No. 16-780

In The Supreme Court of the United States

EKATERINA SCHOENEFELD,

Petitioner,

v.

ERIC T. SCHNEIDERMAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is a global bar association composed of over 42,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations located in at least 85 nations. The entities that employ ACC's members vary greatly in size, industry, and geographic region. They include public and private corporations, partnerships, trusts, non-profits, and other types of organizations. One of ACC's principal roles is to serve as the voice of the in-house bar. For more than 30 years, ACC has sought to educate courts, legislatures, regulators, bar associations, and other law or policy-making bodies on matters that concern corporate legal practice and the ability of ACC members to fulfill their in-house counsel functions. This advocacy often implicates issues relating to the regulation of the legal profession generally, including how outside counsel perform their duties and are regulated. ACC's advocacy activities include submission of *amicus curiae* briefs to this Court and other appellate courts where, as here, an appeal raises a legal issue that is exceptionally important to its members.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* ACC certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), Petitioner's and Respondent's counsel of record received timely notice of ACC's intent to file this *amicus* brief. Both counsel of record have consented to the filing of this brief.

The ability of in-house counsel to advise and represent their clients in connection with litigation, regulatory, and transactional matters anywhere in the United States—including the freedom of in-house counsel to select, engage, and utilize the most suitable outside counsel for a particular matter—is a subject of overarching importance to ACC and the in-house bar. ACC long has advocated against state bar requirements that burden the flow of corporate legal services across jurisdictional boundaries. It is ACC's view that all licensed attorneys should have freedom of movement across State boundaries, so they can practice outside their home jurisdictions, subject to applicable local rules and conditions, without having to apply for local bar admission. *See, e.g.*, ABA Model Rules of Professional Conduct §§ 5.5(c) (allowing attorneys admitted in other jurisdictions to provide legal services on a temporary basis in a particular State) & 5.5(d) (allowing in-house counsel admitted in other jurisdictions to provide legal services in a particular State).

Because the present appeal involves the ability of an attorney who *already is a member* of the bar of a particular State to practice law *in that State*, it implicates a restraint on law practice even more pernicious than state-imposed impediments to practice across jurisdictional lines. The importance of this case is underscored by the fact that the law-practice barrier at issue is imposed by the State of New York—a State which the New York State Bar Association has accurately described as "the premier commercial and legal center in the country – if not the world." Mem. from the Comm. on Legal Education and Admission to the Bar to Exec. Comm.,

N.Y.S. Bar Ass'n (Nov. 18, 2010) ("N.Y.S. Bar Ass'n Mem.") at 1 (on file with author).

The state statute at issue, New York Judiciary Law § 470, which was enacted in its current form more than a century ago, allows "[a] person regularly admitted to practice as an attorney" in New York, but who "resides in an adjoining state," to practice law in New York if his or her "office for the transaction of law business is within the state." Although New York's former in-state residency requirement for Bar admission long ago was held to violate the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, *see Matter of Gordon v. Comm. on Character and Fitness*, 422 N.Y.S.2d 641 (1979), New York Judiciary Law § 470, despite decades of repeated calls for its repeal, *see, e.g.*, Daniel C. Brennan, *Repeal Judiciary Law § 470*, N.Y.S. B.J. 20 (Jan. 1990), remains very much in effect.

Indeed, earlier in this litigation, the New York Court of Appeals, on certification from the U.S. Court of Appeals for the Second Circuit, breathed new life into § 470, interpreting it in a way which makes the in-state office requirement more discriminatory and onerous than ever. The New York high court held in *Schoenefeld v. New York*, 25 N.Y.3d 22, 27 (2015) (reproduced at Pet. App. 50-57), that § 470, "[b]y its plain terms . . . requires nonresident attorneys practicing in New York to maintain a *physical law office* here." *Id.* at 52-53 (emphasis added). The Second Circuit's pre-certification opinion ("*Schoenefeld I*") confirmed that there is no such "physical law office" requirement applicable to a *resident* New York Bar member, who for example,

"may set up her 'office' on the kitchen table in her studio apartment and not run afoul of New York law." *Id.* at 65 (emphasis added). Nonetheless, the Second Circuit panel majority, over a strong dissent, held in its post-certification opinion ("*Schoenefeld II*") that § 470 "does not offend 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." *Id.* at 2-3.

New York Judiciary Law § 470 is precisely the type of antiquated, protectionist, attorney regulation that ACC seeks to challenge through its various advocacy activities. The practice of law unquestionably has become increasingly interstate and international in nature, reflecting the needs of corporate clients in a global economy, as well as technological advances. Yet, state regulation of the legal profession was born in a bygone era when businesses were primarily local, lawyers largely engaged in practice in a single State, and U.S. mail and telephonic "land lines" were the primary modes of communication. The practice of law has changed greatly, but in many States the regulation of lawyers has not, and as a result, state licensing systems are putting the U.S. legal profession at a growing disadvantage in the global marketplace.

New York argues that § 470 is necessary to effectuate service of legal papers, facilitate regulatory oversight of nonresident attorneys, and make attorneys more accessible to New York courts. *See* Pet. App. 41. But § 470, and the State's strained justification for it, are out of step with the realities of modern law practice. Thanks to 21st Century

technology, attorneys can practice law knowledgably and efficiently across state lines, and be readily accessible to clients, opposing counsel, and judicial process, without the necessity of maintaining an in-state brick-and-mortar office. Artificial practice barriers such as § 470 protect neither the public nor clients: Rather, they create obstacles that needlessly impede corporations' ability to hire outside counsel of their choice or to relocate in-house legal staff.

From a broader perspective, the Privileges and Immunities question involved in this case not only has enormous implications for the ability of in-house counsel to conduct and manage their organizations' legal affairs, but also, as the certiorari opinion explains, requires this Court's review in order to clarify whether *McBurney v. Young,* 133 S. Ct. 1709 (2013), fundamentally changed the analytical framework that courts long have used to address Privileges and Immunities challenges to state statutes.

SUMMARY OF ARGUMENT

"It is by now well-settled that the practice of law is a privilege protected by Article IV, § 2, and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause." *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989). That interest is seriously impaired by the discriminatory effects of New York Judiciary Law § 470. In the past, the requirements for satisfying § 470's mandate that nonresident New York Bar members who wish to represent or advise clients in New York maintain a law office within the State were unclear, and arguably a matter of

permissive self-interpretation. But the March 2015 holding of the New York Court of Appeals that "the statute requires nonresident attorneys to maintain a *physical office* in New York," Pet. App. 51 (emphasis added), has brought the discriminatory impacts of § 470 sharply into focus.

While resident New York Bar members can practice law from anywhere in New York (including from their homes), nonresident New York Bar members must incur the considerable expense of maintaining a brick-and-mortar law office within the State. Further, under New York's relatively recent, belatedly adopted multijurisdictional practice rules, members of other States' (and other nations') bars—unlike nonresident members of the New York Bar—can temporarily practice in New York without a permanent law office. And while in-house counsel not admitted in New York can practice full-time at their employers' New York offices, in-house counsel who belong to the New York Bar but work for out-of-state organizations cannot practice in New York.

Although the Second Circuit in *Schoenefeld I* unanimously suggested that a physical law office requirement imposed by § 470 would violate the Privileges and Immunities Clause, *see* Pet. App. 68, 71, two members of the same Second Circuit panel reversed course in *Schoenefeld II* and held that the Privileges and Immunities Clause imposes no impediment to § 470's discriminatory effects. According to the *Schoenefeld II* majority, (i) this Court's 2013 decision in *McBurney v. Young* "clarifies" that a state statute violates the Privileges and Immunities Clause only if a plaintiff can prove

that it was enacted for a protectionist purpose, and (ii) the 1862 statutory antecedent to § 470 was not enacted for such a purpose. Pet. App. 27. This conclusion reads too much into *McBurney*. It also ignores the indisputably discriminatory, law-practice-related effects that § 470's physical office mandate imposes upon nonresident (but not upon resident) New York Bar members, and the stark absence of any legitimate State-related justification for that residency-related unequal treatment of members of the same Bar.

ARGUMENT

I. THE IN-STATE LAW OFFICE ISSUE IS TIMELY AND IMPORTANT

A. The New York Court of Appeals, on certification from the Second Circuit, interpreted Judiciary Law § 470 in the most discriminatory possible way

The draconian impacts of the New York Court of Appeals' narrow interpretation of § 470 are a compelling reason why this Court should grant certiorari.

During the 1980s, this Court repeatedly invalidated in-state residency requirements for state bar admission. *See Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988) (holding that "Virginia's residency requirement for admission to the State's bar without examination violates the Privileges and Immunities Clause"); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (concluding that "New Hampshire's bar residency requirement violates the Privileges and Immunities

Clause"); *see also Barnard v. Thorstenn*, 489 U.S. at 559 (holding that durational residency requirements for admission to the Virgin Islands Bar "violate the Privileges and Immunities Clause"); *cf. Frazier v. Heebe*, 482 U.S. 641, 646 (1987) (finding under the Court's supervisory authority that an in-state residency rule for admission of Louisiana Bar members to the bar of a Louisiana federal district court "to be unnecessary and irrational"); *see generally* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 Geo. J. Legal Ethics 135, 152-153 (2004) (discussing cases).

In each Privileges and Immunities bar-admission case, this Court focused its effects-based analysis on "whether there are substantial reasons to support treating qualified nonresident attorneys differently, and whether the means chosen . . . bear a close or substantial relation to the [State's] legitimate objectives." *Thorstenn*, 489 U.S. at 553. And in each case, the Court rejected the State's purported justifications for discriminating against out-of-state attorneys. In *Piper*, for example, the Court rejected New Hampshire's arguments that nonresident attorneys would be less likely to become familiar with local rules, to behave ethically, to be available for court proceedings, and to engage in pro bono work. *See* 470 U.S. at 285. Along the same lines, the Court in *Friedman* rejected Virginia's contention that an in-state residency requirement would help ensure that bar members keep abreast of state-law legal developments. *See* 487 U.S. at 69; *see also Thorstenn*, 489 U.S. at 558-59. Similarly, when the New York Court of Appeals held the State's bar-

admission residency requirement unconstitutional, it rejected the State's argument that "only resident attorneys will be amenable to the supervision of our courts," noting that "nothing prevents the State from enacting legislation requiring nonresident attorneys to appoint an agent for service of process within the State. *Gordon*, 422 N.Y.S.2d at 646.

Although in-state residency requirements for bar admission are a dead letter, this Court has not yet applied its well-established Privileges and Immunities jurisprudence—or extended its case law on bar-admission residency requirements—to the constitutionality of in-state *office* requirements. *See Piper*, 470 U.S. at 289 (White, J., concurring) ("I would postpone for another day such questions as whether the State may constitutionally condition membership in the [state] bar upon maintaining an office for the practice of law in the State . . . ."); *see also Frazier*, 482 U.S. at 649 (avoiding constitutional issue by holding under the Court's inherent supervisory power that a Louisiana federal district court's local rule requiring Louisiana bar members to maintain an in-state office (as well as live in Louisiana) in order to be admitted to the bar of that court was "unnecessary and irrational"). Based on this Court's residency-requirement precedents, *amicus curiae* Association of Corporate Counsel believes that it would be a small but important step for the Court to hold that the Privileges and Immunities Clause nullifies in-state *office* requirements too.

On certification, the New York Court of Appeals squarely "interpret[ed] the statute as requiring

nonresident attorneys to maintain a *physical law office* within the State." Pet. App. (emphasis added). The State's high court, like the Second Circuit in *Schoenefeld I*, rejected New York's invitation to "interpret the term 'office' loosely to mean someplace that an attorney can receive service." *Id.* at 55;[2] *see also id.* at 56 ("Defendants' proffered interpretation . . . finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute. . . ."). The State's lax advocacy position was inconsistent with the fact that "admitted attorneys who have appeared as attorney of record in [New York's] courts while not in compliance with Judiciary Law § 470 have been found guilty of professional misconduct." N.Y.S. Bar Ass'n Mem. at 2 (citing cases); *see also* Pet. App. 42 (Hall, J., dissenting) (noting that Bar members can be disciplined regardless of where they reside).

Insofar as there was any leeway in the past concerning how nonresident New York Bar members could comply with the in-state office requirement imposed by § 470, that wiggle room now has been entirely eliminated by the New York Court of Appeals in the most burdensome and restrictive way. The same state court of last resort which almost thirty years ago held that New York's exclusion of

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[2] The New York Court of Appeals noted that New York law now authorizes several ways to serve out-of-state attorneys, and also that Bar admission of attorneys who neither reside nor have full-time employment in New York is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for service of process. *See* Pet. App. 56.

out-of-state attorneys from Bar membership was an "invidious discrimination" that unconstitutionally "impair[ed] the efforts of nonresidents to earn a livelihood," *Gordon*, 422 N.Y.S.2d at 645, now essentially has turned that ruling on its head for many thousands of nonresident New York Bar members—both law firm attorneys and in-house counsel—who need or want to represent and advise clients, i.e., practice law, within the State.

Although the correctness of the New York court's interpretation of § 470 is not subject to further judicial challenge, the Second Circuit in *Schoenefeld I* recognized that the "construction of the in-state office requirement for nonresident attorneys . . . in all likelihood[] dictates the outcome of the constitutional privileges and immunities analysis." Pet. App. 71; *see also id.* at 31. The discriminatory restriction imposed by New York Judiciary Law § 470 is even more invidious than an in-state residency or in-state office requirement for admission to a state bar. This is because § 470 is a law-practice prohibition imposed upon nonresident attorneys who *already have been admitted* to the bar of the State in which they wish to practice.

B. The in-state office requirement impairs the ability of nonresident New York Bar members, including nonresident in-house counsel, to serve their clients

As the New York Court of Appeals confirmed, New York Bar members who are subject to § 470 reside throughout the United States (and also abroad). *See* Pet. App. 53 n.2 (accepting interpretation that § 470 applies "to nonresident

attorneys in general" rather than only to "residents of adjoining states"). In fact, according to the publicly accessible New York Attorney Registration Database maintained by the New York Office of Information Technology Services, more than *90,000* New York Bar members reside outside of New York, and therefore are potentially affected by this appeal. *See* https://data.ny.gov/Transparency/NYS-Attorney-Registrations/eqw2-r5nb/data.

"Section 470 substantially burdens nonresident attorneys by requiring them, and only them, to maintain separate office premises within the State." Pet. App. 48 (Hall, J., dissenting). That burden is real. It entails "'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 47 (Hall, J., dissenting) (quoting *Schoenefeld I*, Pet. App. 66). The Second Circuit majority's assertion in *Schoenefeld II* that the physical office requirement applicable to out-of-state (but not to resident) New York Bar members "does not unduly burden the nonresident" because "the expense of a New York office is likely to be less than the expense of a New York home," Pet. App. 21-22, is constitutionally irrelevant conjecture that is oblivious to the very substantial, real-world costs of opening and operating a physical law office in New York City or in many other locations throughout the State. Just ask Petitioner Schoenefeld.

Moreover, the implications of the Privileges and Immunities question presented by this case are not only financial. They go to the heart of an attorney's

ability to represent or advise his or her clients wherever the need may arise. The fact that this appeal involves a law-practice barrier imposed by the State of New York is particularly significant since New York "is both home to numerous commercial enterprises and a place where companies and individuals from throughout the country and the world come together to transact business, aided by their attorneys." N.Y.S. Bar Ass'n Mem. at 1.

From the perspective of *amicus curiae* Association of Corporate Counsel, the physical office requirement, applicable only to *nonresident* members of the New York Bar, adversely affects in-house attorneys and their employers in two fundamental ways:

First, in-house attorneys need the flexibility to advise and represent their employers in connection with internal, transactional, regulatory, and litigation matters in every State where they do business—including in States where their employers do not maintain a permanent or continuous physical presence. Under § 470 as interpreted by the New York Court of Appeals, however, an in-house counsel who, for example, is a dues-paying member-in-good-standing of the New York Bar but lives and works in New Jersey or California, cannot independently represent her corporation in prolonged business negotiations conducted in New York City unless the company "maintain[s] a physical law office within the State." Pet. App. 53. By virtue of her knowledge and experience, that in-house attorney may be the best-suited lawyer to represent the company in its negotiations. But because of § 470, the in-house

attorney, although a member of the New York Bar, would be forced to engage an outside attorney whose law firm has a New York office. In contrast, an in-house counsel who resides in New York City would not be subject to any such constraints, even if she normally commutes to the law department at her company's New Jersey headquarters.

Second, in litigation or other matters where an in-house counsel does want to engage the services of an outside attorney, New York's in-state office requirement may curtail her ability to hire the attorney of her choice. For example, an in-house counsel for a Connecticut-headquartered company may want to engage a particular attorney from the company's long-time, Connecticut-based law firm to represent the company in litigation filed in a New York state court. Even though the outside attorney has extensive knowledge of the company's operations—and is a member of the New York Bar—he would not be able to independently represent the company unless his firm maintains a physical office somewhere in New York. *See generally* N.Y.S. Bar Ass'n Mem. at 4 ("[T]his needless barrier will continue to have a chilling effect on a client's choice of counsel because of the cost involved in establishing a New York office.").

It is important to understand that New York's rules governing practice by in-house counsel or by transient out-of-state attorneys do not supersede or even mitigate the law-practice barriers imposed by § 470 on nonresident members of the New York Bar. Although those rules were "needed to bring New York's ethics rules into step with the day-to-day

reality of modern law practice," particularly the fact that "[e]very day . . . out-of-state lawyers come [to New York] to serve their clients," they only apply to attorneys who are *not* admitted in New York. *See generally* Ronald C. Minkoff, *Miracle on Eagle Street: New York's Temporary Practice Rule*, N.Y. Legal Ethics Rptr. (Jan. 3, 2016), *available at* http://tinyurl.com/jyrd56u (discussing scope and criteria of New York's multijurisdictional practice rules).

For example, the Rules for Registration of In-House Counsel, 22 NYCRR Part 522, expressly apply to an in-house counsel who is employed full time *in New York* but is admitted to practice in a different State or in a foreign jurisdiction. *See* 22 NYCRR § 522.1(a) & (b). In other words, the in-house counsel rules do not apply to New York Bar members who work full time in a different State. And even a registered in-house counsel who works in New York may "not make appearances in this State before a Tribunal . . . or engage in any activity for which *pro hac vice* admission would be required." *Id.* § 522.4(b). The in-house counsel rules, therefore, do nothing for a nonresident in-house counsel, even one who is a member of the New York Bar, if her company does not maintain a physical law office in New York.

Nor do the recently adopted Rules for the Temporary Practice of Law in New York, 22 NYCRR Part 523, eliminate the discriminatory impacts of Judiciary Law § 470. In fact, the temporary practice rules state that "[a] lawyer who is not admitted to practice in [New York] . . . *shall not establish an*

office or other systematic and continuous presence in [New York] for the practice of law," or "hold out to the public or otherwise represent that the lawyer is admitted to practice law in [New York]." 22 NYCRR § 523.1. Thus, the temporary practice rules not only are inapplicable to nonresident members of the New York Bar, but also expressly prohibit precisely what § 470 mandates—establishment of a New York law office.

Indeed, due to § 470's archaic physical office requirement, New York's temporary practice and in-house counsel rules place nonresident New York Bar members at a distinct professional (and competitive) *disadvantage* by depriving them of the law-practice benefits that those rules afford attorneys who are not admitted in New York. *See* Patrick M. Connors, *The Office: New York Judiciary Law § 470 Meets Temporary Practice Under Section 523*, N.Y. Law J. (May 24, 2016) at 1, 2 (discussing several "bizarre outcomes" of "the interplay between Judiciary Law section 470, as interpreted by the courts, and the new 'temporary practice' allowed under Part 523 of the Rules of the Court of Appeals").

This Court, like the Second Circuit, will strain to identify any discernable countervailing benefit that § 470—originally enacted 155 years ago, "when service on an out-of-state attorney presented many more logistical difficulties," Pet. App. 56—still affords the judicial system, the New York Bar, or the public. *See id.* at 41-43 (Hall, J., dissenting) (disputing "the State's proffered justifications for the in-state office requirement"). If anything, the physical office requirement turns back the clock by

precluding nonresident Bar members from utilizing technological advances that help define the nature of 21st Century law practice.

For example, the operation of "online" or "virtual" law offices by nonresident New York Bar members, which the New York State Bar Association Committee on Professional Ethics had provisionally approved prior to the New York Court of Appeals opinion in this litigation, now apparently is no longer acceptable. *See, e.g.,* N.Y.S. Bar Ass'n Ethics Op. 1025, 2014 WL 5369076 (Sept. 29, 2014) (concluding that a nonresident attorney admitted to practice in New York may operate via a purely virtual office, provided that the attorney meets the minimum requirements of Judiciary Law § 470); *see also* Pet. App. 42 n.7 (Hall, J., dissenting) (noting that "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"); Patrick M. Connors, *supra* at 1 ("The statute is especially problematic for those nonresident New York attorneys who want to conduct their practice in a 'virtual law office,' where attorneys have an online presence, but no bricks and mortar facility to meet with clients or accept service of papers."); *see generally* Seth L. Laver & Jessica L. Wuebker, *Home Is Where the Office Is: Ethical Implications of the Virtual Office*, ABA Section of Litigation, Professional Services Liability (Mar. 27, 2014), *available at* http://tinyurl.com/jnuggeh.

II. THE SECOND CIRCUIT MAJORITY OPINION CONFLICTS WITH THIS COURT'S PRIVILEGES AND IMMUNITIES JURISPRUDENCE

Circuit Judge Hall, who authored the unanimous opinion in *Schoenefeld I*, filed a robust dissent in *Schoenefeld II*. *See* Pet. App. 28-49. Judge Hall's dissent explains that "the majority unnecessarily disturbs longstanding Privileges and Immunities Jurisprudence" by misconstruing this Court's opinion in *McBurney v. Young*, 133 S. Ct. 1709 (2013), in a way that departs from "the established two-step inquiry" by "requir[ing] a plaintiff to allege, as part of a *prima facie* case, that the law was specifically enacted for a protectionist purpose," and thereby, "in effect, relieves the State of its burden to provide a sufficient justification for laws that discriminate against nonresidents with regard to fundamental rights." Pet. App. 34, 36, 43, 49.

With regard to the first step of the traditional inquiry—"whether a State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens"—the dissenting opinion explains that "[o]n 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 29, 30 (Hall, J., dissenting) (citations omitted). As to the second-step—where "the burden shifts to the State to provide a sufficient justification for the discrimination"—the dissenting opinion discusses in detail why "the State's proffered justifications for the

in-state office requirement—effectuating service of legal papers, facilitating regulatory oversight of nonresident attorneys, and making attorneys more accessible to New York's courts—are plainly not sufficient." *Id.* at 29-30, 41. The dissenting opinion further explains that if the majority's burden-shifting misreading of *McBurney* were correct, i.e., if the plaintiff "must adduce proof of a protectionist purpose," *id.* at 14 n.6 (maj. op.), "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." *Id.* at 36.

McBurney involved Virginia's Freedom of Information Act (FOIA), which affords to Virginia citizens, but not to citizens of other States, the right to inspect Virginia public records. One of the petitioners, Hurlbert, a California resident, was in the business of obtaining state and local real estate tax records on his clients' behalf. He argued, *inter alia*, that the Virginia statute abridged his ability to pursue his chosen profession. Quoting *Piper*, the Court agreed with Hurlbert that "[o]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *McBurney*, 133 S. Ct. at 1715 (quoting *Piper*, 470 U.S. at 280) (internal quotation marks omitted). But the Court indicated that "the Virginia FOIA does not abridge Hurlbert's ability in engage in a common calling . . . . Rather, the Court has struck down laws as violating the privilege of pursing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state

citizens." *Ibid.* The Court added that "Hurlbert 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." *Ibid.*

In *Schoenefeld II*, the majority elevated this passage in *McBurney* into a groundbreaking "clarification" of this Court's prior Privileges and Immunities jurisprudence, and specifically, the Court's well-established two-step framework for analyzing Privileges and Immunities challenges. According to the majority's reading of *McBurney*, (i) a court "necessarily conducts" the two-step inquiry "in light of the Supreme Court's admonition [in *McBurney*] that constitutionally protected privileges and immunities are *burdened* 'only when [challenged] laws were enacted for [a] protectionist purpose.'" Pet. App. 11 (quoting *McBurney*, 133 S. Ct. at 1715), and (ii) "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," and "[i]n the absence of such a showing, a Privileges and Immunities claim fails." *Id.* at 13-14.

As Circuit Judge Hall indicated in his dissent, the majority's *McBurney*-based "reformulation of . . . settled" Privileges and Immunities law relieves a State of its step-two "burden [to make] 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.'" *Id.* at 30 (Hall, J., dissenting) (quoting *Piper*, 470 U.S. at 284). At

the very least, this Court should grant certiorari to clarify whether it intended *McBurney* to transform the way that Privileges and Immunities cases should be decided.

The *Schoenefeld II* majority's mistaken view of "[w]hat *McBurney* makes plain," that "it is protectionist purpose, and not disparate effects alone, that identifies the sort of discrimination prohibited by the Privileges and Immunities Clause," Pet. App. 13, places the analytical focus on precisely the opposite of where it should be. This case illustrates the point. There is evidence that New York Judiciary Law § 470 "was part of a larger statutory scheme designed to prohibit nonresident attorneys from practicing in New York." *Id.* at 44 (Hall, J., dissenting). But even if, as the majority opinion contends, § 470 was enacted during the middle of the 19th Century primarily for the "nonprotectionist purpose" of facilitating service on nonresident attorneys, that "now largely vestigial" objective, *id.* at 18, should not govern whether the statute, which in today's world clearly has a significant protectionist *effect*, violates the Privileges and Immunities Clause. *See id.* at 15 ("§ 470 imposes a physical office requirement on nonresident attorneys that does not apply to resident attorneys, who may use their homes as offices").

The majority opinion's assertion that § 470 "serves . . . to place admitted resident and nonresident attorneys on equal footing" because the statute's effect is to require both categories of New York Bar members "to maintain a physical presence in New York," *id.* at 21, 23, is premised on the

erroneous notion that practicing law from a New York resident's kitchen table is no different than requiring a nonresident to incur the significant expense of maintaining a bona fide physical law office in New York. The unequal treatment imposed by § 470 is blatant, unjustifiable discrimination against nonresidents who otherwise are qualified, and indeed have been formally admitted, to practice law in the State. As in *Gordon*, 422 N.Y.S.2d at 646, "the State is at a complete loss to justify the blanket discrimination against nonresidents."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 2017