No. 06-499

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

TABLE OF AUTHORITIES – Continued

Page

LEGAL JOURNALS

The Petition challenges two related provisions of respondents' Rule .0502(3) on admission by motion: the requirements (a) that the jurisdiction in which an applicant is already admitted must grant reciprocity to members of the North Carolina Bar, and (b) that the applicant must have actively practiced for four out of the last six years in the jurisdiction from which admission by reciprocity is sought. On the main challenge, respondents argue that this case is a "poor vehicle" (Opposition at 6) and that the decision below is correct. On the "four of the last six years" requirement, respondents do not contend that there are any "vehicle" problems, but, like the court of appeals, they make no effort to defend that provision apart from the general reciprocity requirement. We review the opposition to each provision separately.

I. The Reciprocity Requirement.

Respondents correctly observe that petitioner did not raise a Commerce Clause challenge in his papers below, nor did he cite the principal Commerce Clause cases on which he now relies, *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366 (1976) ("*A&P*") and its progeny. Respondents admit, however, that petitioner challenged the constitutionality of the reciprocity provision under both Privileges and Immunities Clauses and under the Equal Protection Clause, and both lower courts ruled on the challenge. And respondents do not claim that this Court lacks jurisdiction to consider the Commerce Clause challenge or the *A&P* line of cases. Moreover, those cases are also relevant on the Equal Protection and Privileges and Immunities challenges, since if a state interest is not legitimate under the Commerce Clause, it cannot be

invoked to defend this rule even under a rational basis test.[1]

Although respondents moved for summary judgment, they now suggest, as a reason for this Court not to decide the Commerce Clause challenge, that there are facts that are lacking for a proper adjudication (Opp. at 8-9). They argue that, under *A&P*, petitioner must show that the admission standards in California, where he most recently practiced, are equivalent to those in North Carolina, and because there is no evidence on this issue, the Court should not decide it. But respondents misread both *A&P* and their own rule. While *A&P* did observe that Louisiana's standards were equal to those in Mississippi, the decision did not turn on that fact. Rather, what was critical to the Court was that Mississippi would have accepted the milk from Louisiana even if Louisiana's standards were "lower" – so long as Louisiana granted Mississippi producers reciprocal treatment. 424 U.S. at 375.

That is precisely the situation here. If California amended its bar admission rules today and allowed North Carolina lawyers to be admitted on motion on a reciprocal basis, respondents would automatically, with no investigation

[1] The Petition contended (18-19) that, because the reciprocity rule was issued by practicing lawyers, rather than by a court or legislature, the deference that might apply to a court rule does not apply here. Respondents counter by citing *Jones v. N.C. Prisoners' Labor Union Inc.,* 433 U.S. 119 (1977), in which this Court applied a rational basis test to a decision of the state board of corrections, not the legislature. Opp. at 16, n. 3. But that board was made up of full-time state officials, not, as here, of private citizens whose only "government" status is derived from their selection by the Council of the North Carolina Bar to serve on the part-time Board of Law Examiners.

of California's bar admission standards, add California to its list of comity states, and petitioner could be admitted on motion, because that is precisely what Rule .0502(3) provides. This undisputable fact wholly undermines respondents' claim that North Carolina is simply deferring to the judgment of California that its laws are "unique" (Opp. at 10), which is why everyone seeking admission there must take the California bar exam and why North Carolina cannot admit California lawyers unless they take the North Carolina exam.[2] Indeed, one state on respondents' approved list – Wisconsin (App. 48) – does not even require graduates of its two in-state law schools to take a bar exam at all, Wisconsin Supreme Court Rules 40.02(2) & 40.03(2), which surely undercuts respondents' claim that only those states with admission standards equal to those in North Carolina will be admitted without examination. Furthermore, the affidavit submitted by respondents' executive director never suggested that the State attempted to determine whether in fact the admission requirements of other States were comparable to those of North Carolina (App. 38-40), and none of respondents' briefs until its opposition in this Court suggested that Rule .0502(3) requires any such determination.

On the merits of the Commerce Clause challenge, respondents point out (Opp. at 9) that the *A&P* line of

[2] The main reason that California and other warm-weather States like Florida, Hawaii, and Arizona require everyone to take a bar exam is the same one that produced the residence requirements for bar admission, which this Court has held to be unconstitutional: to protect the economic interests of members of their bars. *See* Andrew Perlman, "A Bar Against Competition: the Unconstitutionality of Admission Rules for Out-of-State Lawyers," 18 Geo. J. of Legal Ethics 135, 137 n. 5 (2004).

cases all involve tangible property. However, in the very same paragraph, they cite *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), which is an antitrust case in which this Court held that the agreement in restraint of the provision of legal services there had a substantial effect on interstate commerce, 421 U.S. at 783-786, thereby rejecting respondents' contention that rules governing the delivery of legal services are outside the purview of the Commerce Clause. As the facts here demonstrate, Rule .0502(3) plainly inhibits the movement of lawyers and their ability to deliver interstate legal services, and respondents do not argue otherwise. *See also* Brief of Association of Corporate Counsel as *Amicus Curiae* in Support of the Petition at 4-6.

The portion of the *Goldfarb* opinion quoted by respondents suggests the possibility of some different treatment for legal services under the antitrust laws, but not under the Constitution. Thus, in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court rejected an antitrust challenge to the State's advertising rules, but then struck them down under the First Amendment. Even more relevant to this case, this Court has had four separate post-*Goldfarb* challenges to bar admission rules, and in every case found them to be unlawful.[3] Those decisions are not dispositive of petitioner's challenge to respondents' reciprocity rule, but, in combination with the *A&P* line of cases, they strongly suggest that the rule is inconsistent

[3] *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985); *Frazier v. Heebe,* 482 U.S. 641 (1987); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Barnard v. Thorstenn,* 489 U.S. 546 (1989).

with this Court's teachings and that it faces a very uphill road if it is to be sustained.

Respondents also fail to confront the argument that the Petition makes (at 10-11) on why the decision below is also in conflict with *Saenz v. Roe,* 526 U.S. 489 (1999). In *Saenz,* California reduced its welfare benefits to some applicants depending on the benefits that were allowed in the state from which they came. That is precisely the same kind of discrimination as the discrimination based on state of prior admission that respondents have enacted here: North Carolina discriminates against some applicants for bar admission based on whether their former state of practice has comity with North Carolina. Just as the level of benefits granted by a welfare applicant's prior state of residence had no legitimate bearing on an applicant's current need for welfare, so the willingness of a lawyer's prior state of admission to allow North Carolina lawyers to be admitted without examination has nothing to do with whether that lawyer is qualified to provide competent and honest legal representation in North Carolina.

There is one other point worth noting about respondents' argument that the Court should deny review of the Commerce Clause challenge because this case presents a "poor vehicle" for deciding the question. North Carolina is one of twenty-three states with reciprocity provisions, and it should now be clear to lawyers, the likely challengers to these reciprocity rules, that there is a serious question about their constitutionality, as evidenced by this Court's request for a response to the Petition after respondents filed a waiver. Thus, there can be little doubt that a similar case would be brought again if this Court were to deny review because the Commerce Clause issue was not argued below. Because the Court is likely to take the issue

at some time, there seems little reason to postpone the day of reckoning when all the relevant facts are in the record and the lower courts are not heeding this Court's decisions that bear on these issues.

II. The "Four of the Last Six Years" Requirement.

Petitioner's second challenge is to the requirement that applicants must have practiced law in a state having reciprocity with North Carolina for four of the last six years, which disqualified petitioner even though he was also licensed in Ohio and Indiana, which are reciprocity states with North Carolina. Thus, although petitioner had practiced for the four of the last six years under a California license, that did not "count" under North Carolina's rule, because California is not a reciprocal state. Respondents do not dispute that, if petitioner had reversed the order of his bar admissions and practices, beginning with California and ending with either Ohio or Indiana, he would have met the requirements of Rule .0502(3). It is this irrationality that is at the heart of this portion of petitioner's challenge.

Respondents make no claim that this issue was not fully presented below. Instead of defending this provision on the merits, they follow the example of the court of appeals: they simply do not address it separately, but fold all their arguments into their defense of the basic reciprocity rule under an Equal Protection challenge, using a rational basis analysis. *But see* Petition at 18-19 and note 1 *supra,* arguing for heightened scrutiny. Respondents' failure to analyze this requirement separately from the basic reciprocity challenge is all the more remarkable

since this provision was the basis on which the district court ruled for petitioner.

Like the reciprocity requirement, the "four of the last six years" rule has nothing to do with a lawyer's qualifications to practice law in North Carolina. Rather, they are both solely intended to help North Carolina lawyers gain motion admission elsewhere, thereby placing them in conflict with the *A&P* line of cases and with the teachings of this Court in the bar admission cases relied on by petitioner, even if the actual holdings in those cases do not involve precisely this situation. To be sure, there may yet be an unarticulated basis that would justify the discrimination created by respondents' "four of the last six years" requirement, but to date, they have not advanced one to support its facial irrationality.

CONCLUSION

The Petition presents a legal issue of great importance to practicing lawyers who wish to gain admission by motion to the bars of nearly half the States that condition such admission on reciprocity from the State in which the lawyer is already admitted. The Petition and this Reply demonstrate that this case properly presents the issues and shows that respondents' rule is in conflict with a significant number of decisions of this Court. Accordingly, this Court should grant review to resolve the status of these reciprocal bar admission rules.

Respectfully submitted,

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