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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Neither plaintiff nor amici seriously argue that New York Judiciary Law § 470 should be found to violate the Privileges and Immunities Clause even when interpreted narrowly as defendants propose here, namely to require nonresident attorneys to maintain a New York address at which they may receive personal service of legal papers on behalf of a client.[1] Rather, the focus of plaintiff's brief as well as that of the group of nonresident attorneys who appear as amici here ("amici nonresident attorneys") is to challenge defendants' proposed interpretation, and then to argue that, as they contend the statute must be interpreted, it violates the Privileges and Immunities Clause. But plaintiff and amici nonresident attorneys are mistaken that § 470 cannot reasonably be interpreted as

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[1] The phrase "personal service" here is used as a short-hand to refer to all methods of service on attorneys representing clients that are authorized by N.Y.C.P.L.R. 2103(b) and involve the hand delivery of papers, and thus do not require a longer period of time in which to respond to the papers served than that otherwise prescribed by law. New York's C.P.L.R. authorizes four such methods: (i) delivering the paper to the attorney personally, *id.* 2103(b)(1); (ii) if the attorney's office is open, leaving the papers with a person in charge, or if no person is in charge, leaving them in a conspicuous place, *id.* 2103(b)(3); if the attorney's office is not open, depositing the papers, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box, *id.*; or (iv) leaving them at the attorney's residence within the state with a person of suitable age and discretion, if and only if service at the attorney's office cannot be made, *id.* 2103(b)(4). In contrast, service by mail requires the addition of five days to a time prescribed by law, *see* N.Y.C.P.L.R. 2103(b)(2), for example, the time at which a motion may be noticed to be heard, *see id.* 2214.

defendants propose. And as we demonstrate in our opening brief and further demonstrate below, interpreted in that manner, § 470 does not violate the Privileges and Immunities Clause.

ARGUMENT

POINT I

JUDICIARY LAW § 470 IS REASONABLY READ TO REQUIRE NOTHING MORE THAN A NEW YORK ADDRESS AT WHICH A NONRESIDENT ATTORNEY CAN RECEIVE PERSONAL SERVICE OF LEGAL PAPERS ON BEHALF OF A CLIENT

While Judiciary Law § 470 is amenable to interpretation and has never been interpreted by New York's highest court, plaintiff insists that the statute can only be read to require "an actual office space where a nonresident attorney is required to spend some time on a regular basis practicing law" (Pltff. Br. at 19). She seeks to support her interpretation with references to the statutory text, the legislative history, unreviewed trial court decisions, and a handful of appellate decisions, and asks this Court to adopt a definitive interpretation of the statute. The brief of amici nonresident attorneys (hereinafter "Amici Br.") presents a similar argument (Amici Br. at 5-14). (Amicus the New Jersey State Bar

Association ["NJSBA"] simply assumes that "office" means "bona fide office," which it in turn defines to mean "a fixed location" where the attorney actually practices law, without presenting any argument on the issue at all [NJSBA Amicus Br. at 17].)[2] Contrary to these arguments, Judiciary Law § 470 is amenable to interpretation. Moreover, the statute's proper interpretation is ultimately a matter for the state courts to decide in light of the rule of constitutional avoidance to which they are bound. Plaintiff therefore cannot sustain her constitutional challenge on the basis of a statutory interpretation that is not required.

Preliminarily, plaintiff is wrong to contend (Pltff. Br. at 13-16) that her complaint contains an as-applied challenge that is different from a facial challenge to Judiciary Law § 470. As we explain (Opening Br. at 22-23), plaintiff's as-applied challenge effectively asserts that, regardless of how § 470's office requirement is interpreted, the statute cannot constitutionally be applied to her. Such a claim is no different from a

[2] Instead, amicus NJSBA advocates (NJSBA Amicus Br. at 9-14) in favor of a proposal it has submitted to the New Jersey Supreme Court to eliminate New Jersey's current requirement that all attorneys licensed to practice in the state maintain a bona fide office somewhere, even if not in the state. Because the amicus brief of NYSBA is not responsive to the questions at issue on appeal, it is not further discussed here. To the extent the motion by amicus NYSBA for oral argument remains pending, the motion should be denied on the bases that amicus NJSBA has failed to demonstrate not only why the parties to this appeal cannot adequately defend their respective positions, but also how its participation in oral argument could aid the Court.

claim asserting that no interpretation of the statute would render it constitutional, *i.e.*, a facial challenge. While plaintiff argues that her complaint asserts a separate as-applied challenge based on the fact that she was admitted to practice after passing New York's bar examination, rather than by motion, that fact is irrelevant to the constitutionality of § 470, because defendants have never sought to defend § 470 on the basis of any criteria relevant to the method of admission. Plaintiff is also wrong to challenge (Pltff. Br. at 16-17) defendants' description of the proper standard by which to evaluate her facial challenge. As this Court has repeatedly explained, a statute will survive a facial challenge if there are any circumstances under which it can be constitutionally applied. *See, e.g.*, *Ruston v. Town Bd. of Skaneateles*, 610 F.3d 55, 58 n.2 (2d Cir. 2010); *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008).

To support the claim that Judiciary Law § 470 necessarily requires a nonresident attorney to maintain a physical office space in New York where he or she maintains a regular presence, plaintiff and amici nonresident attorneys rely first on what they insist is the plain meaning of Judiciary Law § 470; plaintiff focuses on the term "office" (Pltff. Br. at 19), and amici nonresident attorneys focus on the phrase "office for the

transaction of law business" (Amici Br. at 6-7). Neither statutory reference identifies the specific legal activities that must occur at the subject office. Indeed, the phrase "office for the transaction of law" is reasonably read to mean an "office that facilitates the transaction of law," and thus that serves as the New York address at which legal papers may personally be served.

Plaintiff and amici nonresident attorneys also rely on various state court decisions to support their view that "office" necessarily means a physical office space where the attorney maintains a regular presence (Pltff. Br. at 21-24; Amici Br. at 7-14). Many of these cases, however, are unreviewed trial court decisions, some of which are from courts of limited jurisdiction, which are of particularly limited value in ascertaining the meaning of a generally applicable state law. *See, e.g., Marte v. Graber*, 17 Misc. 3d 1139(A), 2007 W.L. 4336413 (N.Y. City Civ. Ct. Oct. 5, 2007); *In re Fordan's Estate*, 5 Misc. 2d 372 (Sur. Ct. N.Y. Co. 1956). And almost none of the cited decisions address the constitutional issues implicated,

and thus consider whether the rule of constitutional avoidance warrants a different result.[3]

Nonetheless, as our opening brief demonstrates (Br. at 8-11), the State's intermediate appellate courts have so far suggested that the requirement imposed by Judiciary Law § 470 is satisfied when an attorney maintains a fairly minimal physical presence in the State. The district court ignored the decisions of these courts, and instead assumed without analysis that § 470 likely requires nonresident attorneys to pay property taxes, rent or mortgage payments on a New York office (SA 11).[4]

To be sure, in some cases cited by plaintiff and amici nonresident attorneys, the state courts noted with approval the fact that an attorney

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[3] We are aware of only three cases in which a New York court addressed a challenge to Judiciary Law § 470 under the Privileges and Immunities Clause, and in all three cases, the courts rejected that challenge. *See Lichtenstein v. Emerson*, 251 A.D.2d 64, 64 (1st Dep't 1998); *White River Paper Co. v. Ashmont Tissue*, 110 Misc. 2d 373, 376-77 (N.Y. City Civ. Ct. 1981); *see also Matter of Estate of Garrasi*, 29 Misc. 3d 822 (Sur. Ct. Schenectady Co. 2010) (noting its adherence to *Lichtenstein*, despite the earlier ruling by the district court in this case declining to dismiss plaintiff's complaint). These courts thus did not wrestle with the question whether the statute should be interpreted in light of the rule of constitutional avoidance.

[4] Indeed, in finding that § 470 imposed an undue burden on nonresident attorneys, the district court weighed not only this burden that it assumed § 470 imposed on nonresident attorneys, but also the fact that nonresident attorneys would likely choose to maintain both homes and separate offices in their home states (SA 11). Of course, resident attorneys similarly may choose to maintain both homes and separate offices in New York, but any burden that results from such a choice cannot fairly be attributed to § 470.

maintained physical space in an operational office. *See, e.g.*, *Keenan v. Mitsubishi Estate*, 228 A.D.2d 330 (1st Dep't 1996); *Matter of Scarsella*, 195 A.D.2d 513 (2d Dep't 1993); *Austria v. Shaw*, 143 Misc. 2d 970 (Sup. Ct. N.Y. County 1989); *CA Constr. v. 25 Broadway Off. Props.*, No. 1000728/09, 2010 W.L. 1285418 (N.Y. Sup. Ct. N.Y. Co. March 15, 2010). In these cases, however, the courts found that the subject lawyers satisfied § 470's office requirement. They thus do not establish the minimal criteria for § 470's office requirement. Moreover, even if these cases were regarded as establishing minimal criteria, they would not require the nonresident attorney's physical presence at the qualifying office. *Matter of Tatko v. McCarthy*, 267 A.D.2d 583 (3d Dep't 1999) expressly rejected the notion that the attorney must have a regular physical presence in the State. There, the court denied a motion seeking dismissal of the petition for lack of a New York office at which the petitioner's nonresident attorney was physically present because the attorney had an "of counsel" relationship with a New York attorney.

Plaintiff and amici nonresident attorneys also rely on *Matter of Tang*, 39 A.D.2d 357 (1st Dep't 1972), *Matter of Haas*, 237 A.D.2d 729 (3d Dep't 1997), and *Lichtenstein v. Emerson*, 251 A.D.2d 64 (1st Dep't 1998) (Pltff.

Br. at 22, 46-47; Amici Br. at 13-14), but these cases do not support their position either. *Matter of Tang* is simply inapposite. The court's description there of the "office" referenced in § 470 as the place to which an attorney commutes was dictum, because the court was not presented with the question whether § 470 was satisfied. The court did not need to address the applicability of § 470 at all, because the nonresident attorney was not yet even admitted to practice in New York. As for *Haas* and *Lichtenstein*, while both cases involved attorneys who were found to have violated § 470, as we explain in our opening brief (Br. at 10-11), the particular facts of those cases made it very unlikely that the New York address provided could have been used for personal service of legal papers on the respective nonresident attorneys. *Haas*, moreover, involved the more significant problem that the attorney had relocated to Texas without informing his clients at all, and thus his claim that he maintained an office at the home of a New York assistant was suspect.

In the end, the meaning of § 470 is a matter for the New York courts to decide. The meaning of the term "office" presents a pure question of statutory construction. *See Matter of Madison-Oneida Bd. of Coop. Educ. Servs.*, 4 N.Y.3d 51, 59 (2004); *Matter of Gruber*, 89 N.Y.2d 225, 231-32

(1996). In deciding that question, New York courts are bound by the rule of constitutional avoidance, which requires them "to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided." *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 585 (1991); *see also People v. Correa*, 15 N.Y.3d 213, 233 (2010) ("Faced with the choice between an interpretation that is consistent with the Constitution . . . and one that creates a potential constitutional infirmity, courts are to choose the former."). And New York courts are free to apply this principle, even if the interpretation they ultimately adopt may appear dubious to others. *See Portalatin v. Graham*. 624 F.3d 69, 89-90 (2d Cir. 2010) (noting *en banc* that this Court is bound by the New York Court of Appeals' construction of a New York statute, even if the construction is not clear from the statute's plain meaning and may have been adopted specifically to avoid an unconstitutional construction).

That is not to say that plaintiff must risk discipline or litigation sanctions while she awaits a more definitive interpretation of Judiciary Law § 470 from the state courts. Plaintiff could have brought her declaratory judgment action in state court, and likely can still do so, to determine whether it is sufficient to maintain a New York address at

which she can receive personal service of legal papers. If this Court seeks still more prompt resolution, it can certify that question to the Court of Appeals. But the Court should not invalidate a state statute on the basis of a presumed, but ill-advised, interpretation.

POINT II

READ AS PROPOSED HERE, EVEN IF § 470 IMPLICATES THE PRIVILEGES AND IMMUNITIES CLAUSE, IT DOES NOT VIOLATE IT

As defendants' opening brief demonstrates (Br. at 40-41), where a state rule imposes only a minimal burden on the rights guaranteed by the Privileges and Immunities Clause, courts will uphold it as long as it serves a sufficiently substantial interest. While plaintiff disputes defendants' position on this point (Pltff. Br. at 33, 39-43), she does so on the basis of irrelevant factual differences in some of the cases on which defendants rely. In any event, read as defendants propose, Judiciary Law § 470 imposes only a minimal burden that furthers the State's sufficiently substantial interests, namely its interests in enabling New York courts to adjudicate disputes arising out of service, facilitating the accessibility of its attorneys to its courts on short notice, and preserving the ability of

litigants to rely on the short response time that personal service entails. The statute thus does not violate the Privileges and Immunities Clause.

Most of the arguments presented by plaintiff and amici nonresident attorneys regarding the burden they believe § 470 imposes on nonresident attorneys are irrelevant, because the arguments assume that § 470 requires nonresident attorneys to maintain a physical space in New York at which they are regularly present for the purpose of practicing law, and that nonresident attorneys would not do so but for this requirement.[5] Plaintiff and amici nonresident attorneys also note (Pltff. Br. at 47-48; Amici Br. at 18) that even requiring nonresident attorneys to forge "of counsel" relationships with New York attorneys can be difficult, and thus unduly burdensome for purposes of the Privileges and Immunities Clause, for some attorneys, particularly some solo practitioners or newly admitted lawyers. If, however, § 470 is read as defendants urge – to require only a New York address at which the nonresident attorney can receive personal

[5] Amici nonresident attorneys note the number of attorneys registered with the Office of Court Administration ("OCA") who provide out-of-state business or home addresses, and claim that this number provides information about the extent of the burden that § 470 imposes (Amici Br. at 15). But in fact this number provides no information about how many lawyers are burdened by the requirement of § 470. First, not all attorneys registered to practice with OCA seek to practice in New York courts; for example, many transactional lawyers and inactive lawyers have no reason to do so. Second, many nonresident lawyers work in New York offices and would choose to do so even in the absence of § 470's requirement.

service of legal papers on behalf of a client – maintaining an "of counsel" relationship is more than the statute requires. Indeed, amici nonresident attorneys affirmatively offer an agency option as a "less restrictive means" (Amici Br. at 27) by which New York could serve its interests without running afoul of the Privileges and Immunities Clause. But as long as the attorney's agent could receive personal service of legal papers in the ways authorized by N.Y.C.P.L.R. 2103(b) for personal service of legal papers on attorneys by hand delivery, *see, supra,* at 1 n.1, such an agency should suffice to satisfy the requirements of § 470.

As for the sufficiency of the State's interest in requiring its attorneys to maintain a New York address at which they may receive personal service of legal papers, plaintiff and amici nonresident attorneys make three points warranting a response. First, plaintiff seeks to undermine the sufficiency of the State's interests here by suggesting that, in lieu of requiring a New York address for personal service, the State could require nonresident attorneys to accept service by FAX or email as a condition to practicing in its courts, and that doing so would be less onerous for nonresident attorneys (Pltff. Br. at 36). It is true that service by FAX or email would result in the same response time as personal service, because

when papers are served by FAX or email, no additional time is required to be added to any prescribed response time. *See* N.Y.C.P.L.R. 2103(b)(5), (7).

But New York has a sufficiently substantial interest in assuring parties the ability to personally serve legal papers if they so choose. Legal papers can include court orders directing immediate action; a party serving such orders might wish to increase the chances of bringing them to someone's immediate attention by hand delivering them.[6] Legal papers can also be voluminous and can include oversized exhibits, and the burden of FAXing or scanning and emailing them can accordingly be substantial. If the moving party can personally serve such papers to an agent at a New York address, then the burden of transmitting them elsewhere electronically falls – and properly so – on the nonresident attorney receiving the papers, rather than the adversary serving them. Any burden imposed on nonresident attorneys by requiring them to maintain New York addresses at which legal papers can be personally served is sufficiently minimal to justify that requirement. While the Privileges and Immunities Clause prohibits the imposition of an undue burden on

[6] In New York, service of an order with notice of its entry commences the time period in which to appeal. *See* N.Y.C.P.L.R. 5513. It is therefore routinely relied upon to establish actual notice of an order's contents for enforcement purposes.

nonresidents, surely it does not require the State to accommodate nonresidents at the expense of attorneys seeking to serve them.

This same reason disposes of plaintiff's second but related point (Pltff. Br. at 33, 36) questioning why personal service must occur within the State at all. As we explain (Opening Br. at 40-41), the requirement that personal service take place within the State enables New York courts to supervise disputes arising out of that service. But it also reasonably relieves adversaries seeking to serve papers personally from having to travel outside the state in which they are practicing to serve papers or else developing relationships with process servers or other similar entities, not just throughout the state where they can fairly expect to need such relationships, but wherever the nonresident attorney may be located.

Finally, plaintiff seeks to challenge the sufficiency of the State's interests here by relying on the statute's derivation. She notes that § 470 as originally enacted served as an exception to the residency requirement that then existed for attorneys practicing in the State. From that fact she argues that, once the residency requirement was invalidated by the New York Court of Appeals, no valid purpose could possibly have remained to leave the exception in place. *See* Pltff. Br. at 32.

Plaintiff's argument is misguided because it ignores subsequent history. In the aftermath of the decision by the Court of Appeals to invalidate New York's residency requirement, *see Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266 (1979), the New York Legislature reviewed many provisions throughout state law regulating nonresident attorneys. While it revised many of these provisions, *see* Act of June 18, 1985, ch. 226, 1985 N.Y. Laws 2049, it left § 470 intact.[7]

Moreover, the Legislature left § 470 intact, even though it was presented with a bill to modify the statute. At the time, the Office of the Court Administration ("OCA") proposed a bill that would have modified § 470 expressly to provide that all nonresident attorneys, as opposed to just those nonresident attorneys in adjoining states, were required to maintain an "office" in the State.[8] OCA Program Bill 86-78, introduced as

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[7] Specifically, the 1985 law amended various provisions of the Judiciary Law and New York's C.P.L.R., including Judiciary Law § 90 (procedures for admission without examination); *id.* § 460 (requirement of examination and admission to practice); *id.* § 464 (procedures for certification of candidates to the appropriate Appellate Division department); N.Y.C.P.L.R. 9402 & 9403 (procedures for referring candidates to the appropriate Committee on Character and Fitness); *id.* 9406 (standards for certification by the Committee on Character and Fitness).

[8] One of the primary purposes for retaining the office requirement, according to the OCA's memorandum in support of its program bill, was to "insure[ ] that there will be a local office upon which service affecting the nonresident attorney can be made." Memorandum in Support of OCA 86-78 (JA 131-133).

Senate Bill 8336 (March 31, 1986) (JA 130-134). While the Legislature did not act on that bill, its inaction when it was specifically amending other related provisions provides evidence that the Legislature intended § 470 to continue in effect, even if it no longer served as an exception to a broader rule.

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
May 22, 2012

Respectfully submitted,

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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

2,892 words.

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