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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOBY & MEYERS, LLP, on behalf of itself and all other similarly situated entities authorized to practice law in the State of New York, and JACOBY & MEYERS USA, LLC, Plaintiffs, v. THE PRESIDING JUSTICES OF THE FIRST, SECOND, THIRD AND FOURTH DEPARTMENTS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, Defendants.	Civil Action No. 11 Civ. 3387 (LAK)(KNF)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Plaintiffs JACOBY & MEYERS, LLP and JACOBY & MEYERS USA, LLC (together, "Jacoby & Meyers"), respectfully submit this memorandum of law in opposition to the motion to dismiss the Amended Complaint by the Presiding Justices of the First, Second, Third and Fourth Departments, Appellate Division of the Supreme Court of the State of New York ("Defendants").

PRELIMINARY STATEMENT

The practice of law in the United States is at serious risk of falling behind the rest of the world. With the success of recent legislative initiatives in Australia and the United Kingdom, the growth of "alternative business structures" ("ABS") which allow for non-lawyer ownership of law firms is rapidly accelerating. The growth of these ABS entities represents a profound change for the practice of law and allows for the infusion of significant capital into law firms which, in turn, ensures that access to the legal system remains unshackled for all, regardless of socio-economic considerations. By this action, Jacoby & Meyers seeks to ensure that the American judicial system keeps pace with its international counterparts. Perhaps more importantly, it seeks to do away with an antiquated rule that was designed as law practice economic protectionism. The after-occurring legal fiction that the rule is a necessary ethical constraint is now disavowed even by the ABA Committee studying the matter.

At the prior oral argument on Defendants' initial motion to dismiss, the Court expressed its apparent skepticism as to whether Jacoby & Meyers' challenge was ripe for consideration, or whether the Court should abstain from resolving the dispute. At Plaintiff's request, leave to amend the complaint was granted and Jacoby & Meyers has now set forth the specific identity of the non-lawyer investors who are prepared to

capitalize the law firm in exchange for an ownership interest, and the precise manner in which that investment will be structured, i.e., through the issuance of a membership interest in a newly created limited liability company to which Jacoby & Meyers is prepared immediately to transfer all of its assets. As a result, it cannot credibly be contested that Jacoby & Meyers has now sufficiently alleged the specifics of the transaction which it wishes to pursue, but which it is ethically prohibited from consummating as a result of the dictates of Rule 5.4.

Apparently recognizing the same, and desperate to avoid this Court's consideration of the substantive merits of Plaintiffs' federal constitutional challenge, Defendants renew the blunderbuss of procedural arguments offered in their initial application and again offer a panoply of standing, ripeness, abstention and immunity arguments by which to seek to derail the current prosecution. As set forth more fully below, however, nothing in the state statutes on which Defendants' challenge is predicated prohibits an LLC created in the manner in which Plaintiffs propose from practicing law in New York.

To the contrary, Section 201 of the LLC law allows for the formation of a limited liability company for "any lawful business purpose." And nothing in the Judiciary Law compels a contrary result. In fact, just the opposite is true as Judiciary Law Section 495(4) expressly does not apply to "organizations which offer prepaid legal services" or to "organizations which have as their primary purpose the furnishing of legal services to indigent persons." Thus, the contention that the Judiciary Law somehow bans altogether the practice of law through an LLC that is not registered as a "professional services" LLC is nowhere to be found in that statute.

Similarly, Defendants' "invitation" to the Court to abstain from exercising its jurisdiction over a uniquely federal constitutional challenge should be swiftly declined. Federal courts have a virtually unflagging obligation to exercise the jurisdiction given them, and this case is no exception. There is nothing "uncertain" concerning the application of state law here. Rule 5.4 emphatically prohibits the practice of law in the form of an entity in which a non-lawyer owns any interest, and no other state law imposes a similar restriction to the proposed transaction which Jacoby & Meyers is prepared immediately to consummate. Moreover, asking Plaintiffs to raise their constitutional challenges before the very tribunal that enacted Rule 5.4, would place that body in conflict, as being both a party and a judicial tribunal. Indeed, that body had and continues to have the power, *sua sponte*, to overturn this Rule and their unwillingness to do so is *prima facie* evidence that they have pre-judged the facts of this case. If Plaintiffs were required to adjudicate the constitutionality of Rule 5.4 in state court, this Court would essentially be eviscerating the separation of powers that should otherwise be observed as all three branches of government (legislative, executive, and judicial) would be conflated in one body. This Court should not countenance such a result.

This Court stands at the crossroads of the modern-day evolution of the practice of law. The status-quo is changing, and practitioners in the United States are at risk of falling behind. Jacoby & Meyers is prepared to adapt to the new realities of the profession, but needs a jurist with the same profile in courage to ensure that antiquated

barriers to its survival are cast aside. As we now set forth, Defendants' challenge to Jacoby & Meyers' standing to pursue this action should be summarily denied.[1]

STATEMENT OF RELEVANT FACTS

A. Jacoby & Meyers Pioneers Legal Services For All

Jacoby & Meyers was founded in September 1972, when Stephen Z. Meyers and Leonard D. Jacoby, law school classmates at UCLA, opened its first storefront office in Van Nuys, California. In creating their law practice, Messrs. Jacoby and Meyers sought to ensure that people of modest or average means, who could often not afford to hire a lawyer, had a practical alternative to obtain competent, qualified counsel at reasonable rates. (Amend. Compl. ¶ 22). Since the firm began its operations nearly forty years ago, Jacoby & Meyers has become synonymous with legal services for the masses and has been at the vanguard in overturning vestigial regulations that impede access to the legal system, including attorney advertising. (Amend. Compl. ¶ 23).

Ardent believers in attorneys' rights to freedom of speech and the public's right to be granted access to worthwhile new concepts in the practice of law that could lower the cost of obtaining legal representation, Jacoby & Meyers helped spark an

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[1] In light of the Court's remarks concerning "pushing rocks uphill" at the prior oral argument, Plaintiffs' opposition only responds to Defendants' arguments regarding standing, ripeness, and abstention. We view the task not as Sisyphean, but rather a turning aside of procedural arguments that offer Defendants no refuge from the reality of the merits of this case. Given the litany of jurisdictional issues raised by Defendants, Plaintiffs requested an enlargement of the page limitation to address both the standing issues, as well as the substantive challenges directed at the various causes of action. Unfortunately, the Court declined Plaintiffs' request, thereby intimating its continued struggles with the threshold jurisdictional issues. Accordingly, Plaintiffs respectfully incorporate by reference the prior briefing and compendium of resources in opposition to Defendants' earlier challenge to the substantive, federal causes of action asserted in the Amended Complaint and requests permission to submit a supplemental brief after Defendants' standing challenge is denied.

international debate that lasted for years, and ultimately culminated in a California Supreme Court decision in 1977, applying the founders' rights of free speech and the public's right to be informed. A month later, the United States Supreme Court banned prohibitions on legal advertising in the seminal case of *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691 (1977). (Amend. Compl. ¶ 24). Immediately after the issuance of the *Bates* decision, Jacoby & Meyers placed a full-page advertisement in the Los Angeles Times, and within weeks, the firm aired the first television commercial advertising legal services in the country. (Amend. Compl. ¶ 25).

Jacoby & Meyers has continued to innovate through the years – all in an effort to help provide quality legal services to clientele at reasonable fees. Jacoby & Meyers opened branch offices in retail shopping centers, maintained Saturday and evening office hours, and was the first law firm to accept credit cards for payment. (Amend. Compl. ¶ 26). The firm developed detailed written systems to standardize the handling of cases, expediting the progress of the case and allowing for more efficiency and quality control. For example, the firm developed detailed pre-printed forms for interview intakes, and created standard form pleadings and other legal documents which assured quality control and allowed for paralegals to begin much of the initial drafting at much more reasonable prices, subject to attorneys' oversight, revisions and finalization. (Amend. Compl. ¶ 27).

Jacoby & Meyers continues to practice law in an innovative fashion, and today maintains a network of affiliated law offices across the country, including in Southern California, New York, Alabama, Florida, and Arizona. (Amend. Compl. ¶ 29). More significantly, throughout its forty year history, Jacoby & Meyers has always comported

itself with the highest regard for its ethical and professional responsibilities and has zealously represented the nearly one million clients it has been privileged to serve. Jacoby & Meyers holds its individual practitioners to the highest ethical standards and over the past four decades has demonstrated the independence of professional judgment that it will continue to exhibit regardless of the source of outside capital it is permitted to pursue. (Amend. Compl. ¶ 30).

B. Jacoby & Meyers Requires Additional, Outside Capital

Jacoby & Meyers intends to expand its operations, hire additional attorneys and staff, acquire new technology, and improve its physical offices and infrastructure to increase its ability to serve its existing clients and to attract and retain new clients and qualified attorneys. (Amend. Compl. ¶ 31). Notably, Jacoby & Meyers' business plans principally concern expansion within communities in which working-class, blue-collar and immigrant families reside. Indeed, as Chief Judge Jonathan Lippman remarked in his 2011 State of the Judiciary Speech, it is often "the most vulnerable in our society" for whom the courthouse doors must be kept open. (*Id.*).

In order to expand its operations, and to ensure the public's greatest possible access to legal representation and protection of their rights through the civil justice system in an affordable, cost-effective way, Jacoby & Meyers requires a substantial infusion of new capital. (Amend. Compl. ¶ 33). In these challenging economic times, the traditional channels for a law firm's capital infusion: (1) personal contributions of partners; (2) retained earnings on fees generated and collected; and (3) commercial bank loans (with onerous rates of interest); are either too expensive or unavailable to

fund Jacoby & Meyers and other class members' intended business plans. (Amend. Compl. ¶¶ 33 & 34).

However, several high net-worth individuals including, but not limited to Michael Ostrow, Anthony Costa, and Philip Guarnieri, as well as several institutional investors whose identities Jacoby & Meyers has been asked to keep confidential, have expressed their commitment to invest significant sums of money in Jacoby & Meyers in exchange for owning an interest (specifically, a share of the anticipated profits) in the entity through which Jacoby & Meyers practices law. (Amend. Compl. ¶ 35).

Jacoby & Meyers has recently created Jacoby & Meyers USA, LLC ("Jacoby & Meyers LLC"), a New York limited liability company, for the express purpose of allowing non-lawyers to "own an interest" in the entity through which Jacoby & Meyers is authorized to practice law for profit. (Amend. Compl. ¶ 14). Jacoby & Meyers, LLP is prepared to immediately transfer all of its assets to Jacoby & Meyers USA, LLC and immediately obtain non-lawyer investment. (Amend. Compl. ¶ 14). Unfortunately, however, due to an antiquated Rule of Professional Conduct, Rule 5.4, Jacoby & Meyers is prohibited from effectuating this transaction. (Amend. Compl. ¶ 34).

C. New York's Rule of Professional Conduct 5.4

Defendants, The Presiding Justices of the First, Second, Third and Fourth Departments, Appellate Division of the Supreme Court of the State of New York, are responsible for implementing and enforcing the Rules of Professional Conduct, which are designed to govern the conduct of attorneys licensed to practice law in the State of New York. (Amend. Compl. ¶ 15); *see* N.Y. Judiciary Law § 90(2). Under the Judiciary Law, the Appellate Division is authorized to censure, suspend, or disbar lawyers guilty

of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." N.Y. Judiciary Law § 90(2).

On or about December 16, 2008, then-Chief Judge Judith S. Kaye, the Chief Judge of the New York Court of Appeals, and the Presiding Justices of the Appellate Division announced a new set of attorney conduct rules for New York. These new Rules of Professional Conduct, effective April 1, 2009, were issued as Joint Rules of the Appellate Divisions, and constitute Part 1200 of the New York Court Rules. The Rules of Professional Conduct apply to all attorneys admitted to practice in New York State (either generally or for purposes of a particular proceeding), including out-of-state or foreign attorneys, regardless of where the attorneys' conduct occurs. (Amend. Compl. ¶ 19); *see Rule 8.5: Disciplinary Authority and Choice of Law.*

Rule 5.4 addresses the "Professional Independence of a Lawyer." Rule 5.4 provides, in pertinent part:

> (d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:
>
> (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(Amend. Compl. ¶ 20).

As a result of this rule, Jacoby & Meyers cannot allow a nonlawyer to acquire or own an interest in the legal entity (*i.e.*, the law firm) through which it provides legal services to its clients. (Amend. Compl. ¶ 21). Thus, Jacoby & Meyers is limited to the "normal" avenues of raising capital, which in the current economic climate are either unavailable or prohibitively expensive, such that Jacoby & Meyers (and other similarly-

situated law firms) are effectively barred from raising capital at all by the proscriptions of Rule 5.4.[2]

ARGUMENT

I. The Relevant Governing Standards

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir.1984). When deciding a motion to dismiss, the court must accept as true the well pleaded allegations of the complaint. *Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 810 (1994). "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563 n. 8, 127 S.Ct. 1955, 1969 n. 8 (2007).

To meet the standard of adequacy, the complaint should contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. The Second Circuit interprets *Bell Atlantic* not as requiring "a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty,* 490 F.3d 143, 157-58 (2d Cir. 2007). Here, these standards are easily satisfied.

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[2] With respect to the abstention issue, this Court must not shy away from an issue where the State courts have not only pre-judged the matter, they have been the architects of the position that has caused them to be Defendants in the instant action. The conflict of interest is palpable.

II. PLAINTIFFS HAVE STANDING TO SUE AND THEIR CLAIMS ARE RIPE

A. Plaintiffs Have Standing to Challenge Rule 5.4

As the Supreme Court has repeatedly explained, Article III standing requires an (1) "injury in fact" which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, with the injury being (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-37 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 561, 112 S. Ct. at 2137 citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189 (1990). Where, as here, "the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000).

Defendants challenge Plaintiffs' standing to bring their claims on the misguided basis that even if Rule 5.4 were abolished, the New York limited liability company law ("NY LLC Law") would allegedly prohibit the same conduct (i.e., providing ownership interests to non-lawyers). Defs. Br. at 6. A plain reading of the NY LLC Law, however, reveals the infirmity of Defendants' argument. Accordingly, Jacoby & Meyers has standing to bring the instant action.[3]

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[3] Defendants' claim that Jacoby & Meyers LLC is improperly joined and that Plaintiff failed to obtain leave of court before adding a new party-plaintiff is little more than sandbox litigation. During oral argument on Defendants' motion to dismiss the original complaint, Plaintiff requested permission to amend the Complaint noting that it "may pursue a different legal corporate form and amend on that basis." This Court

1. Attorneys Are Authorized to Practice Law as an LLC

The New York LLC Law allows attorneys to form an LLC for the purpose of rendering legal services. Indeed, Section 201 of the LLC Law provides that:

> A limited liability company may be formed under this chapter for **any lawful business purpose** or purposes except to do in this state any business for which another statute specifically requires some other business entity or natural person to be formed or used for such business.

N.Y. LTD. LIAB. CO. LAW § 201 (emphasis added). A "lawful business purpose" includes "professions" (*see* N.Y. LTD. LIAB. CO. LAW § 102 ("'[b]usiness' means every trade, occupation, **profession** or commercial activity")) (emp. supplied) which includes the practice of law. *See Bailey v. Broder*, No. 94 CIV. 2394 (CSH), 1997 WL 73717 at *3 (S.D.N.Y. Feb. 20, 1997) ("the practice of law is a profession").

The NY LLC Law also affords professionals the option of forming a professional service limited liability company ("PSLLC").[4] *See* N.Y. LTD. LIAB. CO. LAW § 1201, *et seq.*

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granted that request over Defendants' objections. In fact, the Court will recall the stony silence in the courtroom when Your Honor asked the Attorney General for the basis of his objection. Carton Decl., Ex. A. (Transcript at p. 25-27). Leave to amend, including the possible addition of a new party, was granted by this Court. Defendants' reliance on *Renard v. Dillman*, 162 F.3d 1148 (Table), 1998 WL 642474 at *2 (2d Cir. 1998) is misplaced as that case reinforces the well-established policy that "leave to amend should be freely granted in the early stages of litigation, absent undue delay, bad faith, prejudice to the opposing party, or futility." *Clarke v. Fonix Corp.*, 98 CIV. 6116 (RPP), 1999 WL 105031 (S.D.N.Y. Mar. 1, 1999) *aff'd,* 199 F.3d 1321 (2d Cir. 1999) (quotations and citations omitted). Similarly unavailing is Defendants' citation to *Avlon v. 829-31 Rest. Corp.*, No. 92 CIV. 9372 (LBS), 1993 WL 403982 (S.D.N.Y. Oct. 5, 1993) addressing the use of a dormant company to create diversity, an issue not present here.

[4] Jacoby & Meyers LLC was purposefully formed as an LLC, not a PSLLC. (Amend. Compl. ¶ 14). Indeed, Plaintiffs anticipated the very argument being advanced by Defendants and obtained the favorable opinion of the author of the Practice Commentaries for the Limited Liability Company Law that a law firm could be created as an LLC, and not only as a PSLLC. Thus, Defendants' contention that Jacoby & Meyers

Nowhere in the LLC Law (including Article 12 governing PSLLCs), however, is it required that attorneys *must* form a PSLLC to practice law. *See, e.g.*, N.Y. LTD. LIAB. CO. LAW § 1203(a) (emphasis added) (stating that professionals "*may*" form a PSLLC). The Statute's use of the permissive "may" instead of the mandatory "shall" indicates that there is no mandatory requirement that companies wishing to engage in a profession must form as a PSLLC. *See, e.g.*, *Sullivan v. Town of Salem*, 805 F.2d 81, 84 (2d Cir. 1986) (a statute permits discretion regarding an activity where the statute uses "a discretionary 'may', not a mandatory 'shall'"); *Eli v. Apker*, No. 05 CIV. 2703 (DC), 2005 WL 2848956 at *5 (S.D.N.Y. Oct. 28, 2005) (a statute's "use of the permissive 'may' rather than the mandatory 'shall'" indicates that the statute confers discretion); *F & W Oldsmobile, Inc. v. Tax Comm'n*, 106 A.D.2d 792, 792-93, 484 N.Y.S.2d 188, 189 (3d Dep't 1984) ("The language of the statute uses the mandatory 'shall' rather than the permissive 'may'"). Rather, both corporate forms are permitted for law firms, and each form has advantages and drawbacks. For example, the LLC provisions permit non-lawyers to have an ownership interest in the entity, while the PSLLC provisions do not. N.Y. LTD. LIAB. CO. LAW § 602 (stating that "a person may become a member" and containing no restrictions on ownership); *See, e.g.*, *Pappas v. Tzolis*, 87 A.D.3d 889, 889, 932 N.Y.S.2d 439, 442 (1st Dep't 2011) (describing a non-professional owner of an LLC).

Similarly, the name of an LLC may not contain the word "attorney" or "lawyer" or any abbreviation or derivative thereof, whereas the name of a PSLLC may contain "any word that, at the time of formation, could be used in the name of a partnership or

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did not comply with the statutory requirements is entirely incorrect as Jacoby & Meyers fully intended to form as an LLC, and not as a PSLLC.

professional service corporation practicing a profession that such limited liability company is authorized to practice." Thus, Jacoby & Meyers has properly formed an LLC and has carefully ensured that neither the word "attorney," nor the word "lawyer" is present in its name.

The propriety of the formation of Jacoby & Meyer USA LLC is illustrated by the fact that other New York law firms have chosen to form as LLCs instead of PSLLCs. For example, the law firm Wahab Medenica, LLC ("Wahab LLC") was authorized to form as an LLC, and not a PSLLC, by the New York State Department of Corporations. *See* New York State Division of Corporation Entity Information for Wahab Medenica (attached to Carton Decl. as Exhibit B). Wahab LLC is clearly a law firm that practices law. *See* Wahab LLC's website, *available at* http://www.wrlawfirm.com. Although Wahab LLC has been registered as an LLC for more than 7 years, there is no indication that any authority has concluded that Wahab LLC was improperly or impermissibly formed as an LLC. Nor has the Attorney General sought to enjoin their use of that status on the grounds they seek to apply here. Accordingly, the plain meaning of the relevant statutes (and the practical reality that New York law firms already exist as LLCs without fear of prosecution) compel a finding that Jacoby & Meyers properly formed as a LLC under New York law.

2. Judiciary Law Section 495 Does Not Prohibit Jacoby & Meyers LLC From Practicing Law

While Defendants correctly contend that Judiciary Law Section 495 prohibits a corporation or voluntary association from practicing law unless they are authorized to do so by statute, (Defs. Br. at 7; N.Y. JUD. L. § 495), Section 495 exempts from that prohibition any corporation or voluntary association that is "lawfully engaged in a

business authorized by the provisions of any existing statute." N.Y. JUD. L. § 495(4).[5] As established above, Jacoby & Meyers LLC is authorized to practice law pursuant to Section 201 of the NY LLC Law. Defendants cannot cite to any statute (other than the PSLLC law generally), any case law or any other learned commentary to support their conclusion that Article 12 of the LLC Law governing professional service limited liability companies ("PSLLC") is the only "existing statute" that authorizes the practice of law in an LLC form. Defs. Br. at 7. And this for good reason: because no such authorities exist.

Moreover, the infirmity of Defendants' reliance on Section 495 is found in the statute itself which specifically states that it "does not apply to organizations which offer prepaid legal services," or "to organizations which have as their primary purpose the furnishing of legal services to indigent persons." N.Y. JUD. LAW § 1§ 495(7) (emphasis added). Because Jacoby & Meyers openly offers prepaid legal services, and has often furnished legal services to indigent persons without other recourse to the legal system, Section 495 is inapplicable to Jacoby & Meyers. *See, e.g.,* Myrna Oliver, *New Services*

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[5] As a threshold matter, it is arguable that Section 495 does not apply to Jacoby & Meyers LLC at all. Under New York law, Jacoby & Meyers LLC is not a corporation (compare N.Y. BUS. CORP. § 102, et seq. and N.Y. LTD. LIAB. CO. LAW § 102, *et seq.* establishing distinct legal entities); *see also Bear Creek Cranberry Co., LLC v. Cliffstar Corp.,* No. 10-CV-00770 A M (2011 WL 2652338 at *6, n.4 (W.D.N.Y. May 6, 2011, *report and recommendation adopted,* No. 10-CV-770A, 2011 WL 2669090 (W.D.N.Y. July 6, 2011) ("LLC ... is the designation for a limited liability company, not a corporation. . . . Thus, if [plaintiff] is truly an LLC, it is not a corporation.") (internal quotations omitted). Similarly, Judiciary Law § 495 provides little guidance as to whether Jacoby & Meyers LLC constitutes a "voluntary association" under that statute. *See Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593-94, 835 N.Y.S.2d 640 (2d Dep't 2007) (discussing LLCs, corporations and voluntary associations as three distinct entities). Assuming, *arguendo*, that Jacoby & Meyers LLC is a "voluntary association," it would still be excluded from Section 495's prohibitions under Section 495(4)'s exemption for entities lawfully formed under other statutory provisions.

Plans Ease Burdens on Legal System, L.A. Times, Dec. 21, 1987 (discussing prepaid legal services offered by Jacoby & Meyers and other law firms); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 656 n. 316 (1989) (same). Thus, Jacoby & Meyers has properly formed an LLC through which it may lawfully engage in the practice of law.

3. Rule 5.4 is the Only Bar to Jacoby & Meyers USA, LLC Practicing Law With Non-Lawyer Owners

In addition to misconstruing the fact that Jacoby & Meyers purposefully created a LLC and not a PSLLC through which to do business, Defendants recycle the same arguments they made previously regarding additional provisions of the Judiciary Law that they contend bar Jacoby & Meyers LLC from practicing law. (Defs. Br. at 6, 8-9.) These arguments are sorely misplaced. Section 491 of the Judiciary Law, on its face, does not forbid the proposed conduct, but simply forbids nonlawyers from receiving compensation in exchange for referring a matter to a lawyer. N.Y. JUD. LAW § 491.

In *Ungar v. Matarazzo Blumberg & Associates, P.C.*, 260 A.D.2d 485, 688 N.Y.S.2d 588 (2d Dep't 1999), the Second Department extended Section 491 to invalidate a contract where a nonlawyer administrator and claims manager was compensated for his work at a law firm in the same manner that a partner would be compensated. The Second Department's holding in *Ungar* did not and does not prohibit nonlawyers from passively investing in a law firm in exchange for participating in the profits generated by the firm. In fact, no court has extended *Ungar* to prohibit the behavior contemplated by Plaintiff's proposed transaction.

Furthermore, while Judiciary Law Sections 478, 479, 481, 482, 484, 485 and 491 bar nonlawyers from practicing law, holding themselves out as being able to do so,

being compensated for procuring clients for lawyers and engaging in other similar activities, these provisions put no relevant limitations on how law firms conduct their internal affairs. *Cf. N.Y. Bar Ass'n v. Jacoby & Meyers*, 92 A.D.2d 817, 818-19, 460 N.Y.S.2d 309 (1st Dep't 1983) (rejecting a complaint under Section 478 on the grounds that listing lawyers not admitted to practice in the state in a firm's letterhead and title did not violate the judiciary rules). More specifically, these laws create absolutely no limitations on who may passively invest or own an interest in a law firm, as contrasted with the actual provision of legal services to prospective or actual clients. To suggest otherwise, is to offer the Court a flawed analogy. As a result, the injury suffered by Jacoby & Meyers is fairly and unequivocally traceable to Rule 5.4 and is the direct result of its prohibition restricting non-lawyer ownership of law firms.

In addition, even if the other laws which Defendants invoke did somehow prohibit the same type of conduct prohibited by Rule 5.4 (which they do not), if Rule 5.4 is struck down, so too would any similar prohibition be deemed infirm. "It is well established that the supremacy of federal law, including federal court orders to remedy violations for federal constitutional and statutory violations, prevails over conflicting state law." *United States v. City of Yonkers*, 856 F.2d 444, 455 (2d Cir. 1988) (citing *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958)). A constitutional ruling or directive, once established by a federal court, cannot be abrogated by separate state laws that were not specifically at issue in the initial case. *See, e.g., Cooper v. Aaron*, 358 U.S. at 15-23, 78 S.Ct. at 1408-1412. In *Cooper*, the defendant school district claimed that even if it wanted to desegregate schools, other agencies of state government – through legislation and executive action – would continue to prohibit integration. *Id.* at 14-17, 78 S.Ct at 1408-

1409. The Supreme Court ruled that it must evaluate the constitutionality of the school district's action, regardless of whether the equally unconstitutional action by other state actors would cause the same injury. Likewise, this Court must pass judgment on the actions of the defendants in proscribing non-lawyer investment in law firms, even if other state actors might enforce the NY LLC Law against Jacoby & Meyers to achieve the same unconstitutional end.[6] Therefore, a decision by this Court striking down Rule 5.4 on Constitutional grounds could not be undermined by the relevant state laws even in the very unlikely event that those laws were somehow interpreted to be functionally equivalent to Rule 5.4. Defendants cannot cure one infirm rule by reliance on others that suffer from the same constitutional infirmity.

B. Plaintiffs' Claims Are Ripe

Contrary to Defendants' assertions, this is not a case that turns on the imminence of prosecution, because the injury to Jacoby & Meyers has already occurred. Rule 5.4's prohibitions result in an immediate increase in the costs of financing law firms like Jacoby & Meyers, thereby causing a present and ongoing injury to Plaintiffs and making their challenge to Rule 5.4 ripe. *See Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002) (Easterbrook, J.) (statute constraining equity investment in firm causes costs of capital to increase, thereby causing injury sufficient to establish standing).[7] "The impairment of the corporation's ability to raise capital" is

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[6] Other state actors will not take such action for the reasons set forth in this Point II.A.3.

[7] The ripeness cases relied upon by Defendants are inapposite and are offered to support Defendants' mistaken belief that a party must be actually prosecuted or threatened with prosecution under a statute in order for a claim to be ripe. This is directly contrary to *Alliant, Babbitt and Steffel.* In *Texas v. United States*, 523 U.S. 296,

sufficient to confer standing, and Rule 5.4 clearly creates such an impairment for Jacoby & Meyers. *FTD Corp. v. Banker's Trust Co.*, 954 F.Supp. 106, 109 (S.D.N.Y. 1997); *cf., e.g.*, *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1333 (Fed. Cir. 2008) (collecting cases holding that standing exists when the government acts so as to reduce a party's market share).

Moreover, even if Jacoby & Meyers had not already been harmed by Rule 5.4, Defendants concede that Plaintiffs should not be forced to flout the law and face prosecution in order to seek protection of its constitutional rights. (*See* Defs. Br. at 11) ("We note in this regard that plaintiff is in no way required to 'bet the farm' on the Rule's invalidity by going through with the transaction and risking possible discipline"). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l* Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309 (1979); *accord Steffel v. Thompson*, 415

300, 118 S. Ct. 1257, 1259 (1998), the plaintiff's claims were not ripe because the constitutional violation alleged required the occurrence of several speculative events that were not "even likely" to occur. Similarly, in *Marchi v. Bd. of Coop. Educ. Services of Albany*, 173 F.3d 469, 474 (2d Cir. 1999), the Second Circuit held that the claims were not ripe where the defendant never indicated that it intended to take any action against the plaintiff that would violate the constitutional right underlying the plaintiff's lawsuit. And, in *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 749 (1971), the Supreme Court held that claims were not ripe when the threat of prosecution was not "remotely possible." Here, as in *Alliant,* no further or future action is needed to cause injury to plaintiff. Rule 5.4's mere existence, without more, causes injury to Jacoby & Meyers. Whether or not prosecution has been threatened – and here it certainly has not been waived – is of no import where the Rule of Professional Conduct prohibits the very transaction which Plaintiff is prepared to consummate. To rule otherwise would place Plaintiffs in a Hobson's choice by which the cost of challenging Rule 5.4 would be their license to practice law.

U.S. 452, 462, 94 S.Ct. 1209, 1216 (1974) (plaintiff should not be forced to choose between "the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663 (1923) ("[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. . . ."); *TC Systems,* Inc. *v. Town of Colonie*, 263 F.Supp. 2d 471, 479-80, 482 n. 6 (N.D.N.Y. 2003) (constitutional ripeness satisfied where telecommunications provider "faces the dilemma of either complying with the franchise process or suffering the costs and sanctions of noncompliance"). Similarly, "claims predicated on future events are considered fit for adjudication under the ripeness doctrine 'when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now.'" *Mental Hygiene Legal Serv.,* 785 F.Supp. 2d 205 (S.D.N.Y. 2011) (*quoting Simmonds v. I.N.S.*, 326 F.3d 351, 359 (2d Cir. 2003). Jacoby & Meyers easily meets this ripeness requirement.

Finally, conceding that Jacoby & Meyers does not need to violate Rule 5.4 in order for its claims to be ripe, (*See* Defs. Br. at 11), Defendants contend that Jacoby & Meyers should have sought a declaratory judgment in state court. In so arguing, Defendants inexplicably rely upon *Matter of Oglesby v. McKinney*, 7 N.Y. 3d 561 (2006) and *Calcagno v. Aidman*, 872 N.Y.S.2d 689 (Table), 2008 WL 3390943 (N.Y. Sup. Ct. Aug. 8, 2008). Neither of these cases is factually or legally similar to the instant one.

Oglesby simply held that a challenge to a judge's order granting a motion to strike a jury panel should be made by a declaratory judgment, not an Article 78 proceeding. Jacoby & Meyers has not filed an Article 78 proceeding, but instead seeks

a declaratory judgment. *Calcagno* involved a declaratory judgment action in state court to determine whether an attorney disciplinary rule had been violated. Jacoby & Meyers is not seeking a declaration as to whether it has violated Rule 5.4 as was the case in *Calcagno*, it is challenging the very constitutionality of Rule 5.4 under the U.S. Constitution. There simply are no "preliminary issues" (Defs. Br. at 11) for a state court to determine before the constitutionality of Rule 5.4 is determined.[8]

As set forth above, Jacoby & Meyers has standing to maintain its claims against Defendants and its claims are ripe. Challenges to standing can be strained to the point of absurdity. Does the Attorney General, as the executive branch of government, have proper standing to represent the interests of the judiciary, acting outside of its narrowly prescribed authority to regulate the practice of law, in an area reserved for the federal legislature, *i.e.*, the regulation of interstate commerce? Plaintiffs' federal and constitutional claims are uniquely and exclusively within the province of this Court. As a result, Defendants' motion to dismiss the Complaint should be denied.

III. JACOBY & MEYERS' CLAIMS ARE NOT BARRED BY LEGISLATIVE OR JUDICIAL IMMUNITY

Defendants assert that all of Jacoby & Meyers' claims are barred by the doctrine of legislative immunity. (Defs. Br. at 12.) This is simply not so. Indeed, in the very case

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[8] Likewise, neither *Lawline v. Am. Bar. Ass'n,* 956 F.2d 1378 (7th Cir. 1992), nor *Felmeister v. Office of Att'y Ethics,* 856 F.2d 529 (3d Cir. 1988) support Defendants' claim that Jacoby & Meyers' claim is not ripe until "state court proceedings regarding the transaction had concluded." (Defs. Br. at 11). *Lawline* does not involve or address the propriety of state law claims. And in *Felmeister*, the plaintiff's claims were dismissed because the allegations in the complaint made it impossible to determine whether the plaintiff's proposed advertisements would violate a New York disciplinary rule. Here, Defendants themselves contend that what Jacoby & Meyers wants to do – enter into engagements with nonlawyer investors – is prohibited under Rule 5.4.

Defendants rely upon for this proposition, *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct. 1967 (1980), the U.S. Supreme Court found that the Supreme Court of Virginia and its Chief Justice were proper defendants in an action for declaratory and injunctive relief concerning their enforcement of Virginia's ban on attorney advertising. The Supreme Court based its decision on the power vested in the Virginia Court and its chief justice to enforce the rule at issue. *See Consumers Union*, 446 U.S. at 736, 100 S.Ct. at 1977. Thus, while the Court held that the defendants could not be sued in their official capacities for their *enactment* of the rule at issue (due to legislative immunity), the action against them nonetheless could proceed based on their *enforcement* of the rule. *See id.* ("the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were."); *see also Leclerc v. Webb*, 270 F.Supp. 2d 779, 793-94 (D. La. 2003) (Louisiana judges found not immune from constitutional challenge to rule governing admission to the bar "because they are charged with enforcing the allegedly unconstitutional rule.").

The same is true here. Defendants herein, the Presiding Justices of the First, Second, Third and Fourth Departments, Appellate Division of the Supreme Court of the State of New York, are responsible for enforcing the Rules of Professional Conduct. *See* N.Y. JUDICIARY LAW § 90(2). The Appellate Division is authorized to censure, suspend, or disbar lawyers guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." *Id.* Thus, they are proper defendants in their enforcement capacity.

Defendants further argue that judicial immunity bars Plaintiffs' claims because various courts have found "judicial immunity applies in connection with defendants' oversight of disciplinary proceedings in New York." (Defs. Br. at 13). However, only two of these cases, *Brooks v. The New York State Supreme Court, Appellate Division, First Department*, No. 02-CV-4138, 2002 WL 31528632 (E.D.N.Y. Aug. 16, 2002), and *Sassower v. Mangano*, 927 F.Supp. 113 (S.D.N.Y. 1996), address the issue of immunity.[9] To the extent that these cases hold that Defendants are acting in their judicial – as opposed to their enforcement – capacity when they enforce the rules of professional conduct, they are directly at odds with the controlling authority of *Consumers Union*. Indeed, the Supreme Court in *Consumers Union* found that it was unnecessary to reach the issue of whether judicial immunity would bar the plaintiff's claims against the Virginia Court and its members, because the defendants were proper defendants in their enforcement capacity. *See Consumers Union,* 446 U.S. at 736, 100 S.Ct at 1977. Thus, Defendants' contention that they are acting in their judicial capacity when they enforce the Rules of Professional Conduct cannot be squared with the Supreme Court's holding in *Consumers Union*, and therefore must be rejected.[10]

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[9] The remainder of the cases Defendants rely on do not address judicial immunity at all. Rather, they all stand for the proposition that an ongoing disciplinary proceeding may qualify as a "judicial proceeding" warranting abstention under the *Younger* doctrine – a doctrine that is not applicable here. *See Middlesex Cty. Ethics Committee*, 457 U.S. 423, 433, 102 S.Ct. 2515, 2522 (1982); *Whitley v. Comcast*, No. 00 Civ. 9401 (WHP), 2001 WL 1135946, at *4 (S.D.N.Y. Sept. 25, 2001). Critically, none of these cases address the issue of whether Defendants are acting in their judicial or enforcement capacity when they enforce a rule of professional conduct.

[10] To the extent Defendants would argue that the 1996 amendments to Section 1983 overruled *Consumers Union*, this argument is unfounded. As the legislative history to the 1996 amendments makes clear, in enacting the 1996 amendments, the legislature intended to "restore[] the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522, 104

Moreover, even if this Court were to find – contrary to *Consumers Union* – that Defendants' enforcement of Rule 5.4 is a "judicial act," Defendants concede that it would not affect Jacoby & Meyers' claims for declaratory relief. (Defs. Br. at 13) ("'in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.'" (Defs. Br. at 13, quoting Section 1983). Accordingly, because Jacoby & Meyers seeks declaratory relief on each of its causes of action, (*see* Amend. Compl. at pp. 26-28.), none of its claims would be subject to dismissal under the doctrine of judicial immunity.

IV. THIS COURT SHOULD EXERCISE ITS JURISDICTION OVER JACOBY & MEYERS' CONSTITUTIONAL CLAIMS

Defendants' argument that this Court should abstain from hearing Plaintiffs' constitutional challenge and allow the very body that enacted Rule 5.4 (supposedly to avoid conflicts of interest) to rule on its Constitutionality – creating a clear conflict of interest – is so ironic as to be unfathomable. Thus, it should be swiftly and soundly rejected.

The unique posture of this action weighs heavily against this Court's sparing exercise of the abstention doctrine. Specifically, this is not a typical challenge to the constitutionality of a state statute. In such a case, the state judiciary may be well-suited to perform an independent and unbiased review of a statute enacted by the legislature. Here, however, the rule at issue was not enacted by the state legislature, but rather by the judiciary. (*See* Amed. Compl. ¶ 19.) If this Court were to abstain, Jacoby & Meyers

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S.Ct. 1970 (1984), which expanded upon the Court's holding in *Consumer's Union*. *See* S. Rep. No. 104-366, at *36 (1996); *see also Leclerc*, 270 F.Supp.2d at 793. Thus, the 1996 amendments returned the doctrine of immunity to status it occupied under *Consumers Union*.

would be left in the untenable position of raising its constitutional challenges before the very body that enacted Rule 5.4. It is hard to believe that Plaintiffs' challenge to Rule 5.4 would receive an unbiased review, particularly in light of the strident position taken by Defendants in response to this lawsuit. Moreover, asking the New York judiciary to review its own rules – in essence, to judge itself – would violate the advocate witness rule (Rule 3.7) and place the judiciary in conflict position, clearly creating the appearance of impropriety, and undermining public confidence in the judiciary. Further, asking the state court to rule on the validity of Rule 5.4 would strain the principle of separation of powers. Rule 5.4 was promulgated by the state court, and is enforced by the state court. If the court were to adjudicate the constitutionality of Rule 5.4, all three powers (legislative, executive and judicial) would be conflated. Plainly, the only way to obviate this conundrum is for the court to refrain from abstaining.

A. Abstention is Unwarranted

Moreover, notwithstanding the unique posture of this case, abstention is unwarranted even under traditional application of the doctrine. The district court's determination whether to abstain from exercising its jurisdiction in deference to state court resolution of underlying issues of state law is a matter left to its sound discretion. *See Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177 (1965), citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). Indeed, although discretionary, "'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 704, 112 S.Ct. 2206 (1992), quoting, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244 (1976). "Abstention should rarely be invoked, because the federal courts

have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt*, 504 U.S. at 705, 112 S.Ct. at 2215, quoting *Colorado River*, 424 U.S. at 813, 465 S.Ct. at 1246.

The abstention doctrine does not, in any way, divest the federal court of its jurisdiction over a constitutional claim. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416, 84 S.Ct. 461, 465 (1964) (abstention does not "'involve the abdication of federal jurisdiction, but only the postponement of its exercise.'"), quoting *Harrison v. NAACP*, 360 U.S. 177, 79 S.Ct. 1025, 1030 (1959). Rather, where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention *may* be proper. *See Harman*, 380 U.S. at 534, 85 S.Ct. at 1182 (affirming district court's refusal to abstain). The doctrine, however, is only applicable where the issue of state law is uncertain; if the "state statute in question is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.*

Here, there is no "uncertain" issue of a state law that could moot the federal constitutional questions. First, there is no interpretation of Rule 5.4 that would allow Jacoby & Meyers to convey an ownership interest to a non-lawyer in exchange for an investment, thus mooting Jacoby & Meyers' constitutional challenge. Further, contrary to Defendants' assertion, Jacoby & Meyers' standing does not turn on an "uncertain" question of state law. As discussed above in Point I, the NY LLC Law does not preclude Jacoby & Meyers from practicing law as an LLC. Defendants attempt to create uncertainty by misinterpreting that statute and arguing – incorrectly – that Jacoby &

Meyers cannot practice law as an LLC. Defendants cannot concoct a claim that the meaning of the state statute is "uncertain" by baldly pronouncing that the statute has a meaning other than what its plain text denotes. As discussed above, the NY LLC Law has a meaning that is crystal clear. If parties could induce federal district courts to abstain by fabricating alternative meanings for clear state law, then the Courts' bedrock responsibility to enforce constitutional rights would instead rest upon quicksand.

Furthermore, by withdrawing those of its causes of action based on the New York State Constitution, Jacoby & Meyers has narrowed its challenge to Rule 5.4 only to arise under the United States Constitution. As such, it is an action squarely within the jurisdiction of this Court; and it is this Court that should decide Jacoby & Meyers' claims. *See Louisiana State Bd. of Medical Examiners*, 375 U.S at 415-416, 84 S.Ct. at 465 ("recognition of the role of state courts as the final expositors of state law implies no disregard for the *primacy of the federal judiciary in deciding questions of federal law*.") (emphasis added).[11]

B. This Court Should Not Decline to Exercise Jurisdiction Based On The Declaratory Judgment Act

Finally, Defendants' contention that this Court should exercise its "broad discretion" under the Declaratory Judgment Act to refuse to exercise jurisdiction over this action (Defs. Br. at 16) should be swiftly rejected.

First, Jacoby & Meyers' did not bring this action pursuant to the Declaratory Judgment Act (the "Act"), rendering the Defendants' reliance on the Act as the arbiter of

[11] Defendants' argument that the federal constitutional claims could be mooted by state law claims Jacoby & Meyers *has not asserted* is a red herring wholly irrelevant to this motion. Defendants assert that state law claims not contained in the Amended Complaint could render Rule 5.4 void *ab initio* and thus moot Jacoby & Meyers' constitutional challenge. (Defs. Br. at 15). This argument is simply irrelevant because the Amended Complaint does not contain any state law claims.

this Court's jurisdiction inapplicable. Section 1983 provides an independent cause of action providing for declaratory relief. Moreover, contrary to Defendants' apparent position, the Act, which creates a federal cause of action for a declaratory judgment, does not diminish this Court's jurisdiction over Jacoby & Meyers' challenge to the constitutionality of Rule 5.4. Indeed, determining the constitutionality of a state statute is a proper subject for adjudication under the Declaratory Judgment Act. *See Steffel v. Thompson*, 415 U.S. 452, 467, 94 S.Ct. 1209, 1219 (1974) (the Declaratory Judgment Act was designed to test constitutionality of state criminal statutes).

Tellingly, virtually none of the cases cited by Defendants address a federal court's jurisdiction to issue a declaratory judgment on a constitutional challenge. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137 (1995) (underwriters sought declaratory judgment that their commercial liability insurance policies provided no coverage); *Dow Jones & Co., Inc. v. Harrods Ltd.,* 346 F.3d 357, 358 (2d Cir. 2003) (newspaper publisher sought declaration that story was not libelous as a matter of law); *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (newspaper seeking declaratory judgment that its reporters' telephone records were privileged from potential grand jury subpoena).

Moreover, even if this Court were to apply the factors identified by the Second Circuit as relevant to a court's determination of whether to entertain a declaratory judgment action under the Act, such an exercise of jurisdiction would be warranted. The applicable factors are:

> (i) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (ii) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (iii) "whether the proposed remedy is being used merely for 'procedural fencing' or a 'race

> to *res judicata*' "; (iv) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (v) "whether there is a better or more effective remedy."

The New York Times Co. v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006) (citations omitted) (finding that the district court did not abuse its discretion in entertaining the action). All of these factors weigh heavily in favor of this Court hearing this case.

Factors (i) and (ii) favor a decision on the merits. Contrary to Defendants' argument that a resolution of this action would not clarify or settle the issue due to various other New York statutes, a declaration that Rule 5.4 is unconstitutional would settle the legal issue involved and finalize the controversy for all of the reasons discussed in Point I, above. Further, factor (iii) is inapplicable on its face.

Factor (iv) likewise weighs in favor of the Court's exercise of jurisdiction. The Court's resolution of Jacoby & Meyers' constitutional claims would not intrude upon the domain of a state court because the matter at issue is not within the "dominion of the state court." Jacoby & Meyers has withdrawn its state law claims, focusing the issue as a question of federal constitutional law. Indeed, as discussed above, there is no interpretation of Rule 5.4 that would avoid the need for an adjudication of its constitutionality. This determination is not one of state law, but of the United States Constitution, and as such is squarely within the dominion of this Court. *See Louisiana State Bd. of Medical Examiners*, 375 U.S at 415-416, 84 S.Ct. at 466 (recognizing the "primacy of the federal judiciary in deciding questions of federal law.")

True, Jacoby & Meyers asks this Court to block the state court's enforcement of a state court rule. But, as explained above, this claim arises in the unusual context in which the state is acting as law-maker and law-enforcer, and when no state judicial

proceeding against Jacoby & Meyers under Rule 5.4 is pending. In *Ellis v. Dyson*, 421 U.S. 426, 95 S.Ct. 1691 (1975), the plaintiff brought a claim under both Section 1983 and the Act alleging that a state anti-loitering law was unconstitutional. The Supreme Court ruled that the opportunity for adjudication of constitutional rights in a federal forum was "paramount" and superceded by any considerations of comity and federalism, especially where there was no pending state judicial case enforcing the statute. 421 U.S. 426, 432, 95 S. Ct. 1691 (where no state enforcement proceeding is pending "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount"), citing *Steffel*, 415 U.S. 462-62, 94 S.Ct. 1217-1218.[12]

Finally, turning to factor (v), there is no better or more effective remedy. Indeed, the State does not argue that there exists another remedy, but rather that Jacoby & Meyers should seek the same remedy (a declaratory judgment) in state court. (Defs. Br. at 20). However, as discussed above, forcing Jacoby & Meyers to bring this challenge before the very body that enacted Rule 5.4 would: preclude an unbiased review; threaten the appearance of impropriety by the state judiciary; and place the judiciary in a conflict of interest. They are litigants in this proceeding! Given this Court's ability to decide the issue free of these encumbrances, it can hardly be said that seeking a declaratory judgment in state court would be a "better" or "more effective" remedy.

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[12] Defendants' further argument that striking down Rule 5.4 without imposing any alternative restrictions on non-lawyer investment, as exist in other jurisdictions, would create "open season for all sorts of questionable litigation financing schemes" (Defs. Br. at 18) must be rejected. Essentially, Defendants are arguing that the existing Rule is better than no rule at all. But that does not render it constitutional. Should this Court strike down Rule 5.4, Defendants would be free to enact whatever replacement Rule they wish, as long as that Rule is constitutional, unlike Rule 5.4.

For all of the foregoing reasons, this Court should exercise its jurisdiction over Jacoby & Meyers' constitutional claims.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court should deny Defendants' motion to dismiss in its entirety, together with such other and further relief as it deems just and proper.

Dated: White Plains, New York
January 17, 2012

MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2012, a copy of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint and Declaration of Jeffrey I. Carton were filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access the filing through the Court's system.

/s/ Jeffrey I. Carton
Jeffrey I. Carton