Upsolve, Inc. et al v. James Doc. 45

No. 1:22-cv-00627-PAC

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendant,

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. As part of its mission to defend freedom of speech—particularly effective, high-value speech—the Institute has challenged laws across the country that regulate a wide array of occupational speech, including teletherapy, psychological advice, dietary advice, and veterinary advice.[2] Counsel for Amicus have also published extensively on the First Amendment status of occupational speech.[3] Amicus believes that its experience

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[1] No party's counsel authored this brief in whole or in part. No one other than *amicus* Institute for Justice contributed money for this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

Amicus sought the parties' consent to file this brief. Counsel for Plaintiffs has stated that they do not oppose the filing of this brief. Counsel for Defendant has stated that they take no position on the filing of this brief.

[2] *See, e.g.*, *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020); *Hines v. Quillivan*, 982 F.3d 266 (5th Cir. 2020); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

[3] *See, e.g.*, Paul Sherman, Commentary, *Occupational Speech & the First Amendment*, 128 Harv. L. Rev. Forum 183 (Mar. 2015), *available at* https://harvardlawreview.org/2015/03/occupational-speech-and-the-first-amendment/; Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 Cato Sup. Ct. Rev. 197 (2017–18), *available at* https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2018/9/2018-cato-supreme-court-review-8.pdf; Paul Sherman & Robert McNamara, Opinion, *Censorship in Your Doctor's Office*, N.Y. Times (Aug. 2, 2014) at A17, *available at* https://www. nytimes.com/2014/08/02/opinion/censorship-in-your-doctors-office.html.

will help the Court understand how the Supreme Court's most recent case law applies to the First Amendment issues raised in this case, the wider repercussions of this case, and the importance of granting Plaintiffs' motion for preliminary injunction.

INTRODUCTION

If Upsolve wanted to publish a book offering detailed legal advice on how to respond to debt-collection lawsuits, no one would doubt that their speech was fully protected by the First Amendment. The question presented here is whether those constitutional principles change if Plaintiffs' advice is delivered one-on-one, rather than through a book. They do not. On the contrary, the Supreme Court has held that individualized legal advice is fully protected speech, and laws that burden that speech based on its subject matter must satisfy First Amendment scrutiny.

Amicus expects that Defendant will frame the question differently, as whether there is a First Amendment right to "practice law," and will argue that the "practice of law" is a form of regulable conduct that involves speech only incidentally. But this is the wrong inquiry. When federal courts seek to categorize some activity as either "speech" or "conduct," their decisions are not determined by the entire universe of activity that a law might cover. Instead, courts look narrowly at the precise activity that triggers the application of the law in a given case. When the "conduct" that triggers the law consists of speech of a particular

content, that *application* of the law must be analyzed as a restriction on speech, even if other applications of the same law might not raise First Amendment issues.

Here, Plaintiffs have alleged that they wish to give individualized advice on legal topics but are prohibited from doing so by New York's UPL prohibition. Advice is speech. And if Plaintiffs gave advice on some other topic, or if they gave generalized advice instead of individualized advice, their speech would not be prohibited. Thus, as applied to Plaintiffs, the prohibition is a content-based restriction on speech. And like all content-based restrictions on speech, this application of New York's UPL prohibition is subject to strict scrutiny, which it is unlikely to survive.

So holding would not create a general First Amendment right to "practice law" because there are many applications of New York's UPL prohibition that are not triggered by speech, such as handling client funds or exercising a power of attorney on a client's behalf. Other applications may be triggered only by the independent legal effect of speech rather than its communicative content, such as the filing of a complaint or the serving of discovery, which create legally enforceable obligations that states may regulate without offending the First Amendment. Still others—such as appearing before a court—involve limited public forums in which the government has greater latitude to regulate the speakers that may appear. And nothing in this Court's holding need undermine other

consumer protection measures such as New York's prohibition on Plaintiffs' falsely holding themselves out as lawyers, which would be unprotected fraudulent commercial speech.

What ruling for Plaintiffs *will* do is ensure that some of the most vulnerable members of the public have access to valuable legal assistance that is currently denied them. And to reach that result, this Court need simply reaffirm that occupational licensing laws are subject to the same First Amendment rules as any other law when they burden speech based on its content. Any contrary holding would shortchange not only Plaintiffs but countless speakers throughout the country who are subject to occupational licensing laws.

ARGUMENT

I. Supreme Court precedent establishes that individualized legal advice is speech, and content-based restrictions on advice must be reviewed with strict scrutiny.

Because a central question here is whether individualized legal advice is "speech" or "professional conduct," this Court should begin by applying the Supreme Court's established test for distinguishing speech from conduct. That test is set forth, most recently, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There, the Supreme Court held that whenever the "conduct" triggering the application of a law consists of speech with a particular message, that law must be treated as a content-based restriction on speech. *Id.* at 6–11.

Holder's facts are instructive. In that case, the U.S. Supreme Court considered the constitutionality of a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorist groups. The plaintiffs—lawyers and nonprofit groups—wished to provide these groups with training "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." *Id.* at 9, 14–15. In other words, just as in this case, they wanted to give individualized advice on legal matters. They were prevented from doing so, however, because speech in the form of advice was illegal.

Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources." *Id.* at 12. That term was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* at 12–13. The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 24–39.

Just as Amicus anticipates Defendant will do in this case, the government defended the law by arguing that the proscribed speech was merely conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore argued that the law only incidentally burdened the plaintiffs' expression.

Id. at 26–27. But the U.S. Supreme Court *unanimously* rejected that argument, holding that the material-support prohibition was a content-based regulation of speech subject to heightened scrutiny.[4] *Id.*

Most importantly, the Court took a commonsense approach to determining whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs wanted to talk to designated terrorist groups but were prohibited from communicating particular things:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

This analysis applies directly to the First Amendment claim in this case. Plaintiffs wish to talk with people about their legal rights and "whether they may do so . . . depends on what they say." *Id.* If Plaintiffs' speech communicates individualized legal advice, it is barred. If Plaintiffs' speech imparts only general

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[4] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 26–28; *id.* at 45 (Breyer, J., dissenting).

or unspecialized knowledge, it is not barred. Under *Holder*, that is a content-based restriction on speech and thus is subject to strict scrutiny.

Defendant may try to avoid this conclusion by pointing to the nature of the restriction here—an occupational-licensing law—and arguing that such laws should be subject to different rules than those applied in *Holder*. But the Supreme Court foreclosed that argument in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). That case involved the so-called "professional speech doctrine," under which some circuits had held that speech "within the confines of the professional relationship" was exempt "from the rule that content-based regulations of speech are subject to strict scrutiny." *Id.* at 2371 (cleaned up). This doctrine was explicitly premised on the notion that such speech is a form of "professional conduct," such as the "practice of law" or the "practice of medicine." *See, e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *abrogation recognized by Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068–69 (9th Cir. 2020). But the Supreme Court expressly rejected that doctrine, in part because it "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. Instead, the Court reaffirmed that speech is speech—and subject to

ordinary First Amendment rules—even if it occurs in a professional-client relationship. *NIFLA*, 138 S. Ct. at 2371–72.[5]

Applying those principles here, New York's UPL prohibition, as applied to Plaintiffs' legal advice, is a content-based restriction on speech. Like all content-based restrictions on speech, that application is subject to strict scrutiny, under which it is presumptively unconstitutional. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). And Defendant can overcome that presumption only through a strong showing that the law is narrowly tailored to serve a compelling government interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (holding that "the burdens at the preliminary injunction stage track the burdens at trial"). Given the high bar of strict scrutiny, Defendant likely cannot make that showing.

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[5] *See also Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020) ("*NIFLA* makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections."); *Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020) ("The Supreme Court's decision in *NIFLA* also refused to recognize professional speech as a new speech category deserving less protection," and makes clear that the "idea that [laws] target 'professional speech' does not loosen the First Amendment's restraints."); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) ("[T]he First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'") (quoting *NIFLA*, 138 S. Ct. at 2375).

II. A ruling for Plaintiffs would not create a general First Amendment right to "practice law."

Holding that the application of New York's UPL prohibition to pure legal advice likely violates the First Amendment would provide many benefits for the low-income and vulnerable communities that Plaintiffs wish to serve. But one thing it would not do is create a general First Amendment right to "practice law."

Most importantly, a ruling for Plaintiffs would not require the wholesale invalidation of New York's lawyer-licensing scheme simply because this one application of that scheme violates the First Amendment. Under the Supreme Court's overbreadth doctrine, that severe remedy is necessary only when "a substantial number of [a law's] applications are unconstitutional [when] judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). Thus, while facial invalidation may sometimes be appropriate—such as when the government licenses the speech of tour guides, *cf. Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014)—New York's UPL prohibition surely has enough applications not triggered solely by speech that facial invalidation would be inappropriate.

First, there are many applications of New York's UPL prohibition that are not triggered by speech, such as handling client funds or exercising a power of attorney on a client's behalf. Restricting who can undertake these activities on a

client's behalf does not directly implicate the First Amendment because, to the extent that these activities involve speech, the speech itself is not what triggers the law's application.

Other applications of New York's UPL prohibition may be triggered only by the independent legal effect of speech rather than its communicative content, such as the filing of a complaint or the serving of discovery, both of which create legally enforceable obligations that states may regulate without offending the First Amendment. The Ninth Circuit recognized this in a similar context when it held that the United States could not punish physicians who recommended their patients use medical marijuana, even though it could regulate or even prohibit the prescribing of marijuana. *See Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002). Although both the recommendation and the prescription are carried out through speech, only the prescription creates the legal entitlement to access a controlled substance.

Still other applications of the UPL prohibition—such as to advocates appearing before a court—involve nonpublic forums in which the government has greater latitude to regulate who may speak and what they may communicate. *See, e.g.*, *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) ("A courthouse—and, especially, a courtroom—is a nonpublic forum"). And, of course, nothing in this Court's holding need undermine other consumer protection measures such as New

York's prohibition on Plaintiffs' falsely holding themselves out as lawyers, *see* N.Y. Jud. Law § 478, which would be unprotected fraudulent commercial speech. *Cf. Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.").

In short, the only effect of this Court's ruling for Plaintiffs would be to ensure that willing speakers may communicate with willing listeners without state interference.

III. A contrary holding would threaten the First Amendment rights of countless Americans.

As discussed above, the scope of the First Amendment is not limited by the scope of a state's occupational-licensing laws. Simply put, individuals have a right to seek out—and speakers have a right to provide—information about legal matters, subject only to those limitations that satisfy full First Amendment scrutiny. And it's a good thing, too, because the alternative for the vulnerable and low-income people who most need Plaintiffs' advice is not to get it from a licensed lawyer, but to instead go without advice.

Indeed, robust protection for occupational speech is more important than ever before, because more activities than ever before are now considered the conduct of a licensed profession. The proportion of the American workforce that is required to hold an occupational license quadrupled between the 1950s (when less

than 5% of U.S. workers needed a license to do their jobs[6]) and 2017 (when nearly 22% did). For context, the share of the workforce that is licensed is now roughly twice as large as the share that is unionized.[7] A rule that exempted licensed work from First Amendment protection would give countless government agencies unchecked power to silence speech on a wide array of topics.

And experience teaches that these agencies would not hesitate to use their power to silence speech, advice, and even public advocacy on the topics within their ambit. Consider the case of retired engineer Wayne Nutt. *Nutt v. Ritter*, No. 7:21-cv-00106-M (E.D.N.C. filed June 9, 2021), *available at* https://ij.org/wp-content/uploads/2021/06/NC-Engineering-Complaint.pdf. For most of his career, Nutt lawfully practiced engineering in North Carolina, without a license, under the state's "industrial exemption." But when Nutt testified as an expert witness in a lawsuit, the state's engineering board accused him of the unlicensed "practice" of engineering. And North Carolina is not the only state to apply its engineering statute to public advocacy; the state of Oregon did the same when it accused engineer Mats Järlström of the unlicensed practice of engineering after Järlström

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[6] Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Labor Econ. S173, S176 (2013).
[7] See U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics From the Current Population Survey* (Table 40) (2017), https://www.bls.gov/cps/aa2017/cpsaat40.pdf.

emailed the state's board with concerns about the state's timing formula for traffic lights. *See Järlström v. Aldridge*, No. 3:17-cv-00652-SB, 2017 WL 6388957 (D. Or. Dec. 14, 2017).

The Kentucky Board of Examiners of Psychology took a similar tack when it sent a cease-and-desist letter to syndicated newspaper columnist John Rosemond after he published an advice column in a Kentucky newspaper in which he offered advice to parents who wrote to him about their struggles with their teenage son. *See Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015). As Amicus anticipates here, the government argued that advice tailored to an individual's personal parenting situation was the unlicensed practice of a profession that could be regulated without considering the First Amendment.

State surveying boards in North Carolina and Mississippi have taken similar action against companies that produce maps or take aerial photographs of property. *See* Matt Powers, Institute for Justice, *Mississippi Startup Files First Amendment Countersuit Against State Licensing Board*, https://ij.org/press-release/mississippi-startup-files-first-amendment-countersuit-against-state-licensing-board/ (July 10, 2018); *North Carolina Drones*, https://ij.org/case/north-carolina-drones/ (last visited Dec. 13, 2021). In both cases, the state has argued that creating these images is the unlicensed "practice of surveying," even though the maps and photos do not establish official property lines or have any other independent legal effect.

Other examples abound. In North Carolina, the state's dietetics board went through diet blogger Steve Cooksey's website with a red pen, specifying on a line-by-line basis which portions of his low-carb diet advice were the illegal, unlicensed practice of dietetics. *Cooksey v. Futrell*, 721 F.3d 226, 231–32 (4th Cir. 2013). And even advice about animals isn't safe—in Texas, the state argued (unsuccessfully) that retired veterinarian Ron Hines may not offer any individualized advice about any animal, even to pet owners outside the United States, unless he has first physically examined the animal. *See Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021) (holding, on remand from the Fifth Circuit, that the physical-examination requirement, as applied to Hines, was an unconstitutional content-based restriction on speech).
In each of these cases, the government argued—or is still arguing—that the plaintiff's speech is the "conduct" of practicing a profession, and thus receives no First Amendment protection. But if that were true, then there would be no limits to what could be cast out from the scope of the First Amendment. That is because all speech can be characterized, in some sense, as conduct. University professors engage in the conduct of "instructing." Political consultants engage in the conduct of "strategizing." Stand-up comedians engage in the conduct of "inducing amusement." But this does not affect the level of First Amendment protection these speakers enjoy. And for good reason. Indeed, as one circuit aptly described it, "To

classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.'" *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. 2361. This Court, too, should reject that labeling game and resolve this case using ordinary First Amendment principles.

CONCLUSION

This Court should grant the motion for preliminary injunction.

Date: March 3, 2022

Respectfully Submitted,

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