11-4283-cv

United States Court of Appeals

for the

Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff-Appellee,

– v. –

STATE OF NEW YORK, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT AND ITS MEMBERS,

Defendants,

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General for the State of New York, ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ROBERT D. MAYBERGER, in his official capacity as Clerk of New York Supreme Court, Appellate Division, Third Judicial Department, JOHN G. RUSK, Chairman of the Committee on Professional Standards "COPS,"

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is a global bar association of over 40,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations in over 85 countries. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations. For over 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel and the legal departments where they work. To that end, ACC regularly files *amicus curiae* briefs in courts throughout the nation, including this Court.

ACC has a strong interest in this case. The panel majority upheld a New York law that explicitly discriminates against nonresident attorneys seeking to practice law in the state by requiring them to maintain the expense of a New York office. Since its inception, ACC has sought to protect corporate counsel from unnecessary barriers that preclude lawyers from representing their clients across state lines. The panel majority's narrow reading of the Privileges and Immunities

[1] No person other than amicus and its counsel authored this brief in whole or in part. No party, no party's counsel and no other person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief. Federal Rule of Appellate Procedure 29(a) authorizes this brief. All parties have consented to the filing of this brief, which is timely filed within seven days "after the principal brief of the party being supported [was] filed," in accordance with Federal Rule of Appellate Procedure 29(e).

Clause gives a constitutional stamp of approval to such barriers and is contrary to both law and policy. Rehearing *en banc* is warranted to enable the full Court to address the important issues presented by this case.

ARGUMENT

ACC submits that this case presents an "exceptional issue" supporting rehearing for two reasons. *First*, the panel majority's decision is directly contrary to U.S. Supreme Court precedent. *Second*, the decision will result in unnecessary and costly obstacles to the multijurisdictional practice of law in this country.

I. The Panel Majority's Decision Conflicts with Longstanding Privileges and Immunities Jurisprudence

Article IV, § 2, cl. 1, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." When examining claims that a citizenship or residency classification offends the Privilege and Immunities Clause, the Supreme Court has established a two-step inquiry.

First, "[t]he activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988) (internal quotation marks, citations and alterations omitted). The Supreme Court has found that "the practice of law . . . is sufficiently basic to the national economy to be deemed a privilege protected by the Clause." *Id*. at 66 (citing *Supreme Court of*

N.H. v. Piper, 470 U.S. 274, 280-81 (1985)). Accordingly, "the Clause is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." *Friedman*, 487 U.S. at 66. *Second*, if a law, in fact, discriminates against out-of-state residents, the state must demonstrate that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284.

New York Judiciary Law § 470 cannot stand under the Supreme Court's two-step test. *First*, the law facially discriminates against out-of-state attorneys with regard to the practice of law by requiring nonresident attorneys but not resident attorneys to maintain an "office for the transaction of law business" within the state. As the panel recognized in its original opinion, that requirement discriminates against nonresident attorneys by imposing a substantial burden on them that residents do not bear. *See Schoenefeld v. New York*, 748 F.3d 464, 468 (2d Cir. 2014) (noting that the law "carries with it significant expense – rents, insurance, staff, equipment *inter alia* – all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one"). Thus, "it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state." *Id*. at 469.

Second, the State of New York does not provide "sufficient justification for the discrimination." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 94 (2d Cir. 2003). As Judge Hall notes in dissent, the state's "proffered justifications for the in-state office requirement – effectuating service of legal papers, facilitating regulatory oversight of nonresident attorneys' fiduciary obligations, and making attorneys more accessible to New York's courts – are plainly not sufficient to justify the difference in treatment." *Schoenefeld v. Schneiderman*, No. 11–4283–cv, 2016 WL 1612845, at *14 (2d Cir. Apr. 22, 2016). In today's electronic world of instantaneous communication and fast transit, the need to serve legal papers and make attorneys "accessible" does not justify requiring lawyers to maintain a physical office in a state. That is particularly true given that a lawyer's out-of-state office (*e.g.*, Newark) may easily be closer to the New York court in which she seeks to practice (*e.g.*, Manhattan) than a resident's office (*e.g.*, Buffalo). New York's argument that an in-state office requirement is necessary to regulate the behavior of nonresident attorneys is also unpersuasive, as the state "has the authority to discipline all members of the bar, regardless of where they reside." *Piper*, 470 U.S. at 286.

In upholding the New York statute at issue, the panel majority relied on the faulty premise that the plaintiff did not "allege or offer some proof of a protectionist purpose." *Schoenefeld*, 2016 WL 1612845, at *5 (citing *McBurney v.*

Young, 133 S. Ct. 1709, 1716 (2013)); *see also Schoenefeld*, 2016 WL 1612845, at *1 (Section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law").

By requiring plaintiffs to make out a *prima facie* case of discriminatory intent, the panel majority effectively eliminated the requirement that states provide a substantial justification for laws that discriminate against nonresidents. As Judge Hall explains in dissent, there is no basis for the majority's ruling; the Supreme Court's "protectionist purpose" language in *McBurney* was mere "dicta" and "should not be read as unanimously altering the longstanding two-step Privileges and Immunities analysis." *Schoenefeld*, 2016 WL 1612845, at *12 & n.2.

In sum, rehearing *en banc* is essential to correct the panel majority's erroneous legal reasoning and enforce the constitutional right of nonresident attorneys to practice law "on terms of substantial equality" with residents of New York. *Piper*, 470 U.S. at 280.

II. The Panel Majority's Decision Will Impose Significant Costs on Corporate Clients

Rehearing *en banc* is further supported by the adverse – and unwarranted – implications of the panel majority's ruling for the legal industry in this country. Over the last few decades, ACC's members have worked hard to change unnecessary and burdensome state laws and regulations preventing in-house

attorneys from providing legal services to the corporations for which they work. In particular, ACC has fought to enable in-house counsel to practice anywhere without cumbersome bar admission or registration requirements so long as they are members in good standing to practice law in at least one jurisdiction. This saves costs and gives corporations the flexibility they need in a global economy to move their in-house lawyers around to meet constantly changing business and legal demands.

In recent years, great strides have been made in this area. Forty-seven states have modified their rules to allow for multijurisdictional practice by in-house counsel on behalf of their client-employers, enabling U.S. companies to employ in-house lawyers whose law licenses come from other states. However, many unnecessary restrictions remain, including burdensome registration requirements as well as rules mandating special permission for in-house attorneys to appear in court, prohibiting in-house attorneys from volunteering for pro bono work, and forbidding non-U.S. lawyers to practice as in-house counsel. The panel majority's legal analysis represents a giant step backward as it gives states wider latitude to restrict the practice of law by out-of-state attorneys. Corporate clients will needlessly be forced to pay higher legal fees and be deprived of their counsel of choice – a result that is particularly untoward in a time when many in-house legal departments must "do more with less."

Specifically, New York Judiciary Law § 470 imposes substantial costs on in-house counsel and their employers. Many ACC members belong to the bars of numerous states and need the flexibility to represent their employers in the courts of those states even though they do not maintain a physical office there. New York's law forces corporations to hire outside counsel that they otherwise would not need, thereby increasing legal expense and depriving businesses of the ability to use experienced in-house lawyers who are intimately familiar with the company's history, personnel and procedures.

Section 470 also hurts corporations (located both inside and outside of New York) by stripping them of their ability to use outside attorneys who are members of the New York bar but do not maintain an office in New York. For example, the law prohibits New Jersey as well as New York companies from hiring New Jersey lawyers to represent them in the New York courts if the lawyers do not maintain a New York office even though those lawyers are fully qualified to practice in the state (and may provide greater value for their services and/or have a longstanding relationship with the client).

Finally, New York's physical office requirement imposes significant costs without any corresponding benefit. In this modern age of the Internet, email, telecommuting, videoconferencing, virtual law offices and fast transit, there is simply no basis for any state – much less a state at the center of global commerce –

to require a physical office to practice law. As representatives of entities that are as likely to be on the plaintiff side of the "v." as the defendant, ACC's members are uniquely qualified to opine on the lack of need for opposing counsel to have a physical office in the jurisdiction in which a lawsuit is pending. Accordingly, ACC respectfully requests that rehearing be granted to ensure that lawyers who are members of the New York bar may represent their client in the New York courts.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,
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