1 HALL, *Circuit Judge*, dissenting:

2 The majority holds that a New York statute that discriminates, on its face,
3 against nonresident attorneys—burdening them with the expense of maintaining
4 an office in New York while exempting resident attorneys from the same
5 requirement—does not offend the Privileges and Immunities Clause of Article
6 IV, § 2 of the Constitution because, in the majority's view, the plaintiff has failed
7 to prove that the statute evinces a "protectionist" intent. In doing so, the
8 majority injects an entirely novel proposition into our Privileges and Immunities
9 Clause jurisprudence: that a State's explicit discrimination against nonresidents
10 with regard to a fundamental right is constitutionally unobjectionable unless the
11 nonresident makes out a *prima facie* case of discriminatory intent. Such a holding
12 reverses the State's burden of demonstrating that it has a substantial interest
13 justifying the discrimination and that the means chosen bear a close and
14 substantial relation to that interest. Even under the majority's reformulation of
15 our settled law, however, Schoenefeld has established that the New York statute
16 has protectionist aims, and the State's proffered justifications for the
17 discrimination fail to survive scrutiny. I respectfully dissent.

18

I.

The two-step inquiry to be conducted under the Privileges and Immunities Clause is well established. First, the court considers whether a State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens. *See Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 94 (2d Cir. 2003) (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218, 222 (1984)). "The activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause . . . . For it is only with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64–65 (1988) (internal quotation marks, citations and alterations omitted). Second, if the court determines that the State has, in fact, discriminated against out-of-state residents, the burden shifts to the State to provide a "sufficient justification for the discrimination," *Crotty*, 346 F.3d at 94, by making a showing that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against

1 nonresidents bears a substantial relationship to the State's objective." *Supreme*
2 *Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985).

3 On its face, New York Judiciary Law § 470 discriminates against
4 nonresident attorneys with regard to the practice of law, long recognized by the
5 Supreme Court as a "fundamental right" subject to protection under the
6 Privileges and Immunities Clause. *Id.* at 281. As we explained in our prior
7 opinion in this case, *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014), and the
8 New York Court of Appeals unanimously agreed after we certified to it a
9 question, *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221 (2015), Section 470
10 draws a distinction between attorneys who are residents of New York and those
11 who are not. The statute imposes no specific requirement on resident attorneys
12 to maintain a *bona fide* office, thus permitting them to set up an "office" on the
13 kitchen table of their studio apartments if so desired. *Schoenefeld*, 748 F.3d at 468.
14 Nonresident attorneys, however, are required to maintain an "office for the
15 transaction of law business" within the State. N.Y. Judiciary Law § 470. We
16 recognized that "[t]his additional obligation carries with it significant expense—
17 rents, insurance, staff, equipment *inter alia*—all of which is in addition to the
18 expense of the attorney's out-of-state office, assuming she has one." *Schoenefeld*,

1 748 F.3d at 468. Absent a controlling state decision that an "office for the
2 transaction of law business," § 470, meant something other than a *bona fide* office,
3 we concluded that, "as it stands, it appears that Section 470 discriminates against
4 nonresident attorneys with respect to their fundamental right to practice law in
5 the state and, by virtue of that fact, its limitations on nonresident attorneys
6 implicate the Privileges and Immunities Clause." *Id.* at 469.

7 New York argued to us, however, that the statute could be interpreted as
8 requiring no more than a P.O. box or designated agent for service of process,
9 lessening the burden on nonresident attorneys considerably and making Section
10 470 more likely to survive scrutiny. *Id.* While our own review of New York law
11 indicated that a designated physical office space was required, we recognized
12 that the question had not been spoken to by the New York Court of Appeals, and
13 we certified to that court the question: "Under New York Judiciary Law § 470,
14 which mandates that a nonresident attorney maintain an 'office for the
15 transaction of law business' within the state of New York, what are the minimum
16 requirements necessary to satisfy that mandate?" *Id*. at 471. In doing so, we
17 represented that the Court of Appeals' answer would, "in all likelihood, dictate[]
18 the outcome of the constitutional privileges and immunities analysis we have

1 commenced and must complete as we decide the appeal before us." *Id*. The
2 Court of Appeals accepted certification and graciously took time away from its
3 own busy docket to unanimously answer that § 470 required the nonresidents
4 maintain a physical office space. *Schoenefeld*, 25 N.Y.3d at 26, 6 N.Y.S.3d at 223.
5 As we had suspected, maintaining an address or a designated agent for service
6 would not satisfy the requirements of Section 470. *See id.*

7 The majority now disregards the New York Court of Appeals' decision as
8 well as our own prior opinion which, together, constitute the law of the case. *See*
9 *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (noting that,
10 absent an intervening change in controlling law, availability of new evidence, or
11 the need to correct a clear error or manifest injustice, a court's decision upon a
12 rule of law "should continue to govern the same issues in subsequent stages in
13 the same case") (internal quotation marks omitted). Those decisions
14 acknowledged that Section 470 discriminates between in-state and out-of-state
15 attorneys solely on the basis of their residency. Under longstanding precedent,
16 that determination disposes of the initial inquiry; the burden then shifts to the
17 State to provide "sufficient justification for the discrimination." *Crotty*, 346 F.3d
18 at 94. Departing from these precedents, however, the majority holds that the

1 *plaintiff* bears the initial burden of "alleg[ing] or offer[ing] some proof of a
2 protectionist purpose" in order to state a claim under the Privileges and
3 Immunities Clause. Majority Op., ante at 15. In the majority's estimation, if the
4 plaintiff fails to allege a *prima facie* case of protectionist intent, her "Privileges and
5 Immunities claim fails, obviating the need for a tailoring inquiry." Majority Op.,
6 ante at 15.

7 The majority bases its reasoning exclusively on its reading of the Supreme
8 Court's decision in *McBurney v. Young*, 133 S. Ct. 1709 (2013). As the majority
9 acknowledges, that decision did not state any new principle of law, but merely
10 confirmed that the Privileges and Immunities Clause forbids laws that abridge
11 the right to pursue a common calling only when those laws "were enacted for the
12 protectionist purpose of burdening out-of-state citizens."[1] *Id.* at 1715. *McBurney*

---

[1] The majority's application of *McBurney*, which was decided before our prior opinion in this case, is particularly striking given that we did not rely on *McBurney* to uphold the constitutionality of Section 470 at that time. *See Schoenefeld*, 748 F.3d at 469. Instead, in apparent contravention of New York's constitutional requirements for certification, this Court certified a question to the Court of Appeals that was not necessary to our decision. *Cf. Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013) (stating that, prior to certifying a question to the Court of Appeals, this Court must determine "whether the certified question is determinative of a claim before us" (internal quotation omitted)); *Retail Software Servs., Inc. v. Lashlee*, 71 N.Y.2d 788, 790, 530 N.Y.S.2d 91, 92 (1988) (declining to

1 did not disturb the traditional threshold inquiry and two-step analysis in cases,
2 like ours, where the challenged law is one that directly regulates legal practice.
3 Rather, while acknowledging that the Privileges and Immunities Clause
4 "protects the right of citizens to ply their trade, practice their occupation, or
5 pursue a common calling," *id.* (internal quotation marks omitted), the Court held
6 that Virginia's distinction between state citizens and noncitizens in its Freedom
7 of Information Act ("FOIA") did not "abridge" a noncitizen's right to pursue his
8 livelihood "in the sense prohibited by the Privileges and Immunities clause"
9 because the effects on his real estate business, which involved obtaining state
10 property records for his clients, were purely incidental. *Id.*

11 The majority's reading that *McBurney* requires a plaintiff to allege, as part
12 of a *prima facie* case, that the law was specifically enacted for a protectionist

---

answer certified question because it did not satisfy the requirement that it "may be determinative" of the pending action, as required by the New York Constitution). As we recognized in our prior opinion, "[t]he constitutionality of [Section] 470 turns on the interpretation of a provision of the statute that implicates significant New York state interests and is determinative of this appeal." *Schoenefeld*, 748 F.3d at 467.

1 purpose misconstrues *McBurney*'s invocation of the two-step analysis.[2] As an
2 initial matter, the Court resolved the threshold issue, whether a fundamental
3 right is implicated, by noting that the Privileges and Immunities Clause protects
4 the right the plaintiff claimed was violated.[3] *See id.* at 1715. The Court then
5 considered whether sufficient justification existed for the discrimination[4]; it
6 determined that the Virginia FOIA, as a mechanism for state citizens as the

---

[2] Rather than unanimously altering the longstanding Privileges and Immunities analysis through *dicta* without acknowledging as much (or generating a single dissenting opinion), the better reading is that the *McBurney* decision adhered to the traditional two-step analysis.

[3] The Court, by contrast, rejected the plaintiff's Privileges and Immunities challenge based on the asserted "right to access public information on equal terms with citizens of the Commonwealth" at the threshold by determining that the Clause did not "cover[] this broad right." *McBurney*, 133 S. Ct. at 1718–19.

[4] The majority states that it is "not obvious" under *McBurney* whether the State's protectionist purpose is properly considered at the first or second step of the inquiry, noting that the burden shifts to the defendants at the second step, *see, e.g., Supreme Court of Va. v. Friedman*, 487 U.S. at 67, whereas *McBurney* emphasized the nonresident plaintiff's failure to plead or allege proof that Virginia's FOIA was enacted with a protectionist purpose, *see* 133 S. Ct. at 1715–16. Majority Op., ante at 16. The tension the majority perceives between *Friedman* and *McBurney*, however, is due entirely to a strained reading of *McBurney.* The majority's "discriminatory intent" requirement, in any event, remains novel to privileges and immunities jurisprudence whether it is grafted onto the first or second step of the inquiry.

1 holders of sovereign power to obtain an accounting from public officials, evinced
2 a "distinctly nonprotectionist aim." *Id*. at 1716. Further, the statute's distinction
3 between Virginia citizens and noncitizens was justified because it "recognizes
4 that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping
5 in the Commonwealth." *Id.* It was within this context that the Court explained
6 that (1) the plaintiff "does not allege—and has offered no proof—that the
7 challenged provision of the Virginia FOIA was enacted in order to provide a
8 competitive economic advantage for Virginia citizens," *id.* at 1715, and (2) the
9 statute's "effect of preventing citizens of other States from making a profit by
10 trading on information contained in state records" is merely "incidental." *Id.* at
11 1716. In short, the Court's reasoning—that the plaintiff failed to contradict the
12 State's showing that the discrimination against noncitizens was justified—
13 conforms precisely to the traditional two-step inquiry.

14 *McBurney* is distinguishable from this case for the simple reason that the
15 Virginia FOIA is not an economic regulation, nor does it directly regulate the
16 right to pursue a common calling. Rather, the FOIA provides a mechanism for
17 seeking political accountability, and its effects on the plaintiff's profession—data
18 gathering for profit—were purely "incidental." *Id.* It is well-established that,

1 "[w]hile the Clause forbids a State from intentionally giving its own citizens a
2 competitive advantage in business or employment, the Clause does not require
3 that a State tailor its every action to avoid any incidental effect on out-of-state
4 tradesmen." *Id.* Section 470, by contrast, directly regulates the legal profession
5 by expressly and intentionally placing practice requirements on nonresident
6 attorneys like Schoenefeld that it does not place on resident attorneys. The
7 majority stretches *McBurney*'s "incidental" language far beyond the facts of that
8 case to support its conclusion that *any* regulation, even one that directly regulates
9 a "well settled . . . privilege protected by Article IV, § 2," *Barnard v. Thorstenn*, 489
10 U.S. 546, 553 (1989), will pass constitutional muster so long as its discrimination
11 against nonresidents can be characterized as "incidental." Majority Op., ante at
12 13–14.

13 By requiring plaintiffs to allege a *prima facie* case of discriminatory intent,
14 the majority, in effect, relieves the State of its burden to provide a sufficient
15 justification for laws that discriminate against nonresidents with regard to
16 fundamental rights. *See Crotty*, 346 F.3d at 95 (explaining that States may not
17 "treat residents and nonresidents disparately in connection with the pursuit of
18 commerce, a trade, or business venture where that disparate treatment is not

1 supported by a sufficient justification"). Determining whether an unacceptable
2 purpose, such as economic protectionism, underlies the challenged law is at the
3 core of the analysis engaged in *after* the threshold determination into whether a
4 right implicated by the Privileges and Immunities Clause has been abridged. *See*
5 *Piper*, 470 U.S. at 284 ("The conclusion that [a State law] deprives nonresidents of
6 a protected privilege does not end our inquiry . . . The Clause does not preclude
7 discrimination against nonresidents where (i) there is a substantial reason for the
8 difference in treatment; and (ii) the discrimination practiced against nonresidents
9 bears a substantial relationship to the State's objective."). Examining the
10 government's proffered reason for the discrimination and determining whether
11 the challenged law, as enacted, conforms to the proffered reason is the method
12 by which courts determine whether the proffered reason is genuine or merely a
13 pretext for economic protectionism. *Crotty*, 346 F.3d at 97 ("Part and parcel to
14 this analysis is determining whether [the State] ha[s] demonstrated a substantial
15 factor unrelated to economic protectionism to justify the discrimination."). The
16 majority's reasoning would reverse this burden-shifting test by requiring
17 plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than

1 requiring the State to show that the law was *not* enacted for a protectionist
2 purpose.
3 Tellingly, in support of this proposition the majority draws exclusively on
4 cases addressing challenges under the Equal Protection Clause, for which
5 plaintiffs must plead discriminatory intent as part of a *prima facie* case. Majority
6 Op., ante at 13–14 (citing, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009);
7 *Washington v. Davis*, 426 U.S. 229, 241 (1976)). The majority has not cited, nor
8 does there exist, any case suggesting that the requirement to allege
9 discriminatory intent as part of a *prima facie* case under the Equal Protection
10 Clause also applies to Privileges and Immunities claims. Indeed, *Virginia v.*
11 *Friedman*, 487 U.S. 59 (1988), stands for the opposite proposition. In *Friedman*,
12 Virginia argued that its residency requirement for admission to the State's bar on
13 motion did not implicate the Privileges and Immunities Clause on the basis that,
14 because nonresident attorneys could seek admission by taking the Virginia bar
15 exam, "the State cannot be said to have discriminated against nonresidents as a
16 matter of fundamental concern." *Id*. at 65 (internal quotation marks omitted).
17 The Supreme Court rejected that argument as "quite inconsistent with our
18 precedents," stating that "the Clause is implicated whenever . . . a State does not

1 permit qualified nonresidents to practice law within its borders on terms of
2 substantial equality with its own residents." *Id*. at 65–66. This language cannot
3 be squared with a *prima facie* requirement that demands something more than a
4 showing of disparate treatment on the face of the statute.[5]

5 The Equal Protection cases cited by the majority, moreover, are
6 distinguishable on the ground that the challenged policies in those cases were
7 facially neutral but produced racially disparate effects. *See Iqbal*, 556 U.S. at 682
8 (holding that plaintiffs failed to allege that detention policy that
9 disproportionately affected Muslims and Arabs was motivated by a racially

[5] By comparing this case with *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), the majority inadvertently highlights the distinctions between the burden-shifting tests that govern Equal Protection and Privileges and Immunities claims. Majority Op., ante at 16 n.6. In *Village of Arlington Heights*, an Equal Protection case, the Court explained that if a plaintiff demonstrates that a challenged decision was "motivated in part by a racially discriminatory purpose," then the burden shifts to the government to establish that the "same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 270 n.21. To state a claim under the Privileges and Immunities Clause, by contrast, a plaintiff must demonstrate that "a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause," *Barnard*, 489 U.S. at 552, in which case the restriction 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.* The former inquiry requires a threshold showing of discriminatory intent; the latter plainly does not.

1 discriminatory purpose); *Davis*, 426 U.S. at 244 (concluding that facially neutral
2 employment test was not racially discriminatory simply because a greater
3 proportion of African Americans fared poorly). The plaintiffs were thus required
4 to allege facts showing that an otherwise-neutral policy was motivated by an
5 impermissible discriminatory purpose. *See Mt. Healthy City Sch. Dist. Bd. of Educ.*
6 *v. Doyle*, 429 U.S. 274, 283–84 (1977). Section 470, by contrast, draws a facial
7 distinction between residents and nonresidents with regard to the privilege of
8 practicing law; by its very terms, it imposes burdens on nonresidents that it does
9 not impose on residents. Because the statute, on its face, discriminates against
10 nonresidents, no other threshold showing of discriminatory intent is required.[6]
11 In sum, Section 470 discriminates against nonresidents with respect to the
12 practice of law, a fundamental right long recognized as protected under the
13 Privileges and Immunities Clause. The majority recognizes as much, *see* Majority
14 Op., ante at 16–17, but erroneously imposes a threshold requirement that the

---

[6] Indeed, even a state regulation that "d[oes] not on its face draw any distinction based on citizenship or residence" may implicate the Privileges and Immunities Clause where "the practical effect of the provision [is] discriminatory." *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003).

1 plaintiff challenging the discrimination prove there is a protectionist intent above
2 and beyond the traditional analysis.

3 II.

4 Plaintiff having established that a fundamental right has been implicated,
5 it is the State's burden to provide a sufficient justification for the discrimination
6 by demonstrating that "(i) there is a substantial reason for the difference in
7 treatment; and (ii) the discrimination practiced against nonresidents bears a
8 substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. "In
9 deciding whether the degree of discrimination bears a sufficiently close relation
10 to the reasons proffered by the State, the Court has considered whether, within
11 the full panoply of legislative choices otherwise available to the State, there exist
12 alternative means of furthering the State's purpose without implicating
13 constitutional concerns." *Friedman*, 487 U.S. at 66.

14 The State's proffered justifications for the in-state office requirement—
15 effectuating service of legal papers, facilitating regulatory oversight of
16 nonresident attorneys' fiduciary obligations, and making attorneys more
17 accessible to New York's courts—are plainly not sufficient. Regarding the issue
18 of service, the Court of Appeals itself observed that, although "service on an out-

1 of-state individual presented many more logistical difficulties in 1862, when
2 [Section 470] was originally enacted," today there are "adequate measures in
3 place relating to service upon nonresident attorneys," including the methods of
4 mail, overnight delivery, fax and (where permitted) email, as authorized by the
5 CPLR, and the requirement under 22 N.Y.C.R.R. § 520.13(a) that nonresident
6 attorneys designate an in-state clerk of court as their agent for service of process
7 in order to be admitted in New York. *Schoenefeld*, 25 N.Y.3d at 28, N.Y.S.3d at
8 224–25. Thus, not only do "there exist alternative means of furthering the State's
9 purpose without implicating constitutional concerns," *Friedman*, 487 U.S. at 66,
10 but those means are already in place.[7]

11 The State's argument that an in-state office requirement is necessary to
12 regulate the behavior of nonresident attorneys fares no better. The Court has

[7] As the majority notes, New Jersey has eliminated its physical office requirement in favor of various other less onerous conditions. *See* Majority Op., ante at 27 n.13. Further, the New York City Bar permits resident attorneys to maintain a "virtual law office" in New York even if their practice is located primarily out of state, a privilege that is not afforded to in-state residents. Assoc. of the Bar of the City of New York Comm. on Prof. Ethics, Formal Opinion 2014-2: Use of a Virtual Law Office by New York Attorneys (June 2014), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2014opinions/2023-formal-opinion-2014-02. That such accommodations exist solely for resident attorneys further undermines Section 470's nonprotectionist rationale and demonstrates the existence of less-restrictive alternatives to the office requirement.

1 long rejected similar arguments in favor of a residency requirement on the
2 grounds that a "nonresident lawyer's professional duty and interest in his
3 reputation should provide the same incentive to maintain high ethical standards
4 as they do for resident lawyers," and that the State, in any event, "has the
5 authority to discipline all members of the bar, regardless of where they reside."[8]
6 *Piper*, 470 U.S. at 286. Similarly, the Supreme Court has rejected the argument
7 that an in-state office requirement is necessary to ensure the availability of
8 attorneys for court proceedings as "unnecessary and irrational." *Frazier v. Heebe*,
9 482 U.S. 641, 649 (1987).[9] The Court noted that resident lawyers may still
10 maintain their office outside of the state, thus making themselves equally
11 unavailable to the courts, and that "there is no link between residency within a

---

[8] The Supreme Court's decision in *Friedman* is not to the contrary. The Court did not hold, as the majority asserts, Majority Op., ante at 28, that an office requirement would provide a "nonprotectionist alternative" to a residency requirement. Rather, in holding unconstitutional Virginia's residency requirement for admission on motion, the Court noted in dicta, without deciding the constitutionality of that alternative means, that an office requirement would be less restrictive. 487 U.S. at 70.

[9] The Court's holding was pursuant to its supervisory authority over the lower federal courts rather than the Privileges and Immunities Clause, *see id.*, but its reasoning is equally applicable here.

1 State and proximity to a courthouse."[10] *Id.* at 650; *see also Barnard*, 489 U.S. at
2 553–54 (holding with respect to challenge under Privileges and Immunities
3 Clause that unreliable airline and telephone service of Virgin Islands did not
4 support a substantial justification for attorney residency requirement).

5 The majority, moreover, has not engaged in a meaningful analysis of the
6 sufficiency of the State's proffered justifications, underscoring the extent of its
7 departure from the established two-step inquiry under the Privileges and
8 Immunities Clause. Instead, the majority concludes that Schoenefeld's claim
9 must fail at the threshold because, in its view, she has failed to prove that Section
10 470 was enacted for a protectionist purpose. Even if such a *prima facie* showing is
11 required, Schoenefeld has made one out based on the plain text and history of
12 Section 470.

13 It is undisputed that, at the time Section 470 was enacted, it was part of a
14 larger statutory scheme designed to prohibit nonresident attorneys from

---

[10] For example, an attorney practicing in Princeton, New Jersey would be far more accessible to New York City courts than an attorney located in Buffalo, New York. With respect to attorneys who reside a great distance from the State, the Court in *Piper* suggested that they could be required to retain a local attorney for the duration of court proceedings and to be available to the court on short notice. *Piper*, 470 U.S. at 287.

1 practicing in New York. *See Richardson v. Brooklyn City & N.R. Co.*, 22 How. Pr.
2 368, 370 (N.Y. Sup. Ct. Feb. 1, 1862) (noting that the court "ha[d] always required
3 that an attorney should reside within the state"). Chapter 43, the earliest
4 predecessor to Section 470, provided a less burdensome, but still burdensome,
5 exception to the overall residency requirement as an accommodation to
6 commuters in adjacent states. *Rosenberg v. Johns-Manville Sales Corp.*, 416
7 N.Y.S.2d 708, 710 (Sup. Ct. 1979) (explaining with respect to Section 470 that
8 "[t]he requirement of residence, as a condition to the continued right to practice,
9 appears to have been ameliorated for attorneys who reside in an adjacent State,
10 but only upon condition they maintain an office for the practice of law in this
11 State"); *see also* Brennan, *Repeal Judiciary Law § 470*, 62 N.Y.S.B.J. 20, 21 (Jan. 1990)
12 ("The primary purpose of chapter 43 was to carve out an exception to the general
13 rule that an attorney could not practice in the New York State courts unless he
14 was a resident of New York State."). The majority contends that this statutory
15 context is irrelevant because Schoenefeld has not been burdened by the general
16 ban on nonresident attorneys, which was invalidated under the Privileges and
17 Immunities Clause in 1979. *See* Majority Op., ante at 20 (citing *In re Gordon*, 48
18 N.Y.2d 266 (1979)). That a discriminatory and burdensome requirement can be

1 stylized as an "exception" to an even more discriminatory and burdensome
2 requirement, however, does not render it nondiscriminatory or render
3 implausible a threshold inference of discriminatory purpose.[11]
4 The majority further reasons that because the office requirement, like the
5 general ban on nonresident attorneys, was enacted in part to ensure an in-state
6 place of service, *see Richardson*, 22 How. Pr. at 370, it does not exhibit a
7 protectionist purpose. Majority Op., ante at 18–19. This gets it backward,
8 however, for it is the State's burden to prove that service of process is a
9 substantial interest justifying the restriction, not Schoenefeld's burden to prove
10 that service of process was not a motivating concern for the statute. If the
11 majority's rationale were sufficient, then any restriction based on residency, no

---

[11] The legislature's failure to amend or repeal Section 470 after New York's residency requirement was held unconstitutional, *see Gordon*, 48 N.Y.2d 266, 422 N.Y.S.2d 641, compounds, not alleviates, the constitutional problem, as the *Gordon* decision put the legislature on notice that the restrictions it placed on nonresident attorneys could be constitutionally problematic. Indeed, following *Gordon*, members of the legislature attempted, albeit unsuccessfully, to amend Section 470 to permit nonresidents to practice in New York without an office so long as they did not appear as the attorney of record. *See* J.A. 130–32. Regardless of whether that amendment would have effectively resolved the constitutional issue, its proponents were compelled by the conclusion that "*Gordon* and *Piper* . . . command elimination of residency requirements as a condition upon the right to practice law." J.A. 132.

1 matter how onerous, would pass constitutional muster so long as the State could
2 point to a nonprotectionist purpose for the restriction. Were this the test, then
3 there would have been no basis on which to invalidate in-state residency
4 requirements for attorneys under the Privileges and Immunities Clause. *See, e.g.*,
5 *Friedman*, 487 U.S. at 68 (rejecting as insufficient State's reasons for requiring
6 residency of attorneys seeking admission on motion, including ensuring that
7 those applicants "have the same commitment to service and familiarity with
8 Virginia law that is possessed by applicants securing admission upon
9 examination" and facilitating the full-time practice of law); *Piper*, 470 U.S. at 285
10 (rejecting State's argument that nonresident attorneys "would be less likely (i) to
11 become, and remain, familiar with local rules and procedures; (ii) to behave
12 ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and
13 other volunteer work in the State"); *accord Gordon*, 48 N.Y.2d at 274, 422 N.Y.S.2d
14 at 646 (holding that State's justification for residency requirement, the
15 "observ[ation] and evaluat[ion] [of] the applicant's character," was insufficient
16 due to "alternatives which are less restrictive than denial of admission to practice
17 which would further this interest").[12]

---

[12] In none of the above cases, moreover, did the courts dissect the legislative

1 Finally, the majority concludes that the burdensome effects of Section 470
2 on nonresident attorneys are not actually discriminatory because, by ensuring
3 that every attorney that practices in New York has a "physical premises" in the
4 State, the office requirement serves "to place resident and nonresident attorneys
5 on an equal footing, not to favor the former over the latter." Majority Op., ante at
6 23. Thus, the majority faults Schoenefeld's supposed failure to demonstrate that
7 Section 470 poses an "undu[e] burden," Majority Op., ante at 24, because she did
8 not provide evidence to show that significant numbers of New York attorneys in
9 fact practice from their homes rather than from offices or that a nonresident's
10 burden of maintaining an office in New York is greater than a resident's burden
11 of maintaining a home in New York. As a factual matter, the majority's
12 conclusion that the law poses no undue burden on nonresident attorneys directly
13 conflicts with our findings earlier in this case. *See Schoenefeld*, 748 F.3d at 468
14 ("This additional obligation [on nonresident attorneys] carries with it significant

---

history of the pertinent restrictions in order to discern a possible nonprotectionist purpose, as the majority does in this case. Rather, upon finding that the State's restrictions were discriminatory, the State was required in those cases to explain why, at that time, the restrictions were justified. *Cf. McBurney*, 133 S. Ct. at 1715–16 (examining plain text of Virginia statute to determine whether distinction between residents and nonresidents had a protectionist aim).

1 expense—rents, insurance, staff, equipment *inter alia*—all of which is in addition
2 to the expense of the attorney's out-of-state office, assuming she has one.").[13]
3 More importantly, these imagined burdens lose sight of the governing legal
4 standard: "whether the State has burdened the right to practice law, a privilege
5 protected by the Privileges and Immunities Clause, by discriminating among
6 otherwise equally qualified applicants solely on the basis of citizenship or
7 residency." *Friedman*, 487 U.S. at 66–67. Though the Clause "does not promise
8 nonresidents that it will be as easy for [them] as for residents to comply with a
9 state's law," *Schoenefeld*, 748 F.3d at 467 (internal quotation omitted), a
10 "wholesale bar has never been required to implicate the [Clause]," *Crotty*, 346
11 F.3d at 95. Here, it is enough that Section 470 substantially burdens nonresident
12 attorneys by requiring them, and only them, to maintain separate office premises
13 within the State.

---

[13] Although the majority brushes aside these findings as "dicta," Majority Op., ante at 23 n.11, the significant burden on nonresidents of maintaining an in-state office was central to our determination that Section 470, if interpreted to impose an in-state office requirement, "discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause." *Schoenefeld*, 748 F.3d at 469.

1 The majority asserts that Section 470 places all attorneys on equal footing
2 because the statute is, in effect, no different from a law that requires all attorneys
3 to maintain a "physical presence" in New York. *See* Majority Op., ante at 25. But
4 unlike the statutes upheld as constitutional in *Kleinsmith v. Shurtleff*, 571 F.3d
5 1033, 1044–45 (10th Cir. 2009) and *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099,
6 1107–08 (3d Cir. 1997), which require all attorneys to maintain a physical
7 presence within the State, Section 470 explicitly draws a distinction based on
8 residency. This case is thus analogous to *Piper* and *Friedman*, where states'
9 restrictions on legal practice that applied only to nonresidents were invalidated
10 under the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 70; *Piper*, 470
11 U.S. at 288. The Supreme Court, moreover, has long rejected the notion that a
12 State's authority to pass a facially neutral law also empowers it to pass a
13 discriminatory law. *Friedman*, 487 U.S. at 66–67 ("A state's abstract authority to
14 require from resident and nonresident alike that which it has chosen to demand
15 from the nonresident alone has never been held to shield the discriminatory
16 distinction from the reach of the Privileges and Immunities Clause."). That New
17 York could enact some other law that does not distinguish between residents and
18 nonresidents is entirely inapposite to the question before us now.

1 III.

2 The State of New York has chosen to discriminate against nonresident
3 attorneys with regard to their right to pursue a common calling, and it has failed
4 to provide a substantial justification for that discrimination. In holding to the
5 contrary, the majority unnecessarily disturbs longstanding Privileges and
6 Immunities jurisprudence and denies nonresident attorneys their
7 constitutionally-protected right to practice law "on terms of substantial equality"
8 with residents of New York. *Piper*, 470 U.S. at 280. For these reasons, I
9 respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014
(Argued: June 4, 2015 Decided: April 22, 2016)
Docket No. 11-4283-cv)

EKATERINA SCHOENEFELD,

Plaintiff-Appellee,

-v.-

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT; ROBERT D. MAYBERGER, in his official capacity as Clerk of New York Supreme Court, Appellate Division, Third Judicial Department; JOHN G. RUSK, Chairman of the Committee on Professional Standards ("COPS"),

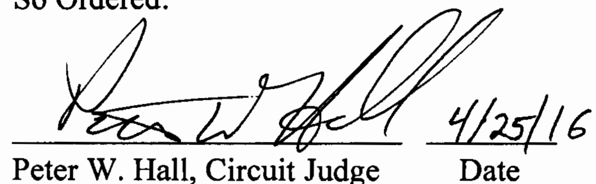
Defendants-Appellants.

BEFORE: RAGGI, HALL, AND CARNEY, *Circuit Judges.*

ERRATA

Page	Line	Delete	Insert
16 n.7 of Dissenting Op.	5	"in-state residents"	"nonresidents"

So Ordered:



Peter W. Hall, Circuit Judge   Date

Copies have been sent
by chambers to:

__ Panel Members
__ West Publishing Co.
__ Clerk of the Court