

11-4283-cv

United States Court of Appeals for the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff - Appellee,

v.

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR 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,

STATE OF NEW YORK, 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,

Defendants.

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

APPELLEE'S PETITION FOR REHEARING *EN BANC*

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Dated: May 6, 2016

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STATEMENT PURSUANT TO F.R.A.P. 35(b)

The appellee-plaintiff, Ekaterina Schoenefeld, respectfully petitions this Court, pursuant to F.R.A.P. 35, for rehearing *en banc* of the Panel's majority opinion ("Majority Opinion" or "Majority") in *Schoenefeld v. Schneiderman*, 2016 App. Lexis 7303 (2d Cir. April 22, 2016). The basis for the petition is that the Majority Opinion (1) contradicts this Court's prior decision in *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014), in contravention of the law of the case doctrine, and (2) conflicts with the Privileges and Immunities Clause jurisprudence as it is interpreted and applied by the Supreme Court and by this Court; and therefore, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

Further, the Majority Opinion involves questions of exceptional importance, namely: (1) it reformulates the well-established law under the Privileges and Immunities Clause by "revers[ing] the burden-shifting test by requiring plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than requiring the State to show that the law was *not* enacted for a protectionist purpose"; (2) it conflicts with the authoritative decisions of other United States Court of Appeals; and (3) it affects tens of thousands New York-licensed, non-resident attorneys. *Schoenefeld v. Schneiderman*, 2016 U.S. App. LEXIS 7303, *45 (Hall, dissenting). (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. THE MAJORITY OPINION IS CONTRARY TO THE PANEL’S PRIOR OPINION IN THIS CASE AND CONFLICTS WITH THE PRECEDENTS SET FORTH BY THE SUPREME COURT’S AND THIS COURT’S DECISIONS.

The Majority Opinion reversed the district court’s decision holding that Judiciary Law Section 470 (“§ 470”)—which applies only to nonresident attorneys, requiring them to maintain “an office for the transaction of law business” in the State to practice law in New York—is unconstitutional and violates the Privileges and Immunities Clause. *Schoenefeld*, 2016 App. Lexis 7303. In so doing, the Majority disregarded the Panel’s prior opinion and the longstanding Privileges & Immunities Clause jurisprudence, relying exclusively on its reading of the Supreme Court’s decision in *McBurney v. Young*, 133 S. Ct. 1709 (2013).

a. The Majority Opinion Contradicts the Panel’s Prior Opinion in This Case in Violation of the Law of the Case Doctrine.

Applying the traditional, two-step inquiry—a year after *McBurney* was decided—the Panel certified the question of what are the minimum requirements necessary to satisfy § 470’s term “office for the transaction of law business.”

Schoenefeld v. New York, 748 F.3d at 467. As the Panel then observed:

... we note that with respect to New York residents the Judiciary Law does not impose a specific obligation on an attorney to maintain an office for the transaction of law business in New York.... [A] review of those laws yields no authority specifically requiring New York residents to maintain any office at all. A New York attorney, therefore, may set up her “office” on the kitchen table in her studio apartment and not run afoul of New York law.

As to nonresident attorneys, however, *Section 470* mandates that they shoulder the additional obligation to maintain some sort of separate office premises within the state. ...

....

This additional obligation carries with it significant expense—rents, insurance, staff, equipment *inter alia*—all of which is in addition to the expense of the attorney’s out-of-state office, assuming she has one.

Id. at 468.

The Panel rejected the State’s argument “that this Court need not read the phrase to require a physical office space with a desk, a telephone, and staff, but rather may hold that the language can permissibly be read to require merely an address [for service of papers]” or “that the designation of an agent in New York to receive service of papers ‘might even suffice’” as “not supported by the New York precedent.” *Id.* at 469. As the Panel further reasoned:

We also note that the term “office,” by itself, although not exactly pellucid, implies more than just an address or an agent appointed to receive process. And the statutory language that modifies “office”—“for the transaction of law business”—may further narrow the scope of permissible constructions.

...

In sum, as it stands, it appears that Section 470 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. Absent a controlling interpretation of *Section 470* by the New York Court of Appeals, this Court is left to predict how that court would construe the critical language in *Section 470*—a task, under the circumstances, we prefer to avoid until it becomes necessary for us to undertake it.

Id. at 469 (emphasis added). Reasoning that “it would be perverse for a federal court to discourage a state court from searching for ‘every reasonable construction’

of a state statute to ‘save [the] statute from unconstitutionality,’ this Court concluded:

As this case now stands, whether Section 470 survives constitutional scrutiny depends on the construction of the in-state office requirement imposed on nonresident attorneys. If the New York Court of Appeals accepts and answers our certified question(s), that answer, in all likelihood, dictates the outcome of the constitutional privileges and immunities analysis we have commenced and must complete as we decide the appeal before us.

Id. at 471 (emphasis added).

The New York Court of Appeals accepted the certified question but declined to save the statute, holding that the term “office for the transaction of law business” means an actual, physical law office and could not be read as requiring only some type of physical presence.^{1/} *Schoenefeld v. New York*, 25 N.Y.3d 22, 27-28 (2015) (“Defendants’ proffered interpretation ... finds no support in the wording of [§ 470] and would require us to take the impermissible step of rewriting the statute”).

As Judge Hall stated, “The majority now disregards the New York Court of Appeals’ decision as well as our own prior opinion which, together, constitute the law of this case.” *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *37-38 (Hall, dissenting) (citing *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d

^{1/} In response to Defendants’ argument that the court should strive to retain statute’s constitutionality when it can, Chief Judge Lippman astutely observed that “sometimes they’re hopeless” and “[w]e can’t retain them.” 02/17/15 Argmt. Tr. 6:12-19 (available at <https://www.nycourts.gov/ctapps/arguments/2015/Feb15/Transcripts/021715-39-Oral-Argument-Transcript.pdf>) (last accessed on May 5, 2016).

Cir. 1992) (“absent an intervening change in controlling law, availability of new evidence, or the need to correct a clear error or manifest injustice, a court’s decision upon a rule of law ‘should continue to govern the same issues in subsequent stages in the same case’”)); *cf. Schoenefeld*, 2016 U.S. App. LEXIS 7303, *13 (“We do not understand *McBurney* to state any new principle of law.”).

Responding to Judge Hall, the Majority brushed off this Court’s prior opinion as “at most dictum that does not bind us here,” claiming that:

Our prior panel opinion decided only to certify the question of § 470’s minimum requirements to the New York Court of Appeals in light of a statutory construction then urged by the Attorney General that might moot *Schoenefeld*’s constitutional challenge.

Schoenefeld, 2016 U.S. App. LEXIS 7303, *25, n.11 (citing *Schwabenbauer v. Bd. of Educ. of City School Dist. of City of Olean*, 777 F.2d 837, 842 (2d Cir. 1985)).

In its attempt to mischaracterize two-thirds of its prior opinion in this case as “at most dictum,” the Majority misconstrues *Schwabenbauer*. In that case, the plaintiff claimed that the “Court accepted that [her] complaint came within the purview of Title VII,” relying on the Court’s statements in a footnote of the prior opinion. The Court rejected plaintiff’s argument, reasoning:

Those statements, however, do not address the retroactive application of the 1972 Act. All we stated in footnote 5 was that the Board was subject to Title VII “at the time it notified *Schwabenbauer* of its decision to deny her tenure and terminate her employment,” which was ... almost two months after the 1972 Act became effective. We did not address the different question that we here decide: whether that Act applies retroactively to cover the Board action taken before the effective date of the Act....

In any event, the retroactivity question was not argued in prior appeal. The issue before us there was whether the district court had properly granted summary judgment in favor of Schwabenbauer. ... Thus, even if the statements in footnote 5 could be viewed as relating to the retroactivity issue, they were not necessary to or a part of our decision. They were dicta and do not bind us in this appeal.

Schwabenbauer, 777 F.2d at 841-42.

Here, unlike in *Schwabenbauer*, the question whether § 470 violates the Privileges & Immunities Clause was precisely the issue—in fact, the only issue—briefed and argued before the Court. Therefore, the Court’s prior opinion discussing § 470’s constitutionality at considerable length—and not merely in a footnote—cannot be discarded as “at most dictum” that is not binding the Court.

Also, for the Majority to reach its decision—i.e., that § 470 does not violate the Privileges and Immunities Clause—it was not necessary to certify the question to the New York Court of Appeals. A proper ground for certification is to resolve the issue of state law that may alter the outcome in a federal case. *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *39-40 (Hall, dissenting) (citing *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013), *Retail Software Servs. v. Lashlee*, 71 N.Y.2d 788, 790 (1988)); *Schoenefeld v. New York*, 748 F.3d at 471.

Here, however, there was no need for certification at all: according to the Majority Opinion, plaintiff loses no matter what – i.e., regardless of how the term “office for the transaction of law business” is defined.

b. The Majority Opinion Conflicts With the Well-Established Analysis of the Privileges and Immunities Clause Claims Set Forth in the Supreme Court’s and This Court’s Decisions.

There is no dispute that the practice of law is a privilege protected by Article IV, § 2 of U.S. Constitution. *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *11.

Thus, plaintiff’s claim should be analyzed as following:

Privileges and Immunities Clause analysis requires us to consider (1) whether a State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens, and (2) if so, whether there is sufficient justification for the discrimination. A “sufficient justification” *can be shown by a State demonstrating* (a) a substantial reason for the discrimination, and (b) a reasonable relationship between the degree of discrimination exacted and the danger sought to be averted by enactment of the discriminatory statute. The availability of less restrictive means is considered when evaluating the measure and degree of the relationship between the discrimination and state interest.

Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 94 (2 Cir. 2003) (internal citations omitted) (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218-22 (1984), *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (emphasis added)); *Bach v. Pataki*, 408 F.3d 75, 88-89 (2d Cir. 2005) (citing *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978), *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1997)).

Here, Section 470—which only applies to nonresident attorneys—clearly discriminates against nonresidents by requiring them to maintain an “office for the transaction of law business” in the State to practice law in New York. N.Y. Jud. L. § 470. As the Court of Appeals now held, the term “office for the transaction of law business” means an actual physical office space, which typically “carries with it significant expense—rents, insurance, staff, equipment,” etc. *Schoenefeld v.*

New York, 25 N.Y.3d 22, 27 (2015) (expressly rejecting defendants suggestion to interpret the term as merely requiring nonresident attorneys to have “some type of physical presence”); *Schoenefeld v. New York*, 748 F.3d 464, 468 (2d Cir. 2014).

On the other hand, § 470 does not affect New York resident attorneys in any way. In fact, as the Panel observed in its prior opinion:

...a review of [New York] laws yields no authority specifically requiring New York residents to maintain any office at all. A New York attorney, therefore, may set up her “office” on the kitchen table in her studio apartment and not run afoul of New York law.

Schoenefeld v. New York, 748 F.3d at 468.

Thus, the burden should now shift to the State to show: (1) substantial purpose exists for discrimination; (2) reasonable relationship between that purpose and office requirement; and (3) no less restrictive means is available.

This is not what happened in this case. Instead of following the precedent, the Majority placed the burden on the plaintiff to show discriminatory intent for the statute’s enactment. *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *15.

1) Based on Its Erroneous Reading of *McBurney*, the Majority Imposed a New Requirement That Plaintiff Must Show That Section 470 Was Enacted for the Protectionist Purpose.

Acknowledging that *McBurney* did not state any new principle of law, the Majority nonetheless concluded that “state laws violate the *Privileges and Immunities Clause* **only** when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.” *Schoenefeld*, 2016 U.S. App. LEXIS 7303,

*13, 32 (emphasis added). In essence, it misconstrued *McBurney* as placing the burden on the plaintiff to “allege or offer some proof of a protectionist purpose to maintain the claim” by taking its language out of the context. *See id.* at *15.

In *McBurney*, the Supreme Court granted certiorari to resolve a conflict with respect to the applicability of the Privileges and Immunities Clause to the States’ “citizens only” FOIA statutes—which are typically enacted as a means of political accountability and are not economic regulations—and not to alter or “clarify” the overall Privileges and Immunities Clause analysis:

Like Virginia, several other States have enacted freedom of information laws [] available only to their citizens. In *Lee v. Minner*, 458 F.3d 194 (2006), the Third Circuit held that this feature of [state] FOIA violated the Privileges and Immunities Clause. ***We granted certiorari to resolve this conflict.***

McBurney, 133 S. Ct. at 1714 (internal citations omitted) (emphasis added); compare with *Schoenefeld v. Schneiderman*, in which the Majority suggests that:

McBurney provides a clarification not available to the district court at the time it ruled in this case, specifically, that the *Privileges and Immunities Clause* does not prohibit state distinctions between residents and nonresidents in the abstract, but “only” those “enacted for the protectionist purpose of burdening out-of-state citizens....”^{2/}

Schoenefeld v. Schneiderman, 2016 U.S. App. LEXIS 7303, *14.

It is within this narrow context the Supreme Court stated in *McBurney* that plaintiff “does not allege—and has offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic

^{2/} Notably, this “clarification” was available when the Panel certified the question to the New York Court of Appeals. *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014).

advantage for Virginia citizens.” *McBurney*, 133 S. Ct. at 1715 (citing *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003)). In *Hillside Dairy Inc.*, it held that disparate effects of a facially nondiscriminatory statute regulating milk pricing sufficed to state a claim under the Privileges & Immunities Clause. 539 U.S. at 67.

Citing various cases where state statutes involving *economic* regulations were held unconstitutional, the Court stated: “Virginia’s FOIA differs sharply from those statutes” in that “state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power [...] may obtain an accounting from the public officials to whom they delegate the exercise of that power.” *McBurney*, 133 S. Ct. at 1715-16 (citing *Hicklin*, 437 U.S. 518 (striking down the Alaska statute containing a resident hiring preference), *United Bldg. & Constr. Trades Council of Camden Cty.*, 465 U.S. 208 (striking down “New Jersey municipal ordinance requiring that at least 40% of employees [...] be city residents”), *Toomer*, 334 U.S. 385 (striking down “a South Carolina statute imposing a \$2,500 license fee on out-of-state shrimping boats and only a \$25 fee on in-state shrimping boats” where plaintiffs alleged the statute’s purpose and effect was to exclude nonresidents while the State claimed its purpose was to conserve shrimp supply).

Again, within that context the Supreme Court then stated “the state FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making profit by

trading on information contained in state records.” *Id.* at 1716. In fact, as Chief Justice Roberts remarked during the oral argument in *McBurney*:

But this – this is not – this is not a regulation of commerce. It’s a State practice that may have an incidental effect on commerce, and the incidental effect may be disproportionate, depending on whether you’re State or local, but it’s not a regulation of commerce.

McBurney v. Young, 02/20/2013 Argt. Tr. 11:10-15 (available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-17.pdf) (last accessed on May 6, 2016).

In other words, as Judge Hall correctly stated in his dissent:

The majority stretches *McBurney*’s “incidental” language far beyond the facts of that case to support its conclusion that *any* regulation, even one that directly regulates a “well settled ... privilege protected by *Article IV, § 2*,” will pass constitutional muster so long as its discrimination against nonresidents can be characterized as “incidental.”

By requiring plaintiffs to allege a *prima facie* case of discriminatory intent, the majority, in effect, relieves the State of its burden to provide a sufficient justification for laws that discriminate against nonresidents with regard to fundamental rights....^{3/}

Schoenefeld, 2016 U.S. App. 1703, at *42-43 (Hall, dissenting) (citing *McBurney*, 133 S. Ct. at 1716, *Barnard v. Thornstenn*, 489 U.S. 546, 553 (1989)) (internal citations omitted).

In short, the Majority “misconstrues *McBurney*’s invocation of the two-step analysis” and “*McBurney* is distinguishable from this case for the simple reason

^{3/} One Court of Appeals has already rejected this very reasoning: “California urges us to read [*McBurney*] to mean that proof of a protectionist purpose always is required We cannot accept that interpretation of *McBurney*.” *Marilley v. Bonham*, 802 F.3d 958, 963-64 (9th Cir. 2015), *en banc* review petition granted *on other issues* and scheduled for rehearing, 815 F.3d 1178 (9th Cir. 2016).

that the Virginia FOIA is not an economic regulation, nor does it directly regulate the right to pursue a common calling.” *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *39, 42 (Hall, dissenting).

2) The Majority Erred in Relying on the Equal Protection Clause Cases to Support Its Holding That the Plaintiff Must Show Discriminatory Purpose to Maintain her Claim.

In his dissent, Judge Hall succinctly observed:

Tellingly, in support of this proposition the majority draws exclusively on cases addressing challenges under the *Equal Protection Clause*, for which plaintiffs must plead discriminatory intent as part of a *prima facie* case. Majority Op., ante at 13-14. The majority has not cited, nor does there exist, any case suggesting that the requirement to allege discriminatory intent as part of a *prima facie* case under the *Equal Protection Clause* also applies to Privileges and Immunities claims. Indeed, *Virginia v. Friedman*, stands for the opposite proposition. In *Friedman*, Virginia argued that its residence requirement for admission to the State’s bar on motion did not implicate the *Privileges and Immunities Clause* on the basis that, because nonresident attorneys could seek admission by taking the Virginia bar exam, “the State cannot be said to have discriminated against nonresidents as a matter of fundamental concern.” The Supreme Court rejected that argument as “quite inconsistent with our precedents,” stating that “the Clause is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents. ***This language cannot be squared with a prima facie requirement that demands something more than a showing of a disparate treatment on the face of the statute.***

Schoenefeld, 2016 U.S. App. LEXIS 7303, *45 (Hall, dissenting) (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65-66 (1988)) (emphasis added).

Failing to cite any case law to support its reliance on the Equal Protection Clause cases, the Majority also ignored the Supreme Court’s and this Court’s decisions recognizing similarities between the Privileges & Immunities Clause and

the Commerce Clause that “have much in common: they share a common origin, are ‘mutually reinforcing’” and “in some instances, the jurisprudence of one may inform that of the other.” *Bach v. Pataki*, 408 F.3d 75, 89, n.27 (2d Cir. 2005) (citing *Hicklin*, 437 U.S. at 531). In *Hicklin*, the Court invalidated the Alaska statute dictating general preference for the hiring of Alaska residents, reasoning:

Although appellants raise no *Commerce Clause* challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the *Commerce Clause* – a relationship that stems from their common origin [...] renders several *Commerce Clause* decisions appropriate support for our decision.

Hicklin, 437 U.S. at 531-32.

Similarly, in *Hillside Dairy Inc.*, the Supreme Court granted certiorari to consider “whether the individual petitioners’ claim under the *Privileges and Immunities Clause* is foreclosed because those regulations do not discriminate on their face on the basis of state citizenship or state residence.” 539 U.S. at 62.

Relying on the long-standing precedent in *Chalker*, the Court held:

... the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [petitioners’] claim.

Id. at 67 (quoting *Chalker v. Birmingham & Northwestern R. Co.*, 249 U.S. 522, 527 (1919)) (emphasis added).

In short, the plaintiff here was not required to make a *prima facie* showing of the discriminatory purpose in the enactment of the statute to maintain her claim.

3) The Majority Effectively “Rewrote” the Statute in Order to Save It From Constitutional Challenge.

Moreover, in reaching its decision, the Majority essentially “rewrote” § 470 in a non-discriminatory manner in order to save it.^{4/} Responding to the certified question, the Court of Appeals held that the term “office for the transaction of law business” means a physical office space, rejecting expressly State’s urging to interpret it as merely requiring *nonresident* attorneys to have “*some type of physical presence.*” *Schoenefeld v. New York*, 25 N.Y.3d 22, 27 (2015) (emphasis added). In disregard of the Court of Appeals’ holding, the Majority effectively rewrote § 470—something that the New York Court of Appeals refused to do—by holding that “the effects of § 470, as applied, are no different from those of a law that on its face requires *all attorneys to maintain a physical presence* in New York.” *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *27 (emphasis added).

II. THE MAJORITY OPINION INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE BECAUSE IT CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF OTHER COURTS OF APPEALS, CREATES SPLIT IN THE CIRCUITS, AFFECTS TENS OF THOUSANDS OF NONRESIDENT ATTORNEYS.

The Majority Opinion warrants the review *en banc* because it involves a question of exceptional importance because it reformulates the well-established

^{4/} The statute reads: “**§ 470. Attorneys having offices in this state may reside in adjoining state.**---A person, regularly admitted to practice as an attorney and counselor, in the courts of record of the state, whose *office for the transaction of law business* is within the state, may practice as such attorney or counselor, *although he resides in an adjoining state.*” N.Y. Jud. Law § 470 (emphases added).

law by “revers[ing] the burden-shifting test by requiring plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than requiring the State to show that the law was *not* enacted for a protectionist purpose.” *Schoenefeld*, 2016 U.S. App. LEXIS 7303, *45 (Hall, dissenting). See discussion above, pp. 7-14.

And, the Majority Opinion now conflicts with other sister states decisions that follow the Supreme Court’s precedents under the Privileges and Immunities Clause. *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1111 (3d Cir. 1997) (“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 [I]Clause”); *NAAMJP v. Castille*, 799 F.3d 216, 224-25 (3d Cir. 2015) (upholding Rule 204 as constitutional since “it treats Pennsylvania residents no differently than out-of-state residents”); *Marilley*, 802 F.3d 958, 963-64 (9th Cir. 2015).

Finally, the Majority Opinion holding that § 470’s office requirement—which even the Majority referred to as “largely vestigial”—warrants review *en banc* because it affects tens of thousands of attorneys.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests rehearing *en banc*.

Dated: May 6, 2016
Princeton, NJ

Respectfully submitted,

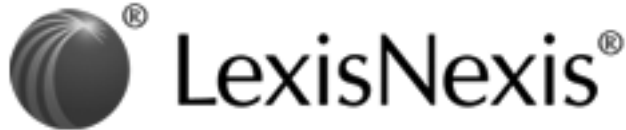
s/ Ekaterina Schoenefeld
Ekaterina Schoenefeld

APPENDIX

Schoenefeld v. Schneiderman,

2016 U.S. App. LEXIS 9303 (2d Cir. April 22, 2016)

(Opinion)



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, STATE OF NEW YORK; 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, Defendants.

Docket No. 11-4283-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2016 U.S. App. LEXIS 7303

**June 4, 2015, Argued
April 22, 2016, Decided**

SUBSEQUENT HISTORY: As Amended April 25, 2016.

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, J.) declaring unconstitutional, under the *Privileges and Immunities Clause*, a New York law requiring nonresident attorneys to maintain an "office for the transaction of law business" within New York State in order to practice law in that state's courts. *N.Y. Judiciary Law § 470*; see *U.S. Const. art. IV, § 2*. In response to a certified question from this court, the New York Court of Appeals has clarified that § 470 cannot be satisfied by anything less than a physical office, a decision that does not allow us to avoid deciding plaintiff's constitutional challenge. We here conclude that § 470 does not violate the *Privileges and Immunities Clause* [*1] because it was enacted not for a protectionist purpose to favor New York resident attorneys but, rather, to provide a means whereby nonresidents could establish a physical presence in the state akin to that of residents, thereby resolving a service

concern while allowing nonresidents to practice law in the state's courts.

Schoenefeld v. New York, 907 F. Supp. 2d 252, 2011 U.S. Dist. LEXIS 100576 (N.D.N.Y., 2011)

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The court reversed the district court's judgment invalidating *N.Y. Jud. Law § 470* because § 470, which requires nonresident bar members to maintain a physical office in New York for transacting law business, does not violate the *Privileges and Immunities Clause*, *U.S. Const. art. IV, § 2, cl. 1*, since it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law; [2]-The court held that the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, for example, a New York office, for them to establish a physical

presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern and no protectionist intent was identified.

OUTCOME: Judgment reversed; case remanded to district court with instructions.

CORE TERMS: nonresident, resident, protectionist, immunity, in-state, discriminatory, practice law, physical presence, quotation marks omitted, practice of law, residency requirement, nonprotectionist, incidental, out-of-state, discriminatory intent, certification, discriminate, residency, threshold, fundamental right, burdensome, implicate, facial, facie, practicing, disparate, proffered, ban, state law, service of process

LexisNexis(R) Headnotes

Constitutional Law > Privileges & Immunities

Legal Ethics > Practice Qualifications

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN1] The United States Court of Appeals for the Second Circuit concludes that *N.Y. Jud. Law § 470* does not violate the Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law. To the contrary, the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, for example, a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern. The Second Circuit identifies no protectionist intent in that action.

Legal Ethics > Practice Qualifications

[HN2] See *N.Y. Judiciary Law § 470* (2016).

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN3] An appellate court reviews an award of summary

judgment de novo, and will affirm if viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact. Claims turning entirely on the constitutional validity or invalidity of a statute are particularly conducive to disposition by summary judgment as they involve purely legal questions.

Constitutional Law > Privileges & Immunities

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN4] The Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, states that the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. The Clause operates to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned. In short, the Clause does not demand that a citizen of one State be allowed to carry with him into another state the privileges and immunities which come with citizenship in his state. Rather, it guarantees that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. It is toward that end that the Clause prevents a State from discriminating against citizens of other States in favor of its own. Although the Privileges and Immunities Clause speaks in terms of citizens, it is now well established that for analytic purposes citizenship and residency are essentially interchangeable.

Constitutional Law > Privileges & Immunities

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN5] The Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, is not an absolute that precludes states from ever distinguishing between citizens and noncitizens. A state need not always apply all its laws or all its services equally to citizens and noncitizens. To prevail on a Privileges and Immunities challenge, a plaintiff must demonstrate that the state has burdened nonresident activity that is sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause. Upon such a showing, the state may defend its position by demonstrating that substantial reasons exist for the discrimination and the degree of discrimination bears a

sufficiently close relation to such reasons. A court necessarily conducts these inquiries in light of the United States Supreme Court's recent admonition that constitutionally protected privileges and immunities are burdened only when challenged laws were enacted for a protectionist purpose.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Constitutional Law > Privileges & Immunities

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations

[HN6] The United States Court of Appeals for the Second Circuit does not understand *McBurney* to state any new principle of law. Nevertheless, *McBurney* provides a clarification that the Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, does not prohibit state distinctions between residents and nonresidents in the abstract, but only those enacted for the protectionist purpose of burdening out-of-state citizens with respect to the privileges and immunities afforded the state's own citizens. Nor does the Second Circuit understand *McBurney* to suggest that the disparate effects of a challenged state law are completely irrelevant to a Privileges and Immunities inquiry. As the United States Supreme Court has recognized in other contexts, burdensome effects can sometimes admit an inference of proscribed intent. What *McBurney* makes plain, however, is that it is protectionist purpose, and not disparate effects alone, that identifies the sort of discrimination prohibited by the Privileges and Immunities Clause, by contrast, for example, to the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Constitutional Law > Privileges & Immunities

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations

[HN7] The *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, regulates effects, not motives, and does not require court inquiry into reasons for enacting a law that has a discriminatory effect. Thus, consistent with *McBurney*, a plaintiff challenging a law under the Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, must allege or offer some proof of a protectionist purpose to maintain the claim. In the absence of such a showing, a Privileges and Immunities claim fails, obviating the need for a tailoring inquiry. The Clause does not require that a

State tailor its every action to avoid any incidental effect on out-of-state tradesmen.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Constitutional Law > Privileges & Immunities

Governments > Legislation > Overbreadth

[HN8] In some circumstances, a facial classification is enough, by itself, to manifest a proscribed intent. That is most apparent where the facial classification is based on an invidious factor, such as race. Facial classifications based on race are subjected to a strict scrutiny review. But precisely because the Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, is not an absolute, not every facial distinction between state residents and nonresidents will admit an inference of protectionist purpose.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Constitutional Law > Privileges & Immunities

Legal Ethics > Practice Qualifications

[HN9] The United States Supreme Court has recently clarified that state laws violate the Privileges and Immunities Clause, *U.S. Const. art. IV, § 2, cl. 1*, only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens. New York's in-state office requirement for nonresident attorneys admitted to the state's bar, *N.Y. Judiciary Law § 470*, has not been enacted for a protectionist purpose disfavoring nonresident admitted attorneys but, rather, for the nonprotectionist purpose of affording such attorneys a means to establish a physical presence in the state akin to that of resident attorneys, thereby eliminating a court-identified service-of-process concern. The effect of § 470, as applied, is no different from a neutral statute requiring all licensed New York attorneys, resident and nonresident alike, to maintain a physical presence in the state, which raises no Privileges and Immunities concern.

COUNSEL: EKATERINA SCHOENEFELD, Schoenefeld Law Firm LLC, Princeton, New Jersey, Pro se.

LAURA ETLINGER, Assistant Solicitor General (Barbara D. Underwood, Solicitor General; Andrea Oser, Deputy Solicitor General, on the brief), for [*2] Eric T. Schneiderman, Attorney General of the State of New York, Albany, New York, for Defendants-Appellants.

David B. Rubin, Esq., Metuchen, New Jersey, for Amicus Curiae The New Jersey State Bar Association, in support of Plaintiff-Appellee.

Leah M. Nicholls, Brian Wolfman, Institute for Public Representation, Washington, D.C., for Amici Curiae New York-Licensed Nonresident Attorneys, in support of Plaintiff-Appellee.

JUDGES: Before: RAGGI, HALL, CARNEY, Circuit Judges. Judge HALL dissents in a separate opinion.

OPINION BY: REENA RAGGI

OPINION

REENA RAGGI, *Circuit Judge*:

On this appeal, we must decide whether New York violates the *Constitution's Privileges and Immunities Clause*, see *U.S. Const. art. IV, § 2*, by requiring nonresident members of its bar to maintain a physical "office for the transaction of law business" within the state, when resident attorneys are not required to maintain offices distinct from their homes, *N.Y. Judiciary Law § 470*. Having now received the New York Court of Appeals' response to our certified question as to the "minimum requirements necessary to satisfy" § 470's office mandate, see *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014); *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015) (holding § 470 to require physical office), [HN1] we conclude that § 470 does not violate the *Privileges and Immunities Clause* because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law. [*3] To the contrary, the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern. We identify no protectionist intent in that action. Indeed, it is Schoenefeld who, in seeking to practice law in New York without a physical presence in the state, is looking to be treated differently from, not the same as, New York resident attorneys. Such differential treatment is not required by the *Privileges and Immunities Clause*. Accordingly, we reverse the judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*) declaring § 470's office requirement unconstitutional, see *Schoenefeld v. New*

York, 907 F. Supp. 2d 252 (N.D.N.Y. 2011), and we remand the case with instructions to enter judgment in favor of defendants on Schoenefeld's Privileges and Immunities claim.¹

1 Because Schoenefeld has not appealed the district court's February 8, 2010 dismissal of her Equal Protection and *Commerce Clause* challenges to § 470, dismissal of her remaining Privileges and Immunities claim should conclude this litigation.

I. Background

Because the facts and procedural [*4] history underlying this appeal are set forth in our prior panel opinion with which we assume familiarity, we reiterate them here only insofar as necessary to explain our decision to reverse and remand.

A. The Privileges and Immunities Clause Challenge to *N.Y. Judiciary Law § 470*

Plaintiff Ekaterina Schoenefeld, a citizen and resident of New Jersey, is licensed to practice law in New Jersey, New York, and California. She maintains an office in New Jersey, but not in New York. She asserts that she has declined occasional requests to represent clients in New York state courts to avoid violating *N.Y. Judiciary Law § 470*, which states as follows:

[HN2] A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

N.Y. Judiciary Law § 470 (McKinney 2016) (emphasis added). Schoenefeld seeks a judicial declaration that the office requirement imposed by § 470 on nonresident members of the New York bar violates the *Constitution's Privileges and Immunities Clause* by infringing on nonresidents' right to practice law in New York. The district court agreed and, on the parties' cross-motions for summary judgment, declared § 470 unconstitutional. See *Schoenefeld v. New York*, 907 F. Supp. 2d at 262-66. This timely appeal followed. [*5]

B. This Court's Certification to the New York Court of

Appeals

In appealing the district court's ruling, New York State's Attorney General, on behalf of all defendants, initially argued that this case presented no *Privileges and Immunities Clause* concern because § 470's office requirement could be construed to demand only "an address for accepting personal service," which could be satisfied by a designated agent. *Schoenefeld v. New York*, 748 F.3d at 467. Alternatively, the Attorney General argued that, even if § 470 did treat nonresident attorneys differently from resident attorneys, it did not violate the *Privileges and Immunities Clause* because the burden imposed on nonresidents was "incidental" and substantially related to New York's sufficient state interest in the service of legal papers. *Id.*

Seeking to avoid a possibly unnecessary constitutional question, see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-79, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (explaining that, in confronting constitutional challenge to statute, court must first determine if any reasonable construction "will contain the statute within constitutional bounds," and emphasizing that "[w]arnings against premature adjudication of constitutional questions bear heightened attention" where federal court is asked to invalidate state statute), but uncertain as to whether New York's highest court would, in fact, construe § 470 as urged [*6] by defendants, see *Schoenefeld v. New York*, 748 F.3d at 468-69 (observing that New York's lower courts had never interpreted § 470 to be satisfied by less than physical office space), this court certified the following question to the New York Court of Appeals:

Under *New York Judiciary Law* § 470, which mandates that a nonresident attorney maintain an "office for the transaction of law business" within the state of New York, what are the minimum requirements necessary to satisfy that mandate?

Id. at 471.

The Court of Appeals accepted the certification and, upon review, held that § 470 "requires nonresident attorneys to maintain a physical office in New York." *Schoenefeld v. State*, 25 N.Y.3d at 25, 6 N.Y.S.3d at 222. In so ruling, the court observed that the statute, initially

enacted in 1862, "appears to presuppose a residency requirement for the practice of law in New York State," to which "[i]t then makes an exception, by allowing nonresident attorneys to practice law if they keep an 'office for the transaction of law business'" in New York. *Id.* at 27, 6 N.Y.S.3d at 223. The Court acknowledged that the 1862 statute had linked the office requirement to service of process, so that "service, which could ordinarily be made upon a New York attorney at his residence, could be made upon the nonresident attorney through mail addressed to his office." *Id.*, 6 N.Y.S.3d at 224. But, the two statutory [*7] parts were severed in 1909, with the office requirement codified at § 470 making no reference to service. See *id.* at 27-28, 6 N.Y.S.3d at 224. In these circumstances, the Court of Appeals concluded that the term "office," as used in § 470, could not be construed to mean only an address or agent sufficient for the receipt of service. Rather, the plain meaning of "office," particularly when joined with "the additional phrase 'for the transaction of law business,'" requires "nonresident attorneys to maintain a physical office in New York." *Id.* at 25, 28, 6 N.Y.S.3d at 222, 224.

The Court of Appeals acknowledged a legitimate state interest in ensuring that personal service can be made on nonresident attorneys practicing in New York courts. But, in construing the statute, it observed that the "logistical difficulties" with service at the time the office requirement was enacted had largely been overcome by state law authorizing "several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email," *id.* at 28, 6 N.Y.S.3d at 224 (citing *N.Y. C.P.L.R. 2103(b)* (McKinney 2015)), as well as the court's own rule conditioning the admission of nonresident attorneys without full-time employment in New York upon their designation of "the clerk of the Appellate Division in [*8] their department of admission as their agent for the service of process," *id.*, 6 N.Y.S.3d at 224-25 (citing *N.Y. Comp. Codes R. & Regs. tit. 22, § 520.13(a)* (2015)). Thus, the office requirement could not be construed to require only an address for service. The term was properly understood to require a physical premises.

Because the Court of Appeals' response to our certified question does not moot Schoenefeld's constitutional challenge to § 470, we proceed to address her claim and conclude that it fails on the merits.²

2 Our dissenting colleague, Judge Hall, suggests that such a conclusion means it was unnecessary--and therefore improper--to certify the question of § 470's minimum requirements to the New York Court of Appeals. See Dissenting Op., post at 4-5, 6 n.1. This court, however, has recognized certification to be appropriate where a state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Nicholson v. Scopetta*, 344 F.3d 154, 168 (2d Cir. 2003) (internal quotation marks omitted) (certifying state-law questions of statutory interpretation to New York Court of Appeals that would "render unnecessary, or at least substantially modify, the federal constitutional question"). That is this case. As our prior panel opinion explained, [*9] New York's Attorney General there argued that § 470 could be read to require only an address for accepting personal service, under which reading the *Privileges and Immunities Clause* would not be "implicate[d]." *Schoenefeld v. New York*, 748 F.3d at 467; see also *id.* at 469 (acknowledging that Supreme Court has "urged the federal courts of appeals to use certification in order to avoid deciding constitutional questions unnecessarily or prematurely" (internal quotation marks omitted)). Further, the Attorney General specifically requested certification if this court could not predict whether the New York Court of Appeals would adopt this reading. See *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153-54 (2d Cir. 2001) (recognizing that "certification request merits more respectful consideration" where, among other things, request was made by Attorney General, who advanced possible saving construction of state statute (internal quotation marks and brackets omitted)). *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013), cited in the dissent, is not to the contrary, as we there certified a question of statutory interpretation to the New York Court of Appeals where, as here, one possible answer would resolve the litigation, while an alternative statutory construction would require this court "to decide the constitutional question." *Id.* at 143. Nor is a proper certification rendered improper because the state court [*10] does not approve the possible statutory construction that would have avoided or

minimized the constitutional challenge.

II. Discussion

A. Standard of Review

[HN3] We review an award of summary judgment de novo, and will affirm if "viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact." *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 25 (2d Cir. 2015) (internal quotation marks and citation omitted). "Claims turning entirely on the constitutional validity or invalidity of a statute," such as the Privileges and Immunities challenge here, "are particularly conducive to disposition by summary judgment as they involve purely legal questions." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 93 (2d Cir. 2003).

B. The Privileges and Immunities Clause

The *Privileges and Immunities Clause* [HN4] states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *U.S. Const. art. IV, § 2, cl. 1*. The Clause operates to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L. Ed. 357 (1868); see *Bach v. Pataki*, 408 F.3d 75, 88 (2d Cir. 2005), overruled on other grounds by *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).³ In short, the Clause does not demand that a citizen of one State be allowed to carry with him into another state the privileges and immunities which come with citizenship in his state. Rather, it guarantees [*11] "that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978) (internal quotation marks omitted). It is toward that end that the Clause "prevents a State from discriminating against citizens of other States in favor of its own." *Id.* (internal quotation marks omitted).

3 Although the *Privileges and Immunities Clause* speaks in terms of citizens, it is now well established that "for analytic purposes citizenship and residency are essentially interchangeable." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988).

The *Privileges and Immunities Clause*, [HN5] however, is "not an absolute" that precludes states from ever distinguishing between citizens and noncitizens. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 67, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988); see *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. at 383 (collecting cases and observing that state need not "always apply all its laws or all its services equally" to citizens and noncitizens). To prevail on a Privileges and Immunities challenge, a plaintiff must demonstrate that the state has burdened nonresident activity that is "sufficiently basic to the livelihood of the Nation as to fall within the purview of the *Privileges and Immunities Clause*." *Supreme Court of Va. v. Friedman*, 487 U.S. at 64 (internal quotation marks and alterations omitted). Upon such a showing, the state may defend its position by demonstrating that "substantial reasons exist for the discrimination and the degree of discrimination [*12] bears a sufficiently close relation to such reasons." *Id.* at 67; accord *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d at 94. A court necessarily conducts these inquiries in light of the Supreme Court's recent admonition that constitutionally protected privileges and immunities are burdened "only when [challenged] laws were enacted for [a] protectionist purpose." *McBurney v. Young*, 133 S. Ct. 1709, 1715, 185 L. Ed. 2d 758 (2013).

In *McBurney*, which was decided after the district court ruled in this case, a nonresident plaintiff challenged Virginia's Freedom of Information Act ("FOIA") for hampering his ability to pursue a common calling. He alleged that the law, by allowing only Virginia citizens to inspect and copy public records, abridged his ability to engage in the business of "request[ing] real estate tax records on clients' behalf from state and local governments." *Id.* at 1714-15. The Supreme Court acknowledged that the ability to pursue a common calling is protected by the *Privileges and Immunities Clause*. See *id.* at 1715. Nevertheless, it identified no unconstitutional burden because plaintiff had failed to "allege," and "ha[d] offered no proof," that the statute "was enacted in order to provide a competitive economic advantage for Virginia citizens." *Id.* To the contrary, the statute was enacted with the "distinctly nonprotectionist aim" of allowing "those who ultimately [*13] hold sovereign power," i.e., the citizens of Virginia, to "obtain an accounting from the public officials to whom they delegate the exercise of that power." *Id.* at 1716. The Supreme Court thus concluded that, even if the statute had "the incidental effect of preventing citizens of other States from making a profit

by trading on information contained in state records," in the absence of a showing of discriminatory purpose to favor state citizens, plaintiff could not pursue a Privileges and Immunities claim. *Id.*⁴

4 While "incidental" can mean "minor," the context in *McBurney* suggests that the Supreme Court used the word to mean something occurring "by chance or without intention or calculation." Webster's Third New International Dictionary 1142 (1986). Indeed, the Court has used the word in this manner in other discrimination cases. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (rejecting equal protection challenge for failure plausibly to plead discriminatory intent, observing that it was "no surprise" that policy "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims" (emphases added)).

[HN6] We do not understand *McBurney* to state any new principle of law. Nevertheless, [*14] *McBurney* provides a clarification not available to the district court at the time it ruled in this case, specifically, that the *Privileges and Immunities Clause* does not prohibit state distinctions between residents and nonresidents in the abstract, but "only" those "enacted for the protectionist purpose of burdening out-of-state citizens" with respect to the privileges and immunities afforded the state's own citizens. 133 S. Ct. at 1715; see *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. at 380-81.

Nor do we understand *McBurney* to suggest that the disparate effects of a challenged state law are completely irrelevant to a Privileges and Immunities inquiry. As the Supreme Court has recognized in other contexts, burdensome effects can sometimes admit an inference of proscribed intent. Cf. *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (noting relevancy of disproportionate impact to racially discriminatory intent). What *McBurney* makes plain, however, is that it is protectionist purpose, and not disparate effects alone, that identifies the sort of discrimination prohibited by the *Privileges and Immunities Clause*, by contrast, for example, to the *Commerce Clause*. See generally *McBurney v. Young*, 133 S. Ct. at 1720 (separately analyzing challenged law under dormant *Commerce Clause*); cf. *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1801 n.4, 191

L. Ed. 2d 813 (2015) [HN7] (observing that "*Commerce Clause* regulates effects, not motives," and does not require court inquiry into "reasons for enacting a law that has a discriminatory effect"). [*15] ⁵ Thus, consistent with *McBurney*, a plaintiff challenging a law under the *Privileges and Immunities Clause* must allege or offer some proof of a protectionist purpose to maintain the claim. In the absence of such a showing, a *Privileges and Immunities* claim fails, obviating the need for a tailoring inquiry. See *McBurney v. Young*, 133 S. Ct. at 1716 (explaining that "Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen").⁶

⁵ *McBurney* cannot be cabined as Judge Hall urges, to *Privileges and Immunities* challenges to non-economic legislation. See Dissenting Op., post at 9-10. Although Virginia's FOIA was not an economic regulation, *McBurney's* *Privileges and Immunities* analysis did not turn on that distinction but, rather, on the plaintiff's failure to adduce proof of protectionist purpose. Indeed, the Court there held that "the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment." *McBurney v. Young*, 133 S. Ct. at 1716 (emphasis added).

⁶ *McBurney* did not specify at what step of the traditional two-step inquiry plaintiff must carry this protectionist-purpose burden. The Ninth Circuit recently concluded that protectionist purpose is properly considered at the second step of [*16] inquiry. See *Marilley v. Bonham*, 802 F.3d 958, 964 (9th Cir. 2015). But the case is now awaiting en banc review. See 815 F.3d 1178 (9th Cir. 2016) (mem.). In any event, the panel conclusion in *Marilley* is not obvious because, at the second step of inquiry, the burden shifts to the defendants, see *Supreme Court of Va. v. Friedman*, 487 U.S. at 67, and *McBurney* emphasized the nonresident plaintiff's failure to plead or offer proof of a protectionist purpose for Virginia's FOIA, see 133 S. Ct. at 1715-16; cf., e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (holding, in Equal Protection context, that if plaintiff demonstrates that challenged decision was "motivated in part by a racially discriminatory purpose," burden shifts to government to establish that "same decision

would have resulted even had the impermissible purpose not been considered"). For this reason, we cannot readily assume, as our dissenting colleague does, that the Supreme Court's discussion of plaintiff's failure necessarily occurred at the second step of the traditional inquiry. See Dissenting Op., post at 8-9. However, we need not here conclusively decide at what step plaintiff must adduce proof of a protectionist purpose because, in any event, Schoenefeld's failure to carry this burden here defeats her *Privileges and Immunities* claim.

With these principles in mind, we consider Schoenefeld's challenge to [*17] § 470.

C. Schoenefeld Has Adduced No Proof that § 470 Was Enacted for a Protectionist Purpose

Schoenefeld asserts that § 470 violates the *Privileges and Immunities Clause* both on its face and as applied. Insofar as the law, both on its face and as applied, pertains to the practice of law, the parties agree that § 470 implicates a privilege protected by the *Privileges and Immunities Clause*. See *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 283, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); accord *Supreme Court of Va. v. Friedman*, 487 U.S. at 65. The parties also do not dispute that § 470 imposes a physical office requirement on nonresident attorneys that does not apply to resident attorneys, who may use their homes as their offices. See *Schoenefeld v. New York*, 748 F.3d at 468 (discussing New York precedent recognizing that resident New York attorney may use home as office).

[HN8] In some circumstances, a facial classification is enough, by itself, to manifest a proscribed intent. This is most apparent where the facial classification is based on an invidious factor, such as race. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227-36, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (subjecting facial classifications based on race to strict scrutiny review). But precisely because the *Privileges and Immunities Clause* is not an absolute, not every facial distinction between state residents and nonresidents will admit an inference of protectionist purpose. See *Supreme Court of Va. v. Friedman*, 487 U.S. at 67. Indeed, in *McBurney*, the Supreme Court did not find the Virginia FOIA's facial distinction between residents and nonresidents [*18] sufficient to admit an inference of protectionist purpose, particularly in light of statutory text and legislative

history to the contrary. We reach the same conclusion with respect to § 470.

In reaching that conclusion we look, as the *McBurney* Court did with the Virginia FOIA, to the purpose of § 470.⁷ That statute's office requirement has its origins in an 1862 predecessor law, Chapter 43, see 1862 N.Y. Laws 139, which was enacted to reverse a court ruling that barred a licensed New York attorney who had moved to New Jersey from further practicing in New York because it might be difficult, if not impossible, to serve him with New York legal process. See *Richardson v. Brooklyn City & Newtown R.R.*, 22 How. Pr. 368 (N.Y. Sup. Ct. Feb. 1, 1862).⁸ The month after that decision, the New York State legislature enacted Chapter 43, making clear that such a nonresident lawyer could practice law in New York, as long as he maintained an office in the state, which office the law designated an accepted site for service, thereby eliminating the concern raised in *Richardson*. As this history demonstrates, the in-state office requirement was not enacted for the protectionist purpose of burdening nonresident attorneys in practicing law in New York. Rather, it was enacted to ensure that every licensed [*19] New York lawyer, whether a state resident or not, could practice in the state by providing a means for the nonresident attorney to establish a physical presence in the state (and therefore place for service) akin to that of a resident attorney. A statute enacted for such a nonprotectionist purpose is not vulnerable to a Privileges and Immunities challenge. See *McBurney v. Young*, 133 S. Ct. at 1715.

7 Because the policy underlying the Virginia FOIA was codified as part of the statutory text, the Supreme Court relied on the statute's plain language to determine its purpose. See *McBurney v. Young*, 133 S. Ct. at 1715 (quoting *Va. Code Ann.* § 2.2-3700(B) (2011)).

8 The court in *Richardson* explained its concerns as follows:

Section 409 of the Code regulates the manner of serving papers. It provides that service may be made upon an attorney at his office, by leaving the paper with the person in charge; or if there be no person in the office, by leaving it in a conspicuous place in the office; and if the office be not open to

admit of such service, by leaving it at the attorney's residence with some person of suitable age and discretion. These various provisions, and especially the latter, would be rendered nugatory if attorneys who resided out of the state were permitted to practice. An attorney might keep [*20] his office closed and empty, and, if he had no residence within the state, might entirely evade the service of papers, and baffle his adversary and the court.

Id. at 370.

In 1877, Chapter 43's office requirement and office service authorization were codified at § 60 of New York's new Code of Civil Procedure. See *Schoenefeld v. State*, 25 N.Y.3d at 27, 6 N.Y.S.3d at 224. In a 1909 recodification, however, the two provisions were divided, with the service part remaining at § 60, while the office requirement became § 470. As the New York Court of Appeals observed, the latter requirement has remained virtually unchanged to the present, while state law and court rules now authorize service by various means in addition to home and office. See *id.* at 28, 6 N.Y.S.3d at 224. But even if § 470's office requirement is now largely vestigial as a means for ensuring service, the fact remains that the law was enacted for that nonprotectionist purpose, and *Schoenefeld* has adduced no evidence of a protectionist intent to afford some economic advantage to resident New York lawyers.

In urging otherwise, *Schoenefeld* argues that Chapter 43 must be viewed in context, as an exception to what was then New York's general ban on nonresident attorneys. The argument fails because *Schoenefeld* has not been burdened by that general [*21] ban, which was invalidated in 1979. See *In re Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). Further, she offered no proof that the office requirement was enacted to further the general ban so as to admit an inference of protectionist intent. Rather, as just noted, the office requirement was enacted as an exception to the ban, ensuring an in-state place of service so that, once admitted, nonresident New York lawyers could practice in the state's courts on functionally the same terms as resident lawyers.

No more can a protectionist purpose be inferred from the 1877 and 1909 recodifications of the office requirement or from New York's failure thereafter to repeal § 470. After the New York Court of Appeals struck down the state's general ban on the admission of nonresident lawyers, see *In re Gordon*, 48 N.Y.2d at 269, 422 N.Y.S.2d at 642-43, the legislature "amended several provisions of the Judiciary Law and the CPLR to conform to that holding," *Schoenefeld v. State*, 25 N.Y.3d at 28, 6 N.Y.S.3d at 224. Schoenefeld offers no evidence that anyone identified a need to repeal § 470 as part of that process, much less that the legislature thereafter refused to do so for the protectionist purpose of favoring resident attorneys. See *McBurney v. Young*, 133 S. Ct. at 1715.⁹ Where a legislature thus manifests its readiness to conform its laws to the *Privileges and Immunities Clause*, a plaintiff must point to more than a failure to amend [*22] or repeal a statute enacted for a nonprotectionist purpose to demonstrate that the law is being maintained for a protectionist purpose.¹⁰ The subsequent availability of other means of service warrants no different conclusion because, in the absence of some showing of protectionist purpose, a state need not demonstrate that its laws are narrowly tailored to a legitimate purpose. See *id.* at 1716 (rejecting Privileges and Immunities claim for failure to demonstrate protectionist purpose without conducting tailoring inquiry).

9 As Judge Hall notes, the legislature did propose an amendment to § 470 in 1986 that was not enacted. See Dissenting Op., post at 20 n.11. But that amendment would still have "mandate[d] that a nonresident attorney have a law office in [New York] before appearing as an attorney of record in any action or proceeding in a court [in the state]." J.A. 132. The amendment's proponents explained that while New York could not limit bar membership to state residents, "it could act to insure the quality of its Bar by adopting reasonable measures that would have special regulatory effect on nonresident attorneys." *Id.* Insofar as Judge Hall contends that the amendment would have permitted nonresident attorneys [*23] without an office in New York to practice in the state so long as they did not appear as attorneys of record, see Dissenting Op., post at 20 n.11, that conclusion appears grounded not in the amendment's text, but in pro hac vice rules existing to this day. See *N.Y. Comp. Codes R. & Regs. tit. 22, § 520.11* (2016) (permitting member

of bar of another state to be admitted pro hac vice provided that, inter alia, attorney is associated with member in good standing of New York bar "who shall be the attorney of record in the matter"); J.A. 133 (explaining that proposed 1986 amendment to § 470 would not "unduly burden[]" nonresident attorney who was "unwilling or unable to maintain" an in-state office because that attorney could practice "so long as local counsel c[ould] be found to appear as attorney of record"). 10 A recent statutory amendment and a newly-promulgated rule of the New York Court of Appeals, cited to us by the parties in *Fed. R. App. P. 28(j)* letters, further indicate that New York is not pursuing a protectionist purpose in regulating the practice of law. See *N.Y. C.P.L.R. 2103(b)(2)* (McKinney 2016) (approving service by mail "made from outside the state"); *N.Y. Comp. Codes R. & Regs. tit. 22, § 523.2* (2016) (permitting lawyer not admitted in New York to engage in temporary practice of law within state provided, among other [*24] things, that lawyer is licensed to practice in another state or even "a non-United States jurisdiction").

Further, this is not a case where the alleged burdensome effects of the challenged statute admit an inference of protectionist purpose.¹¹ While § 470's office requirement expressly pertains only to nonresident attorneys, the requirement serves, as we have already observed, to place admitted resident and nonresident attorneys on an equal footing, not to favor the former over the latter. To practice law in New York, every attorney admitted to its bar must have a presence in the state in the form of a physical premises.¹² The fact that a nonresident attorney will have to establish that presence by leasing an office, while a resident attorney can use his home, does not unduly burden the nonresident. Not only is the expense of a New York office likely to be less than the expense of a New York home, but Schoenefeld has adduced no evidence indicating that significant numbers of resident New York attorneys in fact practice from their homes rather than from offices. Indeed, decisions from sister circuits suggest otherwise. Cf. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1038 (10th Cir. 2009) (observing that, although trust statute would permit Utah attorneys to [*25] use home as requisite place of business within state, it was hardly apparent that many would wish to do so); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1107-08 (3d Cir. 1997) (noting lack of

evidence that, in New Jersey, attorneys practice from their homes).

11 The law of the case doctrine does not bar us from reaching this conclusion because contrary to our dissenting colleague's suggestion, see Dissenting Op., post at 3-5, 22-23, neither our prior panel opinion nor the New York Court of Appeals' response thereto conclusively decided the issue. See *DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992). Our prior panel opinion decided only to certify the question of § 470's minimum requirements to the New York Court of Appeals in light of a statutory construction then urged by the Attorney General that might moot Schoenefeld's constitutional challenge. In this context, our observation that, if construed to require a physical office, § 470 imposed a "significant expense" on nonresident attorneys, *Schoenefeld v. New York*, 748 F.3d at 468, is at most dictum that does not bind us here, see *Schwabenbauer v. Bd. of Educ. of City School Dist. of City of Olean*, 777 F.2d 837, 842 (2d Cir. 1985) (concluding that statements in prior opinion in same case were "not necessary to or a part of" prior decision and were, therefore, non-binding dicta). Meanwhile, the New York Court of Appeals held only that § 470 required nonresident attorneys to maintain a physical office [*26] in the state. See *Schoenefeld v. State*, 25 N.Y.3d at 26-27, 6 N.Y.S.3d at 223.

12 Thus, this case is not akin to *Friedman and Piper*, cited by the dissent. See Dissenting Op., post at 21, 24 (citing *Supreme Court of Va. v. Friedman*, 487 U.S. at 70 (concluding that Virginia rule permitting only residents to be admitted to bar on motion, while nonresidents were required to take and pass bar examination, violated *Privileges and Immunities Clause*); *Supreme Court of N.H. v. Piper*, 470 U.S. at 288 (holding that New Hampshire rule excluding nonresidents from bar violated *Clause*)).

Schoenefeld nevertheless contends that § 470 is unconstitutional because the statute, as applied, requires her to incur the costs of a New York office when she is already incurring the costs of her New Jersey home and office. The flaw in this argument is that Schoenefeld's New Jersey expenses are not a product of New York law. New York can be held to account under the *Privileges*

and *Immunities Clause* only for the condition it imposes on Schoenefeld to practice law in the state, that is, the leasing of an office. As noted, Schoenefeld fails to show that the burden on a nonresident of maintaining an office in New York is greater than the burden on a resident of maintaining a home (and frequently a home and office) in New York. In any event, the *Privileges and Immunities Clause* "does not promise nonresidents that it will be as easy for [them] as for residents to comply [*27] with a state's law." *Schoenefeld v. New York*, 748 F.3d at 467 (quoting *Kleinsmith v. Shurtleff*, 571 F.3d at 1044-45 (observing that "typically it is harder for a nonresident to conduct a business or a profession in a state than it is for a resident")). It promises only that state laws will not differentiate for the protectionist purpose of favoring residents at the expense of nonresidents. See *McBurney v. Young*, 133 S. Ct. at 1715. The effects resulting from § 470's application to Schoenefeld manifest no such protectionist intent.

Indeed, the effects of § 470, as applied, are no different from those of a law that on its face requires all attorneys to maintain a physical presence in New York. Sister circuits have upheld such statutes against *Privileges and Immunities* challenges.

For example, *Kleinsmith v. Shurtleff* involved a *Privileges and Immunities* challenge to a Utah statute requiring "all attorneys who act as trustees of real-property trust deeds in Utah to 'maintain[] a place within the state.'" 571 F.3d at 1035 (alteration in original) (quoting *Utah Code Ann. § 57-1-21(1)(a)(i)* (2009)). Plaintiff argued that the law discriminated against nonresidents because residents could use their homes as the specified "place within the state," while nonresidents would need to lease offices. *Id.* at 1044. The Tenth Circuit, however, held that the law was neutral because it equally [*28] required all trustees to have a physical presence in the state. See *id.* at 1044-47. In reaching this conclusion, the court relied on the statute's lack of facial classification between residents and nonresidents. See *id.* at 1046. But insofar as plaintiff complained of a disparate impact as applied, the court held it "irrelevant to the [*Privileges and Immunities*] *Clause* whether the practical effect of the maintain-a-place requirement . . . burdens nonresidents disproportionately." *Id.* at 1047.

Similarly, in *Tolchin v. Supreme Court of New Jersey*, the Third Circuit upheld a New Jersey law requiring all attorneys to maintain a "bona fide office"

within the state, while recognizing that only resident attorneys could use their homes to satisfy the requirement. *111 F.3d at 1107-08*. As in *Kleinsmith*, the court identified no Privileges and Immunities Clause violation because the law "similarly affect[s] residents and nonresidents. Resident and nonresident attorneys alike must maintain a New Jersey office." *Id. at 1113*.¹³

13 New Jersey has since eliminated its physical office requirement, while continuing to impose various conditions that may most easily be satisfied through an office. See *N.J. R. Ct. 1:21-1(a)(1) (2015)* ("An attorney need not maintain a fixed physical location for the practice of law, [*29] but must structure his or her practice in such a manner as to assure, as set forth in *RPC 1.4*, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions . . . that may arise out of the practice of law and activities related thereto."). We need not here consider whether New York might do the same because, absent a protectionist purpose, the conditions imposed by a state even on nonresidents pursuing a profession within its borders do not implicate the *Privileges and Immunities Clause* so as to require tailoring analysis. See *McBurney v. Young*, *133 S. Ct. at 1716*.

While the laws at issue in these two cases did not facially classify on the basis of residence, to the extent Schoenefeld complains of the burdensome effects of § 470 as applied, facial classification is irrelevant. The effects of § 470 and the laws at [*30] issue in *Kleinsmith* and *Tolchin* are virtually identical. The critical question, then, is whether a law that effectively requires nonresident attorneys to maintain a physical presence in New York akin to that already maintained by resident attorneys unduly burdens the former's ability to practice law. Like the Third and Tenth Circuits, we conclude that it does not. The conclusion finds further support in

dictum in *Supreme Court of Virginia v. Friedman*, wherein the Supreme Court recognized that an in-state office requirement could serve as a nonprotectionist alternative to residency in safeguarding state interests respecting the practice of law. See *487 U.S. at 70* (invalidating residency condition for admission on motion to bar and observing that office requirement adequately protected state interest in limiting such admissions to full-time practitioners); see generally *Newdow v. Peterson*, *753 F.3d 105, 108 n.3 (2d Cir. 2014)* (acknowledging "obligation to accord great deference to Supreme Court dicta, absent a change in the legal landscape" (internal quotation marks omitted)).¹⁴

14 *Frazier v. Heebe*, *482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987)*, cited by Judge Hall, is not to the contrary. See Dissenting Op., post at 17 & n.9. In there concluding that the United States District Court for the Eastern District of Louisiana [*31] could not impose an in-state office requirement for admission to its bar, the Supreme Court relied on its supervisory authority over local federal rules and expressly declined to reach the Privileges and Immunities challenge. See *Frazier v. Heebe*, *482 U.S. at 645, 647 n.7* (explaining that Court's supervisory authority permits it to intervene to protect integrity of federal system, whereas "authority over state-court bars is limited to enforcing federal constitutional requirements" (emphasis added)); see also *id.* (stating that rules differentiating between resident and nonresident attorneys are "more difficult to justify in the context of federal-court practice than they are in the area of state-court practice").

What Schoenefeld in fact seeks through this action is not to practice law in New York on the same conditions as a resident attorney who by virtue of home (or home and office) maintains a physical presence in the state. Rather, she seeks to practice law on different terms, specifically, without maintaining a physical presence in the state. The *Privileges and Immunities Clause* proscribes laws that favor residents over nonresidents in their pursuit of a common calling. It does not mandate that nonresidents be allowed to practice law in a state on terms different [*32] from those applicable to residents.

Accordingly, whether Schoenefeld challenges § 470 on its face or as applied, her Privileges and Immunities

Clause claim fails because she has not demonstrated that the law was enacted for or serves the protectionist purpose of favoring resident New York attorneys and disfavoring nonresident attorneys in practicing law in the state's courts. See *McBurney v. Young*, 133 S. Ct. at 1715. We therefore reverse the district court decision declaring § 470 violative of the *Privileges and Immunities Clause*.

III. Conclusion

To summarize, we conclude as follows:

1. [HN9] The Supreme Court has recently clarified that state laws violate the *Privileges and Immunities Clause* "only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." *McBurney v. Young*, 133 S. Ct. at 1715.

2. New York's in-state office requirement for nonresident attorneys admitted to the state's bar, *N.Y. Judiciary Law § 470*, was not enacted for a protectionist purpose disfavoring nonresident admitted attorneys but, rather, for the nonprotectionist purpose of affording such attorneys a means to establish a physical presence in the state akin to that of resident attorneys, thereby eliminating a court-identified service-of-process concern.

3. Schoenefeld has offered no proof of an animating protectionist purpose, either on the face of the statute or inferred from its effects [*33] as applied. Indeed, the effect of § 470, as applied, is no different from a neutral statute requiring all licensed New York attorneys, resident and nonresident alike, to maintain a physical presence in the state, which raises no *Privileges and Immunities* concern.

4. Schoenefeld cannot point to the expenses of her practice in New Jersey, not required by New York law, to pursue a *Privileges and Immunities* challenge to § 470 in the absence of any proof that that statute's in-state office requirement was enacted for a protectionist purpose.

Accordingly, we REVERSE the district court's judgment invalidating § 470, and we REMAND the case with instructions to deny Schoenefeld's motion for summary judgment and to award judgment in favor of defendants.

DISSENT BY: HALL

DISSENT

HALL, *Circuit Judge*, dissenting:

The majority holds that a New York statute that discriminates, on its face, against nonresident attorneys--burdening them with the expense of maintaining an office in New York while exempting resident attorneys from the same requirement--does not offend the *Privileges and Immunities Clause of Article IV, § 2 of the Constitution* because, in the majority's view, the plaintiff has failed to prove that the statute evinces a "protectionist" intent. In doing so, the majority injects an entirely novel [*34] proposition into our *Privileges and Immunities Clause* jurisprudence: that a State's explicit discrimination against nonresidents with regard to a fundamental right is constitutionally unobjectionable unless the nonresident makes out a *prima facie* case of discriminatory intent. Such a holding reverses the State's burden of demonstrating that it has a substantial interest justifying the discrimination and that the means chosen bear a close and substantial relation to that interest. Even under the majority's reformulation of our settled law, however, Schoenefeld has established that the New York statute has protectionist aims, and the State's proffered justifications for the discrimination fail to survive scrutiny. I respectfully dissent.

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, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (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 [*35] 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, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (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 nonresidents bears a substantial relationship to the State's objective." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).

On its face, *New York Judiciary Law § 470* discriminates against nonresident attorneys with regard to the practice of law, long recognized by the Supreme Court as a "fundamental right" subject to protection under the *Privileges and Immunities Clause*. *Id.* at 281. As we explained in our prior opinion in this case, *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014), and the New York Court of Appeals unanimously agreed after we certified to it a question, *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), *Section 470* draws a distinction between attorneys who are residents of New York and those who are not. The statute imposes no specific requirement on resident attorneys to maintain a *bona fide* office, thus permitting them to set up an "office" on the kitchen table of their studio [*36] apartments if so desired. *Schoenefeld*, 748 F.3d at 468. Nonresident attorneys, however, are required to maintain an "office for the transaction of law business" within the State. *N.Y. Judiciary Law § 470*. We recognized that "[t]his additional obligation carries with it significant expense--rents, insurance, staff, equipment *inter alia*--all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one." *Schoenefeld*, 748 F.3d at 468. Absent a controlling state decision that an "office for the transaction of law business," § 470, meant something other than a *bona fide* office, we concluded that, "as it stands, it appears that *Section 470* 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 nonresident attorneys implicate the *Privileges and Immunities Clause*." *Id.* at 469.

New York argued to us, however, that the statute could be interpreted as requiring no more than a P.O. box or designated agent for service of process, lessening the burden on nonresident attorneys considerably and making *Section 470* more likely to survive scrutiny. *Id.* While our own review of New York law indicated that a designated physical office space was required, we recognized that the question had not been spoken to by the New [*37] York Court of Appeals, and we certified to that court the question: "Under *New York Judiciary Law § 470*, which

mandates that a nonresident attorney maintain an 'office for the transaction of law business' within the state of New York, what are the minimum requirements necessary to satisfy that mandate?" *Id.* at 471. In doing so, we represented that the Court of Appeals' answer would, "in all likelihood, dictate[] the outcome of the constitutional privileges and immunities analysis we have commenced and must complete as we decide the appeal before us." *Id.* The Court of Appeals accepted certification and graciously took time away from its own busy docket to unanimously answer that § 470 required the nonresidents maintain a physical office space. *Schoenefeld*, 25 N.Y.3d at 26, 6 N.Y.S.3d at 223. As we had suspected, maintaining an address or a designated agent for service would not satisfy the requirements of *Section 470*. *See id.*

The majority now disregards the New York Court of Appeals' decision as well as our own prior opinion which, together, constitute the law of the case. *See DiLaura v. Power Auth. of State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (noting that, absent an intervening change in controlling law, availability of new evidence, or the need to correct a clear error or manifest injustice, a court's decision upon a rule of law "should continue [*38] to govern the same issues in subsequent stages in the same case") (internal quotation marks omitted). Those decisions acknowledged that *Section 470* discriminates between in-state and out-of-state attorneys solely on the basis of their residency. Under longstanding precedent, that determination disposes of the initial inquiry; the burden then shifts to the State to provide "sufficient justification for the discrimination." *Crotty*, 346 F.3d at 94. Departing from these precedents, however, the majority holds that the *plaintiff* bears the initial burden of "alleg[ing] or offer[ing] some proof of a protectionist purpose" in order to state a claim under the *Privileges and Immunities Clause*. Majority Op., ante at 15. In the majority's estimation, if the plaintiff fails to allege a *prima facie* case of protectionist intent, her "Privileges and Immunities claim fails, obviating the need for a tailoring inquiry." Majority Op., ante at 15.

The majority bases its reasoning exclusively on its reading of the Supreme Court's decision in *McBurney v. Young*, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013). As the majority acknowledges, that decision did not state any new principle of law, but merely confirmed that the *Privileges and Immunities Clause* forbids laws that abridge the right to pursue a common calling only when

those laws "were enacted for the protectionist purpose of burdening out-of-state [*39] citizens."¹ *Id. at 1715*. *McBurney* did not disturb the traditional threshold inquiry and two-step analysis in cases, like ours, where the challenged law is one that directly regulates legal practice. Rather, while acknowledging that the *Privileges and Immunities Clause* "protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling," *id.* (internal quotation marks omitted), the Court held that Virginia's distinction between state citizens and noncitizens in its Freedom of Information Act ("FOIA") did not "abridge" a noncitizen's right to pursue his livelihood "in the sense prohibited by the *Privileges and Immunities clause*" because the effects on his real estate business, which involved obtaining state property records for his clients, were purely incidental. *Id.*

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 [*40] 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, 525 N.E.2d 737, 530 N.Y.S.2d 91, 92 (1988) (declining to 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.

The majority's reading that *McBurney* requires a plaintiff to allege, as part of a *prima facie* case, that the law was specifically enacted for a protectionist purpose misconstrues *McBurney's* invocation of the two-step analysis.² As an initial matter, the Court resolved the

threshold issue, whether a fundamental right is implicated, by noting that the *Privileges and Immunities Clause* protects the right the plaintiff claimed was violated.³ See *id. at 1715*. The Court then considered whether sufficient justification existed for the discrimination⁴; it determined that the Virginia FOIA, as a mechanism for state citizens as the holders of sovereign power to obtain an accounting [*41] from public officials, evinced a "distinctly nonprotectionist aim." *Id. at 1716*. Further, the statute's distinction between Virginia citizens and noncitizens was justified because it "recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth." *Id.* It was within this context that the Court explained that (1) the plaintiff "does not allege--and has offered no proof--that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens," *id. at 1715*, and (2) the statute's "effect of preventing citizens of other States from making a profit by trading on information contained in state records" is merely "incidental." *Id. at 1716*. In short, the Court's reasoning--that the plaintiff failed to contradict the State's showing that the discrimination against noncitizens was justified--conforms precisely to the traditional two-step inquiry.

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, [*42] 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.

McBurney is distinguishable from this case for the simple reason that the Virginia FOIA is not an economic regulation, nor does it directly regulate the right to pursue a common calling. [*43] Rather, the FOIA provides a mechanism for seeking political accountability, and its effects on the plaintiff's profession--data gathering for profit--were purely "incidental." *Id.* It is well-established that, "[w]hile the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id.* Section 470, by contrast, directly regulates the legal profession by expressly and intentionally placing practice requirements on nonresident attorneys like Schoenefeld that it does not place on resident attorneys. The majority stretches *McBurney*'s "incidental" language far beyond the facts of that case to support its conclusion that *any* regulation, even one that directly regulates a "well settled . . . privilege protected by Article IV, § 2," *Barnard v. Thorstenn*, 489 U.S. 546, 553, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989), will pass constitutional muster so long as its discrimination against nonresidents can be characterized as "incidental." Majority Op., ante at 13-14.

By requiring plaintiffs to allege a *prima facie* case of discriminatory intent, the majority, in effect, relieves the State of its burden to provide a sufficient justification [*44] for laws that discriminate against nonresidents with regard to fundamental rights. *See Crotty*, 346 F.3d at 95 (explaining that States may not "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"). Determining whether an unacceptable purpose, such as economic protectionism, underlies the challenged law is at the core of the analysis engaged in *after* the threshold determination into whether a right implicated by the *Privileges and Immunities Clause* has been abridged. *See Piper*, 470 U.S. at 284 ("The conclusion that [a State law] deprives nonresidents of a

protected privilege does not end our inquiry . . . 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."). Examining the government's proffered reason for the discrimination and determining whether the challenged law, as enacted, conforms to the proffered reason is the method by which courts determine whether the proffered reason is genuine or merely a pretext for economic protectionism. [*45] *Crotty*, 346 F.3d at 97 ("Part and parcel to this analysis is determining whether [the State] ha[s] demonstrated a substantial factor unrelated to economic protectionism to justify the discrimination."). The majority's reasoning would reverse this burden-shifting test by requiring plaintiffs to show that a law *was* enacted for a protectionist purpose, rather than requiring the State to show that the law was *not* enacted for a protectionist purpose.

Tellingly, in support of this proposition the majority draws exclusively on cases addressing challenges under the *Equal Protection Clause*, for which plaintiffs must plead discriminatory intent as part of a *prima facie* case. Majority Op., ante at 13-14 (citing, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 682, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). The majority has not cited, nor does there exist, any case suggesting that the requirement to allege discriminatory intent as part of a *prima facie* case under the *Equal Protection Clause* also applies to Privileges and Immunities claims. Indeed, *Virginia v. Friedman*, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988), stands for the opposite proposition. In *Friedman*, Virginia argued that its residency requirement for admission to the State's bar on motion did not implicate the *Privileges and Immunities Clause* on the basis that, because nonresident attorneys could seek admission by taking the Virginia bar exam, "the State cannot be said to have discriminated [*46] against nonresidents as a matter of fundamental concern." *Id.* at 65 (internal quotation marks omitted). The Supreme Court rejected that argument as "quite inconsistent with our precedents," stating that "the Clause is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." *Id.* at 65-66. This language cannot be squared with a *prima facie* requirement that demands something more than a

showing of disparate treatment on the face of the statute.⁵

5 By comparing this case with *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (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 [*47] 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.

The Equal Protection cases cited by the majority, moreover, are distinguishable on the ground that the challenged policies in those cases were facially neutral but produced racially disparate effects. *See Iqbal*, 556 U.S. at 682 (holding that plaintiffs failed to allege that detention policy that disproportionately affected Muslims and Arabs was motivated by a racially discriminatory purpose); *Davis*, 426 U.S. at 244 (concluding that facially neutral employment test was not racially discriminatory simply because a greater proportion of African Americans fared poorly). The plaintiffs were thus required to allege facts showing that an otherwise-neutral policy was motivated by an impermissible discriminatory purpose. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). *Section 470*, by contrast, draws a facial distinction between residents and nonresidents with regard to the privilege [*48] of practicing law; by its very terms, it imposes burdens on nonresidents that it does not impose on residents. Because the statute, on its

face, discriminates against nonresidents, no other threshold showing of discriminatory intent is required.⁶

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, 123 S. Ct. 2142, 156 L. Ed. 2d 54 (2003).

In sum, *Section 470* discriminates against nonresidents with respect to the practice of law, a fundamental right long recognized as protected under the *Privileges and Immunities Clause*. The majority recognizes as much, *see* Majority Op., ante at 16-17, but erroneously imposes a threshold requirement that the plaintiff challenging the discrimination prove there is a protectionist intent above and beyond the traditional analysis.

II.

Plaintiff having established that a fundamental right has been implicated, it is the State's burden to provide a sufficient justification for the discrimination by demonstrating that "(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." *Piper*, 470 U.S. at 284. "In [*49] deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Friedman*, 487 U.S. at 66.

The State's proffered justifications for the in-state office requirement--effectuating service of legal papers, facilitating regulatory oversight of nonresident attorneys' fiduciary obligations, and making attorneys more accessible to New York's courts--are plainly not sufficient. Regarding the issue of service, the Court of Appeals itself observed that, although "service on an out-of-state individual presented many more logistical difficulties in 1862, when [*Section 470*] was originally enacted," today there are "adequate measures in place relating to service upon nonresident attorneys," including

the methods of mail, overnight delivery, fax and (where permitted) email, as authorized by the CPLR, and the requirement under 22 N.Y.C.R.R. § 520.13(a) that nonresident attorneys designate an in-state clerk of court as their agent for service of process in order to be admitted in New York. [*50] *Schoenefeld*, 25 N.Y.3d at 28, 6 N.Y.S.3d at 224-25. Thus, not only do "there exist alternative means of furthering the State's purpose without implicating constitutional concerns," *Friedman*, 487 U.S. at 66, but those means are already in place.⁷

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 nonresidents. 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.

The State's argument that an in-state office requirement is necessary to regulate the behavior of nonresident attorneys fares no better. The Court has long rejected similar arguments in favor of a residency requirement on the grounds that a "nonresident lawyer's [*51] professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers," and that the State, in any event, "has the authority to discipline all members of the bar, regardless of where they reside."⁸ *Piper*, 470 U.S. at 286. Similarly, the Supreme Court has rejected the argument that an in-state office requirement is necessary to ensure the availability of attorneys for court proceedings as "unnecessary and irrational." *Frazier v. Heebe*, 482 U.S. 641, 649, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987).⁹ The Court noted that resident lawyers may still maintain their office outside of the state, thus making themselves equally unavailable to the courts, and that "there is no link between residency

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

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 [*52] 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.

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.

The majority, moreover, has not engaged in a meaningful analysis of the sufficiency of the State's proffered justifications, underscoring the extent of its departure from the established two-step inquiry under the *Privileges and Immunities Clause*. Instead, the majority concludes that Schoenefeld's claim must fail at the threshold because, in its view, she has failed to prove that *Section 470* was enacted for a protectionist purpose. Even if such a *prima facie* showing is required, Schoenefeld [*53] has made one out based on the plain text and history of *Section 470*.

It is undisputed that, at the time *Section 470* was enacted, it was part of a larger statutory scheme designed to prohibit nonresident attorneys from practicing in New York. *See Richardson v. Brooklyn City & N.R. Co.*, 22

How. Pr. 368, 370 (N.Y. Sup. Ct. Feb. 1, 1862) (noting that the court "ha[d] always required that an attorney should reside within the state"). Chapter 43, the earliest predecessor to *Section 470*, provided a less burdensome, but still burdensome, exception to the overall residency requirement as an accommodation to commuters in adjacent states. *Rosenberg v. Johns-Manville Sales Corp.*, 99 Misc. 2d 554, 416 N.Y.S.2d 708, 710 (Sup. Ct. 1979) (explaining with respect to *Section 470* that "[t]he requirement of residence, as a condition to the continued right to practice, appears to have been ameliorated for attorneys who reside in an adjacent State, but only upon condition they maintain an office for the practice of law in this State"); see also Brennan, *Repeal Judiciary Law § 470*, 62 N.Y.S.B.J. 20, 21 (Jan. 1990) ("The 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."). The majority contends that this statutory context is irrelevant because Schoenefeld has not been burdened by the general ban on nonresident [*54] attorneys, which was invalidated under the *Privileges and Immunities Clause* in 1979. See Majority Op., ante at 20 (citing *In re Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979)). That a discriminatory and burdensome requirement can be stylized as an "exception" to an even more discriminatory and burdensome requirement, however, does not render it nondiscriminatory or render implausible a threshold inference of discriminatory purpose.¹¹

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, 397 N.E.2d 1309, 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.

The majority further reasons [*55] that because the office requirement, like the general ban on nonresident attorneys, was enacted in part to ensure an in-state place of service, see *Richardson*, 22 *How. Pr. at 370*, it does not exhibit a protectionist purpose. Majority Op., ante at 18-19. This gets it backward, however, for it is the State's burden to prove that service of process is a substantial interest justifying the restriction, not Schoenefeld's burden to prove that service of process was not a motivating concern for the statute. If the majority's rationale were sufficient, then any restriction based on residency, no matter how onerous, would pass constitutional muster so long as the State could point to a nonprotectionist purpose for the restriction. Were this the test, then there would have been no basis on which to invalidate in-state residency requirements for attorneys under the *Privileges and Immunities Clause*. See, e.g., *Friedman*, 487 U.S. at 68 (rejecting as insufficient State's reasons for requiring residency of attorneys seeking admission on motion, including ensuring that those applicants "have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination" and facilitating the full-time practice of law); *Piper*, 470 U.S. at 285 (rejecting [*56] State's argument that nonresident attorneys "would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State"); accord *Gordon*, 48 N.Y.2d at 274, 422 N.Y.S.2d at 646 (holding that State's justification for residency requirement, the "observ[ation] and evaluat[i]on [of] the applicant's character," was insufficient due to "alternatives which are less restrictive than denial of admission to practice which would further this interest").¹²

12 In none of the above cases, moreover, did the courts dissect the legislative 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).

Finally, the majority concludes that the burdensome effects of *Section 470* on nonresident attorneys are not actually discriminatory because, by ensuring that every attorney [*57] that practices in New York has a "physical premises" in the State, the office requirement serves "to place resident and nonresident attorneys on an equal footing, not to favor the former over the latter." Majority Op., ante at 23. Thus, the majority faults Schoenefeld's supposed failure to demonstrate that *Section 470* poses an "undue burden," Majority Op., ante at 24, because she did not provide evidence to show that significant numbers of New York attorneys in fact practice from their homes rather than from offices or that a nonresident's burden of maintaining an office in New York is greater than a resident's burden of maintaining a home in New York. As a factual matter, the majority's conclusion that the law poses no undue burden on nonresident attorneys directly conflicts with our findings earlier in this case. See *Schoenefeld*, 748 F.3d at 468 ("This additional obligation [on nonresident attorneys] carries with it significant expense--rents, insurance, staff, equipment *inter alia*--all of which is in addition to the expense of the attorney's out-of-state office, assuming she has one.").¹³ More importantly, these imagined burdens lose sight of the governing legal standard: "whether the State has burdened the right to practice [*58] law, a privilege protected by the *Privileges and Immunities Clause*, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency." *Friedman*, 487 U.S. at 66-67. Though the Clause "does not promise nonresidents that it will be as easy for [them] as for residents to comply with a state's law," *Schoenefeld*, 748 F.3d at 467 (internal quotation omitted), a "wholesale bar has never been required to implicate the [Clause]," *Crotty*, 346 F.3d at 95. Here, it is enough that *Section 470* substantially burdens nonresident attorneys by requiring them, and only them, to maintain separate office premises 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.

The majority asserts that *Section 470* places all attorneys on equal footing because the statute is, in effect, no different from a law that requires all attorneys to maintain a "physical presence" in New York. See Majority [*59] Op., ante at 25. But unlike the statutes upheld as constitutional in *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1044-45 (10th Cir. 2009) and *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1107-08 (3d Cir. 1997), which require all attorneys to maintain a physical presence within the State, *Section 470* explicitly draws a distinction based on residency. This case is thus analogous to *Piper* and *Friedman*, where states' restrictions on legal practice that applied only to nonresidents were invalidated under the *Privileges and Immunities Clause*. *Friedman*, 487 U.S. at 70; *Piper*, 470 U.S. at 288. The Supreme Court, moreover, has long rejected the notion that a State's authority to pass a facially neutral law also empowers it to pass a discriminatory law. *Friedman*, 487 U.S. at 66-67 ("A state's abstract authority to require from resident and nonresident alike that which it has chosen to demand from the nonresident alone has never been held to shield the discriminatory distinction from the reach of the *Privileges and Immunities Clause*."). That New York could enact some other law that does not distinguish between residents and nonresidents is entirely inapposite to the question before us now.

III.

The State of New York has chosen to discriminate against nonresident attorneys with regard to their right to pursue a common calling, and it has failed to provide a substantial justification for that discrimination. In holding to the contrary, the majority [*60] unnecessarily disturbs longstanding *Privileges and Immunities* jurisprudence and denies nonresident attorneys their constitutionally-protected right to practice law "on terms of substantial equality" with residents of New York. *Piper*, 470 U.S. at 280. For these reasons, I respectfully dissent.