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

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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 United States Constitution prohibiting discrimination by states against non-residents.

Since § 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 which has long been held unconstitutional—and 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, plaintiff moved for summary judgment.

At the same time, he defendants filed their own motion for summary judgment and then papers in opposition to plaintiff's motion, in which they basically assert that § 470 is constitutional because it facilitates the "service of paper" and makes available the remedy of attachment. Neither of these are "substantial reasons" that can satisfy strict scrutiny under the Privileges and Immunities Clause.

SUPPLEMENTAL STATEMENT OF FACTS

In response to the defendants' opposition to her motion for summary judgment, plaintiff supplements her motion papers with the Reply Declaration of Ekaterina Schoenefeld.[1/] In

[1/] Throughout this brief, "12/15/10 Schoenefeld Decl." and "01/24/11 Schoenefeld Decl." will refer to plaintiff's Declaration in support of plaintiff's motion for summary judgment and plaintiff's Declaration in reply to defendants' opposition to the same, respectively; and, "01/18/11 Schoenefeld Decl." will refer to plaintiff's Declaration in opposition to defendants' motion for summary judgment.

addition, plaintiff objects to defendants' characterization of her challenge to the statute as a facial challenge only. 01/24/11 Schoenefeld Decl. ¶ 5, Ex. A. While plaintiff's main argument is that § 470 is unconstitutional on its face, her alternative argument is that it is unconstitutional as applied to her and other attorneys who are similarly situated. 01/24/11 Schoenefeld Decl. ¶ 5, Ex. A.

LEGAL ARGUMENT

I. The Defendants' Argument That § 470 Passes Muster Under the Privileges and Immunities Clause Must Fail As They Have Shown No Substantial Reason for the Continuing Discriminatory Treatment of Non-Resident Attorneys

In response to plaintiff's motion for summary judgment, defendants attempt to argue an irreconcilable position. On the one hand, they state in their opposition brief that "§ 470 does not target any suspect class or fundamental right" and that "§ 470 will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." 01/18/11 Def. Br. at 4-5 (internal citations omitted). Or, in other words, if there is "any reasonable conceivable" purpose, regardless of whether that basis was actually considered by the legislature." 01/18/11 Def. Br. at 5 (internal citations omitted). None of the cases cited in support of that proposition, however, involved the Privileges and Immunities Clause of Article IV, Section 2 of the Unites States Constitution. 01/18/11 Def. Br. at 4-6. Yet, in their brief in support of their own motion for summary judgment, defendants properly referred to those cases that are relevant to the issues in this case. 12/15/10 Def. Br. at 4-5 (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Barnard v. Thornstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988)).

Contrary to defendants' assertion, the Supreme Court has held that the practice of law is a "fundamental right." *Piper*, 470 U.S. at 281. In so holding, the Supreme Court stated that:

> In *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), Justice Bushrod Washington, sitting as Circuit Justice, stated that the "fundamental rights" protected by the Clause included:
>
> "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal. . . ." *Id.*, at 552.
>
> Thus in this initial interpretation of the Clause, "professional pursuits," such as the practice of law, were said to be protected.
>
> The "natural rights" theory that underlay Corfield was discarded long ago. *Hague v. CIO*, 307 U.S. 496, 511 (1939) (opinion of Roberts, J.); see *Paul v. Virginia*, 8 Wall. 168 (1869). Nevertheless, we have noted that those privileges on Justice Washington's list would still be protected by the Clause. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 387 (1978).

Id. at 281, n.10.

Concluding that the right to practice law is protected by the Privileges and Immunities Clause, the Supreme Court in *Piper* then invalidated the state's residency requirement as a prerequisite to admission to practice law in that state as violative of the Privileges and Immunities Clause, reasoning 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 (emphases added); *see* 12/15/10 Def. Br. at 5.

Thus, for § 470 to survive, the defendants have the burden 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.

In other words, the defendants' claim that plaintiff has the burden to negate every conceivable basis—regardless of whether it may have been the reason for enacting the statute in the first place—is plainly incorrect. *See* 02/08/10 Mem.-Dec. & Order at 10 (declining to dismiss plaintiff's claim under the Privileges and Immunities Clause because "[t]he state has offered no substantial reason for § 470's differential treatment of resident and nonresident attorneys nor any substantial relationship between that differential treatment and State objectives [and] because case law does not necessitate dismissal of Plaintiff's claims as a matter of law") (12/15/10 Schoenefeld Decl. Ex. B).

The defendants failed to meet this test. They offer no reason or purpose—let alone one that is "substantial"—that would justify the continued existence and enforcement of § 470. Likewise, 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—defendants assert the following reasons for § 470's continued 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. 01/18/11 Def. Br. at 1-2, 4, 6. 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 cursorily

addressed prior constitutional challenges of § 470. 01/18/11 Def. Br. at 1-2, 4, 6. However, as the Magistrate Judge correctly noted during the August 17, 2010 discovery conference, in deciding whether § 470 is constitutional, the Court should look to the legislative history and may not substitute their opinions 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 – although she notedthat defendants intended to rely on the legislative history of the statute and the cases interpreting it – 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).

In other words, it is the State's objectives, as found in the legislative history, that is 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); *see* Roberts-Ryba Affirm. Ex. A, p. 41 (identifying "section 470 of the Judiciary Law [as] the narrow exception to New York's residency as a condition of practice rule"); 12/15/10 Schoenefeld Decl. Ex. F (same);

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[2]/ The Magistrate Judge relied on the defendants' counsel's representations in denying most of plaintiff's discovery requests when defendants represented that they would rely exclusively on legislative history. 12/15/10 Schoenefeld Decl. Exs. C-D. To the extent that defendants have now reneged on those representations and seek to rely on "every conceivable [rational and legitimate] basis" (see 01/18/11 Def. Br. at 5), 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); 01/24/11 Schoenefeld Decl. ¶¶ 3-4.

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 [sic] as 'service of paper'" by emphasizing the fact that the prior version of the statute contained language about service of papers on non-resident attorneys and quoted the Board of Statutory Consolidation's comments made in 1908 when that statute was divided in two parts. 01/18/11 Def. Br. at 1-2. Simply put, the legislative history does not support defendants' argument.

The defendants begin their argument by stating, "[i]n reviewing the law from the year 1862 along with the Full Explanatory Notes";[3]/ yet, the excerpt from the Code of Civil Procedure provided by defendants contains no notes whatsoever—let alone those that are "full" or "explanatory"—for the section in question, i.e., § 60. 01/18/11 Def. Br. at 1-2 (citing Roberts-Ryba Affirm. Ex. A, pp. 6, 10).

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, thereby attempting to create the impression that this commentary somehow directly disclosed the Legislature's intention in enacting § 60, § 470's predecessor, namely, to

[3]/ It should be noted that the earliest case law that is available mentioning § 470 is the 1950 decision – written almost 90 years after the statute's predecessor was enacted. *See Carpenter v. Chapman*, 97 N.Y.S.2d 311 (App. Div. 3d Dep't 1950); 01/24/11 Schoenefeld Decl. Ex. B.

effectuate the "service of paper." 01/18/11 Def. Br. at 2 (citing Roberts-Ryba Affirm. Ex. A, pp. 8-10).

However, the language quoted by 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.

Thus, as discussed *supra*, defendants' claim that "the purpose for § 470 is service of process" and that "[a]s indicated by the legislative history[], service of process was always a factor in the statute" lacks merit. Every state has a court rule or a statutory provision addressing service of process. In New York, the language addressing service of process and office requirement happened to be within the same section of the then Code of Civil Procedure until a separate statute, the Judiciary Law, was created in 1909—at which point § 470 as well as other, non-procedural provisions were removed to the newly created Judiciary Law. See 12/15/10 Roberts-Ryba Affirm. Ex. A, pp. 7-10.

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 state court decisions that attempted to rationalize § 470 when it was challenged in the past, finding the

statute to be constitutional – however, on grounds which are *not* to be found in the legislative history. As stated above, in deciding whether § 470 is constitutional, courts must look at the legislative history only and may not substitute their opinions for what the state Legislature may have thought when it enacted the statute or come up with new, after-the-fact justifications for the statute's enactment. As evidenced by § 470's legislative history, none of the reasons stated by defendants were envisioned as 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, they should be rejected.

However, assuming *arguendo* that the case law cited by the defendants does state reasons for § 470's continued enforcement—such as the attorneys' availability to service of papers, to contacts by clients, courts and other attorneys, the availability of the remedy of attachment, and the courts' ability to oversee and/or discipline non-resident attorneys.[4]/ *Austria v. Shaw*, 542 N.Y.S.2d 505, 506 (Sup. Ct. 1989); *Estate of Fordan*, 158 N.Y.S.2d at 230-31. These reasons make no sense and are by no means substantial, especially in light of the current state of technology and legal developments.

(i.) Service of Process

The argument based on a non-resident attorney's supposed unavailability for service of process lacks any merit today. 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.

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

In defending § 470 based on the "service of paper" argument, defendants essentially engage in circular reasoning when they state 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." 01/18/11 Def. Br. at 2; 12/15/10 Def. Br. at 8. In making this statement, defendants do not even attempt to explain why effective service cannot be made on a non-resident attorney who is located outside of New York State. In fact, there are none.

There are two distinct scenarios, in which a non-resident attorney would need to be served with process. One is where a non-resident attorney would have to be served in an action or proceeding brought against the attorney. Section 520.13 of New York Rules for Admission of Attorneys and Counselors at Law has already addressed this issue as follows:

> § 520.13 Designation of agent for service of process
>
> (a) Every applicant for admission to practice who does not reside and is not employed full-time in the State shall be required, as a condition of admission, to execute and file with the Appellate Division of the department in which the applicant is being admitted, a duly acknowledged instrument in writing setting forth the applicant's residence or mailing address and designating the clerk of such Appellate Division as the applicant's agent upon whom process may be served, with like effect as if served personally upon the applicant, in any action or proceeding thereafter brought against the applicant and arising out of or based upon any legal services rendered or offered to be rendered by the applicant within the State.

22 N.Y.C.R.R. § 520.13(a).

Here, having resided and been employed outside the State of New York at the time of her admission to practice there, plaintiff appointed the Clerk of the Appellate Division, Third Judicial Department as her agent upon whom process may be served with like effect as if served

upon her personally, as required by 22 N.Y.C.R R. § 520.13(a).[5]/ 01/24/11 Schoenefeld Decl. ¶ 9. In other words, situations requiring service of process can easily be—and have already been—addressed.

Another situation involving "service of paper" would be in the ordinary course of practicing law – i.e., an attorney's acceptance of process on behalf of his or her clients. Defendants fail to attempt to even explain why in a case being litigated in state court in New York, all papers would need to be served from or to a New York address. For instance, lawsuits filed in New Jersey state courts frequently involve counsel located in other states who typically litigate these cases without any issues. In New York, like in most—if not all—states, effective service is achieved by means such as mail or personal service. Such service can be easily and promptly made upon non-resident counsel whose offices are located outside of New York by using the U.S. Postal Service, FedEx, UPS, and numerous other commercial mailing and messenger services. See 01/24/11 Schoenefeld Decl. ¶ 11.

Furthermore, modern technology – e.g., telephone service, mobile phones, faxing and e-faxing, emailing, video- and teleconferencing, other Internet-based means of communication and efficient modes of transportation – which is available and widely used today provides much faster and more efficient ways of communicating with clients, courts, opposing counsel and other interested parties. See 01/24/11 Schoenefeld Decl. ¶ 10. Finally, just as in the federal courts, state courts are moving towards electronic filing regimes, a trend that will doubtless continue into the future.

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[5]/ In instances where an attorney is admitted to practice while being a resident of, or being employed in the State of New York, and who subsequently becomes a non-resident attorney subject to § 470—if such a situation is not already addressed elsewhere by New York law—less restrictive means would be a requirement that such an attorney execute an Addendum similar to the one contained in 22 N.Y.C.R R. § 520.13(a).

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 truer in 2011 than in 1862 when the predecessor statutes to § 470 were first enacted, because modern means of transportation and communication exist to facilitate nonresident attorneys' availability to clients, the courts, other attorneys, and for 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 supposed reason to justify § 470's continued enforcement. 01/18/11 Def. Br. at 2. First, no support for that assertion is to be found in the legislative history. Roberts-Ryba Affirm. Ex. A; 12/15/10 Schoenefeld Decl. Ex. F.

Second, this argument does not make sense. As 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." 01/18/11 Def. Br. at 7 (quoting *Austria v. Shaw*, 143 N.Y.S. 2d 505 (Sup. 1989)). Since a non-resident attorney who is being sued will most likely have all or most of his or her assets located in the home state, an "of counsel" relationship or the non-exclusive possession of a desk would not be much help in terms of the availability of the attachment remedy. Furthermore, most attorneys carry professional liability insurance which is the means by which an injured client obtains security for the recovery of his or her damages, thereby serving a more effective purpose than the remedy of attachment.

(iv.) "Discriminatory Benefit" Argument

In their brief, defendants also appear to rely on an opinion of the Civil Court of the City of New York, Special Term, Bronx County, 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. v. Ashmont Tissue, Inc., 441 N.Y.S.2d 960, 963 (Civ. Ct. 1981); 01/18/11 Def. Br. at 4.

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 out of their basements. *See Lichtenstein v. Emerson*, 656 N.Y.S.2d 180, 182 (Sup. Ct. 1997) (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 which does business in New York. On the other hand, under § 470 nonresidents are required to rent offices in New York (no matter how few in number their New York clients may be) in addition to maintaining offices and residences in their home states.

To summarize, none of the reasons offered by defendants are supported by the legislative history, nor are they, in any sense, substantial and they should, therefore, be rejected.

C. The case law from other jurisdictions is inapposite and does not support the defendants' arguments.

In addition to New York state case law, defendants rely heavily on three cases from other jurisdictions—the first two involving *pro hac vice* admissions—which are neither relevant, nor binding and, thus, are not pertinent to this case. *See Piper*, 470 U.S. at 283 (finding its decision that a residency requirement for admission to the bar was unconstitutional to be consistent with *Leis v. Flynt*, 439 U.S. 438 (1979) by reasoning that it was distinguishable from admissions *pro hac vice*). The third case, *Tolchin v. Supreme Court of the State of New Jersey*, involved an in-state office rule that was equally applicable to residents and non-residents alike. 111 F.3d 1099 (3d Cir. 1997).

In *Parnell v. Supreme Court of Appeals of West Virginia*, an out-of-state attorney sought to act as a *pro hac vice* sponsor without maintaining an in-state office, which was required by the

state. 926 F. Supp. 570 (N.D.W. Va. 1996). The plaintiff-attorney resided and practiced law in Georgia and was also licensed in West Virginia. *Id*. Unlike New York, West Virginia did not require that the plaintiff maintain an office in the state in order to practice there; in fact, he did practice in the state and had a pending case in the state court, for which he sought to sponsor the *pro hac vice* admission of three other members of his firm from Georgia. *Id.* at 572-73. The plaintiff challenged the in-state rule for *pro hac vice* sponsors as violating the Privileges and Immunities Clause, which the court rejected, finding 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 did not require that a sponsoring attorney be a West Virginia resident, thereby making the rule equally applicable to resident and non-resident attorneys alike. More specifically, Rule 8.0 states in 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 (emphasis added).

In other words, the West Virginia rule does not even speak in terms of resident versus non-resident – it applies equally to all attorneys.

Moreover, unlike the plaintiff in this case, the non-resident plaintiff in *Parnell* was able to practice law in West Virginia without having an office there – what he sought, rather, was the right to sponsor his other colleagues for *pro hac vice* admission – which is a discretionary function of the court. *See Piper*, 470 U.S. at 283. Here—just like in *Piper*—the plaintiff's right to practice law, or "to pursue the livelihood," is fundamentally different and, therefore, distinguishable.

The California case similarly involved a *pro hac vice* admission issue. In *Paciulan v. George*, the plaintiffs were California residents who were admitted to practice law in other states, but not in California. 38 F. Supp. 2d 1128 (N.D. Cal. 1990). They sought to be appear *pro hac vice* in California state courts. *Id.* at 1130-31. The California state court rule on *pro hac vice* admissions prohibited attorneys licensed in other states from appearing *pro hac vice* if they were either California residents or were regularly employed there. *Id.* at 1131. The plaintiffs 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 plaintiff-*residents* failed to state a claim upon which relief could be granted under the Privileges and Immunities Clause. *Id.* at 1136. Again, this was a *pro hac vice* case in which the challenged rule actually discriminated *against residents* and is, thus, distinguishable.

Finally, in *Tolchin*, a New York resident attorney who was also licensed in New Jersey, challenged the then-existing bona fide in-state office requirement on the grounds that it violated the Privileges and Immunities Clause. 111 F.3d 1099. At that time, Rule 1:21-1(a) of the Rules Governing the Courts of the State of New Jersey provided 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 applied equally to non-resident and resident New Jersey attorneys.[6]/ Accordingly, the Third Circuit 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 affects residents and nonresidents, the Third Circuit rejected the plaintiff's challenge under the Privileges and Immunities Clause:

> 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.

Since the then-existing rule applied equally to *all* New Jersey licensed attorneys, the plaintiff had no claim under the Privileges and Immunities Clause and the *Tolchin* court's reasoning with respect to the attorneys' availability is not persuasive, being more akin to *dictum*, and is otherwise distinguishable. First, unlike Rule 1:21-1(a) as it existed when *Tolchin* was

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

decided, § 470 applies to non-resident attorneys only. Second, as discussed above, the "availability to courts, counsel, and clients" argument does not constitute a "substantial" ground for discriminating against non-residents in light of the technological advancements since 1862 and, even, 1997, when *Tolchin* was decided. Third, the *Friedman* decision cited in *Tolchin* involved a 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.

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).

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

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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).

II. The Defendants' Argument That an "Of Counsel" Relationship Is "Less Restrictive Means" Fails and, If Anything, Supports the Plaintiff's Position That Section 470 Serves as an Artificial Barrier Prohibited by the Privileges and Immunities Clause.[7]/

The defendants argue that § 470's imposition of an in-state office requirement on non-resident attorneys only does not violate the Privileges and Immunities Clause because "the statute allows the plaintiff to practice law in New York State as long as she complies with the office requirement." 01/18/11 Def. Br. at 6-7. This is, once again, an example of circular reasoning, in which the defendants engage without providing any basis in law.

Furthermore, their argument that "an attorney need only establish a relationship 'of counsel' to satisfy the office requirement" is also not supported by existing case law, as evidenced by the inconsistent state court decisions cited. See 12/15/10 Pl. Br. at 14-19. For instance, in *In re Tang*, the Supreme Court stated that "to practice here an attorney must be resident here or a resident of an adjoining State *who commutes to his office here.*" 333 N.Y.S.2d at 966-67 (emphasis added). Clearly, a requirement that a non-resident attorney – who may well have the majority of his or her clients' matters located in the home state – must establish an "of counsel" relationship with a New York law firm and commute there to satisfy § 470 not only fails to meet the "less restrictive means" standard but is also onerous.

Assuming *arguendo* that an "of counsel" relationship could satisfy § 470's office requirement, by requiring non-resident attorneys to associate as "of counsel" in order to practice law in New York state courts, defendants ignore the fact that not all non-resident attorneys who are subject to § 470 might be able to find a law firm willing to offer the attorney such a

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[7]/ The defendants' argument that the plaintiff's claim under the Privileges and Immunities Clause is similar to her previously dismissed claim under the Commerce Clause has no merit because those two provisions overlap in terms of protected rights while implicating different standards of review and, thus, may result in different outcomes. *See Hicklin v. Orbeck*, 437 U.S. 518, 531-33 (1978); *Baldwin*, 436 U.S. at 383, 388; *Piper*, 470 U.S. at 280.

relationship. In other words, both § 470's office requirement and the suggested "of counsel" relationship place non-resident attorneys at a competitive disadvantage relative to New York resident attorneys which is prohibited by the Privileges and Immunities Clause. *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 96 (2d Cir. 2003).

For instance, in *Blumenthal*, the Second Circuit upheld the district court's decision that New York's "Nonresident Lobster Law, *on its face and as applied*, violate[d] the Privileges and Immunities Clause of Article IV of the United States Constitution." *Id.* at 93 (emphasis added). In so holding, the Second Circuit reasoned that:

> The Nonresident Lobster Law discriminates against nonresident commercial lobstermen (such as Appellee Volovar) by preventing them from pursuing their livelihoods in the Restricted Area. Quite simply, a nonresident commercial lobsterman may not obtain a permit to take and land lobsters in the Restricted Area while any and all resident commercial lobstermen may obtain such permits. The right to pursue a lawful calling has long been recognized as a fundamental right…
> . . .
> The Supreme Court has invalidated State statutes that treat residents and nonresidents disparately in connection with the pursuit of commerce, a trade, or business venture where that disparate treatment is not supported by a sufficient justification.
> . . .
> While the Nonresident Lobster Law does not impose an absolute bar to commercial lobstering by nonresidents in New York's waters, a wholesale bar has never been required in order to implicate the Privileges and Immunities Clause.

Id. at 94-95 (internal citations and quotations omitted).

Reviewing *de novo* the district court's decision holding that New York's Nonresident Lobster Law failed to meet the test of the Privileges and Immunities Clause and thus was unconstitutional, the Second Circuit reasoned that "[t]he facts are undisputed that Appellee Volovar sought to engage in a commercial venture in pursuit of her livelihood and we find no evidence that the manner in which she or other nonresident lobstermen sought to do so differed from that of resident lobstermen." *Id.* at 93, 96. The court further noted that "[a] statutory scheme that places nonresidents at a competitive disadvantage for purposes of a common calling

is sufficient to implicate Privileges and Immunities scrutiny." *Id.* at 96. Applying that scrutiny, the Second Circuit then held that the "Nonresident Lobster Law here patently discriminates against nonresidents" because it adversely affected, without substantial justification, "a nonresident's ability to participate in this arena on equal footing with residents." *Id.*

The *Blumenthal* case is rather similar to this case. Like in *Blumenthal*, § 470 "does not impose an absolute bar" on the plaintiff's practicing law in New York. However, it does place the plaintiff and other nonresident attorneys at a significant competitive disadvantage, precluding her from practicing law "on equal footing with residents" without any, let alone a substantial, justification.

Interestingly, in its discussion of the case, the Second Circuit noted the state officials' concerns about enforcing the Nonresident Lobster Law, stating:

> In or about early 1997, Appellants began examining more closely the enforceability of the Nonresident Lobster Law. In a May 9, 1997 memo to Appellant Brewer, Appellant Otterstedt communicated concerns about the constitutionality of permitting restrictions in the Nonresident Lobster Law. Otterstedt's concerns stemmed from an Attorney General's determination that a durational residence requirement in a similar statute, N.Y. Envtl. Conserv. Law § 13-0311(1) ("Nonresident Shellfish Law"), restricting shellfish permits to New York residents was unconstitutional. n6 In light of a challenge to the Nonresident Shellfish Law, Appellant Otterstedt expressed concern, but continued uncertainty, about possible ramifications of enforcing the Nonresident Lobster Law.

Blumenthal, 346 F.3d at 90.

In other words, the state officials in that case clearly recognized that the Nonresident Lobster Law might well be unenforceable and, as such, challenged as being unconstitutional when the Nonresident Shellfish Law was challenged and stipulated to be unconstitutional. *Id.* (The discriminatory provisions of the Nonresident Shellfish Law were similar, but not identical, to those of the Nonresident Lobster Law. *Id.*)

Remarkably, the state officials in this case apparently experienced strikingly similar concerns following the New York Court of Appeals' decision in *Gordon* and the U.S. Supreme Court's decision in *Piper* and made an attempt to redraft § 470. See Roberts-Ryba Affirm. Ex. A, pp. 39, 43; 12/15/10 Schoenefeld Decl. Ex. F (same). As the document drafted in support of that amendment stated:

> 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.

Roberts-Ryba Affirm. Ex. A, p. 41 (emphasis added); 12/15/10 Schoenefeld Decl. Ex. F (same).

However, the attempt to redraft § 470 to avoid constitutional challenge while retaining the same restrictions imposed on nonresidents failed—the proposed version merely rephrased the statute using more modern language but was not less offensive—and the § 470's amendment as proposed in 1985 never became the law. See Roberts-Ryba Affirm. Ex. A, pp. 39, 43; 12/15/10 Schoenefeld Decl. Ex. F (same). To this day, § 470 reflects the language as it was in 1909 when it was removed from the Code of Civil Procedure to the newly-created Judiciary Law.

Attempting to justify the statute in 1985, the State offered essentially the same rationales as the defendants argue in this case and which, the plaintiff respectfully submits, were not the purpose for § 470's enactment and, in any event, do not constitute substantial reasons for

disparate treatment of non-resident attorneys that would withstand constitutional challenge under the Privileges and Immunities Clause of Article IV, § 2 of the Unites States Constitution.[8]/

CONCLUSION

For the reasons stated above, plaintiff respectfully submits that the Court should grant the plaintiff's motion for summary judgment and enter a judgment declaring Judiciary Law § 470 unconstitutional as violative of the Privileges and Immunities Clause and permanently enjoin the defendants from enforcing it against the plaintiff and other similarly situated attorneys.

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Respectfully submitted,

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[8]/ That document also used the argument that the statute increases the likelihood that the nonresident attorney would be more likely to engage in *pro bono* or volunteer activities – which is not part of the legislative history since it was not the statute's purpose in 1862 (or 1909) and the 1985 amendment never became effective. Also, New York does not have a mandatory *pro bono* requirement and, in any event, the *pro bono* argument in support of the residency requirement has already been rejected by the Supreme Court. *Piper*, 570 U.S. at 287.