No. 16-780

IN THE

Supreme Court of the United States

EKATERINA SCHOENEFELD,

Petitioner,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

RONALD C. MINKOFF
TYLER MAULSBY
FRANKFURT KURNIT KLEIN & SELZ, P.C.
488 Madison Avenue
10th Floor
New York, N.Y. 10022
(212) 980-0120
rminkoff@fkks.com

JOEL D. BERTOCCHI
Counsel of Record
ANTHONY E. DAVIS
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Amicus Curiae Association of Professional Responsibility Lawyers

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QUESTION PRESENTED

A New York statute requires lawyers licensed by that State who reside outside New York to maintain an "office for the transaction of law business" in New York, while New York lawyers who reside in the State need not do so. Answering a certified question, the New York Court of Appeals confirmed that the New York "office" referred to in the statute must be a "physical law office." A divided panel of the Second Circuit nonetheless held that imposing the requirement of a "physical law office" in New York only on non-resident New York lawyers did not violate the Privileges and Immunities Clause of the Constitution because the lawyer challenging the statute had not established that the statute was enacted with "protectionist" intent, as opposed to requiring the State to justify the disparate treatment of its non-resident lawyers.

The question presented by the Petition is:

Does a State violate the Privileges and Immunities Clause when it requires attorneys who are licensed to practice law by that State, but who reside elsewhere, to maintain a physical office in the State, while not requiring the same of lawyers who reside in the State?

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INTEREST OF *AMICUS CURIAE*[1]

The Association of Professional Responsibility Lawyers ("APRL") consists of approximately 500 members in more than 40 States and in other countries. Its membership includes lawyers who represent other lawyers (and sometimes other lawyers' clients) in all aspects of legal ethics and professional responsibility. In addition to representing respondents in disciplinary matters, APRL lawyers also advise lawyers and law firms on risk management, legal malpractice, and other aspects of the law of lawyering. APRL also numbers academics and judges among its members. It is the largest organization of private practitioners devoted exclusively to this area of the law. It also issues public statements and files *amicus* briefs, both in this Court, see *National Assoc. for the Advancement of Multijurisdictional Practice v. Lynch*, No. 16-404, and in other federal and state courts.

The statute at issue in this case, N.Y. Jud. Law § 470 ("Section 470"), directly affects the ability of lawyers to live and work in one State as lawyers licensed by another State–often referred to as "multijurisdictional practice." APRL has long been committed to fostering multijurisdictional practice where appropriate. After initially proposing to the American Bar Association Commission on Multijurisdictional Practice ("MJP Commission") that "states establish a common, uniform system permitting the free movement of lawyers and the free trade in legal services across state

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

lines, without derogating from the states' legitimate and historic interests in regulating the legal profession," APRL joined with other Bar organizations to call for rules by which States would recognize the credentials of lawyers licensed in other states. See A. Munnecke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate,* 27 J. LEGAL PROF. 91, 101, 103-04 (2002). APRL and its members have also taken active roles in drafting and implementing Model Rule of Professional Conduct 5.5–the multijurisdictional practice rule eventually adopted by the ABA and by 47 States in some form.

APRL's members are on the front lines every day advising lawyers about application of multijurisdictional practice rules generally and admissions and professional practice rules in the various States in particular. These experiences inform the positions APRL takes in this brief. APRL supports the petition for a writ of *certiorari* seeking reversal in *Schoenefeld v. Schneiderman,* 821 F.3d 273 (2d. Cir. 2016) (*"Schoenefeld II")*, Pet. App. 1-49.

STATEMENT

This case presents a constitutional challenge to an expressly discriminatory New York statute that regulates lawyers, New York Judiciary Law Section 470. That law requires members of the New York State Bar who do not reside in New York to have an "office for the transaction of law business . . . within the state", but does not require the same of New York Bar members who reside within the state. On a certified question, the New York Court of Appeals confirmed that Section 470 requires a nonresident New York lawyer to maintain a "physical office" in New York, and thus to incur the out-of-pocket costs (rent, utilities, staff, etc.) necessary to do so. *Schoenefeld v. State,*

25 N.Y.3d 22, 27-28 (2015); See Pet App. 53-54. Meanwhile, members of the New York Bar who reside in New York need only, in the words of the dissenting judge in the Second Circuit, "set up an 'office' on the kitchen table of their studio apartments if so desired." Pet. App. 30.

The first version of Section 470 was enacted in 1862, when New York still had a lawyer residency requirement. It permitted non-resident New York lawyers to practice in New York as long as their "only office for the practice of law" was in the State, they lived in an "adjoining state," and the lawyer was subject to the "service of papers" at his New York office as if it was his residence. Four years later, in 1866, the requirement that a nonresident lawyer's *only* office be in New York was eliminated. The concept of availability for service of process was separated from the statute in 1908, when Section 470 was enacted to contain the in-state office requirement and when the ability to serve lawyers at their offices became part of the New York Code of Civil Procedure.

Section 470 was officially enacted in 1909, was reenacted in 1945, and remains in the same form today. Pet. App. 78-81. Meanwhile, in 1979 the New York Court of Appeals threw out the residency requirement that had originally supported the enactment of Section 470's predecessor statute, ruling that it violated the Privileges & Immunities Clause. See *Matter of Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 273-74 (1979).

Petitioner is a New York-licensed lawyer who lives and works in New Jersey, where she is also admitted to practice. She maintains an office in New Jersey, but not in New York. In 2011 Petitioner sued in the District Court for the Northern District of New York,

seeking a declaration that Section 470 violates Article IV, Section 2, cl. 1 of the U.S. Constitution, the "Privilege and Immunities Clause." The District Court granted summary judgment in Petitioner's favor, *Schoenefeld v. State of New York,* 907 F.Supp.2d 252 (N.D.N.Y. 2011); Pet App. 74-103, and the State appealed.

Among its arguments on appeal, the State claimed that the phrase "office for the transaction of law business" in Section 470 did not require a physical office, but could be read merely to require an address for service of process. *Schoenfeld v. State of New York,* 748 F.3d 464, 468-69 (2d Cir. 2014) (*Schoenefeld I*"), See Pet. App. 67. Citing New York lower court rulings to the contrary, the Second Circuit certified to the New York Court of Appeals the following question: "Under [Section 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?" Pet. App. 73. In certifying the question the Second Circuit indicated that the answer to this question "in all likelihood" would decide whether Section 470 violated the Privileges and Immunities Clause. Pet. App. 71.

Answering the Second Circuit's question, the New York Court of Appeals, relying on the text and history of Section 470, held that "[b]y its plain terms . . . [Section 470] requires nonresident attorneys practicing in New York to maintain a *physical law office* here." Pet. App. 53-54 (emphasis added). The court specifically noted that service of process, one of the original justifications for the non-resident office requirement, "presented many more logistical difficulties in 1862" than it does today, and strongly suggested that Section

470's distinction between residents and nonresidents was no longer justified. See Pet. App. 56.

The case then returned to the same Second Circuit panel. Contrary to its earlier suggestion that the answer would decide the case, that panel, this time divided, reversed the District Court in *Schoenefeld II*. Initially the panel majority acknowledged that Petitioner had shown that Section 470 implicated a privilege protected by the Privileges and Immunities clause (the practice of law) and that it imposed a requirement on non-resident attorneys that did not apply to resident attorneys. Pet. App. 15. Nevertheless, purportedly relying on *McBurney v. Young,* 133 S.Ct. 1709 (2013), the majority ruled that *Petitioner* had failed to show that Section 470 was enacted for a "protectionist purpose." Pet. App. 18. In doing so the majority considered what the legislature had intended in 1862, when Section 470's predecessor was enacted, which was to facilitate practice by non-resident lawyers despite the residency requirement then in effect (and despite the fact that the residency requirement had been thrown out in 1979—as violative of the same constitutional provision, no less. Pet. App. 17-19. The majority allowed that Section 470's actual effect on non-residents as compared to residents was not "completely irrelevant," but it thought they mattered only to the extent they "admit an inference of proscribed intent." Pet. App. 34-35. And the panel majority declined to consider changes in technology and in how New York lawyers practice since the statute's last reenactment in 1945 because "in the absence of some showing [by Petitioner] of protectionist purpose, a state need not demonstrate that its laws are narrowly tailored to a legitimate purpose." Pet. App. 20.

Judge Hall, who had authored *Schoenefeld I*, dissented. In his view the panel majority's requirement that a plaintiff show discriminatory intent, rather than requiring the State to explain its disparate treatment of non-residents, had "reverse[d] 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." Pet. App. 28-29. He also disagreed with the majority's application of *McBurney*, which in his view had neither announced a new test for Privileges and Immunities claims nor shifted the burden of proof. As Judge Hall saw it, *McBurney* addressed "protectionist intent" only in deciding whether the State had met *its* burden of showing the statute at issue was justified and tailored to its justification. Pet. App. 34-35. And he also thought the effect of the FOIA statute in *McBurney* on interstate commerce was "incidental" compared to that of Section 470. *Id.*

Judge Hall then went on to consider whether the State had adequately justified Section 470. Pet. App. 40. On appeal the State proffered three justifications for Section 470: effectuating service, facilitating regulatory oversight, and accessibility to New York courts. Judge Hall found each wanting. As to service, Judge Hall relied on the New York Court of Appeals' observation that additional methods "are already in place" for serving non-resident New York attorneys as compared to 1862 including New York's current requirement that non-resident attorneys designate an in-state court clerk for service of process. Pet. App. 41-42, citing 22 N.Y.C.R.R. §520.13(a). And he also rejected the States' other rationales. See Pet. App. 40-45, citing *Sup. Ct. of New Hampshire v. Piper,* 470 U.S. 271, 286 (1985) (residency requirement not needed to regulate lawyer's professional conduct), and citing *Frazier v.*

Heebe, 482 U.S. 641, 649 (1987) (requirement that lawyer have office within federal district not necessary to ensure availability to courts, given ease of transportation and telecommunications across state lines).

SUMMARY OF ARGUMENT

In assigning to Petitioner the burden of proving "protectionist intent" the Second Circuit panel majority misread *McBurney*. In that case the Court only addressed that notion in the context of *a State's* justification of a measure that discriminated against non-residents. The Court's cases make it clear that a Privileges and Immunities claimant need only establish that a measure imposes a disparate burden on non-residents with respect to a fundamental right, and that once she does so the State bears the burden of establishing a non-discriminatory justification for the measure and that the measure is narrowly tailored to that justification.

New York's proffered justifications for the "physical office" requirement, however meritorious they were in 1862, fail to hold water in the modern world. New York court rules already require non-resident lawyers to designate in-State agents for service of process. This Court has consistently rejected the need to subject lawyers to regulation as a justification for residency requirements. And advances in travel, telecommunications and computer technology make availability for court appearances a non-issue in 2016.

This case presents an issue of considerable importance to the ever-expanding population of lawyers who live and practice outside their states of admission, including, but not limited to, the more than 134,000 non-resident New York lawyers who do so. Lawyers who

maintain multijurisdictional practices are ethically permitted to operate "virtual law offices," often from their homes, and can take advantage of modern (and sometimes not-so-modern) advances in telecommunications and information sharing to do so efficiently and effectively in serving clients. Whether the Second Circuit's ruling allowing States to burden them with maintaining a costly appendage that does not contribute to their practice or their clients comports with the Court's Privileges and Immunities jurisprudence is a question deserving of the Court's attention.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO ALLOW THE COURT TO CONSIDER WHETHER THE SECOND CIRCUIT MISREAD *McBURNEY* TO REQUIRE A PRIVILEGES AND IMMUNITIES PLAINTIFF TO PROVE "PROTECTIONIST INTENT" BEFORE REQUIRING THE STATE TO JUSTIFY A FACIALLY DISCRIMINATORY LAW.

In holding that Petitioner, and not the State, was required initially to address the purpose of Section 470, the Second Circuit turned Privileges and Immunities law on its head. While the panel majority *said* that it did not "understand *McBurney* to state any new principle of law" and that it had merely provided "clarification," it ultimately held "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." Pet. App. 12-13, citing *McBurney,* 133 S.Ct. at 1715. By placing the burden of

showing a "protectionist purpose" on Petitioner, though, the majority imposed a new threshold requirement that a non-resident plaintiff must meet in pressing a Privileges and Immunities claim. Pet. App. 13-14. ("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."). Whether that reading of *McBurney* was a "clarification" or a departure is a question the Court should consider.

As Judge Hall noted in his dissent, the majority's rule would upend Privileges and Immunities jurisprudence by shifting to a *plaintiff* the burden of proving "protectionist purpose" rather than requiring the State "to provide a sufficient justification for laws that discriminate against nonresidents with regard to" a fundamental right. Pet. App. 36, citing *Piper,* 470 U.S. at 284; see also *Sup. Ct. of Va. v. Friedman,* 487 U.S. 59, 66 (1988) (examining whether State has shown "substantial reasons exist for the discrimination and the degree of discrimination bears a close relation to such reasons").

From APRL's point of view, though, that change is also significant because of what it means for non-resident lawyers and others who, in pursuing a "common calling," are faced with a statute that treats them less favorably than that State's residents. See *Toomer v. Witsell,* 334 U.S. 385, 396 (1945) ("one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of State B."). Quite aside from assigning them an initial burden not previously required of plaintiffs in Privileges and Immunities cases, the panel majority's focus on the original legislative purpose behind a 150-year-old statute leads to

an analysis that ignores the technological, social, and political factors that have affected the exercise of the "privilege" at issue—practicing law, in this case—since enactment. As this case well demonstrates, those changes may render a State's original reasons far less relevant, and the disparity in a State's treatment of its non-resident licensees far more onerous.

Understanding what is necessary to support or invalidate a law that treats non-residents differently, and correctly assign the burden of doing so, is especially critical for laws restricting practice in one State by its lawyers residing in another. The Court has swept aside such laws in the past as violative of the Privileges and Immunities Clause precisely because *States* could not justify their impact on non-residents in light of the conditions in which they currently practiced. For example, the Court invalidated a Virginia rule limiting bar admission without a bar examination only to Virginia residents, observing that "it is of scant relevance" that the plaintiff lawyer lived in Maryland when she worked in Virginia and "has a substantial stake in the practice of law" there. *Friedman,* 487 U.S. at 68-69. And in *Piper* the Court struck down a residency requirement for admission to the New Hampshire Bar, concluding in part that the State had not shown that residency was needed to assure that lawyers could appear in court on an emergency basis since "[o]ne may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire," and the State had other "less restrictive means" to protect its interests. 470 U.S. at 287. In doing so the Court expressly recognized that changes in the way lawyers practice figure into whether disparate treatment of

non-residents is justified. See *id* at 287 n.21 ("Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters"). In neither case was there any analysis of initial legislative purpose.

The panel majority's interpretation of *McBurney*, and its focus on initial intent rather than current reality, represents a step backwards. Under that holding a State can defend disparate treatment of non-resident lawyers if was justified sometime in the past. As APRL will explain, though, in a modern world where a New York client can instantly communicate with a licensed New York lawyer who happens to be in New Jersey (or elsewhere) "24/7," by phone, text or email, the Court should take this opportunity to confirm that the analysis employed in *Piper* and *Friedman* still applies, and still requires a State to justify a statute discriminating in favor of resident lawyers based on its impact on nonresident lawyers *today* – not in the last century, or the century before that.

II. NEW YORK'S PURPORTED JUSTIFICATIONS FOR DISPARATE TREATMENT UNDER SECTION 470 ARE NOT REASONABLE IN THE WORLD OF MODERN LEGAL PRACTICE.

New York offered the Second Circuit three justifications for requiring non-resident attorneys to maintain a physical New York office while not requiring the same of resident attorneys: (1) facilitating service of process on non-residents; (2) monitoring their compliance with professional obligations; and (3) making them more accessible to courts. Pet. App. 41. None is reasonable given the current state of technology and

the rules and statutes governing modern New York practice.

Facilitating Service of Process: Perhaps in 1862 it was difficult for a New Yorker to serve process on a New Jersey resident–even a member of the Bar. Today, of course, it can be effectuated by two clicks of a computer mouse: one to locate a process server in New Jersey, and the other to send a .PDF version of the papers to him. But serving a non-resident New York lawyer is even easier; according to New York's highest court, under New York court rules the admission of non-resident New York lawyers "is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for the service of process for actions or proceedings brought against them." Pet. App. 56*,* 25 N.Y.3d at 28, citing 22 N.Y.C.R.R. § 520.13(a). And once an action has been started, New York's civil procedure statutes make service of papers on non-resident attorneys easier still. Under N.Y. Civ. Pract. L. & Rules 2103(b), papers may be served by mail, facsimile, overnight delivery service or "electronic means," including e-mail. These "[l]ess restrictive means" are thus already available to assure service on non-residents. See *Piper,* 470 U.S. at 287.

Monitoring Compliance with Professional Obligations: The Court has twice rejected the need to monitor attorney conduct as justification for residency requirements, and the reasoning of those cases applies with equal force to Section 470. In *Piper,* the Court noted that "there is no evidence that nonresidents might be less likely to keep abreast of local rules and procedures" than residents, nor any "reason to believe that a nonresident lawyer will conduct [her] practice in a dishonest manner." 470 U.S. at 284. Section 470's

in-state office requirement thus adds no additional protection for clients or the public in general. And of course, as noted above, should it come to that, non-resident lawyers subject to discipline can easily be served with necessary process under New York's rules. Similarly, in *Friedman* the Court rejected the notion that nonresident lawyers who go to the trouble of getting admitted in Virginia "are less likely to respect the bar and further its interests solely because they are nonresidents," and added that Virginia could protect its interests in this regard through "other equally and more effective means," such as "periodic continuing legal education courses" or required *pro bono* work. 487 U.S. at 69.

New York requires CLE for all its Bar members, resident or non-resident, including requirements for ethics and professionalism, see 22 N.Y.C.R.R. § 1500.22(a), and has a disciplinary process that can reach New York lawyers wherever they reside. Under New York's version of Model Rule 8.5, New York lawyers located in other States may be disciplined in New York. N.Y. Rule of Prof. Conduct 8.5 (a) ("A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, *regardless of where the lawyer's conduct occurs")* (emphasis added). New York also requires biennial attorney registration, keeping contact information publicly available and updated. 22 N.Y.C.R.R § 1840 *et seq*. These measures are far more important to ensure that nonresident attorneys comply with their professional obligations than having an in-state office.

Making Attorneys Available for Court Appearances: That the State continued to advance this rationale in 2016 is surprising. Certainly interstate travel has changed since 1862; lawyers residing in an adjacent

State, or even across the country, can (and often do) easily travel to New York to appear personally in court. Even when an emergency appearance must be made, courts can and do handle them by video conference or telephone if an attorney cannot personally appear in time. Indeed, courts first began using these "modern conveniences" as cost-saving measures decades ago, even outside the context of an emergency, as this Court recognized in *Piper* when it noted (in 1983) the increased use by judges of conference calls to address discovery and other matters. *Piper,* 470 U.S. at 287 n. 21, citing R. Hanson, L. Olson, K. Stuart & M. Thornton, *Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?,* 66 Judicature 408, 408-09 (1983); see also B.S. Meierhoefer, *Business by Phone in the Federal Courts* at 2 (Fed. Jud. Ctr. 1983) ("The use of the telephone to conduct certain judicial proceedings has been getting increased public attention as a practical way of curbing the escalating cost of justice."[2]); R. Alvarado, Jr. and M. Wapnick, *Telephonic Court Appearances: Reduce Litigation Costs the Easy Way*, 25 Am. Bankr. Inst. J. 34 (2006) ("While the concept of appearing telephonically has been around for decades, it has only been in the last 10 years that organized methods for conducting telephonic appearances have been widely implemented to make the process uniform and the quality of the calls sufficiently consistent so as to permit judges to conduct their business without disruption."). Requiring a lawyer to have an in-state office for this reason therefore makes no sense for litigators, and even less sense for lawyers who do not litigate and thus never appear in court at all.

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[2] Available at http://www.fjc.gov/public/pdf.nsf/lookup/byphone.pdf/$file/byphone.pdf (last checked January 19, 2017).

Technological changes that are a feature of the everyday life of practicing lawyers demonstrate that Respondent cannot put forth a "substantial reason for its discrimination against nonresident [lawyers]" or "demonstrate[] that the discrimination practiced bears a close relationship to its proffered objectives. *Piper,* 470 U.S. at 287. Nor did the court below say otherwise; the panel majority's "protectionist purpose" analysis, and its misreading of *McBurney*, allowed it to sidestep these not-so-modern realities. Whether it properly did so is a question the Court should address.

III. THIS CASE RAISES SIGNIFICANT ISSUES REGARDING STATE REGULATION OF NONRESIDENT ATTORNEYS

The importance of this case to the legal profession cannot be overstated. The panel majority's view would allow a State to encumber multijurisdictional practice by its own non-resident lawyers with burdens (like the costs of "physical offices") so unnecessary that they are not required of resident lawyers, all based on out-moded views of where lawyers need to be located and how they must practice. Not only will this impact a substantial number of lawyers admitted in New York, it will also run counter to decisions of this Court and to the growing trend to increasingly allow practice across state lines consistent with our state-based lawyer regulatory system.

The panel majority's decision potentially affects each of the 134,231 nonresident members of the New York Bar.[3] Any one of them might wish (or be asked)

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[3] See Atty. Reg. Unit, New York State Unified Ct. Sys. Office of Ct. Admin, *Location of Registered New York Attys. as of the End of Calendar Year 2016*. This statistical table, though not published generally, is a public document available on request

to serve clients from a home office in another State. See, *e.g.,* R. Minkoff, *Ball of Confusion: Practicing from Your Second Home in Another State,* Experience (August/September 2016) at 10. But even if their State of residence would let them do so, New York does not, unduly restricting them in their ability to serve those clients.

New York is not the only State with an in-state office requirement for nonresident, admitted attorneys. Delaware has one as well. See Del Supr. Ct. R. 12(a)(1) ("all papers filed with the Court shall be signed by an attorney who is an active member of the Bar of this Court *and who maintains an office in Delaware for the practice of law*") (emphasis added). The Delaware Bar has 512 nonresident members,[4] each of whom is also potentially affected.[5]

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from the Office of Court Administration's Attorney Registration Unit.

[4] This information was provided by the Delaware Supreme Court Clerk's office, which authorized APRL to so inform the Court because the information is not available in citable form.

[5] Utah has a similar restriction, which was upheld against a Privileges and Immunities challenge in part because, unlike Section 470 and the Delaware rule, it does not draw a distinction between residents and non-residents. See *Kleinsmith v. Shertlief,* 571 F.3d 1033, 1038 (10th Cir. 2009) (upholding Utah statute that requires "'all attorneys who act as trustees of real property trust deeds' to 'maintain[] a place within the state,'" which residents can satisfy by using their home), citing Utah Code Ann. § 57-1-21(a)(i) (2009). Significantly, the *Kleinsmith* court questioned whether Utah lawyers would wish to practice in home offices. *Id.* at 1038. A similar concern was raised 20 years ago in *Tolchin v. Supreme Court of New Jersey,* 111 F.3d 1099, 1107-08 (3d Cir. 1997), which upheld a New Jersey statute that required all New Jersey lawyers, resident and non-resident, to maintain a "bona-fide office" in the State, and noted the lack of evidence that lawyers practiced from their homes. The facts on the ground have obviously changed a lot since then, and New Jersey has repealed

The panel majority's decision also contradicts the Court's own rulings rejecting requirements that unjustifiably burden non-residents. The Court has done this not just with respect to state statutes favoring resident Bar members over nonresidents, but also as to rules governing practice in federal courts. In *Frazier v. Heebe,* 482 U.S. 641 (1987), the Court rejected the Eastern District of Louisiana's refusal to admit a Louisiana-licensed lawyer to its bar because his office and residence were in Mississippi and he did not maintain an office in Louisiana, which the applicable district court rules required. The Court did not decide the question on a constitutional basis, choosing instead to exercise its supervisory power to hold that the residency and office requirements were "unnecessary and irrational." *Id.* at 646. Though it decided no constitutional question, the Court used language that echoed its Privileges and Immunities holdings in *Piper* and *Friedman.* Addressing residency, *Frazier* observed that there was no reason to believe that Louisiana lawyers with offices and residences outside that State were either "any less competent than resident attorneys," or any less likely to show up for court. 482 U.S. at 648. And the Court threw out the in-State office requirement as well, noting that "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court." *Id.*

What is "unnecessary and irrational" for purposes of an exercise of supervisory power is also an insufficient justification for a facially discriminatory requirement

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the statute. Pet. App. 47-48; see also Assoc. of the Bar of City of N.Y. *Ethics Op. 2014-2* (2014) (explaining that New Jersey's "bona-fide office" requirement was repealed in order to facilitate use of virtual law offices, including home offices).

under the Privileges and Immunities Clause. As Respondent conceded below, Section 470 discriminates against non-resident lawyers. And it does so not based on their skill, intellectual ability, ethics or understanding of New York law, but solely on an outmoded view of the need for access to them and their access to court. That requirement is particularly impractical for a State like New York, where a lawyer residing in Buffalo might be further from a court in Manhattan than one residing in New Jersey, Connecticut, Massachusetts and large parts of Pennsylvania. Yet only the latter would be required to bear the expense of maintaining a "physical office" in New York.

The panel majority's decision also ignored the state of lawyer regulation with respect to multijurisdictional practice. The two leading Bar ethics committees in New York–those of the New York State Bar Association ("NYSBA") and the Association of the Bar of the City of New York ("ABCNY")–have opined that there is no *per se* restriction on practicing law in New York from a remote out-of-State location (a so-called "virtual law office") as long as ethical requirements are met. The NYSBA Committee described the advantages to lawyers *and clients* of allowing a lawyer to work from a virtual law office, even one located in another State, which included potential economies in hiring a lawyer who does not have to bear the overhead of an office, synergy with clients who also work "virtually," and the fact that a physical office is no longer needed to effectuate service and communicate with clients or other lawyers. NYSBA Committee *Ethics Op. 1025* (2014). This reasoning is identical to that in ABCNY *Opinion 2014-2* (2014), which also endorsed the use of virtual law offices consistent with the ethics rules. And bar ethics committees in other States agree, reflecting a growing recognition that

physical offices located in a State are not needed to practice law there – by lawyers, clients, or courts. See, *e.g.,* Penn. St. Bar Ethics Op. 2010-200 (2010) (an attorney is permitted to operate from a virtual law office, *i.e.,* one "without a traditional physical counterpart"); Cal. Ethics Op. 2012-184 (2012) (permitting use of virtual law offices); Ill. St. Bar Op. 12-09 (2012) (permitting use of virtual law offices as long as ethical rules complied with); N. C. St. Bar Op. 10 (2005) (North Carolina rules do not prohibit "use of the Internet as an exclusive means of promoting *and delivering* legal services") (emphasis added).

The panel majority's ruling flies in the face of these developments. Indeed, with respect to one of the States that has blessed the use of virtual law offices as ethically permissible for members of its Bar, the Second Circuit has upheld a statute that makes taking advantage of that possibility impossible for some 134,000 of those members, at least insofar as they wish to service New York clients. And it did so based on a 150-year-old policy rationale far removed from today's legal marketplace and the needs of modern legal consumers.

Finally, Section 470 places restrictions on multi-jurisdictional law practice that are inconsistent with ABA policy and New York's own court rules. In 2003, the ABA House of Delegates approved Model Rule 5.5(c), which permits lawyers admitted in one U.S. jurisdiction to practice in another provided certain safe harbors are met. See *Annotated Model Rules of Professional Conduct* (6th ed.) 453 (American Bar Assoc. 2007) ("Annotated Model Rules"). These safe harbors include: hiring local counsel; gaining admission *pro hac vice*; conducting an arbitration or other alternative dispute resolution proceeding; or engaging

in activities "that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." *Id.* Just last year, New York itself adopted a court rule that is virtually identical to Model Rule 5.5(b). *See* 22 N.Y.C.R.R. § 523.2. The purpose of these rules is to facilitate interstate legal practice in areas "under circumstances that do not create a reasonable risk to the interests of . . . clients, the public and the courts." Model Rule 5.5, Comm. 5, cited in Annotated Model Rules at 454. "At least 47 jurisdictions have adopted multijurisdictional practice rules similar or identical to ABA Model Rule 5.5 . . . ." S. Gillers, R. Simon, A. Pearlman & D. Remus, *Regulation of Lawyers: Standards and Statutes* 406 (Wolters Kluwer 2017 ed.).

Moreover, Model Rule 5.5, which APRL strongly supported and which its members helped implement at the state level, is consistent with several model court rules adopted by the ABA House of Delegates in recent years to promote multijurisdictional practice. These include: the Model Rule on Temporary Practice Pending Admission, adopted in 2012, which allows lawyers who move to another State to practice there temporarily while they seek admission to its Bar, see *id.* at 416; the ABA Model Rule on Registration of In-house Counsel, adopted in 2008, which allows in-house lawyers to practice for their corporate employers in states in which they are not admitted (*id.* at 417); the ABA Model Rule on *Pro Hac Vice* Admission, adopted in 2002, to allow lawyers to more easily practice temporarily in courts in which they are not otherwise admitted (*id.* at 416-17); and the ABA Model Rule on Admission by Motion, also adopted in 2002, to facilitate the Bar admission in one State of lawyers admitted in another (*Id.* at 415.).

In adopting these various Model Rules and promulgating them to the various states (many of which have also adopted them), the ABA recognized what APRL members advising lawyers attempting to practice across state lines have long known: that blanket limitations on the ability of lawyers admitted in one State to practice in another–or, as with Section 470, restrictions that burden some admitted lawyers in practicing *in the very State in which they are admitted*—frustrate lawyers and their clients while serving no useful purpose. The free movement and ready communications that modern technology provide make it even more important that lawyers be permitted to serve their clients wherever, and in whatever form, that service is needed and most efficiently and effectively provided. This often will not require the additional cost of maintaining a "physical office" anywhere, much less in one's State of admission—as New York implicitly recognizes by not requiring the same of its resident lawyers.

In sum, the reality on the ground is that outmoded, discriminatory statutes like Section 470 detract from lawyers' ability to serve clients in a national economy while doing nothing to protect the public or promote the integrity of the legal system. The Second Circuit's decision upholding Section 470 is just plain wrong, as a matter of constitutional analysis and practical application. It should be reversed.

CONCLUSION

This case presents important issues regarding the proper analysis of a state statute that gives disparate treatment to residents and non-residents in violation of the Privileges and Immunities Clause, as well as of the proper regulation of legal practice across state

lines in the twenty-first century. Certiorari should be granted to permit the Court to consider those issues.

Respectfully submitted,

RONALD C. MINKOFF
TYLER MAULSBY
FRANKFURT KURNIT
KLEIN & SELZ, P.C.
488 Madison Avenue
10th Floor
New York, N.Y. 10022
(212) 980-0120
rminkoff@fkks.com

JOEL D. BERTOCCHI
Counsel of Record
ANTHONY E. DAVIS
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Amicus Curiae
Association of Professional Responsibility Lawyers

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