CTQ-2014-00005

To be argued by:
LAURA ETLINGER
Time requested: 20 minutes

Court of Appeals of the State of New York

EKATERINA SCHOENEFELD,

Respondent,

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,

v.

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,"

Appellants.

REPLY BRIEF FOR APPELLANTS TO BRIEF OF AMICUS RONALD B. McGUIRE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2028

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
LAURA ETLINGER
Assistant Solicitor General

Dated: January 30, 2015

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PRELIMINARY STATEMENT

Appellants submit this brief in response to the amicus brief of Ronald B. McGuire ("amicus"), which raises a new argument not addressed by the parties, namely that Judiciary Law § 470 is unconstitutionally vague. For the reasons set forth below, the Court should either decline to address amicus's new argument as not properly before it, or it should reject the argument as meritless.

ARGUMENT

POINT I

THE COURT SHOULD NOT ADDRESS THE ARGUMENT RAISED BY AMICUS

In his brief to the Court, amicus does not address the question certified by the Second Circuit. Instead, amicus in effect posits a new question, namely whether Judiciary Law § 470 is unconstitutionally vague. This question has never been addressed by the parties, either in briefing to this Court or in the underlying federal litigation, and it is not a question of state law properly certified to this Court by the Second Circuit. For these reasons, the Court should decline to address it.

Respondent has not challenged Judiciary Law § 470 as impermissibly vague. She brought this action in the United States

District Court for the Northern District of New York challenging § 470 as violative of the Privileges and Immunities Clause, Equal Protection, and the Commerce Clause. The District Court dismissed the Equal Protection and Commerce Clause claims, but found the statute unconstitutional under the Privileges and Immunities Clause. On appeal, the Second Circuit certified to this Court the question of the minimum requirements necessary to satisfy the requirement of Judiciary Law § 470 that a nonresident attorney maintain an office in the State. In certifying that question of state law to this Court, the Second Circuit explained that resolution of the question was necessary for that Court to decide the Privileges and Immunities Clause claim. (A14.) Neither the parties, the federal district court, nor the Second Circuit addressed the void-for-vagueness argument that amicus now seeks to raise.

Indeed, the argument raises a question that is not proper for the Second Circuit's certification process. Rule 27.2 of the Second Circuit's rules authorizes the Court to "certify a question of *state law* to that state's highest court" (emphasis added). The purpose of the rule is to allow a state's high court to address an open question of state law that

controls the outcome of a federal proceeding. *See Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012). The certification process is premised on the principle that a federal court is "bound by [the New York Court of Appeal's] construction of New York law in conducting [its] analysis" of a statute's constitutionality. *Portalatin v. Graham*, 624 F.3d 69, 84 (2d Cir. 2010). Amicus does not posit a question of controlling state law. He raises a different federal constitutional issue from the one presented, and addressed, in this case. For these reasons, his vagueness argument is not properly before the Court, and the Court should decline to address it.

POINT II

JUDICIARY LAW § 470 IS NOT IMPERMISSIBLY VAGUE

If the Court addresses the vagueness challenge, it should reject it. Judiciary Law § 470 is not impermissibly vague. It is amenable to a clear, narrow, and constitutional construction.

"A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement." *People v. Foley*, 94 N.Y.2d

668, 681 (2000); *see, e.g.*, *People v. Stuart*, 100 N.Y.2d 412, 420-21 (2003); *Ulster Home Care Inc. v. Vacco*, 96 N.Y.2d 505, 509 (2001). However, a judicial construction that supplies the requisite clarity is sufficient to avoid a finding that a statute is impermissibly vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972) (relying on anticipated interpretation of local ordinance by State's high court to avoid a vagueness problem); *People v. Heller*, 33 N.Y.2d 314, 328 (1973) (rejecting a void-for-vagueness challenge to a criminal pornography statute because the statute was "easily interpreted as pertaining to hard core pornography" and "as interpreted, that statute has been given and will be given only that narrow application"). Indeed, under the rule of constitutional avoidance, a statute that is subject to a vagueness challenge should be given a limiting construction to avoid rendering the statute constitutionally suspect. As the United States Supreme Court has explained: "It has long been [the Court's] practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." *Skilling v. United States*, 561 U.S. 358, 405 (2010). Thus, when a statute is reasonably amenable to a narrow construction, "clarity at the requisite

level may be supplied by judicial gloss on an otherwise uncertain statute." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

Applying these settled rules, amicus's challenge to § 470 on vagueness grounds fails. Amicus claims first (Amicus Br. at 4-6) that Judiciary Law § 470 is impermissibly vague because, despite the statute's reference to attorneys who reside in adjoining states, it has been construed to require that all nonresident attorneys, whether residing in adjoining or nonadjoining states, maintain an office in the State. As amicus recognizes, however, the statute has been subject to this settled interpretation since 1979, when this Court struck down the State's residency requirement in *Matter of Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266 (1979). Following *Gordon*, although the Legislature amended numerous provisions of the New York Civil Practice Law and Rules (the "C.P.L.R.") and Judiciary Law to remove the residency requirements from the provisions governing attorney admission to practice, Act of June 18, 1985, ch. 226, 1985 N.Y. Laws 2049, it did not modify Judiciary Law § 470. As a result, after *Gordon* and the 1985 amendments eliminating the residency requirements from the provisions governing attorney admission, the

New York courts recognized that Judiciary Law § 470 no longer operated as an exception, for residents of adjoining states, to the residency requirements for admission. Because the Legislature elected to maintain § 470 in the wake of *Gordon*, the statute has since consistently been interpreted as requiring *all* nonresident attorneys admitted to practice in the State, whether residing in adjoining or non-adjoining states, to maintain an office in the State in order to practice in the New York courts. This settled case law provides the required notice to nonresident attorneys of the statute's reach. *See People v. Heller*, 33 N.Y.2d at 328.

Amicus is also mistaken when he argues (Amicus Br. at 6-8) that the lower courts in New York have taken an "ad hoc" approach to applying Judiciary Law § 470. Rather, as we have explained (Opening Br. at 33-36; Reply Br. at 10-13), the courts have simply applied the statute to the facts before them, deciding whether the circumstances in each case were sufficient to satisfy the office requirement. The fact that a statute's terms are "imprecise and open-ended" does not automatically render the statute impermissibly vague. *See People v. Kozlow*, 8 N.Y.3d 554, 561 (2007); *People v. Foley*, 94 N.Y.2d at 681. The question is

whether, in its application and as interpreted, the statute provides adequate warning as to its scope. Thus, any ambiguity in the terms "office for the transaction of law business" will be resolved by the Court's answer to the question certified here. *See Grayned v. City of Rockford*, 408 U.S. at 110-12; *People v. Heller*, 33 N.Y.2d at 328.

The Second Circuit has asked this Court to define the minimum requirements necessary to satisfy Judiciary Law § 470. The Second Circuit certified this question because this Court has never interpreted § 470. We explained (Opening Br. at 20-26; Reply Br. at 2-7) that, in order to avoid a constitutional question, the Court should interpret the statute narrowly to require only an address within the State at which the nonresident attorney can receive personal service of legal papers on behalf of the clients the attorney represents. Moreover, we demonstrated (Opening Br. at 26-36; Reply Br. at 8-16) that this narrow interpretation is reasonable because it is consistent with the statute's original service-related purpose, does not represent a significant departure from the existing lower court case law, and continues to serve legitimate state interests. Whether the Court applies the rule of constitutional avoidance to adopt this narrow reading, or adopts the

broader reading urged by respondent that requires a fully operational law office, the Court's construction of § 470 in this case will resolve any ambiguity in the statute's terms. Accordingly, the answer to the certified question will itself dispel any vagueness concerns.

CONCLUSION

The Court should decline to address the constitutional question raised by amicus. If the Court does address the issue, it should hold that Judiciary Law is not unconstitutionally vague.

Dated: Albany, New York
January 30, 2015

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Appellants

By: _____
LAURA ETLINGER
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2028

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
LAURA ETLINGER
Assistant Solicitor General of Counsel

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