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 OF AMICUS CURIAE THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF PLAINTIFF'S PETITION FOR REHEARING

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Statement and Interest of Amicus Curiae

Amicus Curiae, the New Jersey State Bar Association ("the NJSBA"), is the primary advocate for the members of the New Jersey bar.[1] The NJSBA serves, protects, fosters and promotes the personal and professional interests of over 18,000 members, and functions as the voice of New Jersey attorneys to other organizations, governmental entities and the public with regard to the law, legal profession and legal system.

The NJSBA has played an active role in the evolution and ultimate demise of New Jersey's "*bona fide* office" rule, offering comments on proposed amendments and appearing as *amicus curiae* in related litigation. *See In re Sackman*, 90 N.J. 521, 448 A. 2d 1014 (1982); *Tolchin v. Supreme Court of the State of New Jersey*, 111 *F.*3d 1099 (3d Cir. 1997), *cert. denied*, 522 *U.S.* 977 (1997).

The NJSBA also counts among its members many New Jersey-resident attorneys who are admitted to practice in New York, and have a vital interest in the outcome of this matter. According to the most recently available statistics, as of 2014 roughly

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[1] The NJSBA has no parent corporation, nor does any publicly held corporation own 10% or more of its stock. No party's counsel has authored this brief, in whole or in part, nor has any party, any party's counsel or any person other than the NJSBA, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief. Plaintiff has consented to the filing of this brief, and the State defendants do not oppose it.

42,000 of over 96,000 attorneys admitted in New Jersey were also members of the New York bar.[2] Of these, only 3,817 maintained "*bona fide* private office locations" in New York.[3]

Because the Third Circuit's decision in *Tolchin* was a reference point for the parties' arguments earlier in this case, the NJSBA seeks to inform the Court of New Jersey's experience with the rule since *Tolchin*, as there have been important developments that directly bear on the Privileges and Immunities analysis here.

Argument

The Court should grant rehearing *en banc* because the panel decision substantially limits the important right of clients to choose their own counsel.

En banc reconsideration is reserved for cases posing a "question of exceptional importance," *see Federal Rule of Appellate Procedure* 35(a)(2), and is appropriate when cases "raise issues of important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 *F.*3d 156, 160 (2nd Cir. 2009). *See also* Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 *Brook.L.Rev.* 365, 382-93 (1984); Wilfred

[2] 2014 State of the Attorney Disciplinary System Report (New Jersey Office of Attorney Ethics 2015), accessible at https://www.judiciary.state.nj.us/oae/2014%20State%20of%20the%20Attorney%20Disciplinary%20System%20Report.pdf, at p. 55.

[3] *Id.* at p. 58.

Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 *Hofstra L. Rev.* 297, 311-12 (1986). This is such a case.

The stakes here transcend the pecuniary interests of non-resident lawyers, because New York Judiciary Law § 470 significantly imperils New Yorkers' freedom of choice in legal representation. "[P]reserv[ing] a balance . . . between an individual's right to his own freely chosen counsel" and the need to maintain professional standards in the legal community is "a question of acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice." *Emle Industries, Inc. v. Patentex, Inc.*, 478 *F.*2d 562, 564-65 (2nd Cir. 1973). While the professional standards involved in *Emle Industries* dealt with conflicts of interest, not office space, any rule that substantially limits a client's "right to his own freely chosen counsel" among members of the New York bar, wherever they may reside, warrants the Court's *en banc* scrutiny.

The Supreme Court has established a two-step inquiry for analyzing challenges to legislation under the Privileges and Immunities Clause. The first step focuses on whether "[t]he activity in question [is] sufficiently basic to the livelihood of the Nation[.]" *Supreme Court of Va. v. Friedman*, 487 *U.S.* 59, 64-65 (1988) (internal quotation marks, citations and alterations omitted). The second step focuses on whether the

law discriminates against out-of-state residents and, if so, whether the state has shown 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." *Supreme Court of New Hampshire v. Piper*, 470 *U.S.* 274, 284 (1985).

It is well settled that the practice of law is protected by the Privileges and Immunities Clause, *Friedman*, 487 U.S. at 66. The original panel opinion also recognized that New York Judiciary Law § 470 imposes a substantial burden on non-resident attorneys by requiring them to maintain an "office for the transaction of law business" within the state, while not requiring the same of resident attorneys. See *Schoenefeld v. New York*, 748 F.3d 464, 468 (2d Cir. 2014). Thus, it is incumbent on the State of New York to establish a sufficient reason "for not permitting qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." *Id.*

The panel majority's holding erroneously relies upon *McBurney v. Young*, 133 *S.Ct.* 1709 (2013), to place the burden on plaintiffs to allege a *prima facie* case of protectionist intent. As Judge Hall explained in dissent, though, the reference to a "protectionist purpose" in *McBurney* was "*dicta*" that "should not be read as unanimously altering the longstanding two-step

Privileges and Immunities analysis." *Schoenefeld*, 2016 WL 1612845, at *12 & n.2. In reaching a similar conclusion, the Ninth Circuit observed, "[w]hen the Court determines that the Privileges and Immunities Clause does not apply at all, it says so." *Marilley v. Bonham*, 802 *F.*3d 958, 963 (9th Cir. 2015).

As the dissent correctly concluded, New York'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).

While this litigation has been pending, recent developments in New Jersey have demonstrated that, with the advent of readily-accessible communication technology and internet access, the physical trappings of the traditional "bricks-and-mortar" law office are no longer necessary to achieve the goals of accessibility and responsiveness ostensibly relied upon by the panel majority as constitutional justification for the rule at issue here.

By 1997, when *Tolchin* was decided, New Jersey required all New Jersey-admitted attorneys to maintain an in-state *bona fide* office, regardless of their residence. In rejecting a

constitutional challenge on Privileges and Immunities and other grounds, the court held that "a rational relationship exists between the benefit of attorney accessibility and the *bona fide* office requirement," 111 *F*.3d at 1108. The NJSBA fully supported the court's decision, at the time, and appeared as *amicus curiae* to oppose the grant of *certiorari* by the Supreme Court.

As we now have come to realize, *Tolchin* addressed the practice of law at the dawn of the digital age, at least for smaller firms and solo practitioners who were most impacted by the *bona fide* office requirement.[4] Sensing change in the air, the *Tolchin* court presciently noted the possibility that "some of the recent rapid advances in communication and transportation technology may render the *bona fide* office requirement's intended benefit of attorney accessibility less significant in the future." *Id*. at 1115.

After some further liberalization of the rule to permit location of the *bona fide* office in any American jurisdiction, a 2007 study by the Supreme Court of New Jersey Professional Responsibility Rules Committee,

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[4] According to a survey by the American Bar Association Legal Technology Resource Center, as of 1996 only 32% of individual lawyers had portable computers, and only 37.6% had internet access. *Technology and Law Practice Guide*, "What's Hot: Technology Trends for Smaller Law Firms," http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/tsp97yevics2.html. The first known use of a smartphone was not until 1997, the same year that *Tolchin* was decided. *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/smartphone.

http://www.judiciary.state.nj.us/notices/2007/n070308a.pdf, found "no known problems with respect to deletion of the in-state requirement for a *bona fide* office, and that "[d]ebate about removing the in-state *bona fide* office requirement has all but disappeared since the amendment went into effect."

New Jersey amended the rule again, at the NJSBA's urging, effective February 1, 2013, to dispense with the *bona fide* office requirement entirely, opting instead for standards of "prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice[.]" *New Jersey Court Rule* 1:21-1(a). The revised rule does require attorneys to "designate one or more fixed physical locations" for regulatory inspections of files and financial records, for mail and hand-deliveries, and for services of process, and imposes other requirements intended to assure that attorneys are accessible. Nonresident attorneys who do not maintain an in-state office must authorize the Clerk of the Supreme Court to accept service of process if it cannot otherwise be effectuated pursuant to the appropriate court rules.

In the three years since New Jersey's elimination of the *bona fide* office requirement for all attorneys, there has been no evidence that the practice has negatively impacted any of the important values cited by the panel majority in the present

case. Given the proximity of New Jersey to New York, and the similarities in the day-to-day practice of law in these two jurisdictions, the less restrictive means proven to work in New Jersey are sufficient proof that New York's in-state office requirement is an unnecessary burden, and can no longer withstand scrutiny under the Privileges and Immunities Clause.

Conclusion

For the reasons presented above, *amicus curiae*, the NJSBA, submits that the petition for rehearing should be granted.

Respectfully submitted,

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