11-4283-cv

United States Court of Appeals
for the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff - Appellee,

v.

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, JOHN STEVENS, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Defendants - Appellants.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

New York Judiciary Law § 470 requires nonresident attorneys admitted to practice in the State to maintain an "office" within the State in order to practice in New York's courts. Plaintiff is a resident of New Jersey, and is admitted to practice in a number of states, including New York, but maintains that she has no "office" within the meaning of Judiciary Law § 470. She nonetheless wishes to practice in New York courts. She has therefore commenced this action in the United States District Court for the Northern District of New York seeking to declare Judiciary Law § 470 unconstitutional under, among other provisions, the Privileges and Immunities Clause.

On the parties' cross-motions for summary judgment, the district court (Kahn, J.) rejected plaintiffs' other claims, but declared the statute unconstitutional under the Privileges and Immunities Clause. In so doing, the district court assumed that Judiciary Law § 470 imposes a significant financial burden on nonresident attorneys in that it requires them to maintain an "office" in addition to their residence. The court, however, made some mistaken assumptions about the extent of New York's office requirement. In fact, the statute can reasonably be read to require

nothing more than that nonresident attorneys maintain an address within the State at which they may be served with legal papers on behalf of the clients they represent. Moreover, there is no reason to think that New York's highest court, which has never addressed the scope of the statute's office requirement, would not construe it in this manner.

Read this way, the statute withstands privileges and immunities analysis: Either it does not discriminate against nonresident attorneys and thus does not implicate the Privileges and Immunities Clause at all, or the minimal burden it imposes is directly related to a sufficient state interest. Accordingly, the Court should reverse the district court judgment declaring the statute unconstitutional and dismiss plaintiff's claim.

QUESTIONS PRESENTED

New York Judiciary Law § 470 requires nonresident attorneys once admitted to practice in the State to maintain an office within the State in order thereafter to practice in New York's courts. The questions presented are:

1. Whether Judiciary Law § 470 can be read in a manner that does not discriminate against nonresident attorneys and thus does not implicate the Privileges and Immunities Clause.

2. Even assuming that Judiciary Law § 470 necessarily implicates the Privileges and Immunities Clause, whether it can be read to impose only a minimal burden on the ability of nonresident attorneys to practice in New York's courts that is directly related to a sufficient state interest, namely the State's interest in assuring that attorneys may be served with legal papers within the jurisdiction of New York's courts.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The opinion and order appealed from was issued on September 7, 2011 (SA 22) and final judgment was entered September 7, 2011 (SA 23). [1] Defendants timely filed their notice of appeal on October 5, 2011 (JA 12).

[1] Citations to JA __ are to documents in the Joint Appendix and citations to SA__ are to documents in the Special Appendix. References to Doc. # are to documents filed in the District Court and are designated by the document number set forth on the docket sheet, reproduced at JA 3-11, and assigned to that document by the PACER system.

STATEMENT OF THE CASE

A. Statutory Background

1. Judiciary Law § 470 Requires Nonresident Attorneys Practicing in New York to Maintain an "Office" in the State.

Judiciary Law § 470 provides:

> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state,[2] 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.

Although on its face this provision appears to provide authority for residents of *adjoining* states with an office in New York to practice in New York courts, the provision no longer serves only this limited purpose. As the statute's derivation and interpretation by New York courts make clear, Judiciary Law § 470 now serves to require all nonresident attorneys who

[2] The statutory terms "courts of record of this state" refers to all of New York's judicial tribunals except its town and justice courts. *See* N.Y. Const. Art. 6, § 1(b); Judiciary Law § 2. This brief uses the terms "New York courts" to refer to New York's "courts of record." Neither the statutory term "courts of record" nor the use of the terms "New York courts" in this brief includes federal courts located in New York State.

have been admitted to practice in the State and wish thereafter to practice in New York courts to maintain an office within the State.[3]

When the predecessor to Judiciary Law § 470 was originally enacted in 1862, New York law required all attorneys to be residents of the State, both to be admitted to practice in the first place, and also thereafter to practice in New York courts. The predecessor to Judiciary Law § 470 was enacted as an exception to this requirement, to allow attorneys previously admitted to practice in New York who thereafter moved to an adjoining state but retained their only office in New York to continue to practice in New York courts. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139 (JA 93). The statute was revised in 1866 to eliminate the requirement that such nonresident attorneys retain their *only* office in New York. Act of March 16, 1866, ch. 175, 1866 N.Y. Laws 706 (JA 97). In 1908, so much of the statute as allowed residents of adjoining states to practice in New York courts if they maintained an office in the State was recodified as

[3] Numerous other statutory provisions and court rules govern the process and requirements for admission to practice in New York, as well as initial and continuing requirements for registration. *See, e.g.,* Judiciary Law § 90(1)(a) (admission upon examination); *id.* § 90(1)(b) (admission without examination); *id.* § 468 (providing for registration of newly admitted attorneys); *id.* § 468-a (requiring biennial registration of attorneys); 22 N.Y.C.R.R. §§ 520.2, 520.7, 520.10 (Rules of the New York Court of Appeals governing application and certification for admission to the appropriate Department of the Appellate Division). Judiciary Law § 470 is different, because it relates solely to the *practice* of law in New York courts by attorneys who already are *admitted* to practice in the State.

Judiciary Law § 470 (JA 98, 99, 101).[4] Aside from minor non-substantive changes in 1909 (JA 102-103) and 1945 (JA 106), the language of section 470 has remained unchanged ever since.

In 1979, however, the New York Court of Appeals struck as unconstitutional the then-existing residency requirements for bar examination and admission. *See Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266 (1979). Following that decision, the Legislature amended numerous provisions of the New York Civil Practice Law and Rules (the "C.P.L.R.") and Judiciary Law to remove the residency requirements from the provisions governing attorney admission to practice. Act of June 18, 1985, ch. 226, 1985 N.Y. Sess. Laws 564 (McKinney). The Legislature did not modify Judiciary Law § 470 at that time, however. As a result, after *Gordon* and the 1985 amendments eliminating the residency requirements from the provisions governing attorney admission, Judiciary Law § 470 no longer operated as an exception, for residents of adjoining states, to the residency requirements for admission. Once attorneys could be admitted to practice in the State without regard to residency, the reference in Judiciary Law § 470 to

[4] The original enactment also contained language concerning service of papers on the New York attorney who resided in an adjoining state. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139 (JA 93).

"resid[ing] in an adjoining state" could no longer be read to provide an exception to the former residency requirement. The statute has thus since been interpreted as requiring *all* nonresident attorneys admitted to practice in the State, whether residing in adjoining or non-adjoining states, to maintain an office in the State in order to practice in New York courts. *See Kinder Morgan Energy Partners, LP v. Ace Am. Ins. Co.*, 51 A.D.3d 580 (1st Dep't 2008); *Neal v. Energy Transp. Group*, 296 A.D.2d 339 (1st Dep't 2002); *Matter of Haas*, 237 A.D.2d 729 (3d Dep't 1997) (applying Judiciary Law § 470 in professional misconduct proceeding to attorney who relocated from New York to Texas); *White River Paper Co. v. Ashmont Tissue*, 110 Misc. 2d 373, 376 (Civil Ct., City of N.Y. 1981).

Equally important, the failure of the Legislature to repeal the reference to adjoining states or repeal the entire provision following these events evidences the Legislature's intent to maintain the office requirement for all nonresident attorneys. *See* N.Y. Statutes § 74 (McKinney 1971). The statute does not define the term "office," however, leaving its meaning to be interpreted by the New York courts.

2. New York Has Thus Far Interpreted the Term "Office" in Judiciary Law § 470 to Mean Only A Minimal Physical Presence.

New York's highest court has never addressed the meaning and scope of the office requirement in Judiciary Law § 470. The State's intermediate appellate courts, however, have indicated that it is satisfied when an attorney maintains a fairly minimal physical presence in the State, including an affiliation with an attorney or law firm that has a physical presence in the State.

For example, establishing an "of counsel" relationship with a New York attorney having an office in the State for purposes of the lawsuit has been held to be sufficient to satisfy section 470's office requirement. *See Matter of Tatko v. McCarthy*, 267 A.D.2d 583 (3d Dep't 1999) (affirming the denial of a motion seeking to dismiss the proceeding on the ground that the petitioner's attorney, a Massachusetts resident, did not have a New York office). Maintaining a desk in an office shared with a non-legal firm with the availability of a telephone and the use of a secretary likewise has similarly been found sufficient, even where the secretary is not an employee of the attorney and the attorney is not listed in the New York telephone directory. *See Matter of Scarsella*, 195 A.D.2d 513 (2d Dep't

1993) (rejecting objection based on failure to comply with Judiciary Law § 470 to payment of legal fees to estate's attorney under these facts); *see also Keenan v. Mitsubishi Estate, N.Y.*, 228 A.D.2d 330, 330 (1st Dep't 1996) (holding that a "reciprocal satellite office sharing agreement" satisfies Judiciary Law § 470).

Thus, New York courts have not read the statute to require that the attorney maintain an exclusive office or even an office in a law firm, and they have held that an affiliation with a New York firm may suffice. *See CA Constr., Inc. v. 25 Broadway Office Properties, LLC*, No. 1000728/09, 2010 WL 1285418 (N.Y. Sup. Ct., N.Y. County March 15, 2010) (denying motion that sought dismissal of the action based on failure of Connecticut firm to have a New York office where the firm had an ongoing agreement with a law firm to lease space at that firm's New York office, the Connecticut firm name was indicated at that location, and a designated individual was authorized to accept service for it there); c*f. Matter of Estate of Garrasi*, 29 Misc. 3d 822, 827 (Sur. Ct. Schenectady Co. 2010) (rejecting attorney's claim that he complied with requirement of Judiciary Law § 470 where he had moved out of New York, there was no evidence that the attorney "had a designated telephone number in New York, a New

York address at which to receive service of process, or that he had designated [his former New York firm] to accept telephone calls and service of process on his behalf," or that he had an "of counsel" or other affiliation with the firm).

Indeed, to practice in New York courts, it is generally sufficient for an attorney to provide a New York address at which the attorney can be served with legal papers for the course of the litigation. *See, e.g.*, *Laces Roller Corp. v. Ambassador Ins. Co.*, 134 A.D.2d 408 (2d Dep't 1987) (rejecting party's argument that court should refuse even to entertain opponent's motion based on opponent's alleged violation of Judiciary Law § 470, where notice of motion provided a New York address for opposing counsel).

On the other hand, New York courts have held that the office requirement is not satisfied where, for example, the purported office consisted only of a small room in the basement of a restaurant accessible only by passing through the kitchen and down a flight of stairs, the attorney's name was not posted anywhere on the premises, and, importantly, there was no reason to think that the restaurant's employees would accept legal papers. *See Lichtenstein v. Emerson*, 251 A.D.2d 64

(1st Dep't 1998) (affirming order granting motion to dismiss the action where the complaint was filed by a nonresident attorney under these facts). Similarly, where the New York office consisted only of a post office box address or an address intended to be used solely as a "mail drop," a nonresident attorney was disciplined for failure to maintain an office within the meaning of section 470. *See Matter of Larsen*, 182 A.D.2d 149, 155 (2d Dep't 1992); *see also Matter of Haas*, 237 A.D.2d 729 (3d Dep't 1997) (upholding charge of misconduct where nonresident attorney alleged he maintained an office in the New York home of an assistant, but the record established no relationship between the attorney and the assistant, and there was no assurance that the attorney would receive mail and telephone messages at that address); JA 286 (May 4, 2007 letter of admonition from Third Department Committee on Professional Standards (using a mailbox in a UPS store, having a room in a car wash building to meet with clients, and a telephone number listed on pleadings that automatically forwarded to a number in another State did not constitute having an "office" within the meaning of the statute)).

B. This Lawsuit

Plaintiff Ekaterina Schoenefeld graduated from a New Jersey law school and is admitted to practice in the state courts of New Jersey, California, and New York (JA 38, 89). She resides and has an office for the practice of law in New Jersey (JA 39). She passed the New York State Bar Examination in July 2005 and was admitted to practice in the State of New York in January 2006 (JA 40). She alleges that she has no office in New York (JA 138) and maintains that she has not appeared as an attorney in any New York courts (JA 142).

Plaintiff filed this action pursuant to 42 U.S.C. § 1983 seeking an order declaring Judiciary Law § 470 unconstitutional and enjoining defendants from enforcing the statute (JA 42).[5] The amended complaint alleges that to the extent the statute requires a nonresident attorney admitted to practice in the State to maintain an office in New York in order to practice in New York courts, the statute violates the Privileges and Immunities, Equal Protection, and dormant Commerce Clauses of the United States Constitution (JA 41-42). Plaintiff names as defendants both

[5] Plaintiff commenced this suit in the Southern District of New York solely against the State of New York (Doc. # 1-1). Following the filing of an amended complaint (JA 37), venue of the proceeding was transferred to the Northern District of New York on defendants' motion (JA 43-50).

entity defendants, namely the State of New York; the Appellate Division, Third Department, of the New York Supreme Court (the "Third Department"); and the Third Department's Committee on Professional Standards ("COPS"), and individual defendants in their official capacities, namely the New York Attorney General; the Justices of the Third Department; the Clerk of the Third Department; and the Chair of the Third Department's Committee on Professional Standards (JA 39).[6] Although Judiciary Law § 470 has never been enforced against plaintiff, she alleges that the statute's office requirement effectively prevents her from practicing in New York courts because she maintains no "office" in the State (JA 40). Plaintiff purports to bring both a facial challenge to section 470, and also a challenge as applied to "nonresident New York attorneys" such as herself (JA 38-42).

[6] Three of the individual defendants named in their official capacities have been automatically substituted by their successors in office. *See* Fed. R. Civ. P. 25(d). Thus Attorney General Eric T. Schneiderman has been substituted for former Attorney General Andrew Cuomo, and Chair of the Third Department's Committee on Professional Standards William J. Keniry, has been substituted for the last two Chairs of the Third Department's Committee on Professional Standards, namely John Stevens and Thomas C. Emerson. The official caption of the case should be amended to conform accordingly.

C. Proceedings Below

On defendants' motion to dismiss, the district court dismissed the complaint as to the entity defendants on the basis of Eleventh Amendment immunity (JA 74). The court also dismissed plaintiff's equal protection and commerce clause claims as to all defendants, concluding that the complaint failed to state a plausible cause of action under these provisions (JA 78-80). The court rejected defendants' argument that the suit was not ripe and allowed the case to proceed against the individual defendants in their official capacities (JA 72-73, 74-75, 80). Thus, following the court's decision on defendant's motion to dismiss, the only cause of action remaining was the Privileges and Immunities Clause claim against the individual defendants.

The remaining defendants answered the complaint (JA 82-84) and, following discovery, the parties cross-moved for summary judgment. As to the plaintiff's claim under the Privileges and Immunities Clause, defendants' argument was two-fold: They argued that Judiciary Law § 470 does not implicate the Privileges and Immunities Clause at all, because it does not discriminate against nonresident attorneys, but rather requires all attorneys practicing in New York courts to maintain some physical

presence in the State. Defendants also argued that, even if Judiciary Law 470 implicates the Privileges and Immunities Clause, it does not violate the clause because its minimal office requirement is closely related to a number of substantial state objectives, including the availability of in-state service upon attorneys and the ability of its courts to assure that attorneys could be accessible to the courts for proceedings on short notice as might be required. Further, as plaintiff alleged that she maintained no physical presence in New York at all, defendants argued that plaintiff's purported as-applied challenge to the statute was no different from her facial challenge, and thus that she could prevail only if there were no circumstances under which the statute could be found to be valid (*see, e.g.*, Docs. # 62-2, 68-1, 72).

Relying on her declaration and exhibits that included the defendants' responses to plaintiff's request for admissions and document requests (JA 141-326; *see* JA 142-43), plaintiff argued that Judiciary Law § 470 effectively imposes a residency requirement on attorneys wishing to practice in New York courts, and sought an order declaring the statute unconstitutional under the Privileges and Immunities Clause (Doc. # 64).

D. The District Court's Decision

The District Court declared Judiciary Law § 470 unconstitutional under the Privileges and Immunities Clause. The court explained that the statute's office requirement implicated the right to practice law, a fundamental privilege protected by the Privileges and Immunities Clause (SA 29). The court then rejected defendants' argument that the statute did not discriminate against nonresident attorneys (SA 10, 14). For this purpose, the court assumed that the statute imposes a "significant" "financial burden" on nonresident attorneys, which thus "effectively precludes" a number of nonresident attorneys from practicing law in New York (SA 11; *see also* SA 14 [stating that under section 470 nonresident attorneys "bear a significant competitive cost that resident attorneys do not"]). Indeed, the district court emphasized its interpretation of section 470 as permitting resident attorneys who practice on an intermittent basis in New York to maintain their sole office outside of New York, while requiring nonresident attorneys to maintain both an office in their home state (if they practice there) and an office in New York (SA 12-13, 14), no matter how many New York clients they serve.

Finding that section 470 thus imposed a burden on nonresident attorneys on the basis of residency, the district court went on to analyze whether the statute violated the Privileges and Immunities Clause. Applying the test articulated by the United States Supreme Court in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985), the court considered whether the State proffered "a substantial reason for the difference in treatment" and whether "the discriminatory practice against nonresidents bears a substantial relationship to the state's objective" (SA 15).

The court accepted defendants' position that section 470 was intended to serve the legitimate state interest of facilitating service on all attorneys practicing within the State's courts (SA 16). Relying on Supreme Court cases invalidating attorney residency requirements, however, the court rejected as insufficient the other state interests proffered by defendants, namely an attorney's amenability to appear at unscheduled in-state court proceedings; the ability of state officials to observe and evaluate an applicant for admission and discipline nonresident attorneys; and the facilitation of the remedy of attachment against nonresident attorneys (SA 18-19). But as to the interest accepted by the court – the

State's interest in facilitating service on attorneys within the State – the district court held that the statute's office requirement did not bear a close or substantial relationship to that state interest, even assuming the interest was sufficiently substantial (SA 20-21). In so holding, the court suggested that the relationship was insufficient because requiring nonresident attorneys to appoint an agent for service of process would be a less restrictive means (SA 20).

The district court thus held as a matter of law that the office requirement of Judiciary Law § 470 infringes on the rights of nonresident attorneys to practice law in violation of the Privileges and Immunities Clause (SA 22). Judgment in favor of plaintiff was entered (SA 23), and this appeal followed.

SUMMARY OF ARGUMENT

Although plaintiff purports to raise both facial and as-applied challenges to Judiciary Law § 470 under the Privileges and Immunities Clause, her complaint is properly viewed as raising only a facial challenge to the statute. In support of her purported as-applied challenge, plaintiff asserts that she has no "office" in the State – apparently regardless of how that term is interpreted by New York courts – and thus that the statute

cannot constitutionally be applied to her. But this claim is no different from a claim asserting that no interpretation of the statute would render it constitutional under the Privileges and Immunities Clause, which is the same as a claim challenging the statute on its face.

Plaintiff's facial challenge to Judiciary Law § 470 under the Privileges and Immunities Clause fails because the statute can reasonably be interpreted in a manner that does not violate that constitutional provision. Specifically, the requirement that nonresident attorneys maintain an "office" within the State in order to represent clients in New York courts can reasonably be read as requiring nothing more than that nonresident attorneys maintain an address within the State at which they may be served with legal papers on behalf of the clients they represent. Moreover, there is no reason to think that New York's highest court, if presented with a question of statutory construction, would not construe the statute in this manner.[7]

Read as imposing only such a minimal requirement, the statute does not violate the Privileges and Immunities Clause for either of two reasons.

[7] This court need not decide whether the reasonable construction offered here is the only such construction; as long as the statute, so construed, withstands privileges and immunities analysis, plaintiff's facial challenge fails, and the question of whether New York courts may construe the statute only in that manner is properly left for another day.

First, the imposition of such a requirement does not discriminate against nonresident attorneys and thus does not even implicate the Privileges and Immunities Clause. Reading the statute as requiring nonresident attorneys to have an address at which they may be served within the State has the effect of requiring *all* attorneys practicing in New York courts to have at least one address for service within the State. Moreover, the State has a legitimate interest in requiring all attorneys practicing in its courts to provide an address within the State at which to receive service of legal papers; doing so enables its courts to oversee and adjudicate disputes arising over such service. Because the statute can be read so as not to discriminate against nonresident attorneys, plaintiff cannot establish that, on its face, the statute implicates the Privileges and Immunities Clause.

Second, even if requiring nonresident attorneys to maintain an address within the State at which they may be served with legal papers is viewed as discriminatory in some manner, reading the statute as imposing such a minimal requirement involves no more than an incidental burden on the ability of nonresident attorneys to practice in New York courts. And because any such incidental burden is directly related to at least one sufficient state interest – enabling the New York courts to adjudicate

disputes over service of interlocutory legal papers – the statute can be read in a manner that does not violate the Privileges and Immunities Clause. Indeed, read in this way, the statute arguably serves additional state interests that justify the minimal burden imposed. Plaintiff's facial challenge to Judiciary Law § 470 therefore necessarily fails, even if that statute implicates the Privileges and Immunities Clause.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. "[I]n reviewing a grant of summary judgment, [the Court] reviews questions of law and mixed questions of law and fact *de novo*." *Bessemer Trust Co., N.A. v. Branin*, 618 F.3d 76, 85 (2d Cir. 2010). Additionally, a determination of the district court involving the interpretation of a state statute is considered a question of law that is also reviewed *de novo* by this Court. *Eberhard v. Marcu*, 530 F.3d 122, 129 n.3 (2d Cir. 2008); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 283 (2d Cir. 2006).

ARGUMENT

POINT I

JUDICIARY LAW § 470 CAN REASONABLY BE READ IN A NON-DISCRIMINATORY MANNER THAT DOES NOT IMPLICATE THE PRIVILEGES AND IMMUNITIES CLAUSE

As a preliminary matter, although plaintiff purports to raise both facial and as-applied challenges to Judiciary Law § 470 (JA 38), her complaint is properly viewed as raising only a facial challenge to the statute. In support of her purported "as applied" challenge, plaintiff asserts that she has no "office" in the State at all, and thus has been unconstitutionally precluded from practicing in New York courts (JA 330; *see* JA 138, 142*)*. This claim is really a legal conclusion that serves as a factual allegation only if it is read to mean that plaintiff maintains nothing within the State that could satisfy the office requirement, regardless of how the requirement is interpreted. And such a claim is no different from a claim asserting that no interpretation of the statute would render it constitutional under the Privileges and Immunities Clause, which is exactly what a facial challenge would assert. *See Bach v. Pataki*, 408 F.3d 75, 89 (2d Cir. 2005) (a plaintiff asserting facial challenge to a state law under the Privileges and Immunities Clause "must show an absence of

'any circumstances under which th[e] statute avoids a constitutional reckoning with the Privileges and Immunities Clause'" (*quoting Connecticut ex rel. Blumenthal v. Crotty,* 346 F.3d 84, 100 (2d Cir. 2003)).

Plaintiff's facial challenge fails, because New York's statute requiring nonresident attorneys to maintain an "office" within the State in order to practice in New York courts can reasonably be read in a manner that does not discriminate against nonresident attorneys. The term "office" may mean no more than an address within the State at which the nonresident attorney may receive service, including personal service, of legal papers on behalf of clients. These could include both so-called "interlocutory legal papers," which are legal papers served in the course of litigation other than those that initiate the litigation, and also service of papers on an attorney for purpose of acquiring personal jurisdiction over a client, where authorized. *See, e.g.,* C.P.L.R. 303 (designation of attorney as agent for service). Moreover, there is no reason to think that New York's highest court, if presented with a question of statutory construction, would not so construe it. Read in this manner, the statute does not discriminate against nonresident attorneys and thus does not implicate the Privileges and Immunities Clause at all.

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." "[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." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (emphasis added). While the practice of law is one of the privileges protected by this provision, and a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause, *see Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989), the constitutional provision is not implicated where the state law does not treat nonresidents differently from residents. *See Parnell v. Supreme Court of Appeals of West Va.*, 110 F.3d 1077, 1081 (4th Cir. 1997); *Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990); *In re Conner*, 917 A.2d 442, 448-49 (Vt. 2006). The Privileges and Immunities Clause is implicated where the state "does not permit qualified nonresidents to practice law within its borders on terms of *substantial equality* with its own residents." *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 66 (1988) (emphasis added).

If a State subjects a nonresident attorney seeking to practice in the State to "'no more onerous requirements than those imposed on its own citizens seeking such right, it cannot be said that the State has violated'" the section. *Morrison v. Bd. of Law Examiners of the State of N.C.*, 453 F.3d 190, 194 (4th Cir. 2006) (*quoting Hawkins v. Moss*, 503 F.2d 1171, 1179-80 (4th Cir. 1974)). "The provision was designed 'to place the citizens of each State upon the same footing with citizens of other States'" with respect to the interests protected by the Clause. *Friedman*, 487 U.S. at 64 (*quoting Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1868)). Thus, the Privileges and Immunities Clause only protects against discriminatory treatment on the basis of residency. *Giannini v. Real*, 911 F.2d at 357.

Judiciary Law § 470 requires nonresident attorneys to maintain an "office" in the State in order to practice in its courts, but does not define the term. The term "office" can be construed to mean simply an address within the State at which a nonresident attorney may receive service, including personal service, of legal papers. The designation of an agent for this purpose might even suffice. Read this way, the statute does not discriminate against nonresident attorneys, but rather places them on equal footing with resident attorneys, who necessarily have at least one

location within the State – their residence – at which to receive service of legal papers. *See Lichtenstein v. Emerson*, 251 A.D.2d at 64-65 (recognizing section 470 as nondiscriminatory, because it effectively assures that *all* attorneys practicing within the State maintain "some genuine physical presence" here so that they are amenable to legal service) (*citing Tolchin v. Supreme Court of State of N.J.*, 111 F.3d 1099 (3d Cir. 1997)). By requiring all attorneys who practice in New York courts to have an address within the State at which to receive service of interlocutory papers, the State does not discriminate against nonresident attorneys. Although their status as nonresidents means they must designate some location *other than* their residence at which to accept service of legal papers in New York, this is not discrimination imposed by section 470; it flows from the fact that the attorney chooses to live in another state and practice in New York courts.

It is reasonable to read Judiciary Law § 470 as imposing such a requirement for two reasons. First, the statute as originally drafted was specifically intended among other things to address the issue of service. When section 470's predecessor was originally enacted, it not only created an exception to the then-existing residency requirements for attorneys

admitted to practice in New York who moved to an adjoining state, but it also contained a provision relating to service on the nonresident attorney. Specifically, it provided that service on the nonresident attorney's New York office could be used where service on the resident attorney at his residence in New York would have been permitted. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139 (JA 93). Thus, the provision as originally enacted was specifically intended to facilitate service of legal papers in the State on nonresident attorneys practicing in New York courts.

Second, reading the statute as requiring nonresident attorneys practicing in New York courts to maintain an address for service of legal papers serves a significant state interest because it enables the State's courts to adjudicate disputes arising out of service. *See Lichtenstein*, 251 A.D.2d at 65 (recognizing that Judiciary Law § 470 serves purpose of assuring attorney is amenable to legal service). In New York, when a party is represented by an attorney, interlocutory legal papers must be served on the represented party's attorney, C.P.L.R. 2103(b), and papers asserting jurisdiction over certain parties may be served on an attorney as well, where authorized, *see, e.g.*, C.P.L.R. 303.

Courts adjudicate disputes over whether such service in fact occurred at hearings (customarily called "traverse hearings") at which they may take evidence, including witness testimony. *See* Vincent C. Alexander, C.P.L.R. Practice Commentaries C306:2 (McKinney 2010). A party wishing to call non-party witnesses, such as those who performed or observed the service, will be able to utilize the subpoena power of New York courts only if such witnesses can themselves be served within the State. *See* Judiciary Law § 2-b(1) ("A court of record has power . . . to issue a subpoena requiring the attendance of a person *found in the state* to testify in a cause pending in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served); *Peterson v. Spartan Industries, Inc.*, 40 A.D.2d 807, 807 (1st Dep't 1972) (interpreting Judiciary Law § 2-b as requiring that subpoenas issued by New York courts must be served within the State), *aff'd*, 33 N.Y.2d 463 (1974). Thus reading the "office" requirement as requiring nonresident attorneys to maintain an address within the State enables their adversaries to serve them within the State and thereafter utilize the New York courts to adjudicate service disputes as needed.

Moreover, there is no reason to think that New York's highest court, if presented with a question of statutory construction, would not construe the statute in this non-discriminatory manner. Indeed, while New York's highest court has never addressed the scope of the statute's office requirement, New York's intermediate appellate courts have, and they have thus far indicated that the statute imposes only a fairly minimal requirement. *See* Statement of the case (A)(1), *supra*. But even if the Court has doubts that the New York Court of Appeals would be willing to read the statute in this manner, before this Court strikes the statute as unconstitutional, it should certify to the New York Court of Appeals the question whether it can be read in this manner. *See* United States Court of Appeals for the Second Circuit Rule 27.2; 22 N.Y.C.R.R. § 500.17 (Rule of the New York Court of Appeals governing certified questions).

Judiciary Law § 470 does not directly exclude nonresidents from admission to practice on the basis of residency like the state provisions struck down by the Supreme Court as violative of the Privileges and Immunities Clause in *Barnard v. Thorstenn*, 489 U.S. 546, and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274. In those cases, nonresidents were excluded from admission by the Virgin Islands and New

Hampshire, respectively, and the United States Supreme Court held that such an exclusion could not serve a substantial state interest, let alone be found to be closely related to any such interest.

Nor does Judiciary Law § 470 have the kind of discriminatory effect on nonresident attorneys as that at issue in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59. That case involved a state rule making permanent residency in the state a requirement for an attorney to be admitted to practice without taking an examination.[8] The Supreme Court noted that the rule did not altogether exclude nonresidents from admission to the practice of law in the state, but it nonetheless prevented qualified nonresidents from admission "on terms of substantial equality" with state residents. 487 U.S. at 66. In other words, the admission restriction implicated the Privileges and Immunities Clause, because it "burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among *otherwise qualified* applicants *solely on the basis of citizenship or residency*." *Id.* at 67 (emphasis added).

[8] The court rule in *Friedman* also required that an applicant for admission on motion intend to practice full-time in the state, meaning that the attorney maintains an office and a regular practice in the state. 487 U.S. at 69. However, as the plaintiff in *Friedman* already met this requirement, this aspect of the rule was not at issue and was not ruled upon by the Court. *See id.* at 61, 68.

Unlike the admission bars at issue in *Barnard v. Thorstenn* and *Piper*, and the admission restriction at issue in *Friedman*, Judiciary Law § 470 neither excludes nonresidents altogether from the practice of law in New York, nor need be read to impose a significant burden on *equally qualified* applicants on the basis of residency. As to their ability to provide an in-state location for service of legal papers, the resident and nonresident New York attorney are *not* equally qualified to practice in state courts; the resident necessarily has at least one New York location that can be effectively used for service of legal papers (his residence), while the nonresident, in the absence of section 470's office requirement, may have *no* in-state location for service of papers. Thus, nonresidents admitted to practice in New York may do so on equal terms as state residents. Like state residents, they must provide a New York address for service of legal papers.

Finally, read this way, the office requirement is similar to other state admission and practice requirements that apply to residents and nonresidents alike and have consistently been held not to unconstitutionally discriminate against nonresidents. *See*, *e.g.*, *Tolchin v. Supreme Court of State of N.J.*, 111 F.3d 1099, 1107-08, 1113 (3d Cir.

1997) (holding that New Jersey rule of practice requiring all attorneys licensed in the state to have a bona fide office and attend a mandatory skills course in the state was neutral on its face, did not have the practical effect of favoring resident attorneys or burdening nonresident attorneys, and did not violate the dormant Commerce Clause or Privileges and Immunities Clause); *see also Morrison v. Bd. of Law Examiners of the State of N.C.*, 453 F.3d 190 (upholding as against privileges and immunities and equal protection challenges a comity admission rule that allowed admission without examination to applicants licensed in states with comity as long as applicant had been engaged in full-time practice in the comity state for a specified time period); *Parnell v. Supreme Court of Appeals of West Va.*, 110 F.3d 1077 (holding that rule requiring *pro hac vice* sponsoring attorneys to practice law on a daily basis from an office in the state did not contain a residency requirement triggering privileges and immunities review); *Goldfarb v. Supreme Court of Va.*, 766 F.2d 859 (4th Cir. 1985) (holding that admission without examination rule that required applicant to practice full-time in the admitting state did not violate Commerce Clause or due process).

In rejecting defendants' position and finding Judiciary Law § 470 discriminatory on the basis of residency (SA 10-11), the district court incorrectly compared New York's office requirement to state statutes that discriminated by singling out nonresidents even though residency was not directly related to any legitimate state interest. In *Toomer v. Witsell*, 334 U.S. 385 (1948), for example, the statute at issue required nonresident fishermen to pay a license fee 100 times greater than the fee charged to residents, a provision that plainly served to discourage competition from outside the State. *Id.* at 408; *see also Ward v. Maryland*, 79 U.S. 418 (1870) (statute required nonresidents to pay a trade licensing fee 2 to 25 times greater than fee charged to residents). In *United Building & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984), the local law restricted the hiring of nonresidents by establishing resident hiring preferences for public works projects. *Id.* at 210; *see also Hicklin v. Orbeck*, 437 U.S. 518 (1978) (state law resident hiring preference). Unlike any of these discriminatory provisions, Judiciary Law § 470 singles out nonresident attorneys, but it can be read in a manner that does so only for purposes of placing them on equal footing with resident attorneys for a legitimate state interest.

Judiciary Law § 470 thus can reasonably be read in a manner that does not discriminate on the basis of residency, and thus does not implicate the Privileges and Immunities Clause.

POINT II

EVEN IF THE REASONABLE CONSTRUCTION OF JUDICIARY LAW § 470 OFFERED HERE IMPLICATES THE PRIVILEGES AND IMMUNITIES CLAUSE, IT DOES NOT VIOLATE THAT CLAUSE

Even if the Court finds that the reasonable construction of Judiciary Law § 470 offered here discriminates on the basis of residency in some manner, plaintiff's facial challenge to the statute still fails because, read this way, the statute imposes no more than an incidental burden on nonresident attorneys that is directly related to the State's significant interest in enabling its courts to adjudicate service disputes. Indeed, read this way, the statute arguably serves additional state interests. Judiciary Law § 470 thus does not violate the Privileges and Immunities Clause.

The Supreme Court has repeatedly emphasized that "[t]he Privileges and Immunities Clause bars 'discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not

preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (*quoting Toomer v. Witsell*, 334 U.S. 385, 396). Thus, the Privileges and Immunities Clause does not bar discrimination on the basis of residency when there is both "'(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.'" *Bach v. Pataki*, 408 F.3d at 88-89 (*quoting Connecticut ex rel. Blumenthal v. Crotty,* 346 F.3d at 94 (emphasis added)); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. at 314 ("Tax provisions imposing discriminatory treatment on nonresident individuals must be reasonable in effect and based on a substantial justification other than the fact of nonresidence."); *Supreme Court of N.H. v. Piper*, 470 U.S. at 284 (there must be a substantial state objective and a substantial relationship between the degree of discrimination and the state objective). "[W]hen evaluating the measure and degree of the relationship between the discrimination and state interest," *Bach v. Pataki*, 408 F.3d at 89, courts consider, among other

factors, the availability of less restrictive means. *See Barnard v. Thorstenn*, 489 U.S. at 552-53.

Moreover, the degree of discrimination is relevant in determining the significance of the state interest required as well as the closeness of the fit required between the discrimination and the state objective: "The less serious a discrimination is, the less ought to be required to justify it." *Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir. 1985) (Posner, J.) (holding that attorney admission rule allowing new state residents to be admitted without bar examination if they met continuous practice requirement but requiring nonresidents to take bar examination did not violate Privileges and Immunities Clause). Further, "[t]he inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 U.S. at 396.

As noted in Point I, *supra*, because this case is properly viewed as a facial challenge to Judiciary Law § 470, plaintiff can sustain her challenge to the statute under the Privileges and Immunities Clause, only if there are no circumstances under which Judiciary Law § 470 would be constitutional. *Bach v. Pataki*, 408 F.3d at 89. Because the statute can be

read to impose only an incidental burden on nonresident attorneys that is directly related to a sufficient state interest, it can be read to satisfy the applicable Privileges and Immunities Clause test, and plaintiff's challenge to the statute fails.

A. Judiciary Law § 470 Is Reasonably Read to Impose No More than an Incidental Burden on Nonresident Attorneys.

The alleged difference in treatment here is the requirement in Judiciary Law § 470 that nonresident attorneys maintain an "office" in the State in order to practice in the State's courts. As explained in Point I, *supra,* the term "office" may mean no more than an address within the State at which a nonresident attorney may receive service, including personal service, of legal papers within the jurisdiction of the New York courts. The designation of an agent for this purpose might even suffice. And, as also noted above, there is no reason to think that New York's highest court, if presented with a question of statutory construction, would not construe the "office" requirement in this manner.

The district court assumed that Judiciary Law § 470 necessarily imposes a "significant" "financial burden" and "significant competitive cost" on nonresident attorneys that "effectively precludes" a number of

nonresidents from practicing law in New York (SA 10, 14), but it was mistaken. As noted, plaintiff alleges that she has no office in New York, by which she presumably means she has no presence within the State that could satisfy the office requirement, regardless of how it is interpreted. But because, as we argue here, the statute can reasonably be read to require no more than an address within the State at which the nonresident attorney may receive service of legal papers, the record contains no evidence to establish what, if any, costs plaintiff would incur by complying with such a minimal requirement. Indeed, it seems unlikely that it would cost very much to maintain desk space in New York or arrange an "of counsel" relationship with a New York lawyer, *see Matter of Tatko v. McCarthy*, 267 A.D.2d 583; *Matter of Scarsella*, 195 A.D.2d 513, let alone simply maintain an address for service of legal papers, for example, through a designated agent. Consequently, there is no basis to conclude that the minimal office requirement will necessarily impose a significant financial burden on nonresident attorneys.

Moreover, it is reasonable to assume that many attorneys will choose to work from an office in the State close to the courts in which they regularly practice, regardless of whether they reside within the State, and

most attorneys choosing to do so may well work from offices actually located in the State. *Cf. Piper,* 470 U.S. at 286-87 ("One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire."). For those attorneys, Judiciary Law § 470 will impose no additional burden at all.

Further, in *Friedman*, the Supreme Court suggested that even a more onerous office requirement might withstand privileges and immunities analysis. In that case, the Court rejected Virginia's argument that its exclusion of nonresidents from admission on motion was justified by the need to enforce the State's full-time practice requirement. At the same time, however, the Court indicated that Virginia's ancillary requirement that applicants for admission on motion have a full-time office in the state provided a "less restrictive" alternative to the residence requirement that "is fully adequate to protect whatever interest the State might have in the full-time practice restriction." *Id*. at 69-70. Although the constitutionality of the office requirement was not at issue in *Friedman* (because the plaintiff in that case satisfied the requirement), the

Court viewed the in-state office requirement as qualitatively different from the residency admission restriction it found unconstitutional in that case.

B. Any Such Incidental Burden Imposed on Nonresident Attorneys by Judiciary Law § 470 is Sufficiently Related to the State's Interest in Adjudicating Service Disputes.

The United States Supreme Court has articulated a stringent test for purposes of analyzing state laws and rules under the Privileges and Immunities Clause that "deprive" or substantially burden otherwise qualified nonresidents from the practice of law; in these cases, the Court requires that the deprivation be closely related to a substantial state interest. *Friedman,* 487 U.S. at 65 ("if the challenged restriction *deprives* nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest" (emphasis added)); *Supreme Court of N.H. v. Piper*, 470 U.S. at 284 (similarly explaining rule). Where, however, a state rule imposes only a minimal burden on nonresidents, courts have applied a less stringent test, requiring a less close fit between the burden and the state interest, and only a legitimate state interest, as opposed to a substantial one. *See Tolchin v. Supreme Court of State of N.J.*, 111 F.3d at

1108; *Sestric v. Clark*, 765 F.2d 655. In *Tolchin* and *Sestric*, the courts found that rules that did not appear to discriminate against nonresidents on their face, but nonetheless might impose minimal additional burdens on nonresidents should be upheld because the rules provided a reasonable means to serve a legitimate state interest. Indeed, in *Sestric*, Judge Posner explicitly stated that he was applying a less stringent test because of the minimal degree of discrimination implicated. *Sestric*, 765 F.2d at 664 (explaining that "[t]he less serious a discrimination is, the less ought to be required to justify it").

The minimal burden imposed on nonresident attorneys under the interpretation of Judiciary Law § 470 offered here is closely related to a substantial state interest, or is at least reasonably related to a legitimate state interest. The statute therefore withstands the privileges and immunities analysis.

As noted in Point II(A), *supra*, the legislative history and decisional law interpreting Judiciary Law § 470 indicate that a primary purpose of the office requirement is to assure that an attorney practicing in the New York courts has an address in the State at which to receive service of legal papers. This purpose in turn is directly related to the State's substantial –

or at least legitimate – interest in assuring that attorneys may be served with legal papers within the jurisdiction of the New York courts so that its courts can properly adjudicate disputes concerning such service.

Indeed, the State could adopt no less restrictive alternative to enable its courts to oversee and adjudicate disputes over service of legal papers. Whether this interest is substantial or just legitimate, the Privileges and Immunities Clause is not violated when the degree of discrimination is minimal, and so closely related to the State's interest.

Contrary to the district court's reasoning, the decision in *Frazier v. Heebe*, 482 U.S. 641 (1987), is not dispositive, or even instructive, on the issue presented here. That case involved a local federal district court rule requiring an attorney, as a condition for admission and continued eligibility in the local federal court's bar, either to reside in the state in which the district court was located or to have an office in that state. *Id.* at 643. The Court reviewed the local rule pursuant to its supervisory powers, without passing on its constitutionality. *Id.* at 645. Although the Court described the federal court's state residency and office requirement as "unnecessary and irrational," *id.* at 649, its statement must be understood in context.

The local federal court whose rule was at issue had sought to defend the rule on limited grounds, namely its interest in assuring the competency of counsel appearing before it and the accessibility of counsel to the court on short notice. But the rule was entirely unrelated to an interest in assuring the competency of counsel, and it was "poorly crafted" to assure the accessibility of counsel because it required residency or an office anywhere in the state, not just within the court's jurisdiction. *Id.* at 648-49. *Frazier* thus does not stand for the proposition that requiring a nonresident attorney admitted to practice in the courts of another state to maintain an "office," however defined, within the state is unnecessary or irrational under *all* circumstances, or even indicate that the Supreme Court would so find. Nor does the decision indicate that a *minimal* physical presence that enables service of legal papers on the nonresident attorney within the state is *per se* unnecessary or irrational.

Additionally, reading Judiciary Law § 470 as requiring nonresident attorneys to maintain an address within the State at which to receive service of legal papers *reasonably* serves the State's legitimate interest in facilitating the accessibility of attorneys to its courts on short notice, even if it does not closely fit that interest. Requiring nonresident attorneys to

maintain some minimal presence in the State increases the likelihood that they will be more accessible to the New York courts on short notice.

The state interest of requiring an attorney to have a physical presence in the state to facilitate the attorney's availability to the state courts was rejected in *Piper* and related decisions involving *residency exclusions,* not because the interest was invalid, but because the *extraordinary* burden of requiring an attorney to give up his residency in another state and move to the state in which he seeks to practice was held insufficient to justify this state interest. *See Piper*, 470 U.S. at 286-87 (noting there was "merit" to the state's argument that nonresident attorneys would be less available for prompt court appearances).

In sum, because Judiciary Law § 470 may be interpreted to impose no more than an incidental burden on nonresident attorneys, it survives a facial challenge under the Privileges and Immunities Clause even if viewed as discriminating against nonresidents in some manner. It is closely related to the legitimate, if not substantial, state interest in adjudicating disputes over service and is arguably justified by other state interests as well.

CONCLUSION

The district court's order granting summary judgment to plaintiff, declaring Judiciary Law § 470 unconstitutional and enjoining defendants from enforcing it, should be reversed. The defendants' motion for summary judgment should be granted and the complaint dismissed.

Dated: Albany, New York
January 18, 2012

Respectfully submitted,

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EKATERINA SCHOENEFELD,

Plaintiff,

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

STATE OF NEW YORK, *et al.*,

Defendants.

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 hourlong 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 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 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 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:

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

> 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 (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 (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 (1986); First Nat'l Bank of Az. v. Cities Serv. Co., 391 U.S. 253, 288 (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 (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 (1978) (citing Ward v. Maryland, 79 U.S. 418 (1871); Blake v. McClung, 172 U.S. 239 (1898); Canadian Northern R. Co. v. Eggen, 252 U.S. 553 (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 (1985); Baldwin, 436 U.S. at 279. 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, 464 U.S. 208, 219 (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 (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 (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 (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, 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 (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 (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., 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 Lechtenstein v. Emerson, 251 A.D.2d 64, 64-65 (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 267). 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 (App. Div. 1972); Matter of Fordan, 5 Misc. 2d 372 (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, 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 proces within the State." Id. at 274 (citing Hess v. Pawloski, 274 U.S. 352 (1927); Doherty & Co. v. Goodman, 294 U.S. 623 (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 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 in-state 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 50. 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

Lawrence E. Kahn
U.S. District Judge

* * * * * *UNITED STATES DISTRICT COURT* * * * * *

NORTHERN **DISTRICT OF** *NEW YORK*

JUDGMENT IN A CIVIL CASE

DOCKET NO 1:09-CV-00504 (LEK/RFT)

EKATERINA SCHOENEFELD,

Plaintiff,

-against-

STATE OF NEW YORK, *et al.*,

Defendants.

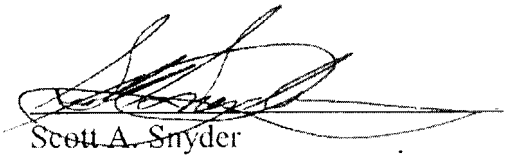
____ **JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the plaintiff as against the defendants, in accordance with the MEMORANDUM-DECISION and ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated September 07, 2011.

DATE: September 07, 2011

LAWRENCE K. BAERMAN
CLERK OF THE COURT



Scott A. Snyder
Courtroom Deputy to the
Honorable Lawrence E. Kahn

C

Effective:[See Text Amendments]

Mckinney's Consolidated Laws of New York Annotated Currentness
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 15. Attorneys and Counsellors (Refs & Annos)
→→ § 470. Attorneys having offices in this state may reside in adjoining state

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.

CREDIT(S)

(L.1909, c. 35. Amended L.1945, c. 649, § 213.)

Current through L.2011, chapters 1 to 55, 57 to 521, 523 to 594, and 597 to 600.

END OF DOCUMENT

11-4283-cv

United States Court of Appeals for the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff - Appellee,

v.

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, JOHN STEVENS, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Defendants - Appellants.

On Appeal from the United States District Court
for the Northern District of New York

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

The undersigned attorney, Laura Etlinger, hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 8,740 words.

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