No. 16-780

IN THE

Supreme Court of the United States

EKATERINA SCHOENEFELD,

Petitioner,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a New York law that requires nonresident New York attorneys to maintain an office in the State in order to practice in the New York courts withstands scrutiny under the Privileges and Immunities Clause because it was enacted to facilitate the service of legal papers and only incidentally burdens nonresident attorneys.

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STATEMENT OF THE CASE

A. Historical Development of Judiciary Law § 470's Office Requirement

New York Judiciary Law § 470 provides:

> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state,[1] 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.

Although on its face this provision appears to provide authority only for residents of adjoining states with an office in New York to practice in New York courts, the provision no longer serves this purpose. As the statute's derivation and interpretation by New York courts make clear, Judiciary Law § 470 now serves to require all nonresident attorneys who have been admitted to practice in the State and wish thereafter to practice in New York courts to maintain an office within the State.

The predecessor to N.Y. Judiciary Law § 470 was originally enacted in 1862 to facilitate service of legal papers on resident attorneys who moved to an adjoining state. At that time, New York required all attorneys to be residents of the State, both to be admitted to practice in the first place, and also thereafter to practice in New York courts. *See Richardson v. Brooklyn City & Newton R.R.*, 22 How.

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[1] The phrase "courts of record of this state" refers to all of New York's judicial tribunals except town and justice courts. *See* N.Y. Const. art. VI, § 1(b); N.Y. Judiciary Law § 2.

Prac. 368, 369, 372 (N.Y. Sup. Ct. 1862) (noting that "the court has always required that an attorney should reside within the state" and upholding objection to appearance by an attorney who had been admitted to practice in New York but had thereafter moved to New Jersey). The predecessor to Judiciary Law § 470 was enacted as an exception to these residency requirements; it allowed attorneys previously admitted to practice in New York who thereafter moved to an adjoining State to continue to practice in New York courts if they retained their only office in New York. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139.

Permitting such attorneys to continue to practice in New York without either a New York office or a New York residence would have posed a problem for service of legal papers. Existing service rules allowed litigants to personally serve legal papers on an attorney whose office was closed by leaving the papers at the attorney's New York residence (with a person of suitable age and discretion). And service by mail was not as prevalent as it is today. Exempting from the residency requirements attorneys who lacked a New York office might therefore have permitted them to "entirely evade the service of papers" and thereby "baffle [their] adversary and the court." *Richardson*, 22 How. Prac. at 370. To address this concern, the statute permitting attorneys who had moved to an adjoining state to practice in New York did two things. First, it required such attorneys to maintain an office—originally their only office—in the State. And second, it adopted a special service rule for such attorneys, providing that papers that could have been personally served on an attorney at the attorney's New York residence if one existed, could be served on a nonresident attorney by mail to the attorney's New

York office, and that such service by mail would be deemed equivalent to personal service on the attorney.[2] *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139.

In 1866, the statute was revised to eliminate the requirement that nonresident attorneys retain their only office in New York, and to remove the language that limited the exception to the residency requirements to those attorneys who had been admitted before the law's enactment and thereafter moved to an adjoining state. *See* Act of March 16, 1866, ch. 175, 1866 N.Y. Laws 348. When New York then enacted its Code of Civil Procedure of 1877, the provision was codified as Code of Civil Procedure § 60. And in 1909,

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[2] The statute, as originally enacted, provided in full:

> Any regularly admitted and licensed attorney of the Supreme Court of this State, and whose only office for the transaction of law business is within this state, may practice as such attorney in any of the courts of this State notwithstanding he may reside in a state adjoining the state of New York, provided that this act shall extend only to attorneys who have been heretofore admitted to practice in the Courts of this State, and who reside out of the State of New York, and that service of papers which might according to the practice of the Courts of this State, be made upon said attorney at his residence, if the same were within the state of New York, shall be sufficient if made upon him by depositing the same in the post office in the city or town wherein his said office is located, directed to said attorney at his office, and paying the postage thereon; and such service shall be equivalent to personal service at the office of such attorney.

Ch. 43, 1862 N.Y. Laws 139.

the portion of the statute allowing residents of adjoining States to practice in New York courts if they maintained an office in the State was recodified as Judiciary Law § 470, while the service-related language remained in Code of Civil Procedure § 60. *See* Act of Feb. 17, 1909, ch. 35, 3 Cons. Laws of N.Y. 2817 (Clarence F. Birdseye, et al., eds. 1909) (enacting Judiciary Law § 470); Act of Feb. 17, 1909, ch. 65, § 3, 1909 N.Y. Laws 21, 28 (amending Code of Civil Procedure § 60). Aside from other minor nonsubstantive changes in 1909 and 1945, the language of § 470 has remained unchanged since. *See* Act of April 9, 1945, ch. 649, § 213, 1945 N.Y. Laws 1371, 1422.

In 1979, the New York Court of Appeals struck as unconstitutional the then-existing residency requirements for bar examination and admission. *See Matter of Gordon v. Comm. on Character & Fitness*, 48 N.Y.2d 266 (1979). In response to that decision, the Legislature amended numerous provisions of the Civil Practice Law and Rules and the Judiciary Law to remove residency requirements from the provisions governing attorney admission to practice. *See* Act of June 18, 1985, ch. 226, 1985 N.Y. Laws 2049. The Legislature did not modify Judiciary Law § 470, however. As a result, Judiciary Law § 470—requiring nonresident attorneys in adjoining states to maintain a New York office—no longer operated as an exception to a general residency requirement for only nonresident attorneys living in adjoining states. Instead it was interpreted as now requiring the larger group of all nonresident attorneys admitted to practice in the State to maintain an office in the State. *See Schoenefeld v. New York*, 25 N.Y.3d 22, 27, 29 N.E.3d 230, 232-33 (2015). (Pet. App. 53-54 & n.2.)

B. This Proceeding

Petitioner Ekaterina Schoenefeld is admitted to practice in the state courts of New Jersey, California, and New York. She resides and has an office for the practice of law in New Jersey. She passed the New York State Bar Examination in July 2005 and was admitted to practice in New York in January 2006. She alleges that she has no office within the State and has declined to represent clients in New York courts because of the State's office requirement.

Schoenefeld commenced this action pursuant to 42 U.S.C. § 1983 seeking an order declaring Judiciary Law § 470 unconstitutional and enjoining defendants from enforcing the statute. The amended complaint alleges that, to the extent the statute requires a nonresident attorney admitted to practice in the State to maintain an office in New York in order to practice in New York courts, the statute violates the Privileges and Immunities Clause of the United States Constitution.[3] That clause provides 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.

The district court agreed that the statute violated this provision and enjoined its enforcement. (Pet. App.

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[3] The amended complaint also asserted claims under the Equal Protection and dormant Commerce Clauses. On defendants' motion, the district court dismissed these claims. (Pet. App. 117-120.) Schoenefeld abandoned these claims by not arguing in the appeal to the Second Circuit that they provided alternative bases to affirm the judgment of the district court. *See Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012) (abandonment); *Johnson v. Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir. 1992) (alternative theories).

102.) On appeal, the State argued that the statute could reasonably be read narrowly to require only a New York address in the State for personal service of legal papers, and on that reading it did not substantially burden nonresident attorneys or implicate the Privileges and Immunities Clause. The Second Circuit certified to the New York Court of Appeals the question what minimum requirements are necessary to satisfy the statutory office requirement for nonresident attorneys. *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014). (Pet. App. 58-73.) The New York Court of Appeals rejected the narrowest reading of the statute and held that the statute requires nonresident attorneys to maintain a physical office in the State. (Pet. App. 54-56.)

The Second Circuit then rejected Schoenefeld's privileges and immunities claim. Citing this Court's decision in *McBurney v. Young*, 133 S. Ct. 1709 (2013), the court upheld § 470 because it was not enacted for a protectionist purpose, as evidenced by its legislative history and its effect. *See Schoenefeld v. Schneiderman*, 821 F.3d 273, 280-85 (2d Cir. 2016). (Pet. App. 11-26.) The Second Circuit applied a two-step analysis, determining first whether the law burdens an activity protected by the Privileges and Immunities Clause, and then, if so, whether the burden could be justified by substantial reasons for the discrimination that bear a sufficiently close relation to the degree of discrimination. The Second Circuit ultimately concluded that § 470 did not burden rights protected by the Clause. (Pet. App. 10-11.)

In concluding that the statute did not burden those rights, the court looked to the purpose and effects of the statute. It found that the purpose was to ensure that all attorneys licensed in New York could

practice in the State by providing a means for nonresident attorneys to establish a physical presence in the State—and therefore a place for service—akin to that of resident attorneys. Because this was a nonprotectionist purpose, the court reasoned that the statute was "not vulnerable to a Privileges and Immunities challenge." (Pet. App. 17.) And the court concluded that the effects of the statute also did not indicate a protectionist purpose because § 470 effectively placed "resident and nonresident attorneys on an equal footing," and did not "favor the former over the latter." (Pet. App. 21.) To practice law in New York, the court observed, every attorney must have a presence in the State in the form of physical premises, whether a home or an office in the State. (Pet. App. 21.) The court thus concluded that § 470 was like laws that impose an in-state office requirement on all attorneys and which have been held not to violate the Privileges and Immunities Clause. (Pet. App. 23-24 [citing *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009), and *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099 (3d Cir. 1997)].)

Judge Hall dissented. He viewed § 470 as an economic regulation that directly regulates the right to pursue a common calling, and consequently he would have held that *McBurney*'s analysis did not apply. (Pet. App. 35-36.) The dissent would have concluded that a fundamental right was implicated, and that the State's justifications for the in-state office requirement were insufficient because the State had alternative means available to address its service and oversight concerns. (Pet. App. 41-43.) Finally, the dissent rejected the majority's reasoning that § 470 placed resident and nonresident attorneys on equal footing because, unlike the other statutes that were

held not to violate the Privileges and Immunities Clause, § 470 facially distinguished between residents and nonresidents. (Pet. App. 47-48.)

Schoenefeld unsuccessfully sought rehearing and rehearing en banc (Pet. App. 121-122), and then timely filed this petition for certiorari.

REASONS FOR DENYING THE PETITION

This case does not warrant review by this Court. Contrary to Schoenefeld's argument, the Second Circuit's decision does not conflict with the decision of this Court in *McBurney v. Young*, 133 S. Ct. 1709 (2013). And notwithstanding the argument of Schoenefeld and amici, the Second Circuit's decision does not conflict with any decisions of other courts of appeals or state courts of last resort.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MCBURNEY V. YOUNG*.

The Second Circuit correctly implemented this Court's analysis in *McBurney v. Young*, 133 S. Ct. 1709, because Judiciary Law § 470, like the statute at issue in *McBurney*, has a distinctly nonprotectionist aim and only incidentally affects the ability of nonresidents to practice law in the State.

McBurney involved a challenge to Virginia's Freedom of Information Act (FOIA), which limited to Virginia residents the ability to obtain public documents and access public meetings. 133 S. Ct. at 1713. The plaintiff complained that the statute violated the Privileges and Immunities Clause because it abridged his ability to earn a living from his calling—obtaining public property records for clients.

Id. at 1715. In holding that the citizens-only FOIA did not abridge the plaintiff's right to pursue a common calling "in the sense prohibited by the Privileges and Immunities Clause," the Court noted that it has struck down laws "as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." *Id*. Because the Virginia FOIA was intended to provide its citizens with access to public records and public meetings, not to provide its citizens with a "competitive economic advantage," the Court concluded that the statute had a "distinctly nonprotectionist aim" and did not violate the Privileges and Immunities Clause merely because it had an incidental effect of preventing citizens of other states from making a profit on information contained in state records. *Id*. at 1715-16.

The Second Circuit properly recognized that Judiciary Law § 470 is like a citizens-only FOIA for purposes of privileges and immunities analysis. Like a citizens-only FOIA, § 470 distinguishes between residents and nonresidents and may impact nonresidents' ability to pursue their common calling. But also like a citizens-only FOIA, § 470's office requirement has a "distinctly nonprotectionist aim." *McBurney*, 113 S. Ct. at 1716. As the Second Circuit recognized, the in-state office requirement was not enacted for the protectionist purpose of burdening nonresident attorneys practicing in the State. "Rather, it was enacted to ensure that every licensed 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." (Pet. App. 17.) Recognizing that

availability of an in-state office was no longer as crucial because of more lenient service rules, the court nonetheless found no evidence that § 470 was being maintained for a protectionist purpose. (Pet. App. 18.) The court also concluded that § 470 did not create anything more than an incidental burden on nonresidents because the statute effectively required *all* New York–licensed attorneys to have a physical presence in the State. (Pet. App. 20-22.) Accordingly, following *McBurney*, the Second Circuit held that any such incidental burden did not require New York to show that the requirement was narrowly tailored to its stated purpose. (Pet. App. 20.)

The Second Circuit's view of § 470 was correct and its implementation of *McBurney* was proper. As we have explained, New York's office requirement was enacted because nonresidents who did not have an office in the State could evade service, whereas resident attorneys could always be served at their residence when their offices were closed. *See Richardson*, 22 How. Prac. at 370. Accordingly, the predecessor to § 470 included a special service rule for nonresident attorneys allowed to practice in the State: they could be served at their in-state offices by mail and such service would be treated as personal service. *See* Act of March 22, 1862, ch. 43, 1862 N.Y. Laws 139. Although service by mail is now common and the more lenient service rules allow alternatives to personal service for interlocutory papers served on a party's attorney, *see* N.Y. Civil Practice Law & Rules 2103(b), the in-state office requirement continues to serve a valid service-related purpose. It assures litigants in New York the full range of service options, including personal service, without any added inconvenience that might arise from attempting to make personal

service on a nonresident attorney outside the State. And personal service may sometimes be preferred, for example, when the matter at hand requires immediate attention. The in-state office requirement also continues to serve the nonprotectionist purpose of facilitating the regulation of the practice of law by allowing regulators to require that New York attorneys maintain their financial records and make them available at the attorney's principal New York office. *See* N.Y. Rules of Prof'l Conduct Rule 1.15(d), *codified at* N.Y. Code R. & Reg. tit. 22 § 1200.

The Second Circuit thus recognized that § 470 is unlike the protectionist economic measures that the Court has struck down because the discriminatory effects on nonresidents were not justified by the protectionist purpose. The office requirement is not like the residency requirements struck down in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which prevented nonresidents from practicing law within the State or territory altogether. Nor is it like the discriminatory admission rules at issue in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), which made permanent residency in the State a requirement for an attorney to be admitted to practice without taking an examination. That rule prevented "otherwise equally qualified applicants" from practicing law in the State on terms of substantial equality with state residents. *Id.* at 67. But with respect to being personally served in New York with legal papers or having their financial records available in the State for examination by New York regulatory authorities, the resident and nonresident are not similarly situated.

In sum, the Second Circuit properly read *McBurney* as requiring a substantial state interest and a narrowly tailored statute in the case of discriminatory, protectionist measures, but not imposing such requirements on this nonprotectionist in-state office requirement that only incidentally affects nonresident attorneys' ability to practice law in the State. Accordingly, the Second Circuit's decision does not conflict with this Court's decision in *McBurney*.

II. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH RULINGS OF OTHER COURTS OF APPEALS OR STATE COURTS OF LAST RESORT.

The Second Circuit's decision also does not conflict with decisions of other courts of appeals or state courts of last resort. Indeed, Schoenefeld does not suggest that any other court has addressed a challenge under the Privileges and Immunities Clause to an analogous statutory provision. Nor could she, given that New York's office requirement for nonresident attorneys is unique among the States.[4]

Instead, Schoenefeld (Pet. 21-22) and amicus New Jersey Bar Association (Br. 21-22) base their claim of conflict on the panel decision of the Ninth Circuit in

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[4] Only two States—Delaware and Missouri—currently impose any office requirements on attorneys, but their rules are different from New York's. *See* Del. Sup. Ct. R. 12(a)(i), (d), *at* www.courts.delaware.gov/rules/pdf/supremecourtrules.pdf (requiring *all* attorneys who sign papers filed with the Delaware Supreme Court to maintain a bona fide office in that State); Rules Governing the Missouri Bar & the Judiciary Rule 9.02, *at* www.courts.mo.gov/page.jsp?id=712 (choose Rule 9.02) (effectively imposing in-state office requirement on nonresident attorneys only when such attorneys' home states impose an office requirement on nonresident attorneys).

Marilley v. Bonham, 802 F.3d 958 (9th Cir. 2015), which invalidated under the Privileges and Immunities Clause certain fees imposed on commercial fisheries. Their conflict claim is misguided for two reasons.

First, the panel decision in *Marilley* was vacated when the Ninth Circuit granted rehearing en banc, 815 F.3d 1178 (9th Cir. 2016), and therefore the panel decision cannot support a claim of conflict. Schoenefeld correctly notes (Pet. 21-22) that rehearing was granted on other grounds, but that fact is irrelevant. The effect of a decision granting rehearing en banc is to vacate the panel decision that preceded it. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001). *See generally* Moore's Federal Practice–Civil § 134.22(2)(c) (LEXIS) (discussing "law of the case" doctrine and opinions vacated by en banc rehearing).

Second, and in any event, the *Marilley* panel's understanding of *McBurney* was not significantly different from the Second Circuit's understanding of that case. To be sure, the *Marilley* panel concluded that under *McBurney*, the question whether the differential fees were enacted for a protectionist purpose should be addressed at step two rather than step one of the privileges and immunities analysis. *See Marilley,* 802 F.3d at 964-65. In contrast, the Second Circuit in this case declined to decide at which stage the question is relevant. (*See* Pet. App. 14 n.6.) But that difference in approach would not constitute the kind of conflict that warrants this Court's review.

The subsequent en banc decision of the Ninth Circuit in *Marilley* does not conflict with the decision here either. The en banc court neither applied

McBurney to the clearly burdensome fees at issue in that case nor said anything about when and how the *McBurney* analysis should apply. *See Marilley*, 844 F.3d 841, 850-53 (9th Cir. 2016) (en banc). Indeed, the *Marilley* en banc court did not need to rely on *McBurney*, because the law at issue in that case involved traditional economic regulation: regulation that expressly treated residents and nonresidents differently for purposes of fees imposed on their common calling. *Id.* at 844-45. The differential fees thus had a clearly protectionist aim, and the en banc court appropriately did not follow the reasoning of *McBurney*, but instead considered whether the fees could be justified by substantial reasons that bear a sufficiently close relation to the burden imposed on nonresidents. *Marilley*, 844 F.3d at 855. For this reason, that decision does not create any conflict with the Second Circuit's decision in this case.

Three other circuits have examined a statute under the Privileges and Immunities Clause since *McBurney* was decided, but none of these creates any conflict either. The Sixth Circuit followed *McBurney* to reject a challenge to a similar citizens-only freedom of information law. *See Jones v. City of Memphis*, 531 F. App'x 709, 710 (6th Cir. 2013). And the Third and Ninth Circuits rejected challenges under the Privileges and Immunities Clause to reciprocal bar admission rules without citing *McBurney*. *See Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 224-25 (3d Cir.), *cert. denied sub nom.*, *Rosario v. Saylor*, 136 S. Ct. 558 (2015); *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1046 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2374 (2015). In *Castille,* the Third Circuit simply held that the state reciprocal

bar admission rule at issue did not implicate the Privileges and Immunities Clause because it did not distinguish between residents and nonresidents. 799 F.3d at 225. And in *Berch,* the Ninth Circuit reached the same conclusion, explaining that even if the Clause were implicated, the rule would be valid because it was closely related to advancing a substantial state interest. 773 F.3d at 1046. Because *Berch* thus rejected the Privileges and Immunities Clause challenge under the traditional two-step analysis, any failure to examine the protectionist purpose or effect of the rule at issue was not outcome determinative. Accordingly, there is no conflict among the courts of appeals as to whether and how to apply this Court's analysis in *McBurney*.[5] And any open questions about how to apply *McBurney* do not warrant this Court's review before the lower courts have had further opportunity to address them.

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[5] Indeed, there is no conflict on this issue arising from district court decisions either. Rather, the one district court opinion that has applied *McBurney*'s protectionist purpose language in the context of a Privileges and Immunities Clause claim has followed it. *See Dairy v. Bonham*, No. 13-cv-1518, 2013 U.S. Dist. LEXIS 172899 (N.D. Cal. Dec. 9, 2013), *on reconsideration*, 25 F. Supp. 3d 1284 (N.D. Cal. 2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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