IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 76-2049

WILSON H. ELKINS, President,
University of Maryland,

Appellant,

v.

JUAN CARLOS MORENO, et al.,

Appellees.

On Appeal From the United States District Court

for the District of Maryland, at Baltimore

(James R. Miller, Jr., Judge)

BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in refusing to abstain from deciding the constitutional issue in this case where such a decision would be rendered unnecessary by a holding of the Court of Appeals of Maryland on the issue of whether a holder of a G-4 visa is precluded from establishing domiciliary intent in Maryland and where friction with the State would be avoided if the Maryland Court of Appeals resolves the domicile issue integral to this case so as to remove any constitutional problem, and where Appellees would suffer no detriment from a delay.

II. Whether the District Court misapplied Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in Weinberger v. Salfi, 422 U.S. 749 (1975), and erroneously concluded that the University of Maryland's policy of denying in-state status to holders of G-4 visas and

students financially dependent on holders of G-4 visas establishes an irrebuttable presumption violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

On May 27, 1975, Appellees, undergraduate students at the University of Maryland (hereinafter referred to as the "University"), brought suit for declaratory and injunctive relief in the United States District Court for the District of Maryland against the University and its President, Dr. Wilson H. Elkins. These students were non-immigrant aliens who held G-4 visas,[1] as did their fathers, who were employed by certain international organizations based in Washington D. C., viz., the Inter-American Development Bank (IDB) and the International Bank for Re-Construction and Development (World Bank). Specifically, the students challenged as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Supremacy Clause of the United States Constitution the University's policy of denying "in-state status" for tuition and charge-differential purposes to holders of G-4 visas or those who are financially dependent on persons holding such non-immigrant status. On June 25, 1976, the University filed an Answer raising various procedural and substantive defenses, one of which

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1. A "G-4 alien" is one class of non-immigrants which consists of aliens who are "officers, or employees of ... international organizations ... and the members of their immediate families." 8 U.S.C. Sec. 1101(a)(15)(G)(iv).

urged the court to abstain from deciding the state law question in the case until it "shall have been heard and determined fully by the Courts of Maryland." Following discovery, the students moved for summary judgment, calling on the court to find their fathers to be Maryland domiciliaries, thus the students entitled to in-state status. On November 4, 1975, the University moved for summary judgment.

Following a hearing on April 9, 1976, the Court (Miller, J.) on July 13, 1976, declined to abstain and held that the University's "In-State Policy" as applied to G-4 aliens created an impermissible irrebuttable presumption in violation of the Due Process Clause of the Fourteenth Amendment. The court said that by the use of a presumption of non-domicile for G-4 aliens, the University denied Appellees the opportunity to demonstrate that they were entitled to in-state status for purposes of tuition and charge differentials. Judge Miller did not rule on the students' Equal Protection or Supremacy Clause claims. The court enjoined University President Elkins (the University itself was dismissed as a party) from denying Appellees and members of their class[2] in-state status "solely because they or their parents" hold G-4 visas. Judge Miller declined to hold that the students'

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2. The class certified by the court was defined as follows: "All persons now residing in Maryland who are current students at the University of Maryland, or who chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish in-state status, or who are currently students in senior high schools in Maryland, and who (a) hold or are named within a visa under 8 U.S.C. Sec. 1101(a)(15)(G)(iv) or are financially dependent upon a person holding or named within such a visa." (App. 62)

fathers were domiciliaries or that the students were entitled to in-state status on the basis of their verified complaint (App. at 52-57). On July 31, 1976, this appeal was noted.

On August 3, 1976, in response to Appellant's motion, the court stayed those portions of its final order which granted declaratory and injunctive relief.[3]

1. The University's In-State Policy

Following the decision of the Supreme Court in Vlandis v. Kline, 412 U.S. 441 (1973), the Board of Regents of the University of Maryland adopted a new policy for the classification of students as "in-state" or "out-of-state" for purposes of determining admission, tuition rates, and charge differentials. Under what is basically a two-step determination, the University will grant in-state status only "to United States citizens and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States." And even these individuals do not automatically qualify for the preferential tuition and charge differential rates. The

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3. The court stayed paragraphs 5 and 6 of its final Order, viz.:

"(5) That the 'In-State Policy' of the University of Maryland which denies to G-4 aliens by the use of an irrebutable presumption of non-domicile the opportunity to establish 'in-state' status is unconstitutional as it is in violation of the Due Process Clause of the Fourteenth Amendment; and

"(6) That Defendant Dr. Wilson H. Elkins is hereby enjoined from enforcing the University of Maryland's 'In-State Policy' with respect to the named plaintiffs and the members of their class by denying them the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differential determinations." (App. 63)

in-state policy describes eight non-exclusive indicia of domicile which are used to assist the University in determining a student's status.[4] (If the student himself is financially dependent on a parent, the University looks to the status of the parent rather than of the student in making the two-step determination.) For students who are financially independent for six consecutive months before registration and who are not United States citizens or permanent resident aliens or financially responsible parents holding similar non-immigrant status, the University does not further examine other domiciliary factors such as whether or not such individuals pay taxes. See Defendants' Answer to Plaintiff's Request for Admissions of Fact, p. 2. This is because individuals who do not meet the first step of the process cannot have the requisite intent to establish Maryland domicile.[5] Id.

Nevertheless, even such students are not forever precluded by the University policy from qualifying for in-state status. A financially responsible parent who adjusts his status from non-immigrant to that of permanent resident alien

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4. Among the domiciliary criteria set out in the University's In-State Policy are: presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments. (App. 22-23)

5. The In-State Policy defines domicile as follows:
"A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time ...." (App. 22)

is then free to exhibit the necessary domiciliary criteria. The same is true of a non-immigrant student who becomes financially independent for six months and who, like Appellee Otero, adjusts his status to that of a permanent resident alien. Moreover, the University's three-step appellate process[6] is available to such individuals both with respect to the effect of change in their immigration status and, subsequently, exhibition of other domiciliary criteria.

2. Legal Characteristics of G-4 Alien Status

Title 8 U.S.C. Sec. 1101(a)(15)(G)(iv) includes as one class of non-immigrant aliens "officers, or employees of ... international organizations, and the members of their immediate families." Two such international organizations are the Inter-American Development Bank and the World Bank, by whom the fathers of Appellees are employed.

Under Sec. 1184(g) of Title 8:

> "The admission to the United States of any alien as a nonimmigrant shall be

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6. The In-State Policy provides that:
"A student who disagrees with his classification may request a personal interview with a classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final." (App. 23)

> for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248 [Sec. 1258 of this title], such alien will depart from the United States."

Pursuant to the regulations for the admission of non-immigrant aliens into the United States, a non-immigrant such as the holder of a G-4 visa must agree "that he will abide by all the terms of and conditions of his admission or extension and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized non-immigrant status." 8 C.F.R. Sec. 214.1. In addition, an alien applying for a non-immigrant visa must state under oath on his application "the purpose and length of his intended stay in the United States." 8 U.S.C. Sec. 1202(c).

Thus, entitlement to G-4 non-immigrant status is derived from the circumstances of an alien's employment with an international organization, and such status with its attendant permission to remain in the United States would terminate at any time that the employment with an international organization ceases.

Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including immunity from legal

process with respect to acts performed in an official capacity, immunity with respect to certain immigration restrictions and alien registration requirements, and certain privileges with respect to travel. Art. XI, Sec. 8, of Articles of Agreement of the International Bank for Reconstruction and Development (12/27/45), 60 Stat. 1440, T.I.A.S. No. 1502.[7] See also 22 U.S.C. Sec. 288(d).

Both agreements also provide that:

> "No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals." IDB Agreement, Art. XI Sec. 9b; World Bank Agreement, Art. VI Sec. 9(b). See also I.R.C. Sec. 893.[8]

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7. The privileges and immunities provisions of these agreements differ in one respect: World Bank employees are declared not to be "local nationals" for purposes of immigration and registration immunities, while IDB employees are accorded such immunities "when not local nationals."

8. Section 893(a) states in part that:

"Wages, fees, or salary of any employee of ... an international organization ... received as compensation for official services to such ... international organization shall not be included in gross income and shall be exempt from taxation under this subtitle if -

"(1) such employee is not a citizen of the United States, or is a citizen of the Republic of the Philippines (whether or not a citizen of the United States) ...."

Internal Revenue Service Regulations implementing this section provide that such employees who wish to adjust their immigration status to that of a permanent resident alien (see 8 U.S.C. Sec. 1255), must execute and file a waiver with the Attorney General of rights, privileges, and immunities and exemptions previously conferred upon them because of their G-4 status. As a consequence, they thereby waive the tax exemption bestowed by Sec. 893(a). IRS Reg. Sec. 1.893. However, for employees of certain international organizations whose establishing agreements provide that tax exemptions are not dependent upon the

Therefore, all compensation received by G-4s from their respective international organizations, including dependency allowances[9] and fringe benefits (see Exhibit 1 Attachment 1 to Plaintiff's Complaint, p. 18), is exempt from income tax levies although no legal prohibitions exist against voluntary payments of such taxes.[10]

3. Status of Student-Appellees and Their Parents

Unlike their fathers, the student-appelles in this case share little in common aside from their undergraduate, dependent, and G-4 status. Appellees Moreno and Otero are natives of Western Hemisphere countries (Paraguay and Bolivia, respectively). (App. 5) Appellee Hogg is a native of an Eastern Hemisphere country, the United Kingdom (App. 3). The former are children of IDB employees and the latter is a daughter

8 (Continued)
Internal Revenue Code, the filing of a waiver upon change of immigration status does not result in loss of the tax exemption. Id. Employees of the World Bank are so favored. Id.

Employees of international organizations are required to pay tax on income other than compensation received from the international organization. Id.

9. Employees of both the IDB and the World Bank receive dependency allowances. Senate Report No. 94-1009, Foreign Assistance and Related Program Appropriation Bill, 1977 (94th Congress, 2d Session), at 10405. This report concludes:

> "[O]ur investigations have led us to the distressing conclusion that, rather than the rewards of a career of service, there is found in the banks a broad pattern of personal enrichment. The personnel management practices of the banks are suggestive of an institutionalized granting of lifetime sinecures where extraordinarily high salaries are commonplace and the pursuit of fringe benefits has been raised to a form of art." Id. at 102.

10. The exemption for World Bank employees (and those of other international organizations) from Maryland state income tax was not finally resolved until July 1976, when the Attorney General of Maryland ruled that such employees were exempt from state income tax. 61 Opinions of the Attorney General (July 27, 1976).

of a World Bank employee (App. 23-25). Amounts spent by their parents for their support range from $2,433 for Moreno (1974) (Ex. 1 Att. 1 to Plaintiff's Complaint, p. 8) to $6,000 for Hogg (1974) (Ex. 1 Att. 1 to Plaintiff's Complaint, p. 4). Wages earned by the students range from $567 for Moreno (1974) (Ex. 1 Att. 1 to Plaintiff's Complaint, p. 3) to $2,479 for Otero (1973) (Ex. 2 Att. 1 to Plaintiff's Complaint, p. 17). Unlike Moreno and Hogg, Otero has sought to adjust his G-4 status to that of immigrant[11] (App. 24).

Their fathers apparently held lucrative and responsible positions with their respective employers. Manuel Moreno has been employed by the IDB since 1960 and is a "member of the professional staff" of the Bank (Ex. 1 att. 1 to Plaintiff's Complaint, p. 18). Rene Otero has also worked for the IDB since 1960 and is assigned to the Bank's legal department (Ex. 2 Att. 1 to Plaintiff's Complaint, p. 9). In 1974, Mr. Moreno received a salary of $26,380 plus a $2,500 dependency allowance (Ex. 1 Att. 1 to Plaintiff's Complaint, p. 18). The record does not reflect the earnings of the other parents nor does it indicate whether the Banks include amounts for a support item such as education in the dependency allowance paid employees or reimburse employees separately for tuition payments made in excess of in-state rates. None of the fathers pay income tax on compensation received from their respective

11. Appellee Hogg's sister adjusted her G-4 status to that of permanent resident alien. (App. 7)

international organization employers. None have sought to alter their G-4 visa status.

Throughout the in-state determination appeals process, counsel who had been retained by the respective international organizations to represent the students (Ex. 1 Att. 2, Ex. 3 Att. 2 to Plaintiff's Complaint) declined the opportunity to present evidence with respect to changes in immigration status by the students' fathers or to demonstrate financial independence for the student adjusting his non-immigrant status.

4. The Lower Court Opinion

In declining to order abstention, Judge Miller held that the present case did not fall within the two major categories of abstention.[12] The court, relying entirely on Burford v. Sun Oil Co., 319 U.S. 315 (1943), categorized the first branch of the abstention doctrine as designed "to avoid unnecessary conflict with the regulations by the State of a complicated area of local interest." (App. 35) Noting that determination of a student's domicile "does not involve a complicated area which the Maryland Legislature has singled out for special treatment," the lack of a state agency manned by experts to handle in-state determination, the absence of federal court interference in the area, the improbability of causing a surfeit of lawsuits with respect to the in-state determination

12. A third category of abstention stemming from Younger v. Harris, 401 U.S. 37 (1971), and its progeny is not at issue in this case.

process and the student-appellees were not seeking to "short circuit" that process, Judge Miller said that "[s]ince none of the factors determinative in Buford exists here, abstention on the rationale of that case is not warranted." (App. 36)

The lower court formulated the second branch of the abstention doctrine as follows: "[A]bstention is proper where an interpretation or construction of an unclear state statute, or constitutional provision might end the litigation, thereby eliminating the need for a federal court to resolve federal constitutional issues" (App. 37). The lower court refused to apply this type of abstention for the following reasons:

1. The language of the University's in-state policy was not subject to an interpretation which could avoid the students' federal constitutional challenge.

2. The Maryland common law of domicile was clear and provided sufficient background to resolve the domicile question raised by the students.

3. The court was not required to abstain in cases presenting unresolved questions of state common law.

4. Federal courts are sufficiently knowledgeable in deciding domicile questions in the context of diversity cases.

5. No principle of federalism is advanced by abstaining where no state statute or state constitutional provision is involved.

6. The delay and expense attendant if the court abstained would be great. (App. 37-38)

Turning to the merits of the case, the court concluded that the University's initial dividing line for in-state qualification between non-immigrants and United States citizens and permanent resident aliens created a presumption of non-domicile. Judge Miller then held that this presumption was not universally true (1) because his analysis of Maryland decisions demonstrated that this case law did not prevent a G-4 visa holder from obtaining Maryland domicile, and (2) because federal law (as interpreted by a District of Columbia court in a case interpreting the meaning of its own law of domicile in another context) likewise did not prevent G-4s from becoming domiciled in a state (App. 42-52).

Relying on Vlandis v. Kline, supra; Stanley v. Illinois, 405 U.S. 645 (1972); and Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974), the lower court said that this irrebuttable presumption of non-domicile, because it was not universally true, and because the University had a reasonable alternative means of making a domicile determination for holders of G-4 visas (viz., the appeals process), could not be justified on a cost-equalization or an administrative convenience basis (App. 52). Ignored by the court was any discussion of Weinberger v. Salfi, supra, which cut back sharply on the application of the cited cases; nor did the court attempt to meaningfully apply the principles of Salfi or to distinguish the present case from Vlandis.

ARGUMENT

I.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT ERRED IN REFUSING TO ABSTAIN.

In both its formulation and application of the principles of abstention, the lower court has demonstrated a fundamental misunderstanding of the doctrine.

The lower court suggested that the so-called Pullman abstention doctrine[13] applies only when a state statute or constitutional provision is involved.[14] However, such is not the case. According to the Supreme Court, abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law" (emphasis added). Colorado River Water Con. Dist. v. United States, ___ U.S. ___, 47 L.Ed. 483, 496 (1976); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). The emphasis of the doctrine is on the issues presented, viz., federal constitutional issues, and the purpose of the doctrine is to avoid decision of a federal constitutional question. H. Hart and H. Wechsler, The Federal Courts and the Federal System 1005 (1973).

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13. See Railroad Comm. of Texas v. Pullman, 312 U.S. 496 (1941), where abstention was ordered on the question of whether the Commission was authorized to enter the order challenged on Fourteenth Amendment grounds.

14. Until recently such a limitation existed in the jurisdiction of three-judge courts. See 28 U.S.C. Secs. 2281-82 (1970).

Moreover, leading authorities on the abstention doctrine have rejected the narrow view espoused by the lower court. For example, an ALI Study of the Division of Jurisdiction Between State and Federal Courts (1969) 282, 284, states that Pullman abstention is applicable to challenges to "state legislation or administrative action." See also Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemporary Problems 216, 229 (1948), and Sterling Drug, Inc. v. Anderson, 127 F. Supp. 511 (D. Tex. 1954). (Where an action is brought in a federal court "for relief against questionable state law, or some allegedly invalid state action," the practice has uniformly been to remit the parties to state courts.) One leading commentator has written:

> "The Pullman doctrine has not generally been invoked when it is an individual official's conduct that is challenged, and a case can be made that the doctrine is concerned with constitutional attacks on state enactments and not simply on unconstitutional conduct by state officials. But any such limitation on the doctrine would be irrational. Its rationale could not be simply that, the state official having acted, no ambiguity concerning the allegedly unconstitutional state action exists; that rationale would distinguish such cases from construction cases in which no conduct under the challenged enactment has occurred, but it does not distinguish them from authorization cases. In authorization cases as well, the challenged state action--though it is a state enactment rather than an individual official's action--may be perfectly clear and the uncertain question of state law is whether that action is authorized. Cases attacking an individual official's conduct can thus be conceptualized as authorization cases; the state

> law issue is whether the official's conduct was consistent with state law or inconsistent with it." Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U.P.L.Rev. 1071, 1123-24 (1974) (footnotes omitted).[15]

In summary, whether Appellant Elkins's decision to deny the students in-state status is viewed as an administrative order, administrative action, or an individual state official's action, the question of whether such is authorized by the state law of domicile is properly a subject for abstention, particularly when all the prerequisites of the Pullman doctrine are present in this case.[16]

If this question is resolved by Maryland courts, the purpose envisioned by the Pullman doctrine will be more than a possibility.[17] The case will be over. If state courts hold that Maryland's law of domicile does not preclude a G-4 alien from establishing domiciliary intent for tuition purposes, the University will have to weigh other domiciliary indicia such as those eight set forth in the In-State Policy and determine the status of the students on that basis. This is precisely

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15. The Field article was cited in Boehning v. Indiana Employees Association, ___ U.S. ___, 46 L.Ed.2d 148 (1975), a per curiam opinion ordering abstention. The author generally favors less resort to abstention.

16. The lower court entirely misconceived the issue presented for abstention in its remarks relative to construction of the University's in-state policy. Appellant concedes that the policy itself is clear.

17. The words "may" and "might" are standard terms in decisions ordering abstention. See Carey v. Sugar, ___ U.S. ___, 47 L.Ed. 587 (1976); Boehning v. Indiana Employees Assoc., supra.

the relief ordered by the lower court--but without the adjudication of a federal constitutional issue. If the Maryland courts decide that under Maryland law domiciliary intent is precluded by G-4 status, the constitutional issue is also obviated, because the University's policy could then scarcely be called a presumption when it is mandated by the State's common law.

Another purpose of Pullman abstention is amply served by the application of the doctrine in this case, viz., the avoidance of needless friction with state policies. 312 U.S. at 500. The proximity of the University of Maryland's College Park campus to Washington's international community practically ensures that the institution will have a sizable non-immigrant student population. And the lower court's refusal to look at the terms and conditions of a non-immigrant visa in determining domicile raises the spectre that in-state status may have to be accorded hundreds of non-resident aliens, after countless hearings and at great cost to an already financially strapped University. In addition, the lower court's failure to recognize that domicile may vary according to the purpose for which it is determined may preempt the State's position on according domicile to non-immigrants in other contexts such as divorce, probate, taxation, attachment, and entitlement to state benefits. 25 Am. Jur. 2d Domicile Sec. 5. See Walsh, Adm'r. v. Crouse, 232 Md. 386, 194 A.2d 107 (1963), holding that residents of federal enclaves within Maryland boundaries were not domiciled in the State for purposes of eligibility

for payments from the State Unsatisfied Claim and Judgment Fund. Such drastic and costly consequences which could occur without even affording the state courts the opportunity to be heard on the question supports abstention in this case. Moreover, the technique employed by the lower court to resolve the principal issue in the case, viz., whether a G-4 visa holder can establish domiciliary intent, militates in favor of abstention. Ironically, after a review of Maryland domicile cases, the court concluded that the issue was not resolved by state law and then relied almost entirely on a District of Columbia case (Alves v. Alves, 362 A.2d 111 (D.C. App. 1970)) which construed in another context that jurisdiction's own law of domicile with respect to G-4s. The lower court erroneously attributed the law of the District of Columbia, where federal interests and the size of Washington's international community may suggest one policy to the courts of Maryland where different policies may be operative.

Another misstatement of the Pullman doctrine found in the lower court opinion is the trial judge's insistence that abstention rules as established in diversity cases in which no federal constitutional question is raised are relevant to this case. ("Federal district courts are presumed to be knowledgeable in the law of the states in which they sit ... and are often called upon to resolve State law domicile questions in diversity of citizenship cases." App. 38.) Such statements are standard fare in diversity cases but have no application in a true

Pullman case where avoiding the federal constitutional question is of prime importance. Sterling Drug, Inc. v. Anderson, supra. Annot. Remission of Issues to State Courts, 3 L.Ed. 562 Sec. 4 (1959).

In a curt fashion the lower court dismissed another factor traditionally considered relevant in abstention cases, viz., the possible delay and expense attendant upon abstention.

A cursory examination of the relevant facts in this case will disclose that abstention will promote expeditious resolution of this controversy and that the students will suffer no harm if this Court abstains. First, the lower court itself stayed the critical portions of its order. Secondly, and most importantly, Maryland law provides an easy method of certifying the key issue in this case to the State's highest court. Maryland Code (1974), Courts and Judicial Proceedings Article Sec. 12-601.[18] And the availability of such a device is an important factor in deciding whether to order abstention. ALI Study, supra at 1144-47. Moreover,

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18. Sec. 12-601 provides that:

"The Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediary appellate court of any other state when requested by the certifying court if there is involved in any proceeding before the certifying court a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the Court of Appeals of this state."

employment of the State's certification procedure would serve the interests of judicial economy and reduce delay and expense. As indicated earlier, resolution of the state law issue by the Maryland Court of Appeals will end this case and will certainly decide it more quickly than if, as is possible, an appeal is prosecuted through this Court to the Supreme Court. Also, the detriment to the students in this case by abstention appears slight. The international organizations themselves have employed counsel in this case. The parents of the students in question do not appear to be suffering from economic deprivation and apparently receive a dependency allowance from their employers which can be used to defray tuition costs.

Finally, the particular constitutional issue raised in this case is one especially appropriate for abstention. It takes little analysis to show that the Supreme Court's employment of the abstention doctrine is issue-related. For example, the two cases in the 1975-76 term in which abstention was ordered raised procedural due process questions. See Carey v. Sugar, supra, and Boehning v. Indiana Employees Assn., supra. See also Field, supra at 1096-1101 on abstaining to avoid "sensitive" constitutional questions.

Certainly, the constitutional issue in this case must be regarded as sensitive. The lower court decided this case on the basis of an irrebuttable presumption, thereby extending this extensively criticized doctrine squarely in the face of a Supreme Court intent to limit its applicability. The Supreme

Court, 1974 Term, 89 Harv. L. Rev. 47, 77 (1975). In Weinberger v. Salfi, supra, the Court declined to turn the irrebuttable presumption doctrine into an "engine of destruction," 422 U.S. at 772, and significantly curbed the reach of prior cases. In addition, the critics of irrebuttable presumptions have agreed that the doctrine

> "is virtually without limits in its potential for condemning legislative classifications. Almost all legislation relies on classification; identifying the purpose underlying particular statutes would allow courts to characterize every classification as an irrebuttable presumption. Few if any of these conclusive presumptions will be 'necessarily or universally true,' because legislation generally creates a class that merely approximates the group of persons that the statute is designed to serve. By rejecting the irrebuttable presumption claim in Salfi the Court indicated that it will not use this device to invalidate a broad range of legislative judgments." 89 Harv. L. Rev. 9 and 81-82. (Footnotes omitted.)

Abstention in this case would avoid extending an unwise and disfavored constitutional doctrine and permit the courts of Maryland to resolve an unsettled question of state law and thus end the controversy.[19]

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19. Appellees also urge the application in this case of the second major category of atstention. The lower court apparently felt that this category was encapsuled completely in the case of Burford v. Sun Oil, supra. However, this is merely one of a series of cases in which abstention is appropriate "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Water Cons. Dist. v. United States, ___ U.S. ___, 47 L.Ed.2d at 496. As the Pullman analysis has suggested, the problems created by the lower court's holding that Maryland law does not preclude the establishment of

II.

THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S IN-STATE POLICY ESTABLISHES AN IRREBUTTABLE PRESUMPTION IN VIOLATION OF DUE PROCESS.

The key issue in this case is whether the irrebuttable presumption doctrine, which has been severely limited by the Supreme Court, Weinberger v. Salfi, supra, and which has been criticized by court and commentator alike, must be extended to reach the classification at issue in this case.

The starting point and in effect the ending point of the lower court's irrebuttable presumption analysis is Vlandis v. Kline, supra. In that case, a divided Supreme Court[20] held that a "permanent irrebuttable presumption of nonresidence" was created by a Connecticut policy which established that an out-of-state applicant for admission to a public college could not adjust to in-state status for the entire period of his attendance at the school, when that presumption was not universally true in fact. 412 U.S. at 443, 452. The majority

19 (Cont'd)
domicile by non-immigrants cuts across this case. It may spell huge financial problems for the University and the State in terms of benefit entitlements for non-immigrants and may affect other areas of critical interest to the State, such as taxes, divorce, etc. Finally, this branch of the abstention doctrine has been extensively employed in contexts where a state court's definition of a common term in state law (such as "domicile") was thought necessary. See Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968) (abstention ordered to permit state court to determine construction of "public use"); and Hawks v. Hamil, 288 U.S. 52 (1933) (abstention ordered to permit state court to construe the word "perpetuities").

20. Chief Justice Burger, Justice Douglas, and Justice Rehnquist dissented. Justice White concurred but only on equal protection grounds.

opinion carefully distinguished two prior Supreme Court cases relating to in-state-- out-of-state tuition differentials. The first, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), aff'd, 401 U.S. 985 (1971), upheld Minnesota's requirement that no student is eligible for in-state status for tuition purposes unless he has been a bona fide domiciliary of the state for at least one year. The second case, Kirk v. Board of Regents of Univ. of California, 78 Cal. Rptr. 260 (1969), appeal dismissed, 396 U.S. 554 (1970), upheld a similar one-year residency requirement for the in-state status. The Vlandis court noted that under these schemes the student could rebut the presumption of non-residency, after having lived in the state one year, by presenting other sufficient evidence to show bona fide domicile within the state, 412 U.S. at 452. The court added that:

> "By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes." Id. (Emphasis added.)

Finally, after rejecting Connecticut's proffered justifications for the statutory scheme (viz., cost equalization, preference for established residents, and administrative certainty), the majority, in the language usually associated with the standard of "strict scrutiny" in Equal Protection cases,[21] said

21. See Dunn v. Blumstein, 405 U.S. 330 (1972).

that the State's interest in administrative efficiency and certainty could not save the conclusive presumption "where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. The Court identified that reasonable alternative as a system permitting an out-of-state student the opportunity to offer evidence of indicia of domiciliary intent. Id. at 454.

Over the next year and a half, the Supreme Court addressed irrebuttable presumption questions on an additional three occasions without expanding the doctrine. In United States Department of Agriculture v. Murry, 413 U.S. 508 (1973), the Court, in a 5 to 4 decision, held that the exclusion of welfare benefits, based on a presumption that a household claiming an 18-year-old child as a dependent for income tax purposes was not needy, violated due process. And in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), five members of the Court held that a Board of Education rule presuming maternal incapacity during set periods during pregnancy and after childbirth created an unconstitutionally impermissible irrebuttable presumption. In LaFleur, the Court relied on Vlandis and Stanley v. Illinois, 405 U.S. 645 (1972), a prior case striking down an administrative presumption that an unwed father was unfit to have custody of his children, and noted that the presumption at issue in LaFleur penalized a female teacher's

right to bear a child. 414 U.S. at 648, 650.[22] In Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973), the Court upheld a Truth-in-Lending Act regulation which was challenged because it was said to conclusively presume that payments made under an agreement providing for more than four installments necessarily included a finance charge when in fact that might not be the case. The Court said that the challenged provision did not create a presumption but rather "imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." 411 U.S. at 377.

In Weinberger v. Salfi, supra, Justice Rehnquist, whose searing dissents marked the Court's major irrebuttable presumption cases,[23] led a six-justice majority in conducting radical surgery on the doctrine. The case involved a challenge to a Social Security Act provision which limited eligibility for survivors' benefits to persons whose relationship

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22. Justice Powell, who joined the majority opinion in Vlandis, concurred in the result in LaFleur on equal protection grounds and indicated that he was reexamining his support of the irrebuttable presumption doctrine because of its troublesome implications for the traditional power of the legislature to classify. 412 U.S. at 652.

23. Vlandis v. Kline, supra at 463-69; U.S.D.A. v. Murry, supra at 522-27; Cleveland Board of Education v. LaFleur, supra at 657-60. Prior to the Salfi decision the commentators were equally critical of the irrebuttable presumption doctrine. Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974); Note, The Conclusive Presumption Doctrine: Equal Process or Due Protection?, 72 Mich. L. Rev. 800 (1974); Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975).

with the insured begins at least nine months before his death. The plaintiffs contended that the nine-month duration-of-relationship requirement created an impermissible irrebuttable presumption that short-lived marriages were a sham aimed at obtaining benefits and that the plaintiffs should be given an opportunity to demonstrate the bona fide nature of their relationship with the insured. The trial court, like the lower court in Moreno, felt it was unnecessary to demonstrate how Vlandis, LaFleur, and Stanley applied to the challenged statute. Instead, the District Court in Salfi merely asserted that these decisions mandated the invalidation of every legislative presumption that was not universally or necessarily true in fact. Salfi v. Weinberger, 373 F. Supp. 961, 965 (N.D. Cal. 1974); 89 Harv. L. Rev. at 78 n.16.

However, the Supreme Court rejected this superficial analysis. Stanley and LaFleur were distinguished on the grounds that they involved basic civil rights and due process liberties, such as the right to raise one's children and the right to personal choice in matters of marriage and family life. 422 U.S. 771. Murry was distinguished as involving an irrational classification that could not have withstood minimal equal protection scrutiny. Id. at 772. Vlandis was said to hold only that if the state conditions eligibility for a benefit on residence, then it must permit claimants to present evidence clearly bearing on the residence issue. Id. at 771. Rather than relying on anything said in Vlandis, Justice

Rehnquist based his decision on Starns:

> "As in Starns v. Malkerson, ..., the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in Starns, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." Id. at 772.

Absent from the Court's opinion was any of the language of "strict scrutiny" or "least restrictive alternative"; instead, Justice Rehnquist, as in his earlier dissents, emphasized the "minimum rationally" equal-protection standard applicable in social welfare cases. See Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Unlike Vlandis, Salfi demonstrated deference to a proffered administrative convenience justification for the statutory scheme:

> "There is ... no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce." 422 U.S. at 785.

Most significantly, the fact that the "presumption" at issue was not universally true did not aid the plaintiffs' case:

> "[U]ndoubtedly [the statute] excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them ....

> "While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham arrangements, we think it clear that Congress could rationally choose to adopt such a course." Id. at 781.

Finally, sounding the death knell for any expansion of the irrebuttable presumption doctrine, the Court said:

> "We think that the District Court's extension of the holdings of Stanley, Vlandis and LaFleur to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Id. at 772.[24]

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24. Commentators were quick to read an intention on the part of the Court to narrow Vlandis:

> "[A]s Justice Brennan pointed out in dissent, the Social Security Act, like the Vlandis statute, involves a category defined in a particular way that excluded other arguably relevant evidence. Duration of relationship requirements were enacted to protect the Social Security Trust Fund from persons who married to obtain benefits, but the statutory scheme does not allow the presentation of evidence bearing on the issue of marital intent. Thus, the Court's attempt to distinguish Vlandis from Salfi is unsatisfactory. It appears, therefore, that Salfi represents a narrowing of the applicability of irrebuttable presumption analysis." 89 Harv. L. Rev. at 80-81.

After Salfi, a number of courts drew a similar conclusion: Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976) (upholding school board's refusal to review teacher's contract unless he moved in the vicinity of the school where he was employed); Sellers v. Ciccone, 530 F.2d 199 (8th Cir. 1976) (upholding exclusion from prison training program of long-term inmates); Fisher v. Secretary of HEW, 522 F. 2d 493 (7th Cir. 1975) (upholding Social Security Act presumptions with respect to coverage of domestic servants); Hammond v. Marx, 406 F. Supp. 853 (D. Me. 1975) (upholding statute setting minimum age for admission to first grade in public schools); United States v. Friday, 404 F. Supp. 1343 (E.D. Mich. 1975) (upholding presumption, in statute regulating firearms purchases, of violent propensities for persons under indictment for crimes punishable by more than one year in prison); Mansfield v. Weinberger, 398 F. Supp. 964 (D.D.C.

Appellant contends that the principles of Salfi, and particularly the interplay between Salfi, Vlandis, and Starns, require reversal of the lower court decision in this case.

At the outset, it is important to note that basic human liberties and fundamental constitutional rights are not at stake in this case. Public education is not a right secured by the United States Constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Starns v. Malkerson, supra at 238; Kirk v. Board of Regents of Univ. of California, supra at 266-67. And state regulation of entitlement to education falls in the category of the social welfare legislation reviewed in Salfi. Hammond v. Marx, supra at 855-57. Thus, contrary to the holding of the lower court in this case, LaFleur and Stanley have no application here.

Secondly, the classification at issue in this case, even assuming it is regarded as a presumption, does not fall within

24 (Cont'd)
1975) (upholding six-month duration-of-separation Social Security eligibility requirement); Skaffe v. Rorex, ___ Col. ____, 45 U.S.L.W. 2176 (decided Aug. 23, 1976) (upholding statutory ban on alien voting in school district elections).

In Turner v. Department of Employment Security, ___ U.S. ____, 46 L.Ed.2d 181 (1975), a case decided after Salfi, the Supreme Court in a per curiam opinion struck down a Utah law creating a presumption of maternal incapacity "virtually identical to the presumption found unconstitutional" in LaFleur. However, the Court was careful to adopt the limitations on the irrebuttable presumption doctrine set out in Salfi. ("The Fourteenth Amendment requires that ... [states] must achieve legitimate state ends through more individualized means when basic human liberties are at stake." 46 L.Ed.2d at 184 (emphasis added).

the prohibitions of Vlandis because it is not permanent. Unlike the students in Vlandis, who could never qualify for in-state status, the student-appellees in this case do have the opportunity to qualify. If their parents alter their status to that of a permanent resident alien or if the students similarly alter their status and provide more than half of their total support, Appellees may be able to qualify for in-state status. Like the plaintiffs in Starns, who after one year of disability could present evidence of domiciliary intent, the students in this case, after they or their parents alter their immigration status to that of permanent resident alien, can present evidence of domiciliary intent necessary to qualify for in-state status.[25] Moreover, Maryland's requirement that G-4s adjust their status to that of permanent resident alien, like the one-year disability in Starns, is an "objective criterion" bearing a close nexus to "underlying policy objectives to be used as the test for eligibility." Nor can it be said that the University's in-state policy speaks in terms of domicile but signifies otherwise in the case of non-immigrants--no more than Minnesota's policy in Starns of establishing a one-year restriction on demonstrating domicile can be said to be fork-tongued because a respectable body of law holds that physical presence for a moment in a particular place

25. See United States v. Friday, supra at 1346, where the District Court emphasized the temporary nature of a statutory disability to purchase firearms in sustaining a firearms law from attack on irrebuttable presumption grounds.

may be enough to establish domicile, see White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888); Winans v. Winans, 205 Mass. 388, 91 N.E. 394 (1910); Jacobs, Law of Domicile Sec. 134. However, even if the student-appellees in this case may in fact be Maryland domiciles, like the out-of-state students in Starns who may have been domiciles before the lapse of one year or the widow in Salfi who may not have entered into a sham marriage to obtain Social Security benefits, it is clear that Salfi does not require that the allegedly presumed fact be true in every case.

Thirdly, the interests asserted by the University in support of the challenged in-state policy are entirely sufficient in light of mere rational basis required by Salfi. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court said:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program." Id. at 633.

The University of Maryland is financed principally through general state revenues and state charges, which include tuition and other fees.[26] However, it is no secret that tuition charges and other fees do not begin to pay for the costs of educating students and that the cost of public higher education

26. For fiscal 1976, more than $259 million was appropriated to operate the University of Maryland.

is heavily subsidized by the State. The University's requirement that non-residents and non-immigrants pay out-of-state rates bears a rational relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's In-State Policy is a rational attempt to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, viz., non-immigrants and non-residents. See Starns v. Markerson, supra at 241. In addition, this economic argument takes on greater force, in light of the fact that Appellees seek to carve out an exception in Maryland's even-handed administration of its In-State Policy for a privileged class not subject to the full range of Maryland taxes.

Although such interests will not withstand a "strict scrutiny" Equal Protection standard and may not justify a permanent irrebuttable presumption under the old Vlandis test, they are perfectly able to support the classification at issue in this case. See Kirk v. Board of Regents of Univ. of California, supra, and Starns v. Markerson, supra. Another sufficient interest recognized in Salfi, which justifies Maryland's treatment of non-immigrant aliens, is the administrative difficulties presented by the spectre of individualized hearings for the University's large non-immigrant student population. At the College Park undergraduate campus of the University of Maryland, 14 staff members devote on the average a third

of their time administering the in-state determination and appeal process at a cost of more than $60,000. In 1975 alone, 875 petitions for in-state classification were filed. How much larger that figure would have been if individualized hearings on additional domiciliary criteria were given to non-immigrants is anyone's guess.[27] But the University's policy of limiting in-state classification hearings for non-immigrants to changes in their immigration status reduces the need for and burden and expense of long, complicated hearings (many of which may require interpreters) with respect to other domiciliary criteria. Both the lower court and Appellees misconceived the nature and purpose of the hearings held for non-immigrant students, confusing the second stage of the two-step domicile determination with the first. The University's policy promotes efficiency and reduces costs so that funds might be better spent on education needs by requiring full-blown hearings on domiciliary criteria only when a G-4 alien or other non-immigrant student has adjusted his immigration status.

Two final issues raised below need be treated cursorily. One is the students' contention that it is an unreasonable burden to require them or their parents to adjust their immigrant status before the University will further consider proffered evidence of domiciliary intent. First, whatever burdens

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27. As of the fall of 1975, more than 550 non-immigrants were registered at the University of Maryland.

may exist in this regard are created by the immigration laws and not the University. Cf. Fiullo v. Levy, 406 F. Supp. 162 (D.N.C. 1975). Secondly, those burdens have been greatly exaggerated by Appellees. Appellee Otero has sought to adjust his immigration status to permanent resident alien. A daughter of Vincent Hogg (father of Appellee Hogg) has so adjusted her immigration status. Eastern Hemisphere aliens, like Vincent and Clare Hogg, can adjust their status without leaving the country. Effective January 1, 1977, a change in the law permits Western Hemisphere aliens, such as the Morenos and the Oteros, to do likewise. See P.L. 94-471, 94th Cong., 2d Sess. (1976). The students have attached to their Motion for Summary Judgment affidavits from IDB and World Bank officials stating that they will not assist employees in adjusting their immigration status by issuing a Department of Labor certificate because of language in the establishing agreements requiring the organization to give "due regard" to recruiting staff on a wide geographic basis (App. 4-19). Aside from the self-serving nature of such statements and the open-ended, discretionary language of the establishing agreements, they do not bar the students from adjusting their status or even necessarily require their fathers to quit their jobs to adjust the immigration status. For example, non-immigrants from the Eastern Hemisphere, like Vincent Hogg, who are members of the professions are not subject to the labor certificate requirement. 8 U.S.C. Sec. 1153(a)(3). And other means of obtaining entry

to this country are available to employees of international organizations. 8 U.S.C. Sec. 1153.

Secondly, "suspect classification" notions have no place in this case. First, although the Supreme Court has applied the irrebuttable presumption analysis in the context of fundamental rights, it has not extended the doctrine to "suspect classifications" such as alienage, nor is such likely in light of Salfi. Second, the Supreme Court has considered as discriminatory against aliens only those classifications which have tended to interfere with the means to a livelihood, such as welfare benefits, employment, etc., Perkins v. Smith, 370 F. Supp. 134, 135-36 (D. Md. 1974), aff'd, ___ U.S. ____, 49 L.Ed.2d 368 (1976), not entitlement to educational benefits.[28] Third, non-immigrants as a class, and G-4 aliens in particular, have none of the traditional indicia of suspectness:

> "[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriguez, supra at 24.

Moreover, as the Ninth Circuit has recently indicated, the suspect classification analysis only applies to schemes discriminating against aliens as a class rather than to classifications among aliens. Alvarez v. District Director of United States Internal Revenue Service, 539 F.2d 1220 (9th Cir.

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28. But see Nyquist v. Mauclet, 406 F. Supp. 1233 (1976), probable jurisdiction noted, 45 U.S.L.W. 332 (Nov. 1, 1976) (constitutionality of New York law denying financial aid to aliens).

1976). As noted earlier, permanent resident aliens can qualify for in-state status and exhibit the necessary domiciliary intent. Finally, the issue was not raised below except in an equal protection context.[29]

In short, there is no obstacle preventing this Court from giving full effect to Salfi and Starns and upholding the University's policy of denying in-state status to holders of G-4 visas.

III.

A G-4 NON-IMMIGRANT ALIEN CANNOT BE DOMICILED IN MARYLAND.

Even if this Court should find that the University of Maryland's In-State Policy creates a permanent irrebuttable presumption with respect to the domicile of holders of G-4 visas, under Vlandis the presumption does not violate due process if it is true in fact. Appellant Elkins contends that the students (or their fathers) lack the capacity to become Maryland domiciles and thus whatever presumption may exist is in fact true.

Under Maryland law, a person's domicile is defined as:

> "[T]he place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any present intention of

29. Moreover, the classification is based on the University's interpretation of the state law of domicile, not alienage.

> removing therefrom, and to which place he has, whenever he is absent, the intention of returning." Shenton v. Abbott, 178 Md. 526, 15 A.2d 906, 908 (1940) (emphasis added).

A similar definition is found in Brafman v. Brafman, 144 Md. 413, 414, 125 A. 161 (1924):

> "[Domicile is] a residence at a particular place accompanied by positive or presumptive proof of the intention to remain there for an unlimited time."

In addition, an individual must have the legal capacity to change his domicile. Liberty Mut. Ins. Co. v. Craddock, 26 Md. App. 296, 303, 338 A.2d 363 (1975). Finally, it should be noted that in the context of entitlement to state benefits, the Maryland Court of Appeals has been very strict in its application of its law of domicile. Walsh, Adm'r v. Crouse, supra; Maddy v. Jones, 230 Md. 172, 126 A.2d 482 (1962).

The University submits that non-immigrant aliens, and G-4 visa holders in particular, cannot establish the requisite intent necessary to create a Maryland domicile for in-state tuition purposes owing to the terms and conditions upon which they continue to reside in this country. A G-4 visa is granted for the sole purpose of entry and residence during employment. It is thus for a period of finite and limited duration. The alien must leave upon termination of employment; he represents an intent to do so when applying for the visa, and so long as he holds the visa this intent is considered continuous. The acquisition of Maryland domicile

requires an intent to establish a home within the State without any present intention of removing therefrom. Shenton v. Abbott, supra. Thus, it would appear impossible as a matter of law for a person who has implicitly and continuously maintained by the terms of his visa that he intends to leave this country upon termination of employment (or other specific purpose) to establish a Maryland domicile. Furthermore, absent an attempt to change from non-immigrant to immigrant status, such a party should be estopped from asserting that despite his original pretentions, and despite the terms of his visa, he really intends to permanently reside in this country.

Rather than relying on any principle of the Maryland law of domicile, the lower court fashioned Maryland's law from a District of Columbia case declaring a G-4 to be a domicile for the purpose of access to the courts. Alves v. Alves, 362 A.2d 111 (D.C. 1970). A fundamental error in the lower court's analysis is its notion of domicile as a final, unalterable concept. However, domicile does not bear a fixed meaning and composition for all applications, and a determination that a non-immigrant alien is domiciled in a place for one purpose does not necessitate that he is domiciled there for another. Although the "core" concept of domicile remains the same, in application a determination of whether domicile exists proceeds not upon a unitary definition but is influenced by differing emphases inherent in its application to differing ultimate questions of law. For example, Connecticut permits a non-

resident alien to sue in its courts. Santangelo v. Santangelo, 137 Conn. 404, 78 A.2d 245, 247 (1951) ("An alien stands on the same footing as a non-resident. Our public policy, as reflected in our constitution, is that our courts should be open to 'every person.'") Yet the University of Connecticut like practically every other state university requires a student alien to have a permanent immigrant visa before he can qualify for in-state status.

Another illustration can be found in Hayes v. Board of Regents of Kentucky State Univ., 362 F. Supp. 1173 (E.D. Ky. 1973), where a student, previously judged to be a Kentucky domiciliary by voting authorities, challenged a determination by the university that he was a non-domiciliary for tuitional purposes. The plaintiff contended that a decision by the former was binding upon the latter. Therein the court noted:

> "This proposition is tenable only if 'domicile' bears a fixed meaning and composition for all applications. If the scope of this term varies according to the purpose served, Kentucky State University is obviously not bound by the identification of 'domicile' made by other agencies." 362 F. Supp. at 1173.

The court found that:

> "[D]omicile is not susceptible to a rigid and arbitrary definition. The term will display varying hues as its application shifts. Consequently, there is no reason to presume that a determination of domicil by voting authorities has binding effect upon college officials." 362 F. Supp. at 1175.

In its decision, the court quoted the following passage from the Restatement (Second) of Conflicts:

> "Domicil serves a large number of purposes, and undoubtedly somewhat different reasons and motivations underlie its use for certain of these purposes. It may therefore be expected that the courts will on occasion be either more or less inclined to find a person domiciled in a state for one purpose (as to give him a divorce) than for another purpose (as to subject him to substituted service or to certain forms of taxation). The extent to which actual court decisions are affected by this consideration is obscured by two factors: (1) even within a single state the courts do not always use identical language in stating the rules of domicil, particularly those relating to the required attitude of mind toward the place in question and (2) the rules, however phrased, are extremely general and flexible in operation.
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> "To reiterate, the core of domicil is everywhere the same. But in close cases, decision of a question of domicil may sometimes depend upon the purpose for which the domicil concept is used in the particular case." Restatement (Second) of Conflicts Sec. 11, Comment O cited in 362 F. Supp. at 1175.

See also Does Domicile Bear A Single Meaning?, 55 Colum. L. Rev. 589.

The lower court disregarded these sound principles in its rush to rewrite the Maryland law of domicile. And, in fact, the court failed to note that the critical passage in Alves relied upon with respect to the relevance of a visa to the question of domicile cites to four divorce-access-to-the-courts cases, 262 A.2d at 115 n.18; or that such access to the courts by aliens is usually predicated on comity rather than domicile. 3 C.J.S. Aliens Sec. 47.[30]

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30. The lower court also cited Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. 1972), another court access case, distinguishable because it applies to refugees rather than G-4s.

In contrast to the Alves decision stands Revenue Ruling 74-364, where the principal question was what tax rate, the domiciliary or the non-domiciliary, should be applied against the estate of a G-4 alien who died after living for many years in Virginia. The deceased had no real or personal property outside the United States except two small accounts in a French bank. It was decided that the alien could not acquire a domicile in this country owing to the conditions of his visa:

> "The acceptance by the decedent of the prescribed terms for his admission to and stay in the United States, as required by Federal law and regulations relating to immigration and nationality, created a legal disability that rendered him incapable of forming the intention necessary for the establishment of a domicile here, as required by section 20.0-1 of the Estate Tax Regulations. This legal disability continued to exist until the time of decedent's death since he was still in the United States as an employee of an international organization holding a G-4 visa." Rev. Rul. 74-364.

The case of In re Estate of Gaffney, 141 N.Y. Misc. 453, 252 N.Y.S. 649 (1931), was cited, wherein in concluding that an alien holding a non-immigrant visa could not be an "inhabitant" (domiciliary) of the state so as to qualify as an administrator of an estate, the court said that:

> "Regardless of his present intentions to remain here, he is subject to the terms of his admission to this country."

The IRS ruling also relied on Seren v. Douglas, 30 Colo. App. 110, 489 P.2d 601 (1971). In that case the plaintiff, a

non-immigrant alien attending the University of Colorado, brought a mandamus action to have his "out-of-state" status altered to "in-state." Plaintiff held a student (F-1) visa which allowed him to reside in this country only for so long as and for the sole purpose of his attending school. The Colorado court, relying on both 8 U.S.C. Sec. 1101(a)(15)(F), defining a holder of a student visa as a person in this country "solely for the purpose of pursuing a course of study" and who has a residence in a foreign country which he has no intention of abandoning, and 8 U.S.C. Sec. 1184(a), providing that the admission of non-immigrants shall be for such time and under such conditions as set by the Attorney General, said:

> "We agree that the federal statutes in question did create a legal disability which would render Seren incapable of forming the intent required by state statute so long as he, in compliance with federal law, was here on a legal basis which bound him to not abandon his homeland. 489 A.2d 603 (emphasis added).

The lower court, in a highly selective reading of Seren, ignored the Colorado court's emphasis on 8 U.S.C. Sec. 1184(a) and the language in Sec. 1101(a)(15) relating to the purpose for which the student was in the country, and sought to distinguish the case solely on the basis that the holder of a student visa is required by statute and is bound by federal law "not to abandon his homeland." The Moreno court by its over-emphasis on the cited language from 8 U.S.C. Sec. 1101(a)(15)(F) has misread the entire Code provision. The framers of Sec. 1101 felt no need to spell out the requirement of non-

abandonment of homeland for non-immigrants who were obviously destined for a short-lived stay in the United States keyed to their employment. Under the court's superficial analysis of Sec. 1101(a)(15), diplomats (A), foreign press (I), alien crewmen (D), even aliens in transit (C), are not prevented from obtaining a domicile in the United States. Appellant suggests that such a reading is fundamentally incorrect, that those federal statutes and the immigration regulations cited earlier (pp. 6-7), either by themselves or in conjunction with the Maryland case law on domicile, prevent G-4 aliens from demonstrating the required intent to become a domicile for purposes of qualifying for in-state tuition rates.

CONCLUSION

For the foregoing reasons, Appellant urges that the Order of the District Court be reversed.

Respectfully submitted,

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