No. 16-780

In The
Supreme Court of the United States

EKATERINA SCHOENEFELD,

Petitioner,

v.

ERIC T. SCHNEIDERMAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state – consistent with the Privileges and Immunities Clause of Article IV – require nonresidents, who are licensed to practice as attorneys in that state, to maintain a separate physical office in that state as a condition of practicing law there, when the state does not require resident attorneys to maintain any office in the state?

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INTRODUCTION

Respondents oppose the Petition on two grounds, neither of which have merit. First, Respondents claim that the Second Circuit's majority decision does not conflict with the decision of this Court in *McBurney v. Young*, 133 S. Ct. 1709 (2013). That claim is far from being accurate. In *McBurney*, this Court granted certiorari to resolve the conflict among the circuits with respect to state freedom of information laws. *McBurney v. Young*, 133 S. Ct. at 1714. The state freedom of information statutes are enacted as means of providing political accountability and are funded by the citizens of those states. *Id.* at 1716. In that regard, the state FOIA statutes differ drastically from state laws regulating the pursuit of "common calling" – here, the practice of law.

Yet, despite its proclamation "[w]e do not understand *McBurney* to state any new principle of law" (App. 12), the Second Circuit essentially upended the entire jurisprudence of the Privileges and Immunities Clause by "requiring plaintiffs to allege a *prima facie* case of discriminatory intent, [. . .], in effect, reliev[ing] the State of its burden to provide a sufficient justification for laws that discriminate against nonresidents with regard to fundamental rights." App. 36 (Hall, dissenting). According to the Second Circuit, plaintiff's failure to adduce evidence of discriminatory intent obviates the need to apply the two-step analysis that this Court has long established for such cases. App. 14, 26-28.

Second, Respondents claim that the Second Circuit's decision does not create a conflict with any other circuit court decision. Ironically, a closer look at the cases cited in Respondents' opposition – also cited in the Petition – further supports the argument that the Second Circuit's decision creates a substantial conflict among the circuits in analyzing the Privileges and Immunities Clause claims.

Finally, focusing in their opposition on service of process to justify the statute, Respondents ignore the reality of the modern technology, communications, and transportation – all of which greatly increased the mobility of lawyers and their clients, with many attorneys licensed to practice law in multiple jurisdictions. More than 90,000 (ACC Amicus Brief at 12) or as many as 134,000 (APRL Amicus Brief at 7) New York-licensed attorneys reside outside New York and are potentially affected by the statute. Few of them, if any, use horses as a means of serving process or travelling to courts and to clients, as was the case in 1862 (when the statute was first enacted) or in 1909 (when it was last amended).

CORRECTION TO THE RESPONDENTS' STATEMENT OF THE CASE

While discussing § 470's history and the New York Court of Appeals' decision on the certified question, Respondents erroneously conclude that, as a result of the

New York Court of Appeals' decision in *Matter of Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309 (N.Y. 1979), Section 470 "no longer operated as an exception to a general residency requirement." Brief in Opposition at 4. To the contrary, the New York Court of Appeals observed:

> Here, the statute appears to presuppose a residency requirement for the practice of law in New York State. It then makes an exception, by allowing nonresident attorneys to practice law if they keep an "office for the transaction of law business" in this State. By its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical office here.

Schoenefeld v. New York, 25 N.Y.3d 22, 27, 29 N.E.3d 230, 232 (2015), App. 53-54.

Already in 1986, recognizing that Section 470 likely runs afoul of the Privileges and Immunities Clause, the Office of the Court Administration and the Committee to Regularize Bar Admission Procedures attempted to amend § 470, reasoning:

> Neither the *Gordon* Court nor the *Piper* Court expressly addressed the question whether a State may impose a continuing residency requirement upon already-admitted members of its Bar. In each of these cases, however, the reviewing court's discomfort with State residency requirements for the Bar admission focused about a concern that such requirements curtail an individual's ability to pursue his or her occupation free from discriminatory interference. *Matter of Gordon*, 48 NY 2d at

> pp 271-272; *Piper*, 53 U.S.L.W. at 4240. Seeing this analytical approach, we are drawn to the conclusion that, although the precise issue was not before them, *Gordon* and *Piper* nonetheless command elimination of residency requirements as a condition upon the right to practice law. Thus, we believe that amendment of section 470 of the Judiciary Law, the narrow exception to New York's residency as a condition of practice rule, is now in order.

State of New York, Unified Court System, OCA Program Bill 86-78, introduced as Senate Bill 8336 (March 31, 1986).

Finally, the service of process provision was severed from the statute more than 100 years ago, when the Board of Statutory Consolidation divided Section 60 (one of § 470's predecessors) by moving the first part to the newly created Judiciary Law (what is now known as § 470) while leaving the service-related language in Section 60 of the Code of Civil Procedure. *See* Act of Feb. 17, 1909, ch. 35, 3 Cons. Laws of N.Y. 2817 (1909); Act of Feb. 17, 1909, ch. 65, § 3, 1909 N.Y. Laws 21, 28; *Schoenefeld v. New York*, 25 N.Y.3d at 28, App. 55 (noting that, "[e]ven assuming the service requirement had not been expressly severed from the statute, it would be difficult to interpret the office requirement as defendants suggest"). Thus, service of process could not have been the purpose of Section 470 when it was enacted in its present form in 1909, as part of the newly created Judiciary Law.

ARGUMENT

A. The Second Circuit's Majority Decision Did Not Follow the Well-Established Analysis of Privileges and Immunities Claims Set Forth by This Court in *McBurney v. Young* and Other Cases.

Respondents misstate the Second Circuit's majority decision when they claim that the Second Circuit "applied a two-step analysis, determining first whether the law burdens an activity protected by the Privileges and Immunities Clause, and then, if so, whether the burden could be justified by substantial reasons for the discrimination that bear a sufficiently close relation to the degree of discrimination." Brief in Opposition at 6.

It never did. Instead, relying on its erroneous interpretation of this Court's decision in *McBurney*, the Second Circuit concluded:

> . . . a plaintiff challenging a law under the Privileges and Immunities Clause must allege or offer some proof of a protectionist purpose to maintain the claim. *In the absence of such showing, a Privileges and Immunities claim fails, obviating the need for a tailoring inquiry.*

App. 14 (emphasis added).

Noting that "[w]e do not understand *McBurney* to state any new principle of law," the Second Circuit essentially upended the entire jurisprudence of the Privileges and Immunities Clause when it: (1) interpreted

McBurney as imposing a new requirement that a plaintiff challenging a statute that regulates *one of the fundamental rights* – i.e., pursuit of "common calling" or practice of law – must first show discriminatory intent for the statute's enactment, and (2) failed to apply the two-step analysis that this Court had long established for such cases. App. 13-14.

What this Court did in *McBurney* was to resolve the conflict among the circuits with respect to *state freedom of information laws*, which are enacted as a means of providing accountability by public officials to their constituents. 133 S. Ct. at 1714, 1716 (emphasis added). And, importantly, state FOIA statutes are funded by the citizens of that state:

> In addition, the provision limiting the use of the state FOIA to Virginia citizens recognizes that Virginia taxpayers foot the bill for the fixed costs underlying the recordkeeping in the Commonwealth.

Id.

Thus, state FOIA statutes differ drastically from laws regulating the pursuit of "common calling" in two respects: (1) their purpose is to provide accountability by public officials to their constituents and not to regulate economic activity, and (2) the costs of recordkeeping, etc. are borne by the taxpayers. It is within this context the Court concluded in *McBurney* that "the state FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making a

profit by trading on information contained in state records." *Id.* In other words – unlike in this case where Section 470 regulates one's ability to practice law, a protected fundamental right – the FOIA statute in *McBurney* was enacted as a means to promote political accountability and not to regulate economic activity.

Erroneously believing that, under *McBurney*, the plaintiff had the threshold burden of showing discriminatory intent for § 470's enactment, the Second Circuit held that she failed to meet it and did not engage in step two of the inquiry – i.e., whether "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective" and "the availability of less restrictive means" in achieving that objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985), App. 14. Instead, the Second Circuit concluded that the State's proffered purpose, facilitating service of process, was enough to defeat the constitutional challenge. App. 26-28.

Thus, the Second Circuit did not analyze whether § 470's in-state physical office requirement applicable only to nonresident attorneys "bears a substantial relationship to the State's objective" of service of process and "the availability of less restrictive means" to achieve that objective. First, that service provision was severed from § 470's predecessor over 100 years ago, when § 470 was enacted in its current form in 1909. Second, had the Second Circuit engaged in the requisite analysis, it would have had no choice but to conclude that, given the modern state of technology, communications, and transportation, there are other,

less restrictive means available to achieve the State's objective.[1] *See Schoenefeld v. New York*, 25 N.Y.3d at 29, App. 56.

This Court has never required that a plaintiff who challenges the constitutionality of a statute regulating the practice of law under the Privileges and Immunities Clause must first show discriminatory intent for the statute's enactment. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Barnard v. Thorstenn*, 489 U.S. 546, 551 (1989) (invalidating the residency requirement after engaging in the tailoring inquiry whether the New Hampshire and Virgin Islands' bars' reasons for discrimination are "substantial" and whether the difference in treatment bears a close or substantial relation to these reasons without any discussion of the state's discriminatory intent).

Following the Second Circuit's rationale, the Virgin Islands could enact a statute requiring that all nonresident – but not resident – members of the bar must maintain a physical office for the transaction of law business in the Virgin Islands and such a statute would withstand constitutional challenge, as long as it did not state that its purpose was to discriminate

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[1] In their opposition, Respondents also argue that the in-state office requirement serves the purpose of "allowing regulators to require that New York attorneys maintain their financial records and make them available at the attorney's principal New York office." Brief in Opposition at 11. This argument must fail because it was not raised below until the supplemental argument before the Second Circuit, it was not the basis for the Second Circuit's decision, and it was never a purpose for § 470's enactment.

against nonresidents. After all, all it would do would be "to place admitted resident and nonresident attorneys on an equal footing, not to favor the former over the latter," if the Virgin Islands wished to require that "[t]o practice law [there], *every* attorney admitted to its bar must have a presence in the state in the form of a physical premises." *See* App. 21.

B. As a Result of the Second Circuit's Decision, the Circuit Courts Are Now in Substantial Conflict.

Contrary to Respondents' assertions, other circuit courts' decisions do not follow the Second Circuit's reading of *McBurney* and continue to engage in the traditional, two-step inquiry when analyzing Privileges and Immunities challenges to state laws discriminating against nonresidents with respect to fundamental rights. Despite Respondents' claims to the contrary, the Ninth Circuit's en banc decision in *Marilley v. Bonham* – which was decided after this Petition was filed – does not follow, and cannot be reconciled with, the Second Circuit's decision in this case. Quite to the contrary, having recited the long-standing precedents of Privileges and Immunities jurisprudence, the Ninth Circuit engaged in a traditional, "two-step inquiry." *Marilley v. Bonham*, 844 F.3d 841, 845 (9th Cir. 2016) (en banc).

Having established that the statute in question falls within purview of the Clause at the first step of the inquiry, the Ninth Circuit then proceeded to step

two – i.e., whether California's differential fees for nonresident fishers were closely related to the advancement of a substantial state interest. *Id.* at 846-47. It was only after extensive, detailed analysis of the differential fees imposed on nonresident fishers by California did the court conclude that California's treatment of nonresidents did not violate the Privileges and Immunities Clause. *Id.* at 847-54.

Noting that "*Commerce Clause* decisions are relevant to the *Privileges and Immunities Clause* because the two clauses share the same underlying concerns," the Ninth Circuit reasoned:

> The core principle of the foregoing cases is that when a state makes an expenditure from a fund to which nonresidents do not contribute, and when the state provides a benefit through that expenditure to both residents and nonresidents, the state may exclude nonresidents from the benefit either in whole or in part, or it may seek compensation from nonresidents for the benefit conferred.

Id. at 850.

Discussing at length the various amounts and percentages of expenses and fees collected by California, the Ninth Circuit established that California operated with a shortfall of approximately $14,635,000 (finding that California spent around $20,000,000 managing its commercial fishing industry but only collected about $5,365,000 in fees from commercial fishers). *Id.* at 851. Accordingly, the en banc court reasoned that

"[t]he shortfall was a subsidy, or a benefit, provided by California to its commercial fishing industry, paid by California taxpayers" and that "[a]ll commercial fishers in California – residents and nonresidents alike – benefited from this subsidy." *Id.* After engaging in specific calculations to determine the extent to which nonresident fishers benefitted from that subsidy, the Ninth Circuit concluded, "the fee differentials charged by California are permitted under the *Privileges and Immunities Clause*." *Id.* at 851-52.

In *NAAMJP v. Castille*, the Third Circuit rejected a challenge to Pennsylvania's Rule 204 that allowed admission by motion if the attorney, *inter alia*, passed the bar exam or practiced for five years in a state offering reciprocal admission. 799 F.3d 216, 218 (3d Cir. 2015). Applying the traditional, two-step inquiry and its earlier decision in *Tolchin*, the Third Circuit concluded that "Rule 204 does not contravene [the] Privileges and Immunities Clause because it treats Pennsylvania residents no differently than out-of-state residents." *Id.* at 224-25 (citing *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1997)).

Similarly, in *NAAMJP v. Berch*, the Ninth Circuit rejected a challenge to an Arizona rule, which – like Pennsylvania's Rule 204 – permitted bar admission on motion only "to attorneys admitted in states having reciprocal admission rules for Arizona-barred attorneys." 773 F.3d 1037, 1042 (9th Cir. 2014). Like the Third Circuit, the Ninth Circuit rejected the constitutional challenge to the Arizona rule because it "applies equally to residents and non-residents of Arizona." *Id.* at 1046

(also noting, in *dictum*, that "the Rule is closely related to advancing a substantial state interest").

Finally, the Sixth Circuit's decision in *Jones v. City of Memphis* is inapposite since, like *McBurney*, it involved the constitutionality of the citizen's-only restriction of Tennessee's FOIA statute. *See* 531 Fed. App'x 709 (6th Cir. Aug. 16, 2013).

In short, Respondents have provided no persuasive reason to deny the Petition.

CONCLUSION

For all the reasons expressed in the Petition for Certiorari and above, the petitioner respectfully submits that her Petition should be granted.

March 22, 2017

Respectfully submitted,

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