11-4283-cv

United States Court of Appeals
for the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff - Appellee,

v.

STATE OF NEW YORK, ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, MICHAEL J. NOVACK, IN HIS OFFICIAL CAPACITY AS CLERK OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT AND ITS MEMBERS, JOHN STEVENS, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Dated: April 17, 2012

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PRELIMINARY STATEMENT

Plaintiff filed this action for declaratory and injunctive relief asserting that, despite being a licensed New York attorney, she is unable to practice in that State because Section 470 of the Judiciary Law ("Section 470") prohibits her, as a nonresident attorney who does not maintain an office in this State, 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 ("Privileges and Immunities Clause").

Section 470 was enacted in 1862 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 (1979). Although these cases dealt with the issue of whether a residency was a valid prerequisite for admission to practice, Plaintiff successfully argued in the court below that the office requirement at issue here was not materially different, constituted impermissible discrimination against nonresident attorneys, and thus was unconstitutional.

Since Defendants failed to show that Section 470 serves any substantial state interest and it continues to be enforced, the district court order denying

Defendants' Motion and granting Plaintiff's motion for summary judgment should be affirmed.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that the in-state office requirement imposed by Section 470 only on nonresident New York attorneys infringes upon their right to practice law in New York in violation of the Privileges and Immunities Clause?

2. Did the district court correctly find that Defendants failed to establish either that Section 470 advanced a substantial state interest, or that there is a substantial relationship between the statute and that interest?

COUNTERSTATEMENT OF THE CASE

On April 1, 2008, Plaintiff filed this lawsuit in the Southern District of New York asserting that Section 470 is unconstitutional under the Privileges and Immunities Clause and seeking declaratory and injunctive relief against the State of New York. 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. JA 37-42 (Am. Compl.).

On September 29, 2008, Defendants filed a Rule 12(b)(3) motion to dismiss the amended 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). JA 3 (Dkt. 7). Plaintiff opposed the motion, and on April 16, 2009, the district court ordered that the case be transferred to the Northern District of New York, finding that the convenience of the multiple defendants warranted the transfer. JA 43-51 (04/16/09 Mem.-Dec. & Order). On April 29, 2009, the case was transferred to the Northern District of New York. JA 3 (Dkt. 1).

On June 16, 2009, Defendants moved to dismiss the amended complaint in its entirety, arguing that it failed to state a claim upon which relief could be granted and that no ripe controversy existed. JA 51-53. Plaintiff opposed the motion to dismiss with respect to the individual defendants only. JA 55-68. On February 8, 2010, the district court issued its Memorandum-Decision and Order, dismissing several defendants and two counts of the complaint.[1]/ JA 69-81 (02/08/10 Mem.-Dec. & Order). Noting that "[t]he state has offered no substantial reason for Section 470's differential treatment of resident and non-resident attorneys nor any substantial relationship between that differential treatment and State objectives,"

the district court allowed Plaintiff to proceed against the remaining Defendants under the Privileges and Immunities Clause. JA 78 (02/08/10 Mem.-Dec. & Order. at 10).

On February 18, 2010, Defendants filed their answer, asserting several defenses and demanding a jury trial. JA 82-85 (Answer).

Subsequently, Plaintiff served Defendants with her discovery requests as well as 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, in which 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.

JA 141-142 (12-15-10 Schoenefeld Decl. ¶¶ 2-3).

Defendants filed a letter-motion, objecting to Plaintiff's discovery requests as irrelevant and unduly burdensome—which Plaintiff opposed. JA 7 (Dkt. 42). During a telephone hearing held before the Magistrate Judge regarding the

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[1]/ Defendants do not appeal the February 8, 2010 Memorandum-Decision and Order.

discovery disputes, Defendants on the record acknowledged that the statute continues to be enforced and represented that they intend to rely solely on the legislative history and applicable case law. JA 157 (Hr'g Tr. 11:9-12:1, 46:1-6); JA 257, 261, 268-269 (Defs. Resp. to Req. Admis. Nos. 1, 3-7). Consequently, the district court limited most of Plaintiff's discovery requests and quashed the third-party subpoenas. JA 237-242 (08-17-10 Disc. Order). 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.

JA 239 (08/17/10 Disc. Order at 3).

In addition, the Magistrate Judge ordered that Defendants answer a number of requests for admissions as drafted by the district court. JA 240-241 (08/17/10 Disc. Order at 4-5). On October 8, 2010, Plaintiff received Defendants' responses to her discovery requests. JA 244-262. Finding certain Defendants' discovery responses inadequate, the court ordered that some Defendants supplement their

responses, which they did supplement. JA 264-266 (11/02/10 Disc. Order); JA 269-290.

On December 15, 2010, Defendants and Plaintiff filed their respective motions for summary judgment. JA 87-134; JA 135-326. On January 18, 2011, Defendants and Plaintiff submitted their opposition papers. JA 327-329; JA 330-337. On January 24, 2011, the reply papers were filed. JA 11; JA 338-351. On September 7, 2011, the district court issued its Memorandum-Decision and Order, denying Defendants' motion for summary judgment, granting Plaintiff's motion for summary judgment in its entirety, and awarding judgment to Plaintiff. JA 14-36. On October 5, 2011, Defendants filed a notice of appeal. JA 12.

COUNTERSTATEMENT OF FACTS

I. Plaintiff and Section 470

Plaintiff is a 2005 law school graduate who is licensed to practice law in New Jersey, New York and California. JA 38-39 (Am. 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. JA 39 (Am. 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. JA 40 (Am. Compl. ¶ 16). At that seminar, Plaintiff learned for the first time that, according to Section 470

which applies only to nonresident New York attorneys, she may not practice law in the courts of the State of New York unless she maintains an office there. JA 40 (Am. Compl. ¶¶ 17-18). Thus, despite being a licensed New York attorney who is in compliance with all requirements save the requirement for a New York office, Plaintiff is unable to practice law in the state courts of New York because Section 470 prohibits nonresident attorneys from practicing law in the State unless they maintain an office there. JA 40 (Am. Compl. ¶ 19).

Respectful of her oath taken upon her admission to practice and her status as an officer of the court, Plaintiff has never appeared in or advertised herself as practicing law in the state courts of New York. JA 142 (12-15-10 Schoenefeld Decl. ¶ 5). Whenever Plaintiff received inquiries about potential representation in the courts of New York, she declined the representation because it would have violated Section 470. JA 142 (12-15-10 Schoenefeld Decl. ¶¶ 4, 6).

As evidenced by the existing case law, the documents produced by Defendants in discovery, as well as Defendants' acknowledgment, there is no question that Section 470 continues to be routinely enforced by Defendants and their counterparts in other judicial departments. JA 157 (Hr'g Tr. 11:9-12:1); JA 257, 261-262, 268-269 (Defs. Resp. to Req. Admis. Nos. 1, 3, 7); JA 272-290 (Comm. on Prof. Stds. findings of professional misconduct based on Section 470). Since Plaintiff cannot ethically advertise or solicit clients in New York solely

because she does not have an office there, she filed this action challenging Section 470 on constitutional grounds.

II. Basis for Defendants' Justification of Section 470

When Plaintiff sought to obtain through discovery the State's objectives behind continuing enforcement of Section 470, Defendants conceded that they would only be relying on the legislative history of the statute and the case law interpreting it. JA 157, 159-160, 171, 174-175, 191-192, 194 (Hr'g Tr. 9:6-14, 11:9-12:1, 23:3-22, 26:14-27:3; 43:5-44:1, 46:1-6); JA 257, 261-262, 268-269 (Defs. Resp. to Req. Admis. Nos. 1, 3-7). During the telephone conference held, at Defendants request, to resolve the discovery dispute 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.

JA 171 (Hr'g Tr. 23:3-22).

Defendants' counsel then stated, "[i]f 470 is unconstitutional then it should be found to be unconstitutional based on legislative history." JA 159 (Hr'g Tr. 11:15-22).

Based on these representations, 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." JA 239 (08/17/10 Disc. Order at 3). In response, Defendants provided the legislative history upon which they intended to rely in defending Section 470 and their responses to requests for admissions that were drafted by the court. JA 248-262, 268-290.

III. Legislative History and Purpose of Section 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]/ JA 92-93 (Chapter 43). Basically, it allowed

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[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

attorneys who were already licensed in New York to continue to practice in the state 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 moved to another state automatically lost the right to practice law in New York. JA 292-294 (1917 N.Y. Op. Att'y Gen. 338, p. 363-64 (Dec. 10, 1917)).

In 1866, Chapter 43 was re-enacted as Chapter 175 with some grammatical and a few substantive changes, which basically eliminated the requirement that the attorney's *only* office had to be in New York and extended the exemption from the residency requirement—if the office requirement was met—to attorneys who were admitted after its enactment.[3]/ JA 94-95 (L. 1866, ch. 175, § 1 (6 Edm., 706)).

> 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.

JA 93 (Chapter 43).

[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

In 1877, Chapter 175 was reenacted as Section 60 of the new Code of Civil Procedure.[4]/ JA 96-97 (Code Civ. P., § 60).

In 1908, the Board of Statutory Consolidation made a decision to divide Section 60 of the Code of Civil Procedure and removed the first part of the section to the newly created Judiciary Law and what is now known as Section 470. JA 98-99 (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

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> 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.

JA 95 (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.

JA 97 (Code Civ. P., § 60).

> 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; JA 102-103, 105-106.

SUMMARY OF ARGUMENT

The practice of law is a fundamental right protected by the Privileges and Immunities Clause. By requiring that nonresident attorneys maintain an office in New York, but not imposing any office requirement whatsoever on resident attorneys, Section 470 discriminates against nonresidents by placing them at a competitive disadvantage and preventing them from practicing law on substantially equal terms with residents.

According to the plain English meaning of the statutory language and based on the legislative history, the term "office" means a requirement that a nonresident attorney maintain an actual physical office space to which he or she commutes or is regularly present for the purpose of practice of law in the State. By so requiring, Section 470 imposes a substantial economic burden on nonresident attorneys, essentially serving as an artificial trade barrier and preventing nonresidents from practicing law on substantially equal terms with residents.

Defendants' claim that merely having an "of counsel" relationship may satisfy the "office requirement" of Section 470 is not supported by the plain meaning of the statute and its legislative history and was correctly rejected by the

court below. Similarly, the district court correctly rejected Defendants' assertion that "service of papers" (and a few other claims asserted in the proceedings below that are not raised in this appeal) constituted a "substantial" state interest justifying the continuing enforcement of Section 470. Holding that Defendants failed to establish either that Section 470 advanced a substantial state interest, or that there is a substantial relationship between the statute and that interest, the district court correctly reasoned that such the proffered objectives could be achieved with less restrictive means not implicating Plaintiff's and other nonresident attorneys' constitutional rights.

ARGUMENT

The District Court Correctly Held That Section 470 Violates the Privileges and Immunities Clause When It Found That Defendants Failed to Establish Either That Section 470 Advanced a Substantial State Interest, Or That There Is a Substantial Relationship Between the Statute and That Interest.

As a preliminary matter, Defendants appear to misconstrue Plaintiff's case as challenging the constitutionality of Section 470 on its face only, claiming that "[i]n support of her purported 'as applied' challenge, plaintiff asserts that she has no 'office' in the State at all." Appellants' Br. at 22. This is plainly incorrect: Plaintiff's basis for the "as-applied" challenge is the fact that Section 470 is applied and enforced equally against nonresident attorneys who passed the New

York bar and the ones admitted on motion. JA 14 (09/07/11 Mem.-Dec. & Order at 1); JA 334-337 (01/24/11 Schoenefeld Decl. ¶ 5, Ex. A).

In *Supreme Court of Virginia v. Friedman*, the Supreme Court struck down the residency requirement imposed on attorneys seeking admission on motion, drawing the distinction between nonresident attorneys who were admitted on motion and those who passed a state bar exam. 487 U.S. 59, 68-70 (1988). Noting the state's interest in "assuring that the admitted attorney has a stake in his or her professional license and concomitant interest in the integrity and standards of the bar," the Supreme Court stated that a bar examination is one way of satisfying that interest. *Id.* at 68. However, with respect to the applicants seeking admission on motion, the Supreme Court noted that "the State's requirement that attorneys so admitted show their intention to maintain an office and a regular practice in the State" was a comparable alternative to a bar examination in satisfying the state's interest. *Id.* at 68-69. Finding that Virginia failed to meet its burden of showing that its discrimination against nonresidents "bears a close relation to the achievement of substantial state objectives," the Supreme Court reasoned that the state had other legislative choices to achieve these objectives "through other equally or more effective means" not implicating constitutional protections. *Id.* at 69-70. Accordingly, the Supreme Court held that Virginia's residency requirement infringed upon nonresidents' interest "in practicing law on terms of substantial

equality with those enjoyed by residents" in violation of the Privileges and Immunities Clause. *Id.* at 70.

Similarly, the court below emphasized the distinction between nonresident attorneys who were admitted on motion and those who passed a state bar exam, noting that:

> The Supreme Court concluded that the "[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.*

JA 77 (02/08/10 Mem.-Dec. & Order at 9) (emphasis added).

Denying Defendants' motion to dismiss Plaintiff's claim under the Privileges and Immunities Clause, the district court reasoned:

> Section 470 does not serve to facilitate a full-time practice requirement applicable only to attorneys admitted on motion. Nor is it a local rule adopted by a particular court. Rather, it is a state rule that applies to all nonresident attorneys, even those who have shown their commitment to service and New York law through attending CLE courses and passing the state bar exam.

JA 78 (02/08/10 Mem.-Dec. & Order at 10).

Here, Plaintiff consistently maintained throughout this litigation that her lawsuit challenged the constitutionality of Section 470 on its face and,

alternatively, as applied to her and other similarly situated attorneys. As correctly stated by the district court, in addition to complying with all other state requirements, Plaintiff took and passed New York State bar examination – unlike those nonresident attorneys who were admitted to the New York bar on motion. JA 40 (Am. Compl. ¶ 12).

With respect to the legal standard for a facial challenge of the constitutionality of a statute, one decision frequently cited is *United States v. Salerno*, in which the Supreme Court stated that "[a] facial challenge to a legislative Act is […] the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." 481 U.S. 739, 745 (1987). However, as subsequent cases attempting to interpret and apply the *Salerno* decision show, this standard—while often cited—is rarely applied, including by the very Court that has pronounced it. *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994) (arguing that "the Salerno principle is wrong [as i]t neither accurately reflects the [Supreme] Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles").

Similarly, this Court has previously noted that "[i]t is not even clear that *Salerno*'s 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context," quoting a plurality of the Supreme Court in *City of Chicago v. Morales* which stated that: "'[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself….'" *Lerman v. Bd. of Elections of N.Y.*, 232 F.3d 135, 145, n.10 (2d Cir. 2000) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55-56, n.22 (1999)) (emphasis in original).

The "as-applied" challenge has been explained by this Court as follows: "[i]nsofar as a plaintiff challenges a State's discrimination against him with regard to privileges and immunities – an 'as-applied' challenge – he need only demonstrate that his own 'nonresidency presents [no] special threat to any of the State's interests that is not shared' by residents." *Bach v. Pataki*, 408 F.3d 75, 89 (2d Cir. 2005) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 289 (1985) (White, J., concurring) (alteration in original)). In other words, Plaintiff only had to show that her "nonresidency" does not pose any special threat to New York State's interests that is not shared by New York resident attorneys—which she did. Accordingly, the court below correctly found that no such "special threat" exists and, in any event, whatever State's interests might be, they could

adequately be protected by other equally or even more effective means that do not violate the Privileges and Immunities Clause.

As explained below, the district court correctly held that, under the applicable standard, Section 470 is unconstitutional and violates the Privileges and Immunities Clause as infringing upon Plaintiff's fundamental right – i.e., pursuit of a livelihood or practice of law – on substantially equal terms with New York resident attorneys.

I. The Word "Office" Means Nothing Less Than an Actual, Physical Space Where Nonresident Attorney Is Required to Be Physically Present on a Regular Basis in Order to Be Able to Practice Law in the State.

There is no need for the Court to certify a question to the New York Court of Appeals as to the meaning of the word "office." As this Court has stated on numerous occasions, "[i]ssues of state law are not to be routinely certified to the highest court[] of New York … simply because a certification procedure is available. … Certification is to be used in those cases where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of New York common law for which no New York authority can be found." *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (internal quotations and citations omitted) (alterations in original). As this Court has long held, when interpreting a statute, the courts:

> … look first to the plain language of a statute and interpret it by its ordinary, common meaning. If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.

Elliott Assoc., L.P. v. Banco De La Nacion, 194 F.3d 363, 371 (2d Cir. 1999) (internal quotations and citations omitted).

In other words, unless a statute provides a definition for the term at issue, a court interpreting the statute would first look at an ordinary, plain English meaning of that term (i.e., what a reasonable person would have understood it to mean) and, if the term is ambiguous, then at the legislative history. Here, the plain meaning of the word "office" is:

> a place where a particular kind of business is transacted or a service is supplied: as
>
> *a*: a place in which the functions of a public officer are performed
> *b*: the directing headquarters of an enterprise or organization
> *c*: the place in which a professional person conducts business

MERRIAM-WEBSTER DICTIONARY, online edition, *available at http://www.merriam-webster.com/dictionary/office*.

Moreover, the legislative history of Section 470 and its predecessors—as enacted in 1862 and 1909—confirms the conclusion that the word "office" cannot be read as anything other than an actual office space where a nonresident attorney is required to spend some time on a regular basis practicing law.

In short, the term "office" means nothing less but a physical place where a person—here, an attorney—conducts the business of practicing law.

Not surprisingly, virtually all New York state court decisions that addressed in any detail Section 470's office requirement have consistently interpreted it as requiring that a nonresident attorney maintain an actual, physical space in New York where he or she is expected to be present on a regular basis for the purpose of practicing law in the State.

In the court below, Defendants attempted to justify Section 470's enforcement relying on state courts' decisions that stated reasons such as counsel's availability to clients, courts and other counsel, courts' ability to supervise and/or discipline nonresident attorneys, and service of process—none of which, except for service of process—is raised in this appeal. None of these reasons are found in the legislative history, they were rejected by the court below and are not now raised on appeal. JA 27, 30-32. Since Defendants abandoned these arguments, they will be addressed in Appellee's brief only with respect to the State's courts' interpretation of Section 470's "office" requirement.[5]/

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[5]/ Most state courts apply Section 470 without much discussion, often producing inconsistent and even prejudicial results by dismissing nonresident attorneys' filings or vacating judgments for Section 470 violations. *Hachette Filipacchi Media US, Inc. v. Smile Photo, Corp.*, 2011 N.Y. Misc. LEXIS 5120 (Sup. Ct. Oct. 13, 2011) (unpublished opinion) (vacating default judgment as a nullity where the statute of limitations had passed); *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 Section 470); *Neal v. Energy Transp. Group, Inc.*, 744 N.Y.S.2d 672 (App. Div. 1st Dep't 2002) (same). However, some courts held differently. *Elm Mgmt. Corp. v. Sprung*, 823 N.Y.S.2d 187, 188 (App. Div. 2d Dep't 2006) (reasoning that

As the case law demonstrates, "office" means a real, actual office space to which a nonresident attorney commutes and spends a substantial part of his or her time working, and not merely "an address," as Defendants now assert for the first time on this appeal. Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990) (citing *Estate of Neufeld*, N.Y. Sur. Ct., Bronx County, N.Y.L.J., p. 15 (Dec. 18, 1986)) (a converted bedroom on a farm qualified as an "office" where counsel spent working between 75 and 100 days a year);[6]/ *CA Constr., Inc. v. 25 Broadway Off. Props., LLC*, 2010 N.Y. Misc. LEXIS 1591, at *3-4 (Sup. Ct. March 15, 2010) (unpublished opinion) (finding that a nonresident attorney satisfied Section 470 since his firm leased space from a New York firm where he and other New York-licensed attorneys from his firm "actually used the White Plains space for legal matters"); JA 289 (Oct. 11, 2007 letter of admonition for

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"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"); *Matter of Garrasi*, 907 N.Y.S.2d 821 (Sur. Ct. Sept. 8, 2010) (unpublished opinion) (noting that fee forfeitures were disfavored, the court held that plaintiff was responsible for legal fees incurred over four years of litigation because he suffered no prejudice as a result of his attorney's noncompliance with Section 470); *but see* JA 276-277 (May 4, 1998 disciplinary letter directing nonresident attorney to refund earned fees for failure to maintain an office that resulted in a dismissal of a pleading).

[6]/ This decision is not available on Lexis and was not provided in discovery.

failure to comply with Section 470, stating failure to "lease office space or meet with clients in New York").

For instance, in *In re Tang*, Appellate Division, First Department, interpreted Section 470 as requiring that "to practice here an attorney must be resident here or a resident of an adjoining State *who commutes to his office here*." 333 N.Y.S.2d at 966 (emphasis added); *In re Larsen*, 587 N.Y.S.2d 39, 43 (App. Div. 2d Dep't 1992) (confirming charges of professional misconduct where an attorney "did not have any office space in New York"). Similarly, in *Marte v. Graber*, the court found that a nonresident attorney failed to comply with Section 470, even though the attorney had a New York address that was "registered" with the Office of Courts Administration ("OCA") and had his mail forwarded to him. 2007 N.Y. Misc. LEXIS 8094, at *4-6 (N.Y.C. Civ. Ct. Oct. 5, 2007). Noting that "OCA does not inspect offices but, rather, takes on faith whatever addresses are given to it," the court reasoned that the attorney was not ever present at that address and that "the statute requires an 'office,' not an 'address.'" *Id.* at 5; *see In re Haas*, 654 N.Y.S.2d 479, (App. Div. 3d Dep't 1997) (finding that listing New York address of a nonresident attorney's assistant did not satisfy Section 470).

In *Austria v. Shaw*, the court similarly interpreted "office" as an actual physical space where a nonresident attorney works, finding that the attorney complied with the statute because "Marshall pa[id] a small monthly rent to

Feinstein, in exchange for desk space in Feinstein's office, use of Feinstein's secretarial staff to take telephone messages, listing of Marshall on the door of the Feinstein's office and the listing on Feinstein's stationery as 'of counsel.'" 542 N.Y.S.2d 505, 506 (Sup. Ct. 1989). And, in *In re Estate of Scarsella*, the court found no violation of Section 470, reasoning that:

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

600 N.Y.S.2d 256, 258 (App. Div. 2d Dep't 1993).[7]/

Furthermore, in *Rosenberg v. Johns-Manville Sales Corp.*, the court held that an out-of-state law firm lacked the capacity to practice law in New York unless it has an office in the State that is managed by a New York licensed partner. 416 N.Y.S.2d 708, 710-11 (Sup. Ct. 1979) (citing Opinion Nos. 175, 495 of NYSBA's Comm. on Prof. Ethics). Also, "the residence of one partner in New York may not relieve the firm of the office requirement if that partner is not the firm attorney involved in the pending litigation in New York." Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990) (citing *Estate of Neufeld*, N.Y. Sur. Ct., Bronx County, N.Y.L.J., p. 15 (Dec. 18, 1986)).

In many instances, however, in which the courts held that a nonresident attorney complied with Section 470 (either because of a New York address identified on a pleading or due to an "of counsel" relationship), they did so by merely stating that the attorney complied—i.e., without providing any details or reasons for such findings and without discussing the issue of whether such nonresident attorney actually ever spent any time working in New York, etc. *See Tatko v. McCarthy*, 699 N.Y.S.2d 509, 511 (App. Div. 3d Dep't 1999) (of counsel relationship); *Keenan v. Mitsubishi Estate*, 644 N.Y.S.2d 241 (App. Div. 1st Dep't 1996) (reciprocal satellite office sharing arrangement); *Laces Roller Corp. v. Ambassador Insur. Co.*, 520 N.Y.S.2d 1015 (App. Div. 2d Dep't 1987) (pleadings showing New York address).

In short, the statute's plain language is unambiguous as to what the term "office" means and plain English meaning of the "office" as well as the legislative history clearly indicate that Section 470 requires that a nonresident attorney maintain an actual physical office space and be there on a regular basis for the purpose of practicing law.

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

II. Practice of Law Is a Fundamental Right Protected by the Privileges and Immunities Clause.

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 *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. at 279-81 (internal citations omitted); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 386-87 (1978). The Supreme Court then held that practice of law is a "fundamental right," reasoning 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).

Piper, 470 U.S. at 281, n.10.

Concluding that the right to practice law is protected by the Privileges and Immunities Clause, the Supreme Court 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, stating 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.

Id. at 284.

In other words, for Section 470 to survive, Defendants had to show that: (1) a substantial reason exists for discriminating against New York-licensed nonresident 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. As the Supreme Court further stated:

> 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).

Here, the district court correctly found that Defendants failed to demonstrate any substantial reason for continuous discrimination against nonresident attorneys – namely, that nonresident attorneys constituted "a peculiar source of the evil" not posed by resident attorneys. As the legislative history and case law interpreting Section 470 indicate, there is simply no such reason or interest—let alone one that is "substantial"—to justify Section 470's continued existence and enforcement. Similarly, Defendants failed to show that the office requirement imposed on nonresident attorneys bears a close or substantial relationship to the State's [undisclosed] substantial reason for differential treatment.

III. Defendants Failed to Establish Either That Section 470 Advanced a Substantial State Interest, Or That There Is a Substantial Relationship Between the Statute and That Interest.

As the court below correctly reasoned, in deciding whether Section 470 is constitutional, the court should look to the legislative history and may not substitute its opinions for what the state Legislature may have thought when it enacted the statute. JA 166 (Hr'g Tr. 18:2-23:3). Accordingly, noting 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*," Defendants' counsel stated that she intended to rely on the legislative history of the statute and the case law interpreting it. JA 171 (Hr'g Tr. 23:18-22) (emphasis added). As she correctly

stated, "[i]f 470 is unconstitutional then *it should be found to be unconstitutional based on legislative history*." JA 159 (Hr'g Tr. 11:15-22) (emphasis added).

The legislative history shows, however, that Section 470 was an exception that was carved out of the original residency requirement that was held unconstitutional over thirty years ago. *In re Gordon*, 48 N.Y.2d at 273-74. Defendants—as well as other state officials—have always identified Section 470 as "the narrow exception to New York's residency as a condition of practice rule" and viewed it as "discriminatory interference" upon "an individual's ability to pursue his or her occupation." JA 132. In any event, whatever substantial state interest might exist, it would have to be found in the legislative history which is, thus, dispositive on this issue.

A. The legislative history shows that Section 470 was enacted as an exception to then-existing residency requirement that has long been held unconstitutional.

Daniel C. Brennan, in his article *Repeal Judiciary Law § 470*—which provides an excellent overview and analysis of the background, history, and case law interpreting Section 470 and its predecessors—concluded that "[t]he primary purpose of chapter 43 was to carve out an exception to the general rule that an attorney could not practice in the New York State courts unless he was a resident of New York State." JA 296-302 (Daniel C. Brennan, *Repeal Judiciary Law § 470*, 62 N.Y. ST. B.J. (Jan. 1990)). As Brennan reasoned, Section 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).[8]/

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 at 966 (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) and *Estate of Fordan*, 158 N.Y.S.2d 228 (Sup. Ct. 1956)).

As the New York Attorney General stated in his 1917 opinion—citing the *Richardson* case—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

[8]/ This decision is not available on Lexis and was not provided in discovery.

> legislative permission such attorneys would have lost their right to practice in New York.

JA 294 (1917 N.Y. Op. Att'y Gen. 338, 364 (Dec. 10, 1917)).

However, the underlying residency requirement—to which Section 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. *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 State's attempts made to identify justifications supporting the residency requirement, the Court of Appeals of New York rejected the proffered reasons, holding that they "serve only administrative convenience and thus are not closely tailored to serve a legitimate State interest." *Id.* at 274.

Following the rationale and reasoning of the highest court of New York in *Gordon*, it follows that if residency as a prerequisite to admission to the bar violates the Privileges and Immunities Clause, then the exception to that residency requirement is also unconstitutional. As the New York Attorney General—the state official who has the power to criminally enforce the laws prohibiting the unlawful practice of law, including violations of Section 470 (*see* N.Y. Jud. Law §§ 476-a, 476-b, 476-c)—explained:

> All qualifications for the office of attorney at law in this State are continuing qualifications, and *if a person after admission to practice lose one of the essential qualifications his right to practice is gone*.

JA 294 (1917 N.Y. Op. Att'y Gen. 338, 364 (Dec. 10, 1917)) (emphasis added).

In other words, if a nonresident attorney who complies with the statute but later decides to close his New York office, "his right to practice is gone"—solely

because of his nonresidency. Once the nonresident attorney's right to practice law is gone due to his losing "one of the essential qualifications for the office of attorney at law"—unlike a resident—he can get it back only by either moving to the State or renting an office.

To summarize, once the residency requirement for admission to the bar was held to be unconstitutional, any provision related to that requirement should have also become a nullity as an obsolete relic serving no valid purpose since the residency requirement underlying it was itself unconstitutional. *See Unites States v. Raines*, 362 U.S. 17, 23 (1960) (suggesting that "the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications").

B. Defendants' claim that the State's interest in "service of papers" justifies continuing discriminatory treatment of nonresident attorneys fails because it is neither a "substantial interest," nor is there a "substantial relationship" between that interest and Section 470.

In support of their claim that "service of paper" constitutes a "substantial state interest" justifying the continuing discriminatory treatment of nonresident attorneys, Defendants rely upon the language of the statute as it was enacted in 1862 that described the manner in which a nonresident attorney could be served. Appellants' Br. at 27 (citing Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139); JA 93. However, Defendants' reliance is misplaced: a mere existence of a

statutory provision addressing service of papers does not automatically render it a substantial state interest – every state has a court rule or a statutory provision governing service of papers. In New York, the language addressing service of papers 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 Section 470 as well as other, non-procedural provisions were removed to the newly created Judiciary Law.

Relying on that language, Defendants assert that "the State has a legitimate interest in requiring all attorneys practicing in its courts to provide an address within the State at which to receive services of legal papers [..] enabl[ing] its courts to oversee and adjudicate disputes arising over such service." Appellants Br. at 20. What Defendants fail to recognize, however, is that a "legitimate" interest is not the same as "substantial" – which is the required showing to withstand a constitutional challenge under the Privileges and Immunities Clause. Second, Defendants cannot explain what exactly is the "peculiar source of the evil" or what is wrong with serving nonresident attorneys with legal papers at their out-of-state addresses. In other words, Defendants' arguments that Section 470 requires that nonresident attorneys maintain an office within the State so that they could receive service, including personal service, of papers on behalf of their clients are simply unconvincing. Appellants' Br. at 23, 25, 26-28.

Defendants claim that Section 470's requirement "to maintain an address for service of legal papers serves a significant state interest because it enables the State's courts to adjudicate disputes arising out of service." Appellants' Br. at 27. Attempting to bolster their claim, Defendants refer to so-called "traverse hearings" in which the "[c]ourts adjudicate disputes over whether such service in fact occurred" and "non-party witnesses, such as those who performed or observed the service" might be called to testify.[9]/ Appellants' Br. at 28. What Defendants fail to mention, however, is that "traverse hearings" adjudicating disputes over service typically involve the issue of service of process (i.e., summons and complaint) which is usually served on a defendant at the commencement of the action when such defendant does not yet have an attorney or, in some other instances, service of papers that are required to be served on a party. *See, e.g.*, *Walkes v. Benoit*, 684 N.Y.S.2d 533 (App. Div. 1st Dep't) (1999); *City of New York v. Miller*, 898 N.Y.S.2d 643 (App. Div. 2d Dep't 2010).

In further support of that "interest," Defendants rely upon the power of New York courts to issue a subpoena requiring the attendance of a person "found in the

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[9]/ It is unclear what the reference to witnesses who "observed the service" is about. If it was a personal service, then the testimony of the one who "performed the service" would suffice. If it was by any other means (e.g., mail, fax, email, etc.), then the serving party would not know who the witnesses are—unless the party being served names them (thus, acknowledging the service)—in which case there would be no "traverse hearing."

state" to appear at the hearing. Appellants' Br. at 28 (citing N.Y. Jud. L. § 2-b(1)). This argument lacks merit. As already stated, service of process on a party that is a typical subject of such hearings would not implicate the office location of a yet-to-be-retained attorney. It also presumes that that a party to be served is a New York resident – which is not necessarily the case since lawsuits filed in New York state courts frequently involve out-of-state parties and, in such a case, a dispute arising out of service will likely involve calling out-of-state witness(es) anyway.[10]/

Moreover, this argument erroneously presumes that a person who performed the service can be "found in the state." But, it is not uncommon for people to live in one state and work in another. In other words, a person who performed the service in New York may actually reside in New Jersey, Pennsylvania, etc. and not be subject to the subpoena power of New York state courts.[11]/

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[10]/ For the purpose of issuing subpoenas to out-of-state non-party witnesses, a procedural device that is known as "letters rogatory" (the actual term may vary by state) exists that allows an attorney to apply for, and have issued by, the court of a state where a witness is located, a subpoena to appear at the hearing, deposition, etc. Surely Defendants are familiar with that concept since, in litigation, a need to subpoena third-party witnesses—who may or may not be residing in that state—frequently arises.

[11]/ Also, as a practical matter, if an attorney hired a person to serve process or papers, that person is likely to voluntarily appear and testify at a hearing (unless such person is no longer interested in a continuing working relationship with the attorney).

Next, Defendants do not even attempt to explain, let alone justify, why an attorney practicing in New York courts must be served *within the State* with legal papers that customarily accompany any pending litigation. Appellants Br. at 23, 26-27. In New York, in addition to personal service, an attorney may be served by mail, overnight delivery service, and even by facsimile transmission and/or electronic means (i.e., email). N.Y.C.P.L.R. 2103(b)(2),(5)-(7). While the latter two options provide the attorney being served must consent to such service, requiring that nonresident attorneys accept service by email or facsimile is a significantly less burdensome and would constitute a less restrictive means to achieve the purported "objectives" of Section 470.

Notably, as Section 470 is being applicable exclusively to nonresident attorneys, neither its language nor purported "objectives" address a situation where a New York *resident* attorney—who, as a resident, is not required to maintain any office—may actually have one out-of-state (e.g., in New Jersey or Connecticut).

Finally, the last scenario when a non-resident attorney might be served with papers is if she is a party to an action or proceeding and has to be served with process. Already in 1979, the Court of Appeals considered and rejected this argument, stating that less restrictive means are available – i.e., legislation could be enacted "requiring nonresident attorneys to appoint an agent for the service of process within the State." *In re Gordon*, 48 N.Y.2d at 274. Indeed, Section 520.13

of New York Rules for Admission of Attorneys and Counselors at Law has already addressed this issue:

> 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…

22 N.Y.C.R.R. § 520.13(a) (emphasis added).[12]/

Neither being a resident nor employed full-time in New York, Plaintiff already executed such document as part of her admission to the bar. JA 340 (01/24/11 Schoenefeld Decl. ¶ 9). In other words, situations requiring such service of process can easily be—and have already been—addressed.

As far back as 1972, Judge 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 more so in 2012 than in 1862 when the predecessor statutes to Section 470 were first enacted, because modern means of transportation, communication, and other technological advances existing today provide much

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[12]/ What is also interesting about this rule, however, is that the "employed full-time" language implicitly confirms the conclusion that Section 470 cannot be satisfied merely by having an "address within the State" or an "of counsel" relationship but requires that a nonresident attorney maintain and commute to an actual, physical office.

faster and more efficient ways of facilitating nonresident attorneys' availability to clients, the courts, other attorneys, and for service of process, thereby invalidating such arguments for upholding Section 470. JA 340 (01/24/11 Schoenefeld Decl. ¶¶ 10-11).

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

> E-filing is part of a broader effort toward creating a "digital courthouse," where the bar and public will be able not only to file papers electronically, but to quickly retrieve court documents, receive court orders, pay fines and fees, and make remote appearances that will be recorded electronically. So much of the basic business transacted in our courts can be accomplished without lawyers or litigants appearing in the courthouse. The "digital courthouse" will provide vast savings for the courts, litigants, and local governments.

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

Finally, any attorney admitted to practice before federal courts in New York may practice there without having a New York office and without any of the apparent concerns such as those which have been advanced in an effort to justify Section 470.

In other words, Defendants' argument based on "service of process" is not supported by the legislative history, is not, in any sense, "substantial," has been correctly rejected by the court below, and, therefore the district court's decision and order should be affirmed in its entirety.

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

In their attempt to support their claim that Section 470 does not discriminate against nonresident attorneys, Defendants rely upon several decisions from other Circuits that readily distinguishable. As the courts have held, practice of law is a fundamental right protected by the Privileges and Immunities Clause but admission on motion or serving as a *pro hac vice* sponsor are not. And, where there is no residency classification, the Privileges and Immunities Clause is not implicated.

For instance, in *Tolchin v. Supreme Court of New Jersey*, a New York attorney who was also licensed in New Jersey, challenged the then-existing bona fide in-state office requirement that, at that time, 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."[13]/ 111 F.3d 1099,

[13]/ New Jersey Court Rule 1:21-1(a) was amended in 2004 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

1102 (3d Cir. 1997). The Third Circuit rejected plaintiff's challenge under the Privileges and Immunities Clause, noting that the in-state office requirement that was then in effect affected equally resident and nonresident attorneys:

> 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).

In other words, since the then-existing rule applied equally to *all* New Jersey licensed attorneys, the plaintiff in *Tolchin* had no claim under the Privileges and Immunities Clause.

In *Parnell v. Supreme Court of Appeals of West Virginia*, an out-of-state attorney who resided and practiced law in Georgia but was also admitted in West Virginia, 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), *aff'd* 110 F.3d 1077 (4th Cir. 1997). However, West Virginia—unlike New York—did not require that the plaintiff maintain an office in the state in order to practice there. 926 F. Supp. at 572-73. In fact, the plaintiff actively practiced in

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

West Virginia state courts and had a pending case there, for which he sought to sponsor as a local counsel *pro hac vice* admission of three other members of his firm in Georgia. *Id.* What he challenged was the in-state office rule for *pro hac vice* sponsors as violating the Privileges and Immunities Clause. *Id.* at 573-74. The court in *Parnell* rejected plaintiff's challenge, finding no residency classification and reasoning that an ability to serve as a local counsel is not a fundamental right. *Id.*

Like in *Tolchin*, Rule 8.0 of West Virginia Rules for the Admission to Practice Law required 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. *See* Rule 8.0(c) of W. Va. Rules for Admission to Practice of Law.

In any event, unlike Plaintiff in this case, the plaintiff in *Parnell* was able to practice law in West Virginia without having an office there – what he sought, rather, was a right to sponsor his colleagues for *pro hac vice* admission – which is a discretionary function of the court. *See Piper*, 470 U.S. at 283. Here—like in *Piper*—Plaintiff's right to practice law, or "to pursue the livelihood," is adversely affected, making this case fundamentally different and, thus, easily distinguishable.

In *Goldfarb v. Supreme Court of Virginia*, a plaintiff was a Virginia resident but admitted to practice law in the District of Columbia only; the plaintiff sought to be admitted on motion to the Virginia bar. 766 F.2d 859, 860-61 (4th Cir. 1985). The Supreme Court of Virginia and its rule "permit[ed] admission without examination only if an applicant who has been licensed five years in another state 'intends to practice full-time as a member of the Virginia bar.'" *Id.* Since the plaintiff "intended to divide his practice between an office in Virginia and an office in Washington," he was denied admission on motion. *Id.* Not wanting to take a bar examination, the plaintiff challenged the constitutionality of the "full practice" requirement for admission on motion under the Due Process Clause and Commerce Clause. *Id.* The Fourth Circuit affirmed the district court's dismissal of the complaint in its entirety, noting that plaintiff's reliance on the cases based on the Privileges and Immunities Clause was misplaced since "the Privileges and Immunities Clause provides 'no security for the citizen of the State in which [the privileges] were claimed.'" *Id.* at 864-65 (internal citation omitted) (alteration in original).

Similarly, in *Morrison v. Bd. of Law Examin'rs of the State of No. Carolina*, a plaintiff resided in North Carolina but was not admitted to practice there. 453 F.3d 190 (4th Cir. 2006). The plaintiff challenged the state's comity admission rule that had a prior practice in a reciprocal state requirement because California,

where he practiced law for six years prior, did not have comity with North Carolina. *Id.* at 191-91. The Fourth Circuit reversed the district court's judgment in plaintiff's favor, finding that there was no residency classification since the rule "treats Morrison no differently than it treats North Carolina citizens and residents." *Id.* at 194.

Finally, in *Sestric v. Clark*, a plaintiff-nonresident sought to invalidate "the requirement that a nonresident who wants to practice law in Illinois pass the Illinois bar exam." 765 F.2d 655, 656 (7th Cir. 1985). An Illinois resident, however, could get admitted on motion provided he was admitted and continuously practiced law for five out of seven years in another jurisdiction. *Id.* at 657. The Seventh Circuit affirmed the district court's decision that dismissed plaintiff's complaint on summary judgment, distinguishing between a residency as a prerequisite to admission to the bar generally (i.e., by taking a bar examination) and a residency as a requirement for admission on motion. *Id.* at 658-65; *see Friedman*, 487 U.S. at 68-70 (striking down the residency as a prerequisite to admission on motion where the attorneys' commitment to the bar was ensured by the requirement—as an alternative to taking a bar examination—that they maintain an office and full time practice in the state).

IV. By Requiring That Nonresident Attorneys Maintain an Office in the State While Not Imposing Any Office Requirement Whatsoever on Resident Attorneys, Section 470 Serves as an Artificial Trade Barrier for Nonresident Attorneys, Preventing Them From Practicing Law on Substantially Equal Terms With Residents.

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, Section 470's office requirement precludes nonresident attorneys from practicing law "on terms of substantial equality" with resident attorneys—and, as such, essentially serves as an artificial trade barrier by imposing on nonresident

attorneys additional costs of maintaining an office in New York which resident attorneys need not bear. Unlike nonresident 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 constitutional Section 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). But, nonresident attorneys 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. This discriminatory treatment was highlighted and approved by the court in *White River Paper Co.*:

> 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.

Not only does this argument lack merit but, in fact, it supports the notion that Section 470 continues to be enforced for protectionist and/or discriminatory economic reasons. *See* JA 27 (09/07/11 Mem.-Dec. & Order at 14). Eliminating

the office requirement for nonresident 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 a person employed in New York.

In other words, Section 470's office requirement for nonresidents basically imposes a discriminatory economic burden on nonresidents, 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 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 prohibitive.

Furthermore, as evidenced by the inconsistent state court decisions, Defendants' claim that merely an "of counsel" relationship satisfies the office requirement of Section 470 is not supported by existing case law and further supports plaintiff's argument that the statute serves as an artificial barrier prohibited by the Privileges and Immunities Clause.

As discussed above, *supra*, pp. 22-24, in *In re Tang*, the court held 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 nonresident 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 in order to satisfy Section 470 not only fails to meet the "less restrictive means" standard but is also onerous.

Assuming, *arguendo*, that an "of counsel" relationship could satisfy Section 470's office requirement, by requiring nonresident attorneys to associate as "of counsel" in order to practice law in New York state courts, Defendants ignore the fact that not all nonresident attorneys who are subject to Section 470 might be able to find a law firm willing to offer the attorney such a relationship. As well known, such a law firm would be held responsible and equally subject to lawsuits for malpractice – regardless of the merits of such lawsuits – that are filed against all attorneys associated with that law firm, including those practicing as "of counsel." Therefore, it is not unreasonable to suggest that for many nonresident attorneys—in instances such as newly admitted attorneys, attorneys who recently relocated to the area (e.g., from California to New Jersey), or simply for attorneys who do not yet have many connections in the legal community—it might not be so easy to find a law firm willing to assume such a risk. Furthermore, even if a nonresident attorney does find such a law firm, Defendants' argument presupposes that that

local firm would be willing to enter into the "of counsel" relationship without requiring that it be compensated – in cash and/or in kind (e.g., by providing free or discounted legal services). In such a case, the "of counsel" relationship could easily be an equal or even a greater burden on a nonresident attorney.

In other words, the suggested "of counsel" relationship—even if it did satisfy Section 470's office requirement, and Plaintiff submits that it does not—would still place nonresident attorneys at a significant competitive disadvantage relative to New York resident attorneys and, thus, is prohibited by the Privileges and Immunities Clause. *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 96 (2d Cir. 2003).

Furthermore, by placing a limitation or restriction—in-state office requirement—under which circumstances a nonresident attorney may practice in New York, Section 470's burden is not "merely incidental" – but, in fact, it places nonresident attorneys at a competitive disadvantage, preventing them from practicing law on equal footing with residents. In *Blumenthal*, this Court 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 Court 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) (emphasis added).

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, this Court 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, this Court 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.*

Like in *Blumenthal*, by requiring that only nonresident attorneys must maintain an office, Section 470 "does not impose an absolute bar" on Plaintiff's practicing law in New York. However, it does place 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.

Notably, in its discussion of the case, this Court described the state officials' concerns about enforcing the Nonresident Lobster Law as follows:

> 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 so 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 Supreme Court's decision in *Piper* and made an attempt to redraft Section 470. JA 130-134. 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.

JA 132 (emphasis added).

However, the attempted redraft of Section 470 in such a way as to avoid the constitutional challenge while retaining the same restrictions imposed on nonresidents failed. The revised version merely rephrased the statute using more modern language but was not less offensive and Section 470's amendment as proposed in 1985 never became the law. JA 130-134. Hence, to this day, Section

470 contains the same language it had in 1909 when it was removed from the Code of Civil Procedure to the newly-created Judiciary Law.

Attempting to justify the statute in 1985, the State offered essentially the same rationales as Defendants argue here and in the court below and which, Plaintiff submits, were not the purpose for Section 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.

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 because Defendants fail to establish either that Section 470 advanced a substantial state interest, or that there is a substantial relationship between the statute and that interest. Thus, the district court correctly found that Section 470 violated the Privileges and Immunities Clause.

CONCLUSION

For the reasons stated above, the district court's order denying Defendants' motion for summary judgment and granting Plaintiff's motion for summary judgment, declaring Judiciary Law § 470 unconstitutional and enjoining Defendants from enforcing it, should be affirmed.

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Princeton, New Jersey

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

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