No. _____

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

PETITION FOR A WRIT OF CERTIORARI

EKATERINA SCHOENEFELD
(*Counsel of Record*)
SCHOENEFELD LAW FIRM LLC
32 Chambers Street
Suite 2
Princeton, NJ 08542
(609) 688-1776
eschoenefeld@schoenefeldlaw.com

Pro Se

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

May a state – consistent with the Privileges and Immunities Clause of Article IV – require non-residents, 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?

LIST OF THE PARTIES TO THE PROCEEDINGS

Petitioner is Ekaterina Schoenefeld, an individual.

Respondents in *Schoenefeld v. Schneiderman, et al.*, are Eric T. Schneiderman, in his official capacity as Attorney General of 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, in his capacity as Chairman of the Committee on Professional Standards ("COPS"). Initially, the first named defendant was the State of New York, which along with a number of other defendants – i.e., New York Supreme Court, Appellate Division, Third Judicial Department and Committee on Professional Standards of New York Supreme Court, Appellate Division, Third Judicial Department and its members – were dismissed from the case by the district court. Also, the original Respondents (all in their official capacities) named in the Amended Complaint were Andrew M. Cuomo, Michael J. Novack, Thomas C. Emerson, who were ultimately substituted by Eric T. Schneiderman, Robert D. Mayberger, and John G. Rusk, respectively.

In addition, a number of amici supported Petitioner in the courts below. They include the New Jersey State Bar Association, a group of New York-licensed Nonresident Attorneys, the Association of Corporate Counsel, and Ronald B. McGuire, Esq.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF THE PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION(S) AND STATUTE(S) INVOLVED	2
STATEMENT OF THE CASE	2
A. Legislative History of Section 470	3
B. Petitioner and Section 470	4
C. The District Court's Decision	6
D. The Second Circuit's Certification Decision	8
E. The New York Court of Appeals' Decision	11
F. The Second Circuit's Final Opinion	12
REASONS FOR GRANTING THE PETITION	14
A. The Second Circuit's Decision Conflicts With the Well-Established Analysis of the Privileges and Immunities Clause Claims Set Forth by This Court	14
1) Based on Its Reading of *McBurney*, the Second Circuit Imposed a New Requirement That Plaintiff Must Show That § 470 Was Enacted for the Protectionist Purpose	15

TABLE OF CONTENTS – Continued

Page

2) The Second Circuit Failed to Follow This Court's Precedents That Invoke the Commerce Clause Analogy in Evaluating the Privileges and Immunities Claims, Erroneously Relying Instead on the Equal Protection Clause Cases..... 22

B. The Second Circuit's Decision Conflicts With Other Courts of Appeals, Creating a Split in the Circuits..... 25

CONCLUSION..... 29

APPENDIX

United States Court of Appeals for the Second Circuit, Opinion, April 22, 2016..... App. 1

New York Court of Appeals, Opinion, March 31, 2015 ..... App. 50

United States Court of Appeals for the Second Circuit, Opinion, April 8, 2014..... App. 58

United States District Court for the Northern District of New York, Opinion, September 7, 2011 ..... App. 74

United States District Court for the Northern District of New York, Opinion, February 8, 2010 ..... App. 104

United States Court of Appeals for the Second Circuit, Order Denying Petition for Rehearing, July 28, 2016 ..... App. 121

TABLE OF AUTHORITIES

Page

CASES

Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005) 25

Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978) 16, 23

Barnard v. Thornstenn, 489 U.S. 546 (1989).....25

Chalker v. Birmingham & Northwestern R. Co., 249 U.S. 522 (1919) 20

Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84 (2d Cir. 2003) 25

Frazier v. Heebe, 482 U.S. 641 (1987) 16

Hillside Dairy Inc. v. Lyons, 539 U.S. 59 (2003) 19, 20

Hicklin v. Orbeck, 437 U.S. 518 (1978) 22, 23

Kleinsmith v. Shurtleff, 571 F.3d 1033 (10th Cir. 2009) 26, 28

Lee v. Minner, 458 F.3d 194 (3d Cir. 2006).....18

Marilley v. Bonham, 802 F.3d 958 (9th Cir. 2015), *en banc review granted on other grounds*, 815 F.3d 1178 (9th Cir. 2016).....21, 25

Matter of Gordon, 48 N.Y.2d 266, 397 N.E.2d 1309 (N.Y. 1979) 3

McBurney v. Young, 133 S. Ct. 1709 (2013) .....*passim*

NAAMJP v. Castille, 799 F.3d 216 (3d Cir. 2015) 25, 28

Schoenefeld v. New York, 748 F.3d 464 (2d Cir. 2014) 1

TABLE OF AUTHORITIES – Continued

Page

Schoenefeld v. New York, 907 F. Supp. 2d 252 (N.D.N.Y. 2011) 1

Schoenefeld v. New York, 2010 U.S. Dist. LEXIS 10639 (N.D.N.Y. Feb. 8, 2010) 1

Schoenefeld v. New York, 25 N.Y.3d 22, 29 N.E.3d 230 (N.Y. 2015) 1

Schoenefeld v. Schneiderman, 821 F.3d 273 (2d Cir. 2016) 1, 18

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 14, 15, 16, 24, 25

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) 16, 25

Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099 (3d Cir. 1997) 25, 26, 27

Toomer v. Witsell, 334 U.S. 385 (1948) 20

United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984) 15, 19

U.S. CONSTITUTION

Commerce Clause 5, 6, 23, 24

Equal Protection Clause 5, 6, 24, 26

Privileges and Immunities Clause of Art. IV, § 2 ..... *passim*

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1404(a) 5

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

N.Y. Jud. Law § 470 .....*passim*

OTHER SOURCES

1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917) 3

McBurney v. Young, S. Ct. Case No. 12-17, 02/20/2013 Argt. Tr. (available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-17.pdf) 21

Schoenefeld v. New York, N.Y. Ct. of App. Case No. 39, 02/17/2015 Argt. Tr. (available at https://www.nycourts.gov/ctapps/arguments/2015/Feb15/Transcripts/021715-39-Oral-Argument-Transcript.pdf) 12

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit reversing the district court's decision (App. 1-49) is reported at 821 F.3d 273. The order of the Court of Appeals for the Second Circuit denying the Petition for Rehearing *En Banc* is included below at App. 121-122. The opinion of the Court of Appeals for the Second Circuit certifying the question to the New York Court of Appeals (App. 58-73) is reported at 748 F.3d 464. The opinion of the Court of Appeals of New York (App. 50-57) is reported at 25 N.Y.3d 22, 29 N.E.3d 230. The opinion of the district court granting Petitioner's motion for summary judgment (App. 74-103) is reported at 907 F. Supp. 2d 252. The opinion of the district court granting in part, denying in part, Respondents' motion to dismiss (2010 U.S. Dist. LEXIS 10639) is unreported and included at App. 104-120.

———♦———

JURISDICTION

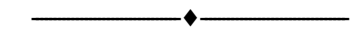
The opinion and judgment of the Court of Appeals for the Second Circuit were issued on April 22, 2016. A timely Petition for Rehearing *En Banc* was denied on July 28, 2016. On October 17, 2016, the Supreme Court (Ginsburg, J.) granted Petitioner an extension of time in which to file this Petition for Certiorari until December 16, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———♦———

CONSTITUTIONAL PROVISION(S) AND STATUTE(S) INVOLVED

The Privileges and Immunities Clause of Article IV, § 2 of the U.S. Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2, cl. 1.

The New York Judiciary Law § 470 provides: "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." N.Y. Jud. L. § 470.



STATEMENT OF THE CASE

Petitioner filed this action for declaratory and injunctive relief asserting that, despite being a licensed New York attorney, she is unable to practice in that State because of Section 470 of the Judiciary Law ("Section 470" or "§ 470"). That law prohibits nonresident attorneys who do not maintain an office in New York, from appearing in New York state courts. Because § 470's office requirement does not apply to resident New York attorneys, she argued that it violated the Privileges and Immunities Clause of Article IV of the United States Constitution.

A. Legislative History of Section 470.

Section 470's predecessor, Chapter 43, which was enacted on March 22, 1862, provided a limited exception to the then-general rule that only New York residents could be admitted to practice law in that state.[1] App. 78-80. Basically, it allowed attorneys who were already licensed in New York to continue to practice in the state, provided their only office for the practice of law was in New York, even if they moved to an adjoining state and were no longer New York residents. *Id.* Chapter 43 applied only to attorneys who were admitted to practice at the time of its enactment. *Id.* Prior to the enactment of Chapter 43, a New York attorney who moved to another state automatically lost the right to practice law in New York. 1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917).

In 1866, Chapter 43 was re-enacted as Chapter 175 with some grammatical and a few substantive changes. Chapter 175 eliminated the requirement that the attorney's only office had to be in New York and extended the exemption from the residency requirement – if the office requirement was met – to attorneys who were admitted after its enactment. App. 80. In 1877, Chapter 175 was re-enacted as Section 60 of the new Code of Civil Procedure. App. 80-81. In 1908, the Board of Statutory Consolidation decided to divide Section 60 by moving the first part to the newly created

[1] In 1979, the New York Court of Appeals held that that residency requirement was unconstitutional because it violated the Privileges and Immunities Clause. *Matter of Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309 (N.Y. 1979).

Judiciary Law, which is now known as Judiciary Law § 470. App. 81.

Section 470 – which survives to this day in the same form as when it was first enacted in 1909 and later re-enacted in 1945 – states:

> § 470. Attorneys having offices in this state may reside in adjoining state. – A person, regularly admitted to practice as an attorney and counselor, in the courts of record of the state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor, although he resides in an adjoining state.

N.Y. Jud. Law § 470.

B. Petitioner and Section 470.

Petitioner is a 2005 law school graduate who is licensed to practice law in New Jersey, New York, and California. App. 77. Petitioner's law office is located in Princeton, New Jersey. *Id.* Prior to opening her firm, Petitioner attended a continuing legal education course entitled *Starting Your Own Practice* offered by the New York State Bar Association. *Id.* At that seminar, Petitioner learned for the first time that she may not practice law in the state courts of New York unless she maintains an office there. *Id.* Thus, despite being a licensed New York attorney in good standing – save the requirement for a New York office – Petitioner is barred by § 470 from practicing law in the State.

App. 78. There is no similar requirement for New York attorneys who reside in the State. App. 64-65.

Respectful of the oath taken upon her admission to practice and her status as an officer of the court, Petitioner has never appeared on behalf of a client or advertised herself as practicing law in the state courts of New York. App. 60. Whenever Petitioner received inquiries about potential representation in the courts of New York, she declined the representation because it would have violated § 470. *Id.*

On April 1, 2008, Petitioner filed a complaint in the Southern District of New York, asserting that § 470 was unconstitutional, both on its face and as-applied, under the Privileges and Immunities Clause and seeking declaratory and injunctive relief. App. 75. Subsequently, Petitioner amended her complaint, adding Thomas C. Emerson, the then-Chairperson of the Third Department's Committee on Professional Standards, several state agencies, and a number of other state officials as defendants, and included additional claims based on violations of the Equal Protection Clause of the 14th Amendment and the Commerce Clause. App. 75-76.

On April 16, 2009, the court granted Respondents' motion filed pursuant to 28 U.S.C. § 1404(a) and the case was transferred to the Northern District of New York. App. 76.

On February 8, 2010, the district court denied Respondents' motion to dismiss the amended complaint in its entirety, but dismissed several defendants

and the Equal Protection and Commerce Clause counts of the amended complaint. App. 119-120. Noting that "[t]he state has offered no substantial reason for § 470's differential treatment of resident and non-resident attorneys nor any substantial relationship between that differential treatment and State objectives," the district court allowed Petitioner to proceed against the remaining individual Respondents under the Privileges and Immunities Clause. App. 116-117.

C. The District Court's Decision.

Subsequently, the parties cross-moved for summary judgment. In support of her motion, Petitioner argued that § 470 discriminates against nonresident attorneys by conditioning their practice of law in New York on maintaining a physical office in New York, serves no substantial state interest, and functions as an artificial trade barrier for nonresident attorneys admitted to practice law in New York – all of which are prohibited under the Privileges and Immunities Clause. App. 84-85. She specifically argued that a physical office requirement imposed on her the burden of additional expenses – such as rent, insurance, utilities, etc. – which a New York resident who chose not to have an office did not incur.

Respondents argued that Section 470 does not trigger review under the Privileges and Immunities Clause or that, in the alternative, the state has a substantial interest and § 470 bears a substantial relationship to that interest and is the least restrictive

means of achieving that interest. App. 85. According to Respondents, the state's interests advanced by § 470 were:

> . . . (1) the need for efficient and convenient service of process such that attorneys are readily available for court proceedings; (2) the ability to observe and discipline nonresident attorneys; and (3) the remedy of attachment.

App. 94.

On September 7, 2011, the district court issued its opinion, expressly rejecting the ability to supervise, observe, and discipline nonresident attorneys, and the remedy of attachment, as reasons for Section 470's validity. App. 94-99. While acknowledging the Respondents' service of papers argument, the district court held that § 470 discriminates against nonresident attorneys by imposing on them additional costs – which resident attorneys are not required to bear – and that these costs are substantial enough to trigger scrutiny under the Privileges and Immunities Clause. App. 88-89. Having determined that § 470 infringes on one of the fundamental rights protected by the Privileges and Immunities Clause – the right to practice law – the district court held that Respondents failed to demonstrate any substantial reason for continuous discrimination against nonresident attorneys and awarded judgment to Petitioner. App. 102.

D. The Second Circuit's Certification Decision.

In their appeal to the Second Circuit, Respondents argued that the state's justification for the office requirement is "service of legal papers and 'enabling the New York courts to adjudicate [service related] disputes.'" App. 64 (alteration in original). Respondents also argued, for the first time on appeal, that "the office requirement imposed by Section 470 can be read in a manner that does not implicate the P&I Clause, that is, an 'office for the transaction of law business' requires only an address for accepting personal service, which 'might' be satisfied by designating an agent for the service of legal papers." App. 63-64.

The Second Circuit rejected the State's argument "that [it] need not read the phrase to require a physical office space with a desk, a telephone, and staff, but rather may hold that the language can permissibly be read to require merely an address [for service of papers]" or "that the designation of an agent in New York to receive service of papers 'might even suffice'" as "not supported by the New York precedent." App. 67. Noting that "a review of [New York] laws yields no authority specifically requiring New York residents to maintain any office at all," the Second Circuit observed:

> . . . the New York Supreme Court and its Appellate Division courts – the New York Court of Appeals having yet to address this issue – *have never interpreted Section 470's office requirement to be satisfied by something*

> *less than the maintenance of physical space in New York state.*

App. 64-65 (emphasis added).

As the Second Circuit further reasoned:

> We also note that the term "office," by itself, although not exactly pellucid, implies more than just an address or an agent appointed to receive process. And the statutory language that modifies "office" – "for the transaction of law business" – may further narrow the scope of permissible constructions.

App. 68.

The Second Circuit concluded that "there is no question that resolution of this appeal turns on the meaning of 'office for the transaction of law business' as used in N.Y. Judiciary Law § 470." App. 67. Noting its "preference that states determine the meaning of their own laws in the first instance" and the importance of this issue to the state, the Second Circuit certified to the New York Court of Appeals the question of what are the minimum requirements necessary to satisfy Section 470's mandate that nonresident attorneys maintain an "office for the transaction of law business" within the state. App. 72.

In issuing certification, the Second Circuit observed that neither the Judiciary Law, nor the New York Civil Practice Law, nor the Rules of Professional Conduct require a resident attorney to maintain any

office at all. App. 64-65. Yet, with respect to nonresident attorneys, "Section 470 mandates that they shoulder the additional obligation to maintain some sort of separate office premises within the state." App. 65. As the Second Circuit further observed, "[t]his additional obligation carries with it significant expense – rents, insurance, staff equipment *inter alia* – all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one." App. 66. The Second Circuit thus concluded:

> *In sum, as it stands, it appears that* Section 470 *discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause.* Absent a controlling interpretation of Section 470 by the New York Court of Appeals, this Court is left to predict how that court would construe the critical language in Section 470 – a task, under the circumstances, we prefer to avoid until it becomes necessary for us to undertake it.

App. 68 (emphasis added).

However, noting that "it would be perverse for a federal court to discourage a state court from searching for 'every reasonable construction' of a state statute to 'save [the] statute from unconstitutionality,'" App. 69, the Second Circuit concluded that:

> *As this case now stands, whether Section 470 survives constitutional scrutiny depends on*

> *the construction of the in-state office requirement imposed on nonresident attorneys.* If the New York Court of Appeals accepts and answers our certified question(s), that answer, in all likelihood, dictates the outcome of the constitutional privileges and immunities analysis we have commenced and must complete as we decide the appeal before us.

App. 71 (emphasis added).

E. The New York Court of Appeals' Decision.

Respondents argued to the New York Court of Appeals that the rule of constitutional avoidance – i.e., that § 470 can reasonably be interpreted as merely requiring nonresident attorneys to provide an address for service of papers or to designate an agent for service – could save the statute. App. 54. Discussing the only state's interest proffered by Respondents on appeal – i.e., "service of papers" – Chief Judge Lippman observed: "it is clear that service on out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted." App. 56. Noting that other means are available for service upon nonresident attorneys, the New York Court of Appeals concluded that "there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary." App. 56.

Accordingly, the New York Court of Appeals declined to save the statute, holding that the term "office

for the transaction of law business" means an actual, physical law office and could not be read as requiring only some type of physical presence.[2] App. 53-55, 56 (holding that "Defendants' proffered interpretation . . . finds no support in the wording of [§ 470] and would require us to take the impermissible step of rewriting the statute").

On March 31, 2015, the New York Court of Appeals issued its opinion, agreeing with Petitioner and "interpret[ing] the statute as requiring nonresident attorneys to maintain a physical law office within the State." App. 53-54 (noting that § 470's purpose was to make an exception to the then-existing residency requirement, the Court of Appeals concluded that "[b]y its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here").

F. The Second Circuit's Final Opinion.

Having received the New York Court of Appeals' answer to the question it certified, the Second Circuit, in a split decision, nonetheless reversed the district court's decision, finding that Petitioner's claim fails on

---

[2] In response to Respondents' argument that the court should strive to retain the statute's constitutionality under the doctrine of constitutional avoidance, Chief Judge Lippman succinctly observed that "sometimes they're hopeless" and "[w]e can't retain them." 02/17/15 Argt. Tr. 6:12-19 (available at https://www.nycourts.gov/ctapps/arguments/2015/Feb15/Transcripts/021715-39-Oral-Argument-Transcript.pdf) (last accessed on December 6, 2016).

the merits.[3] App. 7-8. In reaching this conclusion, the Second Circuit relied on its interpretation of this Court's decision in *McBurney v. Young*, believing that it dictated the outcome of this case:

> Thus, consistent with *McBurney*, 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 a showing, a Privileges and Immunities claim fails, obviating the need for a tailoring inquiry.

App. 13-14 (citing *McBurney v. Young*, 133 S. Ct. 1709, 1716 (2013)).

Analogizing § 470 to Virginia's FOIA in *McBurney*, the Second Circuit then found that § 470's office requirement – which applies *only* to nonresident attorneys – was not sufficient to admit an inference of a protectionist purpose. App. 16. Thus, the Second Circuit held that, since "Schoenefeld has adduced no evidence of a protectionist intent to afford some economic advantage to resident New York lawyers," App. 18, there was no need for a tailoring inquiry and her claim must fail as a matter of law. App. 18, 26-28 (holding that plaintiff's "Privileges and Immunities Clause claim fails because she has not demonstrated that the law was enacted for or serves the protectionist purpose

[3] As Judge Hall correctly noted in his dissent, there was no need for certification at all: according to the Second Circuit's decision, plaintiff loses no matter what – i.e., regardless of how the term "office for the transaction of law business" is defined. *See* App. 33, n.1 (Hall, dissenting).

of favoring resident New York attorneys and disfavoring nonresident attorneys in practicing law in the state's courts").

Judge Hall dissented in a separate, strongly-worded opinion (App. 28-49), concluding:

> The State of New York has chosen to discriminate against nonresident attorneys with regard to their right to pursue a common calling, and that it has failed to provide a substantial justification for that discrimination. In holding to the contrary, the majority unnecessary disturbs longstanding Privileges and Immunities jurisprudence and denies nonresident attorneys their constitutionally-protected right to practice law "on the terms of substantial equality" with residents of New York.

App. 49 (Hall, dissenting) (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 (1985)).

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Decision Conflicts With the Well-Established Analysis of the Privileges and Immunities Clause Claims Set Forth by This Court.

The Second Circuit's interpretation of the Privileges and Immunities analysis – which purported to follow this Court's decision in *McBurney v. Young* – in fact overturned the well-established law and contradicted

this Court's prior decisions that prevent the kind of discrimination that Section 470 creates.

As the dissent below recognized, the "majority's reasoning would reverse this burden-shifting test by requiring plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than requiring the State to show that the law was *not* enacted for a protectionist purpose." App. 37 (Hall, dissenting) (emphases in original). Following the Second Circuit's rationale, a state could pass any law discriminating against nonresidents as long as the state provides some purpose for its enactment – without ever having to show that there is sufficient justification for discrimination or that no other, less restrictive means are available – as long as the state has not expressly stated that the law was enacted for a protectionist purpose.

1) Based on Its Reading of *McBurney*, the Second Circuit Imposed a New Requirement That Plaintiff Must Show § 470 Was Enacted for the Protectionist Purpose.

There is no dispute that the practice of law is protected by the Privileges and Immunities Clause. App. 15; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Thus, plaintiff's claim should have been analyzed as following.

First, the court "must decide whether the [statute] burdens one of those privileges and immunities protected by the Clause." *United Bldg. & Constr. Trades*

Council v. Mayor & Council of Camden, 465 U.S. 208, 218 (1984) (citing *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978)). If so, the court must consider whether:

> (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Piper, 470 U.S. at 284 (internal citations omitted); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 67 (1988).

Here, Section 470 – which only applies to nonresident attorneys – clearly discriminates against nonresidents by requiring them to maintain an "office for the transaction of law business" in the State to practice in the New York courts.[4] And that term means an actual physical office space, which typically "carries with it significant expense – rents, insurance, staff, equipment," etc. App. 55-56, 66.

---

[4] As the courts below observed, this Court held "without addressing its constitutionality, that a similar office requirement imposed by a local Louisiana district court rule was 'unnecessary and irrational.'" App. 89-90 (citing *Frazier v. Heebe*, 482 U.S. 641, 654-55 (1987)); App. 43 (Hall, dissenting) (same) ("The Court's holding was pursuant to its supervisory authority . . . rather than the Privileges and Immunities Clause, [] but its reasoning is equally applicable here").

On the other hand, § 470 does not affect New York resident attorneys in any way. In fact, as the Second Circuit observed in its certification opinion:

> . . . a review of [New York] laws yields no authority specifically requiring New York residents to maintain any office at all. A New York attorney, therefore, may set up her "office" on the kitchen table in her studio apartment and not run afoul of New York law.

App. 64-65.

Thus, the burden should now shift to the State to show: (1) a substantial purpose exists for discrimination; (2) a reasonable relationship between that purpose and office requirement; and (3) less restrictive means are not available.

This is not, however, what happened in this case. Instead of following the precedent, the Second Circuit concluded that *McBurney* required it to place the burden on the plaintiff to show the discriminatory intent for the statute's enactment. App. 13-14. It did so while acknowledging that *McBurney* did not state any new principle of law (App. 12), but nonetheless asserting that "state laws violate the Privileges and Immunities Clause '*only* when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.'" App. 27 (emphasis added).

The plain error of the Second Circuit's holding can be seen from *McBurney* itself. In *McBurney*, this Court granted certiorari to resolve a conflict with respect

to the applicability of the Privileges and Immunities Clause to the States' "citizens only" FOIA statutes, which are typically enacted as a means of political accountability and are not economic regulations:

> Like Virginia, several other States have enacted freedom of information laws [] available only to their citizens. In *Lee v. Minner*, 458 F.3d 194 (2006), the Third Circuit held that this feature of [state] FOIA violated the Privileges and Immunities Clause. We granted certiorari to resolve this conflict.

McBurney, 133 S. Ct. at 1714 (internal citations omitted): *but see Schoenefeld v. Schneiderman*, suggesting that:

> . . . *McBurney* provides a clarification not available to the district court at the time it ruled in this case, specifically, that the Privileges and Immunities Clause does not prohibit state distinctions between residents and nonresidents in the abstract, but "only" those "enacted for the protectionist purpose of burdening out-of-state citizens. . . ."[5]

App. 12.

---

[5] Notably, this "clarification" *was* available at the time of the Second Circuit's Certification Opinion. App. 33, n.1 (Hall, dissenting) ("The majority's application of *McBurney*, which was decided before our prior opinion in this case, is particularly striking given that we did not rely on *McBurney* to uphold the constitutionality of Section 470 at that time.").

It is within this narrow context that this Court stated in *McBurney* that plaintiff "does not allege – and has offered no proof – that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens." *McBurney*, 133 S. Ct. at 1715 (citing *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003)). Citing various cases where state statutes involving *economic* regulations were held unconstitutional, this Court stated: "Virginia's FOIA differs sharply from those statutes" in that "state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power [. . .] may obtain an accounting from the public officials to whom they delegate the exercise of that power." *McBurney*, 133 S. Ct. at 1715-16.

Other cases from this Court establish that discriminatory effects alone suffice to sustain a Privileges and Immunities claim without proof that the State had a discriminatory purpose. *Hillside Dairy, Inc.*, 539 U.S. at 67 (holding that *disparate effects* of a facially *non-discriminatory* statute regulating milk pricing sufficed to state a claim under the Privileges and Immunities Clause);[6] *United Bldg. & Constr. Trades Council of*

[6] In *Hillside Dairy Inc.*, this Court granted certiorari to consider "whether the individual petitioners' claim under the Privileges and Immunities Clause is foreclosed because those regulations do not discriminate on their face on the basis of state citizenship or state residence." 539 U.S. at 62. Relying on the long-standing precedent in *Chalker*, this Court held:

> . . . the absence of an express statement in the California laws and regulations identifying out-of-state

Camden Cty., 465 U.S. 208 (1984) (striking down "New Jersey municipal ordinance requiring that at least 40% of employees [. . .] be city residents"); *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down "a South Carolina statute imposing a $2,500 license fee on out-of-state shrimping boats and only a $25 fee on in-state shrimping boats" where the State's claimed purpose was to conserve shrimp supply).

Because *McBurney* did not involve an economic regulation, it did not and could not have upset this long line of cases. It was only in that context this Court observed 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 profit by trading on information contained in state records." *Id.* at 1716. In fact, as Chief Justice Roberts remarked during the oral argument in *McBurney*:

> But this – this is not – this is not a regulation of commerce. It's a State practice that may have an incidental effect on commerce, and the incidental effect may be disproportionate, depending on whether you're State or local, but it's not a regulation of commerce.

McBurney v. Young, 02/20/2013 Argt. Tr. 11:10-15 (available at http://www.supremecourt.gov/oral_arguments/

> citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [petitioners'] claim.

Id. at 67 (quoting *Chalker v. Birmingham & Northwestern R. Co.*, 249 U.S. 522, 527 (1919)).

argument_transcripts/12-17.pdf) (last accessed on December 6, 2016).

In other words, as Judge Hall correctly stated in his dissent:

> The majority stretches *McBurney's* "incidental" language far beyond the facts of that case to support its conclusion that *any* regulation, even one that directly regulates a "well settled . . . privilege protected by Article IV, § 2," will pass constitutional muster so long as its discrimination against nonresidents can be characterized as "incidental."
>
> By requiring plaintiffs to allege a *prima facie* case of discriminatory intent, the majority, in effect, relieves 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) (internal citations omitted) (emphasis in original).

One court of appeals has already rejected the Second Circuit's reading of *McBurney* as requiring that a plaintiff must make a showing of discriminatory purpose: "California urges us to read [*McBurney*] to mean that proof of a protectionist purpose always is required. . . . We cannot accept that interpretation of *McBurney*." *Marilley v. Bonham*, 802 F.3d 958, 963-64

(9th Cir. 2015), *en banc review granted on other grounds,* 815 F.3d 1178 (9th Cir. 2016).[7]

In short, the Second Circuit departed from the long-standing precedents established by this Court by misconstruing *McBurney's* invocation of "the traditional threshold inquiry and two-step analysis in cases [] where the challenged law is one that directly regulates legal practice." App. 33 (Hall, dissenting). "*McBurney* is distinguishable from this case for the simple reason that the Virginia FOIA is not an economic regulation, nor does it directly regulate the right to pursue a common calling." *Id.* at 35.

2) The Second Circuit Failed to Follow This Court's Precedents That Invoke the Commerce Clause Analogy in Evaluating the Privileges and Immunities Claims, Erroneously Relying Instead on the Equal Protection Clause Cases.

This Court has long recognized that "the mutually reinforcing relationship" exists between the Privileges and Immunities Clause and the Commerce Clause "that stems from their common origin." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). As the Court stated in *Hicklin*, they "have much in common: they share a common origin, are 'mutually reinforcing'"

[7] Rehearing was held on June 21, 2016; no decision has been issued as of the date of this Petition (original argument is available at https://www.youtube.com/watch?v=X78wJmKIs9I and rehearing is available at https://www.youtube.com/watch?v=Kb3LL2m8dmU).

and "in some instances, the jurisprudence of one may inform that of the other."[8] *Id.* at 531.

For instance, in *Hicklin v. Orbeck*, this Court invalidated an Alaska statute, which dictated general preference for hiring of Alaska residents, reasoning that:

> Although appellants raise no *Commerce Clause* challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the *Commerce Clause* – a relationship that stems from their common origin [. . .] renders several *Commerce Clause* decisions appropriate support for our decision.

Hicklin, 437 U.S. at 531-32; *Baldwin*, 436 U.S. at 379 (stating that "[t]he Privileges and Immunities Clause originally was not isolated from the *Commerce Clause*. . . . In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article").

Yet, the Second Circuit essentially ignored the Court's precedents invoking the Commerce Clause jurisprudence (which focus on the statute's *effects*) in examining the Privileges and Immunities claims and

---

[8] In this case, Petitioner did raise the Commerce Clause claim; however, it was dismissed by the district court when it granted in part and denied in part Respondents' motion to dismiss the amended complaint in its entirety. App. 119-120. Since Petitioner prevailed in the district court on her Privileges and Immunities Clause claim, she did not appeal the dismissal of the Commerce Clause claim.

relied instead on the Equal Protection Clause line of cases (which evaluate the statute's *purpose*). App. 13-14 (*contrasting* discrimination prohibited by the Privileges and Immunities Clause and the Commerce Clause while applying the Equal Protection Clause cases to Petitioner's claim and concluding that it must fail). As Judge Hall astutely observed in his dissent:

> Tellingly, in support of this proposition the majority draws exclusively on cases addressing challenges under the Equal Protection Clause, for which plaintiffs must plead discriminatory intent as part of a *prima facie* case. The majority has not cited, nor does there exist, any case suggesting that the requirement to allege discriminatory intent as part of a *prima facie* case under the Equal Protection Clause also applies to Privileges and Immunities claims.

App. 37-38 (Hall, dissenting) (internal citations omitted).

Indeed, if the Second Circuit were correct in applying the Equal Protection Clause analysis – which requires a showing of discriminatory intent – to the Privileges and Immunities Clause cases, the outcomes in many precedents set forth by this Court would have been drastically different. For instance, holding in *Piper* that the state's bar residency requirement violated the Privileges and Immunities Clause, at no point did this Court consider whether the plaintiff showed that New Hampshire had a discriminatory

intent, which she would have been required to do, according to the Second Circuit. *See* 470 U.S. 274; *Barnard v. Thorstenn*, 489 U.S. 546, 551 (engaging in the tailoring inquiry whether the Virgin Islands' bar's reasons for discrimination were "substantial," and whether the difference in treatment bears a close or substantial relation to these reasons without any discussion of the territory's discriminatory intent); *Friedman*, 487 U.S. at 67-69 (same).

B. The Second Circuit's Decision Conflicts With Decisions of Other Courts of Appeals, Creating a Split in the Circuits.

The Second Circuit's decision in this case also warrants review by this Court because it conflicts with other sister states' decisions that follow the Supreme Court's precedents under the Privileges and Immunities Clause.[9] *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1111 (3d Cir. 1997) ("If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the [] Clause"); *NAAMJP v. Castille*, 799 F.3d 216, 224-25 (3d Cir. 2015); *Marilley*, 802 F.3d 958, 963-64 (9th Cir. 2015).

---

[9] The Second Circuit's new requirement that a plaintiff in the Privileges and Immunities Clause case must adduce evidence of discriminatory intent in enacting the law in question also contradicts its prior decisions that followed this Court's precedents. *See Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84 (2d Cir. 2003).

The Second Circuit attempted to reconcile its novel approach to analyzing the Privileges and Immunities Clause claims with other circuits' decisions, asserting that:

> Indeed, the *effects* of § 470, as applied, are no different from those of a law that *on its face requires all attorneys to maintain a physical presence in New York*. Sister circuits have upheld such statutes against Privileges and Immunities challenges.[10]

App. 23, 23-24 (citing *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) and *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009)) (emphases added).

But, despite its claim that the "*effects* of *§ 470* and the laws at issue in *Kleinsmith* and *Tolchin* are virtually identical," App. 25, the Second Circuit failed to employ the analysis identical to the one used in *Kleinsmith* and *Tolchin*.[11]

---

[10] In so holding, the Second Circuit essentially "rewrote" the statute – something that the New York Court of Appeals refused to do. App. 54-56 (rejecting expressly State's urging to interpret it as merely requiring nonresident attorneys to have "some type of physical presence").

[11] To reach its conclusion that Petitioner's claim fails, the Second Circuit drew an analogy with the Equal Protection Clause cases (requiring a showing of *discriminatory intent*), rather than the Commerce Clause claims (focusing on *discriminatory effects*). App. 12-14, 37-40 (Hall, dissenting). Yet, in comparing its decision to those of other circuits, the Second Circuit shifted its focus on the Section 470's *effects*. App. 25 ("effects of § 470 and the laws at issue in *Kleinsmith* and *Tolchin* are virtually identical").

In *Tolchin v. Supreme Court of the State of New Jersey*, a New York resident attorney who was licensed in New Jersey challenged the in-state office requirement on the grounds that it violated the Privileges and Immunities Clause, *inter alia*. 111 F.3d 1099 (3d Cir. 1997). At that time, Rule 1:21-1(a) of the Rules Governing the Courts of the State of New Jersey required that an attorney must maintain "a bona fide office for the practice of law in this State regardless of where the attorney is domiciled."[12] In sustaining the requirement, the Third Circuit reasoned:

> If a state statute or regulation imposes *identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents*, it does not violate the Privileges and Immunities Clause. But when a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."

Id. at 1111 (internal citations omitted) (emphasis added).

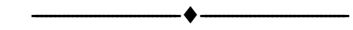
---

[12] Since the Third Circuit's decision in *Tolchin*, the New Jersey office rule has undergone several substantial changes. In February 2013, the Rule was amended again, this time to eliminate the "brick-and-mortar" office requirement altogether. N.J. Ct. R. 1:21-1(a).

And, in its recent decision in *NAAMJP v. Castille*, the Third Circuit reaffirmed this approach in analyzing the Privileges and Immunities Clause challenges. 799 F.3d 216, 224-25 (3d Cir. 2015) (upholding reciprocal bar admission rule since "it treats Pennsylvania residents no differently than out-of-state residents").

Likewise, *Kleinsmith v. Shurtleff* does not support the Second Circuit's conclusion in this case. 571 F.3d 1033 (10th Cir. 2009). The statute in *Kleinsmith* did not involve the attorney's ability to practice law at all. *Id.* Rather, in issue was a Utah statute which required all attorneys – not just nonresidents – *who acted as trustees of real property* to maintain a place in Utah to meet for certain enumerated purposes related to foreclosures. *Id.*

In short, the Second Circuit's decision in this case has now created a conflict with other courts of appeals that continue to follow the well-established analysis of the Privileges and Immunities Clause claims set forth by this Court.



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that her Petition for a Writ of Certiorari be granted.

December 15, 2016

Respectfully submitted,

EKATERINA SCHOENEFELD
(*Counsel of Record*)
SCHOENEFELD LAW FIRM LLC
32 Chambers Street
Suite 2
Princeton, NJ 08542
(609) 688-1776
eschoenefeld@schoenefeldlaw.com

Pro Se

EKATERINA SCHOENEFELD, *Plaintiff-Appellee*, -v.- ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of 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"), *Defendants-Appellants*, 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*.

Docket No. 11-4283-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

821 F.3d 273*; *2016 U.S. App. LEXIS 7303

June 4, 2015, Argued April 22, 2016, Decided

COUNSEL: EKATERINA SCHOENEFELD, Schoenefeld Law Firm LLC, Princeton, New Jersey, *pro se*.

LAURA ETLINGER, Assistant Solicitor General (Barbara D. Underwood, Solicitor General; Andrea Oser, Deputy Solicitor General, *on the brief*), *for* Eric T. Schneiderman, Attorney General of the State of New York, Albany, New York, *for Defendants-Appellants*.

David B. Rubin, Esq., Metuchen, NJ, *for Amicus Curiae* The New Jersey State Bar Association, *in support of Plaintiff-Appellee*.

Leah M. Nicholls, Brian Wolfman, Institute for Public Representation, Washington, D.C., *for Amici Curiae* New York-Licensed Nonresident Attorneys, *in support of Plaintiff-Appellee*.

JUDGES: Before: RAGGI, HALL, CARNEY, Circuit Judges. Judge HALL dissents in a separate opinion.

OPINION BY: REENA RAGGI

OPINION

REENA RAGGI , *Circuit Judge.*

On this appeal, we must decide whether New York violates the Constitution's Privileges and Immunities Clause, *see* U.S. Const. art. IV, § 2, by requiring nonresident members of its bar to maintain a physical "office for the transaction of law business" within the state, when resident attorneys are not required to maintain offices distinct from their homes, N.Y. Judiciary Law § 470. Having now received the New York Court of Appeals' response to our certified question as to the "minimum requirements necessary to satisfy" § 470's office mandate, *see Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014); *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015) (holding § 470 to require physical office), we conclude that § 470 does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring

New York residents in their ability to practice law. To the contrary, the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, *i.e.*, a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern. We identify no protectionist intent in that action. Indeed, it is Schoenefeld who, in seeking to practice law in New York without a physical presence in the state, is looking to be treated differently from, not the same as, New York resident attorneys. Such differential treatment is not required by the Privileges and Immunities Clause. Accordingly, we reverse the judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*) declaring § 470's office requirement unconstitutional, *see Schoenefeld v. New York*, 907 F. Supp. 2d 252 (N.D.N.Y. 2011), and we remand the case with instructions to enter judgment in favor of defendants on Schoenefeld's Privileges and Immunities claim.[1]

I. Background

Because the facts and procedural history underlying this appeal are set forth in our prior panel opinion with which we assume familiarity, we reiterate them

[1] Because Schoenefeld has not appealed the district court's February 8, 2010 dismissal of her Equal Protection and Commerce Clause challenges to § 470, dismissal of her remaining Privileges and Immunities claim should conclude this litigation.

here only insofar as necessary to explain our decision to reverse and remand.

A. The Privileges and Immunities Clause Challenge to N.Y. Judiciary Law § 470

Plaintiff Ekaterina Schoenefeld, a citizen and resident of New Jersey, is licensed to practice law in New Jersey, New York, and California. She maintains an office in New Jersey, but not in New York. She asserts that she has declined occasional requests to represent clients in New York state courts to avoid violating N.Y. Judiciary Law § 470, which states as follows:

> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, *whose office for the transaction of law business is within the state*, may practice as such attorney or counsellor, although he resides in an adjoining state.

N.Y. Judiciary Law § 470 (McKinney 2016) (emphasis added). Schoenefeld seeks a judicial declaration that the office requirement imposed by § 470 on nonresident members of the New York bar violates the Constitution's Privileges and Immunities Clause by infringing on nonresidents' right to practice law in New York. The district court agreed and, on the parties' cross-motions for summary judgment, declared § 470 unconstitutional. *See Schoenefeld v. New York*, 907 F. Supp. 2d at 262-66. This timely appeal followed.

B. This Court's Certification to the New York Court of Appeals

In appealing the district court's ruling, New York State's Attorney General, on behalf of all defendants, initially argued that this case presented no Privileges and Immunities Clause concern because § 470's office requirement could be construed to demand only "an address for accepting personal service," which could be satisfied by a designated agent. *Schoenefeld v. New York*, 748 F.3d at 467. Alternatively, the Attorney General argued that, even if § 470 did treat nonresident attorneys differently from resident attorneys, it did not violate the Privileges and Immunities Clause because the burden imposed on nonresidents was "incidental" and substantially related to New York's sufficient state interest in the service of legal papers. *Id.*

Seeking to avoid a possibly unnecessary constitutional question, *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-79, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (explaining that, in confronting constitutional challenge to statute, court must first determine if any reasonable construction "will contain the statute within constitutional bounds," and emphasizing that "[w]arnings against premature adjudication of constitutional questions bear heightened attention" where federal court is asked to invalidate state statute), but uncertain as to whether New York's highest court would, in fact, construe § 470 as urged by defendants, *see Schoenefeld v. New York*, 748 F.3d at 468-69 (observing that New York's lower courts had never interpreted § 470 to be satisfied by less than physical office space),

this court certified the following question to the New York Court of Appeals:

> Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York, what are the minimum requirements necessary to satisfy that mandate?

Id. at 471.

The Court of Appeals accepted the certification and, upon review, held that § 470 "requires nonresident attorneys to maintain a physical office in New York." *Schoenefeld v. State*, 25 N.Y.3d at 25, 6 N.Y.S.3d at 222. In so ruling, the court observed that the statute, initially enacted in 1862, "appears to presuppose a residency requirement for the practice of law in New York State," to which "[i]t then makes an exception, by allowing nonresident attorneys to practice law if they keep an 'office for the transaction of law business'" in New York. *Id.* at 27, 6 N.Y.S.3d at 223. The Court acknowledged that the 1862 statute had linked the office requirement to service of process, so that "service, which could ordinarily be made upon a New York attorney at his residence, could be made upon the nonresident attorney through mail addressed to his office." *Id.*, 6 N.Y.S.3d at 224. But, the two statutory parts were severed in 1909, with the office requirement codified at § 470 making no reference to service. *See id.* at 27-28, 6 N.Y.S.3d at 224. In these circumstances, the Court of Appeals concluded that the term "office," as used in § 470, could not be construed to mean only an

address or agent sufficient for the receipt of service. Rather, the plain meaning of "office," particularly when joined with "the additional phrase 'for the transaction of law business,'" requires "nonresident attorneys to maintain a physical office in New York." *Id.* at 25, 28, 6 N.Y.S.3d at 222, 224.

The Court of Appeals acknowledged a legitimate state interest in ensuring that personal service can be made on nonresident attorneys practicing in New York courts. But, in construing the statute, it observed that the "logistical difficulties" with service at the time the office requirement was enacted had largely been overcome by state law authorizing "several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email," *id.* at 28, 6 N.Y.S.3d at 224 (citing N.Y. C.P.L.R. 2103(b) (McKinney 2015)), as well as the court's own rule conditioning the admission of nonresident attorneys without full-time employment in New York upon their designation of "the clerk of the Appellate Division in their department of admission as their agent for the service of process," *id.*, 6 N.Y.S.3d at 224-25 (citing N.Y. Comp. Codes R. and Regs. tit. 22, § 520.13(a) (2015)). Thus, the office requirement could not be construed to require only an address for service. The term was properly understood to require a physical premises.

Because the Court of Appeals' response to our certified question does not moot Schoenefeld's constitutional challenge to § 470, we proceed to address her claim and conclude that it fails on the merits.[2]

---

[2] Our dissenting colleague, Judge Hall, suggests that such a conclusion means it was unnecessary – and therefore improper – to certify the question of § 470's minimum requirements to the New York Court of Appeals. *See* Dissenting Op., *post* at 4-5, 6 n.1. This court, however, has recognized certification to be appropriate where a state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Nicholson v. Scoppetta*, 344 F.3d 154, 168 (2d Cir. 2003) (internal quotation marks omitted) (certifying state-law questions of statutory interpretation to New York Court of Appeals that would "render unnecessary, or at least substantially modify, the federal constitutional question"). That is this case. As our prior panel opinion explained, New York's Attorney General there argued that § 470 could be read to require only an address for accepting personal service, under which reading the Privileges and Immunities Clause would not be "implicate[d]." *Schoenefeld v. New York*, 748 F.3d at 467; *see also id.* at 469 (acknowledging that Supreme Court has "urged the federal courts of appeals to use certification in order to avoid deciding constitutional questions unnecessarily or prematurely" (internal quotation marks omitted)). Further, the Attorney General specifically requested certification if this court could not predict whether the New York Court of Appeals would adopt this reading. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153-54 (2d Cir. 2001) (recognizing that "certification request merits more respectful consideration" where, among other things, request was made by Attorney General, who advanced possible saving construction of state statute (internal quotation marks and brackets omitted)). *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013), cited in the dissent, is not to the contrary, as we there certified a question of statutory interpretation to the New York Court of Appeals where, as here, one possible answer would resolve the litigation, while an alternative statutory construction would require this court "to decide the constitutional

II. Discussion

A. Standard of Review

We review an award of summary judgment *de novo*, and will affirm if "viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact." *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 25 (2d Cir. 2015) (internal quotation marks and citation omitted). "Claims turning entirely on the constitutional validity or invalidity of a statute," such as the Privileges and Immunities challenge here, "are particularly conducive to disposition by summary judgment as they involve purely legal questions." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 93 (2d Cir. 2003).

B. The Privileges and Immunities Clause

The Privileges and Immunities Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The Clause operates to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L. Ed. 357 (1868); *see Bach v. Pataki*, 408 F.3d 75, 88 (2d Cir. 2005), *overruled on other grounds by McDonald*

---

question." *Id.* at 143. Nor is a proper certification rendered improper because the state court does not approve the possible statutory construction that would have avoided or minimized the constitutional challenge.

v. Chicago, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).[3] In short, the Clause does not demand that a citizen of one State be allowed to carry with him into another state the privileges and immunities which come with citizenship in his state. Rather, it guarantees "that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978) (internal quotation marks omitted). It is toward that end that the Clause "prevents a State from discriminating against citizens of other States in favor of its own." *Id.* (internal quotation marks omitted).

The Privileges and Immunities Clause, however, is "not an absolute" that precludes states from ever distinguishing between citizens and noncitizens. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 67, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988); *see Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. at 383 (collecting cases and observing that state need not "always apply all its laws or all its services equally" to citizens and noncitizens). To prevail on a Privileges and Immunities challenge, a plaintiff must demonstrate that the state has burdened nonresident activity that is "sufficiently basic to the livelihood of the Nation as to fall within

---

[3] Although the Privileges and Immunities Clause speaks in terms of citizens, it is now well established that "for analytic purposes citizenship and residency are essentially interchangeable." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988).

the purview of the Privileges and Immunities Clause." *Supreme Court of Va. v. Friedman*, 487 U.S. at 64 (internal quotation marks and alterations omitted). Upon such a showing, the state may defend its position by demonstrating that "substantial reasons exist for the discrimination and the degree of discrimination bears a sufficiently close relation to such reasons." *Id.* at 67; *accord Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d at 94. A court necessarily conducts these inquiries in light of the Supreme Court's recent admonition that constitutionally protected privileges and immunities are *burdened* "only when [challenged] laws were enacted for [a] protectionist purpose." *McBurney v. Young*, 133 S. Ct. 1709, 1715, 185 L. Ed. 2d 758 (2013).

In *McBurney*, which was decided after the district court ruled in this case, a nonresident plaintiff challenged Virginia's Freedom of Information Act ("FOIA") for hampering his ability to pursue a common calling. He alleged that the law, by allowing only Virginia citizens to inspect and copy public records, abridged his ability to engage in the business of "request[ing] real estate tax records on clients' behalf from state and local governments." *Id.* at 1714-15. The Supreme Court acknowledged that the ability to pursue a common calling is protected by the Privileges and Immunities Clause. *See id.* at 1715. Nevertheless, it identified no unconstitutional burden because plaintiff had failed to "allege," and "ha[d] offered no proof," that the statute "was enacted in order to provide a competitive economic advantage for Virginia citizens." *Id.* To the contrary, the statute was enacted with the "distinctly

nonprotectionist aim" of allowing "those who ultimately hold sovereign power," *i.e.*, the citizens of Virginia, to "obtain an accounting from the public officials to whom they delegate the exercise of that power." *Id.* at 1716. The Supreme Court thus concluded that, even if the statute had "the incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records," in the absence of a showing of discriminatory purpose to favor state citizens, plaintiff could not pursue a Privileges and Immunities claim. *Id.*[4]

We do not understand *McBurney* to state any new principle of law. Nevertheless, *McBurney* provides a clarification not available to the district court at the time it ruled in this case, specifically, that the Privileges and Immunities Clause does not prohibit state distinctions between residents and nonresidents in the abstract, but "only" those "enacted for the protectionist purpose of burdening out-of-state citizens" with respect to the privileges and immunities afforded the

---

[4] While "incidental" can mean "minor," the context in *McBurney* suggests that the Supreme Court used the word to mean something occurring "by chance or without intention or calculation." *Webster's Third New International Dictionary* 1142 (1986). Indeed, the Court has used the word in this manner in other discrimination cases. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (rejecting equal protection challenge for failure plausibly to plead discriminatory intent, observing that it was "no surprise" that policy "produce[d] a disparate, *incidental* impact on Arab Muslims, even though *the purpose* of the policy was to target neither Arabs nor Muslims" (emphases added)).

state's own citizens. 133 S. Ct. at 1715; *see Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. at 380-81.

Nor do we understand *McBurney* to suggest that the disparate effects of a challenged state law are completely irrelevant to a Privileges and Immunities inquiry. As the Supreme Court has recognized in other contexts, burdensome effects can sometimes admit an inference of proscribed intent. *Cf. Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (noting relevancy of disproportionate impact to racially discriminatory intent). What *McBurney* makes plain, however, is that it is protectionist purpose, and not disparate effects alone, that identifies the sort of discrimination prohibited by the Privileges and Immunities Clause, by contrast, for example, to the Commerce Clause. *See generally McBurney v. Young*, 133 S. Ct. at 1720 (separately analyzing challenged law under dormant Commerce Clause); *cf. Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1801 n.4, 191 L. Ed. 2d 813 (2015) (observing that "Commerce Clause regulates effects, not motives," and does not require court inquiry into "reasons for enacting a law that has a discriminatory effect").[5] Thus, consistent

[5] *McBurney* cannot be cabined as Judge Hall urges, to Privileges and Immunities challenges to non-economic legislation. *See* Dissenting Op., *post* at 9-10. Although Virginia's FOIA was not an economic regulation, *McBurney's* Privileges and Immunities analysis did not turn on that distinction but, rather, on the plaintiff's failure to adduce proof of protectionist purpose. Indeed, the Court there held that "the Clause forbids a State from *intentionally* giving its own citizens a competitive advantage in business

with *McBurney*, 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 a showing, a Privileges and Immunities claim fails, obviating the need for a tailoring inquiry. *See McBurney v. Young*, 133 S. Ct. at 1716 (explaining that "Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen").[6]

---

or employment." *McBurney v. Young*, 133 S. Ct. at 1716 (emphasis added).

[6] *McBurney* did not specify at what step of the traditional two-step inquiry plaintiff must carry this protectionist-purpose burden. The Ninth Circuit recently concluded that protectionist purpose is properly considered at the second step of inquiry. *See Marilley v. Bonham*, 802 F.3d 958, 964 (9th Cir. 2015). But the case is now awaiting *en banc* review. *See* 815 F.3d 1178 (9th Cir. 2016) (mem.). In any event, the panel conclusion in *Marilley* is not obvious because, at the second step of inquiry, the burden shifts to the defendants, *see Supreme Court of Va. v. Friedman*, 487 U.S. at 67, 108 S. Ct. 2260, and *McBurney* emphasized the *nonresident plaintiff's* failure to plead or offer proof of a protectionist purpose for Virginia's FOIA, *see* 133 S. Ct. at 1715-16; *cf., e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21, 50 L. Ed. 2d 450 (1977) (holding, in Equal Protection context, that if plaintiff demonstrates that challenged decision was "motivated in part by a racially discriminatory purpose," burden shifts to government to establish that "same decision would have resulted even had the impermissible purpose not been considered"). For this reason, we cannot readily assume, as our dissenting colleague does, that the Supreme Court's discussion of plaintiff's failure necessarily occurred at the second step of the traditional inquiry. *See* Dissenting Op., *post* at 8-9. However, we need not here conclusively decide at what step plaintiff must adduce proof of a protectionist purpose because, in any event,

With these principles in mind, we consider Schoenefeld's challenge to § 470.

C. Schoenefeld Has Adduced No Proof that § 470 Was Enacted for a Protectionist Purpose

Schoenefeld asserts that § 470 violates the Privileges and Immunities Clause both on its face and as applied. Insofar as the law, both on its face and as applied, pertains to the practice of law, the parties agree that § 470 implicates a privilege protected by the Privileges and Immunities Clause. *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 283, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); *accord Supreme Court of Va. v. Friedman*, 487 U.S. at 65. The parties also do not dispute that § 470 imposes a physical office requirement on nonresident attorneys that does not apply to resident attorneys, who may use their homes as their offices. *See Schoenefeld v. New York*, 748 F.3d at 468 (discussing New York precedent recognizing that resident New York attorney may use home as office).

In some circumstances, a facial classification is enough, by itself, to manifest a proscribed intent. This is most apparent where the facial classification is based on an invidious factor, such as race. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227-36, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (subjecting facial classifications based on race to strict scrutiny

---

Schoenefeld's failure to carry this burden here defeats her Privileges and Immunities claim.

review). But precisely because the Privileges and Immunities Clause is not an absolute, not every facial distinction between state residents and nonresidents will admit an inference of protectionist purpose. *See Supreme Court of Va. v. Friedman*, 487 U.S. at 67. Indeed, in *McBurney*, the Supreme Court did not find the Virginia FOIA's facial distinction between residents and nonresidents sufficient to admit an inference of protectionist purpose, particularly in light of statutory text and legislative history to the contrary. We reach the same conclusion with respect to § 470.

In reaching that conclusion we look, as the *McBurney* Court did with the Virginia FOIA, to the purpose of § 470.[7] That statute's office requirement has its origins in an 1862 predecessor law, Chapter 43, *see* 1862 N.Y. Laws 139, which was enacted to *reverse* a court ruling that barred a licensed New York attorney who had moved to New Jersey from further practicing in New York because it might be difficult, if not impossible, to serve him with New York legal process. *See Richardson v. Brooklyn City & Newtown R.R.*, 22 How. Pr. 368 (N.Y. Sup. Ct. Feb. 1, 1862).[8] The month after

---

[7] Because the policy underlying the Virginia FOIA was codified as part of the statutory text, the Supreme Court relied on the statute's plain language to determine its purpose. *See McBurney v. Young*, 133 S. Ct. at 1715 (quoting Va. Code Ann. § 2.2-3700(B) (2011)).

[8] The court in *Richardson* explained its concerns as follows:

> Section 409 of the Code regulates the manner of serving papers. It provides that service may be made upon an attorney at his office, by leaving the paper with

that decision, the New York State legislature enacted Chapter 43, making clear that such a nonresident lawyer could practice law in New York, as long as he maintained an office in the state, which office the law designated an accepted site for service, thereby eliminating the concern raised in *Richardson*. As this history demonstrates, the in-state office requirement was not enacted for the protectionist purpose of burdening nonresident attorneys in practicing law in New York. Rather, it was enacted to ensure that every licensed New York lawyer, whether a state resident or not, could practice in the state by providing a means for the nonresident attorney to establish a physical presence in the state (and therefore place for service) akin to that of a resident attorney. A statute enacted for such a nonprotectionist purpose is not vulnerable to a Privileges and Immunities challenge. *See McBurney v. Young*, 133 S. Ct. at 1715.

In 1877, Chapter 43's office requirement and office service authorization were codified at § 60 of New York's new Code of Civil Procedure. *See Schoenefeld v.*

> the person in charge; or if there be no person in the office, by leaving it in a conspicuous place in the office; and if the office be not open to admit of such service, by leaving it at the attorney's residence with some person of suitable age and discretion. These various provisions, and especially the latter, would be rendered nugatory if attorneys who resided out of the state were permitted to practice. An attorney might keep his office closed and empty, and, if he had no residence within the state, might entirely evade the service of papers, and baffle his adversary and the court.

Id. at 370.

State, 25 N.Y.3d at 27, 6 N.Y.S.3d at 224. In a 1909 recodification, however, the two provisions were divided, with the service part remaining at § 60, while the office requirement became § 470. As the New York Court of Appeals observed, the latter requirement has remained virtually unchanged to the present, while state law and court rules now authorize service by various means in addition to home and office. *See id.* at 28, 6 N.Y.S.3d at 224. But even if § 470's office requirement is now largely vestigial as a means for ensuring service, the fact remains that the law was enacted for that nonprotectionist purpose, and Schoenefeld has adduced no evidence of a protectionist intent to afford some economic advantage to resident New York lawyers.

In urging otherwise, Schoenefeld argues that Chapter 43 must be viewed in context, as an exception to what was then New York's general ban on nonresident attorneys. The argument fails because Schoenefeld has not been burdened by that general ban, which was invalidated in 1979. *See In re Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). Further, she offered no proof that the office requirement was enacted to further the general ban so as to admit an inference of protectionist intent. Rather, as just noted, the office requirement was enacted as an exception to the ban, ensuring an in-state place of service so that, once admitted, nonresident New York lawyers could practice in the state's courts on functionally the same terms as resident lawyers.

No more can a protectionist purpose be inferred from the 1877 and 1909 recodifications of the office requirement or from New York's failure thereafter to repeal § 470. After the New York Court of Appeals struck down the state's general ban on the admission of nonresident lawyers, *see In re Gordon*, 48 N.Y.2d at 269, 422 N.Y.S.2d at 642-43, the legislature "amended several provisions of the Judiciary Law and the CPLR to conform to that holding," *Schoenefeld v. State*, 25 N.Y.3d at 28, 6 N.Y.S.3d at 224. Schoenefeld offers no evidence that anyone identified a need to repeal § 470 as part of that process, much less that the legislature thereafter refused to do so for the protectionist purpose of favoring resident attorneys. *See McBurney v. Young*, 133 S. Ct. at 1715.[9] Where a legislature thus manifests

[9] As Judge Hall notes, the legislature did propose an amendment to § 470 in 1986 that was not enacted. *See* Dissenting Op., *post* at 20 n.11. But that amendment would still have "mandate[d] that a nonresident attorney have a law office in [New York] before appearing as an attorney of record in any action or proceeding in a court [in the state]." J.A. 132. The amendment's proponents explained that while New York could not limit bar membership to state residents, "it could act to insure the quality of its Bar by adopting reasonable measures that would have special regulatory effect on nonresident attorneys." *Id.* Insofar as Judge Hall contends that the amendment would have permitted nonresident attorneys without an office in New York to practice in the state so long as they did not appear as attorneys of record, *see* Dissenting Op., *post* at 20 n.11, that conclusion appears grounded not in the amendment's text, but in *pro hac vice* rules existing to this day. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 520.11 (2016) (permitting member of bar of another state to be admitted *pro hac vice* provided that, *inter alia*, attorney is associated with member in good standing of New York bar "who shall be the attorney of record in the matter"); J.A. 133 (explaining that proposed 1986

its readiness to conform its laws to the Privileges and Immunities Clause, a plaintiff must point to more than a failure to amend or repeal a statute enacted for a nonprotectionist purpose to demonstrate that the law is being maintained for a protectionist purpose.[10] The subsequent availability of other means of service warrants no different conclusion because, in the absence of some showing of protectionist purpose, a state need not demonstrate that its laws are narrowly tailored to a legitimate purpose. *See id.* at 1716 (rejecting Privileges and Immunities claim for failure to demonstrate protectionist purpose without conducting tailoring inquiry).

Further, this is not a case where the alleged burdensome effects of the challenged statute admit an inference of protectionist purpose.[11] While § 470's office

---

amendment to § 470 would not "unduly burden[ ]" nonresident attorney who was "unwilling or unable to maintain" an in-state office because that attorney could practice "so long as local counsel c[ould] be found to appear as attorney of record").

[10] A recent statutory amendment and a newly-promulgated rule of the New York Court of Appeals, cited to us by the parties in Fed. R. App. P. 28(j) letters, further indicate that New York is not pursuing a protectionist purpose in regulating the practice of law. *See* N.Y. C.P.L.R. 2103(b)(2) (McKinney 2016) (approving service by mail "made from outside the state"); N.Y. Comp. Codes R. & Regs. tit. 22, § 523.2 (2016) (permitting lawyer not admitted in New York to engage in temporary practice of law within state provided, among other things, that lawyer is licensed to practice in another state or even "a non-United States jurisdiction").

[11] The law of the case doctrine does not bar us from reaching this conclusion because contrary to our dissenting colleague's suggestion, *see* Dissenting Op., *post* at 3-5, 22-23, neither our prior panel opinion nor the New York Court of Appeals' response

requirement expressly pertains only to nonresident attorneys, the requirement serves, as we have already observed, to place admitted resident and nonresident attorneys on an equal footing, not to favor the former over the latter. To practice law in New York, *every* attorney admitted to its bar must have a presence in the state in the form of a physical premises.[12] The fact that a nonresident attorney will have to establish that presence by leasing an office, while a resident attorney can use his home, does not unduly burden the nonresident. Not only is the expense of a New York office likely to

---

thereto conclusively decided the issue. *See DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992). Our prior panel opinion decided only to certify the question of § 470's minimum requirements to the New York Court of Appeals in light of a statutory construction then urged by the Attorney General that might moot Schoenefeld's constitutional challenge. In this context, our observation that, if construed to require a physical office, § 470 imposed a "significant expense" on nonresident attorneys, *Schoenefeld v. New York*, 748 F.3d at 468, is at most *dictum* that does not bind us here, *see Schwabenbauer v. Bd. of Educ. of City School Dist. of City of Olean*, 777 F.2d 837, 842 (2d Cir. 1985) (concluding that statements in prior opinion in same case were "not necessary to or a part of" prior decision and were, therefore, non-binding *dicta*). Meanwhile, the New York Court of Appeals held only that § 470 required nonresident attorneys to maintain a physical office in the state. *See Schoenefeld v. State*, 25 N.Y.3d at 26-27, 6 N.Y.S.3d at 223.

[12] Thus, this case is not akin to *Friedman* and *Piper*, cited by the dissent. *See* Dissenting Op., *post* at 21, 24 (citing *Supreme Court of Va. v. Friedman*, 487 U.S. at 70 (concluding that Virginia rule permitting only residents to be admitted to bar on motion, while nonresidents were required to take and pass bar examination, violated Privileges and Immunities Clause); *Supreme Court of N.H. v. Piper*, 470 U.S. at 288 (holding that New Hampshire rule excluding nonresidents from bar violated Clause)).

be less than the expense of a New York home, but Schoenefeld has adduced no evidence indicating that significant numbers of resident New York attorneys in fact practice from their homes rather than from offices. Indeed, decisions from sister circuits suggest otherwise. *Cf. Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1038 (10th Cir. 2009) (observing that, although trust statute would permit Utah attorneys to use home as requisite place of business within state, it was hardly apparent that many would wish to do so); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1107-08 (3d Cir. 1997) (noting lack of evidence that, in New Jersey, attorneys practice from their homes).

Schoenefeld nevertheless contends that § 470 is unconstitutional because the statute, as applied, requires her to incur the costs of a New York office when she is already incurring the costs of her New Jersey home and office. The flaw in this argument is that Schoenefeld's New Jersey expenses are not a product of New York law. New York can be held to account under the Privileges and Immunities Clause only for the condition *it* imposes on Schoenefeld to practice law in the state, that is, the leasing of an office. As noted, Schoenefeld fails to show that the burden on a nonresident of maintaining an office in New York is greater than the burden on a resident of maintaining a home (and frequently a home and office) in New York. In any event, the Privileges and Immunities Clause "'does not promise nonresidents that it will be as easy for [them] as for residents to comply with a state's law.'" *Schoenefeld v. New York*, 748 F.3d at 467 (quoting

Kleinsmith v. Shurtleff, 571 F.3d at 1044-45 (observing that "typically it is harder for a nonresident to conduct a business or a profession in a state than it is for a resident")). It promises only that state laws will not differentiate for the protectionist purpose of favoring residents at the expense of nonresidents. *See McBurney v. Young*, 133 S. Ct. at 1715. The effects resulting from § 470's application to Schoenefeld manifest no such protectionist intent.

Indeed, the effects of § 470, as applied, are no different from those of a law that on its face requires all attorneys to maintain a physical presence in New York. Sister circuits have upheld such statutes against Privileges and Immunities challenges.

For example, *Kleinsmith v. Shurtleff* involved a Privileges and Immunities challenge to a Utah statute requiring "all attorneys who act as trustees of real-property trust deeds in Utah to 'maintain[] a place within the state.'" 571 F.3d at 1035 (alteration in original) (quoting Utah Code Ann. § 57-1-21(1)(a)(i) (2009)). Plaintiff argued that the law discriminated against nonresidents because residents could use their homes as the specified "place within the state," while nonresidents would need to lease offices. *Id.* at 1044. The Tenth Circuit, however, held that the law was neutral because it equally required all trustees to have a physical presence in the state. *See id.* at 1044-47. In reaching this conclusion, the court relied on the statute's lack of facial classification between residents and nonresidents. *See id.* at 1046. But insofar as plaintiff complained of a disparate impact as applied, the court

held it "irrelevant to the [Privileges and Immunities] Clause whether the practical effect of the maintain-a-place requirement . . . burdens nonresidents disproportionately." *Id.* at 1047.

Similarly, in *Tolchin v. Supreme Court of New Jersey*, the Third Circuit upheld a New Jersey law requiring all attorneys to maintain a "*bona fide* office" within the state, while recognizing that only resident attorneys could use their homes to satisfy the requirement. 111 F.3d at 1107-08. As in *Kleinsmith*, the court identified no Privileges and Immunities Clause violation because the law "similarly affect[s] residents and nonresidents. Resident and nonresident attorneys alike must maintain a New Jersey office." *Id.* at 1113.[13]

[13] New Jersey has since eliminated its physical office requirement, while continuing to impose various conditions that may most easily be satisfied through an office. *See* N.J. R. Ct. 1:21-1(a)(1) (2015) ("An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions . . . that may arise out of the practice of law and activities related thereto."). We need not here consider whether New York might do the same because, absent a protectionist purpose, the conditions imposed by a state even on nonresidents pursuing a profession within its borders do not implicate the Privileges and

While the laws at issue in these two cases did not facially classify on the basis of residence, to the extent Schoenefeld complains of the burdensome effects of § 470 as applied, facial classification is irrelevant. The *effects* of § 470 and the laws at issue in *Kleinsmith* and *Tolchin* are virtually identical. The critical question, then, is whether a law that effectively requires nonresident attorneys to maintain a physical presence in New York akin to that already maintained by resident attorneys unduly burdens the former's ability to practice law. Like the Third and Tenth Circuits, we conclude that it does not. The conclusion finds further support in *dictum* in *Supreme Court of Virginia v. Friedman*, wherein the Supreme Court recognized that an in-state office requirement could serve as a nonprotectionist alternative to residency in safeguarding state interests respecting the practice of law. *See* 487 U.S. at 70 (invalidating residency condition for admission on motion to bar and observing that office requirement adequately protected state interest in limiting such admissions to full-time practitioners); *see generally Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) (acknowledging "obligation to accord great deference to Supreme Court *dicta*, absent a change in the legal landscape" (internal quotation marks omitted)).[14]

Immunities Clause so as to require tailoring analysis. *See McBurney v. Young*, 133 S. Ct. at 1716.

[14] *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987), cited by Judge Hall, is not to the contrary. *See* Dissenting Op., *post* at 17 & n.9. In there concluding that the United States District Court for the Eastern District of Louisiana could not impose an in-state office requirement for admission to its bar,

What Schoenefeld in fact seeks through this action is not to practice law in New York on the same conditions as a resident attorney who by virtue of home (or home and office) maintains a physical presence in the state. Rather, she seeks to practice law on different terms, specifically, without maintaining a physical presence in the state. The Privileges and Immunities Clause proscribes laws that favor residents over nonresidents in their pursuit of a common calling. It does not mandate that nonresidents be allowed to practice law in a state on terms different from those applicable to residents.

Accordingly, whether Schoenefeld challenges § 470 on its face or as applied, her Privileges and Immunities Clause claim fails because she has not demonstrated that the law was enacted for or serves the protectionist purpose of favoring resident New York attorneys and disfavoring nonresident attorneys in practicing law in the state's courts. *See McBurney v. Young*, 133 S. Ct. at 1715. We therefore reverse the district court decision declaring § 470 violative of the Privileges and Immunities Clause.

---

the Supreme Court relied on its supervisory authority over local federal rules and expressly declined to reach the Privileges and Immunities challenge. *See Frazier v. Heebe*, 482 U.S. at 645, 647 n.7 (explaining that Court's supervisory authority permits it to intervene to protect integrity of federal system, whereas "authority over state-court bars is *limited* to enforcing federal constitutional requirements" (emphasis added)); *see also id.* (stating that rules differentiating between resident and nonresident attorneys are "more difficult to justify in the context of federal-court practice than they are in the area of state-court practice").

III. Conclusion

To summarize, we conclude as follows:

1. The Supreme Court has recently clarified that state laws violate the Privileges and Immunities Clause "only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." *McBurney v. Young*, 133 S. Ct. at 1715.

2. New York's in-state office requirement for nonresident attorneys admitted to the state's bar, N.Y. Judiciary Law § 470, was not enacted for a protectionist purpose disfavoring nonresident admitted attorneys but, rather, for the nonprotectionist purpose of affording such attorneys a means to establish a physical presence in the state akin to that of resident attorneys, thereby eliminating a court-identified service-of-process concern.

3. Schoenefeld has offered no proof of an animating protectionist purpose, either on the face of the statute or inferred from its effects as applied. Indeed, the effect of § 470, as applied, is no different from a neutral statute requiring all licensed New York attorneys, resident and nonresident alike, to maintain a physical presence in the state, which raises no Privileges and Immunities concern.

4. Schoenefeld cannot point to the expenses of her practice in New Jersey, not required by New York law, to pursue a Privileges and Immunities challenge to § 470 in the absence of any proof that that statute's

in-state office requirement was enacted for a protectionist purpose.

Accordingly, we REVERSE the district court's judgment invalidating § 470, and we REMAND the case with instructions to deny Schoenefeld's motion for summary judgment and to award judgment in favor of defendants.

DISSENT BY: HALL

DISSENT

HALL, *Circuit Judge*, dissenting:

The majority holds that a New York statute that discriminates, on its face, against nonresident attorneys – burdening them with the expense of maintaining an office in New York while exempting resident attorneys from the same requirement – does not offend the Privileges and Immunities Clause of Article IV, § 2 of the Constitution because, in the majority's view, the plaintiff has failed to prove that the statute evinces a "protectionist" intent. In doing so, the majority injects an entirely novel proposition into our Privileges and Immunities Clause jurisprudence: that a State's explicit discrimination against nonresidents with regard to a fundamental right is constitutionally unobjectionable unless the nonresident makes out a *prima facie* case of discriminatory intent. Such a holding reverses the State's burden of demonstrating that it has a

substantial interest justifying the discrimination and that the means chosen bear a close and substantial relation to that interest. Even under the majority's reformulation of our settled law, however, Schoenefeld has established that the New York statute has protectionist aims, and the State's proffered justifications for the discrimination fail to survive scrutiny. I respectfully dissent.

I.

The two-step inquiry to be conducted under the Privileges and Immunities Clause is well established. First, the court considers whether a State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens. *See Connecticut ex rel. Blumenthal v. Crotty,* 346 F.3d 84, 94 (2d Cir. 2003) (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218, 222, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984)). "The activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . . For it is only with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988) (internal quotation marks, citations and alterations omitted). Second, if the court determines that the State has, in fact, discriminated against out-of-state residents, the

burden shifts to the State to provide a "sufficient justification for the discrimination," *Crotty*, 346 F.3d at 94, by making a showing that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).

On its face, New York Judiciary Law § 470 discriminates against nonresident attorneys with regard to the practice of law, long recognized by the Supreme Court as a "fundamental right" subject to protection under the Privileges and Immunities Clause. *Id.* at 281. As we explained in our prior opinion in this case, *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014), and the New York Court of Appeals unanimously agreed after we certified to it a question, *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), Section 470 draws a distinction between attorneys who are residents of New York and those who are not. The statute imposes no specific requirement on resident attorneys to maintain a *bona fide* office, thus permitting them to set up an "office" on the kitchen table of their studio apartments if so desired. *Schoenefeld*, 748 F.3d at 468. Nonresident attorneys, however, are required to maintain an "office for the transaction of law business" within the State. N.Y. Judiciary Law § 470. We recognized that "[t]his additional obligation carries with it significant expense – rents, insurance, staff, equipment *inter alia* – all of which is in addition to the expense of the attorney's out-of-state office,

assuming she has one." *Schoenefeld*, 748 F.3d at 468. Absent a controlling state decision that an "office for the transaction of law business," § 470, meant something other than a *bona fide* office, we concluded that, "as it stands, it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on nonresident attorneys implicate the Privileges and Immunities Clause." *Id.* at 469.

New York argued to us, however, that the statute could be interpreted as requiring no more than a P.O. box or designated agent for service of process, lessening the burden on nonresident attorneys considerably and making Section 470 more likely to survive scrutiny. *Id.* While our own review of New York law indicated that a designated physical office space was required, we recognized that the question had not been spoken to by the New York Court of Appeals, and we certified to that court the question: "Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an 'office for the transaction of law business' within the state of New York, what are the minimum requirements necessary to satisfy that mandate?" *Id.* at 471. In doing so, we represented that the Court of Appeals' answer would, "in all likelihood, dictate[] the outcome of the constitutional privileges and immunities analysis we have commenced and must complete as we decide the appeal before us." *Id.* The Court of Appeals accepted certification and graciously took time away from its own busy docket to

unanimously answer that § 470 required the nonresidents maintain a physical office space. *Schoenefeld*, 25 N.Y.3d at 26, 6 N.Y.S.3d at 223. As we had suspected, maintaining an address or a designated agent for service would not satisfy the requirements of Section 470. *See id.*

The majority now disregards the New York Court of Appeals' decision as well as our own prior opinion which, together, constitute the law of the case. *See DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (noting that, absent an intervening change in controlling law, availability of new evidence, or the need to correct a clear error or manifest injustice, a court's decision upon a rule of law "should continue to govern the same issues in subsequent stages in the same case") (internal quotation marks omitted). Those decisions acknowledged that Section 470 discriminates between in-state and out-of-state attorneys solely on the basis of their residency. Under longstanding precedent, that determination disposes of the initial inquiry; the burden then shifts to the State to provide "sufficient justification for the discrimination." *Crotty*, 346 F.3d at 94. Departing from these precedents, however, the majority holds that the *plaintiff* bears the initial burden of "alleg[ing] or offer[ing] some proof of a protectionist purpose" in order to state a claim under the Privileges and Immunities Clause. Majority Op., ante at 15. In the majority's estimation, if the plaintiff fails to allege a *prima facie* case of protectionist intent, her "Privileges and Immunities claim fails, obviating the need for a tailoring inquiry." Majority Op., ante at 15.

The majority bases its reasoning exclusively on its reading of the Supreme Court's decision in *McBurney v. Young*, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013). As the majority acknowledges, that decision did not state any new principle of law, but merely confirmed that the Privileges and Immunities Clause forbids laws that abridge the right to pursue a common calling only when those laws "were enacted for the protectionist purpose of burdening out-of-state citizens."[1] *Id.* at 1715. *McBurney* did not disturb the traditional threshold inquiry and two-step analysis in cases, like ours, where the challenged law is one that directly regulates legal practice. Rather, while acknowledging that the Privileges and Immunities Clause "protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling," *id.* (internal quotation

[1] The majority's application of *McBurney*, which was decided before our prior opinion in this case, is particularly striking given that we did not rely on *McBurney* to uphold the constitutionality of Section 470 at that time. *See Schoenefeld*, 748 F.3d at 469. Instead, in apparent contravention of New York's constitutional requirements for certification, this Court certified a question to the Court of Appeals that was not necessary to our decision. *Cf. Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013) (stating that, prior to certifying a question to the Court of Appeals, this Court must determine "whether the certified question is determinative of a claim before us" (internal quotation omitted)); *Retail Software Servs., Inc. v. Lashlee*, 71 N.Y.2d 788, 790, 525 N.E.2d 737, 530 N.Y.S.2d 91, 92 (1988) (declining to answer certified question because it did not satisfy the requirement that it "may be determinative" of the pending action, as required by the New York Constitution). As we recognized in our prior opinion, "[t]he constitutionality of [Section] 470 turns on the interpretation of a provision of the statute that implicates significant New York state interests and is determinative of this appeal." *Schoenefeld*, 748 F.3d at 467.

marks omitted), the Court held that Virginia's distinction between state citizens and noncitizens in its Freedom of Information Act ("FOIA") did not "abridge" a noncitizen's right to pursue his livelihood "in the sense prohibited by the Privileges and Immunities clause" because the effects on his real estate business, which involved obtaining state property records for his clients, were purely incidental. *Id.*

The majority's reading that *McBurney* requires a plaintiff to allege, as part of a *prima facie* case, that the law was specifically enacted for a protectionist purpose misconstrues *McBurney's* invocation of the two-step analysis.[2] As an initial matter, the Court resolved the threshold issue, whether a fundamental right is implicated, by noting that the Privileges and Immunities Clause protects the right the plaintiff claimed was violated.[3] *See id.* at 1715. The Court then considered whether sufficient justification existed for the discrimination[4]; it determined that the Virginia FOIA, as a

[2] Rather than unanimously altering the longstanding Privileges and Immunities analysis through *dicta* without acknowledging as much (or generating a single dissenting opinion), the better reading is that the *McBurney* decision adhered to the traditional two-step analysis.

[3] The Court, by contrast, rejected the plaintiff's Privileges and Immunities challenge based on the asserted "right to access public information on equal terms with citizens of the Commonwealth" at the threshold by determining that the Clause did not "cover[ ] this broad right." *McBurney*, 133 S. Ct. at 1718-19.

[4] The majority states that it is "not obvious" under *McBurney* whether the State's protectionist purpose is properly considered at the first or second step of the inquiry, noting that the burden shifts to the defendants at the second step, *see, e.g.*, *Supreme Court of Va. v. Friedman*, 487 U.S. at 67, whereas *McBurney* emphasized

mechanism for state citizens as the holders of sovereign power to obtain an accounting from public officials, evinced a "distinctly nonprotectionist aim." *Id.* at 1716. Further, the statute's distinction between Virginia citizens and noncitizens was justified because it "recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth." *Id.* It was within this context that the Court explained that (1) the plaintiff "does not allege – and has offered no proof – that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens," *id.* at 1715, and (2) the statute's "effect of preventing citizens of other States from making a profit by trading on information contained in state records" is merely "incidental." *Id.* at 1716. In short, the Court's reasoning – that the plaintiff failed to contradict the State's showing that the discrimination against noncitizens was justified – conforms precisely to the traditional two-step inquiry.

McBurney is distinguishable from this case for the simple reason that the Virginia FOIA is not an economic regulation, nor does it directly regulate the right to pursue a common calling. Rather, the FOIA provides

---

the nonresident plaintiff's failure to plead or allege proof that Virginia's FOIA was enacted with a protectionist purpose, *see* 133 S. Ct. at 1715-16. Majority Op., ante at 16. The tension the majority perceives between *Friedman* and *McBurney*, however, is due entirely to a strained reading of *McBurney.* The majority's "discriminatory intent" requirement, in any event, remains novel to privileges and immunities jurisprudence whether it is grafted onto the first or second step of the inquiry.

a mechanism for seeking political accountability, and its effects on the plaintiff's profession – data gathering for profit – were purely "incidental." *Id.* It is well-established that, "[w]hile the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id.* Section 470, by contrast, directly regulates the legal profession by expressly and intentionally placing practice requirements on nonresident attorneys like Schoenefeld that it does not place on resident attorneys. The majority stretches *McBurney's* "incidental" language far beyond the facts of that case to support its conclusion that *any* regulation, even one that directly regulates a "well settled . . . privilege protected by Article IV, § 2," *Barnard v. Thorstenn*, 489 U.S. 546, 553, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989), will pass constitutional muster so long as its discrimination against nonresidents can be characterized as "incidental." Majority Op., ante at 13-14.

By requiring plaintiffs to allege a *prima facie* case of discriminatory intent, the majority, in effect, relieves the State of its burden to provide a sufficient justification for laws that discriminate against nonresidents with regard to fundamental rights. *See Crotty*, 346 F.3d at 95 (explaining that States may not "treat residents and nonresidents disparately in connection with the pursuit of commerce, a trade, or business venture where that disparate treatment is not supported by a

sufficient justification"). Determining whether an unacceptable purpose, such as economic protectionism, underlies the challenged law is at the core of the analysis engaged in *after* the threshold determination into whether a right implicated by the Privileges and Immunities Clause has been abridged. *See Piper*, 470 U.S. at 284 ("The conclusion that [a State law] deprives nonresidents of a protected privilege does not end our inquiry . . . The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."). Examining the government's proffered reason for the discrimination and determining whether the challenged law, as enacted, conforms to the proffered reason is the method by which courts determine whether the proffered reason is genuine or merely a pretext for economic protectionism. *Crotty*, 346 F.3d at 97 ("Part and parcel to this analysis is determining whether [the State] ha[s] demonstrated a substantial factor unrelated to economic protectionism to justify the discrimination."). The majority's reasoning would reverse this burden-shifting test by requiring plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than requiring the State to show that the law was *not* enacted for a protectionist purpose.

Tellingly, in support of this proposition the majority draws exclusively on cases addressing challenges under the Equal Protection Clause, for which plaintiffs

must plead discriminatory intent as part of a *prima facie* case. Majority Op., ante at 13-14 (citing, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). The majority has not cited, nor does there exist, any case suggesting that the requirement to allege discriminatory intent as part of a *prima facie* case under the Equal Protection Clause also applies to Privileges and Immunities claims. Indeed, *Virginia v. Friedman*, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988), stands for the opposite proposition. In *Friedman*, Virginia argued that its residency requirement for admission to the State's bar on motion did not implicate the Privileges and Immunities Clause on the basis that, because nonresident attorneys could seek admission by taking the Virginia bar exam, "the State cannot be said to have discriminated against nonresidents as a matter of fundamental concern." *Id.* at 65 (internal quotation marks omitted). The Supreme Court rejected that argument as "quite inconsistent with our precedents," stating that "the Clause is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." *Id.* at 65-66. This language cannot be squared with a *prima facie* requirement that demands something more than a showing of disparate treatment on the face of the statute.[5]

---

[5] By comparing this case with *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), the majority inadvertently highlights the distinctions

The Equal Protection cases cited by the majority, moreover, are distinguishable on the ground that the challenged policies in those cases were facially neutral but produced racially disparate effects. *See Iqbal*, 556 U.S. at 682 (holding that plaintiffs failed to allege that detention policy that disproportionately affected Muslims and Arabs was motivated by a racially discriminatory purpose); *Davis*, 426 U.S. at 244 (concluding that facially neutral employment test was not racially discriminatory simply because a greater proportion of African Americans fared poorly). The plaintiffs were thus required to allege facts showing that an otherwise-neutral policy was motivated by an impermissible discriminatory purpose. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Section 470, by contrast, draws a facial distinction between residents and

---

between the burden-shifting tests that govern Equal Protection and Privileges and Immunities claims. Majority Op., ante at 16 n.6. In *Village of Arlington Heights*, an Equal Protection case, the Court explained that if a plaintiff demonstrates that a challenged decision was "motivated in part by a racially discriminatory purpose," then the burden shifts to the government to establish that the "same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21. To state a claim under the Privileges and Immunities Clause, by contrast, a plaintiff must demonstrate that "a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause," *Barnard*, 489 U.S. at 552, in which case the restriction is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective," *id.* The former inquiry requires a threshold showing of discriminatory intent; the latter plainly does not.

nonresidents with regard to the privilege of practicing law; by its very terms, it imposes burdens on nonresidents that it does not impose on residents. Because the statute, on its face, discriminates against nonresidents, no other threshold showing of discriminatory intent is required.[6]

In sum, Section 470 discriminates against nonresidents with respect to the practice of law, a fundamental right long recognized as protected under the Privileges and Immunities Clause. The majority recognizes as much, *see* Majority Op., ante at 16-17, but erroneously imposes a threshold requirement that the plaintiff challenging the discrimination prove there is a protectionist intent above and beyond the traditional analysis.

II.

Plaintiff having established that a fundamental right has been implicated, it is the State's burden to provide a sufficient justification for the discrimination by demonstrating that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470

[6] Indeed, even a state regulation that "d[oes] not on its face draw any distinction based on citizenship or residence" may implicate the Privileges and Immunities Clause where "the practical effect of the provision [is] discriminatory." *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67, 123 S. Ct. 2142, 156 L. Ed. 2d 54 (2003).

U.S. at 284. "In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Friedman*, 487 U.S. at 66.

The State's proffered justifications for the in-state office requirement – effectuating service of legal papers, facilitating regulatory oversight of nonresident attorneys' fiduciary obligations, and making attorneys more accessible to New York's courts – are plainly not sufficient. Regarding the issue of service, the Court of Appeals itself observed that, although "service on an out-of-state individual presented many more logistical difficulties in 1862, when [Section 470] was originally enacted," today there are "adequate measures in place relating to service upon nonresident attorneys," including the methods of mail, overnight delivery, fax and (where permitted) email, as authorized by the CPLR, and the requirement under 22 N.Y.C.R.R. § 520.13(a) that nonresident attorneys designate an in-state clerk of court as their agent for service of process in order to be admitted in New York. *Schoenefeld*, 25 N.Y.3d at 28, 6 N.Y.S.3d at 224-25. Thus, not only do "there exist alternative means of furthering the State's purpose without implicating constitutional concerns,"

Friedman, 487 U.S. at 66, but those means are already in place.[7]

The State's argument that an in-state office requirement is necessary to regulate the behavior of nonresident attorneys fares no better. The Court has long rejected similar arguments in favor of a residency requirement on the grounds that a "nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers," and that the State, in any event, "has the authority to discipline all members of the bar, regardless of where they reside."[8] *Piper*, 470 U.S. at 286. Similarly, the Supreme Court has rejected the argument that an in-state office

---

[7] As the majority notes, New Jersey has eliminated its physical office requirement in favor of various other less onerous conditions. *See* Majority Op., ante at 27 n.13. Further, the New York City Bar permits resident attorneys to maintain a "virtual law office" in New York even if their practice is located primarily out of state, a privilege that is not afforded to nonresidents. Assoc. of the Bar of the City of New York Comm. on Prof. Ethics, Formal Opinion 2014-2: Use of a Virtual Law Office by New York Attorneys (June 2014), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2014opinions/2023-formal-opinion-2014-02. That such accommodations exist solely for resident attorneys further undermines Section 470's nonprotectionist rationale and demonstrates the existence of less-restrictive alternatives to the office requirement.

[8] The Supreme Court's decision in *Friedman* is not to the contrary. The Court did not hold, as the majority asserts, Majority Op., ante at 28, that an office requirement would provide a "nonprotectionist alternative" to a residency requirement. Rather, in holding unconstitutional Virginia's residency requirement for admission on motion, the Court noted in dicta, without deciding the constitutionality of that alternative means, that an office requirement would be less restrictive. 487 U.S. at 70.

requirement is necessary to ensure the availability of attorneys for court proceedings as "unnecessary and irrational." *Frazier v. Heebe*, 482 U.S. 641, 649, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987).[9] The Court noted that resident lawyers may still maintain their office outside of the state, thus making themselves equally unavailable to the courts, and that "there is no link between residency within a State and proximity to a courthouse."[10] *Id.* at 650; *see also Barnard*, 489 U.S. at 553-54 (holding with respect to challenge under Privileges and Immunities Clause that unreliable airline and telephone service of Virgin Islands did not support a substantial justification for attorney residency requirement).

The majority, moreover, has not engaged in a meaningful analysis of the sufficiency of the State's proffered justifications, underscoring the extent of its departure from the established two-step inquiry under the Privileges and Immunities Clause. Instead, the majority concludes that Schoenefeld's claim must fail at the threshold because, in its view, she has failed to

---

[9] The Court's holding was pursuant to its supervisory authority over the lower federal courts rather than the Privileges and Immunities Clause, *see id.*, but its reasoning is equally applicable here.

[10] For example, an attorney practicing in Princeton, New Jersey would be far more accessible to New York City courts than an attorney located in Buffalo, New York. With respect to attorneys who reside a great distance from the State, the Court in *Piper* suggested that they could be required to retain a local attorney for the duration of court proceedings and to be available to the court on short notice. *Piper*, 470 U.S. at 287.

prove that Section 470 was enacted for a protectionist purpose. Even if such a *prima facie* showing is required, Schoenefeld has made one out based on the plain text and history of Section 470.

It is undisputed that, at the time Section 470 was enacted, it was part of a larger statutory scheme designed to prohibit nonresident attorneys from practicing in New York. *See Richardson v. Brooklyn City & N.R. Co.*, 22 How. Pr. 368, 370 (N.Y. Sup. Ct. Feb. 1, 1862) (noting that the court "ha[d] always required that an attorney should reside within the state"). Chapter 43, the earliest predecessor to Section 470, provided a less burdensome, but still burdensome, exception to the overall residency requirement as an accommodation to commuters in adjacent states. *Rosenberg v. Johns-Manville Sales Corp.*, 99 Misc.2d 554, 416 N.Y.S.2d 708, 710 (Sup. Ct. 1979) (explaining with respect to Section 470 that "[t]he requirement of residence, as a condition to the continued right to practice, appears to have been ameliorated for attorneys who reside in an adjacent State, but only upon condition they maintain an office for the practice of law in this State"); *see also* Brennan, *Repeal Judiciary Law* § 470, 62 N.Y.S.B.J. 20, 21 (Jan. 1990) ("The primary purpose of chapter 43 was to carve out an exception to the general rule that an attorney could not practice in the New York State courts unless he was a resident of New York State."). The majority contends that this statutory context is irrelevant because Schoenefeld has not been burdened by the general ban on nonresident attorneys,

which was invalidated under the Privileges and Immunities Clause in 1979. *See* Majority Op., ante at 20 (citing *In re Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979)). That a discriminatory and burdensome requirement can be stylized as an "exception" to an even more discriminatory and burdensome requirement, however, does not render it nondiscriminatory or render implausible a threshold inference of discriminatory purpose.[11]

The majority further reasons that because the office requirement, like the general ban on nonresident attorneys, was enacted in part to ensure an in-state place of service, *see Richardson*, 22 How. Pr. at 370, it does not exhibit a protectionist purpose. Majority Op., ante at 18-19. This gets it backward, however, for it is the State's burden to prove that service of process is a substantial interest justifying the restriction, not Schoenefeld's burden to prove that service of process

[11] The legislature's failure to amend or repeal Section 470 after New York's residency requirement was held unconstitutional, *see Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641, compounds, not alleviates, the constitutional problem, as the *Gordon* decision put the legislature on notice that the restrictions it placed on nonresident attorneys could be constitutionally problematic. Indeed, following *Gordon*, members of the legislature attempted, albeit unsuccessfully, to amend Section 470 to permit nonresidents to practice in New York without an office so long as they did not appear as the attorney of record. *See* J.A. 130-32. Regardless of whether that amendment would have effectively resolved the constitutional issue, its proponents were compelled by the conclusion that "*Gordon* and *Piper* . . . command elimination of residency requirements as a condition upon the right to practice law." J.A. 132.

was not a motivating concern for the statute. If the majority's rationale were sufficient, then any restriction based on residency, no matter how onerous, would pass constitutional muster so long as the State could point to a nonprotectionist purpose for the restriction. Were this the test, then there would have been no basis on which to invalidate in-state residency requirements for attorneys under the Privileges and Immunities Clause. *See, e.g.*, *Friedman*, 487 U.S. at 68 (rejecting as insufficient State's reasons for requiring residency of attorneys seeking admission on motion, including ensuring that those applicants "have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination" and facilitating the full-time practice of law); *Piper*, 470 U.S. at 285 (rejecting State's argument that nonresident attorneys "would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State"); *accord Gordon,* 48 N.Y.2d at 274, 422 N.Y.S.2d at 646 (holding that State's justification for residency requirement, the "observ[ation] and evaluat[ion] [of] the applicant's character," was insufficient due to "alternatives which are less restrictive than denial of admission to practice which would further this interest").[12]

---

[12] In none of the above cases, moreover, did the courts dissect the legislative history of the pertinent restrictions in order to discern a possible nonprotectionist purpose, as the majority does in this case. Rather, upon finding that the State's restrictions were

Finally, the majority concludes that the burdensome effects of Section 470 on nonresident attorneys are not actually discriminatory because, by ensuring that every attorney that practices in New York has a "physical premises" in the State, the office requirement serves "to place resident and nonresident attorneys on an equal footing, not to favor the former over the latter." Majority Op., ante at 23. Thus, the majority faults Schoenefeld's supposed failure to demonstrate that Section 470 poses an "undu[e] burden," Majority Op., ante at 24, because she did not provide evidence to show that significant numbers of New York attorneys in fact practice from their homes rather than from offices or that a nonresident's burden of maintaining an office in New York is greater than a resident's burden of maintaining a home in New York. As a factual matter, the majority's conclusion that the law poses no undue burden on nonresident attorneys directly conflicts with our findings earlier in this case. *See Schoenefeld*, 748 F.3d at 468 ("This additional obligation [on nonresident attorneys] carries with it significant expense – rents, insurance, staff, equipment *inter alia* – all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one.").[13] More

---

discriminatory, the State was required in those cases to explain why, at that time, the restrictions were justified. *Cf. McBurney*, 133 S. Ct. at 1715-16 (examining plain text of Virginia statute to determine whether distinction between residents and nonresidents had a protectionist aim).

[13] Although the majority brushes aside these findings as "dicta," Majority Op., ante at 23 n.11, the significant burden on nonresidents of maintaining an in-state office was central to our determination that Section 470, if interpreted to impose an in-state

importantly, these imagined burdens lose sight of the governing legal standard: "whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency." *Friedman*, 487 U.S. at 66-67. Though the Clause "does not promise nonresidents that it will be as easy for [them] as for residents to comply with a state's law," *Schoenefeld*, 748 F.3d at 467 (internal quotation omitted), a "wholesale bar has never been required to implicate the [Clause]," *Crotty*, 346 F.3d at 95. Here, it is enough that Section 470 substantially burdens nonresident attorneys by requiring them, and only them, to maintain separate office premises within the State.

The majority asserts that Section 470 places all attorneys on equal footing because the statute is, in effect, no different from a law that requires all attorneys to maintain a "physical presence" in New York. *See* Majority Op., ante at 25. But unlike the statutes upheld as constitutional in *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1044-45 (10th Cir. 2009) and *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1107-08 (3d Cir. 1997), which require all attorneys to maintain a physical presence within the State, Section 470 explicitly draws a distinction based on residency. This case is thus analogous to *Piper* and *Friedman*, where states' restrictions on

---

office requirement, "discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause." *Schoenefeld*, 748 F.3d at 469.

legal practice that applied only to nonresidents were invalidated under the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 70; *Piper*, 470 U.S. at 288. The Supreme Court, moreover, has long rejected the notion that a State's authority to pass a facially neutral law also empowers it to pass a discriminatory law. *Friedman*, 487 U.S. at 66-67 ("A state's abstract authority to require from resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the discriminatory distinction from the reach of the Privileges and Immunities Clause."). That New York could enact some other law that does not distinguish between residents and nonresidents is entirely inapposite to the question before us now.

III.

The State of New York has chosen to discriminate against nonresident attorneys with regard to their right to pursue a common calling, and it has failed to provide a substantial justification for that discrimination. In holding to the contrary, the majority unnecessarily disturbs longstanding Privileges and Immunities jurisprudence and denies nonresident attorneys their constitutionally-protected right to practice law "on terms of substantial equality" with residents of New York. *Piper*, 470 U.S. at 280. For these reasons, I respectfully dissent.

Ekaterina Schoenefeld, Respondent, v State of New York et al., Defendants, and Eric T. Schneiderman, as Attorney General for the State of New York, et al., Appellants.

No. 39

COURT OF APPEALS OF NEW YORK

25 N.Y.3d 22*; *29 N.E.3d 230*; *6 N.Y.S.3d 221*; *2015 N.Y. LEXIS 658*; *2015 NY Slip Op 02674

February 17, 2015, Argued
March 31, 2015, Decided

COUNSEL: Eric T. Schneiderman, Attorney General, Albany (Laura Etlinger, Barbara D. Underwood and Andrea Oser of counsel), for appellants.

Ekaterina Schoenefeld, Princeton, New Jersey, respondent pro se.

Meghan Boone, Institute for Public Representation, Georgetown University Law Center, Washington, D.C., for Michael H. Ansell and others, amici curiae.

Ronald B. McGuire, New York City, amicus curiae.

JUDGES: LIPPMAN, Chief Judge. Opinion by Chief Judge Lippman. Judges Read, Pigott, Rivera, Abdus-Salaam and Fahey concur. Judge Stein took no part.

OPINION BY: LIPPMAN

OPINION

LIPPMAN, Chief Judge:

In this case, the United States Court of Appeals for the Second Circuit has asked us to set forth the minimum requirements necessary to satisfy the statutory directive that nonresident attorneys maintain an office within the State "for the transaction of law business" under Judiciary Law § 470. We hold that the statute requires nonresident attorneys to maintain a physical office in New York.

Plaintiff Ekaterina Schoenefeld is a New Jersey resident who was admitted to the practice of law in New York in 2006. Schoenefeld is also admitted to practice in New Jersey and maintains her only law office in Princeton. According to the complaint, in 2007, Schoenefeld attended a continuing legal education class entitled *Starting Your Own Practice*, which was offered by the New York State Bar Association in New York City. There, she learned of the statutory requirement that nonresident attorneys must maintain an office within New York in order to practice in this State. Specifically, under Judiciary Law § 470, "[a] person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

Schoenefeld commenced this action in federal district court in July 2008, alleging that Judiciary Law § 470 was unconstitutional on its face and as applied

to nonresident attorneys in violation of the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2).[1] She alleged that she was unable to practice in the State, despite her compliance with all admission requirements, because she does not maintain an office in New York. She further maintained that there was no substantial state interest served by the office requirement, which was not applicable to New York resident attorneys.

The district court granted plaintiff's motion for summary judgment and held that section 470 violated the Privileges and Immunities Clause (*see Schoenefeld v New York*, 907 F Supp 2d 252, 266 [ND NY 2011]). The court determined that the office requirement implicated nonresident attorneys' fundamental right to practice law. The court then rejected the state interests proffered by defendants as insubstantial and found that, in any event, the statute did not bear a substantial relationship to the interests asserted as there were less restrictive means of accomplishing those interests.

The Second Circuit determined that the constitutionality of the statute was dependent upon the interpretation of the law office requirement (*see Schoenefeld v New York*, 748 F3d 464, 467 [2d Cir 2014]). The court

[1] This action was initially commenced in the Southern District of New York. That court granted defendants' motion to transfer venue to the Northern District. The Northern District then granted, in part, defendants' motion to dismiss the amended complaint by dismissing the action as against certain named defendants and by dismissing plaintiff's Commerce Clause and equal protection claims.

observed that the requirements that must be met by nonresident attorneys in order to practice law in New York reflect an important state interest and implicate significant policy issues. The court therefore certified the following question for our review: "Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an 'office for the transaction of law business' within the state of New York, what are the minimum requirements necessary to satisfy that mandate?" (*Schoenefeld*, 748 F3d at 471). We accepted certification (23 NY3d 941, 987 NYS2d 593, 10 NE3d 1148 [2014]) and, as noted above, we interpret the statute as requiring nonresident attorneys to maintain a physical law office within the State.

It is well settled that, where the language of a statute is clear, it should be construed according to its plain terms (*see Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107, 689 NE2d 1373, 667 NYS2d 327 [1997]). We have also held that "no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal" (*Raritan*, 91 NY2d at 107 [internal quotation marks, citation and emphasis omitted]).

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.[2] By

[2] The Appellate Division departments have not limited the application of the statute to residents of adjoining states, but have

its plain terms, then, the statute requires nonresident attorneys practicing in New York to maintain a physical law office here.

However, recognizing that there may be a constitutional flaw if the statute is interpreted as written, defendants urge us to construe the statute narrowly in accordance with the doctrine of constitutional avoidance (*see Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 593, 987 NE2d 621, 965 NYS2d 61 [2013] ["courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional"]). In particular, they suggest that the provision can be read merely to require nonresident attorneys to have some type of physical presence for the receipt of service – either an address or the appointment of an agent within the State. They maintain that interpreting the statute in this way would generally fulfill the legislative purpose and would ultimately withstand constitutional scrutiny.

The statute itself is silent regarding the issue of service. When the statute was initially enacted in 1862, however, it did contain a service provision. At that time, it essentially required that an attorney who maintained an office in New York, but lived in an adjoining state, could practice in this State's courts and

---

applied it to nonresident attorneys in general (*see e.g. Lichtenstein v Emerson*, 251 AD2d 64, 674 NYS2d 298 [1st Dept 1998]; *Matter of Haas*, 237 AD2d 729, 654 NYS2d 479 [3d Dept 1997]). We accept that interpretation, which is not contested by the parties, for the purposes of this certified question.

that service, which could ordinarily be made upon a New York attorney at his residence, could be made upon the nonresident attorney through mail addressed to his office (*see* L 1862, ch 43). Upon the enactment of the Code of Civil Procedure in 1877, the provision was codified at section 60 of the Code. In 1909, the provision was divided into two parts – a service provision, which remained at section 60 of the Code, and a law office requirement, which became section 470 of the Judiciary Law. Notably, after we invalidated a New York residency requirement for attorneys in *Matter of Gordon* (48 NY2d 266, 397 NE2d 1309, 422 NYS2d 641 [1979] the legislature amended several provisions of the Judiciary Law and the CPLR to conform to that holding (L 1985, ch 226). Section 470, however, was not one of the provisions amended and has remained virtually unchanged since 1909.

Even assuming the service requirement had not been expressly severed from the statute, it would be difficult to interpret the office requirement as defendants suggest. As the Second Circuit pointed out, even if one wanted to interpret the term "office" loosely to mean someplace that an attorney can receive service, the additional phrase "for the transaction of law business" makes this interpretation much less plausible. Indeed, the Appellate Division departments have generally interpreted the statute as requiring a nonresident attorney to maintain a physical office space (*see Lichtenstein*, 251 AD2d 64, 674 NYS2d 298; *Haas*, 237 AD2d 729, 654 NYS2d 479; *Matter of Larsen*, 182 AD2d

149, 587 NYS2d 39 [2d Dept 1992]). Defendants' proffered interpretation, on the other hand, finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute (*see Matter of Wood v Irving*, 85 NY2d 238, 245, 647 NE2d 1332, 623 NYS2d 824 [1995]).

The State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here. However, it is clear that service on an out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted. The CPLR currently authorizes several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email (*see* CPLR 2103[b]). Under our own Court rules, the admission of attorneys who neither reside nor have full-time employment in the State is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for the service of process for actions or proceedings brought against them relating to legal services offered or rendered (*see* Rules of Ct. of Appeals [22 NYCRR] § 520.13[a]). Therefore, there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary.

Accordingly, the certified question should be answered in accordance with this opinion.

Judges Read, Pigott, Rivera, Abdus-Salaam and Fahey concur; Judge Stein taking no part.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and record submitted, certified question answered in accordance with the opinion herein.

EKATERINA SCHOENEFELD, *Plaintiff-Appellee*, -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*, 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, MONICA DUFFY, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON, *Defendants-Appellants*.

Docket No. 11-4283-cv.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

748 F.3d 464*; *2014 U.S. App. LEXIS 6411

October 3, 2012, Argued
April 8, 2014, Decided

COUNSEL: EKATERINA SCHOENEFELD, Esq., Princeton, NJ, *for Plaintiff-Appellee*.

LAURA ETLINGER, Assistant Solicitor General (BARBARA D. UNDERWOOD, Solicitor General, ANDREA OSER, Deputy Solicitor General, *on the brief*) *for* ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Albany, NY, *for Defendants-Appellants*.

JUDGES: Before: RAGGI, HALL and CARNEY, Circuit Judges.

OPINION BY: HALL

HALL, *Circuit Judge*:

Defendants-Appellants appeal from the September 7, 2011 judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, J.) granting Plaintiff-Appellee's cross-motion for summary judgment and declaring New York Judiciary Law § 470 ("Section 470") unconstitutional as violative of the Privileges and Immunities Clause of Article IV, section 2 of the Constitution. Specifically, the district court held that Section 470, which requires nonresident attorneys to maintain an "office for the transaction of law business" within the state of New York in order to practice in New York courts, places an impermissible burden on Plaintiff-Appellee's fundamental right to practice law and that the state "failed to establish either a substantial state interest advanced by [the statute], or a substantial relationship between the statute and that interest." *Schoenefeld v. New York*, 907 F. Supp. 2d 252, 266 (N.D.N.Y. 2011).

For the reasons that follow, we respectfully certify a controlling question of state law to the New York Court of Appeals.

BACKGROUND

Plaintiff-Appellee Ekaterina Schoenefeld ("Schoenefeld") is a solo practitioner licensed to practice law in the states of New York, New Jersey, and California. She is also admitted to practice in a number of federal courts including the Northern District of New York. Schoenefeld graduated from Rutgers University School of Law in 2005. She maintains her residence and law office in Princeton, New Jersey.

Section 470, entitled "Attorneys having offices in this state may reside in adjoining state," provides that "[a] person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." N.Y. Judiciary Law § 470 (McKinney 2014). Schoenefeld asserts that she has "never advertised [herself] as practicing law in the state courts of New York and [has] never represented any clients in New York state courts." J.A. at 55. In fact, she states that she has refused occasional requests to represent clients in New York state courts because "accepting these matters would have violated § 470 of the Judiciary Law." *Id.*

Schoenefeld initially brought this action in the Southern District of New York, challenging the constitutionality of Section 470, both facially and as applied, under the Privileges and Immunities Clause of Article IV, section 2 of the Constitution ("P&I Clause" or the "Clause"), the Equal Protection Clause of the Fourteenth Amendment to the Constitution ("Equal Protection Clause"), and the Commerce Clause of Article 1, section 8 of the Constitution ("Commerce Clause"). On Defendants' motion, the action was subsequently transferred to the Northern District of New York. The district court then dismissed Schoenefeld's Equal Protection Clause and Commerce Clause claims as well as her claims against the State of New York, the New York Supreme Court, Appellate Division, Third Judicial Department ("Third Department"), and the Committee on Professional Standards of the Third Department ("Committee on Professional Standards").[1] It permitted Schoenefeld, however, to proceed against the remaining Defendants (all individuals serving in their official capacity) on her claim that Section 470 violates the Privileges and Immunities Clause. Following discovery, the parties cross-moved for summary judgment.

---

[1] The complaint named as Defendants the State of New York; Andrew Cuomo, then Attorney General for the State of New York; the Third Department; All Justices of the Third Department; Michael J. Novack, then Clerk of the Third Department; the Committee on Professional Standards and its members; as well as Thomas C. Emerson, then Chairperson of the Committee on Professional Standards.

The district court determined that Section 470 infringes on one of the fundamental rights protected by the Privileges and Immunities Clause; the right to practice law. The court further concluded that the state failed to demonstrate a "substantial state interest justifying Section 470" as well as a "substantial relationship between Section 470 and the interests that Defendants claim it advances." *Schoenefeld*, 907 F. Supp. 2d at 264. The district court therefore held the statute unconstitutional and granted Schoenefeld's motion for summary judgment. Because the question of the constitutionality of New York Judiciary Law § 470 turns on the interpretation of a provision of the statute that implicates significant New York state interests and is determinative of this appeal, we reserve decision and certify a controlling question of state law to the New York Court of Appeals.

DISCUSSION

The Privileges and Immunities Clause provides that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. The Clause's purpose is to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). "[I]t is '[o]nly' with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment." *Supreme Court of N.H. v. Piper*, 470 U.S.

274, 279, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985) (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978)). While "[t]he Privileges and Immunities Clause does not promise nonresidents that it will be as easy for [nonresidents] as for residents to comply with a state's law; it . . . protects nonresidents from legal classifications that treat them more harshly (without justification)." *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1045 (10th Cir. 2009). To prevail on a P&I Clause claim, "a plaintiff must demonstrate that the 'State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens.'" *Bach v. Pataki*, 408 F.3d 75, 88 (2d Cir. 2005), *overruled on other grounds by McDonald v. Chicago*, 561 U.S. 2, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (quoting *Conn. ex rel Blumenthal v. Crotty*, 346 F.3d 84, 94 (2d Cir. 2003)). "Where a protected privilege or immunity is implicated, the State may defeat the challenge . . . by demonstrating: '(a) a substantial reason for the discrimination, and (b) a reasonable relationship between the degree of discrimination exacted and the danger sought to be averted by enactment of the discriminatory statute.'" *Id.* (citations omitted).

The right to practice law has long been held to be one of the privileges and immunities within the Clause. *Piper*, 470 U.S. at 281 ("[T]he practice of law falls within the ambit of the Privileges and Immunities Clause."). Appellants do not argue to the contrary on appeal but instead contend that the office requirement imposed by Section 470 can be read in a manner that

does not implicate the P&I Clause, that is, an "office for the transaction of law business" requires only an address for accepting personal service, which "might" be satisfied by designating an agent for the service of legal papers. *See* Appellants' Br. at 25. Alternatively, Appellants contend, if this Court does determine that the statute discriminates against nonresident attorneys, the office requirement still does not violate the Clause as it imposes an "incidental burden on the ability of nonresident attorneys to practice in New York courts" substantially related to sufficient state interests – service of legal papers and "enabling the New York courts to adjudicate [service related] disputes." Appellants' Br. at 20-21.

Preliminarily, we note that with respect to New York residents the Judiciary Law does not impose a specific obligation on an attorney to maintain an office for the transaction of law business in New York. *See Lichtenstein v. Emerson*, 171 Misc. 2d 933, 656 N.Y.S.2d 180, 182 (N.Y. Sup. Ct. 1997), *affirmed*, 251 A.D.2d 64, 674 N.Y.S.2d 298 (1st Dep't 1998) (upholding constitutionality of Section 470 but noting that a resident attorney may utilize her home as an office). The New York Civil Practice Law and Rules of Professional Conduct require, of course, that an attorney be adequately equipped to maintain a certain level of accessibility and communication with clients, but a review of those laws yields no authority specifically requiring New York residents to maintain any office at

all.[2] A New York attorney, therefore, may set up her "office" on the kitchen table in her studio apartment and not run afoul of New York law.

As to nonresident attorneys, however, Section 470 mandates that they shoulder the additional obligation to maintain some sort of separate office premises within the state. In particular, the New York Supreme Court and its Appellate Division courts – the New York Court of Appeals having yet to address this issue – have never interpreted Section 470's office requirement to be satisfied by something less that the maintenance of physical office space in New York state. *See, e.g.*, *Kinder Morgan Energy Partners, LP v. Ace Am. Ins. Co.*, 51 A.D.3d 580, 859 N.Y.S.2d 135, 135 (1st Dep't 2008) (affirming lower court's order dismissing without prejudice action commenced by nonresident attorney who did not maintain a "local office"); *Elm Mgmt. Corp. v. Sprung*, 33 A.D.3d 753, 823 N.Y.S.2d 187, 188 (2d Dep't 2006) (noting that failure to maintain a bona fide office is "noncompliance by the plaintiff's counsel"); *Keenan v. Mitsubishi Estate, N.Y., Inc.*, 228 A.D.2d 330, 644 N.Y.S.2d 241, 242 (1st Dep't 1996) (reversing a dismissal under Section 470 where a New Jersey law firm had "entered into a reciprocal satellite office sharing agreement with a firm located" in New York County); *In re Larsen*, 182 A.D.2d 149, 587 N.Y.S.2d 39, 43 (2d Dep't 1992) (post office box is insufficient to satisfy Section 470); *Application of Tang*, 39 A.D.2d 357,

[2] Rule of Professional Conduct 1.15 requires an attorney to maintain complete and accurate books and records, but nothing in that Rule requires an attorney to maintain an "office."

333 N.Y.S.2d 964, 966 (1st Dep't 1972) ("[T]o practice here an attorney must be resident here or a resident of an adjoining State who *commutes to his office here.*" (emphasis added)); *Lichtenstein*, 656 N.Y.S.2d at 181 (interpreting Section 470 as requiring a "bona fide office" and finding that counsel had failed to comply with Section 470 where he maintained as an office a room in the basement of a restaurant owned by a corporation in which he was a shareholder); *Rosenberg v. Johns-Manville Sales Corp.*, 99 Misc. 2d 554, 416 N.Y.S.2d 708, 711 (N.Y. Sup. Ct. 1979) (concluding that an "office" is established only where a partner, rather than an associate, is admitted to the New York State Bar and practicing out of a New York office); *see also* Brennan, *Repeal Judiciary Law* § 470, 62 N.Y.S.B.J. 20, 21 (Jan. 1990) (noting that Section 470's predecessor, chapter 43, "can be viewed, essentially, as an accommodation of 'commuters' "). This additional obligation carries with it significant expense – rents, insurance, staff, equipment *inter alia* – all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one.[3]

[3] Although a nonresident attorney could also potentially fulfill the requirement via an "of counsel" arrangement, such an arrangement is nearly equally as burdensome in that it carries with it additional malpractice exposure for the New York firm, which may demand compensation from the nonresident attorney in exchange for establishing an "of counsel" relationship. This is assuming, of course, that a nonresident attorney can find a local firm willing to commit to such a relationship.

In the face of the prevailing authority from New York's lower courts and for the reasons explained below, there is no question that resolution of this appeal turns on the meaning of "office for the transaction of law business" as used in N.Y. Judiciary Law § 470. Appellants, seeking to persuade us that the statute is not so onerous as to be unconstitutional, argue that this Court need not read the phrase to require a physical office space with a desk, a telephone, and staff, but rather may hold that the language can permissibly be read to require merely an address at which a nonresident attorney may be served legal papers. Alternatively, Appellants maintain that the designation of an agent in New York to receive service of papers "might even suffice." These arguments, however, are not supported by the New York precedent discussed above. Moreover, the absence of authority from New York's highest court does not provide us license to disregard lower court rulings nor to analyze the question as though we were presented with a blank slate. *See Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 321 (2d Cir. 1999) ("While we are not strictly bound by the decision of the Appellate Division, it is nevertheless a well-established principle that the ruling of 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940))); *see also Windsor v. United States*, 699 F.3d 169, 177 (2d Cir. 2012).

We also note that the term "office," by itself, although not exactly pellucid, implies more than just an address or an agent appointed to receive process.[4] And the statutory language that modifies "office" – "for the transaction of law business" – may further narrow the scope of permissible constructions. In light of New York's existing jurisprudence, for a federal court to construe the statute such that the word "office" means either an in-state agent authorized to receive process or simply an address for service of papers will take us far beyond the limits of statutory construction that would comfortably apply here. In sum, as it stands, it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause. Absent a controlling interpretation of Section 470 by the New York Court of Appeals, this Court is left to predict how that court would construe the critical language in Section 470 – a task, under the circumstances, we prefer to avoid until it becomes necessary for us to undertake it.

"[T]he Supreme Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 137

---

[4] In its definition most relevant to these circumstances, the Oxford English Dictionary defines "office" as "[a] room, set of rooms, or building used as a place of business for non-manual work; a room or department for clerical or administrative work." "*Office, n.*" *Definition*, OED Online (3d ed. Mar. 2014) (Apr. 3, 2014), http://www.oed.com/view/Entry/130640?rskey=pvVa8b&result=2&isAdvanced=false.

L. Ed. 2d 170 (1997), urged the federal courts of appeals to use certification in order to avoid deciding constitutional questions unnecessarily or prematurely." *Tunick v. Safir*, 209 F.3d 67, 72 (2d Cir. 2000). We should, therefore, "consider certifying in more instances than had previously been thought appropriate, and do so even when the federal courts might think that the meaning of a state law is 'plain.'" *Id.* at 73. We have also previously made clear that "[w]hether our Court agrees or disagrees with the Court of Appeals' construction of New York law is of no moment." *Portalatin v. Graham*, 624 F.3d 69, 89 (2d Cir. 2010). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997). "More, it would be perverse for a federal court to discourage a state court from searching for 'every reasonable construction' of a state statute to 'save [the] statute from unconstitutionality.'" *Portalatin*, 624 F.3d at 90 (quoting *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 2929-30, 177 L. Ed. 2d 619 & n.41 (2010)).

"Under Second Circuit Local Rule 27.2, we may certify to the New York Court of Appeals determinative questions of New York law [that] are involved in a case pending before [us] for which no controlling precedent of the Court of Appeals exists." *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013) (internal quotation marks omitted). Prior to doing so, we must first determine "(1) whether the New York Court of Appeals has

addressed the issue and, if not, whether the decisions of other New York courts permit us to predict how the Court of Appeals would resolve it; (2) whether the question is of importance to the state and may require value judgments and public policy choices; and (3) whether the certified question is determinative of a claim before us." *Id.* (quoting *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012)) (internal quotation marks omitted).[5]

Applying the factors noted above, we determine that the Court of Appeals has not issued any opinion addressing the constitutionality of Section 470, nor has it specifically construed the term "office for the transaction of law business." Moreover, in light of the potential that the requirements in Section 470 violate the P&I Clause, we cannot predict at this time, based on the current decisions of other New York courts, how the New York Court of Appeals will interpret the statute.

We next consider "the importance of the issue to the state," *Runner v. N.Y. Stock Exchange*, 568 F.3d 383, 388 (2d Cir. 2009) (quotation and internal quotation marks omitted), and "whether it is the kind of question that 'may require value judgments and public policy choices,'" *Osterweil*, 706 F.3d at 143 (quoting *Barenboim*, 698 F.3d at 109). The requirements imposed on a

[5] We have noted, however, that "[c]ertification . . . is not proper where the question does not present a complex issue, there is no split of authority and sufficient precedents exist for us to make [a] determination." *Tinelli v. Redl*, 199 F.3d 603, 606 n.5 (2d Cir. 1999) (quoting *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997)) (internal quotation marks omitted).

nonresident attorney to be able to practice law in New York are important to the state and clearly implicate value judgments and policy choices – ones that should not be ceded to a federal court of appeals when it is unnecessary to do so in the first instance. Additionally, remedies imposed for an attorney's failure to comply with Section 470 will have a serious impact on both lawyers and litigants themselves. For example, noncompliance with Section 470's requirements may result in dismissal of a complaint filed by the noncompliant nonresident attorney, *see Lichtenstein v. Emerson*, 251 A.D.2d 64, 674 N.Y.S.2d 298, 298 (1st Dep't 1998), or disciplinary charges against that attorney, *see In re Larsen*, 587 N.Y.S.2d at 43. Given the gravity of these penalties and the many thousands of attorneys licensed to practice in New York courts who stand to be affected by a decision concerning the constitutionality of Section 470, the issue meets the second requirement for certification.

Finally, we consider "the capacity of certification to resolve the litigation." *Runner*, 568 F.3d at 388. As this case now stands, whether Section 470 survives constitutional scrutiny depends on the construction of the in-state office requirement imposed on nonresident attorneys. If the New York Court of Appeals accepts and answers our certified question(s), that answer, in all likelihood, dictates the outcome of the constitutional privileges and immunities analysis we have commenced and must complete as we decide the appeal before us.

CONCLUSION

Because it is "our preference that states determine the meaning of their own laws in the first instance," *Joseph v. Athanasopoulos*, 648 F.3d 58, 68 (2d Cir. 2011), we respectfully certify the following question to the New York Court of Appeals:

> Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York, what are the minimum requirements necessary to satisfy that mandate?

The New York Court of Appeals may, of course, expand, alter, or reformulate this question as it deems appropriate. *See Kirschner v. KPMG LLP*, 590 F.3d 186, 195 (2d Cir. 2009).

It is hereby ORDERED that the Clerk of the Court transmit to the Clerk of the New York Court of Appeals a certificate in the form attached, together with a copy of this opinion and a complete set of the briefs, appendices, and record filed by the parties in this Court. This panel will retain jurisdiction to decide the case once we have the benefit of the views of the New York Court of Appeals or once that court declines to accept certification. It is further ORDERED that the parties bear equally any fees and costs that may be imposed by the New York Court of Appeals.

CERTIFICATE

The following question is hereby certified to the New York Court of Appeals pursuant to Second Circuit Local Rule 27.2 and New York Compilation of Codes, Rules, and Regulations, title 22, section 500.27(a), as ordered by the United States Court of Appeals for the Second Circuit:

> Under New York Judiciary Law § 470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York, what are the minimum requirements necessary to satisfy that mandate?

EKATERINA SCHOENEFELD, Plaintiff, -against- STATE OF NEW YORK, et al., Defendants.

1:09-CV-00504 (LEK/RFT)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

907 F. Supp. 2d 252*; *2011 U.S. Dist. LEXIS 100576

September 7, 2011, Decided
September 7, 2011, Filed

COUNSEL: For Ekaterina Schoenefeld, Plaintiff: Ekaterina, LEAD ATTORNEY, Schoenefeld Law Firm LLC, Princeton, NJ.

For State of New York, John Stevens, chairman of the Committee on Professional Standards "COPS", other, Thomas C. Emerson Defendants: Christina L. Roberts-Ryba, LEAD ATTORNEY, Nixon, Peabody Law Firm – Albany Office, Albany, NY.

For Andrew M. Cuomo, in his official capacity as Attorney General for the State of New York, New York Supreme Court, Appellate Division, Third Judicial Department, All Justices of New York Supreme Court, Appellate Division, Third Judicial Department, Michael J. Novack, in his official capacity as Clerk of 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: Christina L. Roberts-Ryba, LEAD ATTORNEY, Nixon, Peabody Law Firm – Albany Office, Albany, NY; Kevin

P. Hickey, New York State Attorney General – Albany Office, Albany, NY.

JUDGES: Lawrence E. Kahn, United States District Judge.

OPINION BY: Lawrence E. Kahn

OPINION

MEMORANDUM – DECISION and ORDER

I. INTRODUCTION

Plaintiff Ekaterina Schoenefeld ("Plaintiff") filed this action for equitable relief pursuant to 42 U.S.C. § 1983 in the Southern District of New York on April 1, 2008. *See* Complaint (Dkt. No. 1) ¶ 2. Plaintiff alleges that New York Judiciary Law Section 470 (McKinney 2010) ("Section 470") is unconstitutional on its face and as applied because it violates Article IV, section 2 of the United States Constitution ("Privileges and Immunities Clause"); the Equal Protection Clause of the Fourteenth Amendment; and Article I, section 8 of the Constitution ("Commerce Clause"). *See* Amended Complaint (Dkt. No. 4) ¶¶ 2, 23, 27, 29. Plaintiff brought this action naming thirty-seven Defendants, including the State of New York ("New York"); Andrew M. Cuomo in his official capacity as Attorney General for the State of New York; the New York Supreme Court, Appellate Division, Third Judicial Department ("Appellate Division, Third Department"); all Justices of the Appellate Division, Third Department; Michael J. Novack in his official capacity as Clerk of the Appellate

Division, Third Department; the Committee on Professional Standards of New York Supreme Court, Appellate Division ("Committee on Professional Standards"); the Third Judicial Department and its Members; and John Stevens in his official capacity as Chairman of the Committee on Professional Standards (collectively, "Defendants"). Am. Compl. ¶ 7.

On April 16, 2009, Defendants' Motion to transfer this action to the Northern District of New York under 28 U.S.C. § 1404(a) was granted for the convenience of Defendants. *See* Memorandum and Order (Dkt. No. 17). On June 16, 2009, Defendants filed a Motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction because the claims were not ripe for review. *See* Memorandum of Law in Support of Motion to Dismiss (Dkt. No. 20-2) ("Mem. Supp. Mot. to Dismiss"). On February 8, 2010, the Court found that Plaintiff's claims were ripe but granted the Motion to dismiss with respect to Defendants New York, Appellate Division, Third Department; and Committee on Professional Standards; and dismissed in their entirety Plaintiff's claims against all Defendants under the Fourteenth Amendment and the Commerce Clause. Memorandum-Decision and Order (Dkt. No. 32) ("February 2010 Order") at 12. The February 2010 Order did, however, permit Plaintiff to proceed with her claims against the remaining Defendants under the Privileges and Immunities Clause. *Id.*

Now before the Court are Defendants' and Plaintiff's Motions for summary judgment, which were both

filed on December 15, 2010. Dkt. Nos. 62, 64. On January 18, 2011, Defendants filed a Response to Plaintiff's motion for summary judgment ("Defendants' Response"); and Plaintiff filed a Response to Defendants' motion for summary judgment ("Plaintiff's Response"). Dkt. Nos. 65, 70. On January 24, 2011, both Defendants and Plaintiff filed Reply Memoranda. Dkt. Nos. 72, 73 ("Defendants' Reply" and "Plaintiff's Reply," respectively). For the reasons discussed below, Defendants' Motion for summary judgment is denied, and Plaintiff's Motion for summary judgment is granted.

II. BACKGROUND

A. Plaintiff's Claims and the Present Section 470

Plaintiff is a 2005 graduate of Rutgers University School of Law-Newark and is licensed to practice law in the states of New York, New Jersey, and California. *See* Am. Compl. ¶ 5; Defendants' Statement of Material Facts (Dkt. No. 62-1) ("Def. Stat. Mat. Facts") ¶ 1. Plaintiff maintains her residence and law office in Princeton, New Jersey, which is an hour-long commute from the New York state line and New York City. *Id.* ¶ 6; Def. Stat. Mat. Facts ¶ 1. Plaintiff states that while attending a continuing legal education course, entitled *Starting Your Own Practice*, she learned that under Section 470, nonresident attorneys may not practice law in New York without maintaining an office located in New York. *See* Am. Compl. ¶ 17.

Section 470, which does not apply to attorneys who reside in New York, provides: "A person, regularly admitted to practice as an attorney and counselor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." N.Y. JUDICIARY LAW § 470 (McKinney 2010). Section 470 continues to be enforced by Defendants and by New York courts. *See* Plaintiff's Statement of Material Facts (Dkt. No. 64-1) ("Pl. Stat. Mat. Facts") ¶ 8; Schoenefeld Decl. (Dkt. No. 64-3), Exs. E, G, H (Def. Resp. Req. Admis. ¶¶ 3, 7). Plaintiff is unable to practice law in New York, despite her full compliance with all requirements applicable to attorneys residing in New York, because she does not maintain an office in New York. *See* Am. Compl. ¶ 19; Def. Stat. Mat. Facts ¶ 1; Answer (Dkt. No. 33) ¶ 4. Section 470 has not yet been enforced against Plaintiff; however, Plaintiff claims that because she has no office in New York, the law has forced her to refrain from representing clients when doing so would require her to practice in New York courts. *See* Plaintiff's Memorandum of law in support of Motion for Summary Judgment (Dkt. No. 64-2) ("Pl. Mem. Supp. S. J.") at 5.

B. Legislative History of Section 470

Chapter 43, the original version of Section 470, was first enacted on March 22, 1862. Schoenefeld Decl., Ex. F. At that time, state law provided that only New York residents could be admitted to practice law in

New York.[1] Schoenefeld Decl., Ex. L. Prior to the enactment of Chapter 43, this rule applied to New York attorneys who moved to another state; thus, a New York attorney who moved outside of the state automatically lost the right to practice law in New York. *Id.* Chapter 43 provided a limited exception to the rule that only New York residents could be admitted to practice law in New York:

> Any regularly admitted and licensed attorney of . . . this State, and whose only office for the transaction of law business is within this state, may practice as such attorney in any of the courts of this State notwithstanding he may reside in a state adjoining the state of New York, provided that this act shall extend only to attorneys who have been . . . admitted to practice in the Courts of this State, and who reside out of the State of New York, and that service of papers which might according to the practice of the Courts of this State, be made upon said attorney at his residence, if the same were within the state of New York, shall be sufficient if made upon him . . . directed to said attorney at his office . . . and such service shall be equivalent to personal service at the office of such attorney.

Id. Thus, Chapter 43 specifically allowed attorneys who were already licensed in New York to continue to

---

[1] This requirement was later held unconstitutional by the New York Court of Appeals. *Matter of Gordon*, 48 N.Y.2d 266, 271, 397 N.E.2d 1309, 422 N.Y.S.2d 641, (1979) (citations omitted).

practice in New York courts, so long as their only office for the practice of law was located in New York. *Id.*

In 1866, Chapter 43 was reenacted as Chapter 173 to eliminate the requirement that a nonresident attorney's only office be in New York for that attorney to practice law in-state. Schoenefeld Decl., Ex. F (L. 1866, ch. 175, § 1 (6 Edm., 706)). Chapter 173 stated:

> Any regularly admitted or licensed attorney or counselor of . . . this state, and whose office for the transaction of law business is within this state, may practice as such attorney or counselor in any of the courts of this state, notwithstanding he may reside in a state adjoining the State of New York; provided, that service of papers, which might . . . be made upon him by depositing the same in the post-office . . . directed to said attorney at his office . . . and such service shall be equivalent to personal service at the office of such attorney.

Id. In 1877, Chapter 173 was again reenacted as § 60 of the New Code of Civil Procedure, which provided that:

> A person, regularly admitted to practice as attorney and counselor, in the courts of record of the State, whose office for the transaction of law business is within the State, may practice as such attorney or counselor, although he resides in an adjoining state. But service of a paper, which might be made upon him at his residence, if he was a resident of

> the State, may be made upon him, by depositing the paper in the city or town where his office is located, properly inclosed [sic] in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

Id. (Code Civ. P., § 60 (1877)).

The statute was later divided in 1908, by the Board of Statutory Compilation, and the first sentence of § 60 became Section 470, while the balance of the statute was retained in the Code of Civil Procedure. *See* Board of Statutory Consolidation, cmt. 29 to § 60 (1908). Section 470 was officially enacted in 1909, later reenacted in 1945, and remains in the same form today: "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." Attorneys who reside in New York, by contrast, are permitted under New York law to have only offices located outside the state of New York if they so choose, or to maintain no office outside of the state in which they reside.

III. STANDARD OF REVIEW

Summary judgment is granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). There is a genuine issue of material fact only if the evidence shows that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). To decide a motion for summary judgment, all reasonable evidentiary inferences must be made in favor of the nonmoving party. *See id.* at 255; *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has properly supported its motion, the burden shifts to the nonmoving party to show the existence of a genuine dispute for trial. *See Anderson*, 477 U.S. at 250. The nonmoving party must provide sufficient and specific facts demonstrating the genuine issues for trial, and may not rely on conclusory or speculative allegations to make such a showing. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *First Nat'l Bank of Az. v. Cities Serv. Co.*, 391 U.S. 253, 288, 88 S. Ct. 1575, 20 L .Ed. 2d 569 (1968); *Golden Pacific Bancorp. v. F.D.I.C.*, 375 F.3d 196, 200 (2d Cir. 2004). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

IV. DISCUSSION

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The purpose of the Privileges and Immunities Clause is to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The Supreme Court has traditionally interpreted the Privileges and Immunities Clause to prevent a state from imposing an unreasonable burden on citizens of other states to (1) conduct business, or pursue a common calling within the state; (2) to own private property within the state; and (3) to gain access to the courts of the states. *See Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978) (citing *Ward v. Maryland*, 79 U.S. 418, 20 L. Ed. 449 (1871); *Blake v. McClung*, 172 U.S. 239, 19 S. Ct. 165, 43 L. Ed. 432 (1898); *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553, 40 S. Ct. 402, 64 L. Ed. 713 (1920)).

The Privileges and Immunities Clause, however, is "not an absolute" – in other words, it does not wholly prohibit a state from using residency to distinguish between persons. *Toomer*, 334 U.S. at 396. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Baldwin*, 436 U.S. at 383 (holding that the right to have a hunting license is not "fundamental" under the Privileges and Immunities Clause because

access to elk hunting is not necessary to promote interstate harmony). Therefore, the Privileges and Immunities Clause is implicated only if a state (1) infringes on a fundamental right or privilege, which promotes interstate harmony, and (2) the state infringes on that right on the basis of state residency. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); *Baldwin*, 436 U.S. at 379. If a state statute does not infringe on a fundamental right, or if the discrimination it effects is not based on residency within that state, a challenge to the statute under the Privileges and Immunities Clause must fail. *See Piper*, 470 U.S. at 284.

A finding that a state deprives a nonresident of a fundamental privilege does not end the inquiry. *Id.* Rather, the state is then afforded the opportunity to demonstrate (1) a substantial interest for the discrimination, and (2) that the means used bear a close or substantial relation to that interest. *See Piper*, 470 U.S. at 284. Additionally, in addressing the latter prong, the Court must consider "the availability of less restrictive means" to advance that interest. *Id.*

Plaintiff claims that Section 470 infringes on her right to practice law in New York in violation of the Privileges and Immunities Clause. Am. Compl. ¶ 23. Plaintiff claims that Section 470 effectively imposes a residency requirement on nonresident attorneys because it conditions the practice of law in New York on maintaining an office in New York. *See id.* ¶ 21. Plaintiff further asserts that this requirement serves no substantial state interest and unnecessarily prevents

her from practicing law in New York, despite the fact that she meets all of the requirements imposed on attorneys who are New York residents. *See id.* ¶ 22. Specifically, Plaintiff argues that Defendants can offer no substantial reason for Section 470's discrimination against nonresident attorneys, that state court decisions have shown no valid purpose for Section 470 and inconsistent interpretations of the statute have resulted, and that Section 470 is an artificial trade barrier for nonresident attorneys admitted to practice law in New York. *See* Pl. Mem. Supp. S.J. at 10-21. Plaintiff seeks the following declaratory and injunctive relief: 1) an order declaring Judiciary Law Section 470 unconstitutional; 2) an order permanently enjoining Defendants from enforcing the law; and 3) an award of costs and reasonable attorneys' fees. *Id.*

Defendants argue in their Motion for summary judgment that Section 470 does not impose a residency requirement, and that therefore review under the Privileges and Immunities Clause is not triggered. Defendants' Memorandum of law in support of Motion for Summary Judgment ("Def. Mem. Supp. S.J.") (Dkt. No. 62-2) at 4-10. In the alternative, Defendants argue that even if review under the Privileges and Immunities Clause is triggered, (1) the state has a substantial interest in ensuring that nonresident attorneys are amenable to in-state service of process and available for court proceedings and contact by interested parties; and (2) Section 470 bears a substantial relation to this state interest because it employs the least restrictive means of achieving this interest. *Id.* at 11-13.

A. Fundamental Right

In order to implicate the Privileges and Immunities Clause, Section 470 must deprive nonresidents of a fundamental right or privilege. *See Baldwin*, 436 U.S. at 388. A fundamental right within the meaning of the Privileges and Immunities Clause is one that promotes interstate harmony. *See Piper*, 470 U.S. at 284; *Baldwin*, 436 U.S. at 388. The privilege at issue in the present case is the right to practice law, which, Defendants argue, is not implicated by Section 470. *See* Def. Mem. Supp. S.J. at 10.

"[O]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer*, 334 U.S. at 396. The Supreme Court has long held that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 219, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984). The practice of law has long been held to be a fundamental right within the meaning of the Privileges and Immunities Clause because the profession has both a commercial and noncommercial role in the United States. *See Barnard v. Thorstenn*, 489 U.S. 546, 553, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989); *Piper*, 470 U.S. at 281; cf. *Parnell v. Supreme Court of Appeals of W.Va.*, 110 F.3d 1077, 1081-82 (4th Cir. 1997) (holding that sponsoring applicants for *pro hac vice* admission to practice law is

not a core component of the fundamental right to practice law).

B. Discrimination on the Basis of Residency

As the practice of law is plainly a fundamental right under the Privileges and Immunities Clause, the Court must now determine whether Section 470 impermissibly infringes upon that right on the basis of state residency. Defendants argue that Section 470 does not trigger privileges and immunities review because it imposes an office requirement, not a residency requirement, on nonresident attorneys seeking to practice law in New York. *See* Defs.' Reply at 5. However, the Privileges and Immunities Clause has "consistently [been] interpreted to prevent a State from imposing discriminatory burdens on nonresidents, whether by means of artificial trade barriers in the form of unequal licensing fees, taxes imposed on out-of-State vendors, or employment preferences granted only to residents." *Matter of Gordon*, 48 N.Y.2d at 271 (citations omitted). Although Section 470 imposes an office requirement rather than a residency requirement on out-of-state attorneys, that does not necessitate failure of Plaintiff's claims under the Privileges and Immunities Clause.

The Supreme Court has found state statutes violative of the Privileges and Immunities Clause where such statutes either discriminated against nonresidents by placing an additional cost on conducting business in-state, or prevented nonresidents from obtaining employment in-state. *See Hicklin v. Orbeck*, 437 U.S. 518,

98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978) (finding Alaska statute unconstitutional because it contained a state resident hiring preference for all employment relating to development of the state's oil resources); *Toomer*, 334 U.S. at 385 (finding South Carolina statute unconstitutional where it required nonresident fishermen to pay a license fee of $2500 for each shrimp boat owned, while residents were required to pay $25 for each shrimp boat owned); *Ward v. Maryland*, 79 U.S. 418, 20 L. Ed. 449 (1871) (finding Maryland statute unconstitutional where it required nonresidents to pay $300 per year for a license to trade in goods not manufactured in Maryland, while residents were only required to paid a fee within the range of $12 to $150). *See also United Bldg. & Constr.*, 465 U.S. at 208 (finding a city ordinance unconstitutional under the Privileges and Immunities Clause where it required at least forty percent of employees of contractors on city construction projects to be city residents).

Similarly, Section 470 places an additional threshold cost on all nonresidents wishing to practice law in New York – an additional threshold cost that resident attorneys are not required to incur. A resident attorney of New York may operate an office for the practice of law out of his home or residence. *See Lichtenstein v. Emerson*, 171 Misc. 2d 933, 656 N.Y.S.2d 180, 182 (Sup. Ct. 1997). Conversely, a nonresident attorney must maintain, at minimum, both her residence in another state and an office in New York. *See id.* A nonresident attorney may be required to pay property taxes and rent or mortgage payments on her home, on an office

maintained in New York, and potentially on an office maintained in her home state, whereas a New York resident attorney may only be required to pay taxes on her home. This imposes a financial burden far surpassing that imposed by either the licensing fee disparity of $2475 found unconstitutional in *Toomer*, or the $288 fee disparity found unconstitutional in *Ward*. *Cf. Toomer*, 334 U.S. at 385; *Ward*, 79 U.S. at 418. The additional costs that nonresident attorneys incur in order to practice law in New York impose a significant burden on those who wish to practice law in multiple states. *Cf. Matter of Gordon*, 48 N.Y.2d at 272 (stating that attorneys who wished to practice law in multiple states were "foreclosed from doing so" by the now-unconstitutional New York residency requirement for admission). Section 470 thus effectively precludes a number of nonresident attorneys from practicing law in New York, regardless of whether they have complied with all requirements imposed on residents to practice law in New York. All of these factors support a conclusion that Section 470 infringes on the right to practice law in New York on the basis of residency and is therefore discriminatory under the Privileges and Immunities Clause.

In *Frazier v. Heebe*, 482 U.S. 641, 654-55, 107 S. Ct. 2607, 96 L. Ed 2d 557 (1987), the Supreme Court held, without addressing its constitutionality, that a similar office requirement imposed by a local Louisiana district court rule was "unnecessary and irrational." 482 U.S. at 646. While *Frazier* involved a challenge pursuant to the supervisory authority of the Supreme Court

over lower federal courts, rather than a challenge pursuant to the Privileges and Immunities Clause, the Supreme Court specifically found that the rule's in-state office requirement was improper because (1) it permitted resident lawyers to maintain their only offices outside the state, in spite of the fact that they were equally as unavailable to courts in Louisiana as were nonresident lawyers with out-of-state offices; and (2) "the mere fact that an attorney has an office in Louisiana surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state." *Id.* at 649. Similarly, the office requirement imposed by Section 470 allows resident lawyers to maintain their sole office outside New York, while nonresident attorneys who practice in their own states must also maintain an office in New York if they wish to practice law in New York.

Defendants cite *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 70, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988), in which the Supreme Court held unconstitutional a residency requirement for admission to the Virginia bar without examination. Defs.' Reply at 5. The *Friedman* Court noted in dicta that an office requirement was a less restrictive means of pursuing a state's objectives than was a residency requirement. *Id.* However, *Friedman* addressed a constitutional challenge to the Virginia residency requirement alone; *Friedman* did not decide the constitutionality of the office requirement. *See Friedman*, 487 U.S. at 63, 70. *Furthermore*, Friedman concerned attorneys who were admitted to the bar without examination and does not

apply to the case at hand, where the affected class encompasses all nonresident attorneys, including those who have "shown commitment and familiarity with state law by passing the state bar and complying with all other state requirements." February 2010 Order at 9. Finally, unlike in *Friedman*, where the office requirement applied to all attorneys practicing in Virginia, regardless of residency, the law at issue here applies to all nonresident attorneys but not to resident attorneys. *Friedman*, 487 U.S. at 68-69. Because the language relating to the office requirement in *Friedman* is dicta and because that case is distinguishable from the one at bar, *Friedman* does not control here.

Defendants also rely on *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099 (3d Cir. 1997), and on *Parnell*, 110 F.3d at 1080-81, in which the Third and Fourth Circuits respectively upheld in-state office requirements challenged under the Privileges and Immunities Clause. Def. Mem. Supp. S.J. at 8-9; Defs.' Reply at 4-5. Apart from the fact that neither case is binding on this Court, both cases are distinguishable from the present one. Like the requirement in *Friedman*, the office requirement in *Tolchin* applied equally to nonresidents and residents. *See Tolchin*, 111 F.3d at 1107. Likewise, the office requirement in *Parnell* applied equally to any resident or nonresident attorneys who wished to sponsor other attorneys *pro hac vice*. *See Parnell*, 110 F.3d at 1079. By contrast, in the present case, Section 470's office requirement applies to all nonresident attorneys but not to resident attorneys.

See N.Y. JUDICIARY LAW § 470. Unlike the office requirements at issue in the cases cited by Defendants, Section § 470 does place a discriminatory obstacle in the path of nonresidents wishing to practice law in New York.

Finally, Defendants argue that *not* only is Section 470 neutral in its treatment of nonresident attorneys, but also that if it is not enforced, New York may discriminate in favor of nonresidents as a result. Defs.' Reply at 5-6. As the primary basis for this argument, Defendants cite a New York Supreme Court holding in *White River Paper Co. v. Ashmont Tissue, Inc.*, 110 Misc. 2d 373, 441 N.Y.S.2d 960, 963 (Civ. Ct. 1981), stating as follows:

> It can be argued that to require an office in New York (which will necessitate concomitant expenses and tax ramifications) in order to appear as attorney of record would have the consequence of effectively economically barring many nonresidents from practicing in our courts. As I see it, the answer to this is that the requirement of a New York location places the nonresident in no different position than a resident. The fact that the nonresident must also maintain a residence and/or office elsewhere does not mean he is being discriminated against in the State of New York. On the contrary, if we were to permit him to avoid the expenses of a New York location including the payment of local taxes, we might be creating a discriminatory benefit in his favor.

However, as Plaintiff points out, absent the office requirement of Section 470, nonresident attorneys would still be required to pay taxes on income derived from business activities conducted in New York. N.Y. TAX LAW § 651(a)(3) (McKinney 2011).

Moreover, as noted above, Section 470 discriminates against nonresident attorneys by requiring them to maintain offices in-state even though resident attorneys are not required to do the same. Most importantly, under Section 470, nonresident attorneys bear a significant competitive cost that resident attorneys do not: whereas "New York resident attorneys may practice law out of their basements," "nonresidents are required to rent offices in New York (no matters how few in number their New York clients may be) in addition to maintaining offices and residences in their home states." Pl. Mem. Supp. S.J. at 14. Based on this analysis, the Court concludes that Section 470's requirement that nonresident attorneys maintain an office in-state implicates the fundamental right to practice law under the Privileges and Immunities Clause.

C. Privileges and Immunities Clause Scrutiny

Once the Privileges and Immunities Clause is implicated, the analysis is not at an end. *Piper*, 470 U.S. at 284; *Toomer*, 334 U.S. at 396. A statute may withstand scrutiny under the Privileges and Immunities Clause if the state is able to show: (1) a substantial reason for the difference in treatment; and (2) that the

discriminatory practice against nonresidents bears a substantial relationship to the state's objective. *See Piper*, 470 U.S. at 284. The Court must also consider the availability of less restrictive means of achieving the state's objective. *Id.*

1. Substantial State Interest

Defendants contend that (1) the need for efficient and convenient service of process such that attorneys are readily available for court proceedings; (2) the ability to observe and discipline nonresident attorneys; and (3) the remedy of attachment, are all substantial state interests advanced by Section 470. *See* Def. Mem. Supp. S.J. at 7. A state has an interest in ensuring that its licensed attorneys are amenable to legal service of process and to contact by clients, opposing counsel, the courts, and other interested parties. *See Lichtenstein v. Emerson*, 251 A.D.2d 64, 64-65, 674 N.Y.S.2d 298 (N.Y. App. Div. 1998); *see also Matter of Gordon*, 48 N.Y.2d at 274. Plaintiff counters that the legislative history of Section 470 does not reveal a valid state interest for the provision, but only shows that Section 470 is an exception to the original residency requirement that was held unconstitutional under the Privileges and Immunities Clause. *See* Pl. Opp'n Def. S.J. at 5 (citing *Matter of Gordon*, 48 N.Y.2d at 273-74).

The legislative history of Section 470, as summarized above, indicates that it was intended both as an exception to the original residency requirement and a means of ensuring effective service of process. *See*

Schoenfeld Decl., Ex. F. This law originally operated as a limited exception to the residency requirement that was later found unconstitutional. *See id.;* N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917). All versions of the statute, however, have allowed a nonresident attorney to practice law in New York only so long as he maintained an in-state office. *See* Schoenefeld Decl. Ex. F (Chapter 43; L. 1866, ch. 175, § 1 (6 Edm., 706)) (Code Civ. P. § 60 (1877)); N.Y. JUDICIARY LAW § 470.

Defendants rely primarily on section 60 of the New Code of Civil Procedure to support their argument that service of process was an underlying interest in the enactment of Section 470. *See* Def. Mem. Supp. S.J. at 6-7. A review of section 60 and the earliest versions of the statute – Chapter 43 and Chapter 175 – bolsters this argument. These statutes specifically provided that a nonresident was permitted to practice in New York so long as "service of paper" could be made at his New York office. *See* Schoenefeld Decl., Ex. F (Chapter 43) (L. 1866, ch. 175, § 1 (6 Edm., 706)) (Code Civ. P. § 60 (1877)). *See id.* Section 470, by contrast, does not include any mention of service of process, because in 1908 the Board of Statutory Compilation considered service of process an element of "practice." *See* Board of Statutory Consolidation, cmt. 29 to § 60 (1908). The Board of Statutory Compilation therefore removed the first sentence of section 60 to create Section 470, and the remainder of the provision, which referenced service of process, remained as section 60 of the 1877 Code of Civil Procedure. *See id.* The lack of reference to service of process in the text of Section

470, however, does not mean that effectuating service of process was not a reason for that statute's enactment. On the contrary, a review of the legislative history reveals that the desire to facilitate service of process for any attorney practicing law within the state, whether a resident or nonresident, was a primary concern that led to the enactment of Section 470.

However, to satisfy the requirements of the Privileges and Immunities Clause, the state interest must not only be legitimate, but also substantial in order to justify the disparate treatment on the basis of residency. *See Piper*, 470 U.S. at 284. In *Piper*, the Supreme Court invalidated a state residency requirement for the practice of law in-state, finding that there was merit to the state's assertion that nonresident attorneys would be unavailable for court proceedings throughout the course of litigation, but that it did not give rise to a substantial interest sufficient to withstand scrutiny under the Privileges and Immunities Clause. *See id.* at 286-87. The *Piper* Court reasoned first that "a high percentage of nonresidents who took the trouble to take the state bar examination and pay the annual dues would reside in a place convenient to New Hampshire," and that for lawyers that resided a great distance from the State, the courts could still protect their legitimate interest in ensuring effective service of process by requiring the nonresident attorney to retain a local attorney to be available for unscheduled court proceedings. *Id.* at 286-87; *see also Barnard*, 489 U.S. at 554 (holding that even the Virgin Islands, with its unreliable airline and telephone service, could

not support a substantial justification for a residency requirement based on the need for attorneys to be available for unscheduled court proceedings); *Frazier*, 482 U.S. at 648-49 (holding that a significant percentage of nonresident attorneys that take the state bar examination, and pay annual dues to remain a member of the bar, will reside in locations convenient to that state). Although *Piper* and *Barnard* addressed residency requirements rather than an office requirement, the Supreme Court's analyses in those cases of whether an attorney's amenability to unscheduled in-state court proceedings is a substantial state interest within the meaning of the Privileges and Immunities Clause is instructive for the present case.

Furthermore, the Supreme Court in *Frazier* held that ensuring the availability of attorneys to court proceedings and to contact by interested parties did not justify the in-state office requirement imposed by the local district court rule in that case. The *Frazier* Court held that if immediate availability of attorneys to court proceedings is indeed a substantial state interest, an in-state office requirement is not a well-crafted remedy. 482 U.S. at 650 (noting that an in-state office requirement erroneously presumes a link between an in-state office and proximity to a courthouse); *see also Tolchin*, 111 F.3d 1099 (noting that "[a] New Jersey resident may need to travel farther and longer than someone in New York City" to get to a New Jersey courthouse). Section 470 is similarly ineffective at addressing the state interest advanced by Defendants here, as an attorney in New Jersey may be better able

to travel to a court proceeding in New York City than would an attorney in Syracuse or Buffalo. Based on the precedent set forth above, the Court concludes that ensuring attorneys' ready availability for court proceedings and contact by interested parties is not a sufficiently substantial interest to withstand scrutiny under the Privileges and Immunities Clause.

Defendants also cite as a substantial state interest the ability of bar admission authorities to observe and evaluate an applicant's character, and the ability for a court to discipline nonresident attorneys. *See* Def. Mem. Supp. S.J. at 7 (citing *Matter of Gordon*, 48 N.Y.2d at 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641). The Court does not find this justification persuasive because, as the New York Court of Appeals observed in *Matter of Gordon*, an applicant to the bar in New York is personally available to the Committee on Character and Fitness, and is actually interviewed by one of its members before admission to the bar. 48 N.Y.2d at 274 (noting that the ability and remedies available to safeguard against unethical conduct by resident attorneys can "be applied with equal force" to nonresident attorneys); *see also Piper*, 470 U.S. at 286 (dismissing a similar argument where "[t]he Supreme Court of New Hampshire has the authority to discipline all members of the bar, regardless of where they reside."). The Court finds, as a matter of law, that this justification does not constitute a substantial state interest for Section 470 under the Privileges and Immunities Clause.

The final interest advanced by Defendants to justify Section 470 is the availability of the remedy of

attachment against nonresident attorneys. *See* Def. Mem. Supp. S.J. at 7 (citing *Matter of Tang*, 39 A.D.2d 357, 333 N.Y.S.2d 964 (App. Div. 1972); *Estate of Fordan*, 5 Misc. 2d 372, 158 N.Y.S.2d 228 (Surrogates Ct. N.Y. Co. 1956)). The remedy of attachment is a disciplinary measure involving a seizure on a defendant's property in order to secure the enforcement of a money judgment. *See* N.Y. C.P.L.R. § 6201 (McKinney 2011). Under Section 470's current construction, however, an attorney need only maintain an "of counsel" relationship with an in-state office to satisfy the office requirement. *Austria v. Shaw*, 143 Misc. 2d 970, 542 N.Y.S.2d 505 (N.Y. Sup. Ct. 1989) (holding that an out-of-state attorney paying rent for a desk in an attorney's in-state office had satisfied the office requirement). Based on this standard, the remedy of attachment would have little value to a plaintiff seeking a money judgment, because a nonresident attorney being sued for legal malpractice would have very little property to seize in-state if that attorney only maintained an "of counsel" relationship with a resident office. In any event, the majority of attorneys maintain some form of professional liability insurance to mitigate the cost of any potential money judgments awarded against them. *See* James C. Gallagher, *Should Lawyers Be Required to Disclose Whether They Have Malpractice Insurance?*, Vermont Bar Journal, Summer 2006, at 1-2. This is a more efficient means for potential plaintiffs to recover in malpractice against both nonresident and resident attorneys. The Court thus concludes that as a matter of law the remedy of attachment is not a substantial state interest justifying Section 470.

2. Substantial Relation to the State Interest Advanced by the Statute

Even if a state establishes a substantial interest for a statute, it must also show that the statute is substantially related to that interest. *See Piper*, 470 U.S. at 284. The Court can find no substantial relationship between Section 470 and the interests that Defendants claim it advances, and therefore concludes that Section 470 violates the Privileges and Immunities Clause.

In deciding whether a statute bears a close or substantial relationship to a substantial state interest, a court must consider the availability of less restrictive means to pursue the state interest in order to minimize the burden on the affected party. *See id.* at 284. Even assuming that Section 470 advances a substantial state interest, Defendants argue that it employs the least restrictive means available to do so because there are a number of different ways for nonresidents to satisfy the office requirement. Defendants primarily rely on *Austria*, which held that a nonresident attorney paying rent for a desk in, and maintaining an "of counsel" relationship with, an office in New York satisfied the office requirement. Def. Mot. Supp. S.J. at 8-9 (citing 542 N.Y.S.2d at 505).

This argument is unavailing. The Court of Appeals held in *Matter of Gordon* that although a state has a legitimate interest in regulating the attorneys who practice law in their courts, there are less restrictive means of furthering that interest than denial of admission to the bar. *See Matter of Gordon*, 48 N.Y.2d at 274.

Matter of Gordon suggested, for example, that one such method would be to enact "legislation requiring nonresident attorneys to appoint an agent for the service of process within the State." *Id.* at 274 (citing *Hess v. Pawloski*, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927); *Doherty & Co. v. Goodman*, 294 U.S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935)); *see also* MISS. CODE. ANN. § 73-3-369 (West 2011) (nonresident attorneys admitted to practice law within Mississippi are deemed to have appointed the director of the Mississippi bar as their agent for service of process in-state). It [sic] well-established that New York allows licensed corporations to appoint an agent for service of process in-state if the corporation maintains its principal place of business out-of-state or abroad. *See* N.Y. C.P.L.R. § 318 (McKinney 2011); N.Y. BUS. CORP. LAW §§ 304-306 (McKinney 2011). Mandating that out-of-state attorneys have an appointed agent for service of process in New York is a simple and less restrictive means of ensuring that a nonresident attorney will be subject to personal jurisdiction instate and to contact by the court, clients, and opposing parties.

Similarly, the Supreme Court in *Piper* suggested that state courts may require a nonresident lawyer who resides at a great distance from a particular state to retain a local attorney for the duration of proceedings and to be available for any meetings on short notice. *Id.* at 287; *see, e.g.*, LA. REV. STAT. ANN. § 37:214 (West 2011); N.C. GEN. STAT. ANN. § 84-4.1 (West 2010); Va. Sup.Ct. Rules 1A:4(2). Such a requirement would be less restrictive than the current requirements

imposed by Section 470 for two reasons: first, it would affect only out-of-state attorneys who reside a great distance from New York; and second, it would only require those attorneys to make arrangements for the limited duration of a proceeding. The Supreme Court also held in *Frazier* that the problem of attorney unavailability to court proceedings may be significantly alleviated with the use of "modern communication systems, including conference telephone arrangements." 482 U.S. at 642. Moreover, district courts may impose sanctions on attorneys that fail to appear on schedule. *Id.* at 649; *see also* L.R. 1.1(d) (authorizing district courts in the Northern District of New York to impose sanctions for violations of Federal and Local Rules as well as violations of court orders); 83.4(j) (requiring courts in the Northern District to enforce the New York Code of Professional Responsibilities). All of the above present less restrictive means of ensuring attorney availability than does Section 470's burdensome requirement that all nonresident attorneys maintain offices or full-time of-counsel relationships in New York. *See Austria*, 542 N.Y.S.2d at 505. Because Defendants have failed to establish either a substantial state interest advanced by Section 470, or a substantial relationship between the statute and that interest, the Court concludes as a matter of law that it infringes on nonresident attorneys' right to practice law in violation of the Privileges and Immunities Clause.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion for summary judgment (Dkt. No. 62) is **DENIED**; and it is further

ORDERED, that Plaintiff's Motion for summary judgment (Dkt. No. 64) is **GRANTED**; and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

DATED: September 07, 2011

Albany, New York

/s/ Lawrence E. Kahn

Lawrence E. Kahn

U.S. District Judge

EKATERINA SCHOENEFELD, Plaintiff, -against- STATE OF NEW YORK, et al., Defendants.

1:09-CV-0504 (LEK/RFT)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2010 U.S. Dist. LEXIS 10639

February 8, 2010, Decided

COUNSEL: For Ekaterina Schoenefeld, Plaintiff: Ekaterina Schoenefeld, LEAD ATTORNEY, Schoenefeld Law Firm LLC, Princeton, NJ.

For State of New York, Andrew M. Cuomo, in his official capacity as Attorney General for the State of New York, New York Supreme Court, Appellate Division, Third Judicial Department, All Justices of New York Supreme Court, Appellate Division, Third Judicial Department, Michael J. Novack, in his official capacity as Clerk of 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, Thomas C. Emerson, in his official capacity as the Chairperson of The Committee on Professional Standards, Defendants: Christina L. Roberts-Ryba, LEAD ATTORNEY, New York State Attorney General – Albany Office, Albany, NY.

JUDGES: Lawrence E. Kahn, United States District Judge.

OPINION BY: Lawrence E. Kahn

MEMORANDUM – DECISION AND ORDER

Ekaterina Schoenefeld ("Plaintiff") filed this action for equitable relief pursuant to 42 U.S.C. § 1983 ("§ 1983") in the Southern District of New York on April 1, 2008, alleging that § 470 of the New York State Judiciary Law[1] ("§ 470"), on its face and as applied, violates her rights under Article IV, § 2 ("Privileges and Immunities Clause"), the Equal Protection Clause of the Fourteenth Amendment ("Equal Protection Clause"), and Article I, § 8 ("Commerce Clause") of the Constitution of the United States. *See* Compl. (Dkt. No. 1); Am. Compl. (Dkt. No. 4). Plaintiff brought this action naming thirty-seven defendants including: the State of New York; the New York State Supreme Court, Appellate Division, Third Department ("the Appellate Division"); the Appellate Division Committee on Professional Standards ("Committee on Professional Standards"); New York State Attorney General Andrew M. Cuomo; eleven Justices of the Appellate Division; Appellate Division Clerk Michael J. Novack; and twenty-one members of the Committee on Professional Standards. *See generally* Am. Compl. All individual Defendants were sued in their official capacity only. *Id.* On April 16, 2009, the Honorable Naomi Reice Buchwald, acting pursuant to 28 U.S.C. § 1404(a), granted

[1] Section 470 provides, "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

Defendant's motion to transfer venue to the Northern District of New York. *See* Mem. and Order (Dkt. No. 17). Presently before the Court is Defendants' Motion to dismiss Plaintiff's Amended Complaint. Dkt. No. 20.

I. BACKGROUND

Plaintiff is a 2005 graduate of Rutgers University School of Law and is admitted to practice law in New York, New Jersey, and California. Compl. ¶ 5. She is a solo practitioner with a residence and law office in Princeton, New Jersey. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss the Am. Compl. in its Entirety (Dkt. No. 26) ("Pl.'s Mem").

Plaintiff alleges that while attending a continuing legal education course on June 5, 2007, she "learned for the first time that, according to § 470 of the New York Judiciary Law which is applicable to nonresident New York attorneys only, she may not practice law in the State of New York unless she maintains an office located in the state." Am. Compl. ¶ 17. Though this provision has never been enforced against Plaintiff, she has allegedly refrained from accepting cases that would have required her to practice in New York courts due to her knowledge of, and respect for the law. Pl.'s Mem. at 5.

Plaintiff, appearing *pro se*, filed this suit alleging that § 470 violates her right to enjoy the privileges and immunities of citizenship as guaranteed in Article IV, § 2 of the Constitution of the United States. She claims

that § 470 "effectively imposes a residency requirement on nonresident attorneys . . . when it requires them to maintain a full-time office in the State in order to practice law there" and does not require the same of resident attorneys. Am. Compl. ¶ 21. Plaintiff further alleges that § 470 violates her Fourteenth Amendment equal protection rights by imposing different requirements on resident and nonresident attorneys, namely that nonresidents only are required [sic] maintain a New York office in order to practice within the state. *Id.* ¶ 27. Finally, Plaintiff claims that § 470 places burdens on interstate commerce in violation of Article I, § 8 of the Constitution. *Id.* ¶ 29. Plaintiff claims that the each of the named Defendants, in his or her official capacity, has "some connection with the enforcement of" § 470 and are thus susceptible to suit under 42 U.S.C. § 1983. Pl.'s Mem. at 18-20. Plaintiff seeks the following declaratory and injunctive relief: (1) an order permanently enjoining Defendants from enforcing § 470 and declaring it unconstitutional; (2) reasonable attorney's fees and costs; and (3) "such other and further relief as this Court deems meet and just." Am. Compl. ¶¶ A-C.

Defendants have moved to dismiss Plaintiff's Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Specifically, Defendants assert that: (1) pursuant to Rule12(b)(1), the Court lacks subject matter jurisdiction on the grounds that the case is not ripe; (2) pursuant to Rule 12(b)(6) Defendants State of New York, the Appellate Division, and the Committee on Professional Standards do not

qualify as "persons" within the meaning of 42 U.S.C. § 1983; and (3) pursuant to Rule 12(b)(6), Plaintiff has failed to plead sufficient facts linking the named Defendants to the alleged constitutional violations. Mem. of Law in Supp. of Defs'. Mot. to Dismiss the Am. Compl. in its Entirety (Dkt. No. 20-2) ("Defs.' Mem.") at 1.

II. DISCUSSION

A. Standard of Review

In reviewing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court "must accept as true all material factual allegations in the complaint, but [it is] not to draw inferences from the complaint favorable to plaintiffs." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004). A court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [it] may not rely on conclusory or hearsay statements contained in the affidavits." *Id.*

When considering a motion to dismiss under 12(b)(6), a district court must accept the factual allegations made by the non-moving party as true and "draw all inferences in the light most favorable" to the non-moving party. *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007). "The movant's burden is very substantial, as 'the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.' " *Log On America, Inc. v. Promethean Asset Mgmt. L.L.C.*,

223 F. Supp. 2d 435, 441 (S.D.N.Y. 2001) (quoting *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995) (internal quotation and citations omitted)). In order 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*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Next, if plaintiff provides well-pleaded factual allegations, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

B. Plaintiff's Claim is Ripe

Where defendants' move for dismissal under both Rule 12(b)(1) and Rule 12(b)(6), a court must consider the alleged lack of subject matter under Rule 12(b)(1) first. *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990). Ripeness is a constitutional prerequisite to a federal court's exercise of jurisdiction. *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 51 (2d Cir. 1980). A case must be ripe before a federal court has jurisdiction to grant either injunctive or declaratory relief. *Williamson v. Village of Margaterville*, 1993 U.S. Dist. LEXIS 5447, 1993 WL 133719 at *1 (N.D.N.Y. April 23, 1993) (citing *Int'l Tape Mfrs. Ass'n v.*

Gerstein, 494 F.2d 25 (5th Cir. 1974). Ripeness exists where the controversy is "definite and concrete, touching the legal relations of parties having adverse interests." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937). Where a plaintiff seeks a declaratory judgement, the Constitution requires "a real and substantial controversy admitting of specific relief through a decree of conclusive character." *Id.* at 241.

Defendants argue that Plaintiff has failed to show any likelihood of her practicing law in New York or of § 470 being enforced against her, and, therefore, claim Plaintiff has failed to demonstrate that any real, substantial dispute admitting of specific relief exists. Defs'. Mem. at 5.

Plaintiff correctly notes that she need not violate and be prosecuted for the violation of a statute in order to maintain an action challenging the statute's constitutionality. *See Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (internal citations omitted). Plaintiff has alleged that she is in compliance with all requirements applicable to New York attorneys, has been solicited to take cases that would require her to practice in New York courts, and has refused to take these cases only because she does not have a New York office and does not wish to violate § 470. *See generally* Am. Compl.; Pl.'s Mem. She has alleged sufficient facts for the Court to find a "substantial controversy admitting of specific relief" exists. The Court thus rejects Defendants'

contention that the case is not ripe and should be dismissed pursuant to Rule 12(b)(1).

C. Defendants' Amenability to Suit Under Section 1983

Defendants' move for dismissal of Plaintiff's claims under Rule 12(b)(6), alleging that she has failed to state a claim upon which relief may be granted. Defs.' Mem. at 3. Defendants argue that: (1) Plaintiff has included parties that are not "persons" within the meaning of § 1983 and which are immune to suit; and (2) Plaintiff has not alleged facts demonstrating that the named Defendants are personally involved in the alleged violations. *Id.*

Section 1983 provides in part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

It is well settled that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). The rule prohibiting suit under § 1983 applies "to States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes." *Id.* at 70.

Plaintiff's [sic] admits that her claims against the State of New York and the Appellate Division are outside the scope of § 1983 and barred by the Eleventh Amendment. Pl.'s Mem. at 20. Furthermore, Courts in this Circuit have previously held that the Committee on Professional Standards is an arm of the state. *Aretakis v. Comm. on Prof'l Standards*, 2009 U.S. Dist. LEXIS 64643, 2009 WL 2229578 at *3 (S.D.N.Y. July 27, 2009). Accordingly, Plaintiff's claims as to these Defendants are properly dismissed pursuant to Rule 12(b)(6).

Individual state agents acting in their official capacity and attempting to enforce an unconstitutional statute are not entitled to Eleventh Amendment immunity. *See Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). However, to be found liable under § 1983 state agents must be personally involved in the constitutional deprivations alleged. *See Moffit v. Town of Brookfield*, 950 F.2d 880, 886 (2d Cir. 1991) *citing McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1978). Thus, for Plaintiff to survive Defendants' Motion to dismiss her claims against the individual Defendants, she must provide specific factual allegations that these Defendants were personally involved in the alleged deprivation of her rights. *McKinnon*, 568 F.2d at 934.

An official, whose office is tasked with an express or general duty to enforce a statute alleged to be unconstitutional, is sufficiently connected to that statute to make him a proper party to a suit for injunctive relief. *Ex Parte Young*, 209 U.S. 157; *In re Dairy Mart*

Convenience Stores, Inc., 411 F.3d 367, 372-73 (2d Cir. 2005). The Attorney General is tasked with enforcing laws prohibiting the unlawful practice of law. NY JUD. LAW §§ 476-a; 476-b, 476-c. Equally, the Justices of the Appellate Division and members of the Committee on Professional standards have the power and duty to investigate allegations of professional misconduct and enforce the rules governing such conduct. *See, e.g.*, N.Y. JUD. LAW § 90; 22 N.Y.C.R.R. § 806.3. As such, all of these Defendants, when sued in their official capacity, have some connection to the alleged violation and are proper parties to Plaintiff's suit.

D. Plaintiff's Claim Under the Privileges and Immunities Clause

Courts have long given great deference to states in their regulation of the practice of law. *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438, 441-42, 99 S. Ct. 698, 58 L. Ed. 2d 717 (1979); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975); *see also Baccus v. Karger*, 692 F. Supp. 290, 294 n.8 (S.D.N.Y. 1988). Plaintiff's claims regarding the constitutionality of § 470 require this Court to afford that same deference. Nevertheless, a state's discretion in this area is not absolute. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985) (New Hampshire rule excluding nonresident attorneys from the state bar violates the Privileges and Immunities Clause); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988) (Virginia rule allowing attorneys to

be admitted on motion on condition that they were permanent residents violated the Privileges and Immunities Clause).

A nonresident attorney, who passes a state's bar exam and otherwise qualifies to practice law within that state, has an interest in practicing law that is protected by the Privileges and Immunities Clause. *Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205. Plaintiff has alleged sufficient facts to assert a protected interest in practicing law in New York. *See* Am. Compl. ¶ 19. Plaintiff then claims that she and other qualified nonresident attorneys are unlawfully deprived of this protected interest because § 470 subjects nonresident attorneys, but not resident attorneys, to an office requirement. *Id.* The Privileges and Immunities Clause, however, only "precludes discrimination against nonresidents where (I) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. In considering whether a substantial relationship exists between the regulation and the State's objective, a court should consider whether there are other, less restrictive means available. *Id.*

In essence, Plaintiff's claim is that § 470 of the Judiciary Law imposes the equivalent of a residency requirement on the practice of law. Am. Compl. ¶ 21. Plaintiff correctly notes that the Supreme Court of the United States has held such requirements unconstitutional. *See e.g.*, *Friedman*, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56. Pl.'s Mem. at 4 n.4. In *Friedman*, the

Supreme Court found Virginia's residency requirement to be in violation of the Privileges and Immunities Clause because it burdened a protected privilege, discriminated against nonresident attorneys, *and* the degree of discrimination imposed by the residency requirement did not bear a close relation to the achievement of substantial state objectives. *Id.* at 70. The Supreme Court recognized that Virginia had a substantial interest in ensuring that a nonresident attorney "has a stake in his or her professional licensure and a concomitant interest in the integrity and standards of the bar" and in "ensuring its attorneys keep abreast of legal developments." *Id.* at 68, 69. The discrimination resulting from the residency requirement did not bear a close relationship to these interests because other legislative choices not implicating constitutional protections were available. *Id.* at 69-70.

One such alternative was to require nonresident attorneys who had not passed the state bar and, therefore, not shown the "same commitment to service and familiarity with Virginia law." to practice full-time and maintain an in-state office. *Id.* at 68. The Supreme Court concluded that the "[t]he office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but is fully adequate to protect whatever interest the State might have in the full-time practice requirement." *Id.* at 70. This language suggests an office requirement is constitutional when in service of law practice requirements applicable to nonresident attorneys who had not taken the state bar exam. It does not, however, necessitate the

same conclusion where the affected class is all nonresident attorneys, including those who have shown commitment and familiarity with state law by passing the state bar and complying with all other state requirements.

In *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) the Supreme Court invalidated a local rule requiring an attorney to be a resident of or have an office located in Louisiana. *Frazier* considered only whether a district court was empowered to adopt this local rule. The *Frazier* Court specifically refused to address any Constitutional concerns raised by the rule; rather the Court invalidated the rule in an exercise of its inherent supervisory power to ensure district courts only adopt local rules that "are consistent with the principles of right and justice." *Id.* at 645 (internal quotations omitted).

Section 470 does not serve to facilitate a full-time practice requirement applicable only to attorneys admitted on motion. Nor is it a local rule adopted by a particular court. Rather, it is a state rule that applies to all nonresident attorneys, even those who have shown their commitment to service and New York law through attending CLE courses and passing the state bar exam. Plaintiff has alleged sufficient facts, which, if accepted as true, indicate that she has a protected interest in practicing law in New York. The state has offered no substantial reason for § 470's differential treatment of resident and nonresident attorneys nor any substantial relationship between that differential treatment and State objectives. Given this failure, and

because case law does not necessitate dismissal of Plaintiff's claims as a matter of law, the Court denies Defendants' Motion to dismiss Plaintiff's claim that § 470 violates the Privileges and Immunities Clause.

E. Plaintiff has Failed to State a Claim Under the Equal Protection Clause Upon Which Relief May be Granted

Plaintiff has failed to raise a plausible claim for relief when she asserts that § 470 violates her rights under the Fourteenth Amendment. Plaintiff, a licensed New York attorney living in New Jersey and seeking to practice law in New York without maintaining an office in that state is neither a member of a suspect class, nor invoking a fundamental right. *See Frazier v. Heebe*, 788 F.2d 1049, 1053 (5th Cir. 1986) overruled on other grounds by *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987); *see also Baccus*, 692 F. Supp. at 293 n.7 ("strict scrutiny in bar-admissions cases is not warranted on a fundamental-right theory."). Plaintiff's equal protection argument is not based on her having an immutable characteristic, nor her being a member of a group traditionally subjected to mistreatment. Accordingly, neither heightened nor intermediate scrutiny applies. *Frazier*, 788 F.2d at 1053. Thus, the Court need only inquire as to whether the restrictions contained in § 470 are rationally related to a legitimate governmental purpose. *See Shapiro v. Cooke*, 552 F. Supp. 581, 586 (N.D.N.Y. 1982).

While this Circuit has not specifically addressed the Constitutionality of § 470, other Circuits have found office requirements to have a rational basis. *See, e.g.*, *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (1997) (finding a rational basis in the benefit of attorney accessibility for clients, courts, counsel, and other parties). Similarly, New York state courts have suggested a number of rational bases for the office requirement. *See, e.g.*, *Lichtenstein v. Emerson*, 251 A.D.2d 64, 674 N.Y.S.2d 298, 299 (N.Y. App. Div. 1998) (office requirement ensures nonresident attorneys are amenable to service and contact with clients and other interested parties); *White River Paper Co.*, 110 Misc. 2d 373, 441 N.Y.S.2d 960 (N.Y. Civ. Ct. 1981) (office requirement puts resident and nonresident attorneys on equal footing by not according tax advantage to nonresident attorneys). Finally, in *Friedman*, the Supreme Court clearly indicated that an office requirement, at least as applied to certain classes of nonresident attorney was not irrational or arbitrary.[2] *Friedman*, 487 U.S. at 70.

Given the numerous rational bases that exist for a nonresident attorney to have an in-state office, Plaintiff's claim under the Equal Protection Clause does not plausibly give rise to an entitlement of relief.

---

[2] In Frazier the Supreme Court ultimately decided that a local rule requiring nonresident attorneys to have an in-state office was "unnecessary and irrational." *Frazier*, 482 U.S. at 649. Importantly, however, the rule under consideration was adopted by a district court and applied only to attorneys practicing in front of that one court.

E. Plaintiff has Failed to State a Claim Under the Commerce Clause Upon Which Relief May be Granted

Finally, Plaintiff has failed to state a plausible claim to relief under the Commerce Clause. A statute violates the dormant Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970); *see also Tolchin*, 111 F.3d at 1108. She has raised no theory by which New York's office requirement for nonresident attorneys can be said to be "clearly excessive" to the substantial interest New York has in ensuring that nonresident attorneys are familiar with New York law and maintain a stake in their New York license and interest in the integrity of the state bar. *See Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985). Nor has Plaintiff raised a plausible theory by which the office requirement appears "clearly excessive" to the state's interest in ensuring nonresident attorneys are accessible to clients, courts, and other interested parties. *See Tolchin*, 111 F.3d 1099. Her claim under the Commerce Clause should, therefore, be dismissed.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that Defendants' Motion for dismissal (Dkt. No. 20) is **GRANTED** as to Defendants State

of New York, Appellate Division and Committee on Professional Standards; and it is further

ORDERED, that Defendants' Motion for dismissal (Dkt. No. 20) as to all other Defendants is **DENIED** with respect to Plaintiff's claims under Article IV, § 2 of the Constitution of the United States, and **GRANTED** with respect to Plaintiff's claims under the Fourteenth Amendment and Article I, § 8 of the Constitution of the United States; and it is further

ORDERED, that a copy of this Memorandum-Decision and Order be served on all parties.

IT IS SO ORDERED.

DATED: February 08, 2010

Albany, New York

/s/ Lawrence E. Kahn

Lawrence E. Kahn

U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 28th day of July, two thousand sixteen.

Ekaterina Schoenfeld,

Plaintiff-Appellee,

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,

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.

ORDER
Docket No: 11-4283

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,"

Defendants-Appellants.

Appellant, Ekaterina Schoenfeld, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe
