UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UPSOLVE, INC., AND REV. JOHN UDO-OKON,

Plaintiffs,

v. 22 Civ. 627 (PAC)

LETITIA JAMES, in her capacity as Attorney General of the State of New York,

Oral Argument

Defendant.

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New York, N.Y.
May 12, 2022
11:30 a.m.

Before:

HON. PAUL A. CROTTY,

District Judge

APPEARANCES

WEIL GOTSHAL & MANGES LLP
Attorneys for Plaintiffs
BY: ROBERT NILES-WEED
ELENA DE SANTIS
GREGORY STEWART SILBERT

OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendant
BY: MATTHEW JOSEPH LAWSON

(Case called)

MR. NILES-WEED: This is Robert Niles-Weed from Weil Gotshal, for the plaintiffs. I'm joined at counsel table by Greg Silbert and Elena De Santis.

THE COURT: Who's going to be arguing?

MR. NILES-WEED: I will, your Honor.

THE COURT: All right. OK.

MR. LAWSON: And for the defendant, Letitia James, Matthew Lawson from the New York City Attorney General's Office. Good morning, your Honor.

THE COURT: Good morning, Mr. Lawson.

Before we start, I want to make some oral observations. First of all, this is a question that deals with great legal and social significance. Before the parties present their arguments, let me start with several aspects of the case I do not understand to be in dispute. If I am wrong, you can correct me.

Everyone agrees that the default rate for New Yorkers in these debt collection cases are astronomically high, everyone also agrees that more quality legal advice in this area would be good a thing, and everyone also agrees that the advice that plaintiffs seek to give would constitute an unauthorized practice of law under New York law. As I understand it, the question is, therefore, whether the plaintiffs have a First Amendment right to give that advice

anyway.

We also note the unusual relief the plaintiffs seek. They seek a preliminary injunction, but an injunction normally maintains the status quo. Instead, the plaintiffs' injunction would alter the status quo and create a new carve-out to a time-honored statute. The burden is therefore on the plaintiffs to make their case.

I've allocated 15 or 20 minutes to each side, but that's not a hard-and-fast time rule. I can be flexible. We have plenty of time.

So we'll hear first from the plaintiff.

MR. NILES-WEED: Thank you, your Honor. I'm, as I mentioned, Robert Niles-Weed, and I represent plaintiffs.

I first want to acknowledge the points the Court just made. It's not disputed that the default rate in these actions is astronomically high, a bit more advice would be good, and that providing advice would be the unauthorized practice of law.

But I want to start by specifying exactly what the question is in this case. This is a narrow, as applied, challenge, and plaintiffs seek to provide advice under very precise terms. Specifically, plaintiffs want to provide free advice on a single discrete topic that is truthful, non-misleading, and provided with fully informed consent. It is subject to strict training, regulation, and supervision, and

it is reliably in the client's best interest= are doing this to remedy the access to justice gap the Court recognized and are doing so without displacing any of the state's ordinary regulatory authority outside the narrow scope of that program.

Let me explain in a bit more detail why each of those limitations of plaintiffs' programs are relevant here.

First, the program is free. None of the advice plaintiffs will provide is provided for pecuniary gain. There's no cost to clients, and also no risk of conflicts of interest that come into play when law is practiced for pecuniary gain. The advice is provided solely to help New Yorkers understand and access their legal rights.

Second, plaintiffs seek to provide advice only on the single discrete topic of how to use the state-provided answer form to respond to a debt collection action. Plaintiffs are not asking to represent anybody in court. They're not even asking to file those papers on behalf of the clients they assist, and they're certainly not --

THE COURT: What exactly are they doing?

MR. NILES-WEED: So what plaintiffs will be doing is providing limited person-to-person advice pursuant to the strict terms of the training guide, which is attached as Exhibit B to the complaint. So a client will come to a justice advocate, like plaintiff Reverend John Udo-Okon, and he will direct them to describe their situation and will ask a number

of questions about the facts of their particular case. Based on the facts of their case, he will advise them the best way that they might reliably fill out the state's answer form and respond to the lawsuit against them.

The client -- and this is made clear in the affidavit attached to the training and experience guide which the client must acknowledge -- the client must recognize that they are still fully self-represented, that they are in charge of all the decisions in their lawsuit, and what they're receiving from plaintiffs is just advice, and just advice delivered person to person through speech.

And I'll discuss in a moment why that puts this case within the clean line of the Supreme Court's First Amendment cases.

THE COURT: I was under the impression that the advice didn't go much beyond what was in the brochure, the booklet.

MR. NILES-WEED: Excuse me, your Honor. Go ahead.

THE COURT: Go ahead.

MR. NILES-WEED: It doesn't go beyond that at all. In fact, plaintiffs require everyone providing that advice to attest that they will only provide it subject to those strict terms. So the advice is that being provided in the training guide, and nothing more.

THE COURT: All right.

MR. NILES-WEED: On the training guide, I want to

emphasize that the advice is being provided not just pursuant to this training guide itself but subject to other strict regulations and supervision. The advisers must adhere to conflict of interest and confidentiality rules. Plaintiffs are committed to tracking every single encounter and ensuring that the advice being provided is within the strict, narrow terms of the training guide.

Fifth, and finally, the advice is reliably in the client's best interest. We have two expert affidavits from Professor Pamela Foohey, that's at ECF 7-16, and from Mr. Tashi Lhewa, at ECF 7-5, and they say that a low-income New Yorker receiving advice based on the training guide will be better off than they would be without it.

Now, let me explain, now that I've laid out the features of our program and what exactly it is plaintiffs seek to do, why the First Amendment protects that limited activity. And I'll do it in two discrete ways, because plaintiffs' complaint raises two separate and independent First Amendment challenges, a free speech challenge under the First Amendment and a freedom of association challenge under the First Amendment. Either of which is independently sufficient for plaintiffs to prevail, and both of which must be rejected for plaintiffs not to be likely to succeed on the merits.

So before I do that, actually, let me offer just a word on standing, which the government raised in their

opposition. Your Honor said in his opening remarks that this is unusual relief, but in cases like this, in pre-enforcement challenges to statutes for violating the First Amendment, the bar is quite low to show standing, and the question is whether there is a First Amendment right.

The case law -- and you could see this in the *Cayuga Nation* case, for example, we cite in our brief -- requires plaintiffs to show only that their fear of prosecution is not imaginary or wholly speculative. And the reason for that is because First Amendment rights raise a particular danger of self-censorship and chill that the fear of prosecution will prevent plaintiffs and others like them from engaging in protected speech. And we've shown in a number of places from statements by the parties, by the amicus parties here, and even statements by the state itself why this fear of prosecution is not wholly imaginary.

Plaintiffs, Mr. Rohan Pavuluri and Reverend John Udo-Okon, both talk at declarations in ECF 7-1, paragraph 32, that's Mr. Pavuluri, ECF 7-2, paragraph 18, that's plaintiff Reverend Udo-Okon, talk about how they are currently today being chilled from engaging in this activity because of the fear of prosecution.

And it's not just plaintiffs. I'll note also that there's an amicus brief from 25 law professors who study professional regulation and access to justice. That's at

ECF 34-1. And at pages 5 to 8 of that brief, they talk about how the existing regime paralyzes potential providers, and they talk also about how not merely the threat of prosecution but even the threat of investigation is enough to chill protected speech in this area.

The state, for its part, does not disavow that it will prosecute plaintiffs. The state had ample opportunity in its opposition to say that it would not prosecute plaintiffs, and it didn't. Now, I'll note that even if the state had done so, or does so today, that's still not enough, as cases like the *Vermont Right to Life* made clear, but the state didn't do that. Instead, what the state, joined by its amicus parties, did was to say that plaintiffs' activity would be against the public interest. The state has -- as we note in the first footnote of our reply brief, the state has recently prosecuted people for criminal penalties for violating these exact rules. So I don't think standing is at issue here.

THE COURT: That case was substantially different, though, wasn't it?

MR. NILES-WEED: So the facts of that --

THE COURT: There was a nonlawyer practicing law and holding himself out as a lawyer.

MR. NILES-WEED: That's right, your Honor. The facts are not --

THE COURT: This is different.

MR. NILES-WEED: Absolutely. But the cases talk about how the question in this area is whether or not the statutes that are being used to prosecute are not moribund, and I think showing that the state does use these statutes and encourages -- even in the press release the statement made related to that case encourages people to make complaints to the Attorney General when they're concerned about activity that might be violating the statute. I think it's hard to say that plaintiffs' fear of prosecution is imaginary or speculative.

I'll move to say a few words on the merits. And again, in the First Amendment context, when looking at an injunction, while your Honor is right that a preliminary injunction is unusual relief, the Second Circuit has made clear that in the First Amendment context, the merits, the likelihood of success on the merits, are the dominant, if not the dispositive, question in deciding whether or not to grant an injunction. I'll speak briefly at the end of my remarks on the public interest balancing, but I really want to focus on the First Amendment free speech and free association claims. So I'll start with the free speech claim.

The rules governing the unauthorized practice of law, as they are applied to plaintiffs in this context, function as a content-based regulation of speech. And the Supreme Court has made clear time and again in a number of recent cases that content-based restrictions on speech must satisfy strict

scrutiny.

Plaintiffs want to advise low-income New Yorkers dealing with debt collection actions how to respond to those actions, and the only reason their speech is unlawful is because its content --

THE COURT: If you have this right under the First Amendment, why do you limit your speech, then, to the facts contained in the materials contained in the brochure?

MR. NILES-WEED: So we're doing that for a number of reasons, your Honor. I think the first reason is that to the extent the program were much broader, the government would have a much better case that the regulations, as applied to a broader program, could satisfy strict scrutiny. So that is one reason why we're keeping this very limited.

The other is plaintiffs -- and this sort of connects to the freedom of association claim -- plaintiffs want to ensure that the advice they're providing is in the best interest of low-income New Yorkers and will advance the goal of increasing access to the courts. So plaintiffs have very carefully --

THE COURT: How does it increase access to the courts?

MR. NILES-WEED: So as your Honor mentioned initially --

THE COURT: The client gets something from the debt collector, and then he goes to see the reverend, one of the

reverend's workers, and they have a consultation about the 18 steps that you can take under the state law, and then the client, being so advised, goes off and does his own thing *pro se*. Is that how the program works?

MR. NILES-WEED: That is how the program works, your Honor, and the reason why it matters is because in these cases you have 95 percent of people who receive no representation at all, 88 percent who default; that is, they don't answer at all. So what plaintiffs are trying to do is to meet these people where they are.

Plaintiff, Reverend John Udo-Okon, is a good example. He's already embedded in a low-income community in the Bronx, a disproportionately black community, which are especially harmed by the lack of legal services. And he's making it easier for them to understand what they should do when they're sued by a debt collector and don't know how to respond.

So what plaintiffs are doing is taking the form that the state provides, which the state plainly provided to make it easier for people to respond to these suits, to show up, and what plaintiffs want to do is they just want to make it a little easier by providing advice that will help people understand the state's form and use the state's form. And they're doing it because they believe that providing this information will help these people understand their rights and narrow --

THE COURT: Isn't the major one the one of sewer service, and this really doesn't address sewer service?

MR. NILES-WEED: I'll make two points about sewer service, your Honor. The first is that our training guide does address sewer service. In Exhibit B to the complaint, there's a series of --

THE COURT: Your client doesn't know that he's been sued because he hasn't gotten notice.

MR. NILES-WEED: So let me just clarify a few things for your Honor.

So the plaintiffs here are not the people receiving the advice. They are the people who would be providing it. In our complaint we provided a few examples of people whose stories illustrate the devastating and long-lasting harms that can result from defaulting, but those people are not the plaintiffs here. The plaintiffs are Upsolve, a nonprofit, and Reverend John Udo-Okon who want to provide this advice. And the advice they provide will address sewer service.

In fact, what it recommends and in fact requires advisers to do is if someone comes to them seeking advice and the problem is that they weren't served, it tells them: Here's a list of organizations, which is attached as Exhibit B to the training guide. Here's a list of organizations where you can talk to a lawyer because that problem, the problem of dealing with inadequate service, is outside the scope of what I can

handle.

So it acknowledges the problem of sewer service. It directs people facing that problem to the resources they need to assist them. And what it's really doing is sort of a triage, because when these suits come, they come fast and they come hard. You have people who have limited experience with the court system, face great intimidation and fear, are often in strained financial circumstances to begin with, and they go to their pastor. And the declaration from plaintiff Reverend Udo-Okon talks about this. They come to him asking for advice. So this will be a sort of triage, a first line of defense where he can provide them the advice they need to get started on the process of responding to their lawsuit.

The other point I want to make about sewer service is that there is nowhere in the brief of the amicus parties or in the state that suggests that sewer service is the only problem affecting these folks, and it's certainly not. There are a number of people who fail to answer even after receiving the service, even after receiving adequate service, and the state has made a number of steps to strengthen the requirements for showing service that ensure that sewer service is becoming less of a problem, but there are all of these other problems that plaintiffs are trying to help.

So let m return back to the First Amendment free speech question and show why, under the governing Supreme Court

case law, what the state is doing here is a content-based restriction on speech.

So that advice that I was just describing, the state makes clear that plaintiffs could do it if they were just providing general information, but as soon as the content of what plaintiffs are saying in person, what Reverend John is telling his congregant, as soon as the content of that becomes specialized legal advice, it's illegal, and plaintiffs could be arrested or civilly punished. That's a very plain restriction of the speech on the basis of its content.

I direct the Court to the Supreme Court's decision in *Holder v. Humanitarian Law Project* where it addressed a very similar question. The issue in that case was there was a statute that prevented providing material support to terrorists, but as applied to the plaintiffs in *Holder*, what that statute did is that statute said if you're giving general advice, it's OK, you're allowed to do it, it's kosher, but as soon as you provided specialized advice based on specialized knowledge, then that falls within the ambit of the statute and is unlawful.

And the Supreme Court said, well, it's a statute that says "material support of terrorists." That sounds a lot like conduct and not speech. And, in fact, a lot of the activity covered by the statute is conduct. But the Supreme Court said that's not enough. That, when it's applied to plaintiffs,

regulates their speech on the basis of its content, and that's the relevant question. So the statute in *Holder*, just like the UPL rules in this application, have to satisfy strict scrutiny.

The state for its part argues against somewhat of a straw man on our First Amendment claims, claiming that we seek some unfettered right to practice law without a license or that what we want to do isn't speech at all but is instead conduct. But as I explained, plaintiffs don't want to practice law in any form without a license. All they want to do is engage in limited person-to-person communication on this single discrete topic pursuant to the terms of the strict training guide. If you read the cases the state cites, not only are none of them binding on this Court, but also none of them address facts that are anything like what the Court is being presented here.

I'll say a few words now on our separate and independent free association claim.

In our brief, we explain how cases like *NAACP v. Button* and *In Re Primus*, as they've been interpreted by the Courts of Appeal, by the Second Circuit in *Jacoby & Meyers*, by the Fourth Circuit in *Stein*, they recognize that the First Amendment freedom of association protects not for profit collective activity when it is undertaken to ensure access to the courts. And they identify a number of considerations that determine when this right comes into play and when it doesn't come into play.

And those considerations are (1) whether or not the activity is undertaken for commercial purposes. And the commercial distinction is an important one. Those cases say, and this is what *Jacoby & Meyers* was saying, when you're engaged in collective activity to increase access to the courts but you're doing it to make a profit, your associational right under the First Amendment doesn't come into play there. And, in fact, these cases require as a second element that you're doing it for the purpose of helping people exercise their rights to access the courts. And third, these cases acknowledge that where the right comes into play is where there aren't ethical concerns that are activated.

Again, the commercial/noncommercial distinction is relevant here. If you're taking someone's money, your incentives are misaligned, and the concerns that you might take advantage of that person or provide them advice that is better for you than for them comes into play. None of that is at issue here. The facts of this case satisfy all of the requirements of *Button*, of *Primus*, of *Jacoby & Meyers*, of *Stein* from the Fourth Circuit.

So we separately, in addition to our free speech claim, have an independent likelihood of success on the merits of our freedom of association claim. The government in its opposition doesn't have much to say about our association claim, except that the cases I just discussed have different

facts from ours. We acknowledge that, but what we're talking about is the law and the rules set down by those cases, which those cases made clear apply in situations like this one.

So because the rules in this application, and, again, only in this precise application, because they trigger heightened scrutiny under the First Amendment's freedom of speech and freedom of association, the government must show that those regulations are narrowly tailored to advance a compelling government interest. They must satisfy strict scrutiny, and the state does not meet that burden. In fact, the protections built into our program ensure that what we're doing will advance the state's own interests in ensuring that people are receiving sufficient competent advice to help them access their legal rights.

I'll conclude, and apologies if I've gone over my time, just with a few words about the public interest and the balance of the harms. Though I want to emphasize that in the First Amendment context, it's really the merits that control. They're the dominant, if not the dispositive, consideration, and that's because denial of First Amendment rights is always irreparable harm. And enforcing those rights, ensuring that plaintiffs can advocate and associate pursuant to the terms of the Constitution is always in the public interest.

Beyond that, we've shown -- and I would point the Court specifically to Reverend Udo-Okon's declaration. This is

ECF 7-2 at paragraph 17. He says, and I quote, "There is a critical and immediate need for legal advice on how to respond to debt collection lawsuits within his community."

So there is a need for the help that we'll provide. And I'll return to the undisputed points your Honor raised earlier that the default rate in this area is astronomically high; the rate of legal assistance is astronomically low, if something can be astronomically low; and CLARO, a leading provider that provides limited service assistance, can serve fewer than 2 percent of the people facing these actions. There's plainly need for help that plaintiffs would provide, and New York's decision to implement the answer form that we would be using shows as much.

For its part, the state's opposition addresses much broader arguments in the public interest balancing, but none of them are directly responsive. So the state makes three arguments, and I'll address each of them in turn and then I'll conclude.

The first argument the state makes is that the state faults plaintiffs for bypassing the ordinary safeguards that lawyers must satisfy, the hoops lawyers have to jump through in order to practice commercially the full scope of the practice of law, including the bar exam and character and fitness regulations. But here, all we're talking about is free advice on a single discrete topic with fully informed consent, subject

to strict training and regulation that is reliably in clients' best interests.

THE COURT: Do you anticipate any character and fitness requirements?

MR. NILES-WEED: So, your Honor, Upsolve, plaintiff Upsolve, has committed to vetting the justice advocates and making them promise that the reason they are providing this advice is in the best interest of the communities they're serving. But the rules, the strict definition of the program, ensure that as long as the advice is being provided on those terms, and that's all we're asking for, as long as the advice is provided under those terms, it won't hurt anyone. So there's really no risk of --

THE COURT: So there's no standards, then?

MR. NILES-WEED: As I mentioned, Upsolve, plaintiff Upsolve, has committed to vetting these people and requires them -- and this is --

THE COURT: Vetting the people against what standard, though? Do you have a standard?

MR. NILES-WEED: So I would direct your Honor to --

THE COURT: Have to be a high school graduate or college graduate?

MR. NILES-WEED: They have to be capable of providing the advice on the terms laid out in the training guide. And in the training guide at Exhibit, I believe it's --

THE COURT: That's kind of circular, don't you think?

MR. NILES-WEED: I don't think so, your Honor, because what's going on is plaintiffs are requiring these people to attest that they will only do the things laid out in the training guide. If they do something that is outside the scope of the training guide, if they go beyond it, then they will be subject to the state's ordinary regulatory authority because we're only seeking protection for the metes and bounds of the training guide.

THE COURT: How would they know that they gave inappropriate advice?

MR. NILES-WEED: So in the complaint we describe how the people receiving the advice are -- every encounter is being tracked by Upsolve, and the people are being followed up with to ensure that the advice was provided pursuant to the terms of the guide. And that's a question one could ask the state in any context. How does it know that the advice people are informally providing is pursuant to the terms governed -- of the rules governing the unauthorized practice of law? So all we're talking about is this incredibly narrow --

THE COURT: Does the booklet advise the client that they can resort to the Attorney General's Office if they believe something has gone amiss?

MR. NILES-WEED: So in listing additional resource, I believe we list some resources for the Attorney General's

Office. If that would be the dividing line, that is something that could be included in the guide. I'm not sure it includes it now, but we have -- and we include in the complaint a link to what is a complaint form through Upsolve, but that could easily be updated to say you can also contact the Attorney General.

THE COURT: All right.

MR. NILES-WEED: I'll just make a few more points, if that's all right.

I also want to discuss --

THE COURT: Two more.

MR. NILES-WEED: Two more?

THE COURT: Yes. Take some time for rebuttal. I'd like to hear from Mr. Lawson.

MR. NILES-WEED: Perfect. Two quick points.

THE COURT: Sure.

MR. NILES-WEED: The state makes two more points about the public interest, and I'll explain to you why they shouldn't govern here. The first is --

THE COURT: It's amazing how many lawyers can't count to two.

MR. NILES-WEED: We'll see how I do.

THE COURT: OK.

MR. NILES-WEED: One, so the state says we're usurping the legislature's role and introducing uncertainty. That's not

about this case, your Honor. We're not stopping the legislature from doing anything they want to do except regulate our activity to the extent their regulation violates the First Amendment. They can do whatever they want outside of this narrow program. And whatever future cases people want to bring, if they bring them, are not about us. That's a different case.

Second point, and final point, the state makes the point again that there's no need for this program and there are lots of alternatives, but again I would direct the Court to the statement from the affidavit of plaintiff Reverend Udo-Okon at ECF 7-2, paragraph 17. There's a critical and immediate need for legal advice on how to respond to debt collection lawsuits in his community.

THE COURT: Thank you.

MR. NILES-WEED: So to conclude, the public interest balancing favors allowing plaintiffs' activity which would help facilitate the state's own interests, and more importantly, plaintiffs' rights are protected on the merits of their twin First Amendment claims, the free speech claim and the freedom of association claim. So we've shown we're likely to succeed on the merits, which is the dominant consideration. We've also shown that an injunction is in the public interest. The Court should grant plaintiffs' injunction.

THE COURT: Thank you.

Mr. Lawson.

MR. LAWSON: Thank you, your Honor. And again, I'm Matthew Lawson from the New York State Attorney General's Office, for the defendant, Letitia James.

I'd like to begin by emphasizing that a preliminary injunction is an extraordinary remedy, and it's a remedy on which the plaintiff carries the burden. Among other requirements, these plaintiffs must show that they are likely to succeed on the merits and that an injunction is in the public interest. And these are the primary areas where they have failed to meet their burden of proof.

With the Court's indulgence, and unless the Court has any specific questions as to standing, I'd like to stand on the positions we've taken in our brief on that point and move directly to the First Amendment question on the merits.

THE COURT: Yes.

MR. LAWSON: So plaintiffs cannot possibly prevail in this case because the First Amendment right that they're asserting simply does not exist. I'm a bit baffled by the plaintiffs' characterization of the state's position in this regard because at no time did the state simply limit its argument to the alleged existence or nonexistence of an unfettered right, as Mr. Niles-Weed said. Nor did we limit it to a blanket or unqualified right, as these plaintiffs state in their reply brief. Rather, there is no First Amendment right

to give legal advice or practice law in any respect. And Supreme Court precedent establishes that states have a compelling interest in regulating the practice of professions within their boundaries.

THE COURT: How do you explain the Supreme Court's decision in *Holder against Humanitarian Law*?

MR. LAWSON: I'm glad you ask, your Honor, because I did want to respond to that in detail. That was a case that these plaintiffs did not cite in their opening grief, although one of the amici did. So I'd like to respond, and with the Court's indulgence, I'd also like to hand up an additional Eleventh Circuit published decision that was published -- decided just three months ago.

The problem with *Holder*, the *Holder* case, is that courts, including the Supreme Court, have always treated professional conduct rules, including licensing provisions governing who may practice a profession, as their own special category for First Amendment purposes. And Mr. Niles-Weed said earlier that the state didn't cite any controlling authority on the First Amendment point. That is incorrect. Among the decisions the state cited was the Supreme Court's 2018 decision in *National Institute of Family and Life Advocates v. Becerra*, which was decided eight years after *Holder*. And in that case, the Supreme Court specifically held that states may regulate professional conduct even though that conduct incidentally

involves speech.

And if I may, the Eleventh Circuit decision in a case called *Del Castillo v. Secretary of the Florida Department of Health*, 26 F.4th 1214, is relevant to that point as well. This is the case I'd like to hand up, with the Court's indulgence, if I may.

THE COURT: Sure. Do you have a copy for your adversary?

MR. LAWSON: And before I put on the mask so I may do so, I want to point out I'll be handing up both the Eleventh Circuit published decision and the underlying district court opinion from the Northern District of Florida because, as is often the case --

THE COURT: As long as you have copies for the plaintiff.

MR. LAWSON: I do and one for your Honor's clerk as well.

THE COURT: Great. That will keep them busy.

MR. LAWSON: So I will do that now.

THE COURT: Thank you.

MR. LAWSON: In the *Del Castillo* case -- and I'd like to direct the Court and the parties specifically to page 1225 -- the holding from *Del Castillo* just three months ago is that a statute that governs the practice of an occupation is not unconstitutional as an abridgment of the

right to free speech so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.

I would assert that that is a natural and necessary extension of the Supreme Court's recognition in 2018 that professional conduct rules are their own unique category for First Amendment purposes. And just so your Honor knows the facts, the plaintiff in *Castillo* claimed that she had a First Amendment right to give diet and nutrition advice, even though she was not a licensed dietitian in Florida. So the district court dismissed the First Amendment lawsuit, and the Eleventh Circuit affirmed.

And one thing I want to point out as well is that the *Holder* decision was explicitly raised before the district court in *Del Castillo*. And so if I may, I'd like to refer the Court to the district court decision, which is at 2019 WL 13141202, at page 8, and that's the star pagination in Westlaw. The district court has this specific, direct quote. The district court stated that "*Holder* is distinguishable because the statute at issue in that case was not a generally applicable licensing statute regulating entry into a profession." And that district court decision was affirmed a mere three months ago by the Eleventh Circuit in the published decision in *Castillo*.

So there has been no sea change in the long-running

understanding that professional conduct rules, including rules that govern who may practice a profession, are constitutional as long as the effect on speech is only incidental.

So consistent with --

THE COURT: Let me interrupt you. Is there any doubt that the Attorney General would enforce this law against the plaintiffs?

MR. LAWSON: It's hard to make a determination on that question simply because it's a hypothetical question, and the issue of the unauthorized practice of law is a fact-based inquiry that depends on what actually happens in a given circumstance.

THE COURT: You think this is not the practice of law?

MR. LAWSON: For the purpose of this motion, your Honor, the state is not disputing that the conduct that they state that they would participate in would likely constitute unauthorized practice of law. But, again, that is our assessment of their arguments, not an advisory opinion on hypothetical circumstances that haven't transpired yet.

THE COURT: Well, you're an experienced counsel, and you've tried these cases before. If the plaintiff were to organize itself in the way it says it's going to organize itself and then renders the advice and follows its program that it says it's going to follow, would that constitute the unauthorized practice of law?

MR. LAWSON: Based on my review of the case law, and this is just my review, I think that if what the plaintiff is doing is going beyond the mere distribution of relevant forms, that the closer the plaintiff gets to rendering substantive advice on defenses implicated by those forms, the more likely -- in fact, it probably would fall within the unauthorized practice of law statutes.

So we're not disputing that point for the purpose of the motion, and I'm not sure in that scenario where our own position diverges that much from what the plaintiff has laid out. But where we do disagree, obviously, is in the question of whether there is a First Amendment right to practice law in any respect. And consistent with this long-standing, uniform recognition that professional conduct rules are simply different, they're unique, they're their own special category, as far as I can tell, every single court, state or federal, that has ever entertained the question of whether there is a First Amendment right to give legal advice or to practice law in any respect has rejected that lawsuit. I've never seen a single case from any jurisdiction where a plaintiff goes into court, asks the Court to sign some type of order enjoining an unauthorized practice of law statute so that plaintiff can practice law or give legal advice without a license.

I should also note that the argument also fails in the defensive context. Often you'll see some type of enforcement

action or prosecution for unauthorized practice of law, and the defendant will assert as a defense to that type of prosecution or enforcement action that he had a First Amendment right. And every single case, state or federal, although I believe all the ones I've seen are state, but every state case where that defense is made, the First Amendment argument is always categorically rejected.

So the plaintiffs are in a bit of a conundrum here because the position they're taking on the merits of this case finds literally no support in any case whose facts are even remotely analogous to those present here. So what they're forced to do is they're forced to rely on factual context that have nothing to do with unlicensed laypersons practicing law without a license.

And we got into that a little bit in *Holder*. And again, context matters. The plaintiffs assert that, well, it's not a problem that the facts here are not identical. Well, it is a problem for these plaintiffs because context matters, and we know that because the Supreme Court and federal courts have consistently recognized that professional conduct rules, including generally applicable licensing statutes that govern who may practice a profession, are essentially *sui generis*, they're their own category, and they have been identified as such by the Supreme Court of the United States as recently as 2018.

So I'm not aware of any case from any jurisdiction where a court ever held that an unauthorized practice of law statute was something that needed to be scrutinized under the strict scrutiny standard. The standard that they're asking the Court to apply today has literally no precedent in any case that has anything to do with the unauthorized practice of law.

And to the notion that these statutes are somehow content-based, I would like to direct the Court to a case that these plaintiffs cited from 2020. The plaintiffs say that a law is content based if it is a regulation of speech that on its face draws distinctions based on the message a speaker conveys, and that's *Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335, 2346 (2020). A regulation of speech that on its face draws distinctions based on the message a speaker conveys, "on its face" means that you look at the express text of the statute and see what that statute does and does not direct. Plaintiffs haven't cited a single quotation from a statute that mentions any particular person's message. These are not statutes that suppress ideas. These statutes do not favor one type of message over another. They do not target the communicative aspects of law, but they simply direct who may and who may not practice the profession as a general matter.

And I want to just briefly go to the freedom of association right. The right to freedom of association also

does not include any right to give unlicensed legal advice. And somewhat bafflingly, Mr. Niles-Weed stated in his presentation that the state doesn't mention the right of association very much except to say that the facts are different. Our opposition brief actually had quite a bit to say about the line of cases beginning with *NAACP v. Button* and its progeny. Those cases simply had nothing to do with laypersons practicing law without a license. And the fact is that two primary cases they rely on, which are *NAACP v. Button* and *In Re Primus*, one from 1963 and the other from 1978, didn't involve an unauthorized practice statute at all. They involved First Amendment challenges to anti-solicitation statutes. So the Court never addressed the question. And instead what it's doing is it's saying that the First Amendment protects other activities, and what the plaintiffs were trying to do in those cases, they were trying to make a lawyer recommendation or referral. The plaintiffs here aren't trying to refer an attorney. They're trying to usurp the role of attorney by practicing law without a license. And *Button* and *Primus* simply have nothing to say about that question.

And to further understand that point, one need look no further than the *Jacoby* case, which the plaintiffs also cited in their opening brief. The Second Circuit noted in *Jacoby* that the Supreme Court held that the First Amendment bears on some situations in which clients and attorneys seek each other

out to pursue litigation, and they specifically cite *Button* and other cases for that point.

It is the case here that this is not a situation where clients and attorneys are seeking each other out to pursue litigation. This is a case where the plaintiffs are trying to usurp the role of counsel altogether by empowering unlicensed laypersons to practice law without a license. So there is simply no right of association here, and no such right has been recognized by any court, let alone the Supreme Court.

I just wanted to talk briefly about the tiers of scrutiny analysis. Our position is that any effect on speech that these unauthorized practice statutes have is so incidental that the Court can simply hold them constitutional without proceeding to a separate tiers of scrutiny analysis. But if it does conclude that a tiers of scrutiny analysis is required, the proper standard here would be the rational basis standard and not strict scrutiny.

Under the rational basis standard, the Court need only inquire into whether the state action is rationally related to a legitimate governmental interest, and that's clearly the case here. The Supreme Court has long recognized that states have a compelling interest in the practice of professions, including law, within their borders. And it goes without saying that a statute that is designed to maintain minimum standards of competence, qualifications, and moral fitness is rationally

related to that overriding goal.

If I may, I'd like to proceed to the public interest questions. Again, Mr. Niles-Weed stated that, really, the most compelling question in a First Amendment case is the question on the merits, and the court should focus most of its time on that issue. However, the Supreme Court has recognized that when public interest considerations and the equities strongly weigh against the granting of injunctive relief, the court can deny a motion for preliminary injunction on that basis alone. It's the state's position that --

THE COURT: Why would I want to do that? Here's a situation that really cries out some sort of remedial effort. There's a cycle of debt enforcement that is, I think in many ways, shameless. You see it here in the court when you have people who come in and they've got problems with a debt collection. And it's an area that cries out for more help, more assistance. What's wrong with the state -- excuse me, what's wrong with this effort where it provides some kind of added assistance --

MR. LAWSON: The problem --

THE COURT: -- to people who need help? I notice, Mr. Lawson, you don't question that they need help.

MR. LAWSON: They may very well need help, your Honor, and the problem with the request for that relief is that what it is is essentially a plea for legislative policymaking. This

is a court of law. This court's primary function is to determine whether there is some federal right that has been implicated and to adjudicate legal questions respecting that right. There is a body whose primary function is to address requests for legislative policymaking, and in fact, that body has addressed such requests. It has explicitly considered requests for very specific exceptions to the prohibition against the unauthorized practice of law. And of course I'm speaking of the New York State legislature here.

So my opinion is that questions for -- or requests for legislative policymaking are best directed to the state legislature, and this court is bound to the consideration and adjudication of constitutional issues involving the enforcement of federally recognized rights, at least in a federal question such as the instant one.

But the relief requested here would also harm the public interest in other ways. As the Court, I believe, alluded to, there's no actual standard as to whether the persons recruited to provide this type of unlicensed advice would even be high school graduates. These plaintiffs don't even identify who would be providing the advice here if injunctive relief were to be granted in their favor. So again and again, accepting the Reverend Udo-Okon who would be one such person, the state and this Court know nothing about the character, experience, employment history, or level of

education of the persons that would be empowered to give this advice if an injunction were to be granted in their favor. And in our papers we spoke briefly about --

THE COURT: Have there been bills introduced in the state legislature which would envision a program like the one we're talking about here?

MR. LAWSON: I'm not personally familiar with any such bill, your Honor.

There's really no independent vetting of justice advocates' qualifications or character and fitness at all. And the plaintiffs' primary response to the fact that there are really no character and fitness evaluation of any kind, let alone independent character and fitness evaluation, is to say that, well, we've got this really good training manual. And I fail to understand how a good training manual is an appropriate screening mechanism to ascertain the suitability of character and fitness of persons that would be practicing law or, in this case, giving narrowly circumscribed legal advice.

I'd also like to refer to the advocate amici, and I refer there to the briefs of amici curiae consumer law experts, civil legal services organizations, and civil rights organizations at ECF 57, and that is one of the amicus briefs. The advocate amici make a number of compelling points about the harms that could be implicated here that even I was not aware of. They point out, for example, that debt collection lawsuits

often implicate multiple areas of law. The advocate amici point out that debt collection lawsuits can stem from a variety of alleged debt, such as revolving lines of credit, retail installment sales contracts, personal loans, student loans, and other types of debts.

And the advocate amici point out that different types of debts are often governed by different statutory schemes, and they often present unique legal issues. And what that means is that the defenses can be different, and this is an area where actual expertise in handling the defense of debt collection actions is really important. The advocate amici pointed out that a defendant may have defenses that are different from the ones that are in the form answer, and that if the defendant fails to assert an applicable defense or fails to take the steps required to move to dismiss, that that could be detrimental or even fatal to the defense of the claims.

Another point that we did not have the opportunity to raise in the papers but which is also important is that the plaintiffs here fail to identify what remedy consumers would have if a consumer is harmed after receiving negligent advice from one of plaintiffs' justice advocates. For example, presumably there would be no cause of action for legal malpractice because the persons to be providing this type of advice would not be lawyers. And plaintiffs never identify what other type of claims or remedy would be available.

So in closing, your Honor, I would just like to say that -- one more point, which is that when you're balancing the equities, generally speaking, the Court weighs the harms on both sides. And something important to that consideration is what is the alleged public need for this? And the plaintiffs identify certain problems that community members were having in their papers, they talk about harassing calls from debt collectors, and they talk about community members who never received any notice that they were ever being sued in the first instance. What they don't talk about is they don't put forth any affidavit testimony from any community member who said the primary problem that I've experienced in my life or in my history with this creditor is that I haven't had a lawyer or somebody tell me how to fill out the form answer. Nobody identified that as their primary problem. So the injunction here would not actually address the primary concerns identified by the community members these plaintiffs consulted, and it certainly wouldn't address the problem of sewer service where plaintiffs never receive -- or defendants never receive any notice that they're ever being sued in the first instance.

And the advocate amici identify a number of nonprofit organizations that already give advice of the type here. They identified organizations such as CAMBA Legal Services, District Council 37 Municipal Employees' Legal Services, Legal Services NYC, Mobilization for Justice, and the New York Assistance

Group, and TakeRoot Justice. So there are a number of nonprofits that provide this advice, and plaintiffs don't identify a single occasion in which any of these organizations turned away a New Yorker who simply wanted advice on filling out a preprinted form answer in a debt collection action, which is the sole advice that plaintiffs are seeking leave to provide here.

So the public interest strongly weighs against the granting of the requested injunctive relief, and the state respectfully contends that the motion for preliminary injunction is properly denied for that reason alone, in addition to the fact that there is no likelihood of success on the merits because the First Amendment right asserted here simply does not exist.

THE COURT: Thank you, Mr. Lawson.

Mr. Niles-Weed.

MR. NILES-WEED: Just a few points, your Honor. I'm not going to commit to a number, but I'll try to keep it low.

The first point I'll note is that the government in response to your question didn't dispute that they would potentially prosecute us. It was an opportunity to disavow prosecution. The state didn't do so. It's relevant to the standing inquiry.

The next point I want to discuss is the government's reliance on cases talking about regulations of professional

conduct with a merely incidental effect on speech and explain why that's not the case here. I think there are a number of places I can point your Honor that explain that distinction.

So I would note that the government said in their presentation that there's no right to practice law in any respect, but in the *Lawline* case from the Second Circuit which the government cites, the court says, and this is 956 F.2d at 1386, that there may well be activities, many activities, excuse me, which lawyers routinely engage in which are protected by the First Amendment and which could not be constitutional prohibited to laypersons.

The *Shell* case from Colorado has a similar recognition. That's at 148 P.3d at 173. And the real place to go on this is *Primus*, which was decided the very same day as the Supreme Court's decision in *Ohralik*. And *Ohralik* talks about how the state can regulate in-person solicitation for pecuniary gain. And what *Primus* says is when you're engaged in collective activity for a nonprofit purpose, for political aims, to increase access to courts, that issue that *Ohralik* was talking about does not apply.

And more recent Supreme Court cases likewise confirm that when the effect on speech is not incidental, which is the case here, First Amendment scrutiny applies. All plaintiffs want to do is speech. There is no conduct to which that speech is incidental. So as applied to plaintiffs, we're talking

about a content-based regulation of speech. *NIFLA*, the case the government cites, makes clear that just because speech is done in the context of a professional relationship doesn't exempt it from heightened scrutiny.

And on the Eleventh Circuit case which was decided before the government's brief was submitted in this case, what they're talking about there is a broader swath of conduct relating to nutrition. They're not talking about what plaintiffs are doing here, which is pure person-to-person speech, no adjacent conduct, subject to strict regulations.

Just a few more points. I would -- so on the public interest question, the government points the Court to the Supreme Court's case in *Winter* which looks solely at the public interest balancing. There, the public interest stakes were a risk to a fleet of the U.S. Navy on the one hand, and on the other hand, it was a number of plaintiffs who sought to protect the right of endangered species. What the court recognized is that sometimes the balance is that extreme, but in that case, there were no constitutional rights at issue and not the delicate balancing that's required here.

And on that balancing, as your Honor said, the plaintiffs are trying to help people who need help. All we're asking the Court to do is follow the law as the government suggests, which requires, under the First Amendment speech cases and association cases, that plaintiffs' pure speech,

provided for free, subject to strict restrictions is protected.

I'll conclude just with two more quick points. The first is that the government raised a concern about not knowing who is providing the advice or whether they even have high school diplomas. First, I'll say there are plenty of people who don't have high school diplomas who are qualified to help people in need. And the second point I'll make is that the only question relevant here is not who is doing the advising but what they're doing, and what they're doing is subject to the strict terms of the training guide attached to Exhibit B. So when you're outside that scope, you're not within the program, and so there are none of the concerns that normally motivate the regulation of the practice of law. And that's the real question here.

As your Honor said, this is a problem that cries out for more help. What plaintiffs want to do and plaintiffs seek and would think they would find common cause with the state and its amici, what we're trying to do is to take the state's form, which the state plainly believes is adequate, to help self-represented individuals respond to these lawsuits, and we're helping to make the state form better.

So the question on the public interest balancing is not whether there are other problems that plaintiffs could be solving, like the issue of sewer service. The question is not whether there are other people who might be solving this

problem or helping to solve this problem, which there are, and plaintiffs respect and appreciate the amazing work done by the amici and other organizations, but the status quo as it sits today is that there are 88 percent of people who default in lawsuits like this, and the question for the Court on the public interest balancing is a narrow one. Given that 88 percent default rate, will people be better off with the narrow advice that plaintiffs are seeking to provide, or will they be worse off?

So there might be a bunch of other problems lurking all around these issues, but all we want to do is exceptionally narrow, and it will be in the public interest. And most importantly, it's protected by the First Amendment.

THE COURT: Thank you.

Mr. Lawson, you want to say anything?

MR. LAWSON: I just have a couple brief points on the merits of the First Amendment question.

Mr. Niles-Weed was responding to my point that professional conduct rules with only an incidental effect on speech are constitutional and that such professional conduct rules have been recognized to be a separate category, both by the Supreme Court and others. In rebuttal to my point, Mr. Niles-Weed cited to cases. He cited the Seventh Circuit's opinion in *Lawline v. American Bar Association*, as well as the Colorado Supreme Court's opinion in *People v. Shell*. And let

me just state at the outset that in both such cases, the court squarely rejected the First Amendment arguments that the plaintiff was making.

And far from rebutting the state's argument that professional conduct regulations that have a merely incidental effect on -- of observing an otherwise legitimate regulation, the *People v. Shell* case actually dismissed the case -- or, actually, it rejected a defense, but it rejected the First Amendment argument on that precise basis. On page 173 and 174, the Supreme Court of Colorado explicitly held that the unauthorized practice statute was "merely the incidental effect of observing an otherwise legitimate regulation."

So, again, I would just assert that professional conduct rules, including generally applicable licensing statutes that govern who may practice a profession, are their own category for First Amendment purposes. And resorting to cases from completely different context is simply not the proper approach to First Amendment jurisprudence in this area.

Thank you.

THE COURT: Thank you.

I want to thank the parties for the cogency of the briefing and the oral advocacy. It was very wonderful to see.

I also noticed the civility between the plaintiff and the defendant, and civility is too often lacking in today's hurly-burly of litigation. So thank you for that.

We'll have a decision for you shortly. Thank you very much. Case is adjourned.

(Adjourned)