United States Court of Appeals
For The District Of Columbia Circuit

20-5269 **September Term, 2020**

LAWYERS UNITED INC. et al., Appellants, v. UNITED STATES, et al., Appellees,	No. 1:19-cv-3222 (RCL) Filed: September 1, 2020

MOTION FOR HEARING PRIORITY

Appellants herewith submit good cause and respectfully request hearing priority under 28 USC § 1657 in conformity with the Court's Order holding that procedural motions must be filed by October 1, 2020. Appellants have twice requested a meet and confer on this priority issue with government counsel and submitted written argument in support. Government counsel in the District Court responded that she was not counsel on appeal and to go ahead and make the request as government counsel had not yet been assigned.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The times can blind us to certain truths, but later generations can see that laws once thought necessary and proper only serve to oppress. COVID-19 has led

to the most severe economic downturn in our nation's history since the Great Depression that has highlighted a readily observable justice gap of epidemic proportion.

Appellants in this case object to being compelled to join and subsidize the political speech of a state trade union in order to practice their learned profession in the United States District Courts. Appellants challenge the United States District Court **Local Rules** in California and Florida that categorically deny them both *general* and *pro hac vice* admission privileges. Appellants also challenge being denied *general* admission privileges in the District of Columbia, the capital of this whole nation, solely because they are not admitted in the state and federal courts in California and Florida. Appellants challenge the District of Columbia **Local Rules** that sometimes grant and sometimes deny *general* bar admission privileges to the same lawyer depending on office location. Forty-two jurisdictions have adopted admission on motion for experienced attorneys. Thirty-six jurisdiction have adopted the Uniform Bar Exam for novice lawyers. More than 16,000 lawyers every year are admitted on motion or by transfer of UBE score to a second state. Every one of these 16,000 American citizens are denied a seat at the bar and are ineligible for *general* bar admission privileges in the California and Florida federal district courts based on **Local Rules**. No one presumes that any of these 16,000 lawyers in good standing are going to violate the Rules of Professional

Conduct or are incompetent. Sixteen thousands lawyers every year are provided constitutionally protected privileges and immunities that are denied to Appellants in Federal District Courts in our nation's capital and elsewhere because of habit, inertia, and an antiquated separate but equal culture that has been interred everywhere else except in sister-state attorney licensing.

The United States as a sovereign can act only through its officials acting in their official capacity. Where individuals are sued in their official capacities, "[t]he real party in interest is the government entity, not the named official." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017) (official capacity suits "'represent only another way of pleading an action against an entity of which an officer is an agent"). "Frequently, the administrative determinations involved are made not in Washington but in the field. In either event, these are actions *which are in essence against the United States.*" (Emphasis in original) *Stafford, U.S. Attorney v. Briggs*. 444 U.S. 527, 542 (1980). Hence, defendant United States is the real party in interest.

In *Duplantier v. United States*, federal judges sued the United States for enacting a law which they alleged caused injury. The *Duplantier* Court held it had personal jurisdiction over the United States. In *Texas v. United States*, 86 F. Supp. 3d 591 (SD Tex. 2015), the District Court in Brownsville, TX invalidated a program designed by the Obama administration to provide legal presence to over

four million individuals who are currently in the country illegally and would enable these individuals to obtain a variety of both state and federal benefits. The Court of Appeals affirmed the issuance of a preliminary injunction in *Texas v. US*, 809 F. 3d 134 (5th Cir. 2015). An evenly divided Supreme Court affirmed.

The appellees and defendants are members of the Judicial Conferences of United States Court of Appeals for the District of Columbia Circuit, Ninth Circuit and Eleventh Circuit, and the District Judges serving on the District Courts in the District of Columbia, California, and Florida. All defendants are sued in their official capacity. Congress placed on each Circuit Judicial Council a mandatory duty to periodically review the District Court **Local Rules** within the Circuit (See 28 U.S.C. § 332(d)(4)) for consistency with the Rules Enabling Act standards set forth in 28 U.S.C. §§ 2071 and 2072. Section 2071 (a), proscribes:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. **Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title**. (Emphasis added)

The **Local Rules** are not consistent with Acts of Congress because Congress does not discriminate for or against any class of citizens in exercising constitutional or substantive rights. The full faith and credit statute is an Act of Congress. It does not discriminate for or against any class of citizens.

Similarly, 28 U.S. Code § 2072 (b), proscribes:

> **Such rules shall not abridge, enlarge or modify any substantive right.** All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added)

The **Local Rules** are facially void because they **abridge** and **modify** a plethora of constitutional and substantive rights for out-of-state lawyers and citizens and they **enlarge** the same rights for the home team. Congress has declared an even playing field for all citizens choosing to exercise their constitutional and substantive rights in the federal courts. The Supreme Court has time and again said the same thing by prohibiting *viewpoint* discrimination.

There is a federal statute 28 U.S. C. § 1391(e)(1) and (2) directly providing federal *personal* jurisdiction over the United States and for all federal officials sued in an official capacity in a federal court. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the *person* of the party served." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). *Omni further* holds "federal courts cannot add to the scope of service of summons Congress has authorized." *Id*. at 109. *Omni Capital* is not an outlier. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555 (2017)("Congress' typical mode of providing for the exercise of *personal* jurisdiction has been to authorize service of process.").

The common theme in this **Local Rule** case and controversy is United States government *viewpoint discrimination* for and against classes of lawyers and

citizens when PACER is available and GOOGLE has democratized information for every one everywhere. Appellants allege that the **Local Rules'** categorical granting of *general* admission privileges to **all** novice forum state licensed lawyers and categorical denial of *general* admission privileges to **all** experienced sister-state licensed lawyers from 49 states is arbitrary, irrational and invidious based discrimination. It is quintessential **us** against **them** tribal *viewpoint discrimination* for no legitimate reason other than a naked desire to discriminate.

II. GOOD CAUSE FOR HEARING PRIORITY IS PRESENTED

28 USC § 1657 - Priority of civil actions

> (a) Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown. For purposes of this subsection, "good cause" is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit.

'Good cause' is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of Title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit." 28 USC § 1657(a)

A. GOOD CAUSE IS SELF-EVIDENT AS THE LOCAL RULES NULLIFY THE FEDERAL FULL FAITH AND CREDIT STATUTE

The federal full faith and credit statute, 28 U.S.C. § 1738 provides:

> "The records of any Court or State are admissible in evidence, and such records shall have the same full faith and credit in every court within the United States as they have by law or usage in the Courts of any such State from which they are taken."

All lawyers are licensed by State Supreme Court orders and records. Under § 1738, these state records are entitled to the same full faith and credit in all of the United States Courts. Federal courts presented with this statute, in conformity with an old boys club Local culture or perhaps an irrational fear, routinely look the other way because to acknowledge it is to open up equal access to the federal courthouse for all lawyers and citizens. They have an irrational fear of changing the status quo, notwithstanding the quo has lost its status. This federal discrimination and rejection of the full faith and credit stature is an issue capable of repetition but evading review. The Supreme Court has ultimate supervisory responsibility, but it has never granted certiorari or adjudicated the merits of this United States government *viewpoint* discrimination.

Appellants contend the **Local Rules** nullification of Section 1738 is unlawful and good cause for hearing priority is accordingly established. Appellants further contend that this nullification cannot even pass rational basis review because the federal government does not have any legitimate interest in favoring one group of citizens over another in exercising fundamental rights. In *United States v. Windsor*, the High Court held the federal government is required to accord

same sex spouse marriage licenses full faith and credit. Appellants contend this **Local Rule** failure to provide full faith and credit to their state's licensing smacks of invidious discrimination, identical to when the United States refused to provide full faith and credit to same sex marriage.

B. GOOD CAUSE IS SELF-EVIDENT AS THE FIRST AMENDMENT FREEDOMS TO SPEECH, ASSOCIATION, AND TO PETITION THE GOVERNMENT ARE NOT SUBJECT TO DIVESTURE BY LOCAL VOTE

The First Amendment, in pertinent part provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Appellants aver the disunited Local Rules deprive Appellants of their civil rights — to equal protection, speech, counsel, assembly, to petition the government for the redress of grievances, and their privileges and immunities as licensed lawyers to practice law — in the Federal District Courts.

In *West Virginia Bd. of Ed. v. Barnette*, 319 US 624, 638 (1943), Justice Robert JACKSON summarized First Amendment gospel:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Equally important, as Justice JACKSON famously put it:

> "*If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*" *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

Appellants contend the disunited **Local Rules** which prescribe what shall be orthodox in exercising First Amendment freedoms trespasses our constitutional fixed star. The *Barnette* opinion translates to mean that District Judges by **Local Rules** cannot vote to suppress the First Amendment freedoms of any class of citizens. This **Local Rule** federal discrimination for and against certain classes of citizens is not found in the national attorney admission rules of the Supreme Court, or U.S. Courts of Appeal, or in practice before federal administrative agencies, or in Local Rules of many District Courts.

C. GOOD CAUSE FOR HEARING PRIORITY IS SELF-EVIDENT AS THE SUPREME COURT HAS REPEATEDLY APPLIED STRICT SCRUTINY TO RESTRICTIONS ON ATTORNEY SPEECH

In recent years, the Supreme Court has reiterated time and again that restrictions on attorney speech are not subject to rational basis review. In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the Supreme Court squarely held minimal scrutiny rational basis review is foreign and not applicable to the First Amendment freedoms:

> The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post,* at 2489 (KAGAN, J., dissenting) ("A government entity

> could reasonably conclude that such a clause was needed"). **This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here**. *Id*. at 2465.

Similarly, in *Holder v. Humanitarian Law Project*, 561 US (2010), at issue were restrictions imposed by Congress on providing four types of material support—"training," "expert advice or assistance," "service," and "personnel" to Foreign Terrorist Organizations. Plaintiffs, some of whom were attorneys, claimed these statutory terms violated their First Amendment rights to freedom of speech and association. The holding of *Holder* makes clear that restrictions on lawyer speech imposed by judges are subject to First Amendment strict scrutiny review and not rational basis review, even if those speech and association restrictions are relevant to providing speech and associational support to a foreign terrorist organization.

Similarly, in *Legal Services Corp. v. Velazquez*, 531 US 533 (2001), at issue was the constitutionality of a restriction on attorney speech that was enacted by Congress. The Supreme Court disagreed, and squarely held that the Congressionally imposed restriction on attorney speech was ***facially unconstitutional***. *Id*. at 549. The High Court concluded:

> By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. "Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity

> of maintaining that courts must close their eyes on the constitution, and see only the law." *Id*. at 545.

As in *Legal Services Corp*, the First Amendment speech, associational, and petition restrictions imposed by the hydra of disunited Local Rules that categorically disqualify lawyers from forty-nine states are facially unconstitutional because they prohibit the analysis of certain legal issues and truncate presentation to the courts upon which they depend.

These Local Rule discriminations for and against particular classes of lawyers and the clients they represent constitute content, speaker, and viewpoint discrimination as a matter of law under recent Supreme Court precedent. As to *speaker discrimination*, in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), the Supreme Court has repeatedly counseled judges against favoritism for or against any speaker:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each. *Citizens United*, 130 S.Ct. at 890
>
> …
>
> Any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would

> arise if courts were to begin saying what means of speech should be preferred or disfavored. *Id*. at 890 (Emphasis added)

The challenged Local Rules further constitute impermissible *viewpoint* discrimination because the federal government does not discriminate for or against any class of lawyers or their office location in selecting its own counsel of choice.

D. AT ISSUE IS A MASSIVE DEPRIVATION OF CIVIL RIGHTS

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The D.C. Circuit applies *Elrod v. Burns* with the understanding that "[t]he Supreme Court has instructed that injunctive relief is not appropriate unless the party seeking it can demonstrate that 'First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought.'" *Wagner v. Taylor*, 836 F.2d 566, 576 n. 76 (D.C. Cir. 1987) (alteration in original) (quoting Elrod, 427 U.S. at 373-374); see *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (internal quotations omitted)); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.").

Appellants allege this is the largest mass deprivation of civil rights since Justice BROWN, writing for the majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896) upheld the "separate but equal" doctrine as applied to railroad cars limited to passengers traveling in Louisiana (but not travelling interstate) was constitutional. The Court in *Plessy v. Ferguson* admitted that "separate but equal" cars travelling *interstate* are unconstitutional. *Id*. at 546 (citing *Hall* v. *De Cuir*, 95 U.S. 485 (1878)). The Court further recognized Homer Plessy had a constitutional right to sit on a jury. *Id. at 556* (citing *Strauder v. West Virginia*, 100 U.S. 303, 306, 307*). Plessy v. Ferguson* was decided almost fifty years before the Court began incorporating the Bill of Rights' freedoms under the Fourteenth Amendment.

Homer Plessy was denied a seat on a railroad car travelling in-state under the theory his civil rights were not violated because there is no constitutional right to sit on a train travelling in-state. It was held sitting on a railroad car only involved a ***social*** equality right not a constitutional right. That 19th Century decision held the fact that other citizens may not want to travel in "separate but equal" cars is not relevant because they too only have a ***social*** right and not a constitutional right. In this 21st Century, under the **Local Rules**, Appellants are denied a seat at the bar of the United States District Court under the theory they do not have any constitutional or substantive rights. Clients and citizens who may want to associate

with them and petition the government also do not have any constitutional or substantive rights. This cannot be the law.

In view of the forgoing, hearing priority is requested.

Dated: September 23, 2020

Respectfully submitted,

/s/ Joseph Robert Giannini
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CERTIFICATE OF PARTIES

In conformity with Circuit Rule 27(a)(4), the following listing of parties is certified.

Appellants are Lawyers United, Inc., Evelyn Aimee DeJesus, and Allan Wainwright.

Appellees are the United States and: SRI SRINIVASAN, Chief Judge District of Columbia Judicial Council, and include the, and his Honorable Colleagues PATRICIA A. MILLETT, ROBERT L. WILKINS, GREGORY G. KATSAS;

ED CARNES Chief Judge of the ELEVENTH CIRCUIT JUDICIAL COUNCIL, his Hon. Associate Judicial Council Judges: CHARLES R. WILSON, WILLIAM H/ PRYOR Jr, BEVERLY B. MARTIN, ADELBBERTO JORDAN, ROBIN S. ROSENBAUM, JILL PRYOR, KEVIN C. NEWSON, and BRITT C. GRANT;

SYDNEY R. THOMAS, CHIEF JUDGE of the NINTH CIRCUIT JUDICIAL COUNCIL, and the Hon. Associate Judicial Council Judges, RANDY SMITH, MARY H. MURGUIA, MILAN D. SMITH, JR., MORGAN CHRISTEN, JAY S. BYBEE, BARRY MOSKOWITZ, VIRGINIA A. PHILLIPS, J. MICHAEL SEABRIGHT, OKI MOLLWAY, RICHARD S. MARTINEZ;

BERYL A. HOWELL, CHIEF JUDGE FOR THE DISTRICT OF COLUMBIA, DISTRICT JUDGES EMMET G. SULLIVAN, COLLEEN KOLLAR-KOTELLY, JAMES E. BOASBERG, AMY B. JACKSON, RUDOLPH CONTRERAS, KETANJI B. JACKSON, CHRISTOPHER R. COOPER, TANYA S. CHUTKAN, RANDOLPH D. MOSS, AMIT P. MEHTA, TIMOTHY J.

KELLY, TREVOR N. McFADDEN, DABNEY L. FRIEDRICH, and CARL J. NICHOLS;

PHYLLIS J. HAMILTON, Chief Judge of the Northern District of California, and the Hon. Associate Judges, YVONNE GONZALEZ ROGERS, JON S. TIGAR, JEFFREY S. WHITE, WILLIAM ALSUP, EDWARD CHEN, VINCE CHHABRIA, JAMES DONATO, WILLIAM ORRICK, RICHARD SEEBORG, EDWARD J. DAVILA, BETH LABSON FREEMAN, LUCY H. KOH;

VIRGINA A. PHILLIPS, CHIEF JUDGE OF THE CENTRAL DISTRICT OF CALIFORNIA, and the active DISTRICT JUDGES sitting on this Honorable Court;

LAWRENCE J. O'NEILL, Chief Judge of the Eastern District of California, and Associate Judges DALE A. DROZD, MORRISON C. ENGLAND, JR., JOHN A. MENDEZ, KIMBERLY J. MUELLER, TROY L. NUNLEY;

LARRY ALAN BURNS, CHIEF JUDGE OF THE SOUTHERN DISTRICT OF CALIFORNIA, and Hon. Associate Judges MICHAEL M. ANELLO, CYNTHIA A. BASHANT, ANTHONY J. BATTAGLIA, ROGER T. BENITEZ, GONZALO P. CURIEL, WILLIAM B. ENRIGHT, WILLIAM Q. HAYES, JOHN A. HOUSTON, MARILYN L. HUFF, M. JAMES LORENZ, M. MARGARENT McKEOWN, JEFFREY T. MILLER, BARRY TED

MOSKOWITZ, DANA M. SABRAW, JANIS L. SAMMARTINO, THOMAS J. WHELAN;

MARK WALKER, Hon. Chief Judge of the Northern District of Florida and his active District Court colleagues;

STEVEN MERRYDAY, Chief Judge of the Middle District of Florida and his active District Court colleagues;

K. MICHALE MOORE, Chief Judge of the Southern District of Florida. and his active District Court colleagues.

/s/ Joseph Robert Giannini
Joseph Robert Giannini, Esq.

CERTIFICATE OF DISCLOSURE STATEMENT

In conformity with Circuit Rule 27(a)(4), the following disclosure is certified. There are no publicly held corporations or corporate parents. Appellants Lawyers United Inc. is an organization operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

/s/ Joseph Robert Giannini
Joseph Robert Giannini, Esq.

CERTIFICATE AS TO WORD COUNT

This motion contains 3,266 words measured by computer program.

/s/ Joseph Robert Giannini
Joseph Robert Giannini, Esq.

CERTIFICATE OF SERVICE

On September 23, 2020, I electronically filed this Motion through the CM/ECF system, which will send a notice of electronic filing to all counsel for the defendants.

An original and four copies of this motion were served on the Court by mail.

Dated: September 23, 2020

/s/ Joseph Robert Giannini
Joseph Robert Giannini, Esq.