

ORIGINAL

SUPREME COURT OF THE UNITED STATES

In the Matter of:

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No. 87-399

SUPREME COURT OF VIRGINIA AND :
DAVID B. BEACH, ITS CLERK, :

Appellants, :

v. :

MYRNA E. FRIEDMAN :
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IN THE SUPREME COURT OF THE UNITED STATES

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Appellants,

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: No. 87-399

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Washington, D.C.

Monday, March 21, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

GREGORY E. LUCYK, Richmond, Virginia; on behalf of the
Appellants.

CORNISH F. HITCHCOCK, Washington, D.C.; on behalf of
the Appellee.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning on Number 87-399, The Supreme Court of Virginia v. Myrna E. Friedman. Mr. Lucyk, you may proceed whenever you are ready.

ORAL ARGUMENT OF GREGORY E. LUCYK, ESQ.

ON BEHALF OF APPELLANTS

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

This is a very important case with a very ironic twist. It's ironic because this case involves an attack under interstate privileges and immunities grounds against the Virginia Supreme Court rule which is intended to promote the interstate mobility of experienced attorneys by providing them with a limited form of bar admission without examination.

Presently Virginia is among the minority of states with what you might call liberal bar admission policies. Twenty-eight states, in fact, limit interstate mobility of lawyers. They provide no form of bar admission without examination. This is a vulcanization of the legal profession, and this is a vulcanization which has accelerated in recent years and, in fact, eight states have dropped reciprocity admission since 1985 alone.

1 This case is very important because it brings the
2 Court to a crossroads. If this attack on reciprocity
3 admission is sustained, the decision could hasten the trend
4 of the states toward exclusionary bar admission policies
5 and, in fact, thwart the principles of interstate harmony
6 underlying the privileges and immunities clause.

7 QUESTION: Would that be bad?

8 MR. LUCYK: Your Honor, the decision would, in
9 fact, defeat the purposes of the Constitutional provision.
10 It would be bad.

11 On the other hand, the decision upholding
12 Virginia's rule could reverse the current trend and
13 encourage the states to restore interstate mobility afforded
14 by reciprocity admission.

15 It is helpful first to focus on what is and
16 what is not before the Court. This is not a rerun of
17 Supreme Court of New Hampshire v. Piper. Virginia does not
18 restrict admission to the bar only to Virginia residents
19 and, in fact, the record in this case establishes that
20 13 percent of Virginia's 14,000 bar members are nonresidents
21 admitted by examination. Nor is this a challenge of the
22 right of the states to require an applicant to prove
23 knowledge and competence in local law and to demonstrate a
24 commitment to providing service in the jurisdiction before
25 they may be admitted to the bar.

1 Finally, the Court need not address the right of
2 the states, as twenty-eight states do, to require all
3 applicants to take a bar examination or stand for an
4 examination to demonstrate this commitment and competence
5 in local law.

6 What is here is a very narrow issue and it is
7 the right of Virginia to provide an exception to the
8 general admission requirement of examination.

9 QUESTION: Mr. Lucyk, now what do you say is the
10 main purpose that Virginia has in making the residence
11 requirement? There is, as I understand it, already in
12 Virginia a requirement of full-time practice in Virginia
13 to be admitted on motion.

14 MR. LUCYK: That is correct, Justice O'Connor.

15 QUESTION: So what is there above and beyond
16 that that is Virginia's interest in the residence
17 requirement?

18 MR. LUCYK: Virginia's interest in requiring
19 residence is to ensure that this is, in fact, a restricted
20 license to practice law. Admission by examination is a
21 form of general admission. It entails no long-term
22 restrictions, whereas Virginia intends by its reciprocity
23 program to encourage lawyers, experienced lawyers, to
24 come into the state and provide their full-time
25 availability to the service of Virginia clients.

1 QUESTION: The fact that they agree to work
2 full-time in Virginia is not enough to meet that?

3 MR. LUCYK: Justice, the full-time practice
4 requirement serves to provide 9 to 5 availability, but it
5 does not promote availability of that attorney to Virginia
6 residents and Virginia clients beyond those normal office
7 hours. That is the function of residence.

8 QUESTION: Is there any state bar requirement
9 that a lawyer give a certain amount of pro bono service or
10 have an office open beyond 5 o'clock, or something like that?

11 MR. LUCYK: No, Justice O'Connor. The Virginia
12 Supreme Court presumes that applicants admitted by
13 examination have demonstrated that commitment to the
14 practice of law in the state, that they will provide without
15 any requirement that commitment to providing pro bono
16 services and making their services available.

17 We do not believe we can presume that same
18 commitment from someone who is merely paying the annual
19 dues and making an annual promise.

20 QUESTION: And practicing full-time?

21 MR. LUCYK: And practicing full-time in the
22 state. That is correct.

23 We are asking our practitioners admitted by
24 reciprocity to provide, to demonstrate, a greater
25 commitment, and that is to be available during office hours,

1 during the evenings, during the weekends, to provide pro bono
2 services and to make services available to Virginia clients.
3 That is the purpose that is provided by residence which
4 full-time practice alone --

5 QUESTION: What does full-time practice in
6 Virginia mean? Just your availability that you have just
7 described? May he have a case in the federal court in the
8 District of Columbia?

9 MR. LUCYK: Yes, Justice. It is not a
10 prohibition. It does not completely prohibit.

11 QUESTION: Well he is not practicing full-time
12 in Virginia if he spends a week trying a case in
13 San Francisco.

14 MR. LUCYK: No, Your Honor, but that doesn't
15 defeat the purposes of the full-time practice rule which
16 in and of itself is intended to ensure that an attorney has
17 sufficient contacts with Virginia law on a consistent basis.

18 QUESTION: That may be the purpose, but is it
19 the language of the rule? Isn't the rule rather vague in
20 its structure?

21 MR. LUCYK: The rule is vague, I would agree
22 with you, in its language but it has been interpreted by
23 the Virginia Supreme Court in In Re Brown in 1972 and in
24 In Re Titus. The Court defines its rule to mean that the
25 applicant must open an office for the practice of law in

1 Virginia and engage regularly in the practice of law from
2 that office.

3 QUESTION: You certainly have many lawyers
4 practicing law who have lived all their life in Virginia and
5 yet cannot be admitted to the Virginia bar. Is that not
6 true?

7 MR. LUCYK: I don't know if that is true or not,
8 Your Honor.

9 QUESTION: You must know some. I do.

10 MR. LUCYK: I do know of one. I do know of one
11 and that was a gentleman who sued the Virginia Supreme Court
12 over the full-time practice requirement in 1985. I assume
13 there are others, but I don't think the number is so great
14 that it is substantial or at least as a factor in this case.

15 QUESTION: How does the Supreme Court of Virginia
16 police the full-time practice requirement. Is it an easy
17 requirement to police?

18 MR. LUCYK: It is not, Mr. Chief Justice. We
19 rely upon, essentially, reports from other members of the
20 bar or someone advising or informing the bar disciplinary
21 body that the rule is not being complied with. It is not
22 a self enforcing requirement and, therefore, we rely on the
23 additional exposure to the state occasioned by residents
24 to allow or to provide for additional scrutiny of the
25 attorney.

1 QUESTION: For what period of time must the
2 lawyer be a full-time practitioner in Virginia?

3 MR. LUCYK: So long as the person intends to
4 hold on to that restricted license to practice by
5 reciprocity. It is a continuing requirement.

6 QUESTION: Does the license itself contain the
7 restriction?

8 MR. LUCYK: No. The licenses, the general
9 license that is issued --

10 QUESTION: Has any lawyer ever been disbarred
11 for practicing elsewhere?

12 MR. LUCYK: To my knowledge, Your Honor, there
13 has been one disciplinary case involving noncompliance with
14 the full-time practice requirements. There may have been
15 others, but I am not --

16 QUESTION: What happened in that case?

17 MR. LUCYK: I do not know the specific facts
18 of that case.

19 QUESTION: Were there other charges as well as
20 failing to practice --

21 MR. LUCYK: I believe there may have been.

22 QUESTION: So, as far as you know, nobody has
23 ever been disbarred simply because they practiced
24 somewhere else?

25 MR. LUCYK: No, Your Honor, and, frankly, there

1 haven't been that many attorneys who have been admitted by
2 this rule up to that time.

3 QUESTION: What about the residence requirement?
4 How long -- say, the person lives in a hotel over in
5 Arlington and at the time of making application gets the
6 certificate and then moves to Maryland. What do you do
7 about that?

8 MR. LUCYK: That individual would be out of
9 compliance with the rule and would be subject to revocation.

10 QUESTION: Has anybody ever had their license
11 revoked for moving from Virginia to Maryland?

12 MR. LUCYK: I'm not aware if there have been,
13 Your Honor, and, again, the numbers in the past haven't
14 been that great that compliance has posed great problems.

15 QUESTION: Why is that? That surprises me.
16 You may have noticed there are a lot of lawyers in
17 Washington, D.C., and a fair number of them live in
18 Virginia. And I would assume that practicing in Washington
19 as counsel for a government agency, for example, or on the
20 staff of a government agency would not constitute the
21 regular practice of law in Virginia. There must be a lot
22 of lawyers.

23 MR. LUCYK: It would not, Justice Scalia. And
24 there are quite a few lawyers who reside in the area and
25 who practice up here who take the Virginia Bar examination.

1 There are a significant number, in fact. Nearly 2,000 of
2 our bar members are nonresidents admitted by examination, so
3 it's certainly a reasonable and adequate alternative which
4 is available.

5 QUESTION: Now, once they are admitted by
6 examination they do not have to engage in the regular
7 practice of law in Virginia?

8 MR. LUCYK: That's correct. Once they have
9 passed the examination, they've demonstrated their competence
10 in local law and they have certainly established, or shown
11 a commitment, to a substantial practice in the jurisdiction.

12 QUESTION: But then they aren't, as you say,
13 available twenty-four hours a day. Not necessarily.

14 MR. LUCYK: No, Justice White. It's a different
15 kind of license. Admission by examination --

16 QUESTION: And after examination, they can move
17 out of the state, too.

18 MR. LUCYK: Yes, sir, Justice. We can presume,
19 and this Court has made clear: you can presume that in
20 real life no one is going to take the bar exam unless they
21 intend to make a substantial commitment to practice in the
22 state.

23 QUESTION: Well, they intend to practice in
24 Virginia. The only thing is they change their mind after
25 a couple of years and join a firm in another state.

1 MR. LUCYK: And the Virginia Supreme Court doesn't
2 object to that and it has no problem with that. Someone
3 who has taken the examination has shown that commitment to
4 Virginia.

5 QUESTION: Let's assume two brothers are
6 practicing law in a partnership in Chicago. They decide to
7 set up a partnership, move to Virginia with their business,
8 and so they set up a partnership in Virginia. And one of
9 them lives in Virginia and the other one lives across the
10 line in Maryland. I take it one can be admitted on motion
11 and the other cannot.

12 MR. LUCYK: That's correct, Justice.

13 QUESTION: I'm not sure that makes a whole lot
14 of sense.

15 MR. LUCYK: Justice, it certainly makes sense
16 when you view the purposes of the rule as a whole, and that
17 is to encourage lawyers to move and provide services not
18 just in the border areas of Virginia but all over the state,
19 in the southern and western mountains, in the Piedmont
20 region, on the Eastern Shore.

21 The purpose of the rule, and the rule was
22 adopted, to make it easier for older practitioners to move
23 into the state and to establish a practice, maybe those
24 who have to move because of some change in their personal
25 or professional commitments.

1 It also assists, for instance, the state and
2 local government law offices or even Virginia's free legal
3 services programs for low-income people who must recruit
4 from a small pool of --

5 QUESTION: Do you really think this law attracts
6 lawyers to go out into back woods and practice? Do you
7 really think that?

8 MR. LUCYK: I think the law provides that purpose.

9 QUESTION: Does it do it? Does it attract them?
10 Because my next question is how many has it attracted
11 so far?

12 MR. LUCYK: Justice, I have no empirical evidence
13 to show how many lawyers may have been attracted to
14 particular areas of the state, but I do know that, for
15 instance, our legal services program and farm bill will
16 rely upon this rule to bring attorneys in and get them
17 admitted so they can represent indigent people in that
18 area. You know, the rule does serve that beneficial
19 purpose.

20 So, in effect, we view waiver of the examination
21 as an incentive to give lawyers the opportunity to come
22 into the state and devote their full time and make their
23 availability to the practice of law and the service of
24 Virginia clients. In that sense, the rule, we submit, is
25 a bridge which actually promotes interstate mobility.

1 It's a bridge across state lines and it is a bridge which is
2 not provided by twenty-eight other states which require all
3 practitioners to take the bar examination.

4 QUESTION: Yes, but it still would perform that
5 function if you knocked out the feature of the rule that
6 they challenge.

7 MR. LUCYK: Justice Stevens, I think the problem
8 is that it would not perform that function to the extent
9 the Virginia Supreme Court would like it to because, again,
10 we are talking about an attorney's commitment to full-time
11 availability. And someone who leaves the state, who leaves
12 the area, and goes to a distant location in another state
13 is not going to be available to the same extent as someone
14 who resides directly in the community and is available for
15 a visit in the evening.

16 The other thing that the residence requirement
17 does in terms of aiding in the enforcement, or at least
18 compliance with full-time practice, is it ensures that the
19 attorney's social contacts and community contacts aren't
20 going to bring that attorney additional business.

21 Now, if our attorney who resides in Vienna,
22 Virginia, you know, has social contacts, meets people on
23 weekends and the evenings, people who ask legal questions
24 and need services, and the attorney says, sure, come on
25 into my office and we'll talk about it, that attorney is

1 not facing the potential of developing a substantial out-of-
2 state practice. Whereas our attorney in Cheverly, Maryland,
3 who is meeting with his or her social contacts in the
4 evenings or on the weekends, who are Maryland residents, and
5 these are persons who are saying, look, I've got this legal
6 problem, come on in to my office, well, then we see an
7 expanding or growing out-of-state practice which defeats the
8 purpose of full-time practice.

9 QUESTION: Well, I certainly want to congratulate
10 Virginia on wanting to get more lawyers in this way. It
11 certainly is that most states seem to think they have too
12 many, and you're describing this as really a device to
13 bring in as many lawyers as possible.

14 I thought we were arguing about an exclusionary
15 aspect of it, not an inclusionary aspect of it.

16 MR. LUCYK: Well, Justice, I think our point
17 here is that that you've got to look at the rule as a whole
18 and what is it intended to do. If you look at it at a
19 narrow focus, and if you look at it from the eyes of
20 someone who thinks there should be no restrictions in
21 each state for admission to the bar, then it may appear to
22 be exclusionary. But if you look at it from the eye of
23 a state supreme court that wants to make legal services
24 available to its citizens, yet still provide some
25 guarantee of competence and commitment among its attorneys,

1 then it is an inclusionary rule. It does. It serves as an
2 invitation for experienced attorneys to come into the state
3 and begin servicing Virginia clients on a full-time basis.

4 So, it is, indeed, we would submit, an inclusive
5 not an exclusive rule. It is a bridge across state lines
6 which applies only to foreign attorneys. It does not apply
7 to resident attorneys. The rule is intended to apply and
8 it's called foreign attorneys, to allow those foreign
9 attorneys to migrate, settle and abide in Virginia and
10 begin earning their living and assisting Virginia clients
11 by engaging in the practice of law.

12 QUESTION: If we agree with the Appellee in
13 this case, what will be the consequence? Will everybody
14 have to take the exam or nobody will have to take the
15 exam is what I'm talking about.

16 MR. LUCYK: That would be up to the Virginia
17 Supreme Court. I do know the supreme court, if this
18 requirement of residence is struck down, will re-examine
19 its rule to determine whether it meets their expectations
20 of assuring commitment and competence from untested
21 practitioners. And I think, I would submit, I'll
22 speculate, and I'd be willing to bet all the money in
23 my pocket on that the fact that if residence is struck
24 that reciprocity in Virginia will be eliminated.

25 I think that we have to consider that it's not a

1 ramification that may occur only in Virginia. There's been
2 amicus brief filed by four states in this case, and all of
3 those four states joined in a brief that said residence is
4 going to cut into our ability to ensure that our
5 practitioners are committed to serving, to practice the law,
6 in the state.

7 One of those states, Wyoming, has already
8 abolished its reciprocity rule. It did that in December.

9 QUESTION: Four out fifty is not a very good
10 recommendation to me.

11 MR. LUCYK: Well, Justice, there are already
12 twenty-eight states which do not provide admission without
13 examination, so we are looking at twenty-two states. Of
14 those twenty-two, seven of them require residence.

15 QUESTION: Twenty-two doesn't say too much to me.

16 MR. LUCYK: So the numbers really are, I think,
17 more in favor of our position and if these seven states
18 abolish reciprocity then we are looking at no more than
19 fifteen, a handful of states which still include reciprocity.

20 The other point that we would like to make is
21 that discretionary admission without examination has been
22 subject to further Constitutional attacks on a regular
23 basis involving these so-called interstate harmony
24 provisions of the Constitution. We can see further attacks
25 down the road on the full-time practice requirements. For

1 instance, a non-resident attorney will then challenge the
2 full-time practice requirement saying it imposes an
3 excessive burden on the non-resident who has to maintain an
4 office in the state. So we may see full-time practice
5 disappear.

6 We may also see the requirement of reciprocity
7 disappear, because it is, indeed, a reciprocity program.
8 Texas, for instance, will not admit Florida lawyers to its
9 bar because Florida law requires everyone to take an
10 examination. The same applies to Louisiana lawyers, all of
11 whom are required to take an examination. I can see the
12 Louisiana lawyer suing the Texas State Bar because they do
13 not grant reciprocity to Louisiana lawyers, and that being
14 struck down on the Commerce clause because reciprocity
15 is a protectionist provision that the Commerce clause bars.
16 And once that happens, then all of the rest of those states
17 are going to fall like dominoes and we are going to have
18 a complete vulcanization of the legal profession.

19 QUESTION: Louisiana follows the Napoleonic
20 law and not the common law?

21 MR. LUCYK: That's correct, Justice. Louisiana's
22 different. All of the states, I would submit to you, are
23 different, some more so than others.

24 QUESTION: It has civil law.

25 MR. LUCYK: Justice, I think you are correct that

1 Louisiana is the only state that has civil law --

2 QUESTION: Thank you.

3 MR. LUCYK: -- but, indeed, all of the states
4 and the principles of federalism, you know, provide that
5 each state has its own laws. Not every state has the
6 uniform commercial code or other uniform laws.

7 In Virginia --

8 QUESTION: You might try the Commonwealth of
9 Puerto Rico. That might help you out a little.

10 MR. LUCYK: Thank you, Justice Scalia.

11 So, our position then is that the application of
12 the interstate harmony provisions of the Constitution
13 against these reciprocity rules doesn't really make sense,
14 because in a sense you are defeating the very purpose that
15 these rules are intended to promote.

16 And I'd just like to state a few more words
17 about why we believe that privileges and immunities clause
18 ought not apply to discretionary admission without
19 examination.

20 First, a holding in this case that we must admit
21 the Maryland lawyer who under Rule 1(a)(1) without regard
22 to residence, in fact, would require absolute equality in
23 Virginia's treatment of residents and non-residents. We
24 submit this Court has recognized on numerous occasions that
25 absolute equality is not a prerequisite of the privileges

1 and immunities clause. And, in fact, this Court has approved
2 the principle that the clause is satisfied if a state
3 provides a reasonable and adequate means for the
4 non-resident's enjoyment of the regulated activity.

5 Here, the bar examination is, in fact, a
6 reasonable and adequate alternative means.

7 QUESTION: May I ask you a question about the
8 general subject because you know so much more about it than
9 I do. Has anybody ever challenged the reciprocity
10 requirement itself? In other words, what is the reason
11 for saying a Florida lawyer where they don't have it should
12 not be admitted whereas an Illinois lawyer may be admitted.
13 What's the reason for that?

14 MR. LUCYK: What is the reason for the rule?

15 QUESTION: Has anybody said that's subject to
16 challenge? Or any of these -- talking about all the others.

17 MR. LUCYK: No, Your Honor. To my knowledge,
18 that case hasn't been brought yet. But it's only in very
19 recent years that we've seen commerce clause and privileges
20 and immunities challenges to these discretionary admission
21 provisions. And it's only recently that the courts have
22 begun to apply those provisions to these discretionary
23 admission --

24 QUESTION: I'm just reflecting, in terms of the
25 interest you describe of giving good service to the Virginia

1 clients, it is puzzling to me why a Florida lawyer wouldn't
2 qualify as much as an Illinois lawyer, if he had met the
3 restrictions of full-time practice and residence if he moved
4 from Florida. But he would not be eligible? He or she
5 would not be eligible?

6 MR. LUCYK: Justice Stevens, let me articulate one
7 reason why I think, you know -- the presumption seems to be
8 in this day and age that if there is any condition which
9 limits admission to the bar it must be the product of
10 economic protectionism.

11 But there is another very valid reason for a bar,
12 a state bar, wanting to maintain a reasonable and
13 controllable size of the bar it is required to regulate.
14 And by the 1990s, there will be one million practicing
15 attorneys in this country. It's a staggering thought for
16 a bar-regulating authority to have to consider, even if
17 just ten percent of those attorneys seek admission to the
18 bar by reciprocity, regulating a bar of 100,000 attorneys
19 or even more, especially for a bar like Virginia which has
20 only 14,000 attorneys at this time. And trying to regulate
21 all of the potential misconduct problems that could arise.
22 Indeed, most of the states now have great backlogs in
23 their disciplinary proceedings because they simply cannot
24 keep up with the numbers.

25 But not only regulating misconduct problems, but

1 also trying to enforce, for instance, mandatory continuing
2 legal education requirements on a national scale.

3 QUESTION: Well, I think that all makes good
4 sense, but I would suppose that is directed at the distinction
5 between reciprocity states and nonreciprocity states, just
6 as in the same way that you might say we'll only take
7 lawyers whose names begin with A through M. Because that
8 would serve the same purpose.

9 MR. LUCYK: Justice, it certainly may serve the
10 same purpose, but we submit here that Virginia's rule does
11 achieve a number of very laudable purposes.

12 It does open the doors to reciprocity for and
13 grant a right of travel to non-resident attorneys, so they
14 may come into the state and engage in the practice of law.

15 At the same time, it still ensures a guarantee
16 of competence and commitment from those attorneys. So we
17 submit that the Virginia rule does achieve a balance, a good
18 balance, from the complete exclusion that was presented,
19 for instance, in the Piper case, and from the unregulated,
20 uncontrollable bar which might exist if there were no
21 limitations on the authority of a state to impose some
22 conditions on admission.

23 If there are no further questions, I'd like to
24 reserve a few minutes for rebuttal.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lucyk.

1 We will hear now from you, Mr. Hitchcock.

2 ORAL ARGUMENT OF CORNISH F. HITCHCOCK, ESQ.

3 ON BEHALF OF APPELLEE

4 MR. HITCHCOCK: Thank you, Mr. Chief Justice, and
5 it may it please the Court:

6 There are two ways that a lawyer may be admitted
7 to the Virginia Bar. The first method is to take and pass
8 the bar examination which is administered twice a year and
9 which is available to all applicants who meet certain
10 educational and character requirements. The second method
11 is the one at issue here and it allows lawyers to be
12 admitted without taking the bar examination if they meet
13 three requirements: first, they have been licensed for a
14 least five years by a state which extends the same
15 opportunity to Virginia lawyers; second, they are willing
16 to comply with the full-time practice requirement; and,
17 third, they are permanent residents of Virginia. I should
18 add that these are ongoing requirements, that one may be
19 liable to expulsion from the Virginia Bar if a motion
20 applicant moves out of the state or ceases to practice
21 there on a full-time basis.

22 The residency requirement that is the focus of
23 today's case is justified on two grounds: first, that it
24 assures a lawyer's commitment to the state; and, second,
25 that it helps to assure compliance with the full-time

1 practice rule.

2 If I may, at this point, I'd like to respond to a
3 point Mr. Lucyk made in response to Justice O'Connor's
4 question about after hours availability. This is the first
5 time we have heard the argument that lawyers must be
6 available after 5 o'clock or that that's one of the
7 purposes of why the rule is in effect. I think it's unlike
8 the cases involving police officers or fire officers who
9 are expected by municipality to be available after hours.

10 To the extent that Virginia did want to
11 impose such a requirement, however, Ms. Friedman is willing
12 to honor any commitment that Virginia imposes upon its own
13 citizens. That's really what I think is the core issue
14 here.

15 She is willing to do whatever Virginia asks its
16 own citizens to do in order to be admitted on motion. She
17 is complying with the full-time practice rule. She is
18 willing to pay Virginia Bar dues. She is willing to take
19 the continuing legal education requirements that Virginia
20 imposes upon bar members, regardless of whether they are
21 admitted on motion or by examination. She is willing to
22 do pro bono volunteer work.

23 Despite all of these commitments, her application
24 was denied solely because of the fact that when she leaves
25 the parking lot at night she goes home to Maryland.

1 Before discussing the privileges and immunities
2 clause legal issues, I'd like to make a comment on the
3 facts here which might help put the issue in perspective
4 and show how unconnected residence is with the goals that
5 the state is advancing.

6 Ms. Friedman began work with her current
7 employer in Virginia in January of 1986. At that time,
8 she was living in Virginia and qualified for admission on
9 motion under Rule 1(a)(1). The problem in her situation is
10 that the next month she got married and moved to her
11 husband's home in Maryland. Suppose instead of getting
12 married then, she had waited a year, had been admitted on
13 motion. If at the time she got married a year later,
14 she wanted to move into her husband's home in Maryland,
15 she had to chose between facing the possiblity of some
16 expulsion or disciplinary action under Rule 1(a)(3) or
17 else sitting down and taking the full Virginia Bar
18 examination.

19 While the situation may not be universal, I
20 suggest it illustrates one way in which this rule does not
21 advance the goals that the Commonwealth suggests.

22 QUESTION: Is that such a terrific hardship
23 to sit down and take the Virginia Bar? I mean that's
24 really what this all comes down to, that she just doesn't
25 want to take the Virginia Bar examination.

1 MR. HITCHCOCK: It is, Your Honor, particularly
2 vis-a-vis equally qualified applicants in the same situation
3 she is who are making the same commitment.

4 Let me, since you bring it up, illustrate that
5 it does impose a hardship. First of all, a lawyer who has
6 to take the examination must wait up to six or seven months
7 in order for the examination to be administered. They then
8 must wait an additional three --

9 QUESTION: That is true of everybody getting
10 out of law school. They have to wait for awhile for the
11 exam and no one gets it instantly.

12 MR. HITCHCOCK: Yes, Mr. Chief Justice, but
13 here again we are dealing with experienced lawyers who
14 the state is willing to say we will excuse you from this
15 waiting time, from this obligation, if you live in Virginia.
16 As a result of that, it puts her in a slightly different
17 position.

18 QUESTION: She just couldn't work at her job
19 for six or seven months.

20 MR. HITCHCOCK: That is true, too.

21 The other thing here is that this rule offers
22 a special opportunity for experienced lawyers, people who
23 are out practicing, holding down a full-time job, holding
24 a full-time practice, who have to take time away from that
25 practice in order to study for and prepare for the bar

1 examination. As we've pointed out, that is a fairly
2 substantial burden on a practicing lawyer.

3 The review course which a lawyer would have to
4 take, the most popular one meets for twenty hours a week
5 for six weeks before the bar examination. A lawyer is
6 likely to have to take that, plus spend additional time
7 preparing. Moreover, the lawyer who has to go through --

8 QUESTION: But there is no doubt, I take it,
9 that Virginia could require that of everyone.

10 MR. HITCHCOCK: That is correct. They could
11 require the examination of everyone. But what Virginia
12 has said: we don't believe that people should, that
13 experienced lawyers should be obliged to take this test.
14 They don't have to prove themselves if they are willing
15 to live in Virginia.

16 Having made that decision and having an
17 applicant such as Ms. Friedman who has made exactly the
18 same commitments and is presumably as competent as an
19 equally qualified resident, the only issue is whether
20 the fact she is willing to live in Maryland at night means
21 that she must be tested to the same extent as someone
22 just out of law school or somebody who already lives in
23 the state.

24 QUESTION: Well, Mr. Hitchcock, at least one
25 state, rather one court, the Seventh Circuit, I believe,

1 has held in a very similar situation that the right to be
2 admitted to practice on motion just isn't a fundamental
3 privilege, protected under the privileges and immunities
4 clause. Isn't that right?

5 MR. HITCHCOCK: Let me address that. The court,
6 before it got to that point --

7 QUESTION: In the Sestric case.

8 MR. HITCHCOCK: The Sestric case, yes. The
9 Sestric case was distinguishable first of all because it
10 held that the clause doesn't apply because the universe of
11 people being advantaged are new residents of Illinois and
12 the people being discriminated against were old Illinois
13 residents as well as non-residents. Finding no symmetry
14 between residents versus non-residents, the court said
15 that the clause does not apply for that reason.

16 That is not the situation here.

17 QUESTION: I think the court also had the view
18 that admission on motion just isn't a fundamental privilege.

19 MR. HITCHCOCK: That was an additional point
20 which they discussed. But, here, the distinction that was
21 made here, and I think in Sestric as well, is that as long
22 as a state gives you some opportunity to get a license,
23 that it is free to impose preferential or discriminatory
24 conditions even if, as in this case, they would be run
25 afoul of the Constitution.

1 It's like an unconstitutional condition that
2 the court has recognized in other cases, that even if a
3 state has no obligation to give a certain gratuitous
4 benefit to people it still must grant that benefit in a
5 manner that's consistent with the Constitution.

6 QUESTION: Well, if admission on motion is not
7 a fundamental privilege, then there's nothing unconstitutional
8 about imposing that condition.

9 MR. HITCHCOCK: If it were, but I think that
10 you have to focus on what Piper held. Piper said,
11 consistent with a number of earlier cases, that it is the
12 opportunity to practice law that is at issue. More
13 specifically, in Toomer, in Austin, the court said the
14 inquiry is whether out-of-state residents are being treated
15 on terms of substantial equality with non-residents.
16 Have state residents demanded for themselves a benefit
17 which is not being extended to equally qualified
18 non-residents. That's precisely the situation here.

19 Virginia residents have the opportunity to be
20 admitted in a very efficient and inexpensive manner,
21 indeed, almost a risk-free manner and that option is
22 simply denied to out-of-state residents.

23 I think the problem with the argument that's
24 advanced by the state and in Sestric is the assumption
25 that the clause only applies if lawyers are totally

1 excluded from the bar, if out-of-staters are totally excluded
2 from a certain privilege.

3 This Court has never held that. I think this
4 case is closest to the cases involving commercial licenses
5 where a state has said we will let out-of-staters in but
6 we are simply going to charge them a higher licensing fee.
7 Now, there may be no fundamental right to pursue a certain
8 occupation. In the fishermen cases, for example, the
9 state may say that we are going to put such and such type
10 of fish are off limits for environmental purposes and
11 allow no one the opportunity. But once they make a decision
12 to allow someone to pursue their professional career in
13 the state, they must make it available on terms of
14 substantial equality to residents as well as non-residents.

15 To follow up on Justice Scalia's earlier
16 question, there just is not that term of substantial
17 equality here, to make lawyers, as a practical matter,
18 take time away from their existing practice to review
19 courses they may not have examined since they were in
20 law school and probably are not going to be practicing
21 in their practice in Virginia, to have to wait for ten or
22 eleven months to be admitted through the exam process
23 when lawyers can be admitted on four months by examination,
24 to have basically a risk-free way of getting into the
25 bar as opposed to the risk that any lawyer faces upon

1 taking examination.

2 Indeed, I would suggest, for experienced lawyers
3 that risk may be particularly greater. If a lawyer has
4 specialized in the tax field, there are a lot of subjects
5 that that lawyer may not have addressed since he or she
6 was in law school and must bone up on them and risk the
7 possibility of failure even though that lawyer is not
8 going to deal with them.

9 Finally, there's one additional aspect where
10 there is a penalty here. If Ms. Friedman had stayed in
11 Virginia, she could have been admitted to the bar on motion
12 by paying a fee of \$225.00. Because she moved out of the
13 state, she is required to pay \$100.00 extra in order to
14 take the bar examination. It's an example of the
15 preferential treatment.

16 QUESTION: Can't a state make an added fee
17 there for non-residents because of the added difficulties
18 of investigating their background?

19 MR. HITCHCOCK: It may, Mr. Chief Justice.
20 Indeed, in this case, for exam applicants there is a
21 differential that is directly related to that cost. If
22 a lawyer seeking admission on examination wants to take
23 the examination, he or she is interviewed by a local
24 bar committee in his or her home county. The cost, I
25 believe, is \$50.00 for everything else -- I'm sorry, \$150.00.

1 But if that lawyer lives out of the state and wants to take
2 the examination, there is an extra charge of \$175.00 solely
3 for the character reference analysis.

4 That sort of distinction, which is directly
5 tied to the extra burdens of investigating character of
6 people who live out of state, I don't think we would
7 challenge because of that direct tie. It's closely
8 tailored. There is a substantial relationship under the
9 criteria this Court has enunciated for that kind of
10 criteria.

11 But that's not this case. You take a person
12 who is equally qualified and the fact that she gets
13 married and moves to her husband's home in Maryland means
14 she has to pay more --

15 QUESTION: Did you challenge that explicitly
16 in the Fourth Circuit? Did they cover that in their
17 opinion?

18 MR. HITCHCOCK: No. We did not challenge the
19 differing fee.

20 The point I'm making, to get back to Justice
21 Scalia's first question, it's part of the burden that is
22 being placed on lawyers who are as qualified as Virginia
23 residents but who have to take the examination.

24 Justice Scalia asked isn't this about somebody
25 who doesn't want to take the examination. My answer is

1 yes, because there are important practical consequences if
2 one must take the examination as opposed to being able to
3 be admitted on motion. And they are: the greater risk, the
4 higher cost, the review course, and the additional time
5 that has to be spent. Those are practical matters that
6 concern experienced lawyers.

7 QUESTION: Mr. Hitchcock, I tend to agree with
8 your point that this a pretty blunt way and inefficient
9 way of achieving what Virginia asserts it has in mind,
10 that is some assurance of full-time interest. But I would
11 think it would normally, that fit, would normally be
12 enough in a run-of-the-mind equal protection case, to meet
13 a rationality test. It's pretty blunt, but close enough
14 for government work as we say.

15 What you're arguing, it seems to me, is that
16 once you identify a fundamental right that's subject to
17 the privilege and immunity clause, every aspect that has
18 anything to do with that right suddenly gets elevated
19 to a point where there can't be any loose fit at all.

20 You're really requiring very refined judgements
21 by the legislature, by the Supreme Court of Virginia here.
22 Why should we go along with that? Why shouldn't we just
23 say, if you're excluded that's bad. But here, you're not
24 excluded. What we're arguing about is whether you have
25 to take the bar exam. That's not a privilege or immunity.

1 MR. HITCHCOCK: The answer, Justice Scalia, is
2 that this Court has required a heightened form of scrutiny
3 whenever there is preferential treatment for out-of-staters
4 vis-a-vis equally qualified in-staters. It's part of the
5 importance that the privileges and immunities clause plays
6 on the Constitutional framework, of not allowing equally
7 qualified people from another state to be denied a
8 certain benefit.

9 The standard, I guess, in the Camden case, as
10 well as in the Court's decision in Piper, is not -- it
11 says that there must be a substantial reason for the
12 discrimination or the preference in question and there
13 must be a close fit. It has employed heightened scrutiny,
14 more than is required in the rational basis cases, given
15 the importance of the clause in not erecting barriers
16 between people who are trying to pursue professional
17 pursuits in the different states.

18 So, my answer is the Court has required the
19 opportunities, but they do provide opportunities if the
20 consideration is closely tailored. As I indicated in
21 response to the Chief Justice's question, if somebody wants
22 to take the examination but lives out of the state and
23 cannot be examined by a local character committee, he may
24 be able to charge them a little bit more money to have
25 the National Conference of Bar Examiners do the work.

1 But that's very different in kind from a rule
2 that says we have two equally qualified lawyers, both
3 working side by side in the same office, both making the
4 same commitment, both willing to represent Virginia lawyers,
5 and one of them can be admitted because he or she lives
6 in Virginia -- on motion because he or she lives in
7 Virginia -- and the other has to take the bar examination
8 because she crosses the Theodore Roosevelt Bridge on her
9 way home at night is not a substantial fit. There's not
10 a substantial reason for making a distinction on that
11 basis. There are other more closely --

12 QUESTION: Well, is this much different than
13 would be a Virginia rule that said if you graduate from a
14 law school in Virginia you need not take the bar? But if
15 you graduate from any other law school you must?

16 MR. HITCHCOCK: I think if the rule said that
17 Virginia lawyers may be admitted without taking examination --

18 QUESTION: No. Graduates from Virginia law
19 schools.

20 MR. HITCHCOCK: -- provided that admission to a
21 Virginia law school was available to out-of-state
22 residents, that out-of-staters could try to get in to the
23 Virginia Bar through this method, no, I don't see a problem
24 with that.

25 QUESTION: Well, if they say if you graduate

1 from Virginia law schools you need not take the bar, but if
2 you graduate from any other law school in the country you
3 must take the bar?

4 MR. HITCHCOCK: I don't think there would be a
5 problem with that. And the reason is that if you're
6 creating a preferential way of obtaining a license, so
7 long as there's an option for lawyers who want to avoid
8 the examination of taking advantage of that, i.e., by
9 attending the Virginia law school, then I wouldn't see
10 the problem because you have the open access. The critical
11 point is that one must attend the Virginia law school,
12 and lawyers who say I want to practice in Virginia, without
13 having to take an examination, have an opportunity to
14 pursue that option regardless of their state of
15 citizenship or where they come from.

16 QUESTION: So, the bar exam isn't much of a
17 fundamental right, having to take the bar exam?

18 MR. HITCHCOCK: The fundamental right is the
19 opportunity to pursue one's professional pursuits free
20 from restrictions that discriminate solely on the basis
21 of state citizenship and which are not substantially
22 related to a state's goal. That's really what we're
23 talking about here.

24 The question is not do you have some means of
25 pursuing your profession? The Court did not ask that

1 question in the fishermen cases or even in Piper. The
2 argument in Piper was: sure, you can practice in New
3 Hampshire. You can appear pro hac vice and come in on
4 individual cases. We're not keeping you out. There's a
5 way you can come in and practice law in our state, but
6 we're just not going to let you obtain a particular license.

7 The fundamental right, going back to Courtfield
8 v. Coryell, and in every subsequent case through Piper,
9 has focused on can somebody pursue their career in a
10 manner, with the same, on terms of substantial equality
11 with in-state residents. That is simply not being provided
12 here.

13 The only reason why she's being excluded is
14 her citizenship in another state. Virginia has made a
15 decision that its own citizens don't have to take the
16 bar examination if they meet these criteria. Having
17 satisfied the same criteria, the only question is may she
18 be excluded.

19 If I may, I'd like to turn now to the specific
20 rationales that the Appellants have raised in defense of
21 this particular rule.

22 The first rationale is that it promotes a
23 lawyer's commitment to Virginia. My initial comment is
24 I'm not really sure what that means. It seems to be a
25 reformulation of the arguments which the Court rejected

1 in Piper about how residence assures one's competence and
2 commitment and ethical behavior and willingness to do
3 volunteer work and the like. I think there was a very
4 straightforward answer which the Court gave in Piper that
5 I think answers this concern. The Court, as we read the
6 case, took a very pragmatic approach. It said: lawyers
7 are not going to seek admission to a bar unless they
8 anticipate a considerable practice there, unless they are
9 willing to take on the burden of paying bar dues and
10 continuing legal education requirements, and any pro bono
11 requirements, anything else that the state may seek to
12 impose.

13 There is an ongoing investment, a personal
14 investment, of time and money that lawyers make if they
15 seek admission to a bar, regardless of whether they are
16 admitted on examination or admitted on motion.

17 Suppose, for example, an experienced lawyer is
18 asked by a client can you represent me in Virginia or in
19 Maryland. If it's a one-time offer, the lawyer may have
20 no need to be admitted and may not seek to be admitted as
21 a member of the bar. But if the client says can you
22 represent me on a regular basis. Can you come in and
23 handle all the litigation I've got or all this kind of
24 work that I have in that state, the lawyer may say it's
25 worth my while to seek admission to that bar, with all the

1 benefits as well as the responsibilities, that that entails.

2 So that is why, we would suggest, that the
3 arguments about commitment which the Court rejected in
4 Piper apply with equal force in the context of motion
5 admissions, regardless of whether there's a lesser burden
6 in terms of being able to be admitted on motion without
7 taking the examination. Lawyers don't seek admission to
8 state bars unless they anticipate that they are going to
9 use the opportunity to practice there and unless they are
10 willing to shoulder the burdens.

11 I think that's particularly -- I just added a
12 footnote to that -- true, I think, in states where lawyers
13 seek to practice on a multi-state basis. Lawyers are not
14 going to want a license to practice in two or three states
15 and expect to practice there unless they are willing to
16 honor whatever commitments are entailed with multiple bar
17 membership and multiple practice.

18 Even if the Court were not willing to stop there
19 and say that these reasons -- the argument is not
20 sufficiently substantial -- there is an additional factor
21 here that is unique to Virginia that I think should lay
22 to rest any doubts about the validity or invalidity of
23 the residence requirement.

24 I'm speaking specifically about the full-time
25 practice rule. If Virginia may validly seek to say that

1 all lawyers admitted on motion must commit themselves to
2 full-time practice in the state, then the residency
3 requirement becomes, as the Fourth Circuit says, redundant.

4 QUESTION: Mr. Hitchcock, what do you understand
5 is meant by the full-time practice requirement?

6 MR. HITCHCOCK: The only interpretation that the
7 Supreme Court of Virginia has provided is in the Titus
8 case, which we cite in Footnote 2 of our brief, which is
9 that a lawyer must have an office in Virginia and must
10 practice there on a, quote, regular, unquote, basis.

11 The court -- that's a 1972 or 1973 decision --
12 has not construed it since then. Regular, they apparently
13 equate with full-time but I'm not sure about what would
14 happen if lawyers did other things, even if they were
15 living in Virginia, if they wanted to do things other than
16 practice law forty hours a week, thirty-five hours a week,
17 or whatever it may be. The court has not provided any
18 more specific guidance and there are no disciplinary
19 opinions or other rulings that provide clearer guidance
20 on this point.

21 QUESTION: Mr. Hitchcock, do you think the
22 full-time practice requirement is Constitutional?

23 MR. HITCHCOCK: Your Honor, in cander we
24 argued in Goldfarb v. Supreme Court of Virginia that the
25 full-time practice requirement was invalid under the

1 commerce clause.

2 QUESTION: If that's an invalid requirement, how
3 can it be a substitute for protection for what the state
4 seeks to protect here?

5 MR. HITCHCOCK: Well, as I indicated in the
6 earlier point, I think the Court could stop just by saying --
7 by following Piper in saying that one's commitment to
8 Virginia is sufficiently assured without regard to whether
9 or not there's a full-time practice requirement.

10 QUESTION: You mean by the mere fact that your
11 client applied for admission? That's enough?

12 MR. HITCHCOCK: The fact that she applied for
13 admission and the fact that she was willing to do anything
14 that Virginia seeks to ask her short of full-time practice
15 would be enough here.

16 QUESTION: Because she's represented she's
17 willing to do it. But how can they enforce those
18 representations?

19 MR. HITCHCOCK: I'm sorry, which representations?

20 QUESTION: Well, you say she will practice
21 full-time. Supposing her client opened a branch office
22 over in Annapolis or someplace, with a subsidiary, and
23 asked her to devote part of her time to supervising the
24 affairs of that corporation? She couldn't do it.

25 MR. HITCHCOCK: She couldn't do it, but neither

1 could a lawyer who happened to live in Arlington. If the
2 Virginia firm --

3 QUESTION: Unless both requirements are invalid.

4 MR. HITCHCOCK: Unless both requirements -- well,
5 for the --

6 QUESTION: And both seem somewhat restrictive.

7 MR. HITCHCOCK: They are. I mean, the full-time
8 practice requirement does have some of the same problems
9 of the residence requirement. What it does is it allows a
10 lawyer into the state only if they agree to give up all
11 interstate or multi-state practice.

12 I would add, although it's not essential to
13 resolution of this case, multi-state practice is the sort
14 of thing which I think states should be encouraging. As
15 Chesterfield Smith, the former American Bar Association
16 president, noted in an article which the Court cited with
17 approval in Piper, as lawyers get older and more experienced
18 the demand for their services across state lines increases
19 and restrictions which limit their ability to practice
20 really disserve the public and disserve the clients who
21 may need and wish to retain their services.

22 QUESTION: Yes, but as you develop that argument
23 what do you say about the state's position that really
24 what's going to happen here is that the states are all
25 going to start requiring bar exams and that will make the

1 problem even more acute?

2 MR. HITCHCOCK: Well, my answer is that -- two
3 answers to that.

4 First of all, there's no case of which I am aware
5 involving discriminatory or preferential treatments where
6 any court has tried to predict what's going to happen. When
7 a preferential law is struck down, a state has two choices:
8 they can make the benefit available to everyone or they
9 can make it available to no one. This Court has never held,
10 certainly, that a reviewing court or reviewing judge should
11 say: what is the state likely to do? Does that result
12 constitute sound public policy in my mind and, therefore,
13 I'm going to uphold the Constitutionality or strike down
14 the Constitutionality based on that prediction.

15 QUESTION: But it's very rare that the whole
16 reason for an individual's asking us to strike it down is the
17 same reason that would be frustrated by one of the courses
18 that the state might take. That's what seems, to me,
19 ironic about this case. The very reason you're urging this
20 upon us is to enable freer commerce between the states in
21 legal services. And it's quite possible that the result
22 you are going to achieve, if we hold the way you want, is
23 to reduce that freedom rather than increase it.

24 MR. HITCHCOCK: It may be a possibility but
25 that's a risk involving any kind of preferential law.

1 There are also, I think, corrective mechanisms. I mean, the
2 people who are injured if this provision were to be
3 withdrawn are not only lawyers from out of the states, but
4 Virginia law firms who may want to make it easier to
5 recruit lawyers, and may be willing to say to the Virginia
6 Supreme Court or the legislature which created this option
7 in the first place: we'd like the opportunity, it's really
8 difficult because everyone has to take the bar exam, would
9 you consider some kind of waiver of the exam for people,
10 without regard to the fact that they may chose to live
11 outside the state.

12 There are other corrective mechanisms but, again,
13 regardless of the ironies, if an institution decides to
14 close down or no longer make certain benefits available
15 because it has to admit other people, that's not an
16 argument that it's Constitutional or valid or should be
17 upheld.

18 It's the Court's function, I would respectfully
19 submit, to apply the law here and to let the consequences
20 be decided based upon what the Court's ruling is. And here,
21 even if the Court does, if the full-time practice rule
22 remains in effect -- although as I indicated in response
23 to Justice Stevens, there are problems with that -- that
24 should be enough to satisfy the goals that the state seeks
25 to achieve with respect to assuring a compliance, competence,

1 whatever else. I think that specific argument is undercut
2 by the fact that Virginia has no enforcement mechanism and
3 the notion that without the residence requirement lawyers
4 would be likely to set up sham residences is equally likely
5 as the prospect that they will set up sham offices, which
6 they're likely to do.

7 It might be said, ironically enough, if there are
8 ironies in this case, the people who this rule keeps out
9 now are those lawyers who cannot in good conscience say:
10 I'm willing to practice full-time, I live in Virginia.
11 The lawyers who are allowed in under the rule may be those
12 who don't honor their professional commitments to the same
13 as someone like Ms. Friedman. Those lawyers may be
14 admitted to the bar. They may be practicing in other states
15 or living in other states. The fact that there's no
16 enforcement mechanism may be keeping out the people who
17 can serve Virginia clients well, allowing in those who are
18 not doing the sort of things Virginia seeks of people who
19 want to be admitted on motion.

20 In the remaining time, I'd like to take a moment
21 to talk about the other arguments.

22 If the Court should decide that the privileges
23 and immunities clause doesn't apply here, as some of the
24 questions have indicated, we still submit that the
25 judgement should be invalidated under the equal protection

1 clause, that there is no rational basis for holding that
2 where a lawyer lives promotes compliance with the rule or
3 promotes one's commitment to the jurisdiction.

4 In recent terms, the Court has struck down under
5 that rational basis test some preferential tax laws which
6 sought to give preferences to state residents vis-a-vis
7 non-residents: the Court found that that effort to give
8 the hometeam an advantage, as it said in one case, was not
9 rationally connected to the goals which were advanced.

10 QUESTION: What case are you referring to,
11 Mr. Hitchcock?

12 MR. HITCHCOCK: Metropolitan Life Insurance
13 Company v. Ward, the Alabama tax insurance --

14 QUESTION: Do you regard that as being good law
15 today?

16 MR. HITCHCOCK: I'm not aware of any subsequent
17 precedent that might cast doubt on it.

18 QUESTION: I would think that Northeast Bank
19 case cast considerable doubt on it.

20 MR. HITCHCOCK: Well, in the Northeast Bank Corp.,
21 I think that was -- Northeast Bank Corp. came before that,
22 I think, by one term, but there is a difference there, I
23 think, because you had the Congressional seal of approval
24 upon the legislation in question there. It was not simply
25 an effort by a state to regulate without Congress having

1 looked at the issue. I think that would be a distinction,
2 vis-a-vis this here.

3 Cases such as Williams v. Vermont, that was a
4 case in which the state of Vermont gave an exception from
5 paying a tax to Vermont residents who bought a car in
6 another state, paid tax there and then came back to
7 Vermont. That was an exemption. It's a benefit --
8 something given to Vermont residents that was not given to
9 citizens of other states who bought a car in, say, New York,
10 paid the tax there, came into Vermont and had to pay the
11 tax again.

12 The Court there rejected the justifications that
13 were offered about what amounted to a higher burden on
14 state residents, Vermont residents, vis-a-vis out-of-state
15 residents.

16 We've also suggested that the provision
17 would be invalid under the commerce clause for some of
18 the reasons that I suggested earlier in colloquy with
19 Justice Stevens.

20 And I see that my time has expired. If the
21 Court has no further questions, we would ask that the
22 judgement of the Fourth Circuit be affirmed.

23 JUSTICE REHNQUIST: Thank you, Mr. Hitchcock.
24 Mr. Lucyk, you have four minutes remaining.

25

ORAL ARGUMENT BY GREGORY E. LUCYK, ESQ.

ON BEHALF OF APPELLANTS - REBUTTAL

MR. LUCYK: Thank you, Mr. Chief Justice. If it please the Court:

I'd first like to respond to something that Justice White said during my -- Appellee's argument here, and that is that you expressed concern that if the Appellee were required to take the bar examination she wouldn't be able to work for six or seven months.

That is simply not true. The bar examination is only a two-day examination and the bar review course that is offered for that occurs in the evening hours. In fact, the Appellee could apply for the bar examination in May, take the bar review course, take the exam at the end of July, and she'd admitted to the Virginia Bar by October.

QUESTION: Well, a lot depends on when she decides to make this decision, isn't it? The bar exam is given twice a year.

MR. LUCYK: That's correct. It's given in February and July.

In her case, she sought admission to the bar, she wrote her letter in early summer, and she was still within the time frame that would have allowed her to --

QUESTION: She was working in Virginia. She had a legal job in Virginia, and until she takes the bar

1 and passes it, she is not supposed to act like a lawyer in
2 Virginia. Whatever the time is, it may be a day, it may be
3 two weeks, but while she's waiting to pass the bar she can't
4 work as a lawyer.

5 MR. LUCYK: I think, you know, that's an
6 interesting question, Justice White.

7 QUESTION: Well, do you think she could open a
8 law office and hold --

9 MR. LUCYK: I think she certainly could advise
10 her clients on federal securities law, which was the bulk
11 of her work.

12 QUESTION: Well, could she open an office in
13 Virginia until she passes the bar? She couldn't, of course.

14 MR. LUCYK: She could be employed by her
15 corporation as she was.

16 QUESTION: I just asked you, could she open an
17 office and practice law?

18 MR. LUCYK: She could not hang out her shingle
19 as a sole practitioner. No, she could not.

20 QUESTION: And she can't act like a lawyer
21 working for this organization, either.

22 MR. LUCYK: But, Justice, neither can the
23 reciprocity admit you until they get that license to
24 practice law.

25 In reality, the time it takes is about the same.

1 If you apply for the bar exam in May and are admitted in
2 October, that four to five month period is the same period
3 of time that it takes for someone to apply for reciprocity,
4 to have the papers processed by the National Conference of
5 Bar Examiners, and to do the other things that have to be
6 done. The average period of time is about four months.

7 So, we're not talking about a difference in time commitment.

8 There's no question, and we're not going to deny,
9 that the bar examination imposes a burden. We believe that
10 our restricted license by reciprocity also imposes a burden
11 on applicants. It offers a choice of burden. The choice
12 is: the burden imposed, or the initial burden, of taking
13 the bar examination establishes the assurance of commitment
14 and competence and frees that lawyer from any other long
15 term burdens. There's no requirement to maintain a
16 full-time practice or even an office in Virginia. And,
17 certainly, there's no requirement of residence in Virginia.

18 On the other hand, the reciprocity rule imposes
19 a long term burden. Yes, it does alleviate the initial
20 requirement of the examination but for as long as that
21 person intends to practice law in Virginia, they have the
22 burden of maintaining that full-time practice, complying
23 with that rule of residing in the state, and making
24 themselves available on a full-time basis to serve
25 Virginia clients.

1 The facts in this case are atypical and for that
2 reason we submit that the principle here is much broader.
3 The principles at stake are much broader than the facts of
4 this case. Yes, Ms. Friedman, the Appellee does live close
5 to the border. But the majority of reciprocity applicants
6 aren't going to live that close. They're going to live
7 many more miles away and further distant locations. So,
8 the particular facts about her closeness or nextness to
9 Virginia are not going to apply in the majority of the
10 cases.

11 QUESTION: Well, is that right if they practice
12 full-time in Virginia? Don't you have to presume they
13 live pretty close?

14 MR. LUCYK: Well, I don't think so. I think if
15 we must rely on the promise then we've got to rely on that
16 same promise from someone who lives in Laurel or near
17 Baltimore, that they, in fact, intend to commute every day
18 to Virginia and when they go home in the evening they
19 are not going to establish -- you know, through social or
20 community contacts -- an outside practice.

21 If you require us to make that presumption in
22 this case, where on its face, yes, it seems that that
23 presumption may be legitimate, then we've got to make it
24 in every case. And that's my point, that the rule
25 doesn't apply just to this unique factual situation. It

1 applies to all of the conceivable situations.

2 CHIEF JUSTICE REHNQUIST: Mr. Lucyk, your time
3 is expired. The case is submitted.

4 (Whereupon, at 11:02 a.m., the case in the
5 above-entitled matter was submitted.)
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DOCKET NUMBER: 87-399

CASE TITLE: SUPREME COURT OF VIRGINIA AND DAVID B. LEACH,
ITS CLERK v. MYRNA E. FRIEDMAN

HEARING DATE: March 21, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the

Date: March 25, 1988

Margaret Dally

Official Reporter

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