No. 06-

In The Supreme Court of the United States

STEVEN C. MORRISON,

Petitioner,

v.

BOARD OF LAW EXAMINERS OF NORTH CAROLINA et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN B. MORRISON
(*Counsel of Record*)
559 Nathan Abbott Way
Stanford CA 94305
(650) 725 9648

STEVEN C. MORRISON
1800 Cross County Lane
Apex NC 27502
(919) 454 7701

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington D.C. 20009
(202) 588 1000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a state constitutionally condition its willingness to allow a lawyer to be admitted to practice without taking a bar examination be based on the willingness of the state in which that lawyer is already admitted, and in which that lawyer has been recently practicing, to reciprocate for lawyers from the admitting state?

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner, Steven C. Morrison, and the respondent, Board of Law Examiners of North Carolina, Fred P. Parker III, who is the executive director of the Board, and the following members of the Board and their successors in interest were parties to the proceedings below and are respondents in this Court: Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; and Shirley Fulton.*

* Counsel of record for petitioner and petitioner have the same last name, but they are not related.

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The opinion of the court of appeals (App. 1-9) is reported at 453 F.3d 190 (4th Cir. 2006). The opinion of the district court (App. 10-26) is reported at 360 F. Supp. 2d 751 (E.D.N.C. 2005). The order of the court of appeals denying rehearing and rehearing en banc (App. 27-28) is not reported.

JURISDICTION

The decision of the court of appeals was issued on June 15, 2006. A timely petition for rehearing and rehearing en banc was denied on July 12, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES AND RULES AT ISSUE

North Carolina General Statute § 84-24 is reproduced in the appendix to the petition (App. 33-36). The relevant portion is as follows:

> For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council.
>
> . . .
>
> The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the

> applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law.
>
> . .
>
> The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.
>
> All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Rule .0502 of the North Carolina Board of Law Examiners provides for the admission without examination of lawyers licensed in other jurisdictions. It is reproduced in the appendix to the petition (App. 29-32). The relevant portion of Rule .0502(3), which imposes the limits on admission without examination that are at issue in this case, is as follows:

> (3) [An applicant for admission without taking the bar exam shall prove] to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein,

> the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law.

STATEMENT OF THE CASE

This case challenges the constitutionality of provisions found in the statutes or rules of 23 states under which the right of a lawyer seeking admission to the bar of one of those states without taking the bar exam is conditioned on the willingness of the state from which that lawyer is already admitted to grant reciprocal rights to lawyers from the admitting state. The court of appeals upheld North Carolina's reciprocity requirement, referred to as "comity" there. This Court should grant review because that ruling is inconsistent with this Court's decision in *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976), and its progeny, all of which reject reciprocity as a basis for excluding persons seeking a license or other advantage in the state that imposed such a requirement.

A. Bar Admission Rules in North Carolina.

Like almost every state, North Carolina requires a person seeking to practice law to pass a bar exam and establish his or her moral character and fitness to practice law, unless the person qualifies for admission without examination. Section 84-24 of the North Carolina statutes creates the Board of Law Examiners ("BLE"), whose 11 members are lawyers elected for three year terms by the

Council of the North Carolina Bar.[1] The Council, which governs the Bar, is comprised of 55 lawyers who are elected by members of the Bar, plus three public members appointed by the Governor and the elected officers of the Bar. *See* N.C.G.S. § 84-17. Section 84-24 provides that the BLE, "subject to the approval of the Council," shall issue rules that "promote the welfare of the State and the profession." That section also gives the BLE "full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law. . . ." There is no provision for any court in North Carolina to approve such rules, although section 84-24 does require that BLE rules approved by the Council be transmitted to the North Carolina Supreme Court for entry in its minutes and appropriate publication, unless, pursuant to section 84-21, the Chief Justice finds a rule to be "inconsistent with this article."

Pursuant to this authority, respondents have promulgated Rule .0502, entitled "Requirements for Comity Applicants," which allows certain applicants who are members of bars of some other states to be admitted without taking the North Carolina bar examination. There are a number of requirements for this exception, some of which are designed to assure the BLE that the applicant is qualified to practice law. The only provision at issue here is the two-part reciprocity requirement of subsection (3).

[1] For ease of reference, the BLE, its executive director, and its current and past members will be referred to collectively as respondents or the BLE.

Under it, an applicant must first be licensed in a jurisdiction "having comity with North Carolina"; second, the applicant must have "been for at least four out of the last six years, immediately preceding the filing of this application with the [BLE], actively and substantially engaged in the full-time practice of law" in a jurisdiction having comity with North Carolina. That subsection goes on to define what constitutes the practice of law which includes (c) service as corporate counsel; (d) judicial service, with any federal, state or local court; (e) service as a member of the Judge Advocate General's Department in any branch of the military ("JAG"), "whether or not such service is in the jurisdiction in which the applicant is duly licensed," and (f) being a full-time faculty member at a law school approved by the Council. App. 30-31. Furthermore, the Rule allows an applicant to count a number of activities performed in North Carolina as having been performed in the comity jurisdiction for purposes of the "four of the last six years" requirement, including service as house counsel, full-time employment on a law school faculty or at the Institute of Government of the University of North Carolina at Chapel Hill, and JAG service. *Id.* at 31. These latter provisions have the further effect of removing any doubt that a lawyer not admitted to the North Carolina bar may engage in such activities in North Carolina without engaging in the unauthorized practice of law.

B. Petitioner's Application.

Petitioner graduated from the Indiana University Law School in 1979 and was admitted to the Indiana bar in May 1979 after passing the Indiana bar exam. In 1981, he took and passed the Ohio bar exam and became a member of that bar, and for the next three years he had offices and

practiced law in both states. In 1985, when his work took him to California, he took and passed the California bar and practiced law there until July 2000 when, at the request of a longtime client, he moved to North Carolina, where he served as the chief legal officer for a Raleigh-based software company. When the company was sold in 2003, petitioner lost his job and decided for family reasons to stay in North Carolina and practice law there.

When petitioner attempted to file his application for admission without examination in late 2003, it was rejected because of the reciprocity provisions in Rule .0502(3). Although both Indiana and Ohio have "comity" with North Carolina (*i.e.,* they will admit North Carolina lawyers without examination), California does not. The Rule requires that an applicant not only be licensed in a comity state, but that the applicant must have been actively practicing in a comity state for four of the past six years. Because petitioner had been practicing in California for the first three years and in North Carolina for the next three years, petitioner's Indiana and Ohio bar memberships did not suffice, even though both are comity states. Therefore, the BLE refused to process his application for admission without taking the bar examination because of his failure to satisfy the reciprocity requirements of Rule .0502(3).

C. The Litigation.

On February 11, 2004, petitioner commenced this action under 42 U.S.C. § 1983 against the BLE, its executive director, and its 11 members. Jurisdiction was based on 28 U.S.C. § 1343. Petitioner's claim was that the reciprocity provision, Rule .0502(3), violated the United

States Constitution and, therefore, respondents could not reject his application for admission without examination based on that Rule.

Respondents moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), accompanied by a short affidavit of respondent Fred Parker, the Executive Director of the BLE. App. 38-41. The affidavit raised no issues of fact and made it clear that petitioner's failure to comply with the Comity Rule was the sole basis for the BLE's refusal to accept his application. Paragraph 4 of the Parker affidavit sets forth the purposes of the Rule, and, although they are not contained in the Rule itself or any other statement by the BLE submitted to the court below, petitioner does not dispute that the affidavit reflects the BLE's purposes. Most of these purposes relate to the need to assure that applicants are qualified and fit to practice law in North Carolina and are subject to other requirements in the Rule beyond the reciprocity aspect of subpart (3). The one purpose that does relate to reciprocity is reason (g), which is to "facilitate interstate travel by encouraging other states to admit North Carolina attorneys without taking a bar examination." App. 39. Notably, the affidavit contains no reason that would justify the requirement that four out of the last six years of active practice must be in a state with which North Carolina has comity, even though that was why petitioner's application was rejected by the BLE.

Petitioner submitted his own affidavit and cross-moved for summary judgment. After hearing oral argument, the district court issued an opinion in which it rejected petitioner's challenge to the basic comity requirement because petitioner satisfied it through his admission in Indiana and Ohio. However, the court found that the

portion of the Rule that required that petitioner not only be from a comity state, but that he have practiced for four of the last years in that state was unconstitutional. Respondents filed an appeal to the Fourth Circuit and, in an excess of caution, petitioner filed a cross-appeal from the portion of the district court decision rejecting his challenge to the reciprocity rule as a whole.

The court of appeals reversed the district court and ordered the complaint dismissed. Relying on its prior decision in *Hawkins v. Moss,* 503 F.2d 1171 (4th Cir. 1974), *cert. denied,* 429 U.S. 928 (1975), which antedates this Court's series of decisions dealing with exclusionary bar admission rules discussed *infra* at 12-13, as well as this Court's decisions striking down state laws with reciprocity provisions virtually indistinguishable from this one, *infra* at 9-10, the court upheld the reciprocity requirement by finding that the desire to assist North Carolina attorneys gain admission elsewhere satisfied the minimum standards of rationality that the court thought applied in this situation. Although the district court had struck down only the "four of the last six years" portion of the reciprocity rule, the court of appeals did not explain the basis on which it upheld that particular provision. A timely petition for rehearing was denied, and this petition followed.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with Decisions of This Court.

The only case cited by the Fourth Circuit in upholding North Carolina's reciprocity requirement was its 1974 ruling in *Hawkins v. Moss, supra.* However, subsequent to

Hawkins, this Court was presented with Commerce Clause challenges to reciprocity statutes substantively indistinguishable from Rule .0502(3), and in each case found them unconstitutional. The first of these cases was *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 368 (1976) ("*A&P*"), where a challenge was brought to a Mississippi law that allowed the importation of milk that was found acceptable in other states, but rejected milk from Louisiana "solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi as required by the regulation." The Court found that "Mississippi's contention that the reciprocity clause serves its vital interest in maintaining the State's health standards borders on the frivolous" because Mississippi would allow Louisiana milk to come in "even if Louisiana's standards were lower than Mississippi's" so long as the reciprocity provision were satisfied. *Id.* at 375. In rejecting an effort to characterize the regulation as one that enhanced trade by eliminating hypothetical barriers from other states, the Court observed that a state "may not use the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement." *Id.* at 379.

Two other decisions of this Court reached identical conclusions regarding other statutes containing specific reciprocity requirements. The Nebraska law at issue in *Sporhase v. Nebraska,* 458 U.S. 941 (1982), forbade the taking of ground water into another state unless the other state allowed its water to be taken into Nebraska. Petitioner, whose property straddled the Nebraska-Colorado line, had been denied a permit to pump water from the Nebraska portion of his land for use in irrigating land in Colorado, because Colorado had no reciprocity agreement

with Nebraska that would allow its water to be pumped into Nebraska. In setting aside the reciprocity provision, this Court observed that it "operates as an explicit barrier to commerce between the two States," and that "there is no evidence that this restriction is narrowly tailored to the conservation and preservation [of water] rationale" advanced by the state. *Id*. at 957-58.

Finally, in *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269 (1988), Ohio offered a tax credit on each gallon of ethanol sold, but only if it were produced in Ohio or in a state that granted similar tax credits to ethanol produced in Ohio. The appellant was an Indiana corporation that produced ethanol in Indiana and sold it in Ohio. At one time, Indiana had a tax credit provision that would have satisfied Ohio's reciprocity rule, but it had been repealed and replaced with a direct subsidy to Indiana producers. Ohio claimed that "far from discriminating against interstate commerce, [its law] is likely to promote it, by encouraging other States to enact similar tax advantages that will spur the interstate sale of ethanol," but the Court rejected that defense, relying on its earlier reciprocity decision in *A&P.* As the Court observed, the Ohio law could not be justified on the theory that "the reciprocity requirement is designed to increase commerce in ethanol by encouraging other States to enact ethanol subsidies." *Id.* at 280.

There is a further decision of this Court, which, although not dealing with a statute that had a provision bearing a comity or reciprocity label, addressed a state law that resulted in the same kind of discriminatory treatment and met a similar fate of unconstitutionality, there under the Privileges or Immunities Clause of the Fourteenth Amendment. The case is *Saenz v. Roe,* 526 U.S. 489 (1999),

and the law at issue provided that persons who had lived in California for fewer than twelve months would be entitled to receive welfare benefits no greater than the benefits to which they would have been entitled in their former state of residence. Although written differently, the law was the functional equivalent of a reciprocity provision: if a new resident's former State paid 80% of what California paid, she would receive that 80%, and not what she would have received had she been a California resident for all of that twelve months. California did not seek to justify the law on the ground that it was designed to encourage other states to raise their welfare benefits to the level of California's – so that if California residents went to those other states, they would not suffer a loss in benefits – but if it had, that theory would have been rejected based on the reciprocity trilogy discussed above.

The Fourth Circuit cited no case other than *Hawkins v. Moss* in concluding that North Carolina's reciprocity rule was constitutional. It quoted the portion of *Hawkins* in which the court observed that reciprocity statutes have been uniformly held to "meet a legitimate state goal" and "found invulnerable to constitutional attack" (App. 7, *quoting* 503 F.2d at 1178). The court did not quote the portion of *Hawkins* that sets forth what the court found to be "manifestly a legitimate interest," which the court described as a "state's undertaking to secure for its citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant." 503 F.2d at 1177. Yet it is precisely that effort to seek an advantage for a state's citizens, by conditioning a grant of a license on reciprocity from other states, that this Court condemned in *A&P* and its progeny.

There is a second respect in which the decision below is inconsistent with decisions of this Court, and that is the conclusion that no constitutional violation has taken place because petitioner can always take the bar exam (App. 9). This argument runs counter to rulings of this Court in the very area of bar admission rules, which make clear the importance of the right to seek admission to the bar and that discrimination with respect to the conditions for bar admission impose harms of constitutional magnitude. Thus, in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), the Court ruled that residence requirements for bar admissions violated the Privileges and Immunities Clause of Article IV, Section 2, in a case in which the plaintiff had passed the bar exam but did not wish to move to New Hampshire, as the law required. The Court rejected all of the justifications offered by the state that the residency rule was necessary to enable a state to assure that applicants meet the "high standards of qualification, such as good moral character or proficiency in its law" which this Court set forth as the legitimate guideposts for bar admission nearly fifty years ago in *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 239 (1957). *See also Keenan v. Board of Law Examiners,* 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court) ("In licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law.").

Four years later, another residence requirement case came to this Court in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). This time residence was not a condition for bar membership, but only for obtaining admission without taking the bar exam. The State attempted to distinguish *Piper* on the ground that the

exclusion there was complete, whereas Mrs. Friedman could always take the Virginia bar exam, like everyone else. In finding the requirement to be unconstitutional, this Court said that there need not be a "total exclusion" of an applicant before the Privileges and Immunities Clause applied, and the fact that the plaintiff could take the bar exam was "quite irrelevant" to the constitutional claim before the Court. *Id.* at 65, 66. Despite *Friedman*, the Fourth Circuit here appeared to base its decision in substantial part on this "quite irrelevant" available alternative.

Petitioner recognizes that a number of lower courts, both before and after *Hawkins,* have reached the same conclusion as did the Fourth Circuit here, but in each case involving a reciprocity or other disqualifying provision, the courts based their decisions on the now clearly impermissible ground that the applicant could always take the bar exam. *See, e.g., Schumaker v. Nix*, 965 F.2d 1262, 1270, n.11 (3rd Cir. 1992); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059 (6th Cir. 1984); *Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983); *Goldsmith v. Pringle*, 399 F. Supp. 620, 625 (D. Colo. 1975) (three-judge court); and *Knowlton v. Board of Law Examiners of Tenn.*, 813 S.W. 2d 788, 792 (Tenn. 1974). The Seventh Circuit was the most clear in explaining this rationale. The rules that had been found unconstitutional in other cases, said the court, "resulted in absolute barriers to bar admission, while the Illinois rule *simply* requires applicants in Lowrie's position to take and pass the Illinois bar examination." *Lowrie,* 716 F. 2d at 412 (emphasis added). The court then noted that, because the applicant was highly qualified, he should have no trouble passing the exam, and he would have been admitted long ago if he had pursued that course. *Id.* at 414-15. *But see Friedman, supra,* 487 U.S. at 68 ("A bar examination, as

we know judicially and from our own experience, is not a casual or lighthearted exercise."). Indeed, in a subsequent bar admission case, but still pre-*Friedman,* the Seventh Circuit recognized that "explicitly reciprocal trade barriers have been knocked down under the commerce clause [citing *A&P* because] they are in effect retaliatory tariffs." *Sistrac v. Clark,* 765 F.2d 655, 661 (1985). In that case, however, the court found no trade barrier, despite the reciprocity provision, because the "bar exam is a condition for admission to the bar imposed on residents and non-residents alike; the waiving of the condition for a class of new residents *merely* makes it easier for lawyers to change states." *Id.* (emphasis added).

Another significant aspect of these reciprocity cases is the recognition by a number of courts that reciprocity does not serve to protect the public from incompetent or dishonest lawyers, but is designed solely to help local lawyers gain admission on motion elsewhere. Thus, the court in *Goldsmith, supra,* observed that "[a]dmittedly, the government interests which support a state's reciprocity rules have nothing whatsoever to do with the moral character or professional competency of bar applicants" and the "means employed may smack more of coercion than of comity." 399 F. Supp. at 624, 623. Or, as the court put it in *Shenfield v. Prather,* 387 F. Supp. 676, 688-89 (D. Miss. 1972) (three-judge court): "it is true, as plaintiffs argue, that whether a sister state jurisdiction admits Mississippi attorneys by reciprocity has no bearing on the fitness of the individual applicant. . . ." The court nonetheless upheld the rule based on the "salutary purpose of facilitating professional persons in relocating elsewhere," *id.,* precisely the justification rejected in the *A&P* line of cases.

Petitioner recognizes that this Court has not considered the reciprocity issue in the context of bar admission, but between *A&P* and *Friedman* respondents have a decidedly uphill road to overcome. Moreover, the issue is important because there are now 23 states that have some form of reciprocity in bar admission without examination. ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2006CompGuide.pdf (Chart IX, p. 28) (last visited September 28, 2006). The reciprocity issue is directly presented by this case since respondents refused even to consider petitioner's application because he did not satisfy North Carolina's comity rule, despite having practiced law with an unblemished record for almost 25 years at the time that he submitted his application.[2]

B. The "Four of the Last Six Years" Requirement is Wholly Irrational and Cannot Stand Under Heightened Scrutiny or Even Under the Most Relaxed Standard of Review.

Assuming that some reciprocity requirements are constitutional, petitioner argued, and the district court agreed, that the "four of the last six years" requirement in Rule .0502(3) is invalid. The court of appeals apparently reached the opposite conclusion, although the opinion never addressed this claim directly. Petitioner does not contend that all requirements that an applicant have

[2] The district court concluded that petitioner, in effect, lacked standing to challenge the comity rule because he was admitted in two comity states, Indiana and Ohio. App. 14. The conclusion is plainly mistaken because, if the comity requirement were struck down, the "four of the last six years" provision would no longer be a barrier to his admission without examination based on his California bar membership and practice.

practiced law for some number of years immediately preceding his application are unconstitutional because, in general, they would appear designed to assure that a lawyer seeking admission on motion has in fact been engaged in the active practice of law in the recent past, rather than teaching surfing or operating a pizza parlor. The problem with North Carolina's rule, and the reason that petitioner's application was rejected by the BLE, is that the rule requires the active practice for "four of the last six years" in a jurisdiction with comity with North Carolina (or in North Carolina, to the extent that practice by out-of-state bar members is counted under the rule). Because petitioner's active practice since 1985 was in California, which has no comity with any state, his practice did not "count." In petitioner's view, the distinction for purposes of active practice between practice in a comity and in a non-comity state is indefensible and must be set aside.

Respondents have argued that North Carolina's comity rule is subject only to rational basis review because it does not violate any fundamental right, nor is it directed at any suspect class. The court of appeals agreed, apparently assuming that this challenge was only made under the Equal Protection Clause. But petitioner also challenged the rule under the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment, both of which employ heightened standards of review when the discrimination is based, as it is here, on conduct that took place outside the state that is imposing the restriction. *Saenz*, *supra,* 526 U.S. at 504; *Piper, supra,* 470 U.S. at 284 (recognizing practice of law as fundamental right and hence restriction must bear "substantial relationship to

the State's objective" in light of "the availability of less restrictive means").

To be sure, in this case, the discrimination is not against all outsiders, but only those from non-comity states. This Court, however, has been clear that there need not be perfect symmetry in discrimination for these clauses to apply. Thus, in *Saenz, supra,* the persons whose welfare repayments were reduced were all California residents, but the reduction applied only to those who came from states that had lower welfare payments. Despite the fact that the distinction was not between California residents and all others, but between former residents of higher and lower welfare payment states, the Court found the rule invalid under the Fourteenth Amendment Privileges or Immunities Clause. *See also Zobel v. Williams,* 457 U.S. 55 (1982) (greater payments based on greater length of Alaska residence held unconstitutional); *Hooper v. Bernalillo County Assessors,* 472 U.S. 612 (1985) (similar property tax exemption set aside under Equal Protection Clause). Similarly, in *United Build. & Construc. Trades Council v. Mayor and Council of Camden,* 465 U.S. 208 (1984), the preference was for those who resided in the city, which meant that some state residents were also subjected to discrimination, but the Court nonetheless rejected a literal reading of the Privileges and Immunities Clause and found it applicable. *See also Chalker v. Birmingham & N.W. Ry. Co.,* 249 U.S. 522 (1919) (in-state "chief office" requirement practical equivalent of local citizenship requirement and hence subject to Privileges and Immunities Clause challenge); *Hillside Dairy, Inc. v. Lyons,* 539 U.S. 59 (2003) (reaffirming *Chalker* and holding that proxies for citizenship can trigger applicability of Clause). Thus, the court of appeals erroneously analyzed

the "four of the last six years" rule only under the relaxed standard applicable to most equal protection cases.

Moreover, even under equal protection analysis, the court of appeals overlooked the fact that "the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made" applies to laws enacted by democratically elected legislatures or at least rules issued by courts or other full-time government officials. *Kramer v. Union Free School Dist.,* 395 U.S. 621, 627-28 (1969). Rule .0502(3), however, was issued by the BLE, whose members are all members of the North Carolina bar. It was approved by the Council of the North Carolina bar, all but three of whose 58 members are lawyers elected by their fellow lawyers, and it was subject only to limited review by the Chief Justice of North Carolina to determine whether the rule was "inconsistent with this article." And, of course, as in some of the cases in which this Court has found a classification to be suspect, such as *In re Griffiths,* 413 U.S. 717 (1973) (alienage), where the Court noted the political powerlessness of the disadvantaged group, out-of-state attorneys seeking admission to the North Carolina bar under rules issued by the North Carolina lawyers who sit on the BLE have no representation on or influence over the decision-makers, who may, indeed, act out of economically protectionist motives in excluding outsiders. *Cf. Gibson v. Berryhill,* 411 U.S. 564 (1973) (board of practicing optometrists could not, consistent with due process, bring disciplinary proceedings against their competitors). Thus, there is at least a substantial question as to whether it is appropriate in this case to assess the "four of the last six years" rule under the rational basis standard even if

the only basis for challenge were the Equal Protection Clause.

But whatever the standard, this aspect of Rule .0502(3) cannot stand. First, there is *no* evidence of what purpose it serves, either in the rule itself or in the litigation affidavit prepared by the BLE's executive director. That affidavit set forth seven purposes for the admission rule, none having anything to do with the "four of the last six years" aspect. Second, there is no apparent purpose for the rule's insistence that the requirement be met only from a comity state, as opposed to being met by the practice of law generally. Third, the only claimed purpose served by the reciprocity rule itself is to encourage other states to admit North Carolina lawyers without a bar exam, but the "four of the last six years" requirement will actually *discourage* other states from giving favorable treatment to North Carolina lawyers because of a fear that this additional requirement may make comity with North Carolina much less useful than it might appear to be. Fourth, even if states continue to grant reciprocity to North Carolina lawyers, they may reciprocate and require that "four of the last six years" practice be from a comity state, thus making it more difficult for North Carolina lawyers to be admitted on motion elsewhere.

Beginning with *In re Griffiths*, and continuing through *Piper* and *Friedman,* this Court has shown increased skepticism about the proffered justifications for restrictions on admission to state bars and rejected them in each case, albeit under more stringent review than mere rationality. But the Court's skepticism has not been limited to cases involving heightened scrutiny. Thus, in *Frazier v. Heebe,* 482 U.S. 641 (1987), the Court had before it a variety of constitutional challenges to the rule for

admission to the United States District Court for the Eastern District of Louisiana, which had been issued by the district judges themselves. Despite its pedigree, this Court exercised its "supervisory authority to prohibit arbitrary discrimination" and set aside the rule which required a lawyer to have an office or to reside somewhere in the State of Louisiana to be admitted to the Eastern District because the rule was "unnecessary and irrational." *Id.* at 646. Indeed, even under the rational basis test, this Court has not hesitated to draw the line when a "classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446 (1985). Given the lack of any asserted goal for attaching the "four of the last six years" requirement to the comity rule, it is hard to imagine how respondents can defend it, even if the rational basis test applied.

Granting review and considering this aspect of Rule .0502(3) will enable the Court to consider whether proxies for residence must survive some form of heightened scrutiny in the context of bar admission rules governing admission without examination. At the very least, the case will afford the opportunity to remind the lower courts that, even when the most relaxed standards of review apply, they must still address all claims of invidious discrimination and must assure a minimal level of rationality between an asserted goal and the classification at issue.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

ALAN B. MORRISON
(*Counsel of Record*)
559 Nathan Abbott Way
Stanford CA 94305
(650) 725 9648

STEVEN C. MORRISON
1800 Cross County Lane
Apex NC 27502
(919) 454 7701

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington D.C. 20009
(202) 588 1000

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Steven C. **MORRISON**, Esquire, Plaintiff-Appellee,

v.

BOARD OF LAW **EXAMINERS** OF the STATE OF NORTH CAROLINA; Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; Shirley Fulton; Fred P. Parker, III, and their successors, in their capacities as director and/or members of the Board of Law **Examiners**, Defendants-Appellants.

Association of Corporate Counsel, Amicus Supporting Appellee.

Steven C. Morrison, Esquire, Plaintiff-Appellant,

v.

Board of Law **Examiners** of the State of North Carolina; Susan Freya Olive; Thomas W. Steed, Jr.; Karl Adkins; Edward J. Harper, II; Gail C. Arneke; Robin L. Tatum; Catherine E. Thompson; William K. Davis; Roy W. Davis, Jr.; Emil F. Kratt; Shirley Fulton; Fred P. Parker, III, and their successors, in their capacities as director and/or members of the Board of Law **Examiners**, Defendants-Appellees.

Association of Corporate Counsel, Amicus Supporting Appellant.

Nos. 05-1257, 05-1348.

Argued Nov. 29, 2005.
Decided June 15, 2006.

ARGUED: David J. Adinolfi, II, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants/Cross-Appellees. Steven C. Morrison, Holly Springs, North Carolina, for Appellee/Cross-Appellant.

ON BRIEF: Geri S. Krauss, Anthony E. Davis, Hinshaw & Culbertson, L.L.P., New York, New York; Michael L. Shor, Charlotte Chapter of Association of Corporate Counsel, Charlotte, North Carolina; Brian Klemm, Research Triangle Area Chapter of Association of Corporate Counsel, Cary, North Carolina; Susan Hackett, Association of Corporate Counsel, Washington, D.C., for Amicus Supporting Appellee/Cross-Appellant.

Before WIDENER and SHEDD, Circuit Judges, and WALTER D. KELLEY, JR., United States District Judge for the Eastern District of Virginia, sitting by designation. No. 05-1257 reversed; No. 05-1348 dismissed by published opinion. Judge WIDENER wrote the opinion, in which Judge SHEDD and Judge KELLEY concurred.

OPINION

WIDENER, Circuit Judge.

In this 42 U.S.C. § 1983 case, Steven C. Morrison, an attorney, filed suit alleging that the requirements by the Board of Bar Examiners for obtaining comity admission to practice law in North Carolina under its Rule .0502(3) violate the Privileges and Immunities Clause of Article IV, § 2; the Equal Protection Clause of the Fourteenth Amendment; and the Privileges or Immunities Clause of the Fourteenth Amendment. On cross-motions for summary judgment, the district court found that the state prior practice requirement violated Morrison's right to travel under those Constitutional provisions and ordered the North Carolina Board of Law Examiners to admit him. *Morrison v. Board of Law Examiners,* 360 F.Supp.2d 751, 759 (E.D.N.C.2005). Because we are of opinion that the district court erroneously held that North Carolina could

not constitutionally condition its grant of comity on practicing in a State with comity for a given number of years, we reverse.[1]

I.

Morrison graduated with honors from Indiana University School of Law in 1979. He was admitted to practice law in Indiana in 1979, Ohio in 1981, and California in 1985. Until he moved to California in 1984, Morrison maintained law offices in both Indiana and Ohio. He moved to North Carolina in July of 2000 and has lived there since. Morrison submitted a comity application for admission to the North Carolina Bar on December 13, 2003. For six years prior to filing his application, Morrison practiced law in both California and as in-house counsel in North Carolina.

North Carolina Board of Law Examiners Rule .0502 lists the requirements necessary for obtaining a comity admission. Subpart (3) of that rule requires that the applicant,

[1] Plaintiff's complaint took the position that any grant of comity by North Carolina for one State, but not for another, for licensed attorneys would be invalid. In its opinion, the district court dismissed this claim because it found that plaintiff had suffered no injury from that requirement, obviously referring to Article III injury. A.115. Plaintiff takes exception to that dismissal. Because a dismissal in his cross-appeal for such want of injury is a Constitutional question with jurisdictional consequences, we do not decide that question on appeal but reach the merits of the other question in the case under *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *Ashwander v. TVA,* 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688, Rule 2 (Justice Brandeis concurring) also is applicable.

> [p]rove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law.

N.C.B.L.E. Rule .0502(3).

On January 20, 2004, the Board advised Morrison that his application for a comity admission was denied. The Board denied his application because for four of the six years preceding his application to the Board, Morrison had practiced in a State which did not have comity with North Carolina, namely California.

On February 11, 2004, Morrison filed this suit pursuant to 42 U.S.C. § 1983, alleging that both the requirement that he be admitted to practice in a State having comity with North Carolina, and the requirement that he have practiced for four of the past six years in that State, violate the United States Constitution, particularly the Privileges and Immunities Clause of Article IV, § 2; the Equal Protection Clause of the Fourteenth Amendment; and the Privileges or Immunities Clause of the Fourteenth Amendment.

The district court granted Morrison's motion for summary judgment challenging the Board's requirement that he practice in a specific jurisdiction before obtaining a comity admission. (J.A. 110) The district court also granted the Board's motion for summary judgment as to

Morrison's challenge to the comity requirement. Thus, the district court entered declaratory judgment that the Board's Rule .0502(3) is unconstitutional as applied to Morrison because it requires comity applicants, who are admitted in a comity jurisdiction and have practiced law for four of the immediately preceding six years, to have practiced in a certain jurisdiction. The district court permanently enjoined the Board from enforcing Rule .0502(3) against Morrison. Finally, because Morrison was otherwise qualified pursuant to Rule .0502(3), the district court ordered the Board to extend him a comity admission. This appeal by the Board and cross appeal by Morrison followed.

II.

We review de novo this determination of the validity of the North Carolina regulation involved as we would a district court's determination of the Constitutionality of a state statute. *See McLaughlin v. North Carolina Board of Elections,* 65 F.3d 1215, 1221 (4th Cir.1995).

The Board contends that Rule .0502(3) is constitutional, arguing that Morrison has been treated equally with all North Carolina residents. North Carolina residents do not have an advantage over any other State's applicants for comity admission to the bar. Instead, the Board's rule treats differently persons actively and substantially practicing law in a State having comity from those practicing in a State that does not have comity, which is neither an equal protection violation nor a violation of the privileges and immunities clause, according to the Board. We agree.

As this court stated in *Hawkins v. Moss,*

> The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy; in fact, it is a power in the exercise of which the state has "a substantial interest."

Hawkins v. Moss, 503 F.2d 1171, 1175 (4th Cir.1974) (citation omitted).[2] Here, Rule .0502(3) requires that the applicant be licensed to practice law in a State having comity with North Carolina and that the applicant has been actively and substantially engaged in the full-time practice of law in that State for at least four of the last six years immediately preceding the application.

Comity requirements have been upheld time and again. In *Hawkins,* a case factually very similar to the present one, a New Jersey attorney established a residence in South Carolina and sought admission to the South Carolina Bar on motion. He challenged the constitutionality of a South Carolina Supreme Court rule which allowed a bar exam exemption to those attorneys admitted to practice in a State granting reciprocity to South Carolina attorneys. The district court found that the rule did not violate the constitutional rights of individuals, such as the plaintiff, licensed by States, such as New Jersey, not granting reciprocity and this court affirmed. *See also*

[2] *Hawkins* is a case involving the validity of the South Carolina comity Rule 10, which was similar to, but not the same as, the North Carolina rule involved here. For a collection of cases on the subject, we refer to Judge Russell's opinion in *Hawkins.*

Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (1973) (a three-judge district court case).

We observed in *Hawkins,*

> It is a familiar rule of constitutional law that a statute or rule promulgated under state authority will be found to violate equal protection *only* when it results in discrimination against a certain class and the classification is not rationally related to any legitimate state policy or interest.

Hawkins, 503 F.2d at 1177 (citations omitted). "Reciprocal statutes or regulations, it has been uniformly upheld, are designed to meet a legitimate state goal and are related to a legitimate state interest. For this reason, they have been found invulnerable to constitutional attack on equal protection grounds." *Hawkins,* 503 F.2d at 1178. Moreover, the "mere fact that they 'affect some groups of citizens differently than others' or that they 'result in incidental individual inequality' 'will not render such statutes or rules invalid.'" *Hawkins,* 503 F.2d at 1177 (quoting *Martin v. Walton,* 368 U.S. 25, 26, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961)).

Here, Rule .0502(3) requires that applicants be licensed in a State having comity with North Carolina and have practiced for at least four out of the last six years in such a reciprocal State. This requirement affects Morrison because he most recently practiced in California, a non-comity state with North Carolina. However, the negative impact on Morrison does not render the rule invalid. North Carolina is not discriminating against citizens of other States in favor of her own. The rule simply represents North Carolina's "undertaking to secure for its citizens an advantage by offering that advantage to citizens of any

other state on condition that the other state make a similar grant." *Hawkins,* 503 F.2d at 1176-77.

Morrison and the district court insist that Rule .0502(3) includes a residency requirement, which "implicates the Fourteenth Amendment-protected third component of the right to travel" under the privileges and immunities clause of Article IV and the Fourteenth Amendment. First, Rule .0502(3) contains no residency requirement. Just as importantly, *Hawkins* decided the "privileges and immunities" provision of the Fourteenth Amendment provides no "Constitutional base for an attack on the Rule." *Hawkins,* 503 F.2d at 1178. Moreover,

> the right of federal citizenship as reflected in the "right to travel" and as protected by this provision is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation", but a profession, which is properly subject to state regulation, in any state to which he travels . . .

Hawkins, 503 F.2d at 1178-79. Also of importance is that, Rule .0502(3) treats Morrison no differently than it treats North Carolina citizens and residents. Rule .0502(3) requires all applicants seeking comity admission to have practiced in the comity state for four of the prior six years. "Thus, whether he be a life-long citizen of [North] Carolina or an individual who, like the plaintiff, has just moved to [North] Carolina, his rights under Rule [.0502] are identical." *Hawkins,* 503 F.2d at 1180. "So long, then, as the State does not subject the migrant attorney, seeking the right to practice in the State, to no more onerous requirements than those imposed on its own citizens seeking such

right, it cannot be said that the State has violated" Article IV, § 2. *Hawkins,* 503 F.2d at 1179-80.

Morrison has been held to no more onerous requirements for admission to the North Carolina bar than any citizen of North Carolina. Simply because he practiced in California, a state not having reciprocity with North Carolina, for four of the last six years, does not mean that his constitutional rights have been violated. He does not meet the requirements of the North Carolina Board of Bar Examiners Rule .0502(3), a valid rule. Thus, he must seek an alternative method of gaining admission, such as taking the bar exam, as do all the other North Carolina lawyers similarly situated. We are of opinion and hold that Rule .0502(3) is valid.

Accordingly, the judgment of the district court in case No. 05-1257 is

REVERSED.

The appeal in case No. 05-1348 is

DISMISSED.

360 F.Supp.2d 751

United States District Court, E.D. North Carolina.
Western Division.
Steven C. MORRISON, Plaintiff,
v.
BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and Susan Freya Olive, Thomas Steed, Jr., Karl Adkins, Edward J. Harper, II, Gail C. Arneke, Robin L. Tatum, Catherine E. Thompson, William K. Davis, Roy W. Davis, Jr., Emil F. Kratt, Shirley L. Fulton and Fred P. Parker III and their successors, in their capacities as director and/or members of the Board of Law Examiners, Defendants.
No. 5:04-CV-92-BO(3).

Feb. 4, 2005.

Steven C. Morrison, Holly Springs, NC, Pro se.

David J. Adinolfi, II, N.C. Dept. of Justice, Raleigh, NC, for Defendants.

ORDER

BOYLE, District Judge.

This matter is before the Court on Plaintiff's and Defendants' Cross Motions for Summary Judgment. The underlying dispute involves Defendants' requirements for attorneys to obtain a comity admission to the North Carolina Bar.

For the reasons discussed below, both Parties' Motions for Summary Judgment are GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiff is an attorney who graduated with honors from Indiana University School of Law in 1979. He is licensed to practice law in Indiana, Ohio, and California. Plaintiff was admitted to practice law in Indiana in 1979. He was admitted to practice in Ohio in 1981. Until his move to California in 1984, Plaintiff maintained law offices in both Indiana and Ohio. He was admitted to practice in California in 1985. Plaintiff relocated to North Carolina in 2000. On December 15, 2003, Plaintiff submitted a comity application for admission to the North Carolina Bar. In the six years immediately preceding his application to Defendants, Plaintiff practiced law in both California and as in-house counsel in North Carolina.

North Carolina Board of Law Examiners Rule .0502 lists the requirements necessary for obtaining a comity admission. Subpart (3) of that rule requires that the applicant "prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law." *See* N.C.B.L.E. Rule .0502(3).

On January 20, 2004, Defendants advised Plaintiff that his application for a comity admission was denied. Upon further inquiry, Plaintiff discovered that his application had been denied because he had not practiced in a state having comity with North Carolina for four of the six

years preceding his application to Defendants. Rather, he had practiced law in California, which does not have comity with North Carolina. On February 11, 2004, Plaintiff filed the instant suit pursuant to 42 U.S.C. § 1983, alleging that both the requirement that he be admitted to practice in a state having comity with North Carolina ("the comity requirement") and the requirement that he have practiced for four of the past six years in that state ("the state-specific practice requirement") violate the United States Constitution, particularly the Article IV, section 2 Privileges and Immunities Clause ("Article IV, section 2") and the Fourteenth Amendment Equal Protection, Privileges or Immunities ("Privileges or Immunities Clause").

ANALYSIS

This case turns on the constitutionality of Defendants' requirement that Plaintiff have practiced in a comity jurisdiction for four of the six years immediately preceding his application. Plaintiff argues the state-specific practice requirement is unconstitutional because it treats certain United States citizens differently based on their prior state of residence. Defendants argue that the state-specific practice requirement is not a residency requirement; that states are historically granted deference in regulating their own bars; and that state bar admission requirements are subject only to rational basis review.

Federal Rule of Civil Procedure 56(c) sets out the standard to be met by a party seeking summary judgment. *See* Fed.R.Civ.P. 56(c). Fed.R.Civ.P. 56(c) provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden to show the court that there is no genuine issue concerning any material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to survive the motion, the non-moving party must then show that there is "evidence from which a jury might return a verdict in his favor." *Anderson,* 477 U.S. at 257, 106 S.Ct. 2505. The Court must accept all of the non-moving party's evidence as true and must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See id.* at 255, 106 S.Ct. 2505. In this case, the parties stipulate that no issue of fact exists, and the case is ripe for summary judgment.

1. Bar Admissions Jurisprudence in the Fourth Circuit

The question of bar admission requirements is not new to this Circuit. *See Goldfarb v. Supreme Court of Virginia,* 766 F.2d 859 (4th Cir.1985) (upholding Virginia's requirement that, in order to obtain an admission by motion to the Virginia Bar, an applicant intend to practice full-time in Virginia); *see Hawkins v. Moss,* 503 F.2d 1171 (4th Cir.1974) (upholding South Carolina's reciprocity requirements against an equal protection challenge brought by an attorney not already admitted to practice in a state having a reciprocity arrangement with South Carolina); *see Keenan v. Board of Law Examiners,* 317 F.Supp. 1350 (E.D.N.C.1970) (striking down North

Carolina's requirement that an applicant for admission to the North Carolina Bar reside for at least one year in North Carolina prior to sitting for the Bar examination). However, the unique facts of Plaintiff's case distinguish it from the cases above and present a novel question to the Court.

2. North Carolina's Comity Requirement

Because Plaintiff is admitted to the state bars of two states having comity with North Carolina, he has no comity barrier to admission in North Carolina. Consequently, he does not risk exclusion from the practice of law by state action in North Carolina because of North Carolina's comity requirement. Plaintiff has suffered no injury in fact from North Carolina's comity requirement and cannot question it in this case. Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's challenge to North Carolina's comity requirement is GRANTED. Plaintiff's challenge to the comity requirement is DISMISSED.

3. The State-specific Practice Requirement

While the states' responsibility for professional licensing is entitled to considerable deference, *see Leis v. Flynt,* 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."), the Supreme Court has invalidated certain states' bar admission requirements on constitutional grounds. *See, e.g., Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56

(1988) (striking down the Virginia State Bar's residency requirement as a prerequisite to Virginia's equivalent of a comity admission on Article IV, section 2 grounds); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (striking down the New Hampshire State Bar's residency requirement as a prerequisite to admission to the New Hampshire Bar on Article IV, section 2 grounds); *see also Barnard v. Thorstenn,* 489 U.S. 546, 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989) (striking down on Article IV, section 2 grounds the Virgin Islands' requirement that an applicant to the Virgin Islands Bar have resided in the Virgin Islands for a year prior to his or her application for admission and, if admitted, he or she intend to reside and practice in the Virgin Islands). In those cases, the practice of law was firmly recognized as a "privilege" under Article IV, section 2. *Piper,* 470 U.S. at 281, 105 S.Ct. 1272; *Friedman,* 487 U.S. at 66, 108 S.Ct. 2260.

In this case, Plaintiff, a citizen of North Carolina, seeks a comity admission to the North Carolina Bar. He has been denied the opportunity to practice law in North Carolina and that denial infringes on a privilege protected by Article IV, section 2.[1] Unlike *Piper, Friedman*, and *Barnard,* the unique fact of this case is that Plaintiff has

[1] It is important to note that the *Friedman* Court specifically rejected Virginia's contention that the fact that the applicant for admission by motion was always free to sit for the Virginia Bar examination meant that the applicant was not being discriminated against on the basis of citizenship. Here, Defendants contend that Plaintiff has always been free to sit for the North Carolina Bar like any other applicant and thus is not being discriminated against on the basis of prior residency. The *Friedman* Court specifically rejected this argument and so does this Court. *See Friedman,* 487 U.S. at 66-67, 108 S.Ct. 2260.

already relocated to North Carolina, and, thus, a reading of Article IV, section 2 under *Slaughter-House* affords him no protection. *See Goldfarb,* 766 F.2d at 864-65 ("Goldfarb may not rely directly on [*Piper* and its progeny] because [Goldfarb] is a Virginia resident, and [Article IV, section 2] provides no security for the citizen of the State in which the privileges were claimed.") (quoting *Slaughter-House,* 83 U.S. at 77, 83 U.S. 36) (internal quotations omitted). Applying *Goldfarb* produces the result that Plaintiff, a North Carolinian by virtue of current residence, cannot assert his *Piper*-recognized fundamental right to pursue his profession under Article IV, section 2, which he could assert had he applied for a comity admission while in California.

In more typical challenges to bar admission requirements, plaintiffs have relied on the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Hawkins v. Moss,* 503 F.2d 1171 (4th Cir.1974); *Brown v. Supreme Court of Virginia,* 359 F.Supp. 549 (E.D.Va.1973) (rejecting an equal protection challenge to Virginia's requirement that an attorney seeking admission to the Virginia Bar without examination express an intent to reside and practice in Virginia). However, few courts, if any, did not apply rational basis review, and, as such, equal protection challenges to bar admission standards, other than residency requirements, have been uniformly upheld. In this case, Plaintiff relies on several components of the Fourteenth Amendment to challenge Rule .0502(3). For the reasons discussed below, the Court will only address the most novel of Plaintiff's claims.

Recent Supreme Court precedent allows Plaintiff to pursue this action under the Fourteenth Amendment's Privileges or Immunities Clause.[2] In 1999, the Supreme Court relied on the "right to travel" to invalidate a California law that calculated the amount of welfare benefits available to a newly-arrived California resident based on the amount of benefits available to that individual in his previous state of residence. *See Saenz v. Roe,* 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).[3]

In 1992, the California Legislature enacted § 11450.03 of the state Welfare and Institutions Code. That section limited for new residents the amount of California Aid to Families with Dependent Children ("AFDC") available to the amount the new residents would have received in the State of their prior residence. *Saenz,* 526 U.S. at 493, 119 S.Ct. 1518. In 1997, two plaintiffs from Oklahoma and Washington, D.C., respectively, filed suit challenging the constitutionality of the statute.

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[2] The *Saenz* Court held that standing to challenge state action under the Fourteenth Amendment Privileges or Immunities Clause derived from both state and United States citizenship. *Saenz,* 526 U.S. at 502, 119 S.Ct. 1518. Accordingly, Plaintiff could have brought his "right to travel" challenge prior to his move to North Carolina.

[3] The *Saenz* Court recognized the "right to travel" as having three components. "[The "right to travel"] protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz,* 526 U.S. at 500, 119 S.Ct. 1518. The Court held that the first component pre-dated the Constitution; the second was enshrined in Article IV, section 2; and the third was protected by the Privileges or Immunities Clause of the Fourteenth Amendment. *Saenz,* 526 U.S. at 501-03, 119 S.Ct. 1518.

Both plaintiffs arrived from states that had benefit levels that were substantially lower than those of California. *Saenz,* 526 U.S. at 496, 119 S.Ct. 1518. The statute created two groups of welfare beneficiaries among those who had not resided in California for at least one year: 1) those favored beneficiaries who moved to California from states having welfare benefit levels equaling or exceeding those of California and 2) those disfavored beneficiaries who arrived from states with benefit levels lower than those of California. The distinction between the two groups of beneficiaries turned solely on the location of the beneficiaries' prior states of residence. *Saenz,* 526 U.S. at 505, 119 S.Ct. 1518.

The statute discriminated "against citizens who ha[d] completed their interstate travel," and, therefore, implicated the plaintiffs' Fourteenth Amendment right, the third component of the "right to travel," to "be treated equally in [their] new State of residence." *Saenz,* 526 U.S. at 504-05, 119 S.Ct. 1518. Not recognizing a "fundamental right" to welfare benefits but instead a right to receive equal treatment in the new state, the Court held that California's statutory scheme violated the right to travel "unless shown to be necessary to promote a compelling governmental interest." *Saenz,* 526 U.S. at 504, 119 S.Ct. 1518 (citing 526 U.S. at 499, 119 S.Ct. 1518).

California "advanced an entirely fiscal justification for its multi-tiered scheme," arguing that the law would save California approximately $10.9 million a year. *Saenz,* 526 U.S. at 506, 119 S.Ct. 1518.[4] While not questioning the

[4] The *Saenz* Court pointed out that both the District and Appellate Courts found the law's unstated purpose to be discouragement of indigent immigration into California. There is no allegation in this case

(Continued on following page)

legitimacy of the state's interest, the Court held that the means of saving money chosen by the state were unconstitutional because neither the "duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do those factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among [California's] needy citizens." *Saenz,* 526 U.S. at 507, 119 S.Ct. 1518. The statute violated the Fourteenth Amendment because it was not narrowly tailored to serve California's interest and, therefore, unnecessarily infringed on the third component of the right to travel.

Here, Defendants base their determination of an applicant's suitability for a comity admission in part on the state in which an applicant last practiced law. The rule requires that applicant "prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law." N.C.B.L.E. Rule .0502(3).

Defendants' require an applicant to have "been physically practicing in [the comity] jurisdiction." *See*

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that Defendants hope to discourage immigration to North Carolina by lawyers from states not having comity with North Carolina. Instead, Defendants argue that the rule encourages other states to open their jurisdictions to North Carolina lawyers.

"Reciprocity Requirements for Admission to Practice Law in North Carolina," *available at* http://www.ncble.org. Even though the text of the Rule considers location of prior practice and not residence, the Rule in fact considers Plaintiff's prior residence because Plaintiff both lived and worked in California.

However logical it is to equate residency with place of practice, evidence proving as much is unavailable to the Court. In the legal profession and the workforce in general, crossing a state line to get to work would appear to be the exception more often than the rule. Of course, border residents and those Americans who live in major metropolitan areas, e.g., greater New York City, might cross state lines daily as a matter of course. Nonetheless, statistics supporting the proposition are elusive.[5] In Plaintiff's case, however, like the statute at issue in *Saenz,* the state-specific practice requirement treats him differently based on his immediately prior state of residence.

By its terms, Defendants' Rule .0502(3) sets out three requirements for an applicant seeking admission by comity: 1) a license to practice law in a comity jurisdiction; 2) having practiced law for four of the past six years immediately preceding the application for admission by

[5] Of the several state bars contacted by the Court, none have statistics comparing residency to location of practice. Rather, the state bars compile statistics indicating whether an attorney who is licensed in a particular state lives in that state. As an example, a resident of Atlanta is licensed to practice law in North Carolina and Georgia, with his primary practice occurring in the state of Georgia. He would be counted by the North Carolina Bar as an out-of-state member of the North Carolina Bar. That fact indicates nothing about whether he lives in greater Atlanta or commutes from Chattanooga daily.

comity; and 3) having done so in the jurisdiction from which the applicant seeks a comity admission.[6] Rule .0502(5) further requires that the applicant be in good standing in every jurisdiction in which he is admitted to practice.

Therefore, among all the lawyers seeking comity admissions, the favored group consists of those lawyers admitted in a jurisdiction having comity with North Carolina who have practiced in that jurisdiction for four of the past six years and are in good standing in every jurisdiction in which they are admitted to practice. The disfavored group consists of those lawyers not admitted in a comity jurisdiction; those lawyers admitted in a comity jurisdiction who have not been practicing law for four of the past six years; those lawyers admitted in a comity jurisdiction who have been practicing law for four of the past six years but are not in good standing with every jurisdiction in which they are admitted; and those lawyers admitted in a comity jurisdiction who have been practicing law for four of the past six years and are in good standing with every jurisdiction in which they are admitted but have not been practicing in a comity jurisdiction. Only the last group's identity is based solely on the location of its members' prior residence and practice location. Plaintiff is a member of this group.

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[6] Plaintiff characterizes Rule .0502(3) has having only two components: the comity requirement and the state-specific practice requirement. *See supra* p. 752-53. To avoid constitutional concerns over federalism, the Court construes the Rule as having three severable components. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 71 n. 15, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (recognizing the doctrines of avoidance of constitutional questions and federalism concerns).

Rule .0502(3)'s operation against that group implicates the Fourteenth Amendment-protected third component of the right to travel, as discussed by the Court in *Saenz:* the rule treats an applicant differently based on his prior state of residence. *See Saenz,* 526 U.S. at 502, 119 S.Ct. 1518 ("What is at issue in this case, then, is this third aspect of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."). If Plaintiff had moved directly from Indiana to North Carolina, he would have been granted a comity admission. However, as mentioned above, since he moved from California to North Carolina, he is being denied a comity admission. Accordingly, Defendants must justify both the requirement's purpose and means. *Saenz,* 526 U.S. at 504-05, 119 S.Ct. 1518. Absent a sufficient justification, the rule is unconstitutional.

Like the California Legislature in *Saenz,* Defendants have a legitimate and important purpose in seeking to ensure only the most competent attorneys are admitted to practice in North Carolina. *See Hawkins v. Moss,* 503 F.2d 1171, 1175 (4th Cir.1974) (recognizing a state's bar's substantial interest in ensuring an applicant's legal competency or proficiency); *see also* N.C.G.S. § 84-24 ("The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law."). In an affidavit, Defendant Fred P. Parker III has asserted that the purpose of Rule .0502 is to, *inter alia,* "insure that comity applicants are admitted from jurisdictions which

demand high standards similar to those the State of North Carolina demands of applicants." Def.'s Aff. 2.[7] Like the Court in *Saenz,* this Court accepts as legitimate Defendants' stated purposes.

However, like the statute challenged in *Saenz,* the requirement that the applicant have practiced in a specific jurisdiction before coming to North Carolina is not narrowly tailored to serve North Carolina's interests. *See Saenz,* 526 U.S. at 507, 119 S.Ct. 1518. Defendants' purpose is served by the comity requirement alone. Admission in a state having comity with North Carolina indicates an applicant's competence as a lawyer. Here, Plaintiff has been admitted in both Indiana and Ohio since 1981. Both jurisdictions meet North Carolina's standards for comity recognition.

Defendants' purpose is further served by the requirement that an applicant have "actively and substantially engaged in the full-time practice of law" for four of the six years immediately preceding his application. N.C.B.L.E. Rule .0502(3). This requirement ensures that an applicant cannot immediately gain admission to practice in North Carolina once he obtains admission to a comity jurisdiction. Rather, the rule requires that he practice in another jurisdiction for a sufficient period of time to ensure his professional competence. Here, Plaintiff has practiced law

[7] Assuming without deciding that using comity admissions as a means to encourage other states to grant comity admissions to North Carolina lawyers is an acceptable purpose, *see* Def.'s Aff. 2, that purpose is served by Rule .0502(4) alone. N.C.B.L.E. Rule .0502(4) (requiring that an applicant for a comity admission satisfy Defendants that the jurisdiction from which he seeks admission admits North Carolina lawyers without examination).

for nearly twenty-five years. He has taught courses for the California Bar and has unique experiences practicing law in Indiana, Ohio, California, and North Carolina. There is little danger that, if granted a comity admission, he will fail to meet Defendants' standards.

Rule .0502(5) further serves Defendants' purposes by requiring that an applicant for comity "[b]e at all times in good professional standing and entitled to practice in every state . . . in which the applicant has been licensed to practice." Plaintiff is in good standing with the state bars of California, Indiana, and Ohio.

The only remaining aspect of the rule is its emphasis on the state in which an applicant practiced for four of the six years immediately preceding his application. This component of Rule .0502(3) does not serve Defendants' purposes. There is no jurisdiction in the United States that has a particularly deficient legal bar. Thus, there is little chance that a lawyer's experience practicing in a non-comity jurisdiction could adversely affect his professional competence. Here, Plaintiff has spent the last six years practicing in both North Carolina and California. Neither jurisdiction's legal bar is so deficient as to raise questions about Plaintiff's competence as an attorney.

Because Rule .0502(3)'s state-specific practice requirement treats Plaintiff differently on the basis of the state in which he used to live and practice, the Fourteenth Amendment right to travel is implicated. Where state action implicates the right to travel, to survive a constitutional challenge, a state must justify the action's purpose and means by showing that it is necessary to serve a compelling state interest. If that justification is insufficient, the state action is unconstitutional.

In this case, Defendants' rule treats Plaintiff differently based on whether he used to practice in certain states, thereby implicating the Fourteenth Amendment. Defendants' justification for the rule fails because their purposes are effectively served without applying the state-specific practice requirement. Since the justification fails, Rule .0502(3)'s state-specific practice requirement is unconstitutional. Accordingly, Plaintiff's Motion for Summary Judgment on his Privileges or Immunities Clause claim is GRANTED.[8]

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED as to his challenge to Defendants' requirement that he practice in a specific jurisdiction before obtaining a comity admission. Defendants' Motion for Summary Judgment is GRANTED as to Plaintiff's challenge to Defendants' comity requirement. Plaintiff's challenge to Defendants' comity requirement is DISMISSED.

The Court hereby enters a DECLARATORY JUDGMENT that Defendants' Rule .0502(3) is UNCONSTITUTIONAL as applied to Plaintiff so far as it requires comity applicants who are admitted to a comity jurisdiction and

[8] It is important to note what Plaintiff's success today does not do. Defendants are not required to create comity arrangements with any jurisdiction in the country, and Defendants are free to impose practice requirements of any length of time on would-be comity applicants. Further, Defendants could abolish comity admissions in their entirety and require all applicants for admission to the North Carolina Bar to sit for the Bar Examination. Today's ruling holds only that Defendants cannot Constitutionally confer comity admissions based in part on the location of an applicant's prior state of practice and residence.

have practiced law for four of the past six years to have practiced in a certain jurisdiction during that time period. Defendants are PERMANENTLY ENJOINED from enforcing Rule .0502(3) against PLAINTIFF. Because Plaintiff is otherwise qualified pursuant to Rule .0502, Defendants are ORDERED to extend him a comity admission.

SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 12, 2006

No. 05-1257
CA-04-92-5-BO

STEVEN C. MORRISON, Esquire

Plaintiff-Appellee

v.

BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; SUSAN FREYA OLIVE; THOMAS W. STEED, JR.; KARL ADKINS; EDWARD J. HARPER, II; GAIL C. ARNEKE; ROBIN L. TATUM; CATHERINE E. THOMPSON; WILLIAM K. DAVIS; ROY W. DAVIS, JR.; EMIL F. KRATT; SHIRLEY FULTON; FRED P. PARKER, III, and their successors, in their capacities as director and/or members of the Board of Law Examiners

Defendants-Appellants

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ASSOCIATION OF CORPORATE COUNSEL

Amicus Supporting Appellee

No. 05-1348
CA-04-92-5-BO

STEVEN C. MORRISON, Esquire

Plaintiff-Appellant

v.

BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; SUSAN FREYA OLIVE; THOMAS W. STEED, JR.; KARL ADKINS; EDWARD J. HARPER, II; GAIL C. ARNEKE; ROBIN L. TATUM; CATHERINE E. THOMPSON; WILLIAM K. DAVIS; ROY W. DAVIS,

JR.; EMIL F. KRATT; SHIRLEY FULTON; FRED P. PARKER, III, and their successors, in their capacities as director and/or members of the Board of Law Examiners

Defendants-Appellees

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ASSOCIATION OF CORPORATE COUNSEL

Amicus Supporting Appellant

On Petition for Rehearing En Banc

Appellee/cross-appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Shedd, and Judge Kelley.

For the Court,

/s/ Patricia S. Connor
CLERK

NORTH CAROLINA BOARD OF LAW EXAMINERS

RULE .0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the code of Professional Responsibility as Promulgated by the North Carolina State Bar.

(b) That the applicant furnishes the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $1,500.00, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which the applicant is duly licensed; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(4) Satisfy the Board that the state, or territory of the United States, or the District of Columbia, in which the applicant is licensed, and from which he seeks comity, will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District

of Columbia, without written examination, other than the Multistate Professional Responsibility Examination;

(5) Be at all times in good professional standing and entitled to practice in every state, territory of the United States, or the District of Columbia, in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the Board; except that the applicant may be inactive in any jurisdiction as to which the applicant is not relying to meet the Board's comity rule;

(6) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(7) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971

(8) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application;

(9) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

North Carolina General Statute

§ 84-24. Admission to practice.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years.

The Board of Law Examiners shall elect a member of the Board as chair thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable the Board to perform its duties promptly and properly. The chair and any employees shall serve for a period of time determined by the Board.

The examination shall be held in the manner and at the times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide assistance as

may be required to enable it to perform its duties promptly and properly. Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of Chapter 132 of the General Statutes.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Department of Justice may provide a criminal record check to the Board of Law Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall

not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this section.

The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.

All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Whenever the Council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to the person, noting thereon that the license is issued in compliance with an order of the Council, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance. Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, § 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, § 6; 1947, c. 77; 1951, c. 991, § 1; 1953, c. 1012; 1965, cc. 65, 725; 1973,

c. 13; 1977, c. 841, § 2; 1983, c. 177; 1991, c. 210, § 4; 1995, c. 431, § 17; 2002, c. 147, § 5.)

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§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council", which shall be composed of 55 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president. Notwithstanding any other provisions of the law, the North Carolina State Bar may acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 55. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years based on the number of active members of each judicial district bar according to the records of the North Carolina State Bar

and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the Council until expiration of the remainder of the current term. A councilor whose judicial district is altered by the General Assembly during the councilor's term shall continue to serve on the Council until the expiration of the term and shall represent the district wherein the councilor resides or with which the councilor has elected to be affiliated. If before the alteration of the judicial district of the councilor the judicial district included both the place of residence and the place of practice of the councilor, and if after the alteration of the judicial district the councilor's place of residence and place of practice are located in different districts, the councilor must, not later than 10 days from the effective date of the alteration of the district, notify the Secretary of the North Carolina State Bar of an election to affiliate with and represent either the councilor's district of residence or district of practice. In addition to the 55 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. The public members may vote and participate in all matters before the Council to the same extent as councilors elected or appointed from the various judicial districts. (1933, c. 210, § 3; 1937, c. 51, § 1; 1955, c. 651, § 1; 1961, c. 641; 1973, c. 1152, § 2; 1977, c. 841, § 2; 1979, c. 570, §§ 1, 2; 1981, c. 788, § 3; 1985, c. 60, § 1; 1987, c. 316, § 1; 1995, c. 431, § 9.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:04-CV-92-BO(3)

STEVEN C. MORRISON, *an individual* Plaintiff, v. BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and SUSAN FREYA OLIVE, THOMAS STEED, JR., KARL ADKINS, EDWARD J. HARPER, II, GAIL J. ARNEKE, ROBIN L. TATUM, CATHERINE L. THOMPSON, WILLIAM K. DAVIS, ROY W. DAVIS, JR., EMIL F. KRATT, SHIRLEY L. FULTON and FRED P. PARKER III and their successors, *in their capacities as director and/or members of the Board of Law Examiners* Defendants.	AFFIDAVIT OF FRED P. PARKER III DIRECTOR OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

I, Fred P. Parker III, being first duly sworn, depose and say:

1. I am a citizen and resident of the State of North Carolina and over eighteen years of age.

2. I am currently employed by the State of North Carolina as the Executive Director of the Board of Law Examiners of the State of North Carolina.

3. The Board of Law Examiners has full power and authority under N.C.G.S. §84-24 to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy the Board that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor at law. This legislative mandate includes the power to make, alter and amend such rules and regulations for the admission to the Bar as in the Board's judgment shall promote the welfare of the State and the legal profession.

4. Comity Rule .0502 was adopted to:

   (a) regulate admissions;

   (b) protect the public and assure a competent Bar;

   (c) insure that comity applicants are admitted from jurisdictions which demand high standards similar to those the State of North Carolina demands of applicants;

   (d) help evaluate the character and fitness of comity applicants;

   (e) aid the Board's investigatory function concerning applicants;

   (f) facilitate interstate travel by allowing applicants from reciprocal states to become admitted to the North Carolina Bar without the necessity of taking the Bar examination;

   (g) facilitate interstate travel by encouraging other states to admit North Carolina attorneys without taking a Bar examination.

5. Mr. Morrison has requested to be admitted as an exception to Rule .0502 based upon several facts. The exception to Rule .0502 Mr. Morrison has requested has not been granted for anyone.

6. The State Board has not subjected Mr. Morrison to more onerous requirements for admission than those imposed upon other North Carolina citizens or comity applicants.

7. Mr. Morrison appears to have been, at all times pertinent to this matter, educationally eligible to sit for the North Carolina Bar examination

8. The Board did not accept Mr. Morrison's comity application because he did not meet the requirements in Rule .0502, a fact which he admits when he states he "has continued to be a member of the California State Bar" since 1985. California does not grant comity admission to North Carolina attorneys.

9. Mr. Morrison did not physically practice law for four of the last six years in a state which grants admission without examination to attorneys licensed in North Carolina.

10. For that reason, Mr. Morrison's comity application was not accepted and he was notified by letter dated January 20, 2004.

Further your affiant sayeth not,

This the 10th day of March, 2004.

/s/ Fred P. Parker III
Fred P. Parker III
Executive Director
Board of Law Examiners of
the State of North Carolina

NORTH CAROLINA
COUNTY OF WAKE

Sworn to and subscribed before me
this the 10th day of March, 2004.

/s/ Janice I. Davies
Notary Public
My Commission Expires: 6/25/05

[Seal]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

Case No.: 5:04-CV-92-BO(3)

STEVEN C. MORRISON, *an individual* Plaintiff, vs. BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, *and* SUSAN FREYA OLIVE, THOMAS W. STEED, JR., KARL ADKINS, EDWARD J. HARPER, II, GAIL C. ARNEKE, ROBIN L. TATUM, CATHERINE E. THOMPSON, WILLIAM K. DAVIS, ROY W. DAVIS, JR., EMIL F. KRATT, SHIRLEY L. FULTON and FRED P. PARKER III and their successors, *in their capacities as director and/or members of the Board of Law Examiners* Defendants.	AFFIDAVIT OF STEVEN C. MORRISON (Filed Mar. 23, 2004)

I, Steven C. Morrison, solemnly swear, affirm, and declare that:

1. I am a citizen of the United States residing in North Carolina and over eighteen (18) years old.

2. I am a 50-year-old attorney who graduated with honors from Indiana University School of Law in 1979. I am educationally qualified to be admitted to the bar. (Note: the Board also agrees, see Affidavit of Parker ¶ 7)

3. I clerked for a federal magistrate in the Southern District of Indiana federal court (Hon Thomas Faulconer).

4. I am licensed, by exam, in three states: Indiana, Ohio, and California. Indiana and Ohio are comity states accepted by North Carolina. (Note: the Board agrees that I am admitted in these three states. See Memorandum in Support of Defendants' Motion to Dismiss p.2.)

5. I have been given an "AV" rating from Martindale Hubbell, after they interviewed judges, attorneys, opposing counsel, and the state bar about my ethical and professional performance. An "AV" rating is the highest distinction in legal work and ethics.

6. I have presented four different continuing legal education seminars certified by the bar of California. I have volunteered my legal services *pro bono* for those who could not pay for any attorney yet were disadvantaged by their legal situation. I have helped legal Hispanic Americans fight to keep their kids in classes that were taught in English when "educators" wanted to teach them in Spanish only because of their surnames. I also serve as a board member for my church. I coordinate a high school and college teen group that meets about twice a month. I have been a youth coach, umpire, commissioner and president of a youth league. I have served on civic committees to plan parks and recreational development.

7. I have never been charged or convicted of anything other than a traffic ticket.

8. I was formerly the Chief Legal Officer of TogetherSoft Corporation, a company I started for a client in 1999 and grew extremely quickly to include 400 employees worldwide with 100 here in Raleigh. I was also a board member, and legal representative for our subsidiaries in England, Germany, Czech Republic, Russia, Japan and other subsidiaries. Borland Software, a publicly traded corporation, recently purchased the company for $205 million. As is normal in such a situation, the administrative officers such as myself, were not retained.

9. In the late summer or fall of 2003 (I did not keep a record of the date, but I fully recall the conversation) I called Defendant Fred Parker to ask him if the Board would consider my comity application under my particular circumstances. Fred Parker told me that the Board would never consider the application since it would be rejected it because I was admitted to California and the rules did not allow comity application to attorneys admitted in California.

10. I filed my application for comity admission with the defendant Board of Law Examiners on December 15, 2003. The application, in addition to all the standard information, also had an extensive brief outlining how I could qualify for comity admission under a liberal interpretation (which I have not set before this court) or that in the alternative, why the rules were unconstitutional as applied to me. The intake employee took the application in the other room and within 2 or 3 minutes returned the application to me stating that I did not qualify. I asked why, and she said

that the application indicated that I had had an office in California at some point in the last six years and that therefore I did not qualify. I then prevailed upon her to take the application so that at least I could get a formal notification of the rejection. The Plaintiff offers to submit the application under seal to the court if desired. It needs to be under seal because it contains my social security number, bank accounts, and other sensitive information.

11. The application was returned to me after January 20, 2004 because the Board of Law Examiners decided that I was not eligible for comity admission. The Board has indicated that it was returned because California is not a comity state, and because I practiced in California for part of the last six years instead of in a comity state. See Affidavit of Parker ¶¶ 8-9.

12. I am an expert in certain aspects of software contracting and licensing (both nationally and internationally). It is my experience that all software development contracts or licenses between a North Carolina company and a large company located elsewhere in the US or internationally will have a choice of law provision which will use California or possibly New York law, but will never use North Carolina law. Because of my expertise, I have been contacted on at least two occasions to advise North Carolina companies on such matters because they could not find similar expertise and I have had to decline because I am not admitted in the State of North Carolina

Further the affiant sayeth not.

Sworn and subscribed to, under the United States laws for the penalty for perjury this 23 day of March, 2004

/s/ Steven C. Morrison
Steven C. Morrison

(Web page taken from www.ncble.org/ "comity" as of 9/25/06)

RECIPROCITY REQUIREMENTS FOR ADMISSION TO THE PRACTICE OF LAW IN NORTH CAROLINA

1) Must have graduated from an ABA Accredited Law School.

2) In order to be eligible for admission by comity you must be able to substantiate that you have been engaged in the *full-time practice of law* as your principal means of livelihood and duly licensed in a reciprocal jurisdiction for at least four out of the last six years; *a minimal 48 months*. You must be or have been *physically practicing in this jurisdiction*. You may be required to submit supporting documentation, including time-sheets. In the event you cannot meet this requirement you are not eligible for comity admission.

3) Reciprocal jurisdictions as of April 19, 2005:

ALASKA	NEW HAMPSHIRE
ARKANSAS	NEW YORK
COLORADO	NORTH DAKOTA
CONNECTICUT	OHIO
DISTRICT OF COLUMBIA	OKLAHOMA
GEORGIA	PENNSYLVANIA
ILLINOIS	
INDIANA	TENNESSEE
IOWA	TEXAS
KANSAS	UTAH
KENTUCKY	VERMONT

MASSACHUSETTS	WASHINGTON
MICHIGAN	WEST VIRGINIA
MINNESOTA	WISCONSIN
MISSOURI	WYOMING
NEBRASKA	

COMITY APPLICATION