UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Case 1:22-cv-00627-PAC

UPSOLVE, INC. and REV. JOHN UDOOKON,
Plaintiffs,

-v

LETITIA JAMES, in her official capacityDV
Attorney General of the State of New York,
Defendant.

ERWIN ROSENBERG'S AMENDED MOTION FOR PERMISSIVE INTERVENTION

Rule 24 (b) says "(b) Permissive Intervention. (1) In General. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact."

In this case this Court may address whether the New York lawyer licensing and disciplinry system violates the First Amendment. See Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction D.E. 58 page 7 "The question of whether laypersons have a First Amendment right to practice law without a license is not a new one. "

ERWIN ROSENBERG lives in Miami-Dade County, Florida and is interested in practicing law in New York courts; however, he received a reciprocal discipline of disbarment in New York (although it is pending reconsideration).

The lawyer licensing and disciplinary scheme of New York violates ERWIN ROSENBERG's rights under the First Amendment by asserting an authority from or relating to N.Y. Jud. Law §§ 90, 468-a, 476-a, 478, 484, 485, 750, 753 and the Rules of the Chief Administrator of the Courts (see 22 NYCRR part 118) which imposes a prior restraint on his speech, namely by asserting the right to admit, suspend and/or disbar a lawyer. The licensing scheme vests unbridled discretion in the decisionmaker. The implicit or explicit regulation is overbroad. The scheme creates a risk of delay. Every application of the law creates an impermissible risk of suppression of ideas. Even assuming that the State's interest does justify requiring persons who wish to practice law to obtain a license before practicing law, the law fails to provide that the licensor will, within a specified brief period, either issue a license or go to neutral court for a judicial determination that the censorship complies with the First Amendment.or after issuing a suspension, disbarment or prohibition on pro se filings will, within a specified brief period,, go to a neutral court for a judicial determination that the censorship complies with the First Amendment.

Lawyering speech is protected by the First Amendment. See also Nifla v. Becerra, 138 S. Ct. 2361, 2373 (2018)("Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); but cf. id., at 439, 83 S.Ct. 328 ("[A] State may not, under the guise of prohibiting professional misconduct,

ignore constitutional rights"). ").

At the May 12, 2022 oral argument Defendant cited the February 18, 2022 decision Del Castillo v. Secretary, Florida Department of Health, 26 F.4th 1214 (11th Cir. 2022). Del Castillo. However, that case contradicts Defendant's view. Del Castillo indicates that NIFLA v. Becerra, 138 S.Ct. 2361 (2018) holds that the practice of law is protected by the First Amendment because Justice White's concurrence in Lowe v. SEC, 472 U.S. 181 (1985) held that the licensing of lawyers constitutes the regulation of speech *per se* and is only justified if we hold that professional speech is entitled to a lesser degree of protection than regular speech, the professioanl speech doctrine, but NIFLA v. Becerra rejects the professioanl speech doctrine.

Del Castillo at pages 1220, 1222 (2022) makes clear that the recent NIFLA v. Becerra, 138 S.Ct. 2361 (2018), rejected Justice White's concurrence in Lowe v. SEC, 472 U.S. 181, 232 (1985):

> "As courts sometimes do, the *Locke* court also gave an additional reason for its holding. The second reason we gave for concluding that the interior designer licensing scheme did not violate the First Amendment was that, if "the government enact[ed] generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech ... subject to First Amendment scrutiny." Id. at 1191 (majority opinion) (omission in original) (quoting *Lowe v. SEC*, 472 U.S.

181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring)). There was "a difference," we reasoned, "for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Id.* The interior designer "license requirement regulate[d] solely the latter," we said. *Id.* This second reason, derived from Justice White's concurring opinion in Lowe, is the professional speech doctrine."

. . .

"Second, while the *NIFLA* Court "refused to recognize professional speech as a new speech category deserving less protection," *Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020), it also reaffirmed that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech," *NIFLA*, 138 S. Ct. at 2372."

However, although the licensing scheme for an interior decorator (*Locke*) and dietitians and nutritionists (*Del Castillo*) were deemed constitutional on the basis that the licensing scheme regulated conduct and incidentally speech, such a defense is not applicable to the regulation of lawyers because the legal profession is a "speaking profession". Before Justice White mentioned the professional speech doctrine as the justification for the regulation of the legal profession, he described the legal profession as a "speaking profession". See *Lowe v. SEC*, 472 U.S. 181, 228-230 (Justice White, concurring):

"Perhaps the most obvious example of a "speaking profession" that is subject to governmental licensing is the legal profession. Although a lawyer's work is almost

entirely devoted to the sort of communicative acts that, viewed in isolation, fall within the First Amendment's protection, we have never doubted that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schware v. Board of Bar Examiners, supra*, at 239.

. . .

To protect investors, the Government insists, it may require that investment advisers, **like lawyers**, evince the qualities of truth-speaking, honor, discretion, and fiduciary responsibility.

But the principle that the government may restrict entry into professions and vocations through **licensing schemes** has never been extended to encompass the licensing of speech *per se* or of the press."

(emphases added).

Erwin Rosenberg is not seeking from this Court an order reversing or vacating the any disciplinary orders against him. Rather, he is making a general constitutional attack on the authority from or relating to N.Y. Jud. Law §§ 90, 468-a, 476-a, 478, 484, 485, 750, 753 and the Rules of the Chief Administrator of the Courts (see 22 NYCRR part 118) which imposes a prior restraint on his speech, namely by asserting the right to admit, suspend and/or disbar a lawyer. See District of Columbia Court of Appeals v. Feldman, 460 US 462, 488 (1983)(JUSTICE STEVENS, dissenting)("The Court holds that

respondents may make a general constitutional attack on the rules governing the admission of lawyers to practice in the District of Columbia.").

In order to avoid violating the Eleventh Amendment, this case is being brought only for prospective and injunctive relief to prevent a continuing violation of federal law. against a state official, LETITIA JAMES, in her official capacity as Attorney General of the State of New York. See Green v. Mansour, 474 US 64, 68 (1985)("Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. *Id.*, at 99. The landmark case of Ex *parte Young*, 209 U. S. 123 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Id.*, at 159-160. The theory of *Young* was that an unconstitutional statute is void, *id.*, at 159, and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.*, at 160. *Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. *Id.*, at 155-156, 159.").

The proposed Complaint filed with the initial motion for permissive intervention is hereby incorporated by reference. as the proposed Complaint applicable to this amended motion. Wherefore Erwin Rosenberg moves for permissive intervention

CERTIFICATE OF SERVICE

I hereby certify I mailed to United States Courthouse, 500 Pearl Street, New York, NY 10007 on May 17, 2022.

Respectfully Submitted,

s./

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