricious way and --

QUESTION: Well, I know, but what if we agree with the Court of Appeals that if there is a property interest there was a consitutional violation?

MR. DAANE: Then, of course, I suppose you would have to affirm.

QUESTION: Because you are not going to argue about the property interest issue.

MR. DAANE: I am going to say, Justice White, that the idea of arguing the property interest has some appeal for me and the idea that there should not be a property interest in such as thing as a course grade or

a qualification, an academic qualification.

QUESTION: You didn't present the property interest question in your petition.

MR. DAANE: That is correct.

QUESTION: Well, no, I am not sure I agree with Justice White on that. Your second question presented, as I read it, is the state medical school procedurally correct, dismissal of an academically deficient student subject to substantive due process review and reversal by the federal court. I think that raises the property issue.

MR. DAANE: Clearly it is within the parameters of the question as framed in the petition, Justice Rehnquist.

QUESTION: You are not going to present it though, is that right?

MR. DAANE: I agree.

QUESTION: The Solicitor General said he thought the question was in the case.

MR. DAANE: Yes, and the Solicitor General's position, Justice Powell, is, as I said, quite attractive to me. I just think that the case can be disposed of on a narrower basis. I will argue the property interest if the Court wishes. I don't mean to suggest that it is not a legitimate question.

I mean to suggest only that I believe the case

can be disposed of on the narrower grounds of whether --

QUESTION: Well, maybe we think it is narrower to decide it on whether it is property.

MR. DAANE: Very well, Justice O'Connor.

QUESTION: What is the agreement or the understanding that students have who are admitted to the Medical School in your state?

MR. DAANE: The understanding that they have, Justice O'Connor, is that they should be permitted to proceed in the program while they are meeting the requirements of the Medical School's faculty, while they are on what I term good academic behavior.

QUESTION: Are there provisions in the application forms that make it a matter of discretion of the faculty to retain the student?

MR. DAANE: In the official bulletins of the Medical School, Justice O'Connor -- I am referring now to Exhibits 36 and 39, which are the two bulletins which were effective at the time Mr. Ewing matriculated and at the time he flunked out -- there are clear provisions conferring upon the Promotion Board's discretion to pass, to fail, or to take any one of many intermediate actions between those two extremes with respect to the enrolled students, yes.

I would like to review quite briefly Mr. Ewing's

record admission. He matriculated in the fall of 1975. He flunked out in the summer of '81.

While he was with us he accumulated an unenviable academic record which included numerous low grades, seven incompletes, two terms during which he was on leaves of absence, several terms during which he was on an irregular or reduced course load schedule.

The faculty had devoted considerable time to helping him along at the point which was reached in mid-summer 1980 when they warned him in writing -- and that writing appears at 146 of the Joint Appendix -- that one more deficiency would be cause for his being dropped from registration.

Now, that deficiency could have taken the form, if the Court please, of a failure in a course grade or a failure on a final exam, but in Mr. Ewing's case it took the form of a failure on the National Board of Medical Examiners, Part I Exam.

This is a two-day exam which tests students in seven subject matter areas. Mr. Ewing flunked five out of the seven with the egregiously low score of 235 against a passing standard of 345 which has since been raised to 380. That score was the lowest in the Inteflex program, the combined baccalaureate and medical school program in which Respondent was enrolled and occasioned concerned on the part of the faculty, Promotion and Review Board, which

met the following month to review his record and determine his eligibility to continue.

That meeting took place on July 24, 1981, and was the first of what was to be five meetings of the Michigan faculty devoted to reviewing Mr. Ewing's record. There were two Promotion Board meetings and three meetings of the Medical School's Executive Committee.

If you add all of that up, you will find that over two dozen senior faculty members at the University of Michigan's Medical School devoted countless hours to reviewing Mr. Ewing's progress through the Medical School both before and after.

QUESTION: Where is Mr. Ewing now?

MR. DAANE: He is in Chicago, I am informed by Counsel, enrolled in the Chicago College of Osteopathy, Justice Blackmun.

QUESTION: I take it there is no racial overtone in this case?

MR. DAANE: None whatsoever.

The faculty reviews were unanimous of the opinion that Mr. Ewing should be dropped from registration.

He appealed the first such determination. He appeared before the faculty's Promotion and Review Board, submitted both written evidence and spoke to the Board and was questioned by the Board.

Significantly, the questions, particularly those posed by Dr. Friedman, were directed to the point that Mr. Ewing was well aware at the time he sat for the examination of the grave -- the gravity of his academic condition at that point.

Dr. Friedman also testified, by the way, that he alone --

QUESTION: May I just ask you one question at this point.

MR. DAANE: Certainly.

QUESTION: What is all of this relevant to? If he has no constitutional right, the University didn't have to do any of this, did it?

MR. DAANE: Well --

QUESTION: What is the legal point you are making? I am kind of curious.

MR. DAANE: The legal point is the care and deliberation which went into the decision to terminate.

QUESTION: But, they didn't have to do any of that, did they?

MR. DAANE: No, they didn't as a matter of law. I think they over did what they were required to do.

QUESTION: How does that go to the question of what they were required to do which is really what we are interested in.

MR. DAANE: It goes to the admonition of this Court in Board of Curators v. Horowitz, I believe, Your Honor, that a careful and deliberate decision made by professional decision makers such as those on Michigan's faculty should not be reviewed by the courts.

QUESTION: Mr. Daane, this suit is against the State of Michigan, isn't it?

MR. DAANE: Yes, sir.

QUESTION: Did you consider the Eleventh Amendment issue?

MR. DAANE: Yes, we have argued them on brief.

QUESTION: Are you going to argue that?

MR. DAANE: I hadn't intended to today, Your Honor.

QUESTION: You rest on your briefs?

MR. DAANE: I would rest on the briefs, yes.

QUESTION: Do you think we have jurisdiction?

MR. DAANE: Yes. The Eleventh Amendment issue in this case is interesting because of the way in which the case stands at the intersection of the Eleventh and the Fourteenth. There really are very few federal rights implicated by the complaint Mr. Ewing makes against the University of Michigan.

He asserts in essence that what we have done is failed to follow what is really a state law rule. He doesn't assert that we have deprived him of a specific federal right

protected by the Bill of Rights. He doesn't say, for example, that his dismissal was pretextual in any way. He doesn't allege racial or any other sort of invidiousness nor could he.

He doesn't allege that he has been punished for the exercise of a First Amendment freedom of speech privilege, anything of that kind.

What he argues is that our decision makers were prevented or should have been prevented from making the professional, academic decision that they made by a so-called rule which automatically entitled him to take two cracks at passing the NBME exam.

If you strip the bark off his argument, that is really what it amounts to. He is complaining about the decision of the faculty which considered him to be an unqualified student, unqualified to go forward.

QUESTION: On the Eleventh Amendment issue, there is a motion, as I understand it, by the Respondent to be allowed to amend the complaint now to name the Regents individually.

MR. DAANE: That is correct, Justice O'Connor.

QUESTION: To try to meet that issue. Do you oppose the granting of that motion?

MR. DAANE: We did not file a response to that motion, Justice O'Connor, and my candid opinion is that

it really doesn't change the applicability of the Eleventh Amendment defense, because the motion --

QUESTION: Do you think if they were named individually that you could still argue the Eleventh Amendment defense?

MR. DAANE: Yes, I do, Justice O'Connor, because the motion does not seek to name them in their individual capacities. It seeks to name them in their official capacities, and it seems to me that really does not change the nature of the case for Eleventh Amendment purposes in any terribly significant way.

QUESTION: Do I understand you to say you believe that you can amend a complaint in this Court?

MR. DAANE: Respondent --

QUESTION: Are you willing to let that out?

MR. DAANE: Respondent appears to be of that opinion.

QUESTION: Well, do you agree with him or not?

MR. DAANE: Well, I think it is very late in the day, Justice Marshall.

QUESTION: Do you agree with it or not?

MR. DAANE: We did not oppose it, therefore --

QUESTION: Do you agree with it?

MR. DAANE: Yes.

QUESTION: You agree with it?

MR. DAANE: Yes.

QUESTION: Will you give me one precedent?

MR. DAANE: Hutto -- I don't mean to be arguing Respondent's case, but he cited --

QUESTION: You are as responsible for jurisdiction as he is.

MR. DAANE: Yes, Your Honor. Hutto v. Finney, I believe, is the case upon which Respondent relied.

QUESTION: No.

MR. DAANE: Sorry. I think it is Brandon v. Holt. I misspoke. Brandon v. Holt, 469 U.S., Justice Marshall, is the casae upon which Respondent's argument is premised.

QUESTION: That is it?

MR. DAANE: That is it.

QUESTION: Was there any similar motion made before the District Court or Court of Appeals?

MR. DAANE: There was not, Your Honor.

QUESTION: So, neither of those Courts have had an opportunity to consider this question.

MR. DAANE: That is correct, Your Honor.

There was an Eleventh Amendment decision made by the District Court which concerned the Respondent's claim for damages in that Court and dismissed Count Three of the complaint on the basis of the Eleventh Amendment.

That decision, of course, preceded this Court's

decision in Pennhurst. In Pennhurst, when the Court decided that it was an intolerable intrusion upon state sovereignty for federal courts to order states to conform their conduct to state law, it changed the nature of the Eleventh Amendment issue for us sort of mid-way between the District Court and the Court of Appeals.

We argued the Pennhurst case on application for rehearing in the Court of Appeals and that application for rehearing was denied.

QUESTION: May I just ask this question about the Eleventh Amendment. In your principal brief you start out arguing the Eleventh Amendment and then when you reach the merits you said that the decision on the merits, it sounded a shock wave throughout the community of medical schools throughout the country. You apparently -- Suggesting to me at least that you thought it of great national importance that the merits be addressed. Then you really didn't argue Eleventh Amendment again.

I was wondering if perhaps you have decided to waive it so we could reach the merits.

MR. DAANE: No, I --

QUESTION: You do not waive it?

MR. DAANE: I do not waive it, Justice Stevens.

QUESTION: Just let the shock wave have its effect.

(Laughter)

MR. DAANE: I do think the Fourteenth Amendment issue is of critical importance to the higher education community and to the tradition of academic freedom in this country which this Court's precedence and policy have upheld for many, many years, and that is the issue that I intend to address with the Court this morning.

I would like to get back to the contention on the part of Respondent that the University failed to follow its own rule in this case when it denied him a second chance at the exam.

I would like to assure the Court that this is not a case in which the University of Michigan failed to follow its own rule.

In the first place, we had no rule automatically entitling a student to a retest. Each retest which was granted was granted after specific action of the Promotion and Review Board authorizing such a retest. That action was an exercise of the discretion which I earlier made reference to in the University's bulletin.

QUESTION: Mr. Daane, in the opinion of the Court of Appeals for the Sixth Circuit -- I am looking now at Page 33-A where that opinion is contained in the petition -- The Court of Appeals says, "in sum, the evidence demonstrates that it was the consistent practice of the University of Michigan to allow a qualified medical student who initially

failed the NBME, Part I, an opportunity for a retest."

Do you challenge that factual determination of the Court of Appeals?

MR. DAANE: I challenge the way in which the Court of Appeals expressed it, Justice Rehnquist. I would rather call it a consistent result than a consistent practice.

But, it is true that Mr. Ewing was the only one of the several students with whom he compares himself who was not afforded the opportunity for a retest.

But, that result came about as a product of the specific individual review by the Promotion Board in each case of the eligibility of each student to continue.

QUESTION: Your position then is it was the consistent practice or at least a consistent result, but the circumstances were sufficiently different in Ewing's case so that a different result was justified?

MR. DAANE: They were considered sufficiently difficult by the faculty, Justice Rehnquist, yes.

QUESTION: I am not sure I understand the University's policy. Suppose the medical student is taking 15 courses and he fails all 15. Is he given a rerun on every one of them?

MR. DAANE: I can't answer that question because I am not a medical educator, Mr. Chief Justice.

QUESTION: That is an element in this case, isn't

it, in the light of the statement of the policy of allowing re-examination?

MR. DAANE: Re-examinations are allowed in the discretion of the faculty when faculty considers it appropriate to do so on the basis of the student's potential, the student's overall record, performance in the courses already taken.

There is an awful lot of subjective judgment that goes into those decisions, Mr. Chief Justice, and, therefore, it is very difficult for me to answer --

QUESTION: Is there anything in this record about whether there are allowed a third crack at the examination if they fail?

MR. DAANE: Certainly. Sometimes they are. But, again, it is not the product of an automatic right. That is the point I wish to emphasize.

The other point about that which I wish to emphasize is that when Mr. Ewing took the examination for the first time, he had been warned and he understood the warning that he had received, that one more deficiency would be cause for his termination.

So, I suggest to the Court that if there is to be a rule in this case, that is what it is, one more deficiency and you are out.

QUESTION: When you refer to that warning, are

you referring to the warning on page 146 that you called our attention to once before?

MR. DAANE: Yes, Justice Stevens.

QUESTION: It really doesn't quite say that. It says it will be grounds for dismissal. It doesn't say he would be dismissed.

MR. DAANE: We advised him of the earlier warning which appears at 144 in which it says, "the Board also specified that any further academic deficiencies will lead to your being dropped from registration in the Inteflex program."

I haven't said anything about Youngberg v. Romeo and my time is approaching its end. Youngberg is an important precedent for this case. In Youngberg, this Court held that a professional decision made by professional decision-makers should not be overturned by courts.

If the decision is rational, it is beyond the reach of the judiciary is how I read Youngberg. Unless the decision is so irrational as to make it evident that it was actually not based upon professional judgment, it must be left untouched.

Now, we are not seeking a radical remedy in this Court. All we are seeking is a continuation of that precedent and the policy which has informed this Court over time concerning academic freedom.

We contend that an academic qualification decision should not be subject to substantive due process review. We don't want to bar the courtroom doors to students who wish to assert that they have been treated invidiously, that any of their federally protected rights have been denied them, but what we do want to do is keep the courts out of the business of making academic grade and qualification judgments. I submit that that follows the precedent of Horowitz and Youngberg and is wise national policy.

I would like to reserve the remainder of my time if I may, Mr. Chief Justice.

CHIEF JUSTICE BURGER. Very well.

Mr. Conway?

ORAL ARGUMENT OF MICHAEL M. CONWAY, ESQ.

ON BEHALF OF THE RESPONDENT

MR. CONWAY: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the Regents must abide by their own procedures and rules which they have publicly promulgated to students to rely upon.

The Regents were free in the first instance in their sole discretion to establish whatever standards, rules of procedures they wanted to measure academic performance, including Ewing's performance, but having set the rules to govern this important relationship between institution

and student, the Regents must abide by their same rules if those rules are set on an objective standard. If, to do otherwise, would, as it did in this case, result in a deprivation of a respondent's property interest.

QUESTION: Do those rules kind of amount to a contract in your view?

MR. CONWAY: Yes, they do. Under Michigan Law, Justice Rehnquist, the Booker case cited by the Sixth Circuit, it is a matter of state law that a student is not to be arbitrarily dismissed, in that case from a medical school.

In this instance -- The crucial thing that makes this case so unique is that the violation of the rule resulted in the deprivation of the property interest; that is his dismissal.

QUESTION: And, then what, do the federal courts simply apply Michigan contract law?

MR. CONWAY: Under Sindermann and all the cases, Your Honor, the issue is where there is a property interest we look to state law.

In this case, looking to state law, which is Michigan in this instance, there is a property interest not to be arbitrarily dismissed.

QUESTION: It is based on an agreement between the Regents and the --

MR. CONWAY: We have cited many cases in our brief,

Your Honor, which suggests, under various states, that the relationship between a student and a university is contractual.

QUESTION: Is there a federal parol evidence rule, a federal statute to govern these kinds of contractual claims?

MR. CONWAY: Well, Your Honor, as you know, under Sindermann, it doesn't even have to rise to the level of an actual conflict. Under the Jago case, there is a reasonable expectation of a right. It can be a property interest under federal law or for federal law purposes even though it doesn't rise to the official level of a contract.

QUESTION: But here I thought you said the federal court just to apply Michigan law.

MR. CONWAY: The Michigan law being, Your Honor, whether there is a property interest. Once there is a property interest, then the federal interest here is whether, in violation of the due process clause, the state or its agents in their official capacity have deprived Ewing of his property interest which was initially created by state law.

QUESTION: That is slicing it awfully thin, isn't it, the distinction between federal law and state law?

MR. CONWAY: Your Honor, I think it is well grounded in the precedents of this Court that there isn't any federal notion of a property interest, that the federal notion of a property interest must look to state law. That is what

the Sindermann case stands for. That is what the Sixth Circuit applied. And, it is very clear on these facts, which distinguish it from some of the other cases where the arbitrary and capricious test was addressed by the lower courts, that there is, in fact, as a matter of state law, a property interest.

Now, the Sixth Circuit --

QUESTION: Have the Michigan courts addressed the nature of the interest at the Medical School at the University under the kind of admission policies that are written in the application?

MR. CONWAY: Your Honor, I think the courts have addressed it in this sense. We have on this fact record the existence of a rule promulgated by Michigan. They were free not to do so.

QUESTION: What rule are you talking about?

MR. CONWAY: I am talking about Plaintiff's Exhibit 3 which is in the Joint Appendix at 113 and 114. It was published by the Regents and it was actually disseminated to students, faculty, and the world approximately a week before Ewing took the examination.

And, it quotes Associate Dean Gibson and it is very clear in answer to Mr. Chief Justice's question about what is the rule in other situations. It applies only to this examination and it says that, according to Dean Gibson,

any student -- and I am paraphrasing -- Let me quote it.

According to Dr. Gibson, "everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." That is in the Joint Appendix at 113.

They -- In this instance -

QUESTION: May I ask whether you are reading the word "qualified" in your interpretation?

MR. CONWAY: We don't have to define -- I am reading the word "qualified" as the administrators themselves read it. At trial Mr. Davis, counsel for Michigan, was asked by the District Judge, let's lay this question to rest. Was Mr. Ewing qualified when he went in to take the NBME exam and Mr. Davis responded in the affirmative.

Similarly, Dean Reed, who was the Director of the Inteflex Program, testified that he was qualified.

And, Dr. Gibson, who is quoted in Plaintiff's Exhibit 3, was asked at trial, what does qualified mean? Qualified means he has passed all of his courses and it was undisputed that Ewing had.

QUESTION: Mr. Conway, what is this Plaintiff's Exhibit 3? Was this a formally adopted rule of the University.

MR. CONWAY: Well, it is not promulgated in the

sense that a federal regulation is promulgated, Justice O'Connor.

QUESTION: What is it?

MR. CONWAY: It is this publication which I have before you. It is "On Becoming A Doctor." It says, "Medical Center Report, Special Issue, the University of Michigan." At the conclusion, which we set out this in the Joint Appendix, indicates that it is part of the Medical Center. It is published under the auspices of the University of Michigan's Regents.

QUESTION: Well, it simply is a publication. It didn't form part of the admissions application?

MR. CONWAY: No. This publication came out, Justice O'Connor, about a week before Mr. Ewing took this examination.

QUESTION: Did it come out before he applied for admission as a student at the University?

MR. CONWAY: No, it is some six years --

QUESTION: Was it part of the agreement he made with the University?

MR. CONWAY: Yes, Your Honor, it is part of the agreement.

QUESTION: How so if it hadn't been published when he was admitted as a student?

MR. CONWAY: Because, Your Honor, Mr. Ewing would

have had the option not to take this exam if he knew there was one strike and you are out. If you know the rules in advance, anybody can play the game. Anybody can succeed. That is the notion of fair play we have here.

They told Mr. Ewing that you get two tries. It is as if, Your Honor -- Let me pose two hypotheticals.

If the University said you need 120 credit hours to graduate and a student went through three years at the University and then the University went to a given senior and said to this woman, you have to have 150 hours to graduate, just you, or if you are in a classroom and a professor said you have three hours to complete this examination and after one hour he randomly went and took one student's exam away from him and didn't let him complete, would the courts be powerless to do anything? I think not. The courts have thought not.

For 50 years courts, as we have cited in our brief, have held that arbitrary and capricious conduct can be limiting.

What is important here --

QUESTION: Those examples are hardly comparable to this situation.

MR. CONWAY: Justice Blackmun, I suggest they are in this instance. Mr. Ewing knew he had two chances. If he had only had one chance, then he would be prepared to live or die on his results. He knew he had two chances.

It is like a batter.

QUESTION: Would you select him as your physician?

MR. CONWAY: I would, Your Honor. Your Honor, let me please address that because I think it is an important point and I know there is some levity in response to that point.

This young man is now in medical school. He is going to be a physician.

QUESTION: He is in an osteopathic school.

MR. CONWAY: And, as Your Honor knows, there is -- an osteopathic physician has all the rights of a M.D. graduate, to perform surgery in all the states, can perform in the same manner. His school is accredited. There is AMA approval of osteopathic schools.

The significance of this, Your Honor, is despite what the Regents suggest, this Court isn't going to make Mr. Ewing a physician. As a matter of fact, no court has been asked to make Mr. Ewing a physician. All he has asked for in this case is the right to take the examination again. He will live or die by that.

In 1981, the Regents could have let him take the exam right then and there and we wouldn't have had to go to court to try to vindicate this right. If they thought he was going to fail, let him fail. If they thought he was going to pass, why did they treat him differently?

This record also indicates there is a rule.

QUESTION: What does your client want today by way of relief?

MR. CONWAY: The relief he seeks is the right to take this examination at the University of Michigan which does two things.

QUESTION: Does he want to go back to the University of Michigan?

MR. CONWAY: It gives him the opportunity to go back. He has re-enrolled in medical school. He is now in his second year of medical school. It would give him the opportunity to go back, but more importantly it would give him the opportunity to remove the stigma of his academic dismissal which is going to follow him throughout his professional life.

QUESTION: Well, is he alleging that he wants to take the exam because he wants to gain admission, re-admission to the Medical School?

MR. CONWAY: Yes. The relief of the order that is actually before this Court is an order that orders him -- orders the Regents to permit him to take the examination and if he passes it to treat him as if -- to pass him on to the third phase which is what they would have done. The testimony is unequivocal at trial that the only thing that has kept him from going on is he failed this exam.

The deans were unanimous that if he had passed the exam he would have been promoted to the third, two-year phase at --

QUESTION: Even if he goes back, you can't get rid of the fact that he did flunk more times than anybody else ever flunked.

MR. CONWAY: Sure. Oh, no. Excuse me, Justice --

QUESTION: You can't get rid of that, can you?

MR. CONWAY: Justice Marshall, many people flunked. Forty people flunked. Forty people flunked.

QUESTION: You can't get rid of that, can you?

MR. CONWAY: No, we cannot. But, the fact of the matter is that the record is clear in Plaintiff's Exhibit 1 that 40 students, including Mr. Ewing, between 1975 and 1982 failed this examination on the first try. Thirty-nine were given a second chance. Ten were given a third chance. One was given a fourth chance. We are not asking for a third chance. We are not asking a fourth chance. We are asking for the rule to be followed that Michigan set forth.

QUESTION: Do you promise us that if we agree with you and he flunks again you won't ask for another one?

(Laughter)

MR. CONWAY: Absolutely, Your Honor. I promised that to the District Court. I promised that to the Court of Appeals and as an officer of the Court I will promise

that to you.

QUESTION: Mr. Conway, as I read the record, no one ever had a lower score as your client on that exam, is that correct?

MR. CONWAY: The record is a little ambiguous on that. The evidence was that no one in the Inteflex Program. The District Judge elaborated and said no one, but the fact of the matter is, and we put it in our Appendix, that in the Court of Appeals, in the brief of the Regents, they said the lowness of the score had nothing to do with his dismissal. They have disclaimed that, just as they have disclaimed, in answer to Justice White's question, any issue that there isn't a property interest here.

QUESTION: May I come back to my question?

MR. CONWAY: Yes.

QUESTION: Did the Court of Appeals conclude that that finding of the District Court was clearly erroneous?

MR. CONWAY: No, it didn't address that finding.

QUESTION: Are we bound by it?

MR. CONWAY: That he had the lowest score?

QUESTION: That your client had the lowest score of any medical student who had ever taken this examination?

MR. CONWAY: Well, I think the only fact in the record, Your Honor, is that he had the lowest score in the Inteflex Program. You are bound by that. The other, there

is no evidence whatsoever on that.

QUESTION: Is there any evidence in the record there was anyone who ever made consistently as low grades as your client?

MR. CONWAY: No, because at discovery we were not given access to any of those things, Your Honor. As you will see from the record, we were given statistical information with names removed which is what we asked for. But, the significance of that, Your Honor, Counsel wants to tell you about Mr. Ewing's various shortcomings. There are two answers to this. Whatever they may be, it isn't for a court to decide if they are important. The people who decide they are important are the professors and the professors said he was qualified. He had no deficiencies.

Justice Stevens asked about this letter. Well, the record is clear -- it is in Joint Appendix at 81 and 82 -- that every time he got a warning it was removed and one of those warning letters, Plaintiff's Exhibit 9 is in the record. And, it says, we congratulate you, your deficiency has been removed.

Now, what it turned out at trial was there was a notion of forgiven but not forgotten. But, in fact, what was told Mr. Ewing was that he was removed and the most important thing is the Dean said he was qualified.

QUESTION: Is that irrational to say that it is

forgiven but not forgotten. I mean, he may have come perilously close to flunking out at one point, then he brings himself up. So, whatever warning was on then, but if it happens three times, they don't have to act as if it was the first time it happened.

MR. CONWAY: No, Justice Rehnquist, but they didn't have to tell him it was removed either and they did.

And, the significance here is Mr. Daane refers to the Board minutes. Let's talk about the Board minutes. We objected to the Board minutes at trial as being prepared in anticipation of litigation and as being hearsay. The District Judge permitted those to be received in evidence. We raised that objection in the Sixth Circuit very strenuously about the inadmissibility of these exhibits. The Sixth Circuit didn't pass on it because they ruled in Respondent's favor.

So, I respectfully suggest that they can't rely on evidence to which objection has been made --

QUESTION: For which the District Court overruled?

MR. CONWAY: Why should this Court for the first time address the evidentiary point --

QUESTION: We are dealing with a record made up in the District Court and as I understand it these were proffered by the Defendant, admitted into evidence by the District Court. You challenged the admission in the Sixth

Circuit. The Sixth Circuit didn't pass on it. Are you saying we can't consider that evidence?

MR. CONWAY. Well, Your Honor, I don't think --

QUESTION: That would be an extraordinary doctrine.

MR. CONWAY: Well, Justice, I think prudentially I don't know why you would want to get into an issue that the Court of Appeals didn't have the opportunity pass on. The only reason they didn't pass on it is they found that with those in the record there was a rule and it had been violated.

QUESTION: This is a state institution?

MR. CONWAY: Yes, it is.

QUESTION: And, the minutes are prepared pursuant to the state law?

MR. CONWAY: I don't know of any state law, Justice Marshall. There may be one, but I am not familiar with it. The testimony at trial was that the minutes were prepared and reviewed by Counsel.

QUESTION: Do you know of any minutes of a state agency that aren't admissible?

MR. CONWAY: There is the exception under 8038, Justice Marshall, but there also is the doctrine prepared in anticipation of litigation and the testimony at trial was that they were --

QUESTION: Does that apply to a state institution?

MR. CONWAY: I think it would apply to any document prepared in anticipation of litigation, Your Honor.

QUESTION: You think so.

MR. CONWAY: Yes, Your Honor.

QUESTION: I still can't get away from the point that you can't correct his image. If we rule and give you everything you want, you can't erase that man's image.

MR. CONWAY: Your Honor, there are many other fine graduates of the University's Medical School who failed this examination two times, three times, four times. On the academic record by the University's own calculation out of 23 courses he had difficulties in three of them. There were students who had them in 70 percent of their courses, 50 percent of their courses, 9 out of 23 in the same Inteflex Program.

QUESTION: Mr. Conway, does the record tell us what his grade average was at the time he stood for the examination?

MR. CONWAY: Yes, Your Honor. I believe it was approximately a B- average. It was 2.7 or 8 at the time he sat for the examination. He was in good standing. He was in a difficult Inteflex Program which takes --

QUESTION: May I also ask if, in your view, the record tells us why he was dismissed?

MR. CONWAY: It doesn't, Your Honor. That is

why it is arbitrary.

Let me return to the Romeo test. I think the Romeo test is very akin to the arbitrary and capricious test. It was advanced by the AAUP here. And, the test is very similar, because the Romeo test says was there such a substantial departure from past judgment, practice or procedure that indicates that the presumed validity of the professional decision can be overcome?

The arbitrary and capricious test is really in substance no different than that because it is prima facie correct and it has to be shown to have no rational basis.

And, I think the AAUP's suggestion that the Romeo and Younger serves as an appropriate vehicle. I agree with them. It is akin to the arbitrary and capricious test which have been applied by these courts which was discussed in dictum in Horowitz.

The significance of it here -- Let's look at the past judgment, practice and policy. The judgment of the Regents was they will allow people two tests. They published that in their rule. They gave that to everybody.

QUESTION: Well, you say they published it in their rule. Are you talking about the brochure?

MR. CONWAY: Well, Your Honor, the Sixth Circuit--

QUESTION: I wasn't asking about the Sixth Circuit

character, I was asking you if they published it in their brochure.

MR. CONWAY: Exhibit 3, Your Honor. That is the pamphlet on becoming a doctor.

And, the significance of that, Your Honor, is that they held it out to the community to rely upon.

And, if you look at their past -- Also, we have the fact that every other student similarly situated was given a second chance.

QUESTION: Of course, the faculty argues that this guy was such a loser that he was not similarly situated.

MR. CONWAY: That is their argument, but that is not their evidence, Your Honor. He is the only student among the 40 to have an honor's grade and published research.

But, I don't think the fact of the matter is the Court needs to delve into that, because what the Sixth Circuit held was under the University's own rule of a qualified student he was qualified. The Sixth Circuit didn't create a rule.

You know, the notion of substantive due process connotes to some people that judges make new policy. That is not what we are asking for here. What we are asking for here -- I think that is why the Romeo test is an appropriate analysis.

QUESTION: Are you saying that the faculty can't

determine whether the student is reasonably qualified?

MR. CONWAY: Yes, and they did. They determined he was reasonably qualified and let him take the exam. It is just, Justice O'Connor, as if they said you are qualified to take this final exam and you begin taking it and half way through they take your paper away.

The notion here was you got two --

QUESTION: They didn't take it away. He took the exam and flunked it badly and that entered into the calculation of whether the faculty thought he was qualified.

MR. CONWAY: Well, respectfully, Your Honor, it didn't because of two things. One, the suggestion that there was some kind of deliberative process is unsupported by the record. While the students routinely came up on the agenda, it was also said that they -- everyone was routinely given a second chance.

So, there isn't any calculus here of a discretionary judgment. They made their judgment. This exam, I should point out to the Court, is constructed so that 10 percent fail. Regardless of your raw score, 10 percent fail, that it is a --

So, the University has suggested, for example, that they have now raised the score. They didn't tell you. They raised it in Plaintiff's Exhibit 5. Now students get three chances, every student, the published rules

disseminated to their faculty.

The NBME itself, which administers this exam -- Plaintiff's Exhibit 5 -- I am sorry, it is 4 and 5 is their rule. Four says that every student under the NBME's guidelines gets three changes.

The fact of the matter here is that Ewing was singled out. And, when Counsel goes and suggests to you some particular factual matter --

QUESTION: Can you give me an idea why -- w-h-y -- why Ewing was singled out?

MR. CONWAY: No, Your Honor, I can't, and that is the bottom-line notion of an arbitrary decision. They said he was qualified. Dean Reed, with whom he spoke right after he took the exam, and Dean Reed was the Dean in charge of this program -- told him, oh, yes, you will probably be given a second chance. That is in the record.

QUESTION: Do you mean just out of the clear blue they decided one guy we will sock it to?

MR. CONWAY: There is nothing in the record --

QUESTION: Is that --

MR. CONWAY: Yes, Your Honor.

QUESTION: And, they didn't pay any attention to the fact that he had the worse record?

MR. CONWAY: He did not have the worse record, Justice Marshall. Many students had three and four times

the number of deficiencies he had and they were given chances. Many students were given three times, some four.

And, I think when Counsel tries to --

QUESTION: Well, he did have the lowest scores in the Inteflex Program, did he not?

MR. CONWAY: That was the testimony, but there --

QUESTION: Did the District Court make a finding on that?

MR. CONWAY: Yes. But, Your Honor, if I might address that point, it is also --

QUESTION: What is there to address so far as that particular factual question? There may be an explanation as to why it may not be relevant.

MR. CONWAY: Let me offer an explanation then, Your Honor. The stated students, the testimony is clear, were measured on the same score. Thirty-two of them failed this examination. We don't know what their scores were.

QUESTION: But, it isn't irrational for a faculty to treat people in an Inteflex Program differently from people not in the Inteflex Program.

MR. CONWAY: It wouldn't be irrational except they testified they treated them the same. At this stage in their career, Your Honor, the standards students are going to go into their last two years, which is the third and fourth year of medical school, the Inteflex are going

into the last two years, the fifth and sixth. They get combined. They have taken the same basic medical school courses and the University testified that they treated them the same.

QUESTION: It strikes me that a number of reasons pop up during your argument which would, you know, plausibly or facially justify different treatment for your client than the others. You have an explanation that satisfies you for all them, but it seems to me when there are that many plausible reasons, you are getting away from something that was arbitrary or capricious. You are getting to just a judgment call as to why you don't think it should have happened.

MR. CONWAY: Well, Mr. Justice Rehnquist, I guess the only point I can make to that is that the Sixth Circuit found that there was a rule, found that it applied to Ewing, and found that it was violated. Those are the findings of the Court's judgment that is being reviewed here.

In the petition, the Regents have not suggested that the Sixth Circuit applied purely an erroneous standard in some different fashion, haven't cited any error in that regard.

So, the factual predicate that the legal issue arises on here is the Sixth Circuit's finding that there was a rule, it applied to Ewing, that Ewing was qualified within the meaning of the Regents' own standards, and that

he was dismissed despite that and his dismissal resulted in the deprivation of his property interest to not be arbitrarily dismissed. That is the record --

QUESTION: Mr. Conway, can I clarify one thing in my own mind?

MR. CONWAY: Yes.

QUESTION: The property interest, as I understand it under your presentation, is an interest in not being dismissed from the school arbitrarily?

MR. CONWAY: Yes, Your Honor.

QUESTION: Which conceptually at least is different from a property right to retake an exam.

MR. CONWAY: Yes, Your Honor.

QUESTION: Do you contend there was a property right to retake the exam, contract right?

MR. CONWAY: The property interest that gives rights to federal claim, if I could answer this way, Your Honor, is his dismissal.

If a rule were violated, but as a result of that violation of a rule there was no deprivation of property without due process -- For example, if Ewing were dismissed because, after taking this exam, he went to a clinical course where in fact he got an honors, but let's say he had done something in the judgment of the faculty his performance was so poor he should be dismissed for that, then there

would be no violation of his property interest because he couldn't retake the exam because for some other reason he was dismissed.

The significance here is the combination of the fact that the violation of the rule resulted in the deprivation of the property interest.

He might have a contract claim under state law if it were important enough and not a trivial matter, but he wouldn't have a federal claim because what Michigan has defined as his property interest is his dismissal, not some right to take the exam.

QUESTION: Is the property right the dismissal?

MR. CONWAY: Yes. Under the Booker case, cited by the Sixth Circuit, the Michigan Supreme Court has held there is a property right not to be arbitrarily dismissed.

Let me briefly address the Eleventh Amendment issues. I think there are three answers to that argument that was first raised in the rehearing.

The first is that the suit against the Regents has always been considered by the Regents to be against the Regents in their official capacity. That can be shown from the Joint Appendix where they argue that the money damage claim was barred under Edelman v. Jordan, but said to the District Court you can enter an injunctive relief against us. That is somebody who thinks the suit is against

the officials in their official capacity.

Secondly, we have filed, Justice O'Connor, a motion to amend under the teachings of Brandon v. Holt where an amendment was permitted even though no motion had been filed.

And, there is no prejudice shown here. There has been no objection filed by the Regents. And, under Rule 15(b) of the Federal Rules of Civil Procedure, it is appropriate to conform the evidence, to conform the pleadings to the evidence.

Finally, under the Toll case in this Court, the Regents waived any claim that they now belatedly assert, because they told the District Court that they would be liable for injunctive relief.

QUESTION: Your position, I suppose, had the Regents raised such a defense in the District Court, perhaps you would have amended --

MR. CONWAY: Right away. As a matter of fact, it is a tactic that the Regents continue. And, I refer Your Honor to the case of Spielberg v. Regents, cited in our brief, a 1985 decision where, according to the reported case -- It is Spielberg v. Board of Regents. It is Judge Feikens again. It is a 1983 action. It is a full consideration and the Eleventh Amendment is not mentioned there.

You know, some of the hypotheticals that I have

proposed to the Court strike the Court as far-fetched, but they are not. In this instance, for example, in Crook v. Baker, cited in our brief, these same Regents were found to have rescinded a graduate student's degree after the fact.

Now, the relief we are seeking is very limited here. The decision of the professional judgment of the act of admissions is prima facie correct. Unless there is such a substantial departure, as we believe there is in this case, that presumption carries today.

But, if there is a substantial departure, whether we look at it under the Romeo test proposed by the American Association of University Professors in their amicus brief, if you look at it under the arbitrary and capricious test which has been discussed by the courts heretofore, the result is the same. There is no rational reason for this decision and the --

QUESTION: May I ask one other question?

MR. CONWAY: Yes, sir.

QUESTION: Assume your client were able to retake the exam other than being sponsored through the University of Michigan, say through his present institution or maybe this national organization would let him take it and he passed with flying colors, he got a perfect score. Would you say that Michigan would then be constitutionally

obligated to readmit him?

MR. CONWAY: Yes, Your Honor, because the consequence is in this case that his dismissal -- and the testimony of the deans is clear -- his dismissal arose strictly from failing the exam. Had he passed the exam, he would have been promoted. Let's remember that if he goes back to Michigan he is going to be under the tutelage of this faculty for two more years. He is not going to be made a physician by any judgment of this Court.

As a matter of fact, I understand, Your Honor, that he will take an examination similar to the NBME for osteopathic medical schools in his current institution.

I should also say that a recent -- If I may, that a recent AMA Journal article indicates that less than half of the medical schools require this exam.

But, we have never asked that the exam be waived or that he be promoted. We are only asking that the University which promulgated some rules be bound to apply those rules to the students they promulgated it to so he can have this opportunity and he will live or die by the results.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Daane?

MR. DAANE: Very little, Your Honor.

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ORAL ARGUMENT OF RODERICK K. DAANE, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. DAANE: We seek here the application of the traditional, rational basis test to assess the eligibility of Mr. Ewing to continue and obtain the relief that he wants. Clearly there were many rational bases for the decision to dismiss Scott Ewing from registration --

QUESTION: May I just clarify that one point? What was the reason for his dismissal from the school?

MR. DAANE: It was the accumulated effect of his academic record, Justice Stevens. If the phrase appears once in the record, it appears ten times, the straw that broke the camel's back was the failure on the NBME exam. Mr. Conway has just told you that he was failed solely because he flunked the exam. And, it is true that that was the precipitating factor which terminated his registration.

QUESTION: Is the accumulation the fact that he didn't have better than a B- average plus the failure of the exam on a very low score?

MR. DAANE: It is the reason I devoted as much time as I did at the outset of my argument, Justice Stevens, to outlining his record for you, because the decision of the faculty was based upon multiple deficiencies, the make-up exams, the low scores. The combination is the cumulative effect of --

QUESTION: Is that to be inferred from the record as a whole or is there some document where that reason is set forth in a rather succinct fashion?

MR. DAANE: I think you will find the record and the reasons set forth in the minutes of the five meetings to which I made reference in succinct fashion.

I would like to comment on Respondent's point or question, why didn't we let him take the test, and just be done with it. Give him a second chance, let him flunk it, no law suit. I think there are two good reasons, two good answers to that question.

The first is that the medical faculty considers it very important that its students display the ability to perform in a timely way and to do the things they are assigned under pressure. Mr. Ewing did not demonstrate that ability, in fact, quite the contrary. He was at the six-year mark when he had completed the work that most Inteflex students complete in four.

But, the more significant and important answer to that question is that our medical faculty feels very keenly its obligation to the public to assure the public that the holder of a M.D. degree from Michigan is a qualified physician. They had reached a careful and considered judgment that Mr. Ewing was not going to be a qualified physician and they felt a duty to dismiss him from registration without

permitting him to go forward in the program.

I think I will conclude with that.

QUESTION: May I ask this question just to clarify my understanding of the case? The District Court's first opinion back in 1982 concluded by holding that the University was entitled to Eleventh Amendment immunity and that there had been no waiver of that immunity. And the subsequent opinion of the District Court addressed the substantive issue in the case without deciding it on Eleventh Amendment immunity. What is the explanation of that?

MR. DAANE: Justice Powell, the motion was for dismissal of Count Three of the Complaint which sought monetary damages. The explanation is that the decision by Judge Feikens was filed before this Court's decision in Pennhurst. Pennhurst changed all perception and the Court's perception, I think, of the scope of the Eleventh Amendment defense as it applied to claims for injunctive relief against the state.

It has been clear for some time that claims for monetary relief were clearly barred, but claims for prospective injunctive relief have been in an even much less clear area, if I may say.

Pennhurst changed that with respect to claims for injunctive relief against states to compel them to conform their conduct to state law.

And, at the bottom of this case, it is our contention that that is what Plaintiff seeks, an injunction compelling the University of Michigan to conform its conduct to its rule. As a constitutional corporation of the State of Michigan, rules created by the University may be regarded as state laws, I think, within the same scope as the state laws which were at issue in Pennhurst.

Therefore, if the case is seen as an effort by Respondent to compel the University to conform its conduct to this so-called rule, then I suggest that it fits within the rubric of Pennhurst and should be dismissed for lack of jurisdiction.

Thank you very much, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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SCOTT E. EWING

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BY Paul A. Richardson

(REPORTER)