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 *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF GRANTING *CERTIORARI*

THOMAS H. PROL, ESQ.
President
Amicus Curiae New Jersey State Bar Association
One Constitution Square
New Brunswick, NJ 08901
Telephone (732) 249-5000
tprol@lcrlaw.com

DAVID B. RUBIN, ESQ.
DAVID B. RUBIN, P.C.
Counsel of Record for Amicus Curiae New Jersey State Bar Association
44 Bridge Street
P.O. Box 4579
Metuchen, NJ 08840
Telephone (732) 767-0440
rubinlaw@att.net

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae New Jersey State Bar Association ("NJSBA") is the primary advocate for the members of the New Jersey bar.[1] The NJSBA serves, protects, fosters and promotes the personal and professional interests of over 18,000 members, and functions as the voice of New Jersey attorneys to other organizations, governmental entities and the public with regard to the law, legal profession and legal system.

According to the most recent data available, there are approximately 49,000 New Jersey-admitted attorneys who also are admitted to practice in New York, and have a vital interest in the outcome of this matter.[2]

The NJSBA has played an active role in the evolution of New Jersey's "*bona fide* office" rule, *see* New Jersey Court Rule 1:21-1(a),[3] and has appeared as *amicus*

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[1] Counsel of record received timely notice of the intent to file this brief. Petitioner has granted consent. Respondents have advised that they have no objection. The NJSBA has no parent corporation, nor does any publicly held corporation own 10 percent or more of its stock. No party's counsel has authored this brief, in whole or in part, nor has any party, any party's counsel or any person other than the NJSBA, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[2] *See* 2015 State of the Attorney Disciplinary System Report, accessible at http://www.judiciary.state.nj.us/oae/2015%20State%20of%20the%20Attorney%20Disciplinary%20System%20Report.pdf.

[3] The full text of Rule 1:21-1(a), in its current form, is as follows:

> Qualifications. Except as provided below, no person shall practice law in this State unless that person is an

attorney holding a plenary license to practice in this State, is in good standing, and complies with the following requirements:

(1) An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.

(2) An attorney who is not domiciled in this State and does not maintain a fixed physical location for the practice of law in this State, but who meets all qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in subsection (a)(1) of this rule, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

(3) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(1).

curiae in related litigation. *See In re Sackman*, 90 N.J. 521, 448 A.2d 1014 (1982); *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997), *cert. denied*, 522 U.S. 977 (1997).

Because the lower courts relied on the Third Circuit's decision in *Tolchin* as a reference point for their opinions in this case,[4] the NJSBA seeks to inform the Court of New Jersey's experience with its own rule

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(4) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to the action or the guardian of the party; or (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; (3) is a law student or law graduate practicing within the limits of R. 1:21-3; or (4) is an in-house counsel licensed and practicing within the limitations of R. 1:27-2.

Attorneys admitted to the practice of law in another United States jurisdiction may practice law in this state in accordance with RPC 5.5(b) and (c) as long as they comply with Rule 1:21-1(a)(1). No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

[4] *Schoenefeld v. Schneiderman*, 821 F.3d 273, 284-86 (2d Cir. 2016); *id*. at 296 (Hall, J., dissenting); *Schoenefeld v. New York*, 907 F.Supp.2d 252, 261 (N.D.N.Y. 2011).

since *Tolchin*, as there have been important developments that directly bear on the privileges and immunities analysis involved here.

SUMMARY OF THE ARGUMENT

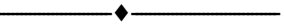
This Court has established a longstanding "two-step inquiry" for analyzing challenges to legislation under the Privileges and Immunities Clause. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988). At the first step of that inquiry, a plaintiff must show that the challenged law treats nonresidents differently from residents and impinges upon a "fundamental" privilege or immunity protected by the Clause. *United Bldg. and Constr. Trades Council v. Camden*, 465 U.S. 208, 218 (1984). If the plaintiff makes that showing, the burden shifts to the state to show that the challenged law is "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65 (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)).

The Second Circuit panel majority has erroneously construed *McBurney v. Young*, 133 S.Ct. 1709 (2013) to require that a plaintiff also prove that the law in question was adopted for a protectionist purpose. That burden of proof had never been enunciated by this Court in any decision before *McBurney*, there is no evidence that the lower courts have previously read the Court's precedents to impose such a requirement, and nowhere in *McBurney* did the Court suggest that it intended to modify prior law. Imposing such a

requirement would relieve the states of their burden of proof at the second step of the analysis, and the Second Circuit's decision creates a split with the Ninth Circuit. *See Marilley v. Bonham*, 802 F.3d 958, 963 (9th Cir. 2015), *rev'd and remanded*, ___ F.3d ___, 2016 WL 7384038 (Dec. 21, 2016) (en banc).

This Court has also mandated that consideration be given to less restrictive means of pursuing the state interest in order to minimize the burden on the affected party. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). New Jersey's experience with its own "*bona fide* office" rule has shown that New York Judiciary Law § 470 is unnecessary to advance any legitimate state interest.

Even more important than the interests of nonresident attorneys are the interests of clients in the freedom to choose legal counsel. New York's arbitrary office requirement threatens that important right, which is reason in itself for close scrutiny of the decision below.



REASONS FOR GRANTING THE PETITION

The Court has granted *certiorari* in the past to review "question[s] of importance in the administration of justice[.]" *Fong Foo v. U.S.*, 369 U.S. 141, 142, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962). This is such a case, as the Second Circuit has recognized that "preserv[ing] a balance . . . between an individual's right to his own freely chosen counsel" and maintenance of professional standards in the legal community is "a question of

acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice." *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 564-65 (2d Cir. 1973).[5]

The stakes in this case transcend the pecuniary interests of nonresident lawyers because New York Judiciary Law § 470 significantly imperils clients' freedom of choice in legal representation by establishing an unconstitutional impediment to the practice of law. This Court has recognized that any limitation on clients' choice of counsel is especially problematic in criminal cases, where Sixth Amendment concerns are implicated. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

For many years, the NJSBA had strongly supported the requirement of a law office in New Jersey, and resisted any changes that would have permitted attorneys to avoid maintaining an ongoing presence in our state. That position was grounded in the belief that a fixed, physical location for the practice of law was necessary to assure accessibility by, and accountability to, courts, adversaries, regulatory authorities and the public.

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[5] The professional standards involved in *Emle Industries* dealt with conflicts of interest, not office space, but any rule that substantially limits a client's "right to his own freely chosen counsel" among members of a particular state's bar, wherever they may reside, deserves close scrutiny.

The NJSBA's historical position on the matter reflected how law was practiced in New Jersey at that time, but the NJSBA's stance on the matter has evolved in light of developments in law firm practice technology, and clients' needs and expectations. For the reasons presented below, the NJSBA submits that the underlying goals of New York's office requirement for nonresident attorneys can be served effectively through less burdensome means, and supports the grant of *certiorari* to review the Second Circuit's judgment below.

A. New Jersey's Experience With The *Bona Fide* Office Rule

Until 1969, New Jersey-admitted attorneys were required to reside in-state. *Sackman*, 448 A.2d at 1017. That year, the Supreme Court of New Jersey implemented the recommendation of a Court-appointed committee to expand eligibility to include nonresident attorneys who maintained their principal office in New Jersey. *Id.* In 1978, the rule was amended again to require resident attorneys to maintain a "*bona fide* office" in New Jersey, while still requiring nonresident attorneys to maintain their principal office in the state. *Id*.

The term "*bona fide* office" was not defined, which prompted another amendment in 1981 to include the following definition:

> For the purpose of this section, a *bona fide* office is a place where the attorney or a responsible person acting on his behalf can be reached in person and by telephone during normal business hours. A *bona fide* office is more than a maildrop, a summer home which is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted. [*R.* 1:21-1(a)].

The rule was amended again, in 1982, in *Sackman*, 448 A.2d at 1017, to require *all* New Jersey-admitted attorneys to maintain a *bona fide* office there, regardless of their residence.

That was essentially the version of the rule in effect in 1997, when the Third Circuit rejected a constitutional challenge on privileges and immunities and other grounds in *Tolchin*, 111 F.3d 1099. The court held that "a rational relationship exists between the benefit of attorney accessibility and the *bona fide* office requirement," *id.* at 1109, and was satisfied that the rule was a reasonable means of advancing New Jersey's interest of "ensuring that attorneys licensed in New Jersey are available to New Jersey courts, practitioners and clients." *Id*. at 1113. The NJSBA fully supported the court's decision, at the time, and appeared as *amicus curiae* to oppose the grant of *certiorari* by this Court.

As we now have come to realize, the Third Circuit, in *Tolchin*, was addressing the practice of law at the dawn of the digital age, at least for smaller firms and

solo practitioners who were most impacted by the *bona fide* office requirement. According to a survey by the American Bar Association Legal Technology Resource Center, as of 1996 only 32 percent of individual lawyers had portable computers, and only 37.6 percent had internet access.[6] The first known use of a smartphone was not until 1997, when *Tolchin* was decided.[7] The *Tolchin* court, sensing change in the air, presciently noted the possibility that "some of the recent rapid advances in communication and transportation technology may render the *bona fide* office requirement's intended benefit of attorney accessibility less significant in the future." *Id*. at 1115.

Much has changed in New Jersey since *Tolchin*. In 2004, New Jersey's Supreme Court once again amended Rule 1:21-1(a) to permit the *bona fide* office to be located "in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia[.]" The revision incorporated the recommendations of two study commissions that had been requested to review the *bona fide* office rule, following an administrative hearing on a proposal by the Philadelphia Bar Association to permit its New Jersey-admitted members to share office space in New Jersey.

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[6] *See* Technology and Law Practice Guide, "*What's Hot: Technology Trends for Smaller Law Firms*," http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/tsp97yevics2.html.

[7] *See Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/smartphone.

One of the committees offered the following rationale:

> 1. The requirement that a lawyer maintain a *bona fide* office in New Jersey does not recognize that technology, when used effectively, can substitute for proximity, and that a lawyer's office in Delaware, Pennsylvania or New York may be just as accessible by such means as an office in New Jersey. Additionally, the existing rule does not recognize the proximity of New York City and Philadelphia to many New Jersey courts and clients, or reconcile the differential in treatment between attorneys with offices located in those cities and attorneys whose New Jersey offices are located at a considerable distance from their clients and from courts in which litigation is pending.
>
> 2. New Jersey has exhibited a gradual relaxation of residency and office requirements, the history of which is set forth in *Tolchin v. Supreme Ct. of the State of N.J.*, 111 F. 3d 1099, 1103-04 (3d Cir. 1997). Nonetheless, the *Tolchin* court upheld the present *bona fide* office rule against constitutional challenge only because it found a rational relationship to exist between the benefit of attorney accessibility and the *bona fide* office requirement. *Id*. at 1108. The observations in the preceding paragraph render even this justification constitutionally suspect and suggest that a further rule relaxation may now be warranted.
>
> 3. The research . . . discloses that the rule as currently written does not fall within the

> mainstream of other states' supervisory schemes. In fact, it is practically unique.
>
> 4. The proposal of the Philadelphia Bar Association that has been designed as a means of compliance with the present *bona fide* office rule envisions the creation of an artificial, shared satellite office. That proposal was not adopted by the Court; but was instead referred to this Committee and the Pollock Commission for further study. If our recommendation is approved, the PBA proposal should become moot.[8]

Under the version of the rule proposed by that committee, a *bona fide* office would still be required, but could be located in any American jurisdiction.

The NJSBA once again supported the existing version of the rule, believing it to be in the best interests of the public at that time, but the proposal was adopted by the New Jersey Supreme Court.

Since 2004, however, the NJSBA has reexamined its position on the *bona fide* office rule, mindful of Justice Holmes' sage observation that the life of the law has not been logic but experience. *See* O. Holmes, *The Common Law* 1 (1881). A three-year review of our experience with the liberalized standard by the Supreme Court of New Jersey Professional Responsibility Rules

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[8] *See* New Jersey Supreme Court Ad Hoc Committee on Bar Admissions, Final Report, http://www.judiciary.state.nj.us/notices/reports/finalreport.pdf.

Committee in 2007[9] found "no known problems with respect to deletion of the in-state requirement for a *bona fide* office," and that "[d]ebate about removing the in-state *bona fide* office requirement has all but disappeared since the amendment went into effect."

As reliance upon email, teleconferencing, social media and other sophisticated forms of digital communication became standard throughout the business community, the bar and the public at-large, in 2010, the NJSBA accepted the recommendation of a joint subcommittee of its Solo and Small-Firm Section and Professional Responsibility and Unlawful Practice Committee to support elimination of the *bona fide* office requirement altogether. The subcommittee was appointed to study the existing rule, and to recommend any changes that it deemed appropriate in view of advancements in technology and law firm practice management.

Shortly after the subcommittee was formed, the New Jersey Supreme Court's Advisory Committee on Professional Ethics and its Committee on Attorney Advertising issued a joint opinion, ACPE Opinion 718/CAA Opinion 41 (2010),[10] holding that so-called "virtual offices," *i.e.*, time-share arrangements with no ongoing presence by an attorney or full-time dedicated

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[9] *See* New Jersey Supreme Court Professional Responsibility Rules Committee, Feb. 2007 Report, http://www.judiciary.state.nj.us/notices/2007/n070308a.pdf.

[10] *See* New Jersey Supreme Court Advisory Committee on Professional Ethics Op. 718/Committee on Attorney Advertising Op. 41 (2010), 200 N.J.L.J. 54 (Apr. 5, 2010), http://www.judiciary.state.nj.us/notices/2010/n100326a.pdf.

staff, do not satisfy the *bona fide* office requirement. The joint opinion correctly applied the rule as it stood, but shone an even brighter spotlight on the growing disconnect between the "bricks-and-mortar" office mandate and the needs of lawyers and their clients.

The subcommittee began its task by identifying the underlying policy objectives that the *bona fide* office rule was intended to advance, then addressing the most effective way to accomplish those objectives to honor the reasonable expectations of clients in the digital environment in which business typically is conducted today. The rule's apparent purpose was to assure that attorneys are promptly accessible and responsive to clients, judicial tribunals, government agencies and bar regulatory authorities. One problem with the existing rule was that it appeared to assume that most attorneys are litigators who spend their days in court, then return to the office to meet with clients. This practice model may have been prevalent in the days of Perry Mason, but hardly reflects the professional lifestyle of most litigators today.

Another problem was that the rule seemed oblivious to transactional attorneys and other non-litigators, who may spend no time "at the office" because they have no need for one, at least not the traditional version contemplated by the rule. Yet another problem was that the rule had been liberalized over the years, to the point where it permitted a licensed New Jersey attorney to reside in Puerto Rico and maintain a *bona fide* office in Guam. The subcommittee concluded that if the rule ever served a useful purpose, it no longer did, at least not in its existing form.

After considerable discussion, the subcommittee unanimously found that a fixed, physical office location, regularly staffed during normal business hours, was not the only reliable way to achieve the accessibility and responsiveness necessary to fulfill an attorney's professional obligations.

In a report to the NJSBA's Board of Trustees, its governing body, the subcommittee emphasized that the "traditional" law office was by no means a relic of a bygone era. It remained a viable choice for attorneys and firms who believed that this practice model best reflected their professional style and identity, and most effectively met the needs of their clientele. But for many attorneys and their clients, smartphones, email and video conferencing offered opportunities for communication and information-gathering far more suited to their needs than a physical office location that the attorney did not require to perform most of the daily tasks of lawyering, and that busy, far-flung clients may have had no interest in visiting.

The subcommittee agreed that attorneys may need to designate physical locations for specific purposes, such as attorney regulatory audits and service of process. For the day-to-day servicing of clients, however, it could discern no persuasive policy basis for continuing the requirement of a *bona fide* office as then defined. The subcommittee noted in passing that the current rule undoubtedly increased the cost of legal services to the public. That would not be reason alone to dispense with the rule if it were necessary to protect clients' interests, but the subcommittee believed that, if that ever were the case, it no longer was.

The subcommittee proposed that Rule 1:21-1(a) be amended to read as follows:

> 1:21-1. Who May Practice; Appearance in Court
>
> (a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and complies with the following requirements:
>
> (i) An attorney need not maintain a fixed, physical office location, but must structure his or her practice in such manner as to assure prompt and reliable communication with, and accessibility by clients, other counsel, and judicial or administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.

(ii) An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in the preceding subsection. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

(iii) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(i).

(iv) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

* * *

The subcommittee's proposed revision to the rule placed front and center the goals of attorney accessibility and responsiveness that remained valid as ever, while offering attorneys flexibility in how those objectives may be achieved. It established a functional test that the subcommittee was confident could be understood by attorneys, and enforced by the judiciary. The proposal was endorsed by the NJSBA's Board of

Trustees, and forwarded to the Supreme Court of New Jersey for consideration.

The Supreme Court of New Jersey's Professional Responsibility Rules Committee issued a report "largely agreeing" with the NJSBA subcommittee's proposal, and recommending that it be accepted with several modifications, including a requirement that the site of the designated "fixed, physical location" for file inspection, hand-deliveries, and process service be located in New Jersey.[11] Mindful of the present litigation, the report observed,

> This will increase the burden on nonresident attorneys who presently satisfy *Rule* 1:21-1(a) by maintaining their offices outside of New Jersey because, if adopted, the proposed amendments would require them to "designate" a *New Jersey* location for service, deliveries, and file inspection. Nonetheless, the members distinguished such a burden from the one at issue in *Schoenefeld v. New York*, 1:09-CV-00504 (N.D.N.Y. Sept. 7, 2011), available at 2011 U.S. Dist. LEXIS 100576 (holding that New York rule requiring nonresident attorneys to maintain in-state offices while resident attorneys can operate offices out of their basements violates Privileges and Immunities Clause of U.S. Constitution). The

[11] *See* New Jersey Supreme Court Professional Responsibility Rules Committee, 2010-2012 Rules Cycle Report, http://www.judiciary.state.nj.us/reports2012/PRRC2010-12RPT.pdf. A copy of the NJSBA subcommittee's recommendations was included as an appendix to that report.

> Committee is of the view that there is a distinction between a requirement to "maintain" a fixed physical office for practice and having to "designate" space for purposes of bringing files for inspection by authorities on short notice and for receiving hand-delivered mail and service of process. [Report at 8-9]

The Supreme Court of New Jersey amended the rule, effective Feb. 1, 2013, to dispense with the *bona fide* office requirement entirely, opting instead for standards of "prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice[.]" New Jersey Court Rule 1:21-1(a). The revised rule does require attorneys to "designate one or more fixed physical locations" for regulatory inspections of files and financial records, for mail and hand-deliveries, and for service of process, and imposes other requirements intended to assure that attorneys are accessible. Nonresident attorneys who do not maintain an in-state office must authorize the Clerk of the Supreme Court to accept service of process if it cannot otherwise be effectuated pursuant to the appropriate court rules.

In the four years since New Jersey's *bona fide* office rule was last amended, the NJSBA's experience has shown that relieving attorneys of the burden of maintaining an in-state office has not negatively impacted any of the important values cited by defendants in this case. Given the proximity of New Jersey to New York, and the similarities in the day-to-day practice of law in these two jurisdictions, the less restrictive

means proven to work in New Jersey are sufficient proof that New York's in-state office requirement can no longer withstand scrutiny under the Privileges and Immunities Clause. *See Piper*, 470 U.S. at 284 (requiring consideration of less restrictive means).[12]

B. The Second Circuit Erroneously Interpreted *McBurney* And Created A Split In The Circuits

Petitioner unquestionably satisfied the first step of this Court's "two-step inquiry," *Friedman*, 487 U.S. at 64-65, as it is well settled that the practice of law is protected by the Privileges and Immunities Clause. *Id.* at 66. The original panel opinion below recognized that New York Judiciary Law § 470 imposes a substantial burden on nonresident attorneys by requiring them to maintain an "office for the transaction of law business" within the state, while not requiring the same of resident attorneys. *See Schoenefeld v. New York*, 748 F.3d 464, 468 (2d Cir. 2014) (App. 65-66). It was therefore incumbent on the state to establish a sufficient reason "for not permitting qualified nonresidents to practice

[12] The district court below cited several examples of less restrictive means to accomplish New York's professed interest in this case, such as appointing an agent for service of process within the state, *see Matter of Gordon*, 48 N.Y. 2d 266, 274 (1979) requiring a lawyer who resides a great distance from a particular state to retain local counsel to be available on short notice for any appearances, *see Piper*, 470 U.S. at 287, and using "modern communication systems, including conference telephone arrangements." *See Schoenefeld v. New York*, 907 F.Supp.2d at 265-66 (quoting *Frazier v. Heebe*, 482 U.S. 641, 642 (1987)).

law within its borders on terms of substantial equality with its own residents." *Id.*

The panel majority's subsequent decision erroneously relied upon *McBurney* to place the burden on petitioner to make out a *prima facie* case of protectionist intent. In doing so, the majority erroneously undercut the Court's longstanding "two-step inquiry," *Friedman*, 487 U.S. at 64, by reading *McBurney* to require that a plaintiff also prove, somewhere along the line, that the law in question was adopted for a protectionist purpose. The majority conceded that "*McBurney* did not specify at what step of the traditional two-step inquiry plaintiff must carry this protectionist-purpose burden[,]" *Schoenefeld*, 821 F.3d at 281 n. 6 (App. 14-15), but found it unnecessary to decide that question "because, in any event, Schoenefeld's failure to carry this burden here defeats her Privileges and Immunities claim." *Id.*

The dissenting judge found it inconceivable that the Court would "unanimously alter[ ] the longstanding Privileges and Immunities analysis through *dicta* without acknowledging as much (or generating a single dissenting opinion)[.]" *Id*. at 290 n. 2 (Hall, J., dissenting) (App. 34). In his view, "[t]he majority's 'discriminatory intent' requirement . . . remains novel to privileges and immunities jurisprudence whether it is grafted onto the first or second step of the inquiry." *Id*. at 290 n. 4 (Hall, J., dissenting) (App. 34-35). "By requiring plaintiffs to allege a *prima facie* case of discriminatory intent, the majority, in effect, relieves the State of its burden to provide a sufficient justification

for laws that discriminate against nonresidents with regard to fundamental rights." *Id*. at 291 (Hall, J., dissenting) (App. 36).

The Ninth Circuit recently addressed the issue in *Marilley v. Bonham*, 802 F.3d 958, 963 (9th Cir. 2015), *rev'd and remanded*, ___ F.3d ___, 2016 WL 7384038 (Dec. 21, 2016) (en banc).[13] A panel of that court initially struck down California's commercial fishing fee structure under the Privileges and Immunities Clause, because it charged nonresidents two to three times more than residents without sufficient justification. In finding for the plaintiffs, the panel rejected the state's argument that, in addition to the traditional two-step inquiry, *McBurney* required the plaintiffs to prove that the differential fees were enacted for a protectionist purpose. *Id.* at 963.

The panel observed, "[w]hen the Court determines that the Privileges and Immunities Clause does not apply at all, it says so" (citing *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978)), and distinguished *McBurney* on the ground that the right to access public information asserted in that case simply was not protected by the Privileges and Immunities Clause. *Id.* at 963-64. The panel concluded that acceptance of the state's argument "would negate the *second* step's burden on the state to provide a valid

[13] The Ninth Circuit had not yet issued its en banc ruling when the petition for *certiorari* was filed in the present case.

justification for the discrimination against nonresidents," and represent a "dramatic overhaul of the first step of the settled two-step inquiry." *Id*.

The full Ninth Circuit, sitting *en banc*, reversed the panel's decision, "easily conclud[ing] that Plaintiff's interests are 'facially burdened'" slip op. at *3, but finding that the state met its burden of establishing that the fees were closely related to the advancement of a substantial state interest. The majority cited *McBurney* only in support of the traditional two-step analysis, slip. op. at *3, *6, and did not require that plaintiffs plead or prove a protectionist intent. Judge Smith, one of the dissenting judges, cited *McBurney* as authority to "examine" whether a protectionist purpose was involved, but did not suggest that plaintiff bore the burden of proving one. *Id*., slip op. at *13, n. 1 (Smith, J., dissenting).

Thus, a split exists between the Second Circuit and the Ninth Circuit over whether *McBurney* requires a plaintiff to prove a protectionist intent. Assuming that the Court intended to impose this proof requirement, it remains unclear even to the Second Circuit where in the two-step analysis this requirement is to be met.

This Court typically approaches reconsideration of its earlier decisions "with the utmost caution[,]" *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council of Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). *See also Am.*

Trucking Ass'ns v. Smith, 496 U.S. 167, 190 (1990) (rejecting an argument that, if accepted, would constitute "*sub silentio* overrul[ing]" of prior Court precedent). It is equally clear that "*dicta* does not and cannot overrule established Supreme Court precedent." *Waine v. Sacchet*, 356 F.3d 510, 517 (4th Cir. 2004). *See also Heleva v. Brooks*, 581 F.3d 187, 196 (3d Cir. 2009).

We recognize that prudence often favors allowing issues to "percolate" in the lower courts before being taken up by this Court.[14] But the petition before the Court does not present a new legal question, or one previously flagged for consideration in a future case, where insights from the lower courts may prove useful. The issue here is how the Court intended one of its decisions to be read at the time it was handed down. No useful purpose would be served by allowing confusion to fester in the lower courts over whether references to a protectionist purpose in *McBurney* were intended to establish a binding proof requirement for plaintiffs or were merely *dicta*.

[14] The Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n. 1 (1995) (Ginsburg, J., dissenting).

CONCLUSION

For the reasons presented above, *Amicus Curiae* New Jersey State Bar Association submits that the petition for *certiorari* should be granted.

Respectfully submitted,

THOMAS H. PROL, ESQ.
President
Amicus Curiae New Jersey State Bar Association
One Constitution Square
New Brunswick, NJ 08901
Telephone (732) 249-5000
tprol@lcrlaw.com

DAVID B. RUBIN, ESQ.
DAVID B. RUBIN, P.C.
Counsel of Record for Amicus Curiae New Jersey State Bar Association
44 Bridge Street
P.O. Box 4579
Metuchen, NJ 08840
Telephone (732) 767-0440
rubinlaw@att.net

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