ORIGINAL

In the

Supreme Court of the United States

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL.,

PETITIONERS,

V.

MARY TOMANIO,

RESPONDENT.

No. 79-424

Washington, D. C.
February 26, 1980

Pages 1 thru 43

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL., Petitioners,	
v.	No. 79-424
MARY TOMANIO, Respondent.	

Washington, D. C.,

Tuesday, February 26, 1980.

The above-entitled matter came on for oral argument at 1:16 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DONALD O. MESERVE, ESQ., State Education Building, Albany, New York 12234; on behalf of the Petitioners

VINCENT J. MUTARI, ESQ., 600 Old Country Road, Garden City, New York 11530; on behalf of the Respondent

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-424, Board of Regents v. Tomanio.

Mr. Meserve, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DONALD O. MESERVE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MESERVE: Mr. Chief Justice, and may it please the Court:

This case here on certiorari raises really four issues, the first being whether the District Court erred in giving declaratory judgment, that the Board of Regents had violated Mary Tomanio's civil rights by not giving her a hearing; the second being the extent to which the District Court and Circuit Court of Appeals should have been bound by the New York State Court's interpretation of state law; and the other two being a unique interpretation of the Second Circuit Court of Appeals with respect to the defenses of res judicata and the statute of limitations.

Since this is a due process case, I think it is important to start with a brief outline of the essential facts to which that due process has got to be applied. Mary Tomanio practiced chiropractic in the state of New York for a few years before the first chiropractic licensing statute was enacted, effective in July 1963. When

that statute came into effect, it provided a special means of qualification for what were called grandfather applicants which was intended to take into account the fact that they had been out of school for a while and that they had been acquiring valuable experience through actual practice.

A limited series of four special examinations was provided for the grandfather applicants. At the time the class action was brought contesting the constitutionality of the licensing statute, Wasmuth v. Allen, cited in our brief, and the New York Court of Appeals sustained the statute and the appeal to this Court was dismissed.

Subsequently, the four examinations originally contemplated were extended to five and then to six special examinations. Mrs. Tomanio had made her application in the normal course of events for licensure, was admitted to the series of special examinations, took and failed all six of them. As a result of retaining credit for subjects passed in previous exams and as a result of grade averaging within a group of subjects, her final margin of failure on the sixth and last examination was six-tenths of one point.

At this point, it is our contention that she had failed to qualify under a valid and constitutional licensing scheme and at this point if there were no more New York statutes involved, the Circuit Court would have

agreed that her previous right to practice chiropractic had expired by the result of her failure on the examinations. However, in New York we have an article of omnibus provisions which apply to all of the thirty professions licensed by the Board of Regents. These are in addition to the special provisions set forth in the separate article for each of the professions.

One of the omnibus provisions which has been in effect for many years provides that the Board of Regents may waive a specific licensing requirement if they are satisfied that it has been substantially met. After failing the examination route under the chiropractic article, Dr. Tomanio applied for a waiver of her failure on the examinations. This was denied by the department, and that was in November of 1971.

She subsequently instituted a state court action contending that the denial was arbitrary and capricious and that the statute required the regents to consider her failure and her narrow margin of failure on the examination and her licensure in two other states.

The Supreme Court of the State of New York at special term granted judgment from the bench for Mrs. Tomanio. No decision was written. The Board of Regents appealed and that judgment was unanimously reversed by the appellate division. On appeal to the Court of Appeals,

it was unanimously dismissed. So that all of the I believe 11 appellate judges in the State of New York dismissed her action.

So then in June of 1976 she initiated an action in the District Court in which she requested a mandatory order directing licensure, an injunction against interference with her right to practice, and a declaration that her civil rights had been violated.

The first two elements of relief, the real relief which she requested, namely licensure and the right to practice were identical to those which had been raised in the state case. There had been no mention of section 1983 or federal civil rights in the prior state court actions.

The Federal District Court denied the request for licensure, denied the request for an injunction against interference with her practice, but did give judgment that the Board of Regents had violated her civil rights through the failure to offer her a hearing on her application for a waiver of the examination failures and in failing to give her the reasons for the denial of her application. The petitioner appealed from that decision, no cross-appeal was filed, and the licensure and practice issue therefore are not before the Court.

QUESTION: Mr. Meserve, I notice that in your brief you rely on the full faith and credit statute enacted

by Congress, 20 U.S.C. 1738, saying that full faith and credit --

MR. MESERVE: Yes.

QUESTION: I didn't see any treatment of that issue in the majority opinion of the Court of Appeals. It was mentioned in Judge Lombard's dissent. Did you raise it in the Court of Appeals?

MR. MESERVE: In substance but not by name, Your Honor. I did not refer to that section. I did argue that the state courts had resolved that issue.

QUESTION: And did you argue that the broad New York rule of estoppel by judgment was litigated or might have been litigated and was barred in the subsequent New York proceeding?

MR. MESERVE: I'm sorry, I don't understand the question.

QUESTION: Well, my understanding of the New York rule of collateral estoppel is that anything that was litigated or might have been litigated is barred in a subsequent lawsuit.

MR. MESERVE: Yes, we did make that argument.

With respect to the question of due process, this was first raised of course in the federal action four years after the final determination. In the letter of November 1971 notifying Mrs. Tomanio of the denial of her

waiver application, and incidentally notifying her that she was admitted to the regular licensing examination, she was informed that if she had any questions she could contact the executive secretary. The letter did not go on at that time to give written reasons for the denial of the application. However, three months later, in February 1972, in our first response to the state court litigation, those reasons were given in writing and in full, therefore she had notice of the reasons for the denial of her application in writing over four years before the institution of this federal action. And I would submit that that issue really is and was academic four years before the case began.

Furthermore, this is not a type of a case where the Board of Regents was doing something to Mary Tomanio, but a case where she had failed to qualify under the statute regulating her profession and then applied arguing that she had the substantial equivalent of the statutory requirements. That application was judged solely on the basis of the material which she submitted and which was accepted at face value. She knew the basis of her argument and she was represented by an attorney from the beginning of the application to the department, I believe, and there is really no question that she has had reasons for denial of her application from the beginning in this case.

With respect to the hearing, the federal district

court judge and the majority of the circuit court held that she should have been given a formal hearing on her application for waiver. Now, there is no statutory provision for such, no hearing was requested by her at any time although she was represented by an attorney throughout, and this Court, as a matter of fact, had not yet decided Roth and Sinderman. So we are being hit with a bit of a lack of anticipation of the decisions of this Court when you put this into the perspective of 1971 when the decision was made.

Secondly, any right to practice which she may have had had been terminated in our opinion by her failure to qualify by passing one of the series of special examinations.

She had no reasonable expectation, much less a mutual expectation that the state would waive a requirement if she proved unable to meet it. And I don't think that the subsequent application under those circumstances continued a right or should have been construed as having reinstated the right really for purposes of considering the due process to which she was entitled on the second application.

I think the court below erred in lumping the original licensing application and the waiver application together. We would also argue that she had in effect due

process. As I said before, she was represented by an attorney in the waiver application, she had a full opportunity to present her arguments in writing and she had so and they were simply that she had almost passed, she was licensed in two other states, a standard which we did not regard as equivalent, and she had passed a private licensing examination which the state also did not accept as equivalent.

She was given eventually the reasons for denial and she had a fully adequate record for judicial review which is proven by the fact that it was in fact reviewed, and the state courts found that she did not have the substantial equivalent.

QUESTION: Well, do you see now asking for a hearing to give the reasons for denial or is she asking for a hearing to give the reasons for failure to give her a waiver?

MR. MESERVE: I think she is now belatedly asking that we give her a hearing on her 1971 application and start all over again, followed I suspect by three more state courts and three more federal courts.

QUESTION: Well, what did the federal court order, a hearing on what subject?

MR. MESERVE: The District Court decision merely said that we should have given her a hearing.

QUESTION: On what?

MR. MESERVE: On her application for a waiver, on her argument that she had the substantial equivalent of the New York requirements.

QUESTION: Isn't that the whole focus or is it more than that?

MR. MESERVE: I think it is more than that.

QUESTION: Did the Court of Appeals expand what the District Court ordered?

MR. MESERVE: No, the Court of Appeals in the appellate division decided that -- this was argued before them, there is no question about this -- that the evidence that she had submitted on her application was not the substantial equivalent, and also, Your Honor, that the statute under which she applied did not apply to this type of an application.

QUESTION: And counsel never asked for a hearing?

MR. MESERVE: Never.

QUESTION: She never did ask for a hearing?

MR. MESERVE: No. In fact, the argument made in the petition with the --

QUESTION: Well, isn't it true that it wouldn't have been granted if it had been asked for?

MR. MESERVE: I don't know that that is true, Your Honor.

QUESTION: You don't know, I see.

MR. McSERVE: The argument made in the complaint in the District Court was not that she wanted a hearing but that because she had never been given a hearing the District Court should give her a license.

Now, we believe the court below erred in ignoring the New York interpretation of its own statute. Section 6506 of the education law, this substantial equivalent section, is as I said before an omnibus provision which has been on the books for many years. It has never been applied by the Board of Regents or by the New York courts to an application for a waiver of a provision which has been failed -- an examination which has been failed. It is a necessary type of statute authorising waiver of experience or examination or preliminary education requirements for candidates who have the substantial equivalent of the New York rule but as it is applied to candidates who have acquired their education or taken their examination in some jurisdiction where it differs from that given in New York but is substantially equivalent thereto. And there is nothing in the record in this case, in either state or federal court, indicating that New York has ever applied this statute to the type of a situation we have here. We contend it was never intended to be, it never should have been, and we contend that the majority in the Circuit Court erred in ignoring that New York interpretation of its own

statutes.

QUESTION: You contend in effect that there was no state interest which she had under New York law that would have warranted a hearing as to whether she should be granted it or not?

MR. MESERVE: No, we contend that the statute was never intended to apply to this. But beyond that, we would say she certainly -- the best she had was a mere hope --

QUESTION: Of a waiver?

MR. MESERVE: -- of a waiver.

QUESTION: And you say the New York courts have construed the statute relating to waivers so as not to apply to this type of situation?

MR. MESERVE: It has never been applied to this type of situation. It used to be that the statute explicitly referred to foreign applicatns. There was a general recodification in 1971 of all of the New York statutes relating to professional licensing, and the present provision no longer contains an implicit restriction to out-of-state applicants. But the interpretation placed upon it by the department and by the appellate division and the Court of Appeals in this case is the same as the interpretation placed upon the former section and in fact the Court of Appeals decision in Mrs. Tomanio's state court action cited

Matter of Erlanger which was the leading New York case under the former statute and which set forth at great length the concept that this was an extraordinary provision not to be applied lightly.

QUESTION: Well, have the New York courts ever subjected a waiver decision to review?

MR. MESERVE: Yes, we have had a number of cases in New York involving applications for waiver, not waiver of an examination that has been failed. That has not even been tried.

QUESTION: Well, would the board have had power to waive in this case?

MR. MESERVE: No. The decision of the appellate division in the New York courts held, and it is cited in the dissenting opinion from the Circuit Court, and it states in ringing language that it would have been arbitrary and an abuse of discretion for the Board of Regents to have granted this request.

QUESTION: Well, that may be so but that implies that there are circumstances under which a waiver in these circumstances might not be arbitrary.

MR. MESERVE: I couldn't agree in these circumstances. There are other circumstances that are appropriate for a waiver, many of them.

QUESTION: Well, are there any standards supplied

by the statute on which waiver is to be granted?

MR. MESERVE: Not in the statute, no.

QUESTION: Why was that?

MR. MESERVE: The Court of Appeals -- the appellate division said and the Court of Appeals affirmed, but you cannot waive an examination that has been failed.

QUESTION: Well, has the Board ever in any circumstances ordered the Board to give a waiver that the Board refused?

MR. MESERVE: I can't recall one offhand, but I suspect that they probably have. We have a fair volume of litigation in professional licensing cases, none however relating to an examination requirement.

QUESTION: Because it has held that the statute simply doesn't --

MR. MESERVE: It doesn't apply.

QUESTION: -- it doesn't apply.

MR. MESERVE: It was not intended as an end-run whereby somebody who can't pass an examination can get around it.

QUESTION: It doesn't sound like the Court of Appeals majority agreed with that interpretation of the New York law, does it?

MR. MESERVE: I think they did.

QUESTION: The Court of Appeals here?

MR. MESERVE: Yes -- oh, no, no, I'm sorry, I am thinking of the New York Court of Appeals.

QUESTION: The federal court.

MR. MESERVE: Oh, no, they ignored it, and this is my argument.

QUESTION: Let me read you what they said. I tried to get at this before.

MR. MESERVE: Yes.

QUESTION: Here is the Court of Appeals majority opinion: The adjudicative fact to be determined in considering whether to grant a waiver is -- and I am omitting some -- whether notwithstanding her narrow failure of the examination, she substantially meets the licensure requirements. That is the narrow question. It hasn't anything to do with the six failures, it has to do only with whether she should have had a hearing on whether there should have been a waiver. He went on to say -- the opinion went on to say, of course the state legislature need not have provided for any waiver of the examination but once it did so denial of the waiver implicates procedural due process.

MR. MESERVE: Mr. Chief Justice --

QUESTION: Now, we have to decide whether that is a correct statement, whether that is correct or not.

MR. MESERVE: No, my argument is that that is

not a correct statement because the New York state legislature did not provide for the waiver of an examination that has been failed.

QUESTION: Where did that originate? Where does the waiver come from, from the licensing board?

MR. MESERVE: The waiver comes -- the waiver statute is general, it can apply to any profession, it can apply to any requirement. It says the Board of Regents may waive a requirement if in their judgment it has been substantially met.

QUESTION: But as a matter of New York law, I take it, we are bound by the way the New York courts have interpreted that particular statute as to when a waiver may be given and when it may not be given.

MR. MESERVE: Right. In the courts and in practice in the administrative body, it has never been applied and the New York courts I think have held fairly that it was never intended to be applied --

QUESTION: Mr. Meserve, I understood you a moment ago to say that in this very case, in ringing language, some New York court said that there was no waiver available in these circumstances.

MR. MESERVE: They said that it would have been an abuse of discretion.

QUESTION: Is that in this case?

MR. MESERVE: Yes, that is in this case. It is quoted by Justice Lombard in the dissenting opinion.

QUESTION: I know, but is it in the appellate division opinion?

MR. MESERVE: It is the appellate division of the New York state courts in her state court action.

QUESTION: Well, we have that in the petitioner for certiorari, do we not?

MR. MESERVE: Yes, you have it in the appendix, too.

QUESTION: Yes, at page D-1. Now, where in that opinion does that appear?

MR. MESERVE: What are you in, Your Honor?

QUESTION: Petition for certiorari, page D-1.

QUESTION: What have you got in your hand, you have got the record?

MR. MESERVE: I've got the appendix.

QUESTION: You've got the appendix. Is it in there?

MR. MESERVE: Yes, A-5.

QUESTION: A-5.

QUESTION: Well, look at D-3: "Had the Board waived the requirements on the record here, it would have abdicated its delegated responsibility."

MR. MESERVE: That is the language I have in my--

QUESTION: Now, how do you read that? Is that a state law construction of the --

MR. MESERVE: Yes, I read that as a construction by the New York appellate courts that section 6506 under which a waiver application was made could not be applied to this situation. I read it as saying that as a matter of law --

QUESTION: State law.

MR. MESERVE: -- state law, the application had to be denied.

QUESTION: And then what did the Court of Appeals do, deny appeal?

MR. MESERVE: Affirmed.

QUESTION: They affirmed?

MR. MESERVE: Yes, the appellate division decision.

QUESTION: So they affirmed that part of the appellate division?

MR. MESERVE: Yes.

QUESTION: You mean the New York Court of Appeals, the highest court of New York.

MR. MESERVE: The New York Court of Appeals.

QUESTION: Yes, I understand that.

MR. MESERVE: I apologize.

QUESTION: And you suggest that the Court of

Appeals, the federal Court of Appeals just ignored that?

MR. MESERVE: Yes. They looked at the language of the statute and nothing more and held that a hearing should have been required. I think his is --

QUESTION: But the United States Court of Appeals has said this violates federal due process, if I read their opinion correctly. Do you read it that way?

MR. MESERVE: Yes.

QUESTION: And that is the issue before us, and that is the only issue before us, isn't it?

MR. MESERVE: No, it is not the only issue, Mr. Chief Justice, but it is one of the issues certainly.

QUESTION: If they are wrong on that, you prevail, don't you?

MR. MESERVE: I hope so.

QUESTION: There is also the issue of whether the Court of Appeals for the Second Circuit should have permitted this matter to be relitigated at all after she had had her chapter 78 proceeding in the New York courts.

MR. MESERVE: Yes. I do not have the time. I want to reserve a few moments and I am almost out of time. I would have to say that I have briefed the point of the unique Second Circuit rules on the statute of limitations and res judicata, and I think that as they have been applied in this case, they do not do substantial -- they are

not in the sound interest of the administration of justice because they encourage an administrative determination followed by three cases in the state court, followed by three federal courts and prolong what should be a fairly straight-forward determination through nine years of litigation.

I would like to reserve the remainder --

QUESTION: Let me ask one question. How do you raise the problem that my examination was erroneously graded?

MR. MESERVE: That was never alleged.

QUESTION: I say how would you raise that?

MR. MESERVE: You could raise that --

QUESTION: But it could be raised?

MR. MESERVE: It could be raised, absolutely, Article 78 proceedings in a state court or through a federal action.

QUESTION: So it could be raised?

MR. MESERVE: Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Mutari.

ORAL ARGUMENT OF VINCENT J. MUTARI, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MUTARI: Mr. Chief Justice, and may it please the Court --

QUESTION: If the Court were to decide that this was res judicata, that would be the end of the case, if this

Court were to decide.

MR. MUTARI: Yes, it would, Your Honor.

I would like to just step into one part of the recitation of the facts which I think can clear up what appears to me to be some sort of a double kind of entendre we are getting here. In the state court, we argued a state issue and in the federal court we are arguing a federal issue.

In 1971, when the legislature in its wisdom chose to pass a law called 7606, which was revision of a law that was on the books since 1939, they gave an opportunity to all citizens of the State of New York to go to the regents and request of them a waiver of their background requirements for license, of their education requirements for a license, and for the examination requirements in whole or in part. Previous to this law, they had 211 in which the legislature of the New York in its wisdom said that only outsiders, people who have been practicing for five years in a given profession may come to the State of New York and show the Board of Regents that that five years of practice and what came before it would be sufficient to warrant an acceptance by the Board of Regents that they substantially complied.

When 6506 came around, it was on the books for five weeks before Mary Tomanio took advantage of it. It

was the first time it was on the books. They open now this application for showing whether they substantially complied or not to citizens of the State of New York and to people for the first time who failed examinations, and it is quoted here in clear English.

Now, that decision of the Board of Regents was an adjudicative decision and the process that Mary Tomanio used, going up through the state court, was one to determine if that adjudicative decision was arbitrary or capricious.

QUESTION: She could have raised her constitutional claims in that proceeding, couldn't she?

MR. MUTARI: Yes, she could and a federal res judicata doctrine which is formulated by the Second Circuit said has even enlarged the federal res judicata concept in the New York State res judicata concept. The federal court said in Monroe v. Pape that you don't have to go down to the state court first before you bring your due process or your civil rights action in the federal court.

QUESTION: But isn't the Second Circuit bound by the act of Congress of 1790, 28 U.S.C. 1738 --

MR. MUTARI: In fact they are supporting the act of Congress. The act of Congress when they instituted the Civil Rights Act, for one simple reason, they were

concerned that some states might not be able to give some people their rights.

QUESTION: I'm talking about the act of 1790, the third section, which says with respect to proceedings in state courts, such acts, records and judicial proceedings shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state or possession.

MR. MUTARI: The state res judicata is broader than that in the State of New York.

QUESTION: Then doesn't the statute require the Second Circuit to observe the New York rule?

MR. MUTARI: And the New York rule for res judicata is that to say Mary Tomanio may not bring her due process case, an entirely different case, a constitutional case, into federal court if she didn't bring it in the state court, provided that the cause of actions were the same, and they quote Winters v. Lavine and misquote it by leaving out that last sentence, provided that the cause of action is the same. And we contend that the cause of action was not the same. We had apples in the state court and we had oranges in the federal court. We had a woman saying that when you were given this broad adjudicative power, Mr. Regents, you didn't use it wisely, you were

arbitrary and capricious, and it was held by special term that they were arbitrary and capricious and then appealed and then the appeal affirmed in the Court of Appeals.

And when we came to the federal court, we said -- Judge Foley -- what happened, they came down with this decision, but the way they arrived at it was in an unconstitutional manner. Whether it was an arbitrary decision or not an arbitrary decision, the way they arrived at it was unconstitutional.

QUESTION: But you didn't appeal to the higher court, did you?

MR. MUTARI: No, we went on a --

QUESTION: I mean the state court proceeding was over when you went to the District Court.

MR. MUTARI: Yes, it was, sir.

QUESTION: Well, isn't the New York rule that not only anything you actually litigated in that proceeding but anything that might have been litigated cannot be relitigated?

MR. MUTARI: No, it is not the New York rule. There is a further sentence that says provided that there is the same cause of action through both litigations, and we contend that it was not the same cause of action.

QUESTION: So when the Court of Appeals ruled, you could have come here, couldn't you?

MR. MUTARI: Directly to the Supreme Court?

QUESTION: Yes, sir.

MR. MUTARI: We went to the District Court. We went --

QUESTION: I said you could have come to this Court,

MR. MUTARI: Yes, Your Honor.

QUESTION: So instead of that you appealed to the District Court.

MR. MUTARI: Yes.

QUESTION: No, you couldn't have come here, you raised no federal question I understood in the state proceeding.

MR. MUTARI: There were no federal questions in the state court.

QUESTION: Well, how could you come here?

MR. MUTARI: Well, I was thinking that maybe we could have come in on some kind of an injunction proceeding or something like that against the lower court, but we tried that already because they arrested Mary Tomanio at one time along the line and we tried and we couldn't get an injunction.

QUESTION: When did you ask for a hearing?

MR. MUTARI: We asked for a hearing in 1973.

QUESTION: Where?

MR. MUTARI: We asked the Board of Regents of the City of New York. We asked the Board of Regents for a hearing.

QUESTION: Where is that in the record?

MR. MUTARI: It is --

QUESTION: Is that in the record?

MR. MUTARI: Yes -- oh, when we asked them for a hearing. We wrote them a letter and asked them for a waiver, not a hearing. I'm awfully sorry.

QUESTION: So you never did ask for a hearing.

MR. MUTARI: We never asked for a hearing and the Supreme Court has said that there is no need to ask that a waiver -- a hearing may be given even although it is not asked for under certain circumstances.

QUESTION: But does it have to be given?

MR. MUTARI: It does not have to be given.

QUESTION: Why should it be given in this case?

MR. MUTARI: We think the circumstances are so extreme here that it should be given.

QUESTION: What is the extreme, that she failed seven times?

MR. MUTARI: The extreme is that she has been practicing chiropractics since 1958 without a blemish, this is her livelihood, her only source of living --

QUESTION: But she failed seven times.

MR. MUTARI: Our contention is that if she failed 107 times and she closely passed the 108th time, we are talking about the one time that she failed just by six-tenths of one percent. This is the reasonableness for which we go and ask for our decision.

QUESTION: Would your position be the same if she failed by five points?

MR. MUTARI: I don't think it could be. Though if we put together that she passed two other state examinations, that she passed the National Chiropractic Board of Examiners exam, which I understood the state of New York now uses as a model, that she practiced without a blemish since 1958 without any mark against her, if we had been granted a hearing, though we did not ask for a hearing, we could have attempted to prove to that Board of Regents these facts by bringing in her peer group as to her competency.

QUESTION: Weren't you there?

MR. MUTARI: Pardon?

QUESTION: Weren't you there? Wasn't the lawyer present?

MR. MUTARI: Yes, I was there, sir.

QUESTION: Well, did you offer to put on evidence?

MR. MUTARI: We asked them for a waiver as the law required and they said no.

QUESTION: Did you offer to put on witnesses?

MR. MUTARI: No, we didn't because the law did not require it or --

QUESTION: If you had been given a hearing, what would you have done?

MR. MUTARI: If we were given a hearing, I believe that we could have brought forward her peer group, eminent people qualified in chiropractic who would testify --

QUESTION: Well, why didn't you bring them?

MR. MUTARI: We were never given a hearing to bring them.

QUESTION: Well, did they tell you you couldn't bring them?

MR. MUTARI: They just said no.

QUESTION: They said no to you?

MR. MUTARI: They said no to me and I said they were arbitrary and capricious.

QUESTION: I thought they listened to you.

MR. MUTARI: Pardon me?

QUESTION: Did they listen to you? Did they cut you off? Did you say anything you wanted to say?

MR. MUTARI: I put most of this in a letter to them when I asked them for the waiver.

QUESTION: I'm talking about when you were there.

MR. MUTARI: I was never there. They never let

you be there. You write to them.

QUESTION: You were never present?

MR. MUTARI: In the regents' home office, no.

QUESTION: Did you submit affidavits?

MR. MUTARI: I submitted our arguments.

QUESTION: You submitted oral arguments?

MR. MUTARI: Written arguments and a letter saying we would like a waiver --

QUESTION: You submitted written arguments?

MR. MUTARI: -- that we feel we come under 6506 subdivision (5).

QUESTION: Did you offer to submit the affidavits of these people you were talking about?

MR. MUTARI: No, I did not.

QUESTION: Were you denied that right?

MR. MUTARI: No, I was not denied the right. We had a "no" in about 48 hours. And the only logical path I felt we could take at that time was to go to the Supreme Court and say they were arbitrary and capricious, that this decision was without foundation.

QUESTION: Mr. Mutari, your theory about their being arbitrary and capricious as I understand it was given the facts that she had almost passed the exam and her history of practice and the like, that it was arbitrary and capricious given those facts to deny her the right to

practice.

MR. MUTARI: That's right, Your Honor.

QUESTION: So didn't you have before them substantially everything you would have put in if you had had a hearing?

MR. MUTARI: The reason we hold hearings here in the United States Supreme Court and in other courts -- or we would all be mailing letters to each other -- I did give it to them in the form of writing, but you have an opportunity to come in, though I didn't ask for it, and bring in witnesses who could or could not impress the jury or the set of judges that were there, bring in her patients who could have attested to her professionalism and caring.

QUESTION: Well, how do you respond to your opponent's argument that as a matter of New York law if she fails the examination they simply could not have given her a waiver?

MR. MUTARI: It is not New York law.

QUESTION: Oh.

MR. MUTARI: 6506, subdivision (5) says that you may waive examination requirements. That law came into effect in 1971, five weeks before she went forward --

QUESTION: But they say, if I remember the argument, is you may not do that for someone who has failed an examination.

MR. MUTARI: That is not so. It is not the law. If he can find it there, fine, but it is not the law of the State of New York.

QUESTION: Does it say specifically that you can waive the examination requirement

MR. MUTARI: Yes, 6506, subdivision (5), the Board of Regents shall supervise the admission to and the practice of professions. In supervising, the Board of Regents may -- discretionary -- waive education, experience and examination requirements -- I editorialize -- in whole or in part for a professiona license prescribed in the article relating to the profession provided the Board of Regents shall be satisfied that the requirement of such article have been substantially met. And we hold here before the Supreme Court of the United States --

QUESTION: They could waive the examination, couldn't they?

MR. MUTARI: Yes.

QUESTION: They could waive the examination, couldn't they?

MR. MUTARI: The examination requirements.

QUESTION: They could waive the whole examination, couldn't they?

MR. MUTARI: Exeatly.

QUESTION: And you think that is what it means?

MR. MUTARI: Yes, sir.

QUESTION: You've just made an analogy to the American tradition of hearings and said as a hearing in this Court. Do you think you have a constitutional due process right to an oral argument and hearing in this Court?

MR. MUTARI: No, I don't, but the only reason we are here is because the Board of Regents sought certiorari and you admitted us here.

QUESTION: But do they have any right? Does anyone have any right to an oral hearing in this Court?

MR. MUTARI: No, sir.

QUESTION: The majority in some terms of our cases are --

MR. MUTARI: A vast majority.

QUESTION: -- are decided without oral argument, are they not?

MR. MUTARI: I agree, Your Honor.

QUESTION: What does that do to your claim that due process requires a hearing in your situation?

MR. MUTARI: The Board of Regents is an administrative agency, the Board of Agents should be very close to the people to whom they are administering, they have a responsibility to the State of New York in handing out these licenses and they should be cognizant and sensitive to giving them to people who have been proven proper

practitioners for a long time, and that Mary Tomanio has proven that she is a worthwhile practitioner, and that is why I think a hearing ought to have been granted to her.

QUESTION: Suppose they had a rule that after you had taken your examination six times and failed you could not take it any longer, and she failed six times, did she not?

MR. MUTARI: And if they did have 6506 on the books, I would say she is done, it is over. But 6506 gave her that other avenue that the legislature said that was open to her.

QUESTION: Well, my hypothesis was that in addition to your existing statutes there was a provision that five times was the limit, as some state licensing boards do have.

MR. MUTARI: I would belive it to be constitutional, she would have had her due process, as long as there was nothing else on the books.

QUESTION: I take it your position is that you could have come here directly from the board, you could have gone into federal court under 1983 without ever going into the state courts at all?

MR. MUTARI: I --

QUESTION: You could have gone and filed a suit under 1983 when your waiver was denied directly, without

ever --

MR. MUTARI: Yes. I must say that we were so sure that the court would find that this arbitrary quick no based on the facts would never require us going into the federal courts.

QUESTION: But the statute doesn't set any standards for the granting of the waiver and none of the cases do, do they?

MR. MUTARI: No, and that is one of the reasons we are here in the federal court now, because there is such a broad discretionary power. It says that the Board of Regents --

QUESTION: What expectation under state law did you ever have that a waiver would be granted?

MR. MUTARI: Well, we were really testing it. It was only on the books for five weeks and we thought that Mary Tomanio had all the qualifications to show that she substantially complied, and I can recite them again, her admissions in other states, passing the national --

QUESTION: My real question is where do you find in state law any limits on the discretion of the board to deny your request for a waiver?

MR. MUTARI: The ordinary --

QUESTION: It sounds like this might be a decision just left to the complete discretion of the board.

MR. MUTARI: It is left to the discretion of the board but they must arrive at whatever decision they do in a constitutional manner, and we are submitting to you now that they did not arrive at it.

QUESTION: But if it is left to the complete discretion of the board, they can go either yes or no and they will be wrong in neither event, I take it.

MR. MUTARI: Well, they will be wrong if their yes or their no is founded on a procedure that is unconstitutional and that is why we are here. We are saying their procedure was unconstitutional because they gave no reasons. She had her property and her liberty she was taking to them and --

QUESTION: But if there are no factors that they have to consider, what would they be hearing about?

MR. MUTARI: They would be hearing her background, her qualifications, her long years of practice --

QUESTION: Which is what you say ought to entitle her to a waiver but maybe the board just doesn't feel that any of those are relevant.

MR. MUTARI: If they did, then we would have lost there but we were never given an opportunity and the constitutional decisions have held that a person ought to be given this hearing or ought to be given reasons before they come up with their yes or no. They come up with their

no like with a rubber stamp. They came up with their no based on hearing nothing.

QUESTION: Then your answer to Justice White's question must be that there are some standards in New York law because otherwise there would be no reason for them to come up -- why they couldn't simply say no, it is a matter completely confined to our discretion and we have decided not to grant it.

MR. MUTARI: I believe the majority of the standards -- and this is why this is a civil rights act -- are here in federal procedure and they didn't follow them.

QUESTION: Mr. Mutari, before you finish, would you be good enough to make a comment or two on the statute of limitations here?

MR. MUTARI: Yes.

QUESTION: It has hardly been mentioned in oral argument by either side and you didn't cite Johnson v. Railway Express Agency which involved 1981 rather than 1983, but I wondered generally your approach to the statute of limitations.

MR. MUTARI: I would submit that the cornerstone of the statute of limitations is the concept of repose. Judge Foley in the District Court told that statute of limitations, which in New York was three years, believing, number one, that there were no witnesses to forget, there

was no evidence to grow stale; there was only one issue, an issue of law. Mary Tomanio brought --

QUESTION: I want to know why it was tolled.

MR. MUTARI: It was tolled in the interest of federalism, the concept that a case ought to be tried in a state court to its fullest before you ever come to the federal court. The federal court already has an overcrowded calendar, particularly in civil rights cases. If the --

QUESTION: A little while ago, didn't you indicate that you could have come directly into federal court?

MR. MUTARI: Yes, I could. I chose -- I had to make a choice and I made my choice in the state court and I did make my choice in the state court. If I were compelled to come to the federal court and if I didn't know that statutes could be tolled, it would mean that a person would go into the state court with his state action and not come to the federal court and in the middle of it have to bring his action in the federal court and you would have two cases going at once in New York and here, as the case before me, or you would have a person not bringing his action at all if he had a civil rights matter and coming directly to the federal court and again congesting the calendar. Judge Foley tolled it and followed a policy of tolling so that a person could go safely to the state court

and try to receive his remedies there without coming to the federal court, and then if you --

QUESTION: Of course, we have that very situation in some EEOC cases.

MR. MUTARI: Yes.

QUESTION: Precisely.

MR. MUTARI: It is in the interest of federalism that this kind of tolling takes place. In the other aspects of when they toll and when there is a statute of limitations, the court looks to whether or not the person was asleep at the switch, sleeping on their rights. She hadn't.

QUESTION: Well, I just suggest that in the Johnson v. Railway Express Agency we reach the opposite conclusion. It is cited in your opponent's brief but not in yours.

MR. MUTARI: I didn't put it in my notes, so the case may come to a different conclusion.

So the end of this, the due process, the statute of limitations, the concept that we had, a person who had this long practice unblemished, who attempted to receive a waiver which was granted and put on the books only five weeks before in the state of New York and was refused. We contend that that refusal at that time was an adjudicative decision that demanded some kind of a hearing. Some kind

of a hearing was not given. No reasons were given. And we came to the federal court because we said this was an unconstitutional way to arrive at this decision and we plead to this Court to accept our arguments.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Meserve? You have four minutes remaining.

ORAL ARGUMENT OF DONALD O. MESERVE, ESQ.,
ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. MESERVE: To sum up very quickly a couple of things: The statute of limitations and res judicata arguments sort of highlight, are highlighted here by the fact that we are trying to remember what happened nine years ago when the application for a waiver was made. The application was made upon three letters and supporting affidavits submitted by Mr. Mutemi which are in the record in the Circuit Court.

He was permitted to submit whatever he wanted to. There was no cutoff at that time. There was no request for a further submission of any kind.

Now, on the question of standards on this waiver--

QUESTION: Are you saying in effect that there is nothing that was not before the board that could have been brought before the board except oral argument?

MR. MESERVE: Yes.

QUESTION: They knew that she had failed the examination six times.

MR. MESERVE: Right.

QUESTION: They knew that she had been in this activity for a good number of years.

MR. MESERVE: Not too many at that time, two to five, I think, but she has been going on. Yes, there was nothing else and on what he submitted the New York courts held that it would have been an abuse of discretion to grant it, the statute was not intended to apply to that.

Now, the statute does have standards built right into it. Those words "substantially met" have a meaning. Almost passing an examination is not quite the same as substantially meeting an examination requirement in our interpretation. Somebody who takes an examination somewhere else which may not be quite the same as ours could be admitted under that provision on a determination that they substantially met the examination requirement. Somebody who almost passes an examination --

QUESTION: Do you say that the Board of Regents did have the authority to waive the examination requirement?

MR. MESERVE: No, they had the authority --

QUESTION: If it determined that the New Hampshire

examination was substantially the equivalent?

MR. MESERVE: Right. They did not have the --

QUESTION: Well, if she argued that it was the substantial equivalent, it seems to me to suggest that you did have the authority as a matter of New York law to grant the waiver you say you didn't have the authority to.

MR. MESERVE: We have the authority to waive an examination requirement if we believe that it has been substantially been met. We never believe that where the examination was a New York examination and was failed.

QUESTION: Well --

MR. MESERVE: We may believe that if an equivalent examination is taken somewhere else.

QUESTION: Well, she did take what she contended was an equivalent examination elsewhere, didn't she?

MR. MESERVE: Yes, and that --

QUESTION: And you disagreed with her, but had you agreed with her you would have had the authority as a matter of New York law to grant the waiver.

MR. MESERVE: Yes.

QUESTION: So I think really your argument before that you had no authority as a matter of New York law really wasn't quite right.

MR. MESERVE: I think it was right if you coupled her failure and her out-of-state examination. If she came

in with an out-of-state examination which was an equivalent of the New York examination, we had the authority to license her. If she had her --

QUESTION: Without requiring the New York examination.

MR. MESERVE: Without requiring the New York exam. We could accept the foreign exam, determining it to be the substantial equivalent.

QUESTION: This would be a reciprocity type of admission.

MR. MESERVE: Yes.

QUESTION: And that is one of the things she argued you should have done in this case.

MR. MESERVE: And she argued that in the state courts and that was one of the issues which was specifically argued and determined against her in the state court.

QUESTION: So it was determined, as I understand the statement of reasons quoted on page four of your brief, on the ground that as a matter of fact you decided the examinations were not substantially the equivalent of the New York exam.

MR. MESERVE: Her foreign examination.

QUESTION: Right.

MR. MESERVE: Yes.

QUESTION: But you would have had discretion to

rule otherwise is all I am saying.

MR. MESERVE: Yes.

QUESTION: All right.

MR. MESERVE: On the statute of limitations and on res judicata argument, the rule in the Second Circuit is contrary to the generally accepted rules and we believe the interests of justice would require a uniform rule in that respect.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:10 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -