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

SUPPLEMENTAL SUBMISSION FOR DEFENDANTS-APPELLANTS

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STATE RULES AND REGULATIONS

PRELIMINARY STATEMENT

Defendants submit this supplemental brief to address whether Judiciary Law § 470 violates the rights of plaintiff, a nonresident member of the New York bar, under the Privileges and Immunities Clause. In addressing the statute's scope in response to a question certified by this Court (ECF 121),[1] the New York Court of Appeals held that Judiciary Law § 470 requires nonresident attorneys to maintain a "physical law office" in the State. (ECF 139, at 4.)

Defendants previously argued (Opening Br. at 22-34) that, because the statute could reasonably be read more narrowly to require only an address for personal service of legal papers, on its face the statute did not implicate the Privileges and Immunities Clause. In so arguing, defendants did not concede that read more broadly, the statute necessarily violated the Clause. In fact, even as interpreted by New York's high court, the statute does not violate plaintiff's rights under the Privileges and Immunities Clause. To the contrary, the statute has a distinctly nonprotectionist aim, because it serves legitimate state interests relating to the regulation of the legal profession, effectively places resident and nonresident attorneys on equal footing as to those interests, and only incidentally affects a nonresident's ability to engage in the practice of law. The statute thus does not

[1] References to "ECF __" are to documents filed in this appeal, designated by the docket entry number. References to "JA__" are to pages of the Joint Appendix filed at ECF 29-30. References to defendant's opening and reply briefs are to the briefs filed at ECF 28 and 78.

abridge the plaintiff's ability to engage in a common calling "in the sense prohibited by the Privileges and Immunities Clause." *McBurney v. Young*, 133 S. Ct. 1709, 1715 (2013).

ARGUMENT

JUDCIARY LAW § 470'S PHYSICAL-OFFICE REQUIREMENT DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

A. An In-State Office Requirement Facilitates Regulation Of The Practice Of Law

Judiciary Law § 470's physical-office requirement serves three legitimate state interests.

First, it serves the State's interest in facilitating the service of legal papers.[2] In New York, when a party is represented by an attorney, interlocutory papers must be served on the represented party's attorney. N.Y. C.P.L.R. 2103(b). Rule 2103(b) enumerates the available methods of service of interlocutory papers and preserves to the litigant the ability to choose the method best suited to the litigant's needs, including personal service to the attorney's office.[3] As we earlier explained

[2] As we explained (Opening Br. at 5-6, 26-27), the statute's legislative history demonstrates that the office requirement was enacted in large part to facilitate personal service on nonresident attorneys.

[3] Personal service may be made by delivering the papers to the attorney directly, or by leaving the papers at the attorney's office under specified circumstances, depending on whether the office is open or closed. Personal service may also be made at the attorney's *New York* residence if service at the attorney's office cannot be made. C.P.L.R. 2103(b)(1)-(4). (*See* Reply Br. at 1 n.1.)

(Reply Br. at 13-14), a litigant may choose to personally serve interlocutory papers for a number of reasons.[4] Requiring a nonresident attorney to maintain a physical office in the State reserves to litigants the full range of service options—including personal service—without having to find a means to personally serve the nonresident attorney outside the State. The requirement also allows the New York courts to oversee and adjudicate disputes arising over such personal service. (*See* Opening Br. at 27-28.)

Second, the physical-office requirement facilitates the State's regulatory oversight of a nonresident attorney's fiduciary obligations. Rule 1.15(d) of the New York Rules of Professional Conduct requires all attorneys to maintain extensive bookkeeping records of the attorney's financial practices, including records concerning client funds. *See* N.Y. Code R. & Reg. tit. 22 ("22 N.Y.C.R.R.") § 1200. Because all New York attorneys must have a physical location in the State, regulators can require them to keep these financial records and make them available for inspection and audit in the State. Indeed, Rule 1.15(i) specifically requires attorneys to keep their financial records and make them available at the attorney's "principal New York State office," from which the records must be produced as requested in connection with a disciplinary

[4] Personal service on an attorney does not require the attorney to be present to receive the papers. *See* N.Y. C.P.L.R. 2103(b)(3).

investigation. *See* 22 N.Y.C.R.R. § 1200. And two of the four Appellate Division Departments responsible for attorney oversight warn that they may conduct an inspection and audit on a random basis. *See* 22 N.Y.C.R.R. §§ 603.15 (First Department), 691.12 (Second Department). Requiring nonresident attorneys to maintain an office in the State therefore facilitates the oversight of the profession by enabling regulators to inspect and audit attorneys' financial records, including on a random basis.[5]

Third, requiring nonresident attorneys to maintain a physical office in the State reasonably serves the State's legitimate interest in making its attorneys more accessible to its courts, because it increases the likelihood that nonresident attorneys will be more accessible to the New York courts on short notice. (*See* Opening Br. at 43-44.) As we previously explained, this state interest was rejected in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), and related decisions involving residency exclusions, not because it was an invalid state interest, but because it was insufficient to justify the extraordinary burden of a residency requirement. A physical-office requirement is far less burdensome than a residency requirement. Indeed, in *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 68-69 (1988), the Supreme Court assumed that requiring a

[5] Other statutes regulating the profession require a geographic tie to the State as well. *See* Judiciary Law §§ 497(1), (3) (attorneys must maintain "interest on lawyer account" funds in a bank that "conducts its principal banking business in this state").

nonresident to maintain an office and a full-time practice in the state served valid state interests. *See Kleinsmith v. Shurtleff,* 571 F.3d 1033, 1047 (10th Cir. 2009) (interpreting *Friedman* as assuming an in-state office requirement would not violate the Privileges and Immunities Clause).

B. The In-State Office Requirement Does Not Violate The Privileges And Immunities Clause Because It Places Residents And Nonresidents On Equal Footing And Serves Nonprotectionist Purposes.

Section 470 places resident and nonresident attorneys on equal footing with respect to these legitimate state interests. Accordingly, it does not violate the Privileges and Immunities Clause.

As to the state interests identified above, the resident and nonresident New York attorney are not equally qualified to practice in the state courts; the resident necessarily has some physical presence in the State and has at least one New York location that can be used for personal service of legal papers and maintenance of required financial records (his residence), while the nonresident, in the absence of § 470's office requirement, may have no such in-state location. Section 470 thus requires that nonresidents practice in New York courts on equal terms with state residents. Like state residents, they must maintain a physical location in the State for the service of legal papers and maintenance of financial records.

In this way, the physical-office requirement does not discriminate against nonresident attorneys as to their ability to practice law in New York in the sense

prohibited by the Privileges and Immunities Clause. As this Court recognized, "the Privileges and Immunities Clause does not promise nonresidents that it will be as easy for nonresidents as for residents to comply with a state's law; it . . . protects nonresidents from legal classifications that treat them more harshly (without justification)." *Schoenefeld v. State of N.Y.*, 748 F.3d 464, 467 (2d Cir. 2014) (internal quotation and alterations omitted). (ECF 121, at 5.) Discrimination "in fact" is thus required to prevail. *Id.* (ECF 121, at 5.) Here, any differential treatment is justified because residents and nonresidents are not similarly situated as to their ability to receive personal service of legal papers in the State and to make financial records available for random inspection and audit in the State. The physical-office requirement thus places residents and nonresidents on equal footing in their ability to comply with rules governing the practice of law. Section 470 effectively assures that *all* attorneys practicing within the State maintain "some genuine physical presence" here. *See Lichtenstein v. Emerson*, 251 A.D.2d 64, 64-65 (1st Dep't 1998).

This factor serves to distinguish § 470 from protectionist economic measures that have been struck down for treating nonresidents differently in order to give residents an economic advantage. (*See* Opening Br. at 33-34 (distinguishing cases).) As the Supreme Court recently explained, it "has struck laws down as violating the privilege of pursuing a common calling only when those laws were

enacted for the protectionist purpose of burdening out-of-state citizens. In each case, the clear aim of the statute at issue was to advantage in-state workers and commercial interests at the expense of their out-of-state counterparts." *McBurney*, 133 S. Ct. at 1715 (distinguishing prior cases).[6] Where, as here, a state law does not have a protectionist purpose, it does not violate the Privileges and Immunities Clause merely because it has an incidental economic effect on nonresidents. "While the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id.* at 1716.

The *McBurney* Court held that Virginia's Freedom of Information Act ("FOIA") did not impermissibly abridge the plaintiff's ability to earn a living in violation of the Privileges and Immunities Clause, even though the plaintiff's very business was to obtain property records from state and local governments for his clients, and the FOIA provided access to public records only to the State's citizens. *See id*. at 1713, 1715-16. The Court reasoned that the citizens-only FOIA did not abridge plaintiff's ability to engage in a common calling "in the sense prohibited by the Privileges and Immunities Clause," because it had a distinctly

[6] *McBurney* was decided after the original briefing in this Court in this case. Defendants brought the decision to the Court's attention in a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j). (ECF 111.)

nonprotectionist purpose—to make state government transparent to those who held sovereign power in the State (its voters)—and it only incidentally affected plaintiff's ability to ply his trade. *Id.* at 1715-16.

The same is true here. Judiciary Law § 470's physical-office requirement serves legitimate state interests relating to the regulation of the practice of law in New York. The statute thus serves valid, nonprotectionist purposes.[7] And the physical-office requirement, which is directly related to the nonresident's ability to fulfill those state interests, only incidentally affects the nonresident's ability to practice in the State. Indeed, as a practical matter, most resident New York attorneys will maintain an office in the State, even in the absence of a regulatory requirement that they do so. Thus § 470 will only sometimes impose a burden not shouldered by resident attorneys.

The nonprotectionist purpose and incidental economic effect of § 470 serve to distinguish it from the attorney residency exclusions and admission restrictions that have been found to violate the Privileges and Immunities Clause. It does not exclude nonresidents from practicing in New York like the laws struck down in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), and *Piper*, 470 U.S. at 274. Nor as we explained (Opening Br. at 30-31) is § 470 like the admission restriction at issue in

[7] *Connecticut v. Blumenthal*, 346 F.3d 84, 99-100 (2d Cir. 2003), does not require a different result. The Court there questioned whether the challenged law in fact served the proffered justification of administrative convenience, and the law imposed a significant restriction on the ability of nonresidents to engage in commercial lobstering.

Friedman, 487 U.S. at 66, which made permanent residency in the state a requirement for an attorney to be admitted to practice without taking an examination. Unlike that admission restriction, § 470 does not "discriminat[e] among *otherwise equally qualified* [attorneys]." *Friedman*, 487 U.S. at 67 (emphasis added).[8]

In sum, because it has the effect of placing nonresidents and residents on equal footing and serves nonprotectionist purposes, the requirement that nonresident attorneys maintain an office in the State does not violate the Privileges and Immunities Clause.

[8] And as we explained (Opening Br. at 42-43), *Frazier v. Heebe*, 482 U.S. 641 (1987), relied upon by the District Court (*see* JA30-31), is not dispositive, or even instructive, on the issue presented here.

CONCLUSION

The district court's order granting summary judgment to plaintiff, declaring Judiciary Law § 470 unconstitutional and enjoining defendants from enforcing it, should be reversed. The defendants' motion for summary judgment should be granted and the complaint dismissed.

Dated: Albany, New York
May 1, 2015

Respectfully submitted,

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