Upsolve, Inc. et al v. James Doc. 76

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**
**Case 1:22-cv-00627-PAC**

**UPSOLVE, INC. and REV. JOHN UDOOKON,**
**Plaintiffs,**

**-v**

**LETITIA JAMES, in her official capacityDV**
**Attorney General of the State of New York,**
**Defendant.**

**ERWIN ROSENBERG'S MOTION FOR RECONSIDERATION OF (E.C.F. No. 69) ORDER DENYING ROSENBERG'S MOTION FOR PERMISSIVE INTERVENTION TO CORRECT A CLEAR ERROR**

"The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478, at 790 (1981) (footnote omitted)" Doe v. New York City Dept. of Social Services, 709 F. 2d 782, 789 (2nd Cir. 1983).

In ECF No. 68 at 16-17 this Court stated "The Court does not question the facial validity of New York's UPL rules to distinguish between lawyers and non-lawyers in most settings, and to regulate all sorts of non-lawyer behavior.[6] " In footnote 6 this Court states: "He pushes the Court to address the broad question of "whether the New York lawyer licensing and disciplinry [*sic*] system violates the First Amendment." *Id.* In other words, Rosenberg seeks to assert a facial challenge—a "general constitutional attack"—on New York's ability to "admit, suspend and/or disbar a lawyer." *Id.* at 5. Rosenberg's



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challenge to the UPL rules is nothing like the Plaintiffs' challenge here, and the Court can confidently predict his challenge to the State's licensing scheme would fall within the myriad of cases upholding UPL statutes generally."

However, it is a clear error for this Court to "confidently predict his challenge to the State's licensing scheme would fall within the myriad of cases upholding UPL statutes generally."

Being licensed to practice law directly and substantially affects the legal advice that those applicants would utter. The U.S. Supreme Court has indicated that it believes that a law that licenses a profession such as lawyering is subject to heightened review and even a temporary delay where the State is not clearly proceeding to a neutral court (such as a federal court) to get a determination on whether the speech reestriction complies with the First Amendment caused by such a licensing scheme renders the licensing scheme violative of the First Amendment. See Riley v. National Federation of Blind of NC, Inc., 487 US 781, 801-802 and n. 13 (1988):

"Given our previous discussion and precedent, it will not do simply to ignore the First Amendment interest of professional fundraisers in speaking. It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak. *E. g., New York Times Co. v. Sullivan,* 376 U. S., at 265-266. **And the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny**. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U. S. 750, 755-756 (1988) (when a State enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech, it is subject to First Amendment scrutiny to ensure that the licensor's discretion is suitably confined).[13]

Generally, speakers need not obtain a license to speak. However, that rule is not absolute. For example, States may impose valid time, place, or manner restrictions. See *Cox v. New*

*Hampshire*, 312 U. S. 569 (1941). North Carolina seeks to come within the exception by alleging a heightened interest in regulating those who solicit money. **Even assuming that the State's interest does justify requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor "will, within a specified brief period, either issue a license or go to court." *Freedman v. Maryland*, 380 U. S. 51, 59 (1965).** That requirement is not met here, for the Charitable Solicitations Act (as amended) permits a delay without limit. The statute on its face does not purport to require when a determination must be made, nor is there an administrative regulation or interpretation doing so. The State argues, though, that its history of issuing licenses quickly constitutes a practice effectively constraining the licensor's discretion. See *Poulos v. New Hampshire*, 345 U. S. 395 (1953). We cannot agree. The history to which the State refers relates to the period before the 1985 amendments, at which time professional fundraisers were permitted to solicit as soon as their applications were filed. **Then, delay permitted the speaker's speech; now, delay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand.**[14]"

. . . "Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review. **Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication.** *Thomas v. Collins*, 323 U. S. 516, 544-545 (1945) (Jackson, J., concurring)."

(emphases added).

Like in the case of Riley, even assuming that the State's interest does justify requiring lawyers to obtain a license before practicing law, such a regulation must provide that the licensor "will, within a specified brief period, either issue a license or go to court." *Freedman v. Maryland*, 380 U. S. 51, 59 (1965). That requirement is not met here, for this Court can take judicial notice that New York's lawyer licensing laws permit a delay without limit since the laws on their face do not allow applicants to practice law to practice law as soon as their applications are filed nor does New York have a practice of filing suit in a neutral court (such as federal court) every time that New York denies a

license or suspends or disbars a New York lawyer so that the federal court can decide whether the restriction complies with the First Amendment. Delay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand.

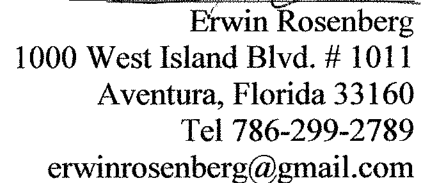
Riley v. National Federation of Blind of NC, Inc., 487 US 781, 801-802 and n. 13 (1988) was cited favorably in Nifla v. Becerra, 138 S. Ct. 2361, 2371 (2018).

Wherefore Erwin Rosenberg moves for a reconsideration of this Court's order denying Rosenberg's motion for permissive intervention to correct a clear error.

CERTIFICATE OF SERVICE

I hereby certify I mailed to United States Courthouse, 500 Pearl Street, New York, NY 10007 on June 7, 2022.

Respectfully Submitted,



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