

19-939

United States Court of Appeals for the Second Circuit

ROBERT DOYLE,

Plaintiff-Appellant,

v.

DOUGLAS C. PALMER, in his official capacity as
Clerk of the United States District Court
for the Eastern District of New York,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

This Petition is from the Summary Order dated December 16, 2019 (Doc. 57-1), which: (i) affirmed the order of the District Court (A-13 - A-42), which had dismissed the Amended Complaint (A-7 - A-12) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT PURSUANT TO RULE 35(b)(1) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

The panel decision conflicts with the following decisions: *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018); *Loving v. United States*, 517 U.S. 748 (1996); *Mistretta v. United States*, 488 U.S. 361 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); and *Wayman v. Southard*, 23 U.S. 1 (1825).

This proceeding involves exceptionally important questions of **first impression** in this Circuit:

1. Whether Congress may delegate, to the Judicial Branch, the power to enact federal-court bar-admission requirements that Congress lacks the power to enact directly.
2. Whether a federal district court may, consistent with the First Amendment, force a bar applicant to engage in a significant amount of expressive conduct.
3. Whether a federal district court may, consistent with the First

Amendment, force a bar applicant to associate with another person and engage, with that person, in a significant amount of expressive conduct.

4. Whether a federal district court may, consistent with the First Amendment, force a bar applicant to waive his freedom of conscience.

ADDITIONAL REASONS TO GRANT THE PETITION

The substance of the Summary Order is as follows:

Doyle, an attorney, challenges the constitutionality of Eastern District of New York (“E.D.N.Y.”) Local Rule 1.3(a), which requires applicants seeking bar admission in the district to submit an affidavit from an E.D.N.Y.-barred attorney attesting to the applicant’s good moral character (the “sponsor affidavit”). Doyle claims Local Rule 1.3(a) is unconstitutional for three reasons: (1) Congress unconstitutionally delegated its rulemaking power to the Judiciary; (2) the rule violates the Due Process Clause of the Fifth Amendment; and (3) the rule violates the First Amendment. We assume the parties’ familiarity with the underlying facts, procedural history, and issues on appeal.

For substantially the reasons stated by the district court, we affirm. The complaint fails to state a plausible claim for relief. Doyle’s claim that the requirement of a [sic] sponsor affidavit is somehow unconstitutional is specious, and we reject it.

We have considered all of Doyle’s arguments and conclude they are without merit.

Summary Order at 1-2. Given that Doyle had meticulously refuted each of the rationales offered by the District Court as well as the Government’s defenses of those

rationales, the panel's refusal to address those refutations is deeply troubling. To litigants and members of the public, it is disheartening when a court, and an appellate court even more so, issues a ruling without explanation; in effect, by fiat. Moreover, doing so necessarily creates the impression that the court gave insufficient attention to the matter, knowingly issued an incorrect ruling, or both. That, among other reasons, is why "courts have an *obligation to explain their decisions* and therefore to allow the public an opportunity to *assess the correctness* of those rulings," *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 42 (C.D. Calif. 1984) (emphases added); of course, a party *especially* has the need to "assess the correctness" of a judicial ruling in order to make an informed decision about whether, and, if so, the extent to which, to proceed in litigating the matters on appeal.

As stated in Wade McCree, *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777 (1981): "[w]hen we read a judicial opinion, we may be swayed in some small measure by whether the writer shares our views or prejudices and concludes with the words 'AFFIRMED' as we ourselves would. But *it is what comes before—how the issues are stated and how they are resolve*—that leads us to conclude whether this is a judge that we are glad to have. Thus, we expect the *judge*, like *no other public official*, to justify his decisions with *reason*," *id.* at 780 (emphases added; footnote omitted); and, as stated in Richard H. Fallon, Jr., *A Theory*

of Judicial Candor, 117 Colum. L. Rev. 2265, 2287 (2017), “[o]pinions must be *minimally informative* in order to satisfy the concerns that lead us to want *reasoned* judicial decisions in the first place” (emphases added).

CONCLUSION

Plaintiff-Appellant’s Petition should be granted along with such other and further relief as is authorized by law and otherwise proper.

Dated: December 30, 2019

s/ Todd C. Bank

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CERTIFICATE OF COMPLIANCE
WITH RULES 35(b)(2)(A) AND 40(b)(1)

1. This petition complies with the type-volume limitation of Fed. Rs. App. P. 35(b)(2)(A) and 40(b)(1) because this brief contains fewer than 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

Dated: December 30, 2019

 s/ Todd C. Bank
TODD C. BANK
Counsel to Plaintiff-Appellant

APPENDIX

Summary Order Dated December 16, 2019 (Doc. 57-1)

19-939-cv
Doyle v. Palmer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand nineteen.

PRESENT: ROBERT D. SACK,
BARRINGTON D. PARKER,
DENNY CHIN,
Circuit Judges.

-----x

ROBERT DOYLE,
Plaintiff-Appellant,

-v-

19-939-cv

DOUGLAS C. PALMER, in his official capacity
as the Clerk of the United States District Court
for the Eastern District of New York,

Defendant-Appellee.

-----x

FOR PLAINTIFF-APPELLANT: TODD C. BANK, Kew Gardens, NY.

FOR DEFENDANT-APPELLEE: MATTHEW J. MODAFFERI, Assistant United States Attorney (Rachel G. Balaban, Varuni Nelson, Assistant United States Attorneys, *on the brief*), for Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (Weinstein, J.).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellant Robert Doyle ("Doyle") appeals from a judgment of the district court entered May 28, 2019, dismissing his claims against defendant-appellee Douglas C. Palmer, Clerk of Court of the United States District Court for the Eastern District of New York ("Defendant"). By memorandum and order entered March 28, 2019, the district court granted Defendant's motion to dismiss the amended complaint pursuant to Rule 12(b)(6) for failure to state a claim.

Doyle, an attorney, challenges the constitutionality of Eastern District of New York ("E.D.N.Y.") Local Rule 1.3(a), which requires applicants seeking bar admission in the district to submit an affidavit from an E.D.N.Y.-barred attorney attesting to the applicant's good moral character (the "sponsor affidavit"). Doyle claims Local Rule 1.3(a) is unconstitutional for three reasons: (1) Congress unconstitutionally

delegated its rulemaking power to the Judiciary; (2) the rule violates the Due Process Clause of the Fifth Amendment; and (3) the rule violates the First Amendment. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

"We review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*." *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

For substantially the reasons stated by the district court, we affirm. The complaint fails to state a plausible claim for relief. Doyle's claim that the requirement of a sponsor affidavit is somehow unconstitutional is specious, and we reject it.

We have considered all of Doyle's arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". To the left of the signature is a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in the center, flanked by two small stars.

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2019, a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic-filing system and copies will be mailed to those parties, if any, by certified mail who are not served via the Court's electronic-filing system.

s/ Todd C. Bank

Todd C. Bank

Dated: December 30, 2019