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)

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The primary purposes of this Reply Brief are to respond to the arguments of Appellees ("the G-4's") relating to the issues raised in the Brief of Appellant ("the University") and to the equal protection attack on the University of Maryland's in-state tuition and fee policy that is also presented in the G-4s' Brief.[1] However, the G-4s' unwarranted and unfair charges that the University has made "inaccurate and misleading allegations of fact" (Brief of Appellees at 4 and 14) cannot be ignored, nor can the University remain silent in the face of the G-4s'

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[1]The equal protection question was raised below but not decided by the District Judge (App. p. 52).

inappropriate attempt to selectively supplement the record in this case with 14 pages of documents (Annexes 1 and 2 to Brief of Appellees). Thus, it is appropriate to set the record straight on these matters at the outset.

Quite properly, the University referred to portions of the record (in most cases material introduced below by the G-4's) as a basis for legal argument on the questions of whether G-4's should be considered members of a disadvantaged "suspect class" and whether the alleged deprivation of rights they have suffered is of an absolute or inconsequential nature.[2] In addition, the University has legitimately delineated those areas where the record is silent. Without explanation or authorization, however, the G-4's reacted to these steps by belatedly attempting to introduce massive documentary evidence.[3] More importantly, they supplement the record in a fashion which is not only inaccurate but which could mislead this Court. It is for this reason that the University is reluctantly forced to balance the G-4s' extra-record presentation.[4] In their Brief and Annexes, the G-4's suggest that it is not the

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[2]Brief of Appellants at 35-36; Brief of Appellees at 61. See also pp. 12-14 infra.

[3]The "Annexes" to the Brief of Appellees account for 14 pages of their 80 page presentation.

[4]The University by no means suggests that it desires or needs this Court to rely on any evidence outside the record created below.

policy of the World Bank to reimburse employees for tuition payments made to the University on behalf of their children (Brief of Appellees at 15). Yet in a notice dated August 16, 1976, the World Bank advised its employees of the decision below and of the possibility of obtaining tuition refunds, stating:

> "Staff members who, under the provisions of Personnel Manual Circular No. Pers/6/76 of April 26, 1976, are eligible for the Bank's tuition equalization subsidy with respect to the education of their dependent children at the University of Maryland must submit to the Personnel Department ... documentation in order to obtain the necessary reimbursement from the Bank ....
>
> "If the amounts reimbursed to the staff member by the Bank are ultimately refunded by the University, the staff member will, of course, be required to repay the Bank." (See Annex A hereto).[5]

As to the G-4s' other charges, it should be obvious that they are in essence more heat than light. For example, contrary to the University's assertion, the G-4's maintain that

> "... there was no opportunity for counsel to present evidence of a readjustment in status on the part of the parents of the appellees, or other children similarly situated, because such a readjustment ... is very difficult to achieve unless appellees' fathers seek other employment." (Brief of Appellees at 17).

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[5]Another defect in the G-4s' extra-record presentation is its apparent selectivity. Page 6.17 of IDB Personnel Policy relating to tuition reimbursements is missing from their Annexes.

This non-sequitur cannot disguise the fact that the G-4's were furnished repeated opportunities to come forward with whatever evidence they wished to offer in support of their petition for in-state classification. Moreover, here and throughout their brief, the G-4's conjure up difficulties in connection with the adjustment of their status from non-immigrant to permanent resident alien. Foremost is the contention that the Banks' own interpretation of their own loosely worded agreements "except in very exceptional cases" bars the Banks from making the labor certification sometimes needed for adjustment of immigrant status (Brief of Appellees at 43). Such imaginary roadblocks cannot bear scrutiny. Moreover, a Bank employee need not adjust his status and face the alleged spectre of loss of employment if the child who seeks to attend the University contributes more than half of his own support and as, one of the student-appellees did in this case, adjusts to immigrant status.[6]

The G-4's also complain because the University correctly pointed out that the lower court failed to note the decision of the Supreme Court in Weinberger v. Salfi, 422 U.S. 749 (1975), and because the University did not call the case to the attention of the trial court (Brief of

[6]The G-4's concede that to stay in the United States a G-4 visa holder will have to change his status at some point. (Brief of Appellees at 41).

Appellees at 17). While neither side informed the lower court of Salfi, this Court must apply controlling precedent without regard to the oversights of counsel or the apparent damage to the G-4s' case.

Finally, the G-4's devote more than a page of their brief to criticizing the University's presentation of information onthe enrollment of nonimmigrants at the University of Maryland, and to speculating on the possible composition of that group (Brief of Appellees at 18-19). The enrollment figure included in the University's Argument (not in its Statement of Facts) is easily verifiable, judicially notable information basic to one of the issues in this case.[7]

ARGUMENT

I.

A DECISION OF THE STATE LAW QUESTION BY MARYLAND COURTS WILL END THIS CONTROVERSY WITHOUT THE NEEDLESS DECISION OF CONSTITUTIONAL QUESTIONS.

The G-4's raise a series of objections to the invocation of abstention (Brief of Appellees at 20-30), none of which withstands scrutiny.

Although the District Court's opinion states on numerous occasions that it resolves a question of the

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[7]Without discussion, the lower court dismissed the administrative convenience justification for the challenged feature of the University's in-state policy (App. p. 52).

Maryland law of domicile (App. pp. 38, 42-44, 48-49), the G-4's maintain that the federal constitutional issues they raise are not entangled in state law (Brief of Appellees at 22). This erroneous assertion is countered by the fact that a substantial portion of the G-4s' brief is devoted to the Maryland law questions and by the additional fact that their irrebuttable presumption claim cannot prevail if Maryland law precludes the establishment of domicile by the holder of a G-4 visa. As the trial court itself noted:

> "If, as the defendants argue, under the law of domicile in Maryland, a G-4 alien cannot establish domicile, then a classification based on domicile which presumes non-domicile for such aliens is not contrary to fact and is universally true." (App. p. 42).

Next, although the G-4's concede that the University's definition of domicile is in accord with the general Maryland common law of domicile, they doubt that a decision of the Court of Appeals of Maryland on the state law question will resolve this case. Specifically, they allege that the University would not be legally obligated to follow the decision of the Maryland courts and that the University could change its in-state policy (Brief of Appellees at 24). However, in Maryland, arbitrary or unreasonable agency conduct is inherently reviewable by state courts. Criminal Injuries Compensation Board v. Gould, 273 Md. 486 (1975). This doctrine would insure that the University would follow its own in-state policy

as interpreted by the Maryland courts. Moreover, the issue of whether the University's in-state policy is changed as a result of a court decision is irrelevant to the abstention question. The University's present in-state policy was drafted as a result of the Supreme Court's decision in Vlandis v. Kline, 412 U.S. 441 (1973). As a result of a final decision in this case (or in Nyquist v. Mauclet, prob. juris. noted U.S. , 50 L. Ed. 2d 282 (1976)) the University's policy also appropriately may be modified. In any event, the G-4's would have no presently protected right in the future shape of the University's in-state policy if they obtained the relief they might seek in the Maryland courts.

Finally, the G-4's contend that this Court should decline to abstain because the state law question presented is not uncertain (Brief of Appellees at 25). However, if such is the case, why did the lower court in its opinion and the G-4's in their brief rely on out-of-Maryland authorities to conclude that the state's law did not preclude the establishment of domicile by the holder of a G-4 visa?

In summary, there is no good reason why this Court should not give effect to the stated purpose of the Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) abstention doctrine (Brief of Appellant 14), avoid the unnecessary decision of federal constitutional ques-

tions, and stay its hand until Maryland courts have resolved the state law issues integral to this case.

II.

THE UNIVERSITY'S APPLICATION OF ITS IN-STATE POLICY TO G-4 ALIENS DOES NOT CREATE AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION AS THAT DOCTRINE HAS EVOLVED IN THE SUPREME COURT NOR DOES IT CREATE A "PERMANENT" IRREBUTTABLE PRESUMPTION IN VIOLATION OF VLANDIS v. KLINE, 412 U.S. 441 (1973).

The G-4s' analysis of the "irrebuttable presumption" question presented for review is marked by tunnel-vision in that it complete ignores the significance of Weinberger v. Salfi, supra, and focuses almost entirely on pre-Salfi cases. As more recent Supreme Court cases demonstrate, Salfi has done more than put a "limit on the outer reach of the irrebuttable presumption doctrine (Brief of Appellees at 36).

In Usery v. Turner Elkhorn Mining Co., U.S. , 49 L. Ed. 2d 752 (1976), the Supreme Court overturned the decision of a three-judge federal court that Vlandis and Stanley v. Illinois, 405 U.S. 645 (1972) mandated the unconstitutionality of a statutory irrebuttable presumption of total disability of miners (and thus entitlement to benefits) due to pneumoconiosis ("black lung disease") based on clinical evidence of a complicated stage of the disease. The Court stated that:

> "We think the District Court erred in equating this case with those in the mold of Stanley and Vlandis ....

> "[T]he argument is essentially that Congress has accomplished its result in an impermissible manner - by defining eligibility in terms of 'total disability' upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But, in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are completely permissible. Cf. Weinberger v. Salfi, 422 U.S. 749, 767-785 ...." 49 L. Ed. 2d at 771.

A more dramatic rejection of the application of Vlandis occurred in Knebel v. Hein, 45 U.S.L.W. 4083 (decided Jan. 11, 1977). In that case a three-judge federal panel had invalidated a federal food stamp regulation that disallowed a deduction for transportation expenses in connection with a job training program for purposes of computing the income of a food stamp recipient. This was done on the ground that the challenged provision established a conclusive presumption that under such circumstances a recipient's food purchasing power was greater and his needs less. Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975).[8] Although the Supreme Court noted that "the District Court was correct that the regulations operate somewhat unfairly in appellee's case," it stated that they did not embody an irrebuttable presumption. 45 U.S.L.W. at 4085. In so holding, the Court emphasized that the availability of more equitable alternatives did

[8]In so holding the lower court relied upon Vlandis, Stanley, United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973), and Bell v. Burson, 402 U.S. 535 (1971).

not invalidate the regulations, especially when "allowing a deduction for all transportation expenses would create significant administrative costs as well as risks of disparate treatment." Id.

Like Salfi, these decisions reject the blind application of Vlandis, resorted to by the lower court here, and support the interests asserted by the University on behalf of its in-state policy (Brief of Appellant at 22-33).[9]

However, as the University indicated in its brief, this Court need in no way disturb Vlandis; rather the University asks, as indeed the Supreme Court has apparently mandated, that Vlandis be limited to its facts. In their brief the G-4's attempt to attribute a "permanent" nature to the alleged presumption at issue in this case because the "university's policy ... prohibits G-4 aliens from ever rebutting the presumption of non-domicile during the entire time they remain in G-4 status" (Brief of Appellant at 35). This is a distortion of the critical footnote nine in the Vlandis opinion which distinguishes Starns v. Malkerson, 401 U.S. 985 (1971). What the G-4's attempt to obscure is that the alleged constitutional

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[9]Rather than rehash the obvious limitations placed on the G-4's cases by Salfi, the University refers the Court to the discussion of Salfi in its brief at 25-28.

deprivation at stake in this case is not a change in immigration status but the denial of a particular benefit: viz., preferential tuition rates and fees. The "permanent" feature of the Vlandis presumption was that in-state tuition benefits were conditioned on a criterion which could never be met during the individual's status as a student - the critical period for which the benefits were sought. If, as the University has demonstrated, (Brief of Appellant at 29-31), the student-appellees do have the opportunity to obtain these particular benefits while in student status, the alleged presumption of non-domicile is not permanent (and thus unconstitutional) even under Vlandis.

Finally, the brief of the G-4's discloses that their constitutional claims are in essence a demand for preferential treatment. In arguing that federal law does not preclude G-4 visa holders from establishing domicile, they contend that unlike those immigrants specifically required to maintain an overseas domicile and those whom they say may enter the United States "for only a specific temporary purpose," G-4's and a few other immigrant categories are specially exempted by Congress from such burden (Brief of Appellees at 51-52). Thus, they in effect ask the University to administer its in-state policy by adopting such proffered distinctions so as to favor a limited (and generally affluent) category of immigrants and to deny benefits to other categories of

immigrants with generally more meager resources. The prevention of such disparate treatment is an additional reason for upholding the University's in-state policy.

III.

THE UNIVERSITY'S APPLICATION OF ITS IN-STATE POLICY TO G-4 ALIENS DOES NOT DISCRIMINATE AGAINST A "SUSPECT CLASS" AS IS RATIONALLY SUPPORTED BY IMPORTANT STATE INTERESTS.

The G-4s' equal protection attack on the University's in-state policy is totally devoid of merit.[10]

First, "strict scrutiny" is not the standard to apply to the classification at stake. The University's policy permits Maryland domiciliaries, including permanent resident aliens, to qualify for preferential in-state tuition rates and fees. Thus, "aliens" as a class are not affected.[11] In addition, a seeming corollary to "strict

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[10]There are compelling reasons why this Court should not reach the G-4s' equal protection claim which was not decided below. See infra at pp. 14-15.

[11]The traditional equal protection test is applicable to the University's in-state policy because that policy does not distinguish between citizens and aliens. See Matthews v. Diaz, U.S. , 96 S. Ct. 1895 (1976). Therein a Medicare statute authorizing benefits for citizens and aliens with five years permanent residence was reviewed. The Supreme Court held that the only question presented was "whether the statutory discrimination within the class of aliens - allowing benefits to some aliens but not to others - is permissible." Id. at 1892 (emphasis in original). The Court then applied the fifth amendment analogue of the reasonable relation test and sustained the statute. Id. at 1892-93. In addition, the G-4s' reliance on the two cases decided under the name of Graham v. Richardson, 403 U.S. 365 (1971) is misplaced. In those cases, brought by permanent resident aliens, the challenged statute cut across all categories of aliens and in effect brought about an absolute deprivation of vital necessities of life, viz., welfare benefits.

scrutiny" equal protection analysis is that the challenged deprivation be absolute. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Rosario v. Rockefeller, 410 U.S. 752 (1973). The G-4's are not denied an education or admissionto the University by the in-state policy. The deprivation, if such exists, consists of payment of required additional fees with respect to which there is no evidence that the student-appellees or their parents are unable to pay. Similarly, unlike statutes invalidated by the Supreme Court as discriminating against aliens, the University's in-state policy effects a purely beneficial result rather than denying access to the necessities of life or foreclosing public or private occupations. See Hampton v. Mow Sun Wong, U.S. , 96 S. Ct. 1895 (1976) (federal civil service); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service); Examining Board of Engineers, Architects and Surveyors v. deOtero, U.S. , 96 S. Ct. 2264 (1976) (engineering); In re Griffiths, 413 U.S. 717 (1973) (practice of law). See also Truax v. Raich, 239 U.S. 33 (1915).

In addition, G-4 aliens are hardly the appropriate class to contend that they are saddled with such disabilities and powerlessness as to qualify as a suspect class deserving of special protection. San Antonio Independent School District v. Rodriguez, supra, at 24. This particularly should be the case where, as here, the

G-4's claim a preferential position among aliens (see supra at 11). Finally, it should be reiterated that the challenged classification is one based on domicile rather than alienage.

If "strict scrutiny" is not the standard to apply to the G-4s' equal protection contention, the challenged classification must be gauged by the rational basis test. As the University has demonstrated (Brief of Appellant at 31-33 and herein at 11-12), that the in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of non-immigrants with respect to tuition and fee differentials. Knebel v. Hein, supra; Weinberger v. Salfi, supra; and Starns v. Malkerson, supra.

Aside from the merits of the G-4s' equal protection claim, there are sound reasons for declining to reach this issue. The lower court decided this case on cross-motions for summary judgment[12] and as the G-4s' attempted initiation of a battle of annexes indicates, the record is not complete on issues relevant to the resolution of the equal protection contention. In addition, until the Supreme

[12]The trial court declined to grant Appellees' Motion for Summary Judgment on the question of their establishment of Maryland domicile (App. pp. 53-57).

Court decides Nyquist v. Mauclet, supra, it would be premature to decide the equal protection questions raised but not decided below.[13]

In summary, the University urges this Court to decline to reach the G-4s' equal protection challenge to the University's in-state policy; if it does reach the issue, this Court should hold that the policy does not unconstitutionally discriminate against the G-4's in violation of the fourteenth amendment.

CONCLUSION

For the foregoing reasons and those stated in its principal brief, the University urges that the Order of the District Court be reversed.

Respectfully submitted,

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[13]The Nyquist case involves an equal protection challenge to New York's policy of denying state financial assistance to aliens who have not applied for citizenship. Among the issues facing the Supreme Court in that case are what equal protection standard should be applied and whether the state can require aliens to adjust their status to naturalized citizens in order to obtain state benefits.

ANNEX NO. 1

University of Maryland - Possible Adjustments of Tuition and Other Charges

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The University of Maryland has long differentiated between individuals who are "resident" (domiciled) in the State of Maryland and individuals who are "non-resident" in the state for purposes of admitting students and charging amounts for tuition and other fees. This is a policy common to most, perhaps all, public universities in the United States. At the University of Maryland, students who are determined to be residents of Maryland are referred to as having "in-state" status; others are in "out-of-state" status.

Beginning in 1974, the University limited eligibility for in-state status to students who are (or students whose spouse or parents are) United States citizens or who are admitted to the United States for permanent residence on immigrant visas. Three students who are G-iv visa holders or whose parents are G-iv visa holders commenced litigation against the University to contest the validity of these limitations. On July 13, 1976, the United States District Court for the District of Maryland decided that a rule which prevented G-iv visa holders from demonstrating that they were domiciled in Maryland was invalid by reason of the due process clause of the United States Constitution, and directed that the rule not be enforced.

The University has decided to appeal this decision to the United States Court of Appeals for the judicial circuit which includes Maryland. Because the appeal is not frivolous, the District Court, following procedures used frequently, has suspended enforcement of its own decision until the appeal is decided. This means that students who are classified as out-of-state by reason of G-iv status will continue to be treated as out-of-state unless and until the decision of the District Court is affirmed by the Court of Appeals.

However, if the decision of the District Court is affirmed, the University will refund the difference between the out-of-state and in-state tuition and other charges for all semesters beginning with the fall 1976 semester if the student would have been classified as in-state for those semesters under the District Court's decision and if the student applies to the Director of Admissions at the University for reclassification from out-of-state to in-state before the last day available for registration for the fall 1976 semester. On receipt of such application, the University will reply that the request will be held in abeyance pending the outcome of the appeal.

Dist to WORLD BANK employees

If you reside in the State of Maryland and if you or your spouse or child is classified as an out-of-state student by reason of G-iv visa status, the student should apply for reclassification to in-state status before the time indicated.

Staff members who, under the provisions of Personnel Manual Circular No. Pers/6/76 of April 26, 1976, are eligible for the Bank's tuition equalization subsidy with respect to the education of their dependent children at the University of Maryland must submit to the Personnel Department the following documentation in order to obtain the appropriate reimbursement from the Bank:

(a) Receipted bills for the tuition paid;

(b) Copies of the application to the Director of Admissions of the University for a reclassification from out-of-state to in-state status, and the Director of Admission's reply thereto; and

(c) Documentation from the University of Maryland listing the resident and non-resident tuition charges.

If the amounts reimbursed to the staff member by the Bank are ultimately refunded by the University, the staff member will, of course, be required to repay the Bank.

August 16, 1976