

M5CHUpsO

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

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

5 Plaintiffs,

6 v.

22 Civ. 627 (PAC)

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

Oral Argument

9 Defendant.

10 -----x

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

13 Before:

14 HON. PAUL A. CROTTY,

District Judge

15 APPEARANCES

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

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

M5CHUpsO

1 (Case called)

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

5 THE COURT: Who's going to be arguing?

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

7 THE COURT: All right. OK.

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

11 THE COURT: Good morning, Mr. Lawson.

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

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

M5CHUpsO

1 anyway.

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

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

11 So we'll hear first from the plaintiff.

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

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

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

M5CHUpsO

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

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

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

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

19 THE COURT: What exactly are they doing?

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

M5CHUpsO

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

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

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

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

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

18 THE COURT: Go ahead.

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

24 THE COURT: All right.

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

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

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

25 THE COURT: This is different.



M5CHUpsO

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

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

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

M5CHUpsO

1 scrutiny.

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

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

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

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

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

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

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

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

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

M5CHUpsO

1 handle.

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

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

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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



M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

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

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

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

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

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

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

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

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

M5CHUpsO

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

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

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

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

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

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

M5CHUpsO

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

7 THE COURT: All right.

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

10 I also want to discuss --

11 THE COURT: Two more.

12 MR. NILES-WEED: Two more?

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

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

16 THE COURT: Sure.

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

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

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

23 THE COURT: OK.

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

M5CHUpsO

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

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

15 THE COURT: Thank you.

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

25 THE COURT: Thank you.

M5CHUpsO

1 Mr. Lawson.

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

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

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

16 THE COURT: Yes.

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

M5CHUpsO

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

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

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

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



M5CHUpsO

1 involves speech.

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

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

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

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

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

18 THE COURT: Great. That will keep them busy.

19 MR. LAWSON: So I will do that now.

20 THE COURT: Thank you.

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

M5CHUpsO

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

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

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

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

M5CHUpsO

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

4 So consistent with --

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

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

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

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

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

M5CHUpsO

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

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

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

M5CHUpsO

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

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

15 And we got into that a little bit in *Holder*. And  
16 again, context matters. The plaintiffs assert that, well, it's  
17 not a problem that the facts here are not identical. Well, it  
18 is a problem for these plaintiffs because context matters, and  
19 we know that because the Supreme Court and federal courts have  
20 consistently recognized that professional conduct rules,  
21 including generally applicable licensing statutes that govern  
22 who may practice a profession, are essentially *sui generis*,  
23 they're their own category, and they have been identified as  
24 such by the Supreme Court of the United States as recently as  
25 2018.

M5CHUpsO

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

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

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

M5CHUpsO

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

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

M5CHUpsO

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

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

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

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



M5CHUpsO

1 related to that overriding goal.

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

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

20 MR. LAWSON: The problem --

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

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

M5CHUpsO

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

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

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

M5CHUpsO

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

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

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

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

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

M5CHUpsO

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

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

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

M5CHUpsO

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

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

M5CHUpsO

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

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

15 THE COURT: Thank you, Mr. Lawson.

16 Mr. Niles-Weed.

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

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

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

M5CHUpsO

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

4 So I would note that the government said in their  
5 presentation that there's no right to practice law in any  
6 respect, but in the *Lawline* case from the Second Circuit which  
7 the government cites, the court says, and this is 956 F.2d at  
8 1386, that there may well be activities, many activities,  
9 excuse me, which lawyers routinely engage in which are  
10 protected by the First Amendment and which could not be  
11 constitutional prohibited to laypersons.

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

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

M5CHUpsO

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

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

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

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



M5CHUpsO

1 provided for free, subject to strict restrictions is protected.

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

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

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

M5CHUpsO

1 problem or helping to solve this problem, which there are, and  
2 plaintiffs respect and appreciate the amazing work done by the  
3 amici and other organizations, but the status quo as it sits  
4 today is that there are 88 percent of people who default in  
5 lawsuits like this, and the question for the Court on the  
6 public interest balancing is a narrow one. Given that  
7 88 percent default rate, will people be better off with the  
8 narrow advice that plaintiffs are seeking to provide, or will  
9 they be worse off?

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

14 THE COURT: Thank you.

15 Mr. Lawson, you want to say anything?

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

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

M5CHUpsO

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

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

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

19 Thank you.

20 THE COURT: Thank you.

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

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

M5CHUpsO

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

3                   (Adjourned)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25