UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EKATERINA SCHOENEFELD, Plaintiff, v. STATE OF NEW YORK, ET AL., Defendants.	Case No.: 09-cv-0504 (LEK) (RFT) (Document Filed Electronically)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Ekaterina Schoenefeld
Bar Roll No. 515685

32 Chambers Street, Suite 2
Princeton, New Jersey 08542
Tel.: (609) 688-1776
Fax: (609) 228-4099
eschoenefeld@schoenefeldlaw.com

Plaintiff Pro Se

Ekaterina Schoenefeld, Esq.
On the Brief

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT

Plaintiff filed this action for prospective declaratory and injunctive relief, asserting that, despite being a licensed New York attorney, she is unable to practice in that State because of § 470 of the Judiciary Law, which prohibits her, as a non-resident attorney, from appearing in New York state courts because she does not maintain an office in this State, in violation of the Privileges and Immunities Clause of Article IV of the Constitution prohibiting discrimination by states against non-residents.

Section 470 was enacted as an exception to the general rule then in effect that one must be a New York resident in order to be admitted to practice law in the State, the rule that has long been held unconstitutional by the U.S. Supreme Court and New York Court of Appeals. Since the plaintiff's case is not materially different because the ability to actually practice law is implicit in the admission to practice in a particular state and there is no dispute that Section 470 of the Judiciary Law is enforced—even though it serves no constitutional purpose—on December 15, 2010, plaintiff moved for summary judgment.

At the same time, the defendants also filed a motion for summary judgment. The plaintiff opposes the defendants' motion for summary judgment for the reasons expressed in the Memorandum of Law and Declaration of Ekaterina Schoenefeld submitted in support of her motion for summary judgment and as supplemented by these papers in opposition.

II. PROCEDURAL HISTORY

In response to the defendants' motion for summary judgment filed on December 15, 2010, plaintiff adopts and incorporates by reference the procedural history of the case as stated in the Memorandum of Law and Declaration of Ekaterina Schoenefeld filed on the same date in support of her motion for summary judgment.

III. STATEMENT OF FACTS

In response to the defendants' motion for summary judgment filed on December 15, 2010, plaintiff adopts and incorporates by reference Statement of Facts as stated in the Memorandum of Law and Declaration of Ekaterina Schoenefeld filed on the same date in support of her motion for summary judgment and as supplemented by Declaration of Ekaterina Schoenefeld filed in opposition to the defendants' motion for summary judgment.[1]/

In addition, plaintiff incorporates herein her Counter-Statement of Material Facts. Moreover, plaintiff specifically objects to the defendants' characterization of the plaintiff's challenge of the statute on its face only. While plaintiff's main argument is that § 470 is unconstitutional on its face, her alternative position is that it is unconstitutional as applied to the plaintiff and other similarly situated attorneys. See 01/18/11 Schoenefeld Decl. Ex. A.

IV. LEGAL ARGUMENT

Defendants' Motion for Summary Judgment Should Be Denied Because They Failed to Make the Requisite Showing That § 470 Does Not Violate the Privileges and Immunities Clause When They Showed No Substantial Reason for the Continuing Discriminatory Treatment of Non-Resident Attorneys Who Are Admitted to Practice Law in New York

Article IV, § 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In other words, under the Privileges and Immunities Clause, "a State must afford residents and non-residents equal treatment" with respect to fundamental rights, such as pursuit of a livelihood – which includes an attorney's right to practice law in a state where he or she is licensed. *See Supreme Court of New*

[1]/ Throughout this brief, "12/15/10 Schoenefeld Decl." and "01/18/11 Schoenefeld Decl." will refer to plaintiff's Declaration in support of plaintiff's motion for summary judgment and plaintiff's Declaration in opposition to defendants' motion for summary judgment, respectively.

Hampshire v. Piper, 470 U.S. 274, 279-81 (1985) (internal citations omitted); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 386-87 (1978).

As the defendants acknowledge in the brief, the Supreme Court in *Piper* invalidated the state's residency requirement as a prerequisite to admission to practice law in the state as violative of the Privileges and Immunities Clause, holding that:

> The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Piper, 470 U.S. at 284; Def. Br. at 5.

Thus, for § 470 to survive, the defendants have to show that: (1) a substantial reason exists for discriminating against New York-licensed non-resident attorneys by requiring them to maintain an office in the State in order to practice law there; (2) such discrimination bears a substantial relationship to the State's objective; and (3) there are no less restrictive means available to satisfy the State's objective.

The defendants failed to meet this test. They alleged no reason or purpose—let alone one that is "substantial"—that would justify the continued existence and enforcement of § 470. Likewise, the defendants failed to show that the office requirement imposed on New York non-resident attorneys bears a close or substantial relationship to the State's [undisclosed] substantial reason for differential treatment.

Attempting to meet the first prong of the test—by showing "a substantial reason for the difference in treatment" of New York non-resident attorneys—the defendants assert the following reasons for § 470's continuing enforcement: (1) attorneys' availability to service of papers as well as to contacts by their clients, opposing counsel, and other interested parties; and

(2) attorneys' availability to the remedy of attachment. Def. Br. at 5, 7-8, 12. None of these reasons are "substantial" within the context of the Privileges and Immunities Clause and none of these reasons formed the basis for § 470's enactment.

A. The defendants' arguments are not supported by the legislative history of § 470 and, therefore, they should be rejected.

In support of their "service of paper" argument, the defendants refer to the 1908 Board of Statutory Consolidation commentary and several New York state court decisions that cursory addressed prior constitutional challenges of § 470. Def. Br. at 5, 7-8, 10. However, as the Magistrate Judge noted during the August 17, 2010 discovery conference—during which most of the plaintiff's discovery requests were denied, including two Rule 30(b)(6) subpoenas *duces tecum* seeking to elicit deposition testimony precisely on the subject—in deciding whether § 470 is constitutional, the judges should look at the legislative history and may not substitute their opinion for what the state legislature may have thought when it enacted the statute.[2]/ 12/15/10 Schoenefeld Decl. Ex. C, Tr. 18:2-23:3. Even opposing counsel conceded – albeit noting that the defendants intend to rely on the legislative history of the statute and interpreting it case law – that "all we have is the history and I plan to brief and do a motion for a *summary judgment based on the legislative history alone*" and that "[i]f 470 is unconstitutional then *it should be found to be unconstitutional based on legislative history*." 12/15/10 Schoenefeld Decl. Ex. C, Tr. 23:18-22; 11:15-22 (emphases added).

---

[2]/ The Magistrate Judge relied on the defendants' counsel's representations in denying most of plaintiff's discovery requests when defendants represented that all they would rely on was the legislative history. 12/15/10 Schoenefeld Decl. Exs. C-D. To the extent that the defendants have now reneged on those representations and are seeking to rely on "every conceivable [rational and legitimate] basis," see Def. Br. at 11, the defendants' motion should be denied pursuant to Fed. R. Civ. P. 56(d) and plaintiff should be allowed the previously denied discovery. Fed. R. Civ. P. 56(d); 01/18/11 Schoenefeld Decl. ¶¶ 3-5.

In other words, the State's objectives—as derived from the legislative history—should be dispositive on the issue of the reason for § 470's enactment.

The legislative history, however, shows that § 470 is nothing more than an exception that was carved out of the original residency requirement, the likes of which were held to be unconstitutional as violative of the Privileges and Immunities Clause several decades ago. *In re Gordon*, 48 N.Y.2d 266, 273-74 (Ct. App. 1979).

Section 470's predecessor, Chapter 43, was first enacted on March 22, 1862—shortly after the Brooklyn Special Term's decision 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—to provide a limited exception to the then-general rule that only New York residents could be admitted to practice law in the State. 12/15/10 Schoenefeld Decl. Exs. F, M. Prior to that, a New York attorney who moved to another state automatically lost the right to practice law in New York. *In re Tang*, 39 N.Y.S.2d 964, 966 (Sup. Ct. 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.*, 270 N.Y.S.2d 155 (Sup. Ct. 1966) & *Estate of Fordan*, 158 N.Y.S.2d 228 (Sup. Ct. 1956)).

In other words, the in-state office requirement imposed by § 470 on New York non-resident attorneys served no purpose other than to provide an exception to the continuing residency requirement for practicing law in New York at that time:

> 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.

12/15/10 Schoenefeld Decl. Ex. L (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 and, in 1877, Chapter 175 was reenacted as § 60 of the new Code of Civil Procedure. 12/15/10 Schoenefeld Decl. Ex. F.

In 1908, the Board of Statutory Consolidation made a decision to divide § 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 § 470. 12/15/10 Schoenefeld Decl. Ex. F.

In their brief—the *only* portion that actually purports to rely upon the legislative history—the defendants attempted to support their argument that the legislative history "outlines the law's rational as 'service of paper'" by emphasizing the fact that the 1862 version of the statute contained language regarding service of papers on non-resident attorneys and quoting the Board of Statutory Consolidation's comments made in 1908 when that statute was divided in two parts. Def. Br. at 6-7. Simply put, it does not.

The defendants begin their argument by stating that, "[i]n reviewing the law from the year 1862 along with the Full Explanatory Notes"; yet, the excerpt from the Code of Civil Procedure provided by the defendants contains no notes whatsoever—let alone "explanatory" or "full"—for the section in question, i.e., § 60. Def. Br. at 6-7 (citing Roberts-Ryba Affirm. Ex. A, pp. 6-7).

The defendants then quote a passage from the 1908 commentary of the Board of Statutory Consolidation—in which the Board noted that the bracketed part of § 60 was being removed to the Judiciary Law while the balance of the section would be retained in the Code of Civil Procedure—attempting to create an impression that this commentary somehow directly

addresses the legislative intent in enacting § 60, § 470's predecessor, namely "service of paper." Def. Br. at 6-7 (citing Roberts-Ryba Affirm. Ex. A, pp. 8-10).

However, the language quoted by the defendants' from the Board of Statutory Consolidation publication was dated 1908 and related to the changes that the New York statutes were then undergoing. In 1909, the Judiciary Law was enacted for the first time and the Board's commentary simply indicated which parts of § 60 would be removed to the newly created Judiciary Law (what is now known as § 470) and which parts would stay in the Code of Civil Procedure. 12/15/10 Schoenefeld Decl. Ex. M.

In other words, the 1908 commentary by the Board of Statutory Consolidation merely reflected administrative housekeeping matters – i.e., which part of § 60 should be removed to the new Judiciary Law and which part should remain in the Code of Civil Procedure – and had nothing to do with the purpose of § 60 or its legislative intent.

B. The defendants' arguments based on the New York state court decisions cited in their brief are not valid and, as such, they should be rejected.

Next, in support of their argument, the defendants refer to a number of the state court decisions that attempted to rationalize § 470 when it was challenged in the past, finding the statute to be constitutional – however, on the grounds *not* found in the legislative history. As stated above, in deciding whether § 470 is constitutional, the judges should look at the legislative history only and may not substitute their opinion for what the state legislature may have thought when it enacted the statute or come up with new justifications for the statute's existence. As evidenced by § 470's legislative history, none of the reasons stated by the defendants were envisioned as the grounds for enacting § 470. In other words, the courts essentially superimposed their own after-the-fact, unsupported justifications in order to uphold the statute and, as such, should be rejected.

However, assuming *arguendo* that the case law cited by the defendants did state the reasons for § 470's continuing enforcement—such as the attorneys' availability to service of papers, to contacts by their clients, opposing counsel, and other interested parties and the availability of the remedy of attachment—these reasons make no sense and are by no means substantial, especially in light of the current state of technology and legal developments.

In upholding the statute, the courts found it constitutional on the grounds it served valid purposes, namely–counsel's availability to clients, courts and other attorneys, the availability of the remedy of attachment, service of process, and the courts' ability to oversee and/or discipline non-resident attorneys.[3]/ *Austria v. Shaw*, 542 N.Y.S.2d 505, 506 (Sup. Ct. 1989); *Estate of Fordan*, 158 N.Y.S.2d at 230-31.

(i.) Service of Process

The argument based on a non-resident attorney's supposed unavailability for service of process lacks any merit today. Already in 1979, the Court of Appeals of New York considered and rejected this argument, stating that less restrictive means are available, noting that legislation could be enacted that would "require[e] nonresident attorneys to appoint an agent for the service of process within the State." *In re Gordon*, 48 N.Y.2d at 274-75.

In defending § 470 based on "service of paper" argument, the defendants essentially engage in the circular reasoning when they state in their brief that "[i]mplicit in the requirements of the statute is the expectation that adversaries and others dealing with the attorney will be able to serve legal notices at the New York address" and that "the purpose of the rule is to allow for service within New York State." Def. Br. at 8. While making this statement, the defendants do

[3]/ Although the ability to supervise and discipline non-resident attorneys is not raised by the defendants, it is briefly addressed here since that reason is stated in the case law cited in the defendants' brief.

not even make an attempt to explain what are the evils of serving process on a non-resident attorney who is located outside of New York State.

In fact, there are none. Like in most—if not all—states, service of process in New York can be effected by means such as mail and personal service. Neither of the two pose any problems with serving papers on a non-resident attorneys whose offices located outside of New York – U.S. Postal Service, FedEx, UPS, and numerous other commercial mailing and messenger services that exist in these days allow papers to be served promptly and without much expense in any state. Moreover—just like federal courts—the state courts are moving now towards electronic filing, a trend that is expected to continue in the future.

Furthermore, the modern technology – e.g., telephone service, mobile phones, faxing and e-faxing, emailing, video- and teleconferencing, other Internet-based means of communications and fast modes of transportation – provides these days for much faster and more efficient ways of communicating with clients, courts, opposing counsel and other interested parties.

As far back 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." *In re Tang*, 333 N.Y.S.2d at 968 (Stevens, P.J., dissenting). This is even more true in 2011—when, unlike in 1862 when the predecessor statutes to § 470 were first enacted—modern means of transportation and communication exist to facilitate nonresident attorneys' availability to their clients, courts, other attorneys, and service of process, thereby invalidating such arguments for upholding § 470.

(ii.) Ability to Supervise and Discipline Non-Resident Attorneys

As the Supreme Court in *Piper* noted that the "Supreme Court of New Hampshire has the authority to discipline all members of the bar, regardless of where they reside. *Piper*, 470 U.S. at 286. Similarly, the New York Court of Appeals stated that "remedies currently available to

safeguard against abuses by resident attorneys – contempt, disciplinary proceedings and malpractice actions – could be applied with equal force against miscreant nonresident attorneys." *In re Gordon*, 48 N.Y.2d at 274-75. Indeed, as the case law and the documents produced by the Chairman of the Committee on Professional Standards reveal, the authorities have investigated, charged and disciplined nonresident attorneys, including those who have failed to maintain an office in New York. *In re Marin*, 673 N.Y.S.2d 247 (App. Div. 3d Dep't 1998); *In re Haas*, 654 N.Y.S.2d 479 (App. Div. 3d Dep't 1997); *In re Larsen*, 587 N.Y.S.2d 39 (App. Div. 2d Dep't 1992); *see* 12/15/10 Schoenefeld Decl. Ex. K.

(iii.) Availability of the Remedy of Attachment

Next, the defendants briefly mention the use of the remedy of attachment as another reason for § 470's enactment and continuing enforcement. Def. Br. at 7. First, no support can be found in the legislative history. Roberts-Ryba Affirm. Ex. A; 12/15/10 Schoenefeld Decl. Ex. F.

Second, this argument does not make any sense – as the defendants state in their brief, "the office requirement can be satisfied in many different ways. 'Neither the telephone nor the desk need to be exclusively that of the attorney.' Thus, an attorney need only establish a relationship 'of counsel' to satisfy the office requirement." Def. Br. at 8-9 (quoting *Austria v. Shaw*, 143 N.Y.S. 2d 505 (Sup. 1989)). Since a non-resident attorney who is being sued—presumably, in a malpractice action—will most likely have all or most of his or her assets located in the home state, an "of counsel" relationship or non-exclusive possession of a desk would not be much of a help in terms of the availability of the attachment remedy. Finally, most attorneys carry professional liability insurance which could be a less restrictive means, serving the same purpose as the remedy of attachment.

(iv.) "Discriminatory Benefit" Argument

In their brief, the defendants also appear to rely on the Civil Court of the City of New York, Special Term, Bronx County opinion, in which the court expressed the following view:

> It can be argued that to require an office in New York (which will necessitate concomitant expenses and tax ramifications) in order to appear as attorney of record would have the consequence of effectively economically barring many nonresidents from practicing in our courts. As I see it, the answer to this is that the requirement of a New York location places the nonresident in no different position than a resident. The fact that the resident must also maintain a residence and/or office elsewhere does not mean he is being discriminated against in the State of New York. On the contrary, if we were to permit him to avoid the expenses of a New York location including payment of local taxes, we might be creating a discriminatory benefit in his favor.

White River Paper Co., 441 N.Y.S.2d at 963.

The defendants provide no further explanation or analysis as to how this court's view supports their argument of the constitutionality of § 470 or even what a "discriminatory benefit" would be to a non-resident attorney if the statute was stricken down. If anything, it supports the notion that § 470 continues to be enforced for protectionist and/or economic reasons. Unlike non-resident attorneys, New York resident attorneys may practice law even out of his or her basement. *See Lichtenstein*, 656 N.Y.S.2d at 182 (finding to be constitutional § 470's requirement of "a local office for a nonresident, but not for a resident [] who can employ a home as an office"); *Citibank, N.A. v. Gillaizeau*, 505 N.Y.S.2d 993, 929 (Civ. Ct. 1986). Thus, eliminating the office requirement for non-resident attorneys would not put them in a better position than resident attorneys because nonresidents would still be required to pay taxes on income derived from business activities conducted in the State—just like any other out-of-state business located in or person employed in New York. On the other hand, under § 470 nonresidents are required to rent an office in New York (no matter how few in number their New York clients may be) in addition to maintaining an office and residence in their home states.

To summarize, none of the reasons offered by the defendants are supported by the legislative history and, by no means, are substantial and, therefore, should be rejected.

C. The case law from other jurisdictions cited by the defendants provide no support to their arguments.

In addition to New York state case law, the defendants rely heavily on three cases from other jurisdictions—the first two involving *pro hac vice* admissions—which are not binding and are distinguishable from this case.

For instance, the *Parnell v. Supreme Court of Appeals of West Virginia* case involved the issue whether an out-of-state attorney may act as a *pro hac vice* sponsor without maintaining an in-state office. 926 F. Supp. 570 (N.D.W. Va. 1996). In that case, the plaintiff was an attorney who resided and practiced law in Georgia and who was also licensed in West Virginia. *Id.* Unlike New York State, West Virginia did not require the plaintiff in *Parnell* to maintain an office in the state; in fact, the plaintiff was actively practicing law in the state and had a pending case in West Virginia state court at that time. *Id.* at 572. The issue was, however, whether the plaintiff could act as a *pro hac vice* sponsor for three other members of his firm who were not licensed to practice law in West Virginia without maintaining an in-state office. *Id.* at 572-73. The plaintiff challenged that rule on constitutional grounds as violating the Privileges and Immunities Clause, which the court rejected finding that there was no residency classification. *Id.* at 573-74.

However, Rule 8.0 of West Virginia Rules for the Admission to Practice Law requires that a sponsoring attorney must be a "responsible local attorney" as defined in subsection (c) of the Rule—which includes having an in-state office—but it does not require that a sponsoring attorney be a West Virginia resident, thereby equally applying to resident and non-resident attorneys. More specifically, Rule 8.0 states in its pertinent part:

> **(c) Responsible local attorney.** The applicant shall be associated with an active member in good standing of the state bar, having an office for the transaction of business within the State of West Virginia, who shall be a responsible local attorney in the action, suit, proceeding or other matter which is the subject of the application, and service of notices and other papers upon such responsible local attorney shall be binding upon the client and upon such person. The local attorney shall be required to sign all pleadings and affix the attorney's West Virginia State Bar ID number thereto, and to attend all hearings, trials or proceedings actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice. The local attorney shall further attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice, and shall be a responsible attorney in the matter in all other respects. In order to be a "responsible local attorney" the local attorney must maintain an actual physical office equipped to conduct the practice of law in the State of West Virginia, which office is the primary location from which the "responsible local attorney" practices law on a daily basis. The responsible local attorney's agreement to participate in the matter shall be evidenced by the local attorney's endorsement upon the verified statement of application, or by written statement of the local attorney attached to the application.

Rule 8.0(c) of W. Va. Rules for Admission to Practice of Law.

Moreover, unlike the plaintiff in this case, in *Parnell*, the non-resident plaintiff was able to practice law in West Virginia without having an office there – what he sought was merely an ability to be a *pro hac vice* sponsor for his other colleagues – which is discretionary and is quite different from the issues in this case. Here, the plaintiff's right to practice law, or "to pursue the livelihood," is involved that is fundamentally different and, therefore, distinguishable.

Next, the defendants cite a California case, also involving the *pro hac vice* admission issues. In *Paciulan v. George*, the plaintiffs were California residents who were admitted to practice law in other states – but not in California – sought to be appear *pro hac vice* in California state courts. 38 F. Supp. 2d 1128, 1130-31 (N.D. Cal. 1990). However, they were precluded from doing so by California state court rule on *pro hac vice* admissions, prohibiting attorneys licensed in other states from appearing *pro hac vice* under this rule if they were California residents or were regularly employed there. *Id.* at 1131. The plaintiffs, California

residents, challenged the constitutionality of that rule on several grounds, including under the Privileges and Immunities Clause. *Id.* Dismissing their lawsuit, the court correctly held that the plaintiffs-*residents* failed to state a claim upon which relief can be granted under the Privileges and Immunities Clause. *Id.* at 1136.

Finally, in *Tolchin v. Supreme Court of the State of New Jersey*, a New York resident attorney who was also licensed in New Jersey, challenged the then-existing a bona fide, in-state office requirement on the grounds that it violated the Privileges and Immunities Clause. 111 F.3d 1099 (D.N.J. 1997). At that time, Rule 1:21-1(a) of the Rules Governing the Courts of the State of New Jersey required that "no person shall practice law in this State unless that person is an attorney, holding a plenary license to practice in this State,… and maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled." *Id.* at 1102.

In other words, the in-state office requirement that was then in effect equally applied to non-resident and resident New Jersey attorneys.[4]/ The Third Circuit then noted that:

> If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause. But when a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."

Id. at 1111 (internal citations omitted).

Noting that the in-state office requirement similarly affect residents and nonresidents, the Third Circuit rejected the plaintiff's challenge under the Privileges and Immunities Clause, reasoning that:

---

[4]/ In 2004, Rule 1:21-1(a) was amended to eliminate the requirement that the office must located in New Jersey. While Rule 1:21-1 still requires that an attorney must maintain a bona fide office, that office does not have to be in New Jersey: "For the purpose of this section, a bona

> Resident and nonresident attorneys alike must maintain a New Jersey office. Moreover, as the district court noted, the bona fide office requirement provides New Jersey with a reasonable avenue through which it can protect its interest of ensuring that attorneys licensed in New Jersey are available to New Jersey courts, practitioners and clients. See Friedman, 487 U.S. at 69-70 (recognizing that an in-state office requirement was an appropriate and less restrictive means of enforcing Virginia's full time practice restriction).

Id. at 1113.

However, the *Tochin* decision is not persuasive and/or distinguishable from the instant case. First, unlike Rule 1:21-1(a) as it existed when *Tolchin* was decided, § 470 applies to New York non-resident attorneys only. Second, as discussed above, *supra*, the "availability to courts, counsel, and clients" argument does not constitute a "substantial" ground for discriminating against non-residents in lights of the technological advancements, both since 1862 and 1997, when the *Tolchin* case was decided. Third, *Supreme Court of Virginia v. Friedman* cited in *Tolchin* involved somewhat different issue – there, the plaintiff sought to be admitted to practice law in Virginia on motion, without taking a bar examination. 487 U.S. 59 (1988). In its discussion of the *Friedman* decision in its February 8, 2010 Memorandum-Decision and Order, this Court stated:

> The Supreme Court concluded that "[t]he office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but is fully adequate to protect whatever interest the State might have in the full-time practice requirement." Id. at 70. This language suggests an office requirement is constitutional when in service of law practice requirements applicable to nonresident attorneys who had not taken the state bar exam. It does not, however, necessitate the same conclusion where the affected class is all nonresident attorneys, including those who have shown commitment and familiarity with state law by passing the state bar and complying with all other state requirements.

12/15/10 Schoenefeld Decl. Ex. B (02/08/10 Mem.-Dec. & Order at 9).

---

fide office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter 'a United States jurisdiction')." N.J. Ct. R 1:21-1(a).

Here, the plaintiff was not admitted on motion—instead, she took and passed the New York State bar examination and has been complying with all other requirements since then. 01/18/11 Schoenefeld Decl. ¶ 2; 12/15/10 Schoenefeld Decl. Ex. A, Amend. Compl. ¶ 19.

II. The Defendants' Argument That Plaintiff's Challenge of Section 470 under the Privileges and Immunities Clause Must Fail.

The defendants' argument that plaintiff's claim cannot survive does not satisfy the rational basis test must fail for several reasons. First, as stated above and in the plaintiff's papers in support of her motion for summary judgment, § 470 has no basis whatsoever. Second, while rational basis is frequently the level of review; it does not usually apply in situations where a fundamental right is implicated. Practice of law is a fundamental right – as the Supreme Court stated, "a State must afford residents and non-residents equal treatment" with respect to fundamental rights, such as pursuit of a livelihood – which includes an attorney's right to practice law in a state where he or she is licensed. *See Piper*, 470 U.S. at 279-81 (1985) (internal citations omitted); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. at 386-87 (1978).

V. CONCLUSION

For the reasons stated above, plaintiff respectfully submits that the Court should deny the defendants' motion for summary judgment.

Dated: January 18, 2011

Respectfully submitted,

By: /s/ Ekaterina Schoenefeld___

Ekaterina Schoenefeld
Bar Roll No. 515685

32 Chambers Street, Suite 2
Princeton, New Jersey 08542
Tel.: (609) 688-1776
Fax: (609) 228-4099
eschoenefeld@schoenefeldlaw.com