CTQ-2014-00005

To be argued by:
LAURA ETLINGER
Time requested: 20 minutes

Court of Appeals
of the State of New York

EKATERINA SCHOENEFELD,

Appellee,

v.

STATE OF NEW YORK, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT AND ITS MEMBERS,

Defendants,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ROBERT D. MAYBERGER, IN HIS OFFICIAL CAPACITY AS CLERK OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, MONICA A. DUFFY, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Appellants.

BRIEF FOR APPELLANTS

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Dated: September 29, 2014

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MISCELLANEOUS

PRELIMINARY STATEMENT

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 courts. Plaintiff is a resident of New Jersey and is admitted to practice in a number of states, including New York. She maintains that she has no "office" within the meaning of Judiciary Law § 470, but nonetheless wishes to practice in New York courts. She commenced this federal declaratory judgment action challenging Judiciary Law § 470 as unconstitutional under, among other provisions, the Privileges and Immunities Clause. Because the United States Court of Appeals for the Second Circuit concluded that the statute's constitutionality "depends on the construction of the in-state office requirement" (A14),[1] the Circuit asked for an authoritative construction of the statute before considering plaintiff's constitutional challenge. The Circuit thus certified to this Court the following question of New York law:

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[1] References to documents included in Appellants' appendix are noted as "A#."

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

This Court can—and therefore should—read the statute's office requirement narrowly to mean nothing more than an address within the State at which the attorney may be served with legal papers on behalf of clients, including by designation of an agent for this purpose. The doctrine of constitutional avoidance requires the Court to read the statute narrowly to avoid raising the difficult constitutional question under the Privileges and Immunities Clause identified by the Second Circuit. And the narrow interpretation offered here is consistent with the statute's text and legislative history, serves reasonable purposes, is generally consistent with the way in which the lower courts have been analyzing the statute, and readily withstands constitutional scrutiny.

QUESTION PRESENTED

New York Judiciary Law § 470 mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York. The question presented is what are the minimum requirements necessary to satisfy that mandate?

STATEMENT OF THE CASE

A. The Historical Development of Judiciary Law § 470's "Office" Requirement

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.

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[2] The statutory terms "courts of record of this state" refers to all New York's judicial tribunals except 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.

On its face, the provision appears simply to provide authority for residents of *adjoining* states with an office in New York to practice in New York courts, but the provision no longer serves this limited purpose. The provision is now widely interpreted to mean that *all* nonresident attorneys who have been admitted to practice in the State and wish thereafter to practice in New York courts must maintain an office within the State, as further explained below.[3]

When the predecessor to Judiciary Law § 470 was originally enacted in 1862, New York 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.[4] *See Richardson v. Brooklyn*

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[3] Judiciary Law § 470 relates solely to the *practice* of law in New York courts by attorneys who already are *admitted* to practice in the State. Other statutes and court rules govern admission to practice and registration as an attorney. *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).

[4] The state residency requirement was originally imposed by court rule. The first express statutory reference to a residency requirement appears to be section 56 of the Code of Civil Procedure of 1877. *See* Throop, Code of Civil Procedure § 56 (1877) (requiring examination of "[a] male citizen of the State, of full age, hereafter applying to be admitted to practice as an attorney or

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City and Newton RR. Co., 22 How. Prac. 368, 369 (Sup. Ct. 1862) (noting that "the court has always required that an attorney should reside within the state" and upholding objection to appearance by an attorney who had been admitted to practice in New York but who had thereafter moved to New Jersey). 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 (*reproduced at* A77 & Addendum A1).[5]

Permitting these attorneys to continue to practice after moving to an adjacent state posed a problem for service of legal papers. Existing service rules allowed litigants to personally serve legal papers on an attorney whose office was closed by leaving them at the attorney's New

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counsellor, in the courts of record of the State"). The residency requirement was later codified in a number of statutory provisions, including former Judiciary Law §§ 90, 460, 464 and former C.P.L.R. 9402.

[5] Because the copy of the 1862 law included in the record on appeal to the Second Circuit and the appendix filed with appellants' brief here is illegible, we have included a legible copy of the law as an addendum to this brief.

York residence (with a person of suitable age and discretion). And service by mail was not as prevalent as it is today.[6] Exempting these attorneys from the residency requirement might therefore permit them to "entirely evade the service of papers" and thereby "baffle [their] adversary and the court" by keeping their New York offices closed or dispensing with an office altogether. *See Richardson v. Brooklyn City and Newton RR. Co.*, 22 How. Prac. at 370.[7] To address this concern, the statute permitting this small group of nonresident attorneys to practice in the State did two things. First, it required attorneys to maintain an "office"—originally their only office—in the State. And second, it adopted a special service rule for such attorneys, providing that papers that could have been personally served on an attorney at the attorney's residence if the attorney resided in New York, could be

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[6] Such service was permitted in only limited circumstances—where the person making the service and the person on whom it was made resided in different places between which there was "regular communication" by mail—and it doubled the time for responding as compared to personal service. *See* Howard, Code of Procedure of Pleadings and Practice of N.Y. §§ 410, 412 (1862 2d ed.).

[7] The *Richardson* case was decided one month before the predecessor to Judiciary Law § 470 was enacted in 1862, and is cited as the cause of the original enactment. *See* Daniel C. Brennan, *Repeal Judiciary Law § 470*, New York State Bar J. 323 (Jan. 1990).

served on a nonresident attorney by mail to the attorney's New York "office," and that such service by mail would be deemed equivalent to personal service on the attorney. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139 (*reproduced at* A77 & Addendum A1).[8]

In 1866, the statute was revised to eliminate the requirement that nonresident attorneys retain their *only* office in New York, and to remove the language that limited the exception to attorneys who had been admitted before the law's enactment. Act of March 16, 1866, ch.

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[8] The statute, as originally enacted, provided in full:

> Any regularly admitted and licensed attorney of the Supreme Court 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 heretofore 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 by depositing the same in the post office in the city or town wherein his said office is located, directed to said attorney at his office, and paying the postage thereon; and such service shall be equivalent to personal service at the office of such attorney.

Chapter 43 of the Laws of 1862 (*reproduced at* A77 & Addendum A1).

175, 6 Edmonds, Statutes at Large 706 (2d ed. 1877) (*reproduced at* A79). When the Code of Civil Procedure of 1877 was enacted, the provision was codified as Code of Civil Procedure § 60. Then, in 1909, 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 Judiciary Law § 470, while the service-related language was retained in Code of Civil Procedure § 60. Act of Feb. 17, 1909, ch. 35, 3 Birdseye, Cumming and Gilbert's Cons. Laws of N.Y. 2817 (Matthew Bender 1909) (enacting Judiciary Law § 470); Act of Feb. 17, 1909, ch. 65, § 3, 1909 N.Y. Laws 28 (amending Code of Civil Procedure § 60). (*See* A83, 85, 87-88.) Aside from other minor non-substantive changes in 1909 and 1945,[9] the language of § 470 has remained unchanged since.

In 1979, this Court 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). In response to that decision, the Legislature amended numerous

[9] Act of April 9, 1945, ch. 649, § 213, 1945 N.Y. Laws 1371, 1422.

provisions of the Civil Practice Law and Rules ("C.P.L.R.") and the Judiciary Law to remove residency requirements from the provisions governing attorney admission to practice. Act of June 18, 1985, ch. 226, 1985 N.Y. Sess. Laws 2049. The Legislature did not modify Judiciary Law § 470, however. As a result, after *Gordon* and the 1985 amendments eliminating residency requirements from the provisions governing attorney admission, Judiciary Law § 470 remained in effect, but 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 "resid[ing] in an adjoining state" could no longer be read to provide an exception to the former residency requirement.

Instead, the Legislature's decision to leave Judiciary Law § 470 in place has been understood to evidence its intent to maintain the office requirement for nonresident attorneys.[10] And when the category of

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[10] Indeed, the Legislature left Judiciary Law § 470 in its original form even when it was presented with a bill the following year that would have modified the statute expressly to provide that all nonresident attorneys were required to maintain an "office" in the State. *See* Office of Court

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nonresident attorneys expanded, the scope of § 470 was understood to expand correspondingly. Thus the statute has 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); *White River Paper Co. v. Ashmont Tissue*, 110 Misc. 2d 373, 376 (Civil Ct., City of N.Y. 1981). The statute does not define the term "office," however, leaving its meaning to be interpreted by the courts.

2. The Courts Have Thus Far Interpreted the Term "Office" in Judiciary Law § 470 to Mean Only A Minimal Physical Presence Consistent With Its Historical Service-Related Purpose.

This Court has never addressed the meaning and scope of the office requirement in Judiciary Law § 470. The departments of the Appellate Division have thus far found that it may be satisfied by

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Administration ("OCA") Program Bill 86-78, introduced as Senate Bill 8336 (March 31, 1986) (*reproduced at* A114, 118).

maintaining a fairly minimal physical presence in the State. And in making that determination, the courts have often looked to factors bearing on the suitability of the office for service of legal papers.

For example, courts have held that the office requirement is satisfied when the nonresident attorney has an affiliation with an attorney or law firm that has a physical presence in the State. Affiliations that have been held to satisfy § 470 have included an "of counsel" relationship for purposes of a lawsuit with a New York attorney having an office in the State, *see Matter of Tatko v. McCarthy*, 267 A.D.2d 583 (3d Dep't 1999), and a "reciprocal satellite office sharing agreement" between the nonresident firm and a New York law firm, *see Keenan v. Mitsubishi Estate, N.Y.,* 228 A.D.2d 330, 331 (1st Dep't 1996). Even an affiliation with a non-legal firm has been held to suffice, and the "office" need not be maintained exclusively by the nonresident attorney. *See Matter of Scarsella*, 195 A.D.2d 513, 515-16 (2d Dep't 1993).[11] The results in these cases are consistent with viewing Judiciary

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[11] A number of trial courts have ruled to the same effect. *See CA Constr., Inc. v. 25 Broadway Office Properties, LLC*, No. 1000728/09, 2010 N.Y. Misc. LEXIS 1591 (Sup. Ct. N.Y. County March 15, 2010) (rejecting challenge to filing of action by a Connecticut law firm that had an ongoing

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Law § 470's office requirement as imposing a reasonably minimal requirement sufficient to serve its historical purpose of facilitating service within the State on the nonresident attorney.

On the other hand, courts have held that the office requirement is not satisfied when the circumstances of the case made it unlikely that the attorney would receive service of legal papers at the in-state address provided. For example, the First Department has held that Judiciary Law § 470 is not satisfied when the purported office consists 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 is not posted anywhere on the premises; and there is 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); *see also Matter of Estate of Garrasi*, 29 Misc. 3d 822, 827 (Surr. Ct. Schenectady Co. 2010) (office requirement similarly not satisfied where there was no

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agreement to lease space at a 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); *Austria v. Shaw*, 143 Misc. 2d 970 (Sup. Ct. N.Y. County 1989) (rental of desk space in a New York attorney's office with a telephone that is answered suffices even if the desk and telephone staffing are not exclusively dedicated to the nonresident attorney).

evidence that the relocated attorney "had a designated . . . 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").

Similarly, where the in-state address consisted only of a post office box address or an address intended to be used solely as a "mail drop," a nonresident attorney has been disciplined for failure to maintain an "office" within the meaning of § 470. *See Matter of Larsen*, 182 A.D.2d 149, 155 (2d Dep't 1992); May 4, 2007 letter of admonition from Third Department Committee on Professional Standards (*reproduced at* A143). Thus, consistent with the historical purpose of the office requirement, courts have held that § 470 is satisfied by a fairly minimal presence in the State and have often looked to factors bearing on the suitability of the purported office for service of legal papers in determining whether the office requirement of Judiciary Law § 470 is satisfied.

B. The Federal Court Proceeding

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. (A65.) She resides and has an office for the practice of law in New Jersey. (A66.) 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. (A67.) She alleges that she is precluded from appearing as an attorney in any New York Court because she has no office within the State. (A66-67, 122.)

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. (A69.) 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. (A68-69.) Plaintiff named as defendants numerous state entities and individuals in their official capacities believed by plaintiff to be responsible for enforcing the statute. (A66, 68-69.) On defendants' motion, the U.S. District Court for the Northern District of New York (Kahn, J.) dismissed the Equal Protection and Commerce Clause claims, as well as all claims against the entity

defendants.[12] The case thus proceeded against the individual defendants on plaintiff's claim that Judiciary Law § 470 violates the Privileges and Immunities Clause. (*See* A42-54, 55.) Following discovery, the parties cross-moved for summary judgment.

1. In Declaring Judiciary Law § 470 Unconstitutional The District Court Assumed The Term "Office" Imposes A Significant Financial Burden On Non-resident Attorneys.

The district court declared Judiciary Law § 470 unconstitutional under the Privileges and Immunities Clause. The court reasoned that the statute's office requirement implicated the right to practice law, a fundamental privilege protected by the Privileges and Immunities Clause, and discriminated against nonresident attorneys. (A28, 30-31.)

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[12] The entity defendants are the State of New York; the Appellate Division, Third Department; and the Third Department's Committee on Professional Standards ("COPS") and its unnamed members. The individual defendants are the New York Attorney General; the Justices of the Third Department; the Clerk of the Third Department; and the Chair of the Third Department COPS. (A66.) During the proceedings before the Second Circuit, three of the named individual defendants were automatically substituted by their successors in office, and the caption was changed accordingly. (*See* A19.) We note that when the Second Circuit issued its decision certifying a question to this Court, the caption inadvertently retained a reference to a former chair of the Third Department COPS as "other Thomas C. Emerson." In addition, in the Second Circuit, John G. Rusk would now be automatically substituted for Monica Duffy as Chair of the Third Department COPS. *See* Fed. R. Civ. P. 25(d).

The court based its finding of discrimination on its assumption that the statute imposes a significant financial burden on nonresident attorneys, which thus "effectively precludes" a number of nonresident attorneys from practicing in New York courts. (A30; *see also* A33 (nonresident attorneys "bear a significant competitive cost that resident attorneys do not").) Critical to the court's analysis was its conclusion that resident attorneys could practice law from their homes, while nonresident attorneys would have to expend significant sums to pay property taxes, mortgage costs or rent for an office in New York, no matter how few New York clients they served or how often their work required their physical presence in the State. (A30, 33.)

The district court reasoned further that the statute's discriminatory effect was not justified by a substantial state interest. For this purpose, the court accepted defendants' position that § 470 was intended to serve the State's legitimate interest in facilitating service on all attorneys practicing within the State's courts. (A35.) But the court held that even assuming that interest was substantial, the statute's office requirement did not bear a sufficiently close relationship to that state interest. (A38-40.) In so holding, the court suggested that

the relationship was insufficient because the State could further its service-related interest in a less burdensome way, for example by requiring nonresident attorneys to appoint an agent for service or retain local counsel as needed for specific matters. (A40.) The court did not consider whether either of these less burdensome arrangements might themselves by sufficient to satisfy § 470's office requirement. Judgment in favor of plaintiff was entered accordingly (A19a), and defendants appealed.

2. The Second Circuit Determined That The Constitutionality Of Judiciary Law § 470 Depends Upon The Meaning Of The Office Requirement.

In urging the Second Circuit to reverse, defendants argued that plaintiff was effectively mounting a facial challenge to Judiciary Law § 470, arguing that it could not withstand constitutional attack on any understanding of the office requirement. Defendants argued that plaintiff's facial challenge should fail because the statute could be read narrowly to require only an address within the State at which a nonresident attorney could receive service, including personal service, of legal papers on behalf of the attorney's clients. Defendants noted that such a requirement might be met by the mere designation of an agent to

receive service on the attorney's behalf. Read this way, defendants maintained that the statute does not discriminate against nonresident attorneys, but rather places such attorneys on equal footing with resident attorneys, who necessarily have at least one location within the State—their residence—at which to receive personal service of legal papers.

Defendants additionally argued that, even if on a narrow reading the statute implicated the Privileges and Immunities Clause, it would not violate that clause. Rather, it would impose no more than an incidental burden that would be directly related to the State's legitimate interests in facilitating personal service in New York and adjudicating service disputes, and it would serve additional state interests as well. (Br. at 34-44). Finally, defendants argued that to the extent the federal court questioned whether this Court would interpret § 470 in the manner proposed to avoid a difficult constitutional question, it should certify a question to this Court before striking the statute as unconstitutional. (Br. at 29; Reply Br. at 10.)

Plaintiff, and the nonresident attorney amici who appeared in support of her position, proffered a different interpretation of Judiciary

Law § 470. They argued that § 470 requires a nonresident attorney to maintain a physical office space where the attorney is present on a regular basis in order to practice law in the State, effectively a full-time, operational law office. (Pl. Br. at 18-24; Br. of Amici N.Y.-Licensed Nonresident Attorneys at 6-14.) Such a requirement, they asserted, imposes a significant financial burden on nonresident attorneys that is not sufficiently related to any significant state interest.

Following briefing and oral argument, the Second Circuit certified to this Court the question as to the minimum requirements necessary to satisfy § 470's office requirement. (A3-14.) The Circuit concluded that the statute's constitutionality "turns on" the scope of that requirement. (A6, 14.) Indeed, because it believed that New York courts had thus far construed § 470 as requiring the maintenance of an operational office that "carries with it significant expense," the Circuit observed that it "appears" that the statute so construed discriminates against nonresident attorneys and thereby implicates the Privileges and Immunities Clause. (A11.) The Circuit determined that certification of this question was necessary before the Court could analyze the underlying constitutional question, however, because it recognized that

this Court might construe § 470 more narrowly in order to avoid a constitutional issue. (A13). The Circuit explained that this Court should be given the opportunity to construe the scope of the office requirement in the first instance. (A13-14.) This Court accepted certification and directed briefing on the certified question. (A1.)

ARGUMENT

THE RULE OF CONSTITUTIONAL AVOIDANCE CALLS FOR A NARROW READING OF JUDICIARY LAW § 470

The principle of constitutional avoidance requires the Court to read Judiciary Law § 470 in the narrow manner offered here. The Second Circuit concluded that interpreting § 470 as requiring nonresident attorneys to maintain an operational law office implicates the Privileges and Immunities Clause and appears to violate that clause because it imposes a financial burden on nonresidents that resident attorneys do not share. In contrast, interpreting § 470 as requiring only an address sufficient for the personal service of legal papers on behalf of clients places nonresident attorneys on equal footing with resident attorneys who may be personally served at their New York residence

and avoids raising a serious question as to the statute's constitutionality.

This Court has long been guided by the principle that the courts should interpret state statutes to avoid raising serious constitutional concerns. *See, e.g., Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 593 (2013); *Matthews v. Matthews*, 240 N.Y. 28, 34-35 (1925); *People ex rel. Simpson v. Wells*, 181 N.Y. 252, 257 (1905). "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." *People v. Correa*, 15 N.Y.3d 213, 233 (2010). Thus, where a statute "is at least susceptible" of a constitutional interpretation, the Court is "clearly obliged by statute and decisional law to embrace [the interpretation that] will preserve its validity." *People v. Finkelstein*, 9 N.Y.2d 342, 345 (1961).

The canon of constitutional avoidance is dispositive here. The Second Circuit found that a broad interpretation of § 470 that would require nonresidents to maintain an operational office in the State would implicate the Privileges and Immunities Clause and thus raise a serious question as to the statute's constitutionality. Indeed, by stating

that "the question of the constitutionality of New York Judiciary Law § 470 turns on the interpretation of [the "office" requirement] of the statute" (A6) and then certifying a question to this Court regarding the statute's minimal requirements, the Second Circuit signaled its intention to invalidate the statute under the Privileges and Immunities Clause if this Court does not read it narrowly. The canon of constitutional avoidance thus determines the proper interpretation of Judiciary Law § 470 and the answer to the question certified here.

A. Reading Judiciary Law § 470 Broadly Raises A Difficult Constitutional Question.

The right to practice law is one of the privileges protected by the Privileges and Immunities Clause. *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283 (1985). And because the clause provides that the "[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 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).

Reading § 470 to require nonresident attorneys to maintain a full-time operational office in the State would impose a burden on nonresident attorneys that resident attorneys do not necessarily have to bear. On such a reading, the statute requires nonresidents to maintain an office in New York separate and apart from their residence, which is necessarily located elsewhere. Neither § 470 nor any other provision requires resident attorneys to maintain an office separate from their residence, however; they may practice law from an office located in their home, and they need not maintain a traditional office at all.[13] And even

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[13] New York Rules of Professional Conduct require that all attorney advertisement include the "principal law office address" of the lawyer or law firm whose services are being advertised. N.Y. Rule of Professional Conduct 7.1(h). Ethical opinions have interpreted this rule to require a bona fide street address, but have not opined that a residential street address would not suffice. *See* New York State Bar Ass'n ("NYSBA"), Ethics Op. 964 (2013). In Ethics Op. 964, the NYSBA opined that a lawyer who did not have a traditional law office could not use a mail box as her address in attorney advertising. A more recent ethics opinion has held that renting space in a virtual law office would suffice to meet the professional rules. *See* Assoc. of the Bar of the City of New York Comm. On Prof. Ethics, Formal Op. 2014-2 (June 2014), available at http://www.nycbar.org/ethics/ethics-opinions-local/2014opinions/ 2023-formal-opinion-2014-02 (last accessed July 29, 2014).

In addition, the New York Rules of Professional Conduct require all New York attorneys to maintain complete and accurate financial records concerning their practice, which shall be maintained or made available at the attorney's "principal New York State office", but the rule does not specify that

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if a purpose of § 470 were to make attorneys readily accessible to the local courts in which they practice, reading § 470 to require nonresident attorneys to maintain an operational office anywhere in the State would not serve such a purpose very well. Indeed, in *Frazier v. Heebe*, 482 U.S. 641, 648-49 (1987), where the United States Supreme Court reviewed under its supervisory powers a local district court rule requiring nonresident attorneys to maintain an office anywhere in the state, the Court reasoned that the rule was "poorly crafted" to serve its stated purpose of assuring the accessibility of counsel to the court's local jurisdiction, and thus struck it as irrational. Thus a broad reading of § 470 that would require nonresident attorneys to maintain an operational office in the State at least arguably discriminates against nonresident attorneys, as the Second Circuit opined. (*See* A11.)

Defendants do not concede that such a reading would necessarily violate the Privileges and Immunities Clause. A requirement that nonresident attorneys maintain an office in the state is not nearly as burdensome as the outright exclusions from admission struck down in

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the office must be separate from the attorney's residence. *See* N.Y. Rules of Professional Conduct 1.15(c),(i).

Barnard v. Thorstenn, 489 U.S. 546, and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, or even the limitation struck down in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, which allowed only residents to apply for admission without examination. Indeed, the one appellate court of which we are aware to have thus far analyzed whether requiring only nonresident attorneys to maintain an in-state office violates the Privileges and Immunities Clause rejected the constitutional challenge. *See Lichtenstein v. Emerson*, 251 A.D.2d at 64-65; *see also White River Paper Co. v. Ashmont Tissue, Inc.*, 110 Misc. 2d 373. And the United States Supreme Court has described a full-time office requirement as a "less restrictive" alternative to a residency requirement. *See Friedman*, 487 U.S. at 70.[14]

Nonetheless, interpreting § 470 as requiring nonresidents to maintain an operational office in the State at least raises a question of

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[14] The court rule analyzed in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, required that an applicant for admission on motion not only be a resident of Virginia, but also intend to practice full-time in that state, meaning that the applicant intend both to maintain an operational office in the state and also a regular practice in the state. 487 U.S. at 69. Because the plaintiff in *Friedman* already met both of these latter requirements, this aspect of the rule was not at issue. *See id.* at 61, 68-69.

the statute's constitutionality under the Privileges and Immunities Clause because it arguably "does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." *Friedman*, 487 U.S. at 66. Under the rule of constitutional avoidance, a broad reading of § 470 should be avoided if the statute can reasonably be interpreted to avoid a potentially unconstitutional construction. *See People v. Correa*, 15 N.Y.3d at 233.

B. Judiciary Law § 470 Can Reasonably Be Construed To Require No More Than An Address Within The State At Which The Nonresident Attorney May Receive Service of Legal Papers.

Judiciary Law § 470 need not be read to impose a burden on nonresident attorneys that is not imposed on state residents. The term "office" in § 470 can reasonably be construed to mean simply an address within the State at which a nonresident attorney may receive service, including personal service,[15] of legal papers on behalf of the clients the

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[15] The phrase "personal service" here is used as a short-hand to refer to all methods of service on attorneys representing clients in pending actions that are authorized by C.P.L.R. 2103(b) and involve the hand delivery of papers. The C.P.L.R. authorizes four such methods: (i) delivering the paper to the attorney personally, C.P.L.R. 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, C.P.L.R. 2103(b)(3); (iii) if the attorney's

(*continued on next page*)

attorney represents. The designation of an agent within the State would suffice, as long as the agent could receive personal service of legal papers in the ways authorized by C.P.L.R. 2103(b). Read this way, § 470 does not discriminate against nonresident attorneys, but rather places such attorneys on equal footing with resident attorneys, who necessarily have at least one location within the State—their residence—at which to receive personal service of legal papers. *See Lichtenstein v. Emerson*, 251 A.D.2d at 64-65 (recognizing § 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).

To be sure, the narrow reading offered here is not the only reasonable construction of the statute or even the most natural one, as the Second Circuit noted. (S*ee* A11 & n.4.) It is nonetheless a reasonable reading. Indeed, reading § 470 in this manner is consistent with the

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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, C.P.L.R. 2103(b)(4).

statute's language and legislative history, serves reasonable purposes, is generally consistent with the way in which the lower courts have been analyzing the statute, and readily withstands constitutional scrutiny.

1. The Narrow Reading Offered Here Is Consistent With The Statute's Language and Legislative History.

Judiciary Law § 470 does not define the word "office." While the statute adds the qualification that an office is "for the transaction of law business," it neither explains that phrase nor identifies any specific legal activities that must occur at the subject office. But the phrase can reasonably be read to mean an office "that facilitates the transaction of law business" in that it serves as the New York address at which legal papers may be served, including by personal service.

Moreover, reading the text in this manner is consistent with the statute's legislative history. That history makes clear that one of the statute's purposes was to facilitate the ability of litigants to personally serve in the State legal papers on nonresident attorneys practicing in New York courts.

As explained, *see supra* at 4-7, the predecessor to § 470 was enacted as an exception to the requirement that attorneys had to be New York residents, both for admission purposes and also to practice in New York courts. Enactment of a rule allowing residents who moved to adjoining states to practice in New York courts required a special rule governing service of legal papers on these nonresident attorneys. The existing service rules allowed legal papers to be personally served on an attorney by leaving them at the attorney's New York residence (with a person of suitable age and discretion) if the attorney's office was closed. *See Richardson v. Brooklyn City and Newton RR. Co.*, 22 How. Prac. at 370 (citing Code of Civil Procedure § 409); Howard, Code of Procedure of Pleadings and Practice of N.Y. § 409(1) (1862 2d ed.). The original enactment was intended to assure that a nonresident attorney could not "entirely evade the service of papers" by keeping his New York office closed or by dispensing with an office altogether. *Richardson*, 22 How. Prac. at 370. To this end, it required the nonresident attorney to maintain an "office" in the State and provided that litigants could personally serve the nonresident attorney by mailing papers to the nonresident attorney's New York office from the city or town where the

office was located.[16] *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139 (*reproduced at* Addendum A1.) It thus assured that litigants would be able to personally serve legal documents in the State on nonresident attorneys practicing in New York courts.

Reading § 470 in the narrow manner offered here is consistent with this original legislative purpose. By reading the office requirement simply to mean that nonresident attorneys must maintain an address within the State at which they may receive personal service of legal documents, the statute continues to serve one of its original purposes.

2. The Narrow Reading Offered Here Serves Two Reasonable Purposes.

Reading § 470 in the narrow manner offered here makes sense because it serves two reasonable purposes. First, it assures that litigants will not be more limited in the range of service options

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[16] This particular provision addressing service on a nonresident attorney by mail (which was then codified in Rule 20 of the Civil Practice Rules) was eliminated as unnecessary when the modern C.P.L.R. was enacted in 1962. *See* Act of April 4, 1962, ch. 308, 1962 N.Y. Laws 1347. A special rule permitting nonresident attorneys to be served by mail was deemed unnecessary because service by mail on any attorney from anywhere in the State was then permitted. *See* Temporary Commission on the Courts, *Second Preliminary Report of the Advisory Committee on Practice and Procedure* (Feb. 15, 1958), 1958 Leg. Doc. No. 13, at 178.

available to them when they are litigating against nonresident attorneys. Under New York's service rules, 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. Litigants may choose to personally serve papers for a variety of reasons. Legal papers include court orders directing immediate action, and a party serving such an order might wish to increase the chances of bringing it to someone's immediate attention by hand delivering it. Additionally, by choosing personal service, litigants may obtain an earlier return date on motions, *see* C.P.L.R. 2103(b)(2),(6); need not obtain opposing counsel's consent, as service by facsimile transmission and electronic means generally require, *see id.* 2103(b)(5),(7); and have an alternative mode of service that may be more convenient or less expensive for voluminous or oversized documents or exhibits.

Construing Judiciary Law § 470 to require an address at which the nonresident attorney can be personally served with legal papers is fully consistent with this purpose. It preserves for state court litigants

a full range of service options without the added burden of having to maintain contacts to effect personal service wherever an adversary's nonresident attorney happens to reside. *See Lichtenstein*, 251 A.D.2d at 65 (recognizing § 470's purpose as assuring nonresident attorney's amenability to legal service); Office of Court Administration ("OCA") Memorandum in Support of OCA Program Bill 86-78 (noting that one of the primary purposes of the proposed bill that would retain an office requirement expressly for all nonresident attorneys was to "insure[ ] that there will be a local office upon which service affecting the nonresident attorney can be made") (*reproduced at* A116).

Second, this interpretation ensures that service may be made within the jurisdiction of New York courts, and thereby enables New York courts to resolve disputes over such service. Courts adjudicating disputes over whether service in fact occurred may convene traverse hearings at which they may take evidence, including witness testimony. *See* Vincent C. Alexander, C.P.L.R. Practice Commentaries C306:2, at 104-05 (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.") (emphasis added); *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 be served within the State), *aff'd on other grounds*, 33 N.Y.2d 463 (1974). Thus reading § 470's office requirement as requiring nonresident attorneys to maintain an address for service within the State, including through designation of an agent for this purpose, enables adversaries of such nonresident attorneys to serve them within the State and thereafter utilize New York courts to adjudicate service disputes as needed.

3. The Narrow Reading Offered Here Is Generally Consistent With The Manner In Which the Lower Courts Have Analyzed The Statute.

The adoption of the narrow interpretation offered here is generally consistent with the manner in which the lower courts have analyzed the

provision. As noted, *supra* at 10-13, courts applying Judiciary Law § 470 since 1979, when the residency requirement to which it operated as an exception was struck down, have often relied on factors bearing on the suitability of the designated New York "office" for service when finding that the statute's office requirement was satisfied. For example, affiliations with New York firms that have been found to satisfy the office requirement, such as "of counsel" relationships for purposes of the lawsuit or a satellite office-sharing agreement with a New York law firm, provide a means whereby litigants may easily serve the nonresident attorney in New York. *See, e.g., Matter of Tatko v. McCarthy*, 267 A.D.2d at 584; *Keenan v. Mitsubishi Estate, N.Y.,* 228 A.D.2d at 331. Likewise, agreements whereby a nonresident attorney has use of desk space and support staff in a New York firm allow the nonresident attorney to be served in New York. *See, e.g., Matter of Scarsella*, 195 A.D.2d 513; *CA Constr., Inc. v. 25 Broadway Office Properties, LLC*, No. 1000728/09, 2010 N.Y. Misc. LEXIS 1591 (Connecticut law firm leased space at a New York firm's office, the Connecticut firm name was indicated at that location, and a designated individual was authorized to accept service for it there).

And consistent with viewing Judiciary Law § 470 as serving a service-related purpose, courts have found the office requirement was not met when the purported office would not be sufficient for personal service of legal papers. For example, courts have held that a post office box or an address intended to be used solely as a "mail drop" does not satisfy section 470. *See Matter of Larsen*, 182 A.D.2d at 155; *see also* May 4, 2007 letter of admonition from Third Department COPS (*reproduced at* A143).

A number of courts similarly have held that the office requirement was not satisfied where the purported office was not identified or readily accessible and there was no assurance that on-site employees would accept service of legal papers for the nonresident attorney. For example, in *Lichtenstein v. Emerson*, 251 A.D.2d 64, the court affirmed an order granting a motion to dismiss where the complaint was filed by a nonresident attorney whose purported New York "office" was located in the basement of a restaurant, the attorney's name was not posted anywhere on the premises, and there was no reason to think that the restaurant's employees would accept legal papers. And in *Matter of Haas*, 237 A.D.2d at 730, the court held that the relocated attorney

violated Judiciary Law § 470 where he claimed to maintain an office in the home of an assistant, but the record did not disclose the relationship between the attorney and the assistant and there was no assurance that the attorney would receive mail or telephone messages there. *See also Matter of Estate of Garrasi*, 29 Misc. 3d at 827 (rejecting relocated attorney's claim that he complied with requirement of Judiciary Law § 470 where there was no evidence that the attorney "had a designated . . . 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").[17]

[17] Other decisions enforcing § 470's office requirement, including some cited by the Second Circuit (A9-10), provide no insight into the criteria required to meet the statute because they do not describe the facts deemed insufficient to satisfy the statute. *See, e.g., Elm Mgt. Corp. v. Sprung*, 33 A.D.3d 753, 754 (2d Dep't 2006) (referring to attorney's failure to maintain a "bona fide office" without noting whether attorney had any presence in the State); *Kinder Morgan Energy Partners, LP v. Ace Am. Ins. Co.*, 51 A.D.3d at 580 (attorney must maintain a "local office"); *Cheshire Academy v. Lee*, 112 Misc. 2d 1076 (Civil Ct., City of N.Y. 1982) (attorney must maintain a "bona fide office").

4. Read In The Narrow Manner Offered Here, The Statute Readily Withstands Constitutional Scrutiny.

Finally, the statute readily withstands constitutional scrutiny when read in the narrow manner offered here. On that reading, the statute does not discriminate against nonresident attorneys, but rather places nonresident and resident attorneys on equal footing by ensuring that all attorneys who practice in New York courts have an address within the State at which they can personally be served with legal papers on behalf of the clients they represent. 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 § 470; it flows directly from the fact that the attorney chooses to live in another state and practice in New York courts. In other words, as to their ability to provide an in-state location for the personal service of legal papers, a factor directly related to the practice of law, *see* C.P.L.R. § 2103(b) (requiring that service of interlocutory papers be made on a represented party's attorney and allowing personal service on the attorney's New York residence), 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 used for service of legal papers (his residence), while the nonresident, in the absence of § 470's office requirement, may have *no* in-state location for service of papers. Thus, if § 470 requires nonresidents admitted to practice in New York to maintain only an address for the in-state service of legal papers, it merely requires that nonresidents practice in New York courts on equal terms with state residents. Like state residents, they must provide a New York address for service of legal papers.

By certifying to this Court the question as to the minimum requirements that § 470 imposes, the Second Circuit signaled its view that the statute would withstand constitutional scrutiny if narrowly construed. And indeed, 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 clause. *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 (1869)). Accordingly, the clause is not implicated where the state law does not treat nonresidents differently from residents. *See United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 220 (1984) ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause."); *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) ("Discrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause."); *In re Conner*, 917 A.2d 442, 448 (Vt. 2006) ("To establish such a constitutional violation, however, it is essential to show actual discrimination on the basis of out-of-state residency."). Thus, construed in the narrow manner offered here, § 470 readily withstands constitutional scrutiny.

For all these reasons, Judiciary Law § 470 can reasonably be construed to require no more than an address within the State at which the nonresident attorney may receive service of legal papers. And read

this way, § 470 does not impose a burden on nonresident attorneys that is not imposed on state residents. Thus, because section 470 is at least "susceptible" of an interpretation that avoids raising serious questions as to the statute's constitutionality, the narrow interpretation offered here should be adopted. *See People v. Correa*, 15 N.Y.3d at 232.

CONCLUSION

To avoid a construction that raises serious concerns about the statute's constitutionality, the Court should interpret Judiciary Law § 470 as requiring only that the nonresident attorney maintain an address within the State sufficient for personal service of legal papers, including by designation of an agent for this purpose.

Dated: Albany, New York
September 29, 2014

Respectfully submitted,

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Chap. 43.

AN ACT to authorize attorneys of the Supreme Court of this State residing in adjoining States, to practice in the Courts of this State.

Passed March 22, 1862.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any regularly admitted and licensed attorney of the Supreme Court 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 heretofore 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 by depositing the same in the post office in the city or town wherein his said office is located, directed to said attorney at his office, and paying the postage thereon; and such service shall be equivalent to personal service at the office of such attorney.

To extend only to attorneys who have heretofore been admitted to practice in this state.

§ 2. This act shall take effect immediately.