CTQ-2014-00005

To be argued by:
EKATERINA SCHOENEFELD
Time requested: 20 minutes

Court of Appeals
of the State of New York

EKATERINA SCHOENEFELD,

Respondent,

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, JOHN G. RUSK, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS,"

Appellants.

BRIEF OF RESPONDENT

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Date Completed: November 30, 2014

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PRELIMINARY STATEMENT

Section 470's predecessor, Chapter 43, was enacted in 1862 as a narrow exception to the then general rule that one had to be a New York resident in order to be admitted to practice law in the State. That prerequisite has long been held unconstitutional; however, Section 470, the vestigial appendix, survived to this day in the same form as when it was first enacted in 1909 as part of then-newly created Judiciary Law.

At the time of the enactment and reenactment of Section 470 and its predecessors, the term "office for the transaction of law business" was commonly understood as an actual, physical space where a typical duties of a law office were performed and this is how New York's lower state courts and the Committee on Professional standards have, to this day, consistently interpreted Section 470's office requirement – nonresident attorneys must maintain an actual, physical office in this State where they are expected to spend at least some time practicing law.

Recognizing that requiring an actual, physical office would not pass constitutional muster, Defendants ask this Court to effectively rewrite Section 470's "office for the transaction of law business" requirement to mean an address for service of papers. However, this too would be a significant barrier to practicing law in this State, especially to solo practitioners or small firms and would also not survive the constitutional challenge.

Alternatively, construing the term "office for the transaction of law business" as requiring attorneys to provide an email address for the purpose of service of process and other legal papers would the least restrictive means satisfying the state's interest regarding service of process thereby preserving the statute and reflecting the modern realities of practicing law.

QUESTION PRESENTED

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?

STATEMENT OF THE CASE

I. Plaintiff's Challenge of Constitutionality of Section 470.

Plaintiff is a 2005 law school graduate, a New Jersey resident, and is licensed to practice law in New Jersey, New York, and California. (A65-66). Plaintiff's law office is located in Princeton, New Jersey. (A66). Prior to opening her firm, Plaintiff attended a continuing legal education course entitled *Starting Your Own Practice*, which was offered by the New York State Bar Association in New York City. (A67). At that seminar, Plaintiff learned for the first time that, according to Section 470 which applies only to nonresident New York attorneys, she may not practice law in the courts of the State of New York unless she

maintains an office there. (A67). Thus, despite being a licensed New York attorney who is in compliance with all requirements save the requirement for a New York office, Plaintiff is unable to practice law in the state courts of New York because Section 470 prohibits nonresident attorneys from practicing law in the State unless they maintain an office there. (A67).

Respectful of the oath taken upon her admission to practice and her status as an officer of the court, Plaintiff has never appeared in or advertised herself as practicing law in the state courts of New York. (A126). Whenever Plaintiff received inquiries about potential representation in the courts of New York, she declined the representation because it would have violated Section 470. (A126).

On April 1, 2008, Plaintiff filed a complaint in the Southern District of New York, asserting that Section 470 was unconstitutional, both on its face and as-applied, under the Privileges and Immunities Clause and seeking declaratory and injunctive relief. On July 8, 2008, Plaintiff amended her complaint, adding Thomas C. Emerson, the then-Chairperson of the Third Department's Committee on Professional Standards, several state agencies, and a number of other state officials as defendants, and included additional claims based on violations of the Equal Protection Clause of the 14th Amendment and Commerce Clause of the U.S. Constitution. (A64-69).

On April 16, 2009, the court granted Defendants' motion filed pursuant to 28 U.S.C. § 1404(a) and the case was transferred to the Northern District of New York. (A56-63).

On February 8, 2010, the district court granted in part and denied in part Defendants' motion to dismiss the amended complaint in its entirety, dismissing several defendants and two counts of the complaint.[1]/ (A42-54). Noting that "[t]he state has offered no substantial reason for Section 470's differential treatment of resident and non-resident attorneys nor any substantial relationship between that differential treatment and State objectives," the district court allowed Plaintiff to proceed against the remaining individual Defendants under the Privileges and Immunities Clause. (A51).

On February 18, 2010, Defendants filed their answer, asserting several defenses and demanding a jury trial.

II. The District Court Held That Section 470 Violates the Privileges and Immunities Clause of the U.S. Constitution.

Subsequently, both Defendants and Plaintiff filed their respective motions for summary judgment. In support of her motion, Plaintiff argued that Section 470 effectively imposes a residency requirement on nonresident attorneys by

[1]/ Plaintiff opposed Defendants' motion to dismiss only with respect to the individual Defendants.

conditioning the practice of law in New York on maintaining a physical office in New York, that it serves no substantial state interest, and serves as an artificial trade barrier for nonresident attorneys admitted to practice law in New York – all of which are prohibited under the Privileges and Immunities Clause. (A27).

Defendants argued that Section 470 does not trigger review under the Privileges and Immunities Clause or that, in the alternative, the state has a substantial interest and Section 470 bears a substantial relationship to that interest and is the least restrictive means of achieving that interest.[2]/ (A27-28). According to Defendants, the alleged state's interests advanced by Section 470 were:

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

(A34).

In its Memorandum-Decision and Order issued on September 7, 2011, the district court expressly rejected the ability to supervise, observe, and discipline nonresident attorneys, and the remedy of attachment as proffered reasons for Section 470's enforcement. (A34-38). While acknowledging the Defendants' service of papers argument, the district court held that Section 470 discriminates against nonresident attorneys by imposing on them additional costs—which

[2]/ Notably, in the district court proceedings, Defendants did not argue conceded – that Section 470's office requirement means anything less than an actual, physical office space.

resident attorneys are not required to bear—and that these costs are substantial enough to trigger scrutiny under the Privileges and Immunities Clause. (A29-39).

Having determined that Section 470 infringes on one of the fundamental rights protected by the Privileges and Immunities clause – the right to practice law – the district court held that Defendants failed to demonstrate any substantial reason for continuous discrimination against nonresident attorneys and awarded judgment to Plaintiff. (A41-42).

Defendants appealed.

III. Rejecting Defendants' Interpretation of Section 470, the Second Circuit Certified the Question to the New York Court of Appeals.[3]/

In their appeal, Defendants argued that "the State has a legitimate interest in requiring all attorneys practicing in its courts to provide an address within the State at which to receive service of legal papers [..] enabl[ing] its courts to oversee and adjudicate disputes arising over such service." (SA035). Defendants also argued that Section 470's office requirement "can be construed to mean simply an address within the State" or "designation of an agent" for service of papers. (SA040).

The Second Circuit declined to adopt Defendants' proposed construction of Section 470 as requiring "merely an address at which a nonresident attorney may

[3]/ The New Jersey State Bar Association and a group of New York-licensed nonresident attorneys also submitted their briefs as *amici curiae* in support of Plaintiff-Appellee. (SA147, SA170).

be served legal papers." (A10). Noting that "a review of [New York] laws yields no authority specifically requiring New York residents to maintain any office at all," the Second Circuit observed that:

> … the New York Supreme Court and its Appellate Division courts—the New York Court of Appeals having yet to address this issue—*have never interpreted Section 470's office requirement to be satisfied by something less than the maintenance of physical space* in New York state.

(A8-9) (emphasis added).

As the Second Circuit reasoned, as to non-resident attorneys, Section 470's "additional obligation carries with it significant expense—e.g., rents, insurance, staff, equipment, *inter alia*—all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one." (A10).

Accordingly, the Second Circuit expressly rejected Defendants' argument that "the office requirement imposed by Section 470 can be read in a manner that does not implicate the P&I Clause, that is, an 'office for the transaction of law business' requires only an address for accepting personal service, which 'might' be satisfied by designating an agent for the service of legal papers."[4]/ (A8, A10).

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[4]/ The Second Circuit went on to note that:

> In sum, as it stands, it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause.

(A11).

As the Second Circuit explained, "the absence of authority from New York's highest court does not provide us license to disregard lower court rulings nor to analyze the question as though we were presented with a blank slate." (A9-10). And, as the Second Circuit noted, "the term 'office,' although not exactly pellucid, implies more than just an address or an agent appointed to receive process" and that "the statutory language that modifies 'office'—'for the transaction of law business'—may further narrow the scope of permissible constructions." (A11).

The Second Circuit concluded that "there is no question that resolution of this appeal turns on the meaning of 'office for the transaction of law business' as used in N.Y. Judiciary Law § 470." (A10). Noting its "preference that states determine the meaning of their own laws in the first instance" and the importance of this issue to the state, the Second Circuit determined that this question should be certified to the New York Court of Appeals. (A13-14).

On April 8, 2014, the Second Circuit certified the question to the New York Court of Appeals while retaining jurisdiction to decide the case once the Court of Appeals issues its opinion (or declines to accept certification). (A14-15).

ARGUMENT

I. The Rule of Constitutional Avoidance Cannot Save Section 470 Because the Term "Office for the Transaction of Law Business" Cannot Be Reasonably Construed as Meaning Merely "an Address" or "Designating an Agent" for Service of Legal Papers.

Defendants argue that the rule of constitutional avoidance requires the Court to read Section 470's office requirement narrowly – i.e., to hold that the term "office for the transaction of law business" means nothing more than providing "simply an address" or designating an agent for service of legal papers. App. Br. at 20. As explained below, this argument is flawed.

This Court has long held that, under the rule of constitutional avoidance:

> … it is the duty of this court in construing a statute which is *reasonably* susceptible of two constructions, one of which would render it unconstitutional, and the other valid, to adopt that construction which saves its constitutionality. A like duty requires us to avoid a construction which raises grave and doubtful constitutional questions if the statute can *reasonably* be construed so as to avoid such questions.

Matthews v. Matthews, 240 N.Y. 28, 34-35 (1925) (emphases added); *People v. Correa*, 15 N.Y.3d 213, 232-33 (2010); *People v. Wells*, 181 N.Y. 252, 257 (1905).

Thus, while interpreting the term "office for the transaction of law business," as this term is used in Section 470, this Court can only choose such construction as is reasonable. As this Court explained in *Matthews*:

> … the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material

> part of the same; and where there are several statutes relating to the same subject, they are all to be taken together …
> …
> In construing a statute we have a right *to consider conditions existing when it was adopted, and which it must be assumed the Legislature intended to meet*, and also other statutes relating to the same subject.
> …
> When a number of statutes, whenever passed, relate to the same thing or general subject-matter, they are to be construed together and are in *pari materia*.

240 N.Y. at 35-36 (internal quotations and citations omitted) (emphasis added); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 662-63 (1876) (stating that the courts "are not at liberty to suppose that the legislature intended any thing different from that [the act's] language imports").

In other words, when interpreting the term "office for the transaction of law business," the Court should look at the intent of the Legislature *at the time when Chapter 43, Section 470's predecessor, was enacted*, other statutes on the same subject-matter, and the then-existing conditions. *See Bull v. New York City Railway Co.*, 192 N.Y. 361, 372 (1908) (having considered conditions existing when the statute in question was adopted as well as other statutes relating to the same subject matter and adopting the construction in accordance with the ordinary meaning of terms).

Applying these principles of constitutional avoidance, it follows therefore that Section 470's office requirement must be construed in accord with its legislative history and in *pari materia* with the original residency requirement. Here, the legislative history clearly shows—and Defendants do not dispute—that

Section 470 was enacted as an exception to the original residency requirement. *Matter of Gordon*, 48 N.Y.2d at 273-74; (A153-59) (Daniel C. Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990)); (A151) (1917 N.Y. Op. Att'y Gen. 338, 364 (Dec. 10, 1917) (noting that Section 470 was enacted to carve out an exception to the continuing residency requirement for practicing law in New York); (A116) (describing Section 470 as "the narrow exception to New York's residency as a condition of practice rule"). That residency requirement was already found to be unconstitutional by this Court thirty-five years ago. *Matter of Gordon*, 48 N.Y.2d at 273-74.

In short, the Defendants' proposed "narrow reading" is contrary to the plain language of Section 470 and the Legislature's intent when it enacted and reenacted the statute and, therefore, it should be rejected. As this Court has previously held, "courts are not at liberty to save a statute by, in effect, rewriting it in a manner that contravenes its plain wording as well as its unambiguously articulated legislative purpose." *Matter of Wood v. Irving*, 85 N.Y.2d 238, 245 (1995).

A. Section 470's Plain Language Is Clear That the Term "Office for the Transaction of Law Business" Means an Actual, Physical Office Space and Not Merely "an Address."

Section 470—which survived to this day in the same form as when it was first enacted in 1909 and later reenacted in 1945—requires:

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

N.Y. Jud. Law § 470; (A87, A90).

Neither Section 470 nor any of its predecessors defined the term an "office for the transaction of law business."

In its prior decisions involving the interpretation of statutes, this Court has previously held that:

> Where the terms of a statute are clear and unambiguous, *"the court should construe it so as to give effect to the plain meaning of the words used."* Resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment.

Auerbach v. Bd. of Educ., 86 N.Y.2d 198, 204 (1995) (internal citations omitted) (emphasis added); *Doctors Council v. New York City Employees' Ret. Sys.*, 71 N.Y.2d 669, 674-75 (1988).

Here, there is no ambiguity in the term "office for the transaction of law business" as this term is typically understood in the context of a typical law practice – an actual, physical space where an attorney spends some time practicing law and where the typical law office activities are performed.[5]/ *See Matter of*

[5]/ Adopting Defendants' proposal to define the term "office" to mean "simply an address within the State at which a nonresident attorney may receive service" or "designation of an agent within the State" (App. Br. at 26-27) would lead to absurd results and be contrary to common

Carpenter, 276 A.D. 634, 635 (3d Dep't 1950) (noting that nonresident attorney had an office in New York and "no other office, as that term is usually understood, for the practice of law"); *see also* (SA181-182) (Br. of *Amici* N.Y.-Licensed Nonresident Attys. at 6-7) (citing 6A N.Y. Jur. 2d, Attorneys at Law § 44).

Unsurprisingly, the Second Circuit rejected the very same arguments Defendants now make before this Court and, when certifying the question to this Court, the Second Circuit stated:

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

(A11).

Indeed, as the Second Circuit observed in a footnote, "In its definition most relevant to these circumstances, the Oxford English Dictionary defines 'office' as '[a] room, set of rooms, or building used as a place of business for non-manual work; a room or department for clerical or administrative work.'"[6]/ (A11) (citing

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sense. Simple phrases that are typically used in the course of the "transaction of law business"—such as "send a copy to my office," "meet me at the office," "I'll be at the office"—would no longer be clear, become ambiguous and confusing to clients, counsel, and other parties (e.g., "I'll be at the office [where I'll be working on a brief]" vs. "I'll be at the office [to see if I've been served with papers]").

[6]/ The 1913 Webster Dictionary defines "office" in a similar fashion:

> The place where any kind of business or service for others is transacted; a building, suite of rooms, or room in which public officers or workers in any

"Office, n." Definition, OED Online (3d ed. Mar. 2014) *available at* http://www.oed.com/view/Entry/130640?rskey=pvVa8b&result=2&isAdvanced=false) (Nov. 30, 2014).

In short, the plain language of the statute indicates that the term "office for the transaction of law business" means nothing less than an actual, physical space where an attorney is present on a regular basis for the purpose of practicing law.

B. Section 470's Historical and Legislative Background Evidence That the Term "Office for the Transaction of Law Business" Means an Actual, Physical Office for Practicing Law in the State.

The review of the legislative history and purpose of Section 470 and its predecessors—as enacted in 1862 and 1909—leads to the only possible conclusion: the term "office for the transaction of law business" that is consistent with the context and purpose of Section 470's enactment is that of an actual, physical space where a nonresident attorney is present on a regular basis for the purpose of practicing law. *See Uniformed Firefighters Ass'n v. Beekman*, 52 N.Y.2d 463, 471 (1981) (noting that "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to

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> organization transact business; as, the register's office; a lawyer's office; the doctor's office; the Mayor's office.

"Office, n." Definition, Webster's Online Dictionary, *available at http://www.webster-dictionary.org/definition/office* (Nov. 27, 2014).

determine its meaning and scope"); *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 434, 437 (1975) (same).

Daniel C. Brennan, in his article *Repeal Judiciary Law § 470*—which provides an excellent overview and analysis of the background, history, and case law interpreting Section 470 and its predecessors—concluded that "[t]he primary purpose of chapter 43 was to carve out an exception to the general rule that an attorney could not practice in the New York State courts unless he was a resident of New York State." (A153-59). As Brennan noted, its enactment was likely prompted by the decision of the Brooklyn Special Term held in February 1862 that considered the case of a New York-licensed attorney who was not permitted to appear in state court after he moved to New Jersey. (A154) (citing *Richardson v. Brooklyn City & Newtown R.R. Co.*, 22 How. Pr. 368).

Indeed, the *Richardson v. Brooklyn City & Newtown R.R. Co.* case—involving a New York attorney who moved to Jersey City, New Jersey—was decided just six weeks earlier, on or about February 11, 1862.[7]/ 22 How. Pr. 368 (Sup. Ct. 1862) (reproduced at C08-9). In that case, the court held that "after an attorney had left the state, with a fixed intention of residence elsewhere, he could

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[7]/ The entire proceeding in the *Richardson* case took approximately a month—including the entry of default judgment, issuance of execution, order staying execution, and oral argument on the defendant's counsel's objection to plaintiff's counsel's no longer residing in the state—from serving a complaint on January 4, 1862 to oral argument on February 4, 1862, with the decision issued on February 11, 1862. (C08-9) *Richardson v. Brooklyn City & Newtown R.R. Co.*, 22 How. Pr. 368 (Sup. Ct. 1862).

no longer practice in the court, nor could his name be used in the conduct of a suit." *Id.* at 371 (internal citations omitted). After discussing the then long-existing residency requirement as a prerequisite to the admission to New York bar and applicable rules on the service of papers, the court in *Richardson* explained:

> An attorney might keep his office closed and empty, and, if he had no residence within the state, might entirely evade the service of papers, and baffle his adversary and the court.
>
> Attorneys are liable to attachment, and to punishment for contempt of the court, for the commission of various acts of misconduct. Those remedies may also be evaded, if they non-residents.[8]/
>
> If an attorney may have a residence out of the state, and still practice in its courts, he may also dispense with an office, since there is no more positive requirement that he should keep an office, than there is that he should have a residence within the state. An attorney might, thus, as I have intimated, completely baffle his opponents, and evade the control of the court; and, though guilty of malpractice and misconduct, be a constant fugitive from justice.[9]/

Id. at 370.

In so concluding, the court in *Richardson* admitted however that these concerns did not involve any circumstances in that case and were nothing more but a speculation as to what might "likely to happen" when it continued, stating that:

> … There is nothing here but a technical objection to the appearance of a very respectable gentleman of the profession. Still the case

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[8]/ Rejected by the district court, the arguments of the remedy of attachment and supervision by the courts are no longer advanced by Defendants.

[9]/ Tellingly, despite the statute's 150 plus years of existence, none of the cases concerning Section 470 involved a nonresident attorney "baffl[ing] his adversary and the court" by evading the service of papers.

> supposed is, perhaps, as likely to happen now among the multitude of individuals who, since 1847, have crowded into a profession whose barriers have been thrown down, as it was when it might have been presumed that an attorney and counsellor of this court had the acquirements of a lawyer and the principles of a gentleman. Among the numerous incompetent persons whom we are compelled to see in the courts, invested with the character of lawyers under the present constitution, which has made it substantially impossible to keep anybody out, and with the Code of Procedure,... it would be very unwise to relax any of the protection to suitors and to the administration of justice, which were found necessary in better days.

Richardson v. Brooklyn City & Newtown R.R. Co., 22 How. Pr. at 370-71.

In response, Chapter 43 was enacted on March 22, 1862 to address the situation like in *Richardson* case by providing a limited exception to the then-general rule that only New York residents could be admitted to practice law in this state.[10]/ (A76-77). Basically, it allowed attorneys who were already licensed in New York to continue to practice in state courts, provided their only office for the practice of law was in New York, even if they moved to an adjoining state and

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[10]/ Chapter 43 stated that:

> 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.

(A77).

were no longer New York residents. Chapter 43 applied only to attorneys who were admitted to practice at the time of its enactment. *Id.* Prior to the enactment of Chapter 43, a New York attorney who moved to another state automatically lost the right to practice law in New York. (A149-51) (1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917)).

In 1866, Chapter 43 was re-enacted as Chapter 175 with some grammatical and a few substantive changes, which basically eliminated the requirement that the attorney's *only* office had to be in New York and extended the exemption from the residency requirement—if the office requirement was met—to attorneys who were admitted after its enactment.[11]/ (A78-79) (L. 1866, ch. 175, § 1 (6 Edm., 706)).

In 1877, Chapter 175 was reenacted as Section 60 of the new Code of Civil Procedure.[12]/ (A80-81) (Code Civ. P., § 60).

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[11]/ Chapter 175 stated that:

> Any regularly admitted or licensed attorney or counselor of the supreme court of this state, and whose office for the transaction of law business is within this state, may practice as such attorney or counselor in any of the courts of this state, notwithstanding he may reside in a state adjoining the State of New York; provided, that service of papers, which might, according to the practice of the courts of this state, be 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.

(A79) (L. 1866, ch. 175, § 1 (6 Edm., 706)).

[12]/ Section 60 provided that:

> A person, regularly admitted to practice as attorney and counsellor, in the course of record of the State, whose office for the transaction of law is within the State, may

In 1908, the Board of Statutory Consolidation made a decision to divide Section 60 of the Code of Civil Procedure and removed the first part of the section to the newly created Judiciary Law and what is now known as Section 470. (A82-85) (Code Civ. P., § 60).

Thus, it is clear that at the time of the enactment of Section 470 and its predecessors—when residency was a prerequisite to admission to practicing law in New York—the Legislature could not have possibly intended the term "office for the transaction of law business" to mean merely "an address" or "designation of an agent" for process of service. *See Alliance of Amer. Insurers v. Chu*, 77 N.Y.2d 573, 585 (1991) (having discussed the principle of constitutional avoidance, the Court then reasoned that, where the "effects of the legislation are obvious and acknowledged" and "infringe on constitutionally protected rights, we cannot avoid our obligation to say so"). In other words, merely "providing an address" or "designating an agent" for service of papers—as Defendants suggest—would had

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> practice as such attorney or counsellor, although he resides in an adjoining state. But service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon him by depositing the paper in a post-office in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

(A81) (Code Civ. P., § 60).

never satisfied Section 470's office requirement at the time when the statute was enacted and later re-enacted.[13]/

II. The Rule of Constitutional Avoidance Cannot Save Section 470 Because It Is an Obsolete Relic of the Residency Requirement That Had Been Long Held Unconstitutional.

As its legislative history shows, Section 470's predecessor, Chapter 43, was enacted as an exception to the original residency requirement that was held unconstitutional over 30 years ago. *See Matter of Gordon*, 48 N.Y.2d at 273-74. As Brennan correctly noted in his article, the enactment of Section 470's predecessor was essentially "an accommodation of 'commuters.'" (A154).

Indeed, prior to the enactment of Chapter 43, New York's residency was not only a prerequisite, but it was also a *continuing qualification* to practicing law in New York. Thus, if a New York attorney moved to another state, he lost the right to practice law in New York immediately. *Matter of Tang*, 39 A.D.2d 357, 359 (1st Dep't 1972) (noting that "[a]ttorneys regularly admitted who subsequently move or fail to maintain an office here lose the right originally acquired") (citing *Park Lane Commercial Corp. v. Travelers Indem. Co.*, 50 Misc. 2d 231 (N.Y. Sup. Ct. 1966) and *Estate of Fordan*, 5 Misc. 2d 372 (N.Y. Surr. Ct. 1956)).

[13]/ Section 470 was last re-enacted in 1945 – at the time when the residency was still a prerequisite for admission to New York bar (which was held unconstitutional in 1979).

As the New York Attorney General stated, Chapter 43 was enacted to carve out an exception to the residency requirement for bar admission in New York:

> An analogous qualification, that of residence within the State of New York, is likewise a continuing qualification, and an attorney at law for New York State acquiring a residence in another State *ipso facto* loses his right to practice here (Richardson v. Brooklyn City R. R. Co., 22 How. Pr. 368). A legislative interpretation to the same effect is found in § 470 of the Judiciary Law which permits attorneys admitted to practice in New York State to reside in an adjoining State, thereby connoting that except for the specific legislative permission such attorneys would have lost their right to practice in New York.

(A151) (1917 N.Y. Op. Att'y Gen. 338, 364 (Dec. 10, 1917)).

As New York Attorney General explained, "[a]ll qualifications for the office of attorney at law in this State are continuing qualifications, and *if a person after admission to practice lose one of the essential qualifications his right to practice is gone*." (A151) (emphasis added).

Essentially, it means that if a nonresident attorney who complies with the statute but later decides to close his New York office, "his right to practice is gone"—solely because of his "nonresidency." Once the nonresident attorney's right to practice law is gone due to his losing "one of the essential qualifications for the office of attorney at law," he can only get it back by either becoming a resident or renting an office in the state. (A133-34) (Committee on Professional Standards' findings that a non-resident attorney who "did not maintain a law office

in the state as required by Judiciary Law §470" was "not entitled to practice law in the state" and was "not entitled to charge or collect a fee").

However, the residency requirement—to which Section 470 was enacted to serve as an exception—has long been dead. *See Matter of Gordon*, 48 N.Y.2d 166, at 273-74 (1979). Already in 1979—six years prior to the Supreme Court's decision in *Supreme Court of New Hampshire v. Piper*—this Court held that residency as a prerequisite to admission to the New York bar was unconstitutional and violated the Privileges and Immunities Clause. *Matter of Gordon*, 48 N.Y.2d 266 (1979). In so holding, this Court reasoned:

> The principal purpose of the privileges and immunities clause, like the commerce clause, is to eliminate protectionist burdens placed upon individuals engaged in trade or commerce by confining the power of a State to apply its laws exclusively to nonresidents. In essence, the clause prevents a State from discriminating against nonresidents merely to further its own parochial interests or those of its residents.

Id. at 271 (internal citations omitted).

The Court noted that the applicant was excluded from membership in the New York bar "based solely upon his residence in North Carolina – a criterion which serves no purpose other than to deny persons the right to pursue their professional career objectives because of parochial interests." *Id.* Analyzing the residency requirement under the Privileges and Immunities Clause, the Court held:

> There is nothing in the record to indicate that an influx of nonresident practitioners would create, or even threaten to create, a particular evil [within the competence of the State] to address. No valid reason is

> proffered as to why admission to practice law before the courts of this State must be made dependent upon residency. Indeed, aside from an oblique reference to the purported "dangers" said to be inherent in the licensing of nonresident lawyers, the State is at a complete loss to justify the blanket discrimination against nonresidents…

Id. at 273-74 (alteration in original).

Rejecting the State's proffered justifications in support of the residency requirement—similar to the ones advanced in this case—the Court found that they "serve only administrative convenience and thus are not closely tailored to serve a legitimate State interest." *Id.* at 274.

After this Court's decision in *Matter of Gordon* and the Supreme Court's decision in *Piper*, there were some concerns about Section 470's constitutionality and attempts to amend it to avoid constitutional scrutiny. (A114-18). As the Committee of the Office of Court Administration stated in its report:

> Neither the Gordon Court nor the Piper Court expressly addressed the question whether a State may impose a continuing residency requirement upon already-admitted members of its Bar. In each of these cases, however, the reviewing court's discomfort with State residency requirements for the Bar admission focused about a concern that such requirements curtail an individual's ability to pursue his or her occupation free from discriminatory interference. Matter of Gordon, 48 NY 2d at pp 271-272; Piper, 53 U.S.L.W. at 4240. Seeing this analytical approach, we are drawn to the conclusion that, although the precise issue was not before them, Gordon and Piper nonetheless command elimination of residency requirements as a condition upon the right to practice law. Thus, we believe that amendment of *section 470 of the Judiciary Law, the narrow exception to New York's residency as a condition of practice rule*, is now in order.

(A116) (emphasis added).

However, the attempt to revise Section 470 in such a way as to avoid the constitutional challenge while retaining the same restrictions imposed on nonresidents failed. The revised version merely rephrased the statute using more modern language but was not less offensive; Section 470's amendment as proposed in 1985 never became the law. (A118). Hence, to this day, Section 470 contains the same language it had in 1909 when it was removed from the Code of Civil Procedure to the newly-created Judiciary Law.

Applying the rationale and reasoning of this Court in *Matter of Gordon*, it logically follows that, if residency as a prerequisite to admission to the bar violated the Privileges and Immunities Clause and was unconstitutional, then Section 470—which was created as an exception to that residency requirement—should also become a nullity as an antiquated relic that no longer serves any valid purpose. *See Unites States v. Raines*, 362 U.S. 17, 23 (1960) (suggesting that "the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications").

Already in 1990, at least one New York state court held that Section 470 was "no longer viable," referring to the then-recent decisions in *Matter of Gordon* and *Piper*. (C62) (Corrigan & Donovan, *Admission? Yes; Practice? No: New York's Inconsistent Treatment of Nonresident Attorneys*, ST. JOHN'S J. CIV. RTS. & ECON. DEV., Vol. 6: Iss. 2, Art. 7 (1991) (quoting *Warner Corp. v. Vittorio, Puleo, Doe,*

& Bagel Wholesale Bakery, Inc., No. 21964-89 (N.Y. Civ. Ct. Bronx County Apr. 16, 1990)). As Corrigan and Donovan put it, the court "repudiated New York's residency requirement, section 470 of the Judiciary Law, as outdated due to the decision in *Piper* and subsequent cases, and permitted a non-resident bar member without a New York office, to appear as counsel." *Id.* (C51).

The New York State Bar Association's Committee on Legal Education and Admission to the Bar in its Memorandum dated November 18, 2010 (reaffirming report of December 8, 2004) similarly urged to repeal Section 470's office requirement, calling it a "needless barrier" and "anachronistic vestige of an era when only residents could be admitted to the New York State Bar." (C40-44).

III. The New York Courts Have Thus Far Construed the Term "Office for the Transaction of Law Business" of Section 470 to Require Nothing Less Than an Actual, Physical Space Maintained for the Purpose of Practicing Law in the State.

In their 1991 article discussing Section 470 and its office requirement, Corrigan and Donovan observed:

> The minimum requirements for an office facility was addressed in *Estate of Neufeld*, in which New Jersey residents claimed that the rental of a room and telephone in a farm house constituted an "office" within the meaning of the statute. The surrogate court stated that although the arrangement was "less than a classic operating law office," it seemed to comply with the statute's minimal requirements, which were vague and "worthy of clarification." More recently, courts have followed this interpretation, and have held that as long as the telephone is answered, the attorney receives messages, and the

> mail is forwarded to the attorney, the requirements of the statute are satisfied.

(reproduced at C60) Corrigan & Donovan, *Admission? Yes; Practice? No: New York's Inconsistent Treatment of Nonresident Attorneys*, ST. JOHN'S J. CIV. RTS. & ECON. DEV., Vol. 6: Iss. 2, Art. 7 (1991) (quoting *Estate of Neufeld*, 196 N.Y.L.J. 117, Dec. 18, 1986)).

Indeed, virtually all New York state courts' decisions that applied Section 470 consistently interpreted it as mandating that a nonresident attorney maintain an actual, physical space in New York where he or she is expected to be present on a regular basis for the purpose of practicing law in the State, and not merely "an address," as Defendants assert in their papers. *Matter of Haas*, 237 A.D.2d 729, 729-30 (3d Dep't 1997) (finding that listing New York address of nonresident attorney's assistant did not satisfy Section 470); *Empire HealthChoice Assurance, Inc. v. Lester*, 81 A.D.3d 570, 571 (1st Dep't 2011) (holding that failure of counsel to maintain a local office for the practice of law required striking of a pleading served by such attorney); *Kinder Morgan Energy Partners, LP v. Ace American Ins. Co.*, 51 A.D.3d 580 (1st Dep't 2008) (same); *Neal v. Energy Transp. Group, Inc.*, 296 A.D.2d 339 (1st Dep't 2002) (same); *Hachette Filipacchi Media US, Inc. v. Smile Photo, Corp.*, No. 603263/03, 2011 N.Y. Misc. LEXIS 5120, *5 (N.Y. Sup. Ct. Oct. 13, 2011) (same); *Matter of Obiora v. New York State Div. of Hous. & Cmty. Renewal*, No. 29373/08, 2010 WL 118527 (2d Dep't Jan. 14, 2010) (noting that "any attorney representing the appellant … must have an office for the

practice of law in New York State" as required by Section 470); *Weiss v. Spitzer*, No. 23490/04, 2007 WL 1851191 (2d Dep't Jan. 5, 2007) (dismissing appellants' motion "with leave to renew upon proof that the appellants' attorney maintains an office for the transaction of law business in the State of New York"); *Paggioli v. Poly Prep Country Day Sch.*, No. 11188/05, 2006 WL 4649940 (2d Dep't Aug. 23, 2006) (granting appellant's motion "on condition that the attorney for the appellant either submits proof that it has an office for the transaction of business in New York State" as required by Section 470 or "moves to be admitted pro hac vice"); *Cheshire Acad. v. Lee*, 112 Misc. 2d 1076 (N.Y. Civ. Ct. 1982) (finding that nonresident attorney "may not practice law in this State unless he or she maintain a bona fide office in this State").

For instance, in *Matter of Tang*, Appellate Division, First Department, interpreted Section 470 as requiring that "to practice here an attorney must be resident here or a resident of an adjoining State *who commutes to his office here.*" 39 A.D.2d 357, 360 (1st Dep't 1972) (emphasis added); *Matter of Larsen*, 182 A.D.2d 149, 155 (2d Dep't 1992) (confirming charges of professional misconduct where an attorney "did not have any office space in New York").

In *Marte v. Graber*, the court found that a nonresident attorney failed to comply with Section 470, even though the attorney had a New York address that was "registered" with the Office of Courts Administration ("OCA") and had his

mail forwarded to him. 17 Misc. 3d 1139(A) (N.Y. Civ. Ct. Oct. 5, 2007), *aff'd in Cohen v. Engoron*, No. 100298/2009, 2009 N.Y. Misc. LEXIS 4885, *5-6 (N.Y. Sup. Ct. Oct. 29, 2009) (denying petition to vacate Oct. 5, 2007 order finding that "defense counsel failed to satisfy the requirement of § 470 that he maintain an office in New York for the transaction of law business within the meaning of the statute" because "the address cited by [him] was simply an address from which mail was forwarded to him at his office in North Carolina"). Rejecting attorney's argument that he complied with § 470 since he had an address in New York where mail and other papers were accepted and forwarded to his office in North Carolina, the court held that "the statute requires an 'office,' not an 'address.'" *Marte v. Graber*, 17 Misc. 3d 1139(A) (nonresident attorney "does not claim that he is ever there […]; he does not claim that he currently has telephone service there; he does not claim that he has any employees that are ever there") (emphasis added).

In *Austria v. Shaw*, the court similarly interpreted "office" as an actual physical space where a nonresident attorney works, finding that the attorney complied with the statute because "Marshall pa[id] a small monthly rent to Feinstein, in exchange for desk space in Feinstein's office, use of Feinstein's secretarial staff to take telephone messages, listing of Marshall on the door of the Feinstein's office and the listing on Feinstein's stationery as 'of counsel.'" 143

Misc. 2d 970, 971 (N.Y. Sup. Ct. 1989). And, in *Matter of Estate of Scarsella*, the court found no violation of Section 470, reasoning that:

> [H]e maintains a desk in an office located in Manhattan. He has a telephone there, but at the time of the trial the number was not listed in the New York telephone directory. He shared the office with a realty company, and there is a secretary there who, even though not on his payroll, is available to him. This testimony shows that he satisfies the requirement of Judiciary Law § 470.

195 A.D.2d 513, 515-16 (2d Dep't 1993).[14]/

In *Matter of Estate of Garrasi*, a nonresident attorney argued that he continued to maintain a professional relationship with his former New York firm after he moved out of state and, thus, satisfied Section 470. 29 Misc. 3d 822, 827 (Surr. Ct. 2010). The court rejected his argument, finding that he violated § 470:

> … the fact remains that Attorney Stein failed *to physically maintain an "office for the transaction of law business in New York" within the plain meaning of Judiciary Law § 470.* …[t]here is no indication that Attorney Stein had a designated telephone number in New York, a New York address at which to receive service of process, or that he had designated the Pierro Law Group to accept telephone calls and service of process on his behalf.

Id. (emphasis added).

Furthermore, in *Rosenberg v. Johns-Manville Sales Corp.*, the court held that an out-of-state law firm lacked the capacity to practice law in New York

[14]/ Apparently, the *Scarsella* court had no concerns about issues such as attorney-client privilege or confidentiality of clients' matters when it found acceptable attorney's using a secretary employed by a realty company.

unless it had an office in the State that was managed by a New York licensed partner. 99 Misc. 2d 554, 557-58 (N.Y. Sup. Ct. 1979) (citing Opinion Nos. 175, 495 of NYSBA's Comm. on Prof. Ethics). Also, "the residence of one partner in New York may not relieve the firm of the office requirement if that partner is not the firm attorney involved in the pending litigation in New York." (A155) Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990) (citing *Estate of Neufeld*, N.Y. Surr. Ct., Bronx County, N.Y.L.J., p. 15 (Dec. 18, 1986)).

In *CPA Mutual Insurance Co. of America Risk Retention Co. v. Weiss & Co.*, the court denied plaintiff's motion to disqualify defense counsel, a Pennsylvania law firm, for failure to maintain a bona fide office in New York State, holding that:

> Here, the defendants' counsel … has leased office space in an office building on Broadway in Manhattan which it shares with another firm, its name now appears in the directory in the building's lobby, its New York address appears on the firm's letterhead, it maintains an exclusive New York State telephone number and is supported by a receptionist who is authorized to accept service of process. In addition, two of the firm's members are admitted to practice in New York. Under the circumstances, it has satisfied the requirements of Judiciary Law § 470.

No. 603967/06, 2008 WL 8234086 (N.Y. Sup. Ct. Aug. 18, 2008).

In *Reem Contracting v. Altschul & Altschul*, First Department similarly found that plaintiff's counsel, a New Jersey firm, met the office requirement of Section 470 based counsel's affirmation "that the firm leases a New York office

with a telephone, that partners of the firm use the office periodically, and that many of the firm's attorneys are admitted to practice in New York." No. 104202/11, 117 A.D.3d 583, 584 (1st Dep't May 20, 2014).

Similarly, in *Lichtenstein v. Emerson*, the court interpreted Section 470 as requiring that nonresident attorneys must "maintain some genuine physical presence" in the state and found that plaintiff's attorney did not "maintain an 'office for the transaction of law business" based on the motion court's factual determinations that plaintiff's counsel "had no employees in this State; his name was not posted anywhere on the premises; there was no indication that any employees of the restaurant/bar had ever been instructed to accept legal papers…." 251 A.D.2d 64, 65 (1st Dep't 1997).

In *CA Construction Inc. v. 25 Broadway Office Properties, LLC*, the court found that a nonresident attorney satisfied Section 470 reasoning that his firm had an ongoing lease for an office space in White Plains which included all typical office accouterments and was actually used by him and other New York licensed attorneys from his firm "for legal matters such as the conduct of depositions." No. 100728/09, 2010 N.Y. Misc. LEXIS 1591, *3-4 (N.Y. Sup. Ct. March 15, 2010). In addition, the firm's name appeared in a building directory and there was a person authorized to accept service of process. *Id.*

In *Miller v. Corbett*, the court found that a nonresident attorney complied with Section 470 after he introduced evidence that he "maintained bona fide office space and a desk," which along with a telephone were for his exclusive use, that he was "present at the premises on a regular basis … has telephone service and receives calls in person or by voicemail," was also of counsel to New York based attorney, and was "provided with office facilities and the ability to be served with papers." 177 Misc. 2d 266, 269-70 (N.Y.C. Ct. 1998).

In some instances, the courts found that a reciprocal satellite office sharing arrangement satisfied Section 470's office requirement. *Keenan v. Mitsubishi Estate*, 228 A.D.2d 330, 331 (1st Dep't 1996) (finding that "a reciprocal satellite office sharing arrangement" with a firm located in New York satisfied Section 470); *Cabanillas v. Smithkline Beecham Corp. Glasosmithklineplc Forest Pharm., Inc.*, No. 14632/07, 2007 WL 7314027 (N.Y. Sup. Ct. Sept. 20, 2007) (same). For instance, in *Serer v Gorbrook Associates Inc.*, the court denied plaintiffs' motion to disqualify defendants' counsel on the grounds that "he does not have a bona fide office in the State of New York," finding that defendants' attorney:

> …is authorized to practice in the State of New York insofar as his office in New Jersey has a reciprocal arrangement with the New York firm […] in which each firm uses the offices of the other to receive court papers, conduct depositions, closings, and meetings.[15]/

[15]/ Of course, a solo or small firm practitioner based in Arizona or North Dakota, for instance, may find it rather difficult to find a New York law firm willing to enter into a similar arrangement.

2011 N.Y. Misc. LEXIS 5887, *15-16 (N.Y. Sup. Ct. Dec 7, 2011).

With respect to an "of counsel" relationship, some courts found that an of counsel relationship satisfied Section 470, while other courts held that it did not. *Matter of Tatko v. McCarthy*, 267 A.D.2d 583, 584 (3d Dep't 1999); *Certilman v. Becker*, 1996 N.Y. Misc. LEXIS 619 (N.Y. Sup. Ct. March 28, 1996).

In any event, however, as Plaintiff argued and the Second Circuit agreed, "such an arrangement is nearly equally as burdensome in that it carries with it additional malpractice exposure for the New York firm, which may demand compensation from the nonresident attorney in exchange for establishing an 'of counsel' relationship. This is assuming, of course, that a nonresident attorney can find a local firm willing to commit to such a relationship." (A10), (SA192-193).

To summarize, virtually all New York state court decisions that did discuss underlying factual findings in any detail, consistently held that Section 470 requires more than "merely an address for service" or designating "an agent" for service of papers.

IV. The Committee on Professional Standards, Third Department, Has Thus Far Interpreted Section 470 As Requiring Nonresident Attorneys to Maintain an Actual Law Office in the State.

Likewise, the Committee on Professional Standards, in its findings of professional misconduct by nonresident attorneys, similarly interpreted Section

470's requirement of an "office for transaction of law business" as mandating that a nonresident attorney maintain an actual law office within the state. (A129-47) (Committee on Professional Standards' findings of professional misconduct based on Section 470).

For instance, in a December 8, 1995 letter of admonition issued to a non-resident attorney for violating of Section 470, *inter alia*, the Chairperson of the Committee wrote:

> In the notice of appearance, you recited your law office address as [REDACTED], New York. *You did not maintain a law office at that address* on that date having previously discontinued same.

(A129) (emphasis added).

In the February 2, 1996 Notice of Disciplinary Action issued to another non-resident attorney, the Chairperson of the Committee stated:

> Although you are registered as an attorney and practice law in the State of New York, *you do not maintain a bona fide office in this State as required by Judiciary Law Section 470.*

(A131) (emphasis added).

In its May 4, 1998 "letter of education," the Committee directed a non-resident attorney to refund the entire amount of legal fees received for the following reasons:

> …you engaged in the practice of law within the state of New York by representing [REDACTED] while you did not maintain a law office in the state as required by Judiciary Law § 470. As a result, the third party complaint which you filed on behalf of your clients was

> declared a nullity by Supreme Court. This necessitated your clients having to retain new counsel.
>
> During the course of your representation of [REDACTED] you billed them [REDACTED] and received payments of [REDACTED] towards your fees. The Committee has determined that since you were not entitled to practice law in the state you were not entitled to charge or collect a fee.
>
> The Committee directs that you refund the entire amount of your fee to [REDACTED] within thirty days…[16]/

(A133-34).

On May 31, 2001 and April 2, 2007, the Committee issued two more letters of education, informing non-resident attorneys that they "engaged in a legal matter and [were] practicing law in the State of New York without maintaining a physical office within the state" or "failed to maintain an office for the practice of law in New York State as required by Judiciary Law §470." (A139-40, A141-42).

On May 4, 2007, the Chairperson—one of the Defendants in this case (in a representative capacity)—stated that the Committee determined that a non-resident attorney's conduct was improper based on, *inter alia*, her violation of Section 470:

> You were the attorney of record for [REDACTED] in litigation commenced in New York…
>
> When questioned whether you maintained a law office in New York for the [REDACTED] litigation, you initially asserted that you opened a post office box in New York and made arrangements with your

[16]/ Notably, there is no indication whatsoever that the non-resident attorney did not competently represent the clients – e.g., that he failed to appear at any court hearing or that the third-party complaint he drafted was in any way deficient.

> brother-in-law to use a room in his building if necessary to meet with clients. Upon further questioning you acknowledged that your law office address was a mailbox in a UPS store, the telephone number on your pleadings automatically connected to [REDACTED] in the State of [REDACTED] and your brother-in-law's building was a car wash.

(A143-45).

Claiming now that having merely "an address for services of legal papers" satisfies Section 470 is simply disingenuous. Even a car wash – as any other business – receives mail and can be served with process. So, if the term "office" means "simply an address for service of process," what is wrong, one might ask, with using the brother-in-law's car wash for that purpose?

Finally, on October 11, 2007, the Committee issued its letter of education, calling a non-resident attorney's attention to Section 470, in which it noted:

> *You do not lease office space or meet with clients in New York. You have permission to use an office in the [REDACTED] Building leased by [REDACTED] but you have no desk or telephone in that office and do not regularly receive correspondence at that address.*

(A146-47) (emphasis added).

In other words, in its disciplinary letters, the Committee on Professional Standards, Third Department, has uniformly interpreted the term "office for the transaction of law business" to require a nonresident attorney to maintain an actual, physical office and not merely provide "an address" or "designate an agent" for service of papers.

Here, as evidenced by Section 470's language, its purpose and legislative history—and subsequently confirmed by New York state court decisions and disciplinary letters issued by the Committee on Professional Standards—the term "office for the transaction of law business" has never been interpreted to mean anything other than an actual, physical office space where a non-resident attorney is expected to spend some time on a regular basis for the purpose of practicing law (e.g., receiving mail, answering phone calls, meeting with clients, etc.).

In short, under the rule of constitutional avoidance, the Court should attempt to construe the statute to preserve its constitutionality *but only if there is another reasonable construction* that does so. *Matthews v. Matthews*, 240 N.Y. at 34-35. As this Court has already held, "courts are not at liberty to save a statute by, in effect, rewriting it in a manner that contravenes its plain wording as well as its unambiguously articulated legislative purpose." *Matter of Wood v. Irving*, 85 N.Y.2d at 245. Section 470's plain language, its legislative purpose, as well as subsequent interpretations by state courts and agencies clearly demonstrate that the term "office for the transaction of law business" cannot be reasonably construed to mean anything other than an actual, physical office and not merely "an address."

V. Rewriting the Statute, as Defendants Propose, Will Not Preserve Its Constitutionality Under the Privileges and Immunities Clause.

As a preliminary matter, it should be noted that, contrary to Defendants' claims that Plaintiff's challenge of Section 470's constitutionality is only facial, *see, e.g.,* App. Br. at 17, Plaintiff has always maintained that Section 470 is unconstitutional both on its face and as applied. (A5, A20, A42, A65, A170). As it was extensively argued before, Plaintiff's basis for the as-applied challenge is the fact that Section 470 is enforced equally against nonresident attorneys who passed the New York bar exam and the ones admitted on motion. (SA013-17). Denying Defendants' motion to dismiss, the district court noted the distinction between the attorneys admitted on motion and those who "have shown familiarity with state law by passing the state bar and complying with all other state requirements."[17]/ (A50) (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988)).

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[17]/ Also, as Corrigan and Donovan noted in their article, "it is unclear whether section 470 restricts only those attorneys appearing as counsel in litigation matters before the courts or whether it applies to all attorneys who desire to practice in New York." (C60) Corrigan & Donovan, *Admission? Yes; Practice? No: New York's Inconsistent Treatment of Nonresident Attorneys*, ST. JOHN'S J. CIV. RTS. & ECON. DEV., Vol. 6: Iss. 2, Art. 7 (1991). As one Defendant stated in response to request to admit that "non-resident attorneys who passed the New York State bar exam and are in compliance with all requirements for practicing law in New York - except for the office requirement of Section - are precluded from practicing law in New York by Section 470," he "Cannot Admit or Deny. Upon information and belief, Section 470 has only been enforced against non-resident attorneys of record." (SA005) (emphases added).

Further, Section 470 specifically addresses nonresident attorneys residing in adjoining states. Jud. L. § 470. However, in *White River Paper Co. v. Ashmont Paper*, the court held that Section 470 requires all nonresident attorneys to maintain a local office in New York. 110 Misc. 2d 373, 376 (N.Y. Civ. Ct. 1981). Still, some courts have interpreted Section 470 as requiring that, in order to practice law in New York, a non-resident attorney must both maintain an office

Having gone through the process of studying and passing the New York bar exam—which is considered to be among the most difficult in the country—such nonresident attorneys have shown more commitment and respect to New York laws and practice than those admitted on motion and that they are less likely to engage in litigation tactics such as avoiding service of process or denying they were served with process in the rare instances where such service on the attorney is required.

However, regardless of which standard is applied, Defendants cannot prevail under either, even if the term "office for the transaction of law business" was modified to mean "an address" or "appointment of an agent" for service of process, meanings which the Legislature never envisioned when it enacted and re-enacted

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in the state and reside in an adjoining state. *See CPA Mutual Insur. Co. of America Risk Retention Co. v. Weiss & Co.*, No. 603967/06, 2008 WL 8234086 (N.Y. Sup. Ct. Aug. 18, 2008) (stating that "Section 470 provides that a nonresident attorney admitted to practice law in New York State may practice as an attorney in this State if the state in which counsel resides adjoins New York State and if counsel maintains an office in New York") (emphasis added); *Sack v. Sortor*, No. 115010/08 (N.Y. Sup. Ct. March 6, 2009) (same) (reproduced at C10).

Ironically, as Corrigan and Donovan observed, Section 470 "under certain circumstances [] affords greater rights to attorneys who are not admitted to practice in New York than to members who have been admitted." (C61) (Corrigan & Donovan, *Admission? Yes; Practice? No: New York's Inconsistent Treatment of Nonresident Attorneys*, ST. JOHN'S J. CIV. RTS. & ECON. DEV., Vol. 6: Iss. 2, Art. 7 (1991) (referring to the *United States Ice Cream v. Carvel* case). In that case, a nonresident member "who sought to represent the defendant was disqualified because he did not have a New York office" and was denied admission *pro hac vice* "because he was a member of the New York Bar." (A156) (Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990)); *but see Paggioli v. Poly Prep Country Day School*, No. 11188/05, 2006 WL 4649940 (2d Dep't Aug. 23, 2006) (granting appellant's motion "on condition that the attorney for the appellant either submits proof that it has an office for the transaction of business in New York State" as required by Section 470 or "moves to be admitted pro hac vice").

the statute and which are so drastically different from what the New York state courts have interpreted them to be.

As the district court and the Second Circuit have already held in this case, for Section 470 to withstand the constitutional challenge under the Privileges and Immunities Clause, Defendants have to show:

> (i) a substantial interest for the discrimination, and (ii) that the means used bear a close or substantial relation to that interest. Additionally, in addressing the latter prong, the Court must consider "the availability of less restrictive means" to advance that interest.

(A27-28) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)) (internal citations omitted); (A7) (citing *Bach v. Pataki*, 408 F.3d 75, 88 (2d Cir. 2005)).

Defendants cannot do so.

A. Defendants' Stated Interest Is Not "Substantial."

Defendants argue that [re]defining the term "office for the transaction of law business" as meaning merely "an address" or "designation of an agent" for service of process within the State "makes sense because it serves two reasonable purposes." App. Br. at 30. One such "reasonable purpose" is to "assure[] that litigants will not be more limited in the range of service options when they are litigating against nonresident attorneys" and another to "ensure[] that service may

be made within the jurisdiction of New York courts, [] thereby enabl[ing] New York courts to resolve disputes over such service."[18]/ App. Br. at 30-32.

First, Defendants do not even claim that either of these two alleged purposes are "substantial" – a showing they must make for Section 470 to survive.

Second, Defendants' arguments that Section 470's office requirement should survive because it ensures more options for their service, including personal service, of papers on behalf of their clients or because it enables the state courts to adjudicate disputes arising out of service are unconvincing. App. Br. at 30-33.

In their attempt to bolster the latter claim, Defendants refer to so-called "traverse hearings" in which the "[c]ourts adjudicating disputes over whether such service in fact occurred […] may take evidence, including witness testimony." App. Br. at 32. Defendants argue that "[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."[19]/ App. Br. at 32-33 (citing Jud. L. § 2-b(1)).

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[18]/ After litigating this case for over 5 years, Defendants now claim for the first time before this Court that yet another purpose of the statute exists – i.e., to ensure that litigants will not be limited in the range of service options when litigating against nonresident attorneys. App. Br. at 30-31.

[19]/ It is unclear, and Defendants do not explain, why obtaining evidence of a nonresident is more difficult in a "traverse hearing" setting than a trial or other evidentiary hearing.

What Defendants do not mention, however, is that these "traverse hearings" typically involve the issue of service of process that must be served on a party (e.g., summons and complaint that is usually served at the commencement of the action when a defendant does not yet have an attorney). *See, e.g., Walkes v. Benoit*, 257 A.D.2d 508 (1st Dep't 1999); *City of New York v. Miller*, 72 A.D.3d 726 (2d Dep't 2010). Thus, since a typical subject of "traverse hearings" is service of process at the commencement of the action, the location of the office of a yet-to-be-retained attorney is not implicated. And, Defendants presume that a party to be served is a New York resident – which may or may not be the case since lawsuits filed in New York courts frequently involve out-of-state, or ever increasingly out-of-country, parties and, in such cases, a dispute arising out of service will likely require the testimony of out-of-state witnesses and, in this event, there are tried and true, time-tested methods of securing their testimony.[20]/

Furthermore, Defendants erroneously assume that a person who makes personal service—that a non-party witness who performed or observed the service—can always be "served within the State." But, it is not uncommon for people to live in one state and work in another. In other words, a person who

[20]/ For the purpose of issuing subpoenas to out-of-state, non-party witnesses, letters rogatory may be obtained to compel a witness in another state, via subpoena, to appear at a hearing, deposition, etc. Surely Defendants are familiar with that procedure since, in litigation, the need to subpoena third-party witnesses—who may or may not reside in the forum—frequently arises.

makes service in New York may actually reside in Pennsylvania or New Jersey and not be subject to the subpoena power of New York state courts. Also, personal service these days is often and easily accomplished using professional process service companies whose employees would appear to testify at a hearing, most likely even without a subpoena, if needed.[21]/

The only plausible scenario when a personal service on an attorney is required is if he or she is about to become a party to a proceeding and must be served with process. In 1979, this Court considered and rejected this argument, stating that less restrictive means are available, such as legislation could be enacted "requiring nonresident attorneys to appoint an agent for the service of process within the State." *Matter of Gordon*, 48 N.Y.2d at 274. Indeed, Section 520.13 of New York Rules for Admission of Attorneys and Counselors at Law has already addressed this issue by requiring every applicant for bar admission who does not reside or employed full-time in the State to designate the clerk of the appropriate Appellate Division as the applicant's agent for the purpose of service of process. 22 N.Y.C.R.R. § 520.13(a).

[21]/ As a practical matter, such companies provide more efficient service of process than, for example, Sheriff's offices, at a reasonable cost. For instance, a litigant could fax or email to Guaranteed Subpoena, Inc. – which serves process nationwide, including same day service – any legal process that needs to be served.

As for the latest stated purpose—to avoid limiting the range of options for service—as Defendants admit, in New York, an attorney may also be served by mail, overnight delivery service, and even by facsimile transmission, and/or by electronic means (i.e., email). N.Y.C.P.L.R. 2103(b)(2),(5)-(7). While the latter two options provide that the attorney must consent to such service, to require that nonresident attorneys accept service by email or facsimile is significantly less burdensome and would constitute a less restrictive – and better – means to achieve the purported "objectives" of Section 470.[22]/

In fact, requiring nonresident attorneys to accept service by electronic means would afford less expensive and faster service.

B. Defendants' Proposed "Reading" of § 470 Would Still Impose a Substantial, Discriminatory Burden on Nonresident Attorneys.

Defendants argue that the term "office for the transaction of law business" could be read to mean "simply an address" for service of papers (essentially rewriting the statute) which would help Section 470 survive the constitutional challenge. This argument is flawed for several reasons.

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[22]/ Although Defendants state that a litigant may "have an alternative mode of [persona] service that may be more convenient or less expensive for voluminous or oversized documents or exhibits," App. Br. at 31, one would hope that a litigant would not attempt to file and serve a box or two of legal papers for an expedited hearing by the court. In such a case, however, using email or Dropbox (or a similar service) to serve such papers on a nonresident attorney would be a better (and more environmentally friendly) alternative mode that would fulfill that purpose.

First, as argued above, *supra* at pp. 11-20, 25-38, such a "reading" is contrary to the plain language of the statute, legislative history, and subsequent interpretations by state courts and agencies and is against common sense and traditional, plain meaning of the term "office" in the context of a law practice. In essence, Defendants urge the Court to engage in rewriting the statute. But, as this Court has held, "courts are not at liberty to save a statute by, in effect, rewriting it in a manner that contravenes its plain wording as well as its unambiguously articulated legislative purpose." *Matter of Wood v. Irving*, 85 N.Y.2d at 245.

Second, rewriting the term "office for the transaction of law business" to mean "simply an address" or "designating an agent" for service of papers would not save Section 470 because the statute so revised would still impose substantial additional costs on nonresident attorneys thus serving as an artificial trade barrier in violation of the Privileges and Immunities Clause. *Matter of Gordon.* 48 N.Y.2d at 271 (holding that the clause "has been consistently interpreted to prevent a State from imposing discriminatory burdens on nonresidents whether by means of artificial trade barriers in the form of unequal licensing fees, taxes imposed on out-of-State vendors, or employment preferences granted only to residents").

Arguing the need to preserve Section 470, Defendants allege that the state's interest is to enable the service of process and other legal papers typically served in the course of litigation. App. Br. at 26-27, 30-31. Defendants claim that the

purpose is to provide litigants in cases where nonresident attorneys are involved with an option to personally serve nonresident attorneys with papers such as "court orders directing immediate action, [which] a party serving such an order might wish to increase the chances of bringing it to someone's immediate attention by hand delivering it," to allow litigants by choosing personal service to obtain an earlier return date on motions, or to "have an alternative mode of service that may be more convenient or less expensive for voluminous or oversized documents or exhibits."[23]/ App. Br. at 31.

What Defendants fail to—or choose not to—recognize is that defining the term "office for the transaction of law business" to mean "simply an address" or "designation of an agent" for service would not serve that purpose unless providing "simply an address" also contemplates hiring at least one office staff person (who would scan and email or otherwise forward legal papers to nonresident attorney's out-of-state location) as well as obtaining the appropriate insurance, buying equipment (e.g., copier/scanner/fax, computer, phone, etc.), and purchasing utility services (e.g., Internet, phone, electricity) for that New York "address." *See Matter of Haas*, 237 A.D.2d 729, 730 (3d Dep't 1997) (finding that nonresident

[23]/ Of course, hand delivery from New York City to Princeton would be a lot easier than to a lawyer who has designated an address for service of papers in Massena, New York. And, it is unclear how service via personal delivery is superior even if both lawyers are in the State – for instance, one is in New York City and the other in Buffalo (especially during the winter).

attorney's use of his assistant's address in New York could not satisfy Section 470 absent evidence "that mail and telephone messages could be sent to the purported office with any assurance that respondent would receive them).

In essence, to meet the Defendants' proposed definition of the term "office for the transaction of law business," a non-resident attorney would have to maintain an actual law office, as that term is plainly and ordinarily understood, even if it is not staffed by an attorney.[24]/ Designating an agent for service of process would not alleviate these costs either because a nonresident attorney would have to pay the designated agent or someone else to forward legal papers to the out-of-state office (in this case, the cost of equipment, office rent, utilities, etc. would be included in the cost of that person's services). And, as *amici* New York-licensed nonresident attorneys pointed out in their brief to the Second Circuit, using "a 'virtual office' service, which provides telephone and mail forwarding services […] is quite costly." (SA192).

In other words, there is no such thing as providing "simply an address" for service of papers. To maintain such "an address" in New York, a nonresident

[24]/ Given the articulated purpose—e.g., serving court orders directing immediate action where a party "might wish to increase the chances of bringing it to someone's immediate attention," App. Br. at 31—renting a P.O. box or a mailbox at a UPS store would not suffice since a nonresident attorney would have either to wait until his/her mail is forwarded to his/her out-of-state location (which defeats the purpose of bringing one's immediate attention to a court order directing immediate action) or to regularly visit his/her mailbox – essentially "commuting" to his or her UPS/P.O. box in New York.

attorney would need to rent at least some actual, physical office space to do the things enumerated above. Indeed, as *amici* New York-licensed nonresident attorneys stated in their *amici curiae* brief, "*Amicus* Mr. Carlucci must pay to have his mail FedExed from his New York office to his New Jersey office on a daily basis." (SA194) (emphases added). And, "*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." (SA195).

In other words, for as long as Section 470 continues to require an office within the state – even if that term were given a new meaning of "an address" – the statute would still be unconstitutional due to its discriminatory effects such as additional substantial costs, limitations on a number of cases, potential but very real threat of delays and exposure to malpractice suits resulting therefrom, as well as distractions from disqualification motions and motions to dismiss.[25]/

[25]/ As *amici* New York-licensed nonresident attorneys argued, the discriminatory treatment of § 470 imposes additional costs and distractions on nonresident attorneys who have to defend motions for disqualification or to dismiss pleadings for failure to comply with the statute. *See* (SA194); *Willing v. Truitt*, No. 600809/2009, N.Y. Sup. Ct. Oct. 20, 2010 (attorney's compliance with § 470 was subject of the hearing by a special referee) (reproduced at C14-21).

VI. In the Alternative, Should the Court Decide That It Can Read § 470 in Such a Way as It Can Be Saved, the Court Could Reasonably Interpret It as Requiring Nonresident Attorneys to Provide an "Email Address" and to Accept Service of Papers by Electronic Means.

As detailed above, Defendants arguments simply do not hold water: the statute's language, legislative history, and case law interpreting it are clear that Section 470's office requirement means nothing less than a physical law office space – i.e., a typical law office in its most traditional meaning. Rewriting the statute to save it as requiring "simply an address" for service of papers would be contrary to this Court's prior holding and, in any event, would not save the statute because it would still impose a substantial financial burden on the nonresident attorneys and be in violation of the Privileges and Immunities Clause.

The only viable solution to save the statute is by redefining the term "office" to reflect the modern state of technology and the current trend of new, evolving ways of practicing law.

For instance, New York Rule 7.1(h) that regulates attorneys' advertisements was historically interpreted as requiring that advertising for legal services "must [] include the street address of the lawyer's office," with the latter being interpreted as a "place where [law] business is conducted or services are performed."[26]/ (C38)

[26]/ New York Rule 7.1(h) states: "All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered." (emphasis added).

New York State Bar Ass'n ("NYSBA"), Ethics Op. 756 (March 13, 2002) (quoting BLACK'S L. DICT. 1112 (7th Ed. 1999)). In reaching this conclusion, the NYSBA referred to the § 470's office requirement and case law interpreting it. *Id.*

In its Ethics Opinion 964, the NYSBA reaffirmed its determination that Rule 7.1(h) requires that lawyer's advertising "must include the street address of the lawyer's principal office." (C36) NYSBA, Ethics Op. 964 (Apr. 4, 2013).

But, in its most recent Ethics Opinion 1025, the NYSBA reconsidered its prior position on Rule 7.1(h), finding that "it is incorrect to interpret the attorney-advertising rule as an independent mandate for attorneys who advertise to maintain a physical office address." (C31) NYSBA, Ethics Op. 1025 (Sept. 29, 2014). The NYSBA's Ethics Opinion 1025 was issued in response to an inquiry of a solo New York-licensed attorney living outside of the U.S. who engages only in transactional practice via a purely virtual office. (C29-30) NYSBA, Ethics Op. 1025.

Discussing at length New York City Bar Association's Formal Opinion 2014-2 which addressed the use of a virtual law office by a New York lawyer who was considering becoming a solo practitioner while doing most of her work from her home, the NYSBA stated:[27]/

[27]/ Unlike the inquirer in NYSBA's Ethics Op. 1025 (who has a purely virtual office), the virtual law office as used in NYC Bar Ass'n Formal Opinion 2014-2 referred to "a physical location that offers business services and facilities, such as private or semi-private work spaces, conference rooms, telephones, printers, photocopy machines, and mail drop services to lawyers." (C22) NYC Bar Ass'n Formal Opinion 2014-2 (June 2014).

> Indeed, as N.Y. City 2014-2 points out, the more electronically-connected lawyer may be "at least as accessible as a lawyer who rents a dedicated physical office space."

(C32) NYSBA, Ethics Op. 1025 (Sept. 29, 2014) (citing N.Y.C. Bar Ass'n, Formal Op. 2014-2 (June 2014) (reproduced at (C22-28)).

Noting attorneys have numerous duties under Rules of Professional Conduct ("[t]here is no 'virtual law office exception' to any of the Rules"), the NYSBA concluded:

> To the extent N.Y. State 756 and 964 opine that Rule 7.1(h) or its predecessor imposes an obligation for a physical office, they are modified. We now conclude that an attorney who is admitted to practice in New York but who is not resident in New York and who advertises his or her practice in New York must include the address of the attorney's principal office, which may be the Internet address of a virtual law office.[28]/

(C33) (emphasis added).

As the NYSBA also noted, "the physical office requirement is undergoing changes in other states." *Id.* at (C31). For instance, until ten or so years ago, New Jersey required that all (resident and nonresident) attorneys maintained a bona fide office in the state. (SA154-165).[29]/ In February 2013, New Jersey Court Rule

[28]/ The NYSBA went on to note that "[t]he attorney must have an office that meets the minimum requirements of Judiciary Law §470, but we express no opinion as what Judiciary Law §470 requires." (C33).

[29]/ See Brief of *Amicus Curiae* The New Jersey State Bar Association in Support of Plaintiff and Affirmance of the District Court Judgment which provides a detailed overview and historical background of the New Jersey bona fide office rule.

1:21-1(a) was amended again, this time to eliminate the "brick-and-mortar" office requirement altogether.[30]/ N.J. Ct. R. 1:21-1(a).

As early as 1972, Justice Stevens noted in his dissent that "[a]ny requirement must be viewed in relation to the age or period of time in which it operates or is applicable." *Matter of Tang*, 39 A.D.2d at 362 (Stevens, P.J., dissenting). This

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[30]/ New Jersey Court Rule 1:21-1(a) now provides:

> (1) An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.
>
> (2) An attorney who is not domiciled in this State and does not maintain a fixed physical location for the practice of law in this State, but who meets all qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in subsection (a)(1) of this rule, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.
>
> (3) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(1).
>
> (4) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

N.J. Ct. R. 1:21-1(a).

rationale is even more applicable in 2014 than in 1862 when the predecessor statutes to Section 470 were first enacted. Today the means of transportation, communication, and other technological advances existing provide much faster and more efficient ways of facilitating nonresident attorneys' availability to clients, the courts, other attorneys, and for service of process, thereby invalidating such arguments for upholding Section 470.[31]/

As it is already the case with federal courts, New York state courts are increasingly moving towards electronic filing regimes, a trend that will doubtless continue into the future.[32]/ Already 3 years ago, Chief Judge Lippman commented on e-filing, stating that "[i]n the year 2011, this is not a pipe-dream, but rather the very least we should be doing to move the courts boldly and efficiently into the 21st century" and introducing his vision of a "digital courthouse" in New York:[33]/

> E-filing is part of a broader effort toward creating a "digital courthouse," where the bar and public will be able not only to file papers electronically, but to quickly retrieve court documents, receive court orders, pay fines and fees, and make remote appearances that will be recorded electronically. So much of the basic business

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[31]/ As New York-licensed nonresident attorneys stated in their *amici curiae* brief, "many of the *amici* conduct their law practice primarily by telephone and email or in their clients' offices." (SA187).

[32]/ Notably, any attorney admitted to practice before the federal courts in New York may practice there without having a New York office and without any of the apparent concerns which have been advanced in an effort to save Section 470.

[33]/ Some of New York state courts already provide for e-filing and electronic service. For instance, as New York-licensed nonresident attorneys pointed out in their *amici* brief to the Second Circuit, "New York's own court system now *requires* electronic service of interlocutory papers in many commercial, contract, and tort cases." (SA200) (citing N.Y.C.R.R. § 202.5-bb).

> transacted in our courts can be accomplished without lawyers or litigants appearing in the courthouse. The "digital courthouse" will provide vast savings for the courts, litigants, and local governments.

(C-46) (March 2, 2011 Press Release, New York State Unified Court System) (*available at* http://www.nylj.com/nylawyer/adgifs/decisions/030211budget.pdf) (Nov. 30, 2014).

Indeed, defining Section 470's term "office for the transaction of law business" as requiring an email address for service of papers within the State would be more closely related to the original term since many attorneys these days conduct the business of law primarily by phone and email while reflecting the modern ways of practicing law and current state of technology.[34]/

This Court has held that it should not rewrite a statute to save it from constitutional nullification. In the event that this Court should decide to interpret Section 470 in light of today's technology and realities of the conduct of law business, it should not adapt the "fix" advanced by Defendants as it would still not pass constitutional muster. Rather, this Court should opt for the "digital" office and require providing an email address for service. (After all, what would be better to interact with a digital courthouse than a digital law office?)

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[34]/ Other states already implemented such electronic service of papers by email. For instance, two years ago, the Supreme Court of Florida amended Florida court rules to require email service of all pleadings and other documents. Fla. R. Jud. Admin. 2.516(b)(1).

CONCLUSION

This Court should reject Defendants' arguments that providing merely an address or designating an agent for service of process would satisfy Section 470's requirement of maintaining an "office for the transaction of law business" because it is not supported by Section 470's legislative history, is contrary to the plain language of the statute, the legislative intent, and the New York state court decisions interpreting it.

As the legislative history of Section 470 and court decisions interpreting it evidence, Section 470's office requirement means nothing less than an actual, physical office space where a nonresident attorney is required to be present on a regular purpose to practice law in New York.

In the alternative, should this Court decide to interpret the term "office for the transaction of law business" so as to save the statute, it should construe it as requiring to provide an email address for the purpose of service of papers as a condition of practicing law within the State.

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