13-17082

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAAMJP, et al,

Plaintiffs-Appellants,

v.

REBECCA WHITE BERCH et al,

Defendants-Appellees.

On Appeal from the United State District Court
For the District of Arizona

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. Supporting Plaintiffs-Appellants and Supporting Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), amicus curiae Public Citizen, Inc., states that it is a non-stock, nonprofit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of Public Citizen.

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INTEREST OF THE AMICUS CURIAE[1]

Public Citizen, Inc. is a nonprofit corporation founded by Ralph Nader in 1971 to engage in a wide range of public-interest advocacy activities. It is located in Washington, DC, and has more than 300,000 members and supporters nationwide. Public Citizen appears before Congress, federal agencies, and the courts to advocate for consumer protections, access to the courts, and open government, among other things. Public Citizen has a long history of policing bar rules that may have anticompetitive effects or serve to limit individuals' access to the lawyer of their choice. For example, through its litigation division, Public Citizen Litigation Group, Public Citizen attorneys were counsel of record in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (successful challenge to Virginia rule allowing residents, but not non-residents, to be admitted to its bar without taking the bar exam); *Frazier v. Heebe*, 482 U.S. 641 (1987) (successful challenge to federal district court requirement that applicant for bar admission reside or have an office in the state where the court is located); and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (successful antitrust challenge to minimum fee

[1] This brief is filed with the consent of all the parties. FRAP 29(a). No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

schedules set by bar associations). In these and other cases in which Public Citizen challenged similar rules, it did so with the goal of making legal services more available and affordable to consumers. One of the means of achieving that goal is to reduce restrictions on admission to the bar where those restrictions do not assure that a lawyer is competent and has the requisite character to serve clients and the courts.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal is from a decision of the United States District Court for the District of Arizona upholding the portion of Rule 34(f) of the Rules of the Supreme Court of Arizona conditioning the ability of attorneys who wish to be admitted on motion on the willingness of the state in which they are currently licensed to admit attorneys from Arizona on similar conditions. The Arizona Supreme Court has found that this "reciprocity" condition, as it is known, is satisfied by the rules of 32 states and the District of Columbia, but is not satisfied in 17 other states and five territories.[2] In sustaining the reciprocity requirement, the District Court relied solely on defendants' assertion that the rule "serves the interest of encouraging other states to admit Arizona attorneys on similar terms" (Excerpts of Record (ER) 44, n.

[2] www.azcourts.gov/Portals/26/admis/2013/AOM_RECIP_2013(2).pdf.

22). The defendants did not assert, and the court did not find, that the rule provides any additional protection for the public.

Appellants have raised a number of objections to the reciprocity requirement, among them that it violates the Dormant Commerce Clause. They have chosen to devote less than two pages in their brief to this argument (Br. 42-44), which is little more than half of what the lower court said in rejecting it. ER 39-42. In the view of amicus, the Commerce Clause provides the best constitutional argument for overturning the reciprocity requirement. The reciprocity rule directly and adversely affects commerce, which is what the Dormant Commerce Clause seeks to prevent.

The adverse effects of requiring reciprocity are twofold. First, it places barriers on the ability of lawyers to move or expand their practices from one jurisdiction to another, solely because of the irrelevant happenstance of whether the jurisdiction in which they currently practice is open to having lawyers from other states become members of that bar without taking a bar exam. Second, by limiting admission by motion for attorneys, the reciprocity requirement has the inevitable effect of limiting client choices in selecting among otherwise qualified lawyers, thereby increasing costs, requiring clients to retain their second choice of counsel, or both.

The Supreme Court has been clear that reciprocity is a forbidden barrier to interstate commerce, absent a valid reason for the requirement. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Because the actual reason for Arizona's reciprocity rule — helping Arizona lawyers get admitted elsewhere — is in itself not a permissible motive for discrimination under the Commerce Clause, and because it does nothing to protect the public from incompetent lawyers or those who lack proper character to practice law, it cannot withstand this Commerce Clause challenge. The forty year old decision in *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert denied*, 420 U.S. 928 (1975), which upheld a reciprocity rule similar to Arizona's, is not binding on this Court and should be rejected both because it predates *A&P* and the other anti-reciprocity cases decided by the Supreme Court, and because it fails to recognize the anti-competitive impact of such rules.[3]

[3] As appellants explain in their brief (Br. 3), Arizona now allows admission by transfer of an applicant's uniform bar examination score, under which an applicant who has passed the uniform bar exam now utilized in Arizona may be admitted on that basis, subject to certain conditions. Rule 34(h) *reprinted in* Appellants' Appendix to Brief ("App.") 67. The uniform bar exam is a relatively new development, and thus does not benefit attorneys who passed other bar exams and who seek admission to the Arizona bar.

ARGUMENT

THE RECIPROCITY REQUIREMENT FOR ADMISSION ON MOTION VIOLATES THE DORMANT COMMERCE CLAUSE.

"A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

A. State Bars Have a Long History of Exclusions from Admission for Reasons Unrelated to an Applicant's Qualifications.

The rule being challenged in this case is another in a long history of state bar rules excluding applicants for admission for reasons unrelated to their fitness or capacity to practice law. Set forth below, in chronological order, is a partial list of cases challenging these rules and the reason for the exclusion, which were found wanting in most of the cases. Cases raising substantially the same issue in the same or other jurisdictions are not included. These cases illustrate how prevalent is the habit of illegitimate bar exclusion from membership and how the impact has always been to protect the interests — mainly economic — of existing bar members.

* * *

Women
Bradwell v. People of State of Illinois, 83 U.S. 130 (1872).

Blacks & Other Racial Minorities
In re Taylor, 48 Md. 28 (1877).

Prior Communist Party Membership
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

Durational Residence Requirement (1 year) to Take Bar Exam
Smith v. Davis, 350 F. Supp. 1225 (D.W.Va. 1972) (three-judge court).

Non-US Citizenship
In Re Griffiths, 413 U.S. 717 (1973).

Refusal to Count as Prior Practice for Motion Admission Time Practicing Law for Agency of State of Prior Admission
Shapiro v. Cooke, 552 F. Supp. 581 (N.D.N.Y. 1982).

Admission to Local State Bar Required for Federal District Court Admission
Galahad v. Weinshienk, 555 F. Supp. 1201 (D. C. Colo. 1983)

Out of State Resident (Right to Take Bar Exam)
Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

Full Time Practice Requirement for Admission on Motion
Goldfarb v. Supreme Court of Virginia, 766 F.2d. 850 (4th Cir. 1985), *cert denied,* 474 U.S. 1086 (1986).

Out of State Resident (Admission on Motion)
Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988).

Federal Court Rule Requiring Office or Home in State
Frazier v. Heebe, 482 U.S. 641 (1987).

In-State Office Requirement
Tolchin v. Supreme Court of the State of New Jersey, 111 F.3d 1099 (3rd Cir.), *cert. denied,* 522 U.S. 977 (1997).

Office Requirement Only for Non-Resident Attorneys
Schoenefeld v. New York, 907 F. Supp. 2d 252 (N.D.N.Y. 2011).

* * *

In most of these cases, the anti-competitive effects of the rule were recognized, although in some the rule was upheld because the court found it to be counterbalanced by benefits to the courts or the public.

Although bar admission rules have been a major source of these adverse effects on consumers of legal services and individuals seeking bar admission, other bar rules have had similar adverse impacts. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) (minimum fee schedules violate federal anti-trust laws); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) (total ban on all advertising protected by state action defense to anti-trust laws, but found to violate First Amendment); *Sperry v. State of Florida,* 373 U.S. 379 (1963) (rule requiring persons licensed by patent office to be Florida bar members, if working in Florida, preempted by federal law); *United Mine Workers of America v. Illinois,* 389 U.S. 217 (1967) (bar rule forbidding union to hire attorneys to represent members in workers compensation cases violated the First Amendment right to petition the government for redress of grievances applicable in commercial matters).

Amicus respectfully suggests that this history should serve as a significant warning sign that courts called on to review any bar admission

rule must be on the lookout for bar protective measures defended on the contrived ground that they protect clients of bar members or the courts before which lawyers appear.

This case, however, is easier than many because neither appellees nor the trial judge offered any client or court protective reason for the reciprocity requirement. As discussed *infra* at 10, they all agreed that the Arizona reciprocity rule exists solely to help members of the Arizona bar in obtaining admission on motion to the bar of other states by encouraging other states to admit Arizona lawyers on motion. The only remaining question is whether that reason is a valid one under the Commerce Clause jurisprudence of the Supreme Court, and, as we now show, it is not.

B. Reciprocity Is Not a Legitimate Basis for Burdening Interstate Commerce.

There can be no doubt that Arizona's reciprocity rule has restricted the ability of two of the named plaintiffs — John Doe and Mark Anderson — to move to Arizona for personal reasons and to practice law there. ER 107, ¶ 2; 139, ¶ 1. Their home states (Florida and Montana) do not have reciprocity with Arizona, and as a result of Rule 34(f), they will have to take the Arizona bar examination instead of being able to be admitted on motion. Plaintiff Allison Gavin is admitted to the California bar and is already an Arizona resident. ER 120, ¶ 8. Because California does not have reciprocity

with Arizona, she too has to take the bar exam in Arizona. In the meantime, she cannot practice law, but is working as a contract law clerk. The reciprocity restriction thus places a burden on the interstate movement of lawyers who wish to deliver commercial legal services, and hence is subject to challenge under the Dormant Commerce Clause. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704-07 (7th Cir. 2009) (discriminatory bar admission rules can raise Dormant Commerce Clause problems).

In addition to the burdens imposed on would-be providers of legal services in Arizona, such as the plaintiffs Doe, Anderson, and Gavin, individuals and companies who are in need of legal services in Arizona have reduced choices because the reciprocity restriction inevitably reduces the number of lawyers among whom clients may choose. This reduced choice results in less competition among lawyers to obtain clients, which may further injure clients by increasing the amounts that they must pay for legal services, or by forcing them to utilize lawyers they may find less suitable to their needs than ones kept out by the reciprocity requirement, or both. Transactions between lawyers and clients are commercial activities, which often have interstate aspects to them, and hence are a proper subject of the Commerce Clause. *See Goldfarb v. Virginia State Bar*, 421 U.S. at 783-86.

Defendants' Statement of Material Facts in Support of Their Motion for Summary Judgment, Docket 54, Exhibit 1, ¶ 7, asserts three reasons for the reciprocity requirement:

> "A. Insure that comity applicants are admitted from jurisdictions which demand high standards similar to those Arizona demands of applicants.
> B Facilitate interstate travel by encouraging other states to admit Arizona attorneys without taking a bar examination.
> C. Facilitates [sic] interstate travel and commerce by easing the admission of qualified out of state attorneys to the Arizona Bar."

The first is plainly not supported by the text of Rule 34(f), which does not require that the standards of the reciprocal state approximate those in Arizona. The third (easing admission for out of state attorneys) is not a purpose or consequence of the rule's *reciprocity* requirement, which is the subject of this challenge; rather, that purpose would be served much more fully without the reciprocity requirement, which impedes rather than facilitates interstate mobility. Thus, the purpose of Arizona's reciprocity requirement is, as the trial court concluded (ER 44, n. 22), only to encourage other states to admit Arizona attorneys on motion, a purpose having nothing to do with protecting the interests of Arizona clients or the Arizona courts.

The Supreme Court has clearly held that reciprocity agreements are subject to challenge under the Dormant Commerce Clause. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 376 (1976) (*A&P*). In *A&P*,

Mississippi permitted out-of-state milk producers to sell milk in Mississippi only if their home state accepted "milk and milk products produced and processed in Mississippi on a reciprocal basis." *Id.* at 367. The plaintiff was a retailer that had 38 outlets that sold milk in Mississippi and had built a plant for processing raw milk that would be sold in its stores. A&P wanted to purchase unprocessed milk from Louisiana, but Louisiana declined to enter reciprocity agreements with any state, including Mississippi. In all other respects, Mississippi was willing to accept Louisiana milk without any objection based on standards of wholesomeness.

The Court unanimously rejected Mississippi's asserted justification that reciprocity was "a reasonable exercise of its police power over local affairs, designed to assure the distribution of healthful milk products to the people of its State." *Id.* at 370. The district court had found that the burden imposed by the reciprocity requirement "did not constitute a sufficient burden on interstate commerce to violate the Commerce Clause." *Id.* at 374. In overturning that ruling, the Supreme Court concluded that the lower court had "attached insufficient significance to the interference effected by the clause upon the national interest in freedom for the national commerce, and attached too great significance to the state interests purported to be served by the clause." *Id.* at 375. The Court observed that, although the reciprocity rule

was "not in terms an absolute and universal bar to sales of out-of-state milk," it had "'in practical effect exclude(d) from distribution in (Mississippi) wholesome milk produced . . . in (Louisiana).' Only state interests of substantial importance can save § 11 in the face of that devastating effect upon the free flow of interstate milk." *Id.* (citation omitted, parentheses in original).

Mississippi sought to justify its reciprocity rule as a measure designed to protect the public health, but the Court found that argument "borders on the frivolous." *Id.* Mississippi had admitted that it "will accept a standard below that applicable to domestic producers if the forwarding state will do the same . . . ." *Id.* For that reason, Mississippi's "reciprocity clause thus disserves rather than promotes any higher Mississippi milk quality standards." *Id.*

That same objection also applies to Arizona's reciprocity Rule 34(f)(1)(A)(ii), which permits admission on motion if the applicant has been "admitted to and engaged in the active practice of law in another jurisdiction allowing admission of Arizona lawyers on a basis equivalent to this rule . . . ." App. 73. Although the rule does not say it in so many words, Arizona does not care what score another state requires for bar passage, how loosely it evaluates character before admission, or how lax its standards may be in

enforcing its disciplinary rules. Its rule is "if you will let our lawyers in, we will let in yours — even if we might not have admitted them in the first place." *But see infra* at 22 (requirement for course in Arizona law with significant exceptions).

Mississippi also argued that "the reciprocity requirement is in effect a free-trade provision, advancing the identical national interest that is served by the Commerce Clause." *Id.* at 378. The Court rejected that rationale as well: Mississippi may "insist on enforcement of its own, somewhat different, standards as the alternative. But Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." *Id.* The State also argued that its reciprocity requirement "is a legitimate means by which Mississippi may seek to gain access to Louisiana markets for its own producers as a condition to allowing Louisiana milk to be sold in Mississippi." *Id.* at 379. The Court rejected that argument as well:

> "However available such methods in an international system of trade between wholly sovereign nation states, they may not constitutionally be employed by the States that constitute the common market created by the Framers of the Constitution. To allow Mississippi to insist that a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'"

Id. at 380 (citations omitted). After some additional quotations and citations to similar effect, the Court expressly held "that the mandatory character of the reciprocity requirement of § 11 unduly burdens the free flow of interstate commerce and cannot be justified as a permissible exercise of any state power." *Id.* at 381.

Two other Supreme Court decisions 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 his 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, the 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." *Id.* at 274. Once again, relying on its earlier reciprocity decision in *A&P* the Court rejected that defense, finding it to be a form of "economic protectionism." *Id.* at 276. As the Court observed, the Ohio law could not be constitutionally 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.

Another decision of the Supreme Court, 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 the entire 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 court below cited *Hawkins v. Moss,* 503 F.2d 1171 (4th Cir. 1974), which upheld the reciprocity requirement for bar admission at issue there. ER 42. It was wise not to rely heavily on *Hawkins* since that decision came two years before *A&P*, and its approach cannot be reconciled with the later ruling. In rejecting the Commerce Clause challenge, the lower court did cite *A&P* (ER 42, n.22) and *New Energy Co. v. Limbach*, *supra*, (ER 41), but failed to appreciate their strong anti-reciprocity messages and their direct application to the facts of this case.

The court below also relied on *Schumacher v. Nix*, 965 F.2d 1262 (3rd Cir. 1992), where Pennsylvania employed a reciprocity provision as part of its rule that determined whether members of the bar of another state that allowed graduates of unaccredited law schools to take its bar exam would be permitted to take the bar exam in Pennsylvania. The Third Circuit upheld that rule, but only against an Equal Protection challenge that was assessed under rational basis review. *Id.* at 1268. The opinion neither mentioned the Commerce Clause nor cited any of the Commerce Clause cases on which amicus relies here.

The court below also cited *Scariano v. Justices of Sup. Ct. of State of Ind.*, 38 F.3d 920 (7th Cir. 1994) (ER 43), a challenge to an Indiana law that allowed admission on motion only if the applicant promised to practice "predominantly" in Indiana for five years. In that case, the Seventh Circuit rejected Equal Protection and Commerce Clause challenges, but because there was no reciprocity provision, as there is here, its holdings are of no significance to this case. The final authority relied on — *Shapiro v. Cooke*, 552 F. Supp. 581 (N.D.N.Y. 1982) — also did not involve a reciprocity clause, and when it discussed the Commerce Clause, it did not cite any of the cases on which amicus relies in this brief.

In several of the cases that the trial judge used to support the Arizona rule, the court observed that the bar applicant could always take the bar exam (ER 43-44). That precise argument was made to support Virginia's ban on admission by motion for non-residents, but it was soundly rejected in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988), for legal as well as practical reasons: "A bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise."

Because forcing other states to grant reciprocity is not itself a permissible justification for protectionist measures under the Commerce Clause, the Arizona rule could only be upheld if it served some other legitimate interest in protecting the public or the courts. But no such interest is genuinely asserted here, and as other courts that have examined reciprocity requirements for bar admission have recognized, such rules do not protect the public from incompetent or dishonest lawyers. Thus, the court in *Goldsmith v. Pringle*, 399 F. Supp 620, 624, 623 (D. Colo. 1975) (three-judge court) observed in an Equal Protection challenge, 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." Or, as the court put it in another Equal

Protection case, *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 . . . ." *Shenfield* nonetheless upheld the rule based on the "salutary purpose of facilitating professional persons in relocating elsewhere," *id.*, precisely the justification that would be rejected in *A&P* and its progeny, beginning four years later.

Notably, the American Bar Association, which has not always been in the forefront of reducing restrictions on bar admission, has now come down firmly on the side of eliminating reciprocity for admission on motion, as its Model Rule makes clear. ER 142-43. In support of this 2012 amendment, the ABA's Commission on Ethics 20/20 issued a supporting report that opposed reciprocity and other similar restrictions:

> The Commission found no evidence that these more restrictive approaches are related in any way to the competence of the applicants or the protection of the public. Indeed, jurisdictions that have adopted the Model Rule without any additional restrictions have reported no problems. The Commission believes that such varied additional restrictions only serve to sustain outdated and parochial purposes at a time when the relevance of borders to the competent practice of law has and will continue to erode. The Commission believes that the Model Rule on Admission by Motion ensures competent representation and amply protects the integrity of the bar.

ER 148. *See also* ER 145 (motion admittees no "more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted through more traditional procedures").

Beyond the fact that no authority supports appellees' defense under the Commerce Clause, three other Arizona bar admission rules confirm the economic protection aspects of the reciprocity requirement and hence its invalidity. Rule 38(c) allows full time faculty at Arizona law schools, who have been admitted on examination in another state, to practice in Arizona, without taking the bar exam, subject to certain conditions. App. 82. However, once they are no longer faculty members, they lose their status as bar members unless they have taken the bar exam. App. 83, ¶ 5. The most significant limitation — and the one that shows clearly the bar-protective nature of the reciprocity requirement — is that faculty who become bar members under this Rule are expressly limited in the amount of time per year during which they can engage in "compensated" legal work to an average of eight hours per week. Rule 38(c)(5). *Id*. There is no consumer protection or court protection rationale for that limit, and it is not intended to protect the law school, because that rule also requires that the faculty member adhere to university policies on this matter. The only justification for the eight hour per week limit is that the bar wants to limit the amount of

competition from law school faculty members, which is essentially what the reciprocity rule also fosters. Indeed, the faculty rule says, in essence, as along as you were admitted elsewhere, our citizens don't need any more protection than that — but just don't take any more than eight hours a week of compensated business from our bar members.

Second, Rule 38(e) allows a lawyer who has practiced elsewhere for five years to volunteer for an approved civil legal services organization, again without taking the bar exam, as long as the organization employs at least one Arizona bar member. App. 93-94. Thus, the out-of-state lawyer is allowed to provide free legal services without proving his or her ability, as long as that lawyer is not taking any paying work away from active members of the bar.

Third, under Rule 38(g) (App. 100), lawyers licensed to practice elsewhere for two years can work for state or county funded organizations representing indigent defendants in criminal cases for two years without taking the bar exam. In contrast to their five-year civil counterparts, they *cannot* be volunteers (perhaps because of Sixth Amendment concerns), but the Rule goes beyond that to mandate that they "receive pay and benefits commensurate with other regularly licensed lawyers in the office." Rule 38(g)(2)(A)(vii). App. 101. That provision mandating equal compensation

can only be explained by the bar's desire to be sure that out-of-state lawyers do not come to Arizona and take jobs from Arizona lawyers by working for lower salaries. There is no non-bar-protective explanation for this requirement.[4]

Another anomaly in these bar rules further shows that Arizona's reciprocity requirement is not concerned with assuring that everyone who serves clients in Arizona is familiar with Arizona law. Rule 34(j) requires that everyone who is admitted through a bar exam (now the unified bar exam) or on motion via reciprocity must take a course in Arizona law. App. 69. By its terms that Rule does not apply to the four alternative means of being allowed to render legal services described above, which in itself is an oddity. But more important for this case, the mandatory course in Arizona law should more than satisfy any legitimate interest that the state has in assuring that lawyers coming from other states are familiar with the basics of

[4] Approved civil legal services organizations may also employ lawyers who have two years of practice in other jurisdictions under Rule 38(f). App. 97. There is no limit on how long those lawyers may work in that capacity, and they may be compensated by a salary from the organization, but not otherwise, for their services as attorneys. It is unclear how this exception squares with the one for pure volunteers (who must have five years experience) or the one for criminal defense organizations (that must provide the attorneys comparable pay and benefits and who can employ them only for two years). But whatever the explanations, they have nothing to do with assuring that the lawyers employed by those organizations are competent and otherwise qualified to practice law in Arizona.

Arizona law and underscores the irrelevance of the reciprocity requirement as a means to achieve that legitimate goal. *See also* Rule 45 (mandatory continuing legal education requirements).

These alternative admission rules eliminate any doubt that the reciprocity requirement is there for one and one reason only: to help members of the Arizona bar gain admission elsewhere. Under *A&P* and the other Supreme Court decisions cited above, reciprocity rules violate the Dormant Commerce Clause unless they have a legitimate, not protectionist reason for their existence. The law is clear that "[i]n licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law." *Keenan v. Board of Law Examiners*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court). Because helping Arizona bar members to gain admission in other states is not a legitimate purpose, and the reciprocity requirement does nothing to advance any other interests of the state in ensuring the fitness of lawyers, Rule 34(f)'s reciprocity requirement must be set aside.

CONCLUSION

For the foregoing reasons, the reciprocity requirement for admission on motion to the Arizona bar set forth in Rule 34(f)(1)(A)(ii) should be

declared to violate the Dormant Commerce Clause, and the decision below reversed and remanded for entry of a judgment to that effect.

Respectfully Submitted,

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Dated : January 31, 2014 /s/ Alan B. Morrison

CERTIFICATE OF SERVICE

I certify that on this 31st of January, 2104, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alan B. Morrison