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 OF NEW YORK-LICENSED NONRESIDENT ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT OF THE INTERESTS OF *AMICI CURIAE*

New York Judiciary Law § 470 requires nonresident lawyers to maintain an "office for the transaction of law" within New York to practice in state courts. *Amici curiae* are lawyers who are admitted to practice law in New York but do not reside in New York. They include solo practitioners and lawyers in small law firms. Most *amici* are admitted to practice in at least one other jurisdiction in addition to New York, including California, the District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, and Vermont.

Amici include lawyers who have been unable to practice in New York or have turned down work or clients because of the discriminatory costs imposed by § 470. *Amici* also include lawyers who practice in New York but whose law practices have been burdened by the compliance costs associated with § 470.

All of the *amici* want to use their New York law licenses and practice law in New York but must suffer the substantial costs imposed by § 470's office requirement. These costs put *amici* at a competitive disadvantage in the New York legal market vis-à-vis resident lawyers by requiring them to maintain and pay for office space in New York or forgo economic opportunities in the state. Moreover, the office requirement is particularly troubling for many of the *amici*—including Regina Waynes Joseph, a past president of the Garden State Bar Association—who

live very close to the New York border and wish to practice in New York courts without § 470's discriminatory burdens.

As New York-licensed lawyers in good standing who reside outside of the state, *amici* are well situated to inform the Court of the very real burdens imposed by § 470 and the ways in which the statute places them at a disadvantage compared to resident lawyers when vying for New York business. Together, *amici* believe that their insight into the practical impediments posed by the office requirement will assist the Court in resolving the constitutional issues raised by this case.

This brief is filed with the consent of the parties under Federal Rule of Appellate Procedure 29(a). A full list of *amici* is included as the Appendix to this brief.[1]

SUMMARY OF THE ARGUMENT

Section 470 singles out nonresident lawyers by requiring them to maintain an "office for the transaction of law" within New York to practice in state courts. Attempting to minimize this facial discrimination against nonresidents, the State concocts an unreasonable interpretation of the statute and argues, counter-intuitively, that an "office for the transaction of law" means nothing more than an

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amici* contributed money intended to fund the preparation or submission of the brief.

address where a nonresident lawyer can receive service. This interpretation flies in the face of the statutory language and the relevant case law. As New York courts have held, § 470 requires an office, not just an address.

Section 470's office requirement imposes far more than an incidental burden on nonresident lawyers. The statute imposes significant costs, risks, and administrative burdens on nonresidents that residents are spared. As a result, § 470 puts nonresident lawyers at a competitive disadvantage in the New York legal market and excludes many qualified nonresidents from practicing law in that market altogether. This kind of discrimination against nonresidents falls squarely within the ambit of Article IV's Privileges and Immunities Clause and is permissible only if the State demonstrates a substantial interest that is closely related to the office requirement. The State does not.

Neither of the interests that the State advances to justify § 470 withstands scrutiny. The State has not shown that witness availability for the adjudication of service disputes is a problem that affects any significant number of cases involving nonresident lawyers, or that less restrictive means of advancing its interest are unavailable. Furthermore, the State cannot seriously claim that the statute is closely related to its interest in ensuring that lawyers are available to New York courts when its own interpretation of the office requirement does not further, but actually undermines, that interest.

ARGUMENT

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, cl. 1. The Clause was intended "'to place the citizens of each State upon the same footing with citizens of other States.'" *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). A state violates the Clause if (1) the state imposes a discriminatory burden on a fundamental right of nonresidents and (2) the discriminatory burden is not closely related to the advancement of a substantial state interest. *See Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985). One of the privileges protected by the Clause is the right of a qualified nonresident to practice law within a state on terms of substantial equality with resident lawyers. *See Friedman*, 487 U.S. at 66; *Piper*, 470 U.S. at 279-81.

New York Judiciary Law § 470—which requires nonresident lawyers licensed to practice law in New York courts to maintain a New York office—offends the Clause and should be invalidated. *First*, as a threshold matter, the interpretation of the statute urged by the State—which the State argues resolves the constitutional problem—is unreasonable and unsupported by the statutory text and relevant case law. *Second*, § 470 imposes a significant discriminatory burden on

the fundamental right of nonresident lawyers to practice law in New York courts by requiring them to maintain a New York office. *Third*, § 470's discriminatory treatment of nonresident lawyers is not closely related to the State's asserted interest in "enabling its courts to adjudicate service disputes," Appellants' Br. 34, or "facilitating the accessibility of attorneys to its courts on short notice," *id.* at 43.

I. The State's Interpretation of § 470's Office Requirement Conflicts with the Statutory Text and Case Law and Should Therefore Be Rejected.

For the first time on appeal, the State, adopting an extreme version of constitutional avoidance, urges this Court to interpret § 470 to require nonresident lawyers only to maintain a New York address at which they may receive service of process and papers. Based on this interpretation, the State argues that § 470 does not impose a discriminatory burden on nonresidents. But the State's interpretation is unreasonable and should be rejected because it is contrary to the statutory text and New York case law interpreting it.

The State posits that § 470 reasonably can be read to require "nothing more than that nonresident lawyers maintain an address within the State at which they may be served with legal papers on behalf of the clients they represent." *Id.* at 19. The State notes that, under this interpretation, an "of counsel relationship" with a New York lawyer or law firm, an "affiliation with a New York law firm," or a reciprocal satellite office sharing agreement satisfies § 470's office requirement. *Id.* at 8-9 (citing cases). Finally, the State, without citing any authority, speculates

that the "designation of an agent for th[e] purpose [of receiving service] might even suffice." *Id.* at 25.

However, the statutory text undermines the State's interpretation and demonstrates that § 470 cannot reasonably be read to require nothing more than a New York address for service. Moreover, state courts have held that § 470 places a much heavier burden on nonresident lawyers who practice in New York courts and, at the very least, requires them to maintain a physical office in New York in which they can practice law.

A. Section 470's text undermines the State's interpretation of the office requirement.

The text of § 470 provides no support for the State's interpretation. Section 470 states that

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

N.Y. Jud. Law § 470. Although § 470 does not explicitly define the term "office," the text contradicts the State's position that "office" is narrowly defined as an "address" where a lawyer can receive service of process. *See Marte v. Graber*, 17 Misc. 3d 1139(A), 2007 WL 4336413, at *2 (N.Y. Civ. Ct. Oct. 5, 2007) ("[T]he statute requires an 'office,' not an 'address' . . . ."). Taken to its logical conclusion, the State's interpretation of the term "office"—as potentially meaning nothing

more than an address at which a lawyer may receive process—would narrowly define the statutory phrase "for the transaction of law business" to mean "for the receipt of service of process." Nothing in the statutory text supports that reading, and the State cites no case that supports that interpretation.

Moreover, the reality of legal practice demonstrates that lawyers, in "transact[ing]" "law business," do far more than receive litigation documents for their clients. *Cf.* 6A N.Y. Jur. 2d, Attorneys at Law § 44. In New York, the practice of law includes giving legal advice, drafting legal documents, and holding oneself out as authorized to practice law in the state—not just receiving service of papers or process. *See id.* (citing to New York cases defining the practice of law). Thus, the statutory term "office" cannot be reasonably interpreted to require only a New York address at which a lawyer may be served process; indeed, not even the State interpreted "office" in this way in the district court. The State's attempt to do so now should be rejected.

B. New York courts have interpreted § 470 to require nonresident lawyers to maintain a physical New York office in which they can practice law.

As explained above, the State erroneously asserts that § 470 merely requires nonresident lawyers to maintain a New York address at which they may receive service of process or papers. But "the statute requires an 'office,' not an 'address.'" *Marte*, 2007 WL 4336413 at *2. Although "[n]othing in the statute states the size

or type of office required to be maintained," *Austria v. Shaw*, 542 N.Y.S.2d 505, 506 (N.Y. Sup. Ct. 1989), New York courts have interpreted § 470 to require nonresident lawyers to maintain an actual physical office, *see In re Fordan's Estate*, 158 N.Y.S.2d 228, 230 (N.Y. Surr. Ct. 1956) (Maintaining a "mailing address at [a relative's] home is of no material significance as the actual maintenance of an office . . . is required.").

Courts have held that nonresident lawyers may satisfy the office requirement by renting physical space where the lawyer can conduct his or her legal practice, *see, e.g.*, *Matter of Scarsella*, 195 A.D.2d 513, 515-16 (N.Y. App. Div. 1993); by arranging a reciprocal satellite office sharing agreement, *see, e.g.*, *Serer v. Gorbrook Assocs., Inc.*, 2011 WL 6332378 (N.Y. Sup. Ct. Dec. 1, 2011); or by arranging an "of counsel" relationship with a New York lawyer or firm, *Matter of Tatko*, 699 N.Y.S.2d 509, 511 (N.Y. App. Div. 1999). The case law demonstrates that the key question for New York courts when interpreting § 470 is not simply whether nonresident lawyers have an address to receive service or process or papers but rather whether lawyers have an actual physical New York "office for the transaction of law business." *See* N.Y. Jud. Law § 470.

First, New York courts have repeatedly held that a nonresident lawyer may satisfy § 470 by renting a New York office in which she maintains desk space, a telephone, and secretarial staff. *See Scarsella*, 195 A.D.2d at 515-16 (lawyer

satisfied § 470 by maintaining a desk and telephone in a Manhattan office); *Austria*, 542 N.Y.S.2d at 506 (lawyer satisfied § 470 by renting a desk and paying for secretarial staff to take telephone messages); *Miller v. Corbett*, 676 N.Y.S.2d 770, 772-73 (City Ct. Yonkers 1996) (lawyer complied with § 470 by maintaining a desk and telephone in his client's New York office where the lawyer was present "on a regular basis").

At issue in *Scarsella*, *Austria*, and *Miller* was not only each lawyer's amenability to service of process but rather each lawyer's physical presence in an actual New York office. In all three cases, the courts found important the rental of desk space as well as the availability of secretarial staff and a telephone, demonstrating the courts' overarching concern as to whether the nonresident lawyers maintained a physical office space in which they actually conducted legal business.

In *Miller*, the nonresident lawyer's "regular" presence in the New York office was essential. 676 N.Y.S.2d at 772-73. The court's reasoning in *Miller* demonstrates that its interpretation of § 470 hinged less on service-of-process concerns and more on the actual physical presence and availability of the nonresident lawyer in the New York office space. *See id.*

Although *Austria* acknowledged that § 470 contemplated the importance of being able "to serve legal notices at the New York address," it further noted that "a

rental of desk space, with a telephone which is answered . . . suffices" to meet the statutory requirement. 542 N.Y.S.2d at 506. Importantly, the court listed three other concerns underlying § 470, including disciplining attorneys, using the remedy of attachment against attorneys, and evaluating attorney character. *Id.* Service of process was therefore only one of the four justifications for the statute recognized by the court. *See id.*

If the State's interpretation of § 470 were correct, the discussion of the availability of a telephone in *Scarsella*, *Austria*, and *Miller* would be irrelevant because service of process and legal papers cannot be effectuated by a telephone call in New York. *See* N.Y.C.P.L.R. §§ 303 *et seq.*; N.Y.C.P.L.R. § 2103. That the New York courts found telephone availability to be important in all three cases demonstrates that a lawyer's amenability to service does not suffice to comply with § 470.

These cases also demonstrate the arbitrary burdens that § 470 places on nonresident lawyers. For example, requiring a New York lawyer to have a telephone in a New York office makes very little sense. A New York telephone number does not make a lawyer more available or present in New York, and there is nothing intrinsically different between a telephone number in New Jersey or California and one in New York. Additionally, if availability by telephone is important, having a New York office or secretarial staff is not necessary to achieve

that end and may, in fact, undermine it. Many solo practitioners, like many of the *amici*, answer their own phones and would be less accessible if messages were sent first to New York telephones or secretarial staff, only to be conveyed later to the nonresident practitioners. Thus, not only is the State's interpretation of § 470 erroneous, but it also demonstrates that the statute's discriminatory treatment is untethered to a substantial state interest.

Second, New York courts have held that a lawyer may comply with § 470 by arranging a reciprocal satellite office sharing agreement with a New York lawyer or firm. *See, e.g.*, *Keenan v. Mitsubishi Estate, N.Y.*, 228 A.D.2d 330, 331 (N.Y. App. Div. 1996); *Serer*, 2011 WL 6332378. In *Keenan*, the court explained that the reciprocal satellite office sharing agreement demonstrated that the nonresident lawyer's firm "maintained an office to engage in the 'transaction of law business' in this State." 228 A.D.2d at 331. Absent from *Keenan*'s reasoning was any mention of service of process or whether the New York firm was authorized to accept service on behalf of the out-of-state firm. Similarly, in *Serer*, although the court acknowledged that receipt of "court papers" was one aspect of the reciprocal office sharing arrangement between the out-of-state firm and New York firm, the court recognized that it was only one among many important features of the reciprocal agreement. 2011 WL 6332378. Specifically, the court noted that the arrangement facilitated the nonresident's actual practice of law in New York in

three other ways: It allowed the nonresident lawyer to "conduct depositions, closings, and meetings." *Id.*

Beyond demonstrating the inaccuracy of the State's interpretation of § 470, *Keenan* and *Serer* also illustrate the unjustified burden that the law imposes on nonresident solo practitioners, who are less likely to have the capacity to use reciprocal satellite office sharing agreements because of their limited resources. Notably, both cases involved arrangements between two *firms*, not between a solo practitioner and a firm. Because reciprocal office sharing arrangements require each party to make its space available to the other party, solo practitioners—who may not have the resources needed by larger firms, may practice out of their homes, or cannot otherwise afford to share their office spaces—are often left without this option. In fact, many of the *amici* conduct their law practice primarily by telephone and email or in their clients' offices.

Third, one intermediate appellate court has held that a nonresident lawyer may satisfy § 470's office requirement by arranging an "of counsel" relationship with a New York lawyer who has a New York office. *See Tatko*, 699 N.Y.S.2d at 511. *Tatko* found the "of counsel" relationship sufficient without any mention of the nonresident lawyer's amenability to service of process. *Id.* Notably, as demonstrated in Part II.A below, it is very difficult for nonresident solo

practitioners with limited resources like many *amici* to establish "of counsel" relationships with New York firms or lawyers.

As these cases show, New York courts have interpreted § 470 to require a lawyer to maintain an actual physical office, arrange a reciprocal office sharing agreement with a New York lawyer, or establish an "of counsel" relationship with a New York firm. By contrast, New York courts routinely find that a nonresident lawyer fails to satisfy § 470 when the lawyer is regularly absent from the New York address or when the lawyer uses that address solely as a mail drop. *See Lichtenstein v. Emerson*, 251 A.D.2d 64, 64 (N.Y. App. Div. 1998); *Matter of Haas*, 237 A.D.2d 729, 730 (N.Y. App. Div. 1997) (per curiam); *Marte*, 2007 WL 4336413, at *2. For example, in *Marte*, the court held that a lawyer failed to comply with § 470 where he purportedly maintained a New York address and had mail forwarded from that address to his North Carolina office but did not claim to be present at the New York address, did not claim to have telephone service there, and did not claim to have employees there. *Id.* Similarly, in *Haas*, the court held that the lawyer failed to satisfy the office requirement when he purportedly maintained his New York office in the home of his assistant but failed to demonstrate that mail and telephone messages would be delivered to him. 237 A.D.2d at 729. Finally, in *Lichtenstein*, the court held that the lawyer failed to satisfy § 470's office requirement because it was improbable that the lawyer

"transacted legal business from a small room located in a basement of a restaurant." 251 A.D.2d at 64. *Lichtenstein* discussed other relevant factors including the plaintiff's failure to report New York income, lack of New York-based employees, failure to instruct restaurant employees to accept legal service, and failure to register the address with the Office of Court Administration. *Id.* Service of process was but one of the relevant factors in determining compliance or noncompliance with § 470. *See id.*

In sum, the case law paints a more nuanced picture than the interpretation offered by the State. New York courts have interpreted § 470 to require more than the maintenance of an address at which a lawyer may receive service of process or papers because those courts recognize other justifications underlying the statute, such as disciplining attorneys and evaluating attorney character. *See Austria*, 542 N.Y.S.2d at 506. The State takes *one* of the justifications of the office requirement—ensuring effective service of process—and makes it the *only* justification. As the cases demonstrate, that is not the only justification. The State's interpretation is therefore unreasonable and should be rejected.[2]

[2] In a last-ditch effort to salvage its interpretation, the State requests certification to the New York Court of Appeals to determine whether § 470 reasonably can be read to require nothing more than the maintenance of an address at which nonresident attorneys may be served process. Appellants' Br. 28-29. Because the text of § 470 and the case law interpreting it require nonresident lawyers to maintain a physical office space in New York where they can practice law,

(cont.)

II. Section 470 Imposes Discriminatory Burdens on Nonresident Lawyers and Therefore Triggers Scrutiny Under the Privileges and Immunities Clause.

Although the State attempts to avoid a constitutional problem by contorting the meaning of § 470, as Part I demonstrates, the statute means what it says: to practice in New York courts, nonresident lawyers must maintain an actual "office for the transaction of law" in New York or establish an "of counsel" relationship or office sharing agreement with a New York firm. This requirement imposes discriminatory burdens on up to 107,610 members of the New York bar with out-of-state business or home addresses.[3] Nonresidents must expend time, money, and effort to comply with the office requirement and shoulder administrative burdens and risks that residents are spared—as the State concedes, the statute "singles out" nonresidents. Appellants' Br. 33. Far from "minimal," *id.* at 41, the costs of compliance put nonresidents at a real competitive disadvantage relative to New York resident lawyers and exclude many nonresidents from the New York market

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certification is unnecessary to resolve this case. Moreover, the State's request for certification is too narrow. Should the Court find certification appropriate, *amici* request certification to the Court of Appeals to determine the minimum requirements necessary to satisfy § 470.

[3] This figure was provided to counsel for *amici* via email by a communications official of the New York State Unified Court System, which oversees New York attorney registration. Although some of the New York lawyers with out-of-state business addresses may reside in New York, this figure demonstrates the large number of lawyers adversely affected by § 470.

altogether. This is precisely the kind of discrimination the Privileges and Immunities Clause was designed to combat.

A. Section 470 imposes discriminatory financial and administrative burdens and heightened risks on nonresident lawyers.

As the district court correctly concluded, § 470 discriminates against nonresidents by placing an "additional threshold cost" on practicing law in New York courts. JA 24. Although a resident may practice law in the state from a single office or from his or her home, a nonresident must either finance an additional office in New York or arrange an "of counsel" relationship or office sharing agreement with a New York lawyer or firm. All of these options are quite burdensome. Moreover, § 470 burdens nonresidents with heightened risks and administrative hassles that prevent them from practicing law in New York courts on equal footing with New York residents.

Nonresidents who comply with § 470 by renting an actual office in New York must shoulder a severe financial burden. *Amicus* Michele A. Peters paid $2,436.40 per month to rent a Manhattan office in addition to her New Jersey office—an expense she can no longer afford. *Amicus* Sydney J. Chase trades legal services worth up to $350 per month to rent Brooklyn office space in addition to his Florida home office. *Amicus* Michael Carlucci pays $10,000 per year to rent a New York office in addition to maintaining his New Jersey office. These added expenses are beyond the means of many nonresident lawyers, especially solo and

small-firm practitioners, who represent around three quarters of American lawyers. Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2000*, at 29 (2004). Indeed, only three out of the twenty-two *amici* have been able to afford to rent actual office space in New York.

A cheaper method that arguably complies with § 470 is to use a "virtual office" service, which provides telephone and mail forwarding services and use of meeting rooms on an hourly basis. But even this option is quite costly. The base cost of these services ranges from $59 per month to over $100 per month, for a total of $700 to over $1,000 per year. *See* Virtual Office, http://www.virtualoffice.com/landing.php (last visited Apr. 20, 2012); Corporate Suites, http://www.corporatesuites.com/virtual-office-packages/ (last visited Apr. 20, 2012). This is hardly an "incidental" burden. Appellants' Br. 37. Furthermore, the alternative of establishing a reciprocal office sharing agreement with a New York firm is impracticable for nonresidents who lack connections to New York firms or the ability to offer the use of out-of-state space. Indeed, none of the *amici* have such an agreement.

Using an "of counsel" relationship with a New York firm to comply is an equally impractical option. "Of counsel" relationships are not just marriages of convenience meant to clear protectionist administrative hurdles; they demand a "close, regular and personal relationship" involving regular consultation between

the firm and the nonresident lawyer. N.Y. City Bar Op. 1996-8 (1996), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/1996-opinions/1140-formal-opinion-1996-8; ABA Formal Op. 90-357 (1990). This standard is not easy to meet, especially for solo practitioners who may have difficulty convincing a New York law firm to associate with them. "Of counsel" relationships also implicate conflict-of-interest imputation rules that can deprive both the nonresident lawyer and the New York firm of potential clients. *See* N.Y. State Bar Ass'n Op. 793 (2006), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=55602. Moreover, *amicus* Antonio D. Pyle reports that the New York lawyer with whom he is "of counsel" must maintain additional malpractice insurance to cover him. Because these costs affect the nonresident lawyer *and* the New York law firm, many firms hesitate before accepting a nonresident lawyer as "of counsel." Thus, "of counsel" relationships are a burdensome or impractical option for many nonresidents.

Out of prudence or inability to meet § 470's office requirement, nonresidents sometimes retain local counsel in New York, despite being licensed there. This puts them at a competitive disadvantage. For instance, *amicus* John Mueller, a solo practitioner residing in Kentucky, has paid between 20% and 35% of his legal fees to local counsel in his New York cases, undermining, if not eliminating, any advantage he gains by maintaining his New York bar membership.

In addition, even nonresidents who believe they have complied with the office requirement can face motions for disqualification from opposing counsel. At least one small firm nonresident lawyer is currently defending such a motion. *See* Pl.'s Mem. of Law in Opp'n to Mot. to Disqualify Counsel Pursuant to N.Y. Judiciary Law § 470, *Tahan v. Giraud*, No. 60107/11 (N.Y. Sup. Ct. Apr. 19, 2012). Motions for disqualification distract nonresident lawyers from their cases, impose added costs, and inhibit nonresident New York lawyers from taking more cases in New York courts. By contrast, resident lawyers can practice without this distraction. Nonresident lawyers also face a heightened risk of client-fee forfeiture, as clients may evade fee agreements by arguing that a nonresident lawyer violated § 470. *See*, *e.g.*, *In re Estate of Garrasi*, 907 N.Y.S.2d 821 (N.Y. Surr. Ct. 2010).

To avoid these risks, nonresidents normally list a New York address—whether that of an actual office space, a New York firm with which they have an agreement, or a "virtual office" provider—on their letterhead, court papers, and advertising materials. As a result, correspondence and court papers are frequently mailed to nonresidents at a New York address, only to be forwarded to their out-of-state location. *Amicus* Mr. Carlucci must pay to have his mail FedExed from his New York office to his New Jersey office on a daily basis. There is no sensible reason for this empty exercise in mail forwarding, which serves only the interests of the United States Postal Service and FedEx, but not the interests of clients or

New York courts. For instance, *amicus* Mr. Chase, who rents space in a New York office and relies on its secretarial staff to forward mail to his residence in Florida, has encountered delays in his New York cases and once missed a deadline when mail was not forwarded promptly. *Amicus* Carl Archer, a New Jersey resident, has had to limit the number of New York cases he can take because the New York lawyer with whom he has an office sharing agreement cannot handle the burden of processing and forwarding a high volume of mail addressed to Mr. Archer.

These heightened risks and added costs put nonresident lawyers at a competitive disadvantage compared to New York residents. Nonresidents must either pass the costs of complying with § 470 on to clients by charging higher rates, making the lawyer less competitive, or cut back on other business expenditures, such as legal database subscriptions or support staff. For instance, *amicus* Ms. Peters was able to afford a New York office in addition to her New Jersey office only by forgoing an assistant to answer the telephone. For nonresident lawyers who cannot afford these added costs or trade-offs, the office requirement's "practical effect is virtually exclusionary." *Toomer v. Witsell*, 334 U.S. 385, 397 (1948). Indeed, many *amici*—including Brendan J. Klaproth, Paul Kostro, Laura Mann, and Sara A. Weinstein—have had to turn down cases in New York or refrain from practicing law in New York courts altogether because they cannot afford to obtain or associate with an office in New York. The statute thereby

prevents nonresidents from competing on equal footing with residents in the New York legal market.

B. Recent changes in the national economy and legal market exacerbate § 470's discriminatory effect on nonresidents.

Over the last fifty years, globalization, increased national economic integration, and technological developments have led to an increasing need for cross-border representation. *See* American Bar Association, *Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice* 1-2, 9-12 (2002); Thomas D. Morgan, *The Vanishing American Lawyer* 89 (2010). Moreover, as the Supreme Court recognized over twenty-five years ago, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). As a result, many nonresidents seek admission to the New York bar to facilitate a multijurisdictional practice. Indeed, over half the *amici* are licensed and practice in three or more jurisdictions.

Section 470, however, can prevent nonresidents from taking advantage of these increasing opportunities for cross-border representation. For example, a lawyer in Chicago, who is barred in both Illinois and New York, might wish to represent a Chicago corporation both in Illinois and in New York if the corporation

does business there and yet be unable to do so because of the burden of complying with § 470. The statute thus preserves a greater share of the New York legal market for residents, undermining competition and increasing costs for clients.

Technological advances also highlight § 470's discriminatory effect on nonresidents. Today, a physical office space is not always necessary to meet with clients; indeed, many of the *amici* interact exclusively with even their local clients over the Internet and by telephone. Use of online data storage technologies to practice law has become increasingly accepted. *See, e.g.*, N.Y. State Bar Ass'n Op. 842 (2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=42697&TEMPLATE=/CM/ContentDisplay.cfm. As a result, a New York resident solo practitioner can practice from home without a separate physical office, thereby reducing clients' fees. But § 470 prevents nonresidents who wish to practice in New York from doing the same because they must incur the added overhead expense of renting a New York law office or associating with a New York firm.

The State observes that some nonresidents are not burdened by § 470 because they "regularly" practice in New York and thus already maintain an office there. Appellants' Br. 38-39. But even assuming that some nonresidents are not burdened by § 470, this does not lessen the discriminatory impact that the statute has on others. Moreover, for the reasons explained above, today, nonresidents

admitted in New York are likely to practice in multiple states and not solely in New York. The statute's discriminatory effect on these lawyers—who have no reason to maintain an office in New York—cannot be denied.

III. Section 470's Discriminatory Treatment of Nonresident Lawyers Is Not Closely Related to Any Substantial State Interest.

To withstand a Privileges and Immunities challenge, a statute that discriminates against nonresidents must be closely related to a substantial state interest. *See Friedman*, 487 U.S. at 65, 68. As noted in Part I, New York courts have offered numerous justifications for § 470—which include disciplining lawyers, using the remedy of attachment, and evaluating nonresident lawyers' character—none of which can withstand any level of scrutiny. Indeed, the State does not even attempt in this Court to defend the statute based on any of these interests. Rather, the State asserts only two interests to support § 470: adjudicating service disputes and facilitating the availability of lawyers in New York state courts. Because neither of these interests is substantial or closely related to the office requirement, § 470 cannot withstand scrutiny under the Privileges and Immunities Clause.

The State urges this Court to adopt "a less stringent" level of scrutiny than that articulated in *Friedman* because the burdens imposed on nonresidents by the office requirement are "minimal." Appellants' Br. 40-41. But as demonstrated in Part II, the office requirement imposes far more than "minimal" burdens on

nonresidents. Nonresidents often spend hundreds or thousands of dollars annually to comply, putting them at a competitive disadvantage relative to New York residents. Moreover, those who cannot comply are completely excluded from practicing law in New York courts. Section 470, therefore, discriminates against nonresidents—and is economically protectionist—in a manner similar to other state laws that the Supreme Court has subjected to stringent review. *See Toomer*, 334 U.S. at 389 (license fees of $2,500 for nonresidents, $25 for residents); *Ward v. Maryland*, 79 U.S. 418, 420 (1871) (license fees of $300 for nonresidents, $150 maximum for residents).

A. Section 470 is not closely related to any substantial state interest in adjudicating service disputes.

The State argues that § 470 furthers its interest in adjudicating disputes over service of process and interlocutory papers—that is, "legal papers served in the course of litigation other than those that initiate the litigation," Appellants' Br. 23—because only witnesses "found in the state" can be subpoenaed in service dispute hearings. *Id.* 27-28 (citing N.Y. Jud. Law § 2-b(1)). But the State has not shown that this interest is substantial or closely related to the office requirement.

1. To qualify as "substantial," the State's interest in adjudicating disputes over service of interlocutory papers and process must address a problem that applies to more than a small percentage of nonresident lawyers. *Cf. Piper*, 470 U.S. at 286-87 (state's interest in ensuring lawyer availability to state courts

insubstantial because a "high percentage" of nonresidents were likely to be available). New York has not shown that its interest in adjudicating service disputes applies to any significant number of cases involving nonresident lawyers.

To begin, witness testimony is unlikely to be relevant in most disputes over service of interlocutory papers. Given that interlocutory papers can be served by mail—in which case service is effective upon mailing, *not* upon receipt—or by fax or electronic means, N.Y.C.P.L.R. § 2103(b), witness testimony would only be relevant when interlocutory papers are served personally. But personal service is expensive, and cheaper means—such as fax, email, or mail—are available. *See id.* As a result, interlocutory papers are likely served personally in only a tiny number of cases. Indeed, New York's own court system now *requires* electronic service of interlocutory papers in many commercial, contract, and tort cases. *See* 22 N.Y.C.R.R. § 202.5-bb; Admin. Order of the Chief Administrative Judge of the Courts (Jan. 12, 2012), *available at* www.nycourts.gov/supctmanh/AO%20Efil%201-12-12.pdf. A state that demands *electronic* service of interlocutory papers can hardly have a substantial interest in adjudicating disputes over *personal* service of interlocutory papers.

The same applies to the State's interest in adjudicating disputes over service of process. New York law already requires nonresident lawyers to designate the clerk of the appellate division as their agent for service of process in malpractice

actions against them. *See* 22 N.Y.C.R.R. § 520.13(a). As a result, the State cannot argue that § 470 advances its interest in adjudicating disputes over service of process on a lawyer in cases concerning the lawyer's legal services. Instead, the State argues that it has an interest in adjudicating disputes over service of process on a nonresident lawyer acting as an agent for her client. The State points out that, under New York law, a lawyer may automatically become an agent of a client. *See* N.Y.C.P.L.R. § 303. But this statute applies only to a narrow subset of cases. Specifically, when a lawyer represents a plaintiff in state court and the plaintiff otherwise would not be subject to the personal jurisdiction of New York, the lawyer automatically becomes the client's agent for purposes of service of process—but only for actions that could have been raised as counterclaims in the plaintiff's original lawsuit. *See id.* The State does not point to a single case where a lawyer's out-of-state location prevented a court from adjudicating a service dispute arising in this kind of situation. For lawyers whose clients have sufficient contacts with New York to be subject to personal jurisdiction, as most clients who bring a lawsuit in New York would, § 303 is inapplicable, and the office requirement does nothing to further the State's interest in ensuring witnesses are available for disputes over service of process.

2. Even assuming that the State has a substantial interest in ensuring that witnesses are available for adjudication of service disputes, less restrictive means

would "further[] the State's purpose without implicating constitutional concerns." *Friedman*, 487 U.S. at 67 (citation omitted). As the district court noted, the State could simply require nonresidents to designate an agent for service within the State. JA 34. This alternative would directly serve the State's interest in ensuring that witnesses are available for service dispute adjudications, and it would be much less burdensome than the office requirement, as a registered agent for service in New York can cost as little as $75 per year. *See* National Registered Agent, http://www.nationalregisteredagent.com/new-york-registered-agents.aspx (last visited Apr. 20, 2012). Although the State claims that § 470 reasonably can be interpreted to require nothing more than this less restrictive alternative, New York case law indicates otherwise. *See supra* Part I.A.

B. Section 470 is not closely related to any substantial state interest in facilitating lawyers' availability to New York courts.

The government offers a final, unconvincing justification for § 470—that it "increases the likelihood" that nonresident lawyers will be "more accessible to the New York courts on short notice." Appellants' Br. 44. It is unlikely that this interest is substantial, given that "modern communication systems, including conference telephone arrangements, make it possible to minimize the problem of unavailability." *Frazier v. Heebe*, 482 U.S. 641, 649 (1987).

Even assuming it is substantial, however, § 470 is not closely related to this objective. The statute does not ensure that lawyers are available to appear in New

York courts on short notice. A lawyer who resides in Alaska could arrange an office sharing agreement to comply with § 470, but this would involve nothing more than the option to use the New York firm's office space on occasion and would not make the Alaska lawyer any more available to New York courts on short notice. Similarly, a nonresident lawyer with an office in Hoboken could rent an office in Buffalo, perhaps to take advantage of lower rent, and this would not make the nonresident any more available to Manhattan courts on short notice. Section 470, therefore, does not ensure that lawyers are available to appear in New York courts on short notice.

Furthermore, the State's incorrect interpretation of § 470—that it requires only an address at which there is an agent who can receive service of process—likewise does nothing to ensure that a nonresident *lawyer*, as opposed to his or her agent, is available on short notice to appear before New York courts. The statute can hardly be justified by an interest the State's own interpretation does not advance.

* * *

Despite the State's attempt to rewrite § 470 to make it constitutional, the statute's text and New York case law show that § 470 cannot reasonably be read to require only an address for service within the state. Far from being "incidental," Appellants' Br. 37, the burden § 470 imposes on nonresidents results in significant

financial and administrative costs, heightens their business and litigation risks, and thereby precludes nonresident lawyers from entering the New York legal market on equal terms with New York residents. Because the State has not shown that either of its asserted interests justifying the statute is substantial and closely related to the office requirement, § 470 cannot withstand constitutional scrutiny.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B) because it contains 6,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

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I hereby certify that on April 24, 2012, a true and correct copy of the foregoing Brief of New York-Licensed Nonresident Attorneys as *Amici Curiae* in Support of Plaintiff-Appellee was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

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