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 SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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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. That prerequisite has long been held unconstitutional. *See Barnard v. Thornstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *In re Gordon*, 397 48 N.Y.2d 266 (Ct. App. 1979). Although these decisions dealt with the issue whether a state's residency requirement was a valid prerequisite for admission to practice, plaintiff submits that this case is not materially different, since the ability to actually practice law is implicit in the admission to practice in a particular state.

Since there is no dispute that Section 470 of the Judiciary Law is enforced, even though it serves no constitutional purpose, plaintiff moves for summary judgment.

II. PROCEDURAL HISTORY

On April 1, 2008, plaintiff filed this lawsuit in the Southern District of New York asserting that § 470 of the Judiciary Law is unconstitutional under the Privileges and Immunities Clause of the U.S. Constitution and seeking prospective declaratory and injunctive relief against the State of New York. Schoenefeld Decl. Ex. A. 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.

On September 29, 2008, defendants filed a Rule 12(b)(3) motion to dismiss plaintiff's complaint for improper venue or, in the alternative, to transfer the case to the Northern District of New York under 28 U.S.C. § 1404(a). Plaintiff opposed the motion, and on April 16, 2009, the district judge ordered that the case be transferred to the Northern District of New York, finding that the convenience of the multiple defendants warranted the transfer. On April 29, 2009, this case was transferred to the Northern District of New York.

On June 16, 2009, the defendants moved to dismiss the complaint in its entirety on the grounds the complaint failed to state a claim upon which relief could be granted and because a ripe controversy did not exist. Plaintiff opposed the motion to dismiss with respect to the individual defendants only. On February 8, 2010, this Court issued its Memorandum-Decision and Order, dismissing some of the defendants and two counts in the complaint. Schoenefeld Decl. Ex. B, 02/08/10 Mem.-Dec. & Order. Noting that "[t]he state has offered no substantial reason for § 470's differential treatment of resident and non-resident attorneys nor any substantial relationship between that differential treatment and State objectives," the Court allowed the plaintiff to proceed against the remaining defendants under the Privileges and Immunities Clause. Schoenefeld Decl. Ex. B, 02/08/10 Mem.-Dec. & Order. at 10.

On July 24, 2010, plaintiff served defendants' counsel with three sets of discovery requests—interrogatories, document requests, and requests for admissions—directed to all, but one, of the defendants. Schoenefeld Decl. ¶ 2. On August 3, 2010, plaintiff also issued two third-party subpoenas to produce documents and to take oral depositions pursuant to Rule

30(b)(6) to the State of New York and the Committee on Professional Standards, wherein she sought to elicit deposition testimony on the following subjects:

1. Past and current proceedings taken to enforce Section 470 of the Judiciary Law.

2. The State's substantial objectives or interests that are protected or advanced by Section 470 of the Judiciary Law.

3. The manner in which the State's substantial objectives or interests are protected or advanced by Section 470 of the Judiciary Law.

Schoenefeld Decl. ¶ 3.

On August 10, 2010, the defendants filed a letter-motion, objecting to the plaintiff's discovery requests as irrelevant and unduly burdensome, which the plaintiff opposed. On August 17, 2010, a telephone conference was held with the Magistrate Judge to resolve these discovery disputes, during which the defendants' counsel made a number of representations to the Court—including acknowledgements that the statute continues to be enforced and that the defendants intend to rely solely on the legislative history and applicable case law. Schoenefeld Decl. Ex. C. Consequently, the Court limited the discovery requests that were directed to the defendants and quashed the third-party subpoenas. Schoenefeld Decl. Ex. D, 08/17/10 Disc. Order at 2. But, in permitting certain discovery, the Court sought "to ensure that the Plaintiff is not blind-sided by the presentation of either facts or relevant opinions that are outside the scope of the legislative history," ordering that:

> … the Defendants shall provide the Plaintiff with the entire legislative history and any other documents, whether an advisory opinion from the Attorney General's office, memorandum, rule, regulation, or the like that may reveal the rational basis or substantial objectives of Section 470. Further, the Defendants shall provide "unpublished court opinions" – those opinions not found on Westlaw, Lexis, or LoisLaw – that they intend to rely upon in support of the constitutionality of the statute.

Schoenefeld Decl. Ex. D, 08/17/10 Disc. Order at 3.

The Court also ordered the defendants to answer a number of requests for admissions which were drafted by the Court. Schoenefeld Decl. Ex. D, 08/17/10 Disc. Order at 4-5.

On October 8, 2010, plaintiff received the defendants' discovery responses—including the defendants' responses to the requests for admissions and the document discovery ordered by the Court. Schoenefeld Decl. Exs. E-H.

Plaintiff considered defendants' responses to the requests for admissions to be deficient and filed a letter-motion to that effect, to which the defendants' counsel responded. Dkt. Nos. 53, 55. On November 2, 2010, a telephone conference was held to resolve the dispute, as a result of which a discovery order was issued directing certain defendant(s) to serve amended responses. Schoenefeld Decl. Ex. I. On November 22, 2010, the plaintiff received a supplemental production of documents and amended responses to the requests for admissions provided by the Chairman of the Committee on Professional Standards, evidencing the continued enforcement of § 470. Schoenefeld Decl. Exs. J-K.

Currently, the date set for trial is April 4, 2011.

III. STATEMENT OF FACTS

A. Plaintiff and Judiciary Law § 470

Plaintiff is a 2005 law school graduate who is licensed to practice law in New Jersey, New York, and California and is admitted to practice before this Court. Schoenefeld Decl. Ex. A, Amend. Compl. ¶¶ 5-6. Plaintiff's residence and law office are located in Princeton, New Jersey, which is approximately one hour by car or public transportation from New York City. Schoenefeld Decl. Ex. A, Amend. Compl. ¶ 6. 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. Schoenefeld Decl. Ex. A, Amend. Compl. ¶

16. At that seminar, plaintiff learned for the first time that, according to § 470 of the New York Judiciary Law which applies only to non-resident New York attorneys, she may not practice law in the courts of the State of New York unless she maintains an office there. Schoenefeld Decl. Ex. A, Amend. Compl. ¶ 17. 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 § 470 prohibits non-resident attorneys from practicing law in the State unless they maintain an office there. Schoenefeld Decl. Ex. A, Amend. Compl. ¶ 19.

Having taken the constitutional oath of office upon her admission to practice that requires her to uphold the U.S. Constitution and the laws of the State of New York, plaintiff chose not to violate § 470 and instead, chose to challenge its constitutionality in federal court forum on the grounds § 470 impairs her right to practice law, the statute effectively circumvents several U.S. Supreme Court decisions which hold that a state may not constitutionally impose a residency requirement as a prerequisite for applying for admission to practice law in that state. Schoenefeld Decl. Ex. A, Amend. Compl. ¶ 19.

Respectful of her oath 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. Schoenefeld Decl. ¶ 5. Whenever plaintiff has received inquiries about potential representation in the courts of New York, she has declined the representation because it would have violated § 470 of the Judiciary Law. Schoenefeld Decl. ¶ 6.

As evidenced by the existing case law, the documents produced by the defendants in discovery, as well as defendants' acknowledgment, there is no question that Judiciary Law § 470 continues to be routinely enforced by the defendants and their counterparts in other judicial

departments of the New York state courts. Schoenefeld Decl. Exs. C, G, H, J, K. As a result, the plaintiff cannot ethically advertise or solicit clients in New York solely because she does not have an office there. Accordingly, the plaintiff filed this action challenging Judiciary Law § 470 on constitutional grounds.

B. Defendants' Justification for Judiciary Law § 470

When plaintiff attempted to obtain through discovery the reasons and objectives behind the continued enforcement of § 470, the defendants conceded that they will rely only on the legislative history of § 470 and the case law interpreting it. Schoenefeld Decl. Ex. C, Tr. 11:15-22; 28:9-14; 46:1-6. For instance, during the telephone conference held to resolve the discovery dispute at the defendants' counsel's request, the following colloquy occurred:

> THE COURT: … Mrs. Roberts-Ryba, let me ask you this, in terms of you defending the constitutionality of the statute, it's showing that there is a substantial objective and interest in enforcing the statute what do you intend on using as an underlined [sic] factual basis to support that?
>
> MRS. ROBERTS-RYBA: The legislative history is what I plan on using. I believe that the only relevant information that we have – the legislative [sic] that past [sic] the statute is long gone – 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.

Schoenefeld Decl. Ex. C, Tr. 23:3-22; 26:14-27:3; 43:1-44:1.

Based on this representation, the Court allowed limited discovery "to ensure that the Plaintiff is not blind-sided by the presentation of either facts or relevant opinions that are outside the scope of the legislative history," ordering that:

> … the Defendants shall provide the Plaintiff with the entire legislative history and any other documents, whether an advisory opinion from the Attorney General's office, memorandum, rule, regulation, or the like that may reveal the rational basis or substantial objectives of Section 470. Further, the Defendants shall provide "unpublished court opinions" – those opinions not found on Westlaw, Lexis, or LoisLaw – that they intend to rely upon in support of the constitutionality of the statute.

Schoenefeld Decl. Ex. D, 08/17/10 Disc. Order at 3.

In compliance with the August 17, 2010 Order, the defendants provided the legislative history upon which they intend to rely in defending § 470, together with their responses to the requests for admissions that were drafted by the Court. Schoenefeld Decl. Exs. F-H, J, K.[1]/ As the defendants' counsel stated, "[i]f 470 is unconstitutional then it should be found to be unconstitutional based on legislative history." Schoenefeld Decl. Ex. C, Tr. 11:15-22.

C. Legislative History and Purpose of § 470

Chapter 43, which was first enacted on March 22, 1862, provided a limited exception to the then-general rule that only New York residents could be admitted to practice law in that state.[2]/ Schoenefeld Decl. Ex. F (Chapter 43). Basically, it allowed attorneys who were already licensed in New York to continue to practice in the State's courts, provided their only office for the practice of law was in New York, even if they moved to an adjoining state and 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

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[1]/ Other defendants produced essentially the same responses to plaintiff's requests for documents as the Chairman of the Committee on Professional Standards (See Schoenefeld Decl. Ex. F).

[2]/ 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.

Schoenefeld Decl. Ex. F (Chapter 43).

moved to another state automatically lost the right to practice law in New York. 1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917) (Schoenefeld Decl. Ex. L.)

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.[3]/ Schoenefeld Decl. Ex. F (L. 1866, ch. 175, § 1 (6 Edm., 706)).

In 1877, Chapter 175 was reenacted as § 60 of the new Code of Civil Procedure.[4]/

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[3]/ 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.

Schoenefeld Decl. Ex. F (L. 1866, ch. 175, § 1 (6 Edm., 706)).

[4]/ 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 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.

Schoenefeld Decl. Ex. F (Code Civ. P., § 60).

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. Schoenefeld Decl. Ex. F (Code Civ. P., § 60).

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

> **§ 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.

IV. STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). All reasonable evidentiary inferences should be viewed in favor of the non-moving party. *Willner v. Town of N. Hempstead*, 977 F. Supp. 182, 195 (E.D.N.Y. 1997). To successfully oppose a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Merely "offering purely conclusory allegations" or offering evidence in opposition that is merely speculative is insufficient to defeat a summary judgment motion. *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116-1117 (2d Cir. 1988).

V. LEGAL ARGUMENT

Plaintiff Is Entitled to Summary Judgment Declaring § 470 Unconstitutional as Violative of the Privileges and Immunities Clause Because the Defendants Cannot Show Any 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." As the Supreme Court noted in *Supreme Court of New Hampshire v. Piper*, "[the] Clause was intended to create a national economic union," requiring that "a State must afford residents and non-residents equal treatment" with respect to fundamental rights, such as pursuit of a livelihood. 470 U.S. 274, 279-81 (1985) (internal citations omitted); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 386-87 (1978).

Accordingly, the Supreme Court in *Piper* invalidated a state's residency requirement as a prerequisite to admission to practice law in that state, 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.

In other words, for § 470 to survive, the defendants must 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 cannot meet this test. As the legislative history provided by the defendants and the case law interpreting § 470 indicate, there is no reason or purpose—let alone

one that is "substantial"—to justify the continued existence and enforcement of § 470. Similarly, the defendants cannot 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. In short, § 470 is unconstitutional because it violates the Privileges and Immunities Clause.

A. Because § 470 Serves No Substantial Purpose or Reason, There Can Be No Relationship Between the Ongoing Discrimination Against Nonresident Attorneys and the State's Objectives That Would Justify the Continued Enforcement of § 470.

The Supreme Court has held that the Privileges and Immunities Clause:

> … does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. A 'substantial reason for the discrimination' would not exist, … unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.

Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978) (alteration in original) (internal citations omitted).

As defendants' counsel acknowledged, "[i]f 470 is unconstitutional then it should be found to be unconstitutional based on legislative history." Schoenefeld Decl. Ex. C, Tr. 11:15-22. The legislative history shows, however, 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). Therefore, there is no reason—let alone a "substantial" one—to justify the continued existence and enforcement of § 470.

Daniel C. Brennan, in his well-researched article *Repeal Judiciary Law § 470*—which provides an excellent overview and analysis of the background, history, and case law interpreting § 470 and its predecessor statutes, Chapter 43 and Chapter 175—similarly found 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." 62 N.Y. St. B.J. (Jan. 1990). Schoenefeld Decl. Ex. M. As Brennan reasoned, § 470's 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. *Id.* (citing *Richardson v. Brooklyn City R. R. Co.*, 22 How. Pr. 368).[5]/

Indeed, prior to the enactment of Chapter 43, New York residency was not only a prerequisite, but was also a *continuing qualification* to practicing law in New York, meaning that if a New York attorney moved to another state, he lost the right to practice law in New York immediately. *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)).

The New York Attorney General similarly stated in his opinion—citing the *Richardson* case—that Chapter 43 was enacted to carve out an exception to the continuing residency requirement for practicing law 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.

1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917) (Schoenefeld Decl. Ex. L).

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[5]/ Plaintiff is unable to provide the Court with a copy of that decision since it is not available on Lexis and she was unable to obtain it through the discovery process.

However, the underlying residency requirement—to which § 470 was enacted to serve as an exception—did not survive. In 1979—six years prior to the Supreme Court's decision in *Piper*—the Court of Appeals of New York held that residency, as a prerequisite to admission to the New York bar, was unconstitutional and violated the Privileges and Immunities Clause of Article IV of the U.S. Constitution. *In re Gordon*, 48 N.Y.2d 266. In striking down the residency requirement, the Court of Appeals reasoned that:

> 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 of Appeals then noted that the applicant had been 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 of Appeals found that:

> 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).

Considering the attempts made to identify reasons to support the residency requirement, the Court of Appeals of New York rejected the justifications, holding that they "serve only

administrative convenience and thus are not closely tailored to serve a legitimate State interest." *Id.* at 274.

Accordingly, it follows that, once the residency requirement for admission to the bar was held to be unconstitutional, any provision related to that requirement would also become a nullity as an obsolete relic serving no valid purpose since the residency requirement underlying it was itself unconstitutional.

B. In Enforcing § 470, the State Court Decisions Reveal No Valid Purpose or Objective, Thereby Resulting in Inconsistent Interpretations of the Statute

To reiterate, the plaintiff maintains that there is no substantial objective or purpose in continuing the enforcement of Judiciary Law § 470. As evidenced by the legislative history, the purpose in enacting § 470 was simply to provide an exception to the residency prerequisite for admission to practice in New York. Since the residency requirement had long been held unconstitutional, the exception has no valid purpose and should also not survive. *See In re Gordon*, 48 N.Y.2d at 274-75. A number of state court decisions attempted to rationalize § 470 with reasons such as counsel's availability to clients, courts and other counsel, the courts' ability to supervise and/or discipline non-resident attorneys, and the need for service of process. None of these reasons were the purpose for which the statute was enacted and they should, therefore, be rejected.

Only a handful of New York state cases directly confronted the issue of § 470's constitutionality under the Privileges and Immunities Clause. 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. *Austria v. Shaw*, 542 N.Y.S.2d 505, 506 (Sup. Ct. 1989); *Estate of Fordan*, 158 N.Y.S.2d at 230-31.

However, as evidenced by § 470's legislative history, none of these were envisioned as reasons for enacting § 470 and, thus, the courts essentially superimposed their own after-the-fact, unsupported justifications in order to uphold the statute. In any event, in view of the current state of technology and subsequent legal developments, such justifications can no longer be considered valid.

For instance, in *White River Paper Co. v. Ashmont Tissue, Inc.*, the Civil Court of the City of New York, Special Term, denied plaintiff's application for an *ex parte* order on the grounds that its attorney did not maintain an office in New York. 441 N.Y.S.2d 960, 963 (Civ. Ct. 1981). Noting the public policy favoring settlements, the court stated that "[m]eetings between disputants may be facilitated[,] telephonic communication may be made more easily and less expensively [and] papers needing service on short notice before a hearing . . . may be readily served." *Id.* Thus, the court concluded that "the local office requirement for nonresidents does not result in disparate treatment and the fact that litigation can be more effectively resolved without a trial if there is a local presence justifies such a mandate." *Id.*

Likewise, in *Lichtenstein v. Emerson*, the court dismissed the plaintiff's complaint without prejudice because the plaintiff's attorney was not a New York resident and did not maintain an office in the State. 656 N.Y.S.2d 180, 182 (Sup. Ct. 1997). Relying on the rationale expressed in *White River Paper Co.*[6]/ and noting that "none of the reported New York cases dealing with section 470 have discussed constitutionality, and the statute has been enforced where it was found that no bona fide office was maintained," the court granted the defendant's motion to dismiss the complaint because a desk in the basement of a restaurant did not satisfy § 470's office requirement because no one was authorized to accept service there. *Id.* at 183. On

[6]/ Both cases were decided by the same judge.

appeal, the Appellate Division, First Department upheld the dismissal of the complaint and the constitutionality of § 470, reasoning that "a State has an interest in ensuring that a lawyer practicing within its boundaries is amenable to legal service and to contact by his or her client, as well as opposing [sic] and other interested parties." *Lichtenstein v. Emerson*, 674 N.Y.S.2d 298, 299 (App. Div. 1st Dep't 1998).

Finally, in a recent unpublished opinion, the court "briefly address[ed] the Respondent's constitutional challenge to the restrictions imposed by Judiciary Law § 470, [finding that] this Court is constrained to follow the First Department's decision in *Lichtenstein v. Emerson.*" *Matter of Garrasi*, 907 N.Y.S.2d 821, 825-26 (Sur. Ct. Sept. 8, 2010) (unpublished opinion) (internal citations omitted).

However, 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 truer in 2010—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 and other attorneys, and the service of process, thereby invalidating such arguments for upholding § 470.

With respect to an attorney's supposed unavailability for service of process and the courts' supposed inability to supervise and discipline nonresident attorneys, such arguments lack merit today. In 1979, the Court of Appeals of New York considered and rejected these arguments, stating that less restrictive means are available to satisfy the State's objectives. *In re Gordon*, 48 N.Y.2d at 274-75 (noting that legislation could be enacted "requiring nonresident attorneys to appoint an agent for the service of process within the State" and 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").

Rejecting the second argument, 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. 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* Schoenefeld Decl. Ex. K.

Other New York state court decisions simply applied § 470 to the facts in issue, without much discussion of the law's purpose or rationale, resulting, at times, in inconsistent results.[7]/ For instance, in *Rosenberg v. Johns-Manville Sales Corp.*, the court held that an out-of-state law firm lacks the capacity to practice law in the State unless it has an office in New York that is managed by a New York licensed partner. 416 N.Y.S.2d 708, 710-11 (Sup. Ct. 1979) (citing

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[7]/ This trend continues to date. Some courts dismissed nonresident attorneys' filings on the grounds of their non-compliance with § 470. *Kinder Morgan Energy Partners, LP v. Ace Am. Insur. Co.*, 859 N.Y.S.2d 135 (App. Div. 1st Dep't May 29, 2008) (unpublished opinion) (dismissing complaint without prejudice because of a nonresident attorney's failure to maintain a local office); *Neal v. Energy Transp. Group, Inc.*, 744 N.Y.S.2d 672 (App. Div. 1st Dep't 2002) (same). However, other courts held otherwise. *Elm Mgmt. Corp. v. Sprung*, 823 N.Y.S.2d 187, 188 (App. Div. 2d Dep't 2006) (reasoning that "the noncompliance by the plaintiff's counsel with the Judiciary Law did not provide a basis for the defendant to have the complaint against him dismissed"); *Webb v. Papaspiridakos*, 2009 N.Y. Misc. LEXIS 1435, at *5 (Sup. Ct. June 9, 2009) (unpublished opinion) (noting that "section 470 has been treated so strictly that in the Appellate Division, First Department dismissal of the action, although without prejudice, is required" but the "Appellate Division, Second Department, . . . is not so strict about this requirement").

Opinion Nos. 175, 495 of NYSBA's Comm. on Prof. Ethics). And, "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." Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. St. B.J. (Jan. 1990) (citing *Estate of Neufeld*,[8]/ N.Y. Sur. Ct., Bronx County, N.Y.L.J., p. 15 (Dec. 18, 1986)).

Furthermore, in *In re Tang*, the 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*" because otherwise "he is neither [] susceptible to discipline nor available for service." 333 N.Y.S.2d at 966-67 (emphasis added).

However, in *Austria v. Shaw*, the court found that a nonresident attorney complied with § 470 because he had a desk and an of counsel relationship with a New York firm. 542 N.Y.S.2d at 506; *Miller v. Corbett*, 676 N.Y.S.2d 770, 772-73 (City Ct. 1998); *see Tatko v. McCarthy*, 699 N.Y.S.2d 509, 511 (App. Div. 3d Dep't 1999) (finding that an of counsel relationship with a New York attorney was sufficient). In *In re Estate of Scarsella*, however, the court found no violation of § 470 by a nonresident attorney, 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.[9]/ This testimony shows that he satisfies the requirement of Judiciary Law § 470.

600 N.Y.S.2d 256, 258 (App. Div. 2d Dep't 1993).

Similarly, in *Keenan v. Mitsubishi Estate*, the court found that a reciprocal satellite office sharing arrangement satisfied § 470's office requirement. 644 N.Y.S.2d 241, 241-42 (App. Div.

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[8]/ Plaintiff is unable to provide the Court with a copy of that decision since it is not available on Lexis and she was unable to obtain it through the discovery process.

1st Dep't 1996). In yet another, March 2010 decision, the court found that a non-resident attorney satisfied § 470 because his firm, which was based in Connecticut, leased space from a New York firm, had a 917 phone number routed to the Connecticut office, and authorized a New York firm's office manager to accept service. *CA Constr., Inc. v. 25 Broadway Off. Props., LLC*, 2010 N.Y. Misc. LEXIS 1591, at *3-5 (Sup. Ct. March 15, 2010) (unpublished opinion).

In terms of the courts' supposed inability to supervise and discipline nonresident attorneys, this argument is likewise without merit. In 1979, the Court of Appeals of New York considered and rejected that argument, noting that less restrictive means are available. *In re Gordon*, 48 N.Y.2d at 274-75 (noting that legislation could be enacted "requiring nonresident attorneys to appoint an agent for the service of process within the State" and 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 other words, when enforcing § 470, the state courts do not do so uniformly or for the same reasons. This appears to be due to the inability to identify the statute's legislative purpose, thereby producing inconsistent and confusing results (e.g., requiring that a New York licensed partner be in charge of the office in one case but allowing merely an of counsel relationship in another; citing the remedy of attachment as one of the grounds in one decision but finding that having a desk and a phone line with forwarded calls to be satisfactory in another).

Clearly, any person who is admitted to practice law in New may practice in the federal courts there. In other words, even plaintiff can, if she chooses, represent New York clients in

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[9]/ Interestingly, the *Scarsella* court had no concerns about issues such as confidentiality of clients' matters in attorney's using a secretary employed by a real estate company.

federal courts there, without any of the apparent concerns such as those which have been advanced in an effort to justify § 470.

In short, the defendants cannot show a valid reason to support the continued enforcement of § 470.

C. Section 470 Serves as an Artificial Trade Barrier for New York Non-Resident Attorneys That Is Impermissible Under the Privileges & Immunities Clause

As the Supreme Court in *Piper* stated, "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Piper*, 470 U.S. at 280 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)) (internal quotations omitted). For instance, in *Toomer*, the Supreme Court "held that nonresident fishermen could not be required to pay a license fee of $2,500 for each shrimp boat owned when residents were charged only $25 per boat." *Id.* at 281.

In its discussion of the [un]constitutionality of the residency requirement for admission to practice law in the State of New York in the context of the Privileges and Immunities Clause, the Court of Appeals of New York similarly noted that:

> Thus, 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.

In re Gordon. 48 N.Y.2d at 271 (internal citations omitted).

Here, § 470's office requirement precludes non-resident attorneys from practicing law "on terms of substantial equality" with resident attorneys—it essentially serves as an artificial trade barrier when it imposes on New York non-resident attorneys additional costs of maintaining an office in New York (in addition to the office they likely have in their home state)

which New York resident attorneys need not bear.[10]/ As the court in *White River Paper Co.* acknowledged:

> 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.

This argument, however, lacks merit because, if anything, it supports the notion that § 470 continues to be enforced for protectionist and/or economic reasons. 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 in their state of residence.

In other words, § 470's office requirement for nonresidents basically imposes another form of discriminatory burden on non-residents, or a trade barrier—here, the additional costs of maintaining an office—that is prohibited by the Privileges and Immunities Clause. *See In re Gordon*, 397 N.Y.2d at 272 (noting that "[o]ne who desires to engage in a multistate practice,… is effectively foreclosed from doing so" by CPLR 9406 (subd 2) that was then in effect, requiring

[10]/ Presumably, a New York resident attorney 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

a proof of a six-month residency in New York prior to admission to practice). Here, if each state in which plaintiff is licensed to practice law required her to maintain an office there, the burden would be at least onerous, if not prohibitive. To summarize, section 470 does not serve a constitutionally valid purpose or objective such as would justify its continued enforcement. It fails to withstand challenge under the Privileges and Immunities Clause and should be held unconstitutional.

VI. 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 others who are similarly situated.

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Respectfully submitted,

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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).