AJM American Justice Movement

Upsolve & Rev. John Udo-Okon v. New York: Amicus Briefs Filed in 2nd Circuit, January 2023

Table of Contents

- The NAACP & the NAACP New York State Conference – pg. 2
- Law Professors who Study Access to Justice & Regulation of the Legal Profession – pg. 36
- Professor Rebecca L. Sandefur & 22 Empirical Scholars – pg. 68
- The National Center for Access to Justice – pg. 116
- Responsive Law – pg. 158

22-1345

IN THE

United States Court of Appeals for the Second Circuit

UPSOLVE, INC., REVEREND JOHN UDO-OKON,
Plaintiffs-Appellees,

v.

LETITIA JAMES, in her official capacity as Attorney General of the State of New York,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York
No. 22-cv-627
Hon. Paul A. Crotty

BRIEF OF AMICI CURIAE THE NAACP AND THE NAACP NEW YORK STATE CONFERENCE IN SUPPORT OF PLAINTIFFS-APPELLEES

Joseph Rostain Schottenfeld
Martina Tiku
Glynnis Hagins
NAACP | EMPOWERMENT PROGRAMS
4805 Mount Hope Drive
Baltimore, MD 21215
(203) 444-9577

Daniel A. Rubens
Jodie C. Liu
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

(Additional counsel on inside cover)

Sarah H. Sloan
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, DC 20005
(202) 339-8400

Counsel for Amici Curiae

CORPORATE DISLCOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae the NAACP and the NAACP New York State Conference state that they have no parent corporations and that no publicly held corporations own 10% or more of their stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
INTEREST OF AMICI CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. The right to associate protects plaintiffs'—and the NAACP's—right to facilitate meaningful access to the courts through the provision of helpful and accurate legal advice. 5
A. The right to associate protects collective efforts to use the courts for political expression—including Upsolve's efforts to redress unfair and discriminatory debt collection actions. 7
B. The right to associate protects collective activity intended to help people access the courts 10
II. The First Amendment's protections for the right to associate in this context do not and cannot belong to lawyers alone 15
III. The NAACP's debt-related advocacy demonstrates why it is vitally important that the right to associate protects plaintiffs' efforts to expand access to the courts. 20
CONCLUSION 26
CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

Cases

Bates v. State Bar of Ariz.,
433 U.S. 350 (1977) 3, 14

Bill Johnson's Rests., Inc. v. NLRB,
461 U.S. 731 (1983) 10, 19

Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar,
377 U.S. 1 (1964) 6, 11, 12, 13

Burns v. Ohio,
360 U.S. 252 (1959) 14

Ga. Conf. of the NAACP v. City of LaGrange,
No. 3:17-cv-67 (N.D. Ga. 2020) 21

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 15

Griffin v. Illinois,
351 U.S. 12 (1956) 14

Ex parte Hull,
312 U.S. 546 (1941) 14

Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Departments,
852 F.3d 178 (2d Cir. 2017) 9, 15, 18

Johnson v. Avery,
393 U.S. 483 (1969) 14, 18, 19

Lewis v. Casey,
518 U.S. 343 (1996) 14

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 5

NAACP v. Button,
371 U.S. 415 (1963) 1, 3, 6-12, 14, 17

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 5

In re Primus,
436 U.S. 412 (1978) 8-11, 16

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 5

Seminole Tribe of Fla. v. Florida,
517 U. S. 44 (1996) 18

Thomas v. Collins,
323 U.S. 516 (1945) 3, 6

United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n,
389 U.S. 217 (1967) 10, 12, 17

United Transp. Union v. State Bar of Mich.,
401 U.S. 576 (1971) 2, 6, 13, 16-18, 20

Statutes & Rules

S.C. Code § 27-37-40 25

Other Authorities

$50K & Beyond, NAACP, https://tinyurl.com/y2bmz78u (last visited Jan. 11, 2023) 21

Chris Albin-Lackey, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, Human Rights Watch (Jan. 2016), https://tinyurl.com/w8wphts5 24

Mark E. Blue & George F. Nicholas, *Another Voice: Debt law would fix an economic and racial injustice*, Buffalo News (Dec. 2, 2021) 21

Khristopher J. Brooks, *Disparity in home lending costs minorities millions, researchers find*, CBS News (Nov. 15, 2019), https://tinyurl.com/2zvmsvcp 22

Debt in America: An Interactive Map, Urb. Inst. (Mar. 31, 2021), https://tinyurl.com/5b5v3yyx 22

Tashfia Hasan et al., *Disparities in Debt: Why Debt Is a Driver in the Racial Wealth Gap*, Aspen Inst. (Feb. 7, 2022), https://tinyurl.com/d9664vss 22

How Debt Collectors Are Transforming the Business of State Courts, Pew Charitable Trusts (May 6, 2020), https://tinyurl.com/4hwzmjmp 23, 24

Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015), https://tinyurl.com/2jdpmu6e 23

Payday Lending in America: Who Borrows, Where They Borrow, and Why, Pew Charitable Trusts (July 2012), https://tinyurl.com/yza2kaens 22

Miranda Santillo et al., *Communities of Color Disproportionally Suffer from Medical Debt*, Urb. Inst. (Oct. 14, 2022), https://tinyurl.com/4eapw8da 22

Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263 (2016) 23

INTEREST OF AMICI CURIAE[1]

The National Association for the Advancement of Colored People (the "NAACP") is the country's oldest and largest civil rights organization. The New York State Conference of the NAACP is the NAACP's New York affiliate. The NAACP has over two million supporters and members, including nearly 8,000 members in New York. For more than a century, the NAACP has used collective action and the legal process to champion equality and justice, including in landmark cases like *NAACP v. Button*, 371 U.S. 415 (1963).

The outcome of this case will have profound civil rights implications for NAACP members and for the NAACP's institutional interest in redressing injustice and inequality. People of color are more likely to face debt collection actions; they are more likely to do so without adequate legal information or the assistance of an attorney; and they are more likely to default in these actions. Like Upsolve and

[1] No party's counsel authored this brief in whole or in part and no party or party's counsel or person other than Amici Curiae or their counsel contributed money that was intended to fund the preparing or submitting of this brief. All parties have consented to the filing of this brief.

Reverend Udo-Okon, the NAACP can help people facing debt collection actions. But New York's unnecessarily broad unauthorized practice of law ("UPL") rules prevent Plaintiffs-Appellees and the NAACP and its members from fully and effectively using collective action to provide the legal advice necessary to allow meaningful access to the courts and check the inequalities that result from debt collection actions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right of meaningful access to the courts is a core underpinning of the American justice system. That right, however, is not realized for thousands of low-income defendants in debt collection actions in New York who cannot obtain legal representation. Because nearly all of these defendants lack legal assistance, most cases result in default judgments.

The collective action proposed by Upsolve, Inc., and Reverend John Udo-Okon (together, "plaintiffs")—the provision by nonlawyers of free and straightforward legal advice to defendants in debt collection actions—can improve access to the courts. Plaintiffs' "group legal action" is also protected by the First Amendment's right to associate, *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971): As the

Supreme Court has reiterated time and again, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977).

The NAACP writes in full support of plaintiffs, but limits this brief solely to explaining the freedom-of-association claim that the district court rejected as an alternative basis for preliminary injunctive relief.[2] That rejection was in error. The freedom-of-association claim, properly understood, independently supports a preliminary injunction. *See* Br. for Plaintiffs-Appellees (ECF No. 103) at 52-54. The right to associate—as *NAACP v. Button*, 371 U.S. 415 (1963), first acknowledged—unambiguously protects groups' efforts to use the courts for expressive political purposes, whether those purposes be ending school desegregation, as the NAACP sought in *Button*, or eliminating

[2] Even if this Court affirms the district court's ruling on plaintiffs' free-speech claim and does not reach the freedom-of-association claim, the precedent protecting the right to associate in this context helps demonstrate why the speech at issue here merits its own constitutional protection. The central lesson of these cases is the value of—and the protections afforded to—efforts to persuade people to action through the courts. *See Thomas v. Collins*, 323 U.S. 516, 537 (1945) ("Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts.").

unjust debt collection practices, as Upsolve seeks here. The protections afforded by the right to associate cover both these highly political causes and, relatedly, the efforts by groups like Upsolve and the NAACP simply to help people get through the courthouse doors to exercise their rights. And, critically, these protections do not depend on whether a lawyer leads the collective effort.

By prohibiting plaintiffs from providing helpful legal advice, New York's UPL rules burden the right to associate. As a practical matter, the unnecessary breadth of these rules not only deepens debt-related inequalities, but also forces organizations like the NAACP to limit their advocacy to less effective channels. A disproportionately high number of defendants in debt collection actions are people of color; default judgments against them compound the underlying disparities in terms of who owes debt and on what terms. But New York's UPL rules confine the NAACP and other advocacy organizations to working to offset the consequences of default judgments, rather than joining in efforts to prevent defaults in the first place by providing advice about the law.

ARGUMENT

I. The right to associate protects plaintiffs'—and the NAACP's—right to facilitate meaningful access to the courts through the provision of helpful and accurate legal advice.

The First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). The NAACP is intimately familiar with the importance of this right. Indeed, landmark Supreme Court precedents on the freedom of association involve past efforts to silence the NAACP and its civil rights allies. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924-33 (1982) (reversing judgment against NAACP and NAACP leaders for NAACP-led boycott because "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that NAACP members' "right … to pursue their lawful private interests privately and to associate freely with others" barred civil contempt judgment against NAACP for refusing to produce membership lists in lawsuit challenging NAACP's registration as a foreign corporation under state law).

In particular, the Supreme Court has established "that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transp. Union*, 401 U.S. at 585. The "common thread running through" this line of decisions is the need to protect collective activity directed at the various purposes of our court system, *id.*—from encouraging people to use the court system for political transformation, *see Button*, 371 U.S. at 429, to encouraging them to use the court system at all, *see Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 4-8 (1964). In this sense, the right to associate mirrors the express protections of the First Amendment, which guard "great secular causes" no less than "small ones." *Thomas*, 323 U.S. at 531. And, here, the right to associate safeguards efforts by plaintiffs and the NAACP to use collective action to achieve the twin aims of reducing unfair or discriminatory debt collection practices and helping debtors exercise their legal rights.

A. The right to associate protects collective efforts to use the courts for political expression—including Upsolve's efforts to redress unfair and discriminatory debt collection actions.

Starting with *NAACP v. Button*, the Supreme Court has specifically addressed how the right to associate protects the ability of nonprofit, mission-driven organizations like Upsolve or the NAACP to use collective action to advance political ideas or beliefs through the courts. *Button*, 371 U.S. at 429-33. In doing so, the Supreme Court has repeatedly made clear that associating for the sole purpose of political expression, as opposed to the advancement of commercial interests, occupies the heartland of the First Amendment's protection. Here, organizations like Upsolve and the NAACP seek to associate for the purposes of political expression—to voice a political stance on the abuse of state-enabled debt collection mechanisms, particularly as that abuse disproportionately affects communities of color and low-income individuals.

Button involved the NAACP's challenge to the application of Virginia laws regulating legal solicitation to prohibit the NAACP from assisting Black communities in litigation to end school desegregation. *See* 371 U.S. at 419-26. In holding that Virginia's laws "unduly

inhibit[ed]" the NAACP's freedoms of expression and association, *Button* emphasized that the NAACP's court-directed activities were "a form of political expression," aimed at "achieving the lawful objectives of equality of treatment by all government … for the members of the [Black] community in this country." *Id.* at 429, 437. Indeed, *Button* observed that, at the time, litigation was perhaps "the *sole* practicable avenue open to a minority to petition for redress of grievances." *Id.* at 430 (emphasis added). Absent the constitutional protections afforded to the right to associate, "a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression"—"[i]ts mere existence could well freeze out of existence all such [advocacy] on behalf of the civil rights of Negro citizens." *Id.* at 435-36.

The Supreme Court reiterated *Button*'s core message in *In re Primus*, 436 U.S. 412 (1978), which involved South Carolina's attempt to prohibit the ACLU from seeking potential clients in litigation to further the ACLU's political objectives. Drawing comparisons to the NAACP's activities in *Button*, *Primus* described the ACLU's work "as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.* at 431.

"[M]uch like the NAACP," *Primus* explained, the ACLU engages "'in extensive educational and lobbying activities' and 'also [devotes] much of [its] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [its] declared purposes.'" *Id.* at 427 (quoting *Button*, 371 U.S. at 419-20). As in *Button*, *Primus* concluded that this kind of activity "is 'a form of political expression' and 'political association'" protected by the First Amendment's "freedom to engage in association for the advancement of beliefs and ideas." *Id.* at 428, 438 n.32 (quoting *Button*, 371 U.S. at 429, 431).

Like the NAACP in *Button* and the ACLU in *Primus*, Upsolve is a not-for-profit organization that seeks to associate with the aim of pressing its political and ideological views about the social injustices perpetuated by the corporate debt collection apparatus. It does so by reaching out to disadvantaged communities and providing them tools to seek redress. Upsolve's mission and activities thus are highly akin to those of "advocacy group[s] like the ACLU or the NAACP" that "have recognized associational rights." *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Departments*, 852 F.3d 178, 186 (2d. Cir. 2017). In fact, Upsolve's agenda overlaps very closely

with aims of the NAACP, which, as explained further below, also associates with communities heavily affected by overly burdensome and improper debt collection practices. As in *Button* and *Primus*, therefore, Upsolve's efforts to aid underrepresented communities entail associational activity that "come[s] within the right 'to engage in association for the advancement of beliefs and ideas.'" *Primus*, 436 U.S. at 424 (quoting *Button*, 371 U.S. at 430).

B. The right to associate protects collective activity intended to help people access the courts.

In *Button* and across a variety of contexts, the Supreme Court has also repeatedly reaffirmed the First Amendment's related protections for—and the virtues of—collective activity directed at helping each other access the courts in the first place to exercise the right to petition. *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-23 (1967) (establishing that the right to associate protects union activity "to assist its members in the assertion of their legal rights," even though the rights were not "bound up with political matters of an acute social moment"); *see also Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for

redress of grievances."). As the Supreme Court has recognized, collective action often provides the only means of securing access to the courts. *See, e.g.*, *Primus*, 436 U.S. at 431 ("[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants."). The assistance Upsolve seeks to provide—and that, as described below, the NAACP often does provide in one form or another—serves the same purpose and merits the same protection.

In a set of cases following *Button*, the Supreme Court repeatedly struck down efforts to limit union members' ability to band together to help each other bring employment-related claims. The first of those cases, *Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964), is representative. *Trainmen* established that "the First Amendment guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them." *Id.* at 5-6. At issue in *Trainmen* was Virginia's attempt to bar a railroad workers' association from, in relevant part, advising members that their personal injury claims "not be settled without first seeing a

lawyer, and that in the [association's] judgment the best lawyer to consult was the counsel selected by it." *Id.* at 4. As in *Button*, *Trainmen* concluded that Virginia "could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Id.* at 7. *Trainmen* reasoned that, because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries," "for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics." *Id.* Instead, the workers' activity was "an inseparable part of th[e] constitutionally guaranteed right to assist and advise each other." *Id.* at 6; *see also, e.g.*, *United Mine Workers*, 389 U.S. at 221-22.

Fundamental to *Trainmen*'s and related decisions' protection of "group legal action" was the Supreme Court's recognition that the workers' "statutory rights … would be vain and futile if [the workers] could not talk together freely as to the best course to follow." *United Transp. Union*, 411 U.S. at 585; *see Brotherhood of R. R. Trainmen*, 377

U.S. at 5-6. As *Trainmen* explained, the collective action at issue in that case stemmed from nearly 100 years of effort by the railroad workers' association to create and advance employment-related protections. The association's advocacy was one of "the moving forces that brought about the passage of" legislation protecting railroad workers in the late Nineteenth and early Twentieth Century. *Id.* at 3. But "[i]t soon became apparent to the railroad workers … that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of" these statutory protections, *id.*—only by banding together to advise each other and coordinate legal action could these railroad workers secure their rights.

That same understanding—that rights written on paper often have no force absent protections for the activity necessary to effectuate them—motivates a number of Supreme Court decisions on access to the courts. Based on the constitutional significance of the right to petition, for example, the Supreme Court has "protected" the right of access by prohibiting state officials from interfering with individuals' attempts to prepare or file legal documents and from imposing certain fees on the indigent. *Lewis v. Casey,* 518 U.S. 343, 350 (1996) (citing *Johnson v.*

Avery, 393 U.S. 483, 484, 489-90 (1969); *Burns v. Ohio*, 360 U.S. 252, 258 (1959); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); and *Ex parte Hull*, 312 U.S. 546, 547-49 (1941)). And the Supreme Court has rejected limits on the provision of legal information, because of the value of pursuing legal action rather than "suffer[ing] … silently" and the critical importance of "the aggrieved receiv[ing] information regarding their legal rights and the means of effectuating them." *Bates*, 433 U.S. at 376, 376 n.32.

Here, in light of the necessarily judicial nature of debt collection actions, it is not enough to say that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Button*, 371 U.S. at 430. By the time a debt collection action has been instituted in court, litigation is the *only* option for fighting against the often racially discriminatory abuses of the system that produced and attend the action. For that possibility to pan out, however, courts must zealously safeguard the associational rights of plaintiffs and organizations like the NAACP to join together to help debtors access the courts.

II. The First Amendment's protections for the right to associate in this context do not and cannot belong to lawyers alone.

As a practical matter, Amici can attest—based on their combined experience of nearly 200 years of organizing and advocating for political causes—to the fact that collective action only rarely involves lawyers. As a legal matter, the Supreme Court and this Court's decisions setting forth the protections afforded the First Amendment's right to associate in the context of access to the courts make clear that nothing limits that right to lawyers. Instead, those protections belong, like all those secured by the First Amendment, "to the people" and are shared by those who join together without profit motive to further meaningful access to the courts.[3] *Jacoby & Meyers*, 852 F.3d at 187.

That is where the district court went astray. The district court correctly recognized that "the 'common thread'" throughout the relevant

[3] That is subject, of course, to the appropriate limitations a state may place on the practice of law. *See, e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice."). The appropriate breadth of those limitations, however, depends on the First Amendment protections at issue in this case. Br. for Plaintiffs-Appellees at 48-51 (discussing state's burden under First Amendment).

Supreme Court freedom-of-association precedents "is the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" A190 (quoting *United Transp. Union*, 401 U.S. at 585). But it incorrectly concluded that these precedents are "fundamentally distinguishable" from this cause because they allegedly apply only to *attorneys* who seek to exercise this right. A191. Contrary to the district court's reasoning, the Supreme Court's precedents all "confront[] a non-lawyer's purported associational right." A191.

Button, *Primus*, and the Supreme Court's union cases are explicit that it is not lawyers, or at least not lawyers alone, who enjoy the right to associate to promote meaningful access to the courts. Instead, these cases uniformly "uph[eld] the First Amendment principle that *groups* can unite to assert their legal rights as effectively and economically as practicable." *United Transp. Union*, 401 U.S. at 580 (emphasis added). That is, it is the organizations, their members, and their staff—legal or otherwise—that ultimately possess the protected right to associate under the First Amendment.

Across its union cases, for instance, the Supreme Court has consistently recognized the rights of the union and union members—not their lawyers—to engage in collective activity to promote access to the courts. For example, *United Mine Workers* "upheld the right of *workers to act collectively* to obtain affordable and effective legal representation." *United Transp. Union*, 401 U.S. at 584 (emphasis added). In other cases, like *Button*, the Supreme Court specifically protected "the activities of the NAACP, its affiliates *and* legal staff"— in that case, the NAACP's longstanding efforts to use litigation to "achiev[e] the lawful objectives of equality of treatment by all"—such that its holding was not cabined to the NAACP's lawyers or lawyers themselves. 371 U.S. at 429, 437.

While these cases may involve lawyers, they leave no doubt that the protections of the First Amendment's right to associate arise from the expressive nature of the activity, not the profession of the actor. *See, e.g.*, *United Mine Workers*, 389 U.S. at 221-23 (explaining that the nature of the protected activity is "not confined to any [particular] field of human interest" (citation omitted)). In *Jacoby & Myers*, for example, this Court recently summarized the Supreme Court's union cases in

this space as "uniformly decid[ing] that unions and union members have rights under the First Amendment to associate and to act collectively to pursue legal action—action that *ordinarily* necessitates the involvement of lawyers." 852 F.3d at 187 (emphasis added). Ordinarily, but not always. As *United Transp. Union* cautioned, "the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action."[4] 401 U.S. at 585.

That lawyers need not be the agent of expression or association is reinforced by *Johnson v. Avery*, 393 U.S. 483 (1969). *Johnson* dealt with a challenge by an incarcerated individual to state prison regulations that prohibited him from helping other incarcerated individuals to file habeas petitions. *Id.* at 484. The Supreme Court struck down the regulation, because "[i]n the case of all except those who are able to help

[4] *United Transp. Union*'s explicit caution that "the principle here involved" in these cases "cannot be limited to the facts of this case" further calls into question the district court's decision to limit that principle to situations in which "clients and *attorneys* [sought] each other out to pursue litigation." A190. In general, the result *and* the reasoning of Supreme Court opinions are binding, *see Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 67 (1996), so the district court had little reason to attempt to limit the principle of *Button*, *Primus*, and the union cases to their facts.

themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available." *Id.* at 488. In barring the state from effectively "adopt[ing] and enforc[ing] a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions," *id.* at 487, *Johnson* explicitly rejected the state's contention that it could prohibit nonlawyers from providing this help under "the power of the State to restrict the practice of law to licensed attorneys," *id.* at 490 n.11. In other words, *Johnson* affirmed the right of a nonlawyer to provide legal advice to a client, because "[t]he power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." *Id.*

Johnson's lesson, as Justice Douglas described in his concurring opinion, is that "[t]he cooperation and help of laymen, as of lawyers, is necessary if the right of reasonable access to the courts is to be available to the indigents among us." 393 U.S. at 498. That lesson applies with equal force here. Beyond flying in the face of precedent, confining "group legal action" to "group legal action involving lawyers" further entrenches inequalities among who can access and use our legal system, perhaps especially in the context of debt collection. *See infra.*

The "indigents among us" are disproportionately people of color, and there are far too few lawyers—a profession with disproportionately few members of color—to ensure that they have "reasonable access to the courts," let alone the "meaningful access" plaintiffs and the NAACP seek to secure. But the First Amendment protects "collective activity undertaken to obtain meaningful access to the courts," *United Transp. Union*, 401 U.S. at 585, regardless of whether that activity involves lawyers.

III. The NAACP's debt-related advocacy demonstrates why it is vitally important that the right to associate protects plaintiffs' efforts to expand access to the courts.

The NAACP undertakes a variety of forms of collective action to redress debt-related inequities. Broad as these efforts are, however, they are inadequate to provide the debtors who are at the heart of this case with the access to courts they need to secure their rights in debt collection actions. For these debtors, only helpful and tailored legal advice can provide recourse. Without that advice, they are far more likely to default and lose the cases brought against them. Because these debtors are disproportionately people of their color, their losses compound the harms caused by our unequal debt collection system—the

very harms the NAACP seeks to eliminate through its other forms of advocacy and collective action.

The NAACP's debt-related advocacy is extensive. The NAACP has, among other efforts, launched a campaign to advocate for student loan forgiveness. *See $50K & Beyond*, NAACP, https://tinyurl.com/y2bmz78u (last visited Jan. 11, 2023). The NAACP has sued to end unjust debt collection practices. *See, e.g.*, *Ga. Conf. of the NAACP v. City of LaGrange*, No. 3:17-cv-67 (N.D. Ga. 2020) (successfully challenging city's policy of cutting off utility services to residents who do not pay court debts). The NAACP has supported and helped pass new legislation in New York to lower interest rates on judgments against debtors who lose a consumer debt action. *See* Mark E. Blue & George F. Nicholas, *Another Voice: Debt law would fix an economic and racial injustice*, Buffalo News (Dec. 2, 2021), https://tinyurl.com/3re8667m. And the NAACP has worked alongside consumer advocates to provide general guidance to NAACP members so that they better understand debt collection practices and the debt collection system.

The intensity of these efforts reflects the profound consequences of debt for the Black community. Generational wealth gaps have left

disproportionately high numbers of people of color in debt. *See* Miranda Santillo et al., *Communities of Color Disproportionally Suffer from Medical Debt*, Urb. Inst. (Oct. 14, 2022), https://tinyurl.com/4eapw8da; Tashfia Hasan et al., *Disparities in Debt: Why Debt Is a Driver in the Racial Wealth Gap*, Aspen Inst. (Feb. 7, 2022), https://tinyurl.com/d9664vss. Black individuals typically pay higher interest rates on their debt, seemingly regardless of the size of that debt. *See Payday Lending in America: Who Borrows, Where They Borrow, and Why*, Pew Charitable Trusts 9, 13 (July 2012), https://tinyurl.com/yheawuyj; Khristopher J. Brooks, *Disparity in home lending costs minorities millions, researchers find*, CBS News (Nov. 15, 2019), https://tinyurl.com/mr42kk9f. And they are more likely than their white counterparts to fall behind on their debt—in New York, 29% of residents in communities of color are delinquent on their debt, as compared to 19% of residents in predominantly white neighborhoods. *Debt in America: An Interactive Map*, Urb. Inst. (Mar. 31, 2021), https://tinyurl.com/5b5v3yyx.

These underlying disparities don't stop at the courthouse door—judicially enforced debt collection causes debt consequences to cascade.

Black debtors are more likely to be subject to collection actions over their debt. *See How Debt Collectors Are Transforming the Business of State Courts*, Pew Charitable Trusts 17 (May 6, 2020), https://tinyurl.com/4hwzmjmp. And, when faced with these actions, Black defendants are also far more likely to default than other defendants, even when accounting for income. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015), https://tinyurl.com/2jdpmu6e. In general, "black families [have] grossly fewer resources to draw on when they come under financial pressure." *Id.* But higher default rates also arise specifically from the fact that communities of color have particularly uneven and inadequate access to legal information and legal representation. Low-income individuals only rarely have legal representation in debt collection actions, but low-income Black individuals are especially unlikely to seek legal help or to find it when they do. *See id.*; Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263, 1268 (2016) ("[B]lack respondents in this study were less likely than white respondents to have sought, or considered seeking, legal help for their civil legal problems."). Local

NAACP leaders grapple with this dynamic directly: As members and leaders of their respective communities, they interact frequently with other community members who are unsure of whether or where to turn for legal help; there are often no lawyers to whom they can be referred.

Defaulting has severe ramifications. A default judgment often triggers automatic interest rates and court fees, *see How Debt Collectors Are Transforming the Business of State Courts*, *supra*, at 2, 17, and allows creditors to seek wage garnishment. Further, defaulting almost entirely extinguishes the debtor's chances to challenge inaccurate or discriminatory debt collection practices, which, studies have shown, pervade throughout the debt collection system. *See, e.g.*, Chris Albin-Lackey, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, Human Rights Watch 28-32 (Jan. 2016), https://tinyurl.com/w8wphts5. Over time, default judgments contribute to job loss, housing instability, and even incarceration—issues that disproportionately affect the Black community.

So, for debtors facing a debt collection action, the battleground for advocacy is the courts. Organizations like the NAACP can advocate for debt relief or lower interest rates; they can inveigh against

discrimination in our debt collection system. But New York's UPL rules limit the ways in which plaintiffs and the NAACP can use advocacy to help debtors exercise their rights and, in effect, prevent Black and low-income debtors from losing those debt collection actions in the first place.

Through programs like Upsolve's, the NAACP's volunteer leaders and members could serve as they so often do in other contexts: To provide the advice their neighbors, friends, and community members need and often look to their local NAACP for.[5] Providing that advice about the law is critical to a debtor who has only thirty days to respond to a debt collection action and facilitate meaningful access to the courts.

[5] The NAACP specifically tailors programming around UPL provisions. For example, the NAACP runs a community-based housing program in South Carolina that strives to expand meaningful access to the courts by providing tenants facing eviction actions with basic information and referrals. Under South Carolina's housing laws, tenants who have an eviction action filed against them "must appear and show cause"—*i.e.*, request a hearing—within ten days of the filing to prevent a magistrate judge from summarily issuing a writ of ejectment. S.C. Code § 27-37-40. In practice, most tenants facing an eviction action in South Carolina default. Because of South Carolina's UPL rules, the NAACP trains its community volunteers to provide only general information about the hearing process, and not concrete advice about how and why to request a hearing.

And it falls within "th[e] constitutionally guaranteed right to assist and advise each other." *Trainmen*, 377 U.S. at 6.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the district court's grant of a preliminary injunction.

Respectfully submitted,

/s/Daniel A. Rubens

Daniel A. Rubens
Jodie C. Liu
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Sarah H. Sloan
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, DC 20005
(202) 339-8400

Joseph R. Schottenfeld
Martina Tiku
Glynnis Hagins
NAACP | EMPOWERMENT PROGRAMS
4805 Mount Hope Drive
Baltimore, MD 21215
(203) 444-9577

Counsel for Amici Curiae

January 11, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because this brief contains 5094 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Daniel A. Rubens
Daniel A. Rubens
Counsel for Amici Curiae

22-1345

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE* LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Miles E. Coleman
NELSON MULLINS RILEY & SCARBOROUGH, LLP
2 W. Washington Street / Fourth Floor
Greenville, SC 29601
miles.coleman@nelsonmullins.com
(864) 373-2352

Counsel for *Amici Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that, as natural persons, they have no parent corporations and are not held by any publicly held corporation.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The regulation of legal advice as the unauthorized practice of law is comparatively recent. 4

II. The regulation of legal advice is overly broad and only selectively formally enforced. 7

III. The State's vigorous effort to enforce a monopoly over basic legal advice is inconsistent with current practice and evidence. 14

IV. The advice at issue is indistinguishable from everyday speech about the law. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

El Gemayel v. Seaman,
72 N.Y.2d 701 (N.Y. 1988) 7

Fla. Bar v. TIKD Servs. LLC,
326 So. 3d 1073 (Fla. 2021) 11

Matter of N.Y. Cty. Lawyers' Ass'n v. Dacey,
28 A.D.2d 161 (N.Y. App. Div. 1967) (Stevens, J., dissenting), *rev'd on dissenting opinion*, 234 N.E.2d 459 (N.Y. 1967) 8

Matter of Rowe,
604 N.E.2d 728 (N.Y. 1992) 8

People v. Alfani,
227 N.Y. 334 (N.Y. 1919) 6, 7, 19

People v. Divorce Associated & Publ.,
95 Misc.2d 340 (N.Y. Sup. Ct. 1978) 7

Spiegel v. Ahearn,
No. 101251/2016, 2018 WL 4743366 (N.Y. Sup. Ct. Oct. 2, 2018) 8

Spivak v. Sachs,
16 N.Y.2d 163 (N.Y. 1965) 7

State v. Winder,
42 A.D.2d 1039 (N.Y. App. Div. 1973) 8

Sussman v. Grado,
746 N.Y.S.2d 548 (N.Y. Dist. Ct. 2002) 8

Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.,
179 F.3d 956 (5th Cir. 1999) (per curiam) 11

Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., Civil Action No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 24030 (N.D. Tex. Aug. 13, 1999) 10

Statutes

20 U.S.C. § 1415(h)(1) 16

Other Authorities

8 C.F.R. § 292.1 16

20 C.F.R. § 404.1705 16

42 C.F.R. § 435.908(b) 16

N.Y. Comp. Codes R. & Regs. tit. 12, § 460.6 15

N.Y. Comp. Codes R. & Regs. tit. 12, § 302-1.1 15

Benjamin H. Barton, *The Lawyers' Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2014) 13

Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law*, 91 FORDHAM L. REV. (forthcoming 2023) 18

Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014) 11, 12

Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) 4, 5, 6

Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999) 4, 6

Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297 (2019) 12

Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016) 12

Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan and Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315 (2021) 18

Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97 (2018) 5

Lauren Sudeall, *The Overreach of Limits on "Legal Advice,"* 131 THE YALE L.J. FORUM 637 (Jan. 3, 2022) 9, 10

Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709 (2012) 11

N.J. Unauthorized Practice of Law Comm., Op. 57 (Apr. 2021), *available at* https://tinyurl.com/NJ-UPL-Op-57 17

National Center for Access to Justice, *"Unauthorized Practice of Law" Enforcement in California: Protection or Protectionism?* (2022), *available at* https://tinyurl.com/NCAJ-report 12

National Center for Access to Justice, *"Working with Your Hands Tied Behind Your Back": Non-Lawyer Perspectives on Legal Empowerment* (2021), *available at* https://tinyurl.com/NCAJ-Working-With-Your-Hands 13

New York City Bar Association, *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners* (2013), *available at* https://tinyurl.com/Narrowing-the-Justice-Gap 15

Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 105 (1976) 6

Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* 11 (2014), *available at* https://tinyurl.com/Accessing-Justice 19

Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms,* 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 283 (2020) 18

Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012) 13

Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE UNIV. L. REV. 885 (2000) 5

W. Bradley Wendel, Foreword: *The Profession's Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563 (2014) 14

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who research and write about the regulation of the legal profession. They share a common interest in improving access to legal assistance for low- and moderate-income people facing debt collection actions. *Amici* are especially interested in this case because it presents an important question: whether laws prohibiting the unauthorized practice of law, as applied to community volunteers offering basic legal advice, infringe upon volunteers' First Amendment rights. A full list of *amici* is attached as Appendix A.

[1] *Amici curiae* submit this brief accompanied by a motion for leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2). Counsel for the parties were informed of and consented to this filing, and counsel for *amici curiae* states pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case challenges lawyers' claim of monopoly over basic legal advice. The State has mounted a vigorous appeal of the narrow, as-applied judgment below, characterizing a carve-out for community volunteers as an existential threat to the State's ability to regulate the practice of law *at all*. But nonlawyers can assist one another in understanding and using the law without harm to the public or to the State's interests in professional licensing and regulation, as empirical evidence shows and as New York and other states—and the United States—have recognized in numerous contexts. The Court should affirm the injunction and invite further efforts to improve public access to basic legal assistance in specific contexts of widespread legal need. The State's arguments to the contrary are wrong for at least four reasons.

First, the allegedly "long tradition" of state regulation of the unauthorized practice of law, *see* Appellant's Br. at 26, 53, is not, in fact, a point in the State's favor. In New York and elsewhere, prohibitions against the provision of legal advice by nonlawyers are comparatively recent.

Second, the State's arguments are undercut by the fact that the regulatory regime at issue is both overly broad and only selectively formally enforced, chilling initiatives to improve access to basic legal assistance without any coherent doctrinal or factual foundation. The justifications for enforcement are strongest when nonlawyers misrepresent their credentials or there is risk of serious harm to the public. Neither danger is present here.

Third, the State's effort to enforce a monopoly over the provision of basic legal advice is inconsistent with current practice and evidence. In New York and elsewhere, nonlawyers are authorized to provide legal information *and advice* in specified contexts both in and outside of court and agency proceedings. Such authorizations have been shown not only to cause no harm, but, in appropriate situations (as here), to aid the administration of justice.

Fourth, the State's arguments go too far, as the advice it seeks to regulate is indistinguishable from everyday speech about the law. The State's position in this regard is not merely overbroad, it is counterproductive. When, as here, a program is carefully designed to train community volunteers to provide basic information and advice in a

specific, narrow context using a standardized form provided by the State, all while expressly *not* holding themselves out as lawyers, the State's enforcement zeal would be put to better use elsewhere.

ARGUMENT

I. The regulation of legal advice as the unauthorized practice of law is comparatively recent.

Prior to the 1930s, unauthorized practice regulation focused on rights of appearance in court or nonlawyers holding themselves out to be lawyers. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 7 (1981) ("Although some states had enacted unauthorized practice statutes before the 1930s, most dealt only with nonlawyer appearances in court . . . [and] scattered cases against lay practitioners . . . who had held themselves out as attorneys"); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2583 (1999) (discussing the role of bar associations "in lobbying for passage of legislation which prohibited nonlawyers from making court appearances").

Even in New York, where bar associations formed as early as the 1870s, the first licensing statute was not promulgated until 1898, and

there was no enforcement activity for ten years. *See* Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 117 (2018). Although Appellant dismisses original historical research on unauthorized practice regulation (Appellant's Br. at 53, referring to "secondary sources"), the historical record is clear that efforts to police the provision of advice by nonlawyers were virtually nonexistent before the twentieth century and expanded significantly only after the Great Depression. *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE UNIV. L. REV. 885, 956 (2000) ("States exercised virtually no licensing authority over the mere rendering of advice during either the post-colonial or Reconstruction eras."); Rigertas at 97 (stating that bar associations' efforts to prohibit the unauthorized practice of law "exploded" in the 1930s); Rhode at 7 (noting the "embarrassing absence" of precedent for expanded enforcement).

In New York, the New York County Lawyers Association launched the first unauthorized practice campaign in 1914, "by forming an unauthorized practice committee to curtail competition from title and trust companies." Denckla at 2583–84; *see also* Rhode at 7 (gathering

cases). The sole case that Appellant cites to demonstrate New York's supposedly "century-plus" tradition of regulating legal advice is factually distinguishable and, in any event, is a historic outlier. *See* Appellant's Br. at 53–54 (citing *People v. Alfani*, 227 N.Y. 334, 336–37 (N.Y. 1919)); *id.* at 4, 8, 6, 39. Admittedly, *Alfani* spoke of regulating the provision of "all advice . . . in matters connected to the law." *Alfani*, 227 N.Y. at 336–37. But *Alfani* involved advice that was being given by a notary who "held himself out to the public as *being in th*[*e*] *business*" of drawing legal instruments *for hire*. *See Alfani*, 227 N.Y. at 336–37.

The current appeal presents facts very different from those deemed regulable in *Alfani*. *Compare id.*, *with* J.A. 12–13, 24, 55 (explaining that the legal advice that Upsolve's volunteers would provide is free, and that the volunteers would affirmatively tell the recipients that the volunteers are not attorneys). Even if we ignore these factual distinctions (as Appellant does), *Alfani* was an outlier in its time, and that case hardly proves a long-standing and consistent tradition of regulating mere advice. *See* Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 105, 111 n.29 (1976) (noting that *Alfani* departed

from the policy at that time of "imposing sanctions *only* against those who fraudulently styled themselves as 'attorneys' or undertook to represent others in court.") (emphasis added).

The other cases Appellant cites as authority for the regulation of legal advice in New York date from 1965 or later and only one involves a nonlawyer. *See* Appellant's Br. at 4, 8 (citing *Spivak v. Sachs*, 16 N.Y.2d 163, 166 (N.Y. 1965) (involving a California attorney trying to recover fees for advising a New York client); *El Gemayel v. Seaman*,72 N.Y.2d 701, 707 (N.Y. 1988) (holding that phone calls to New York client by an attorney licensed in a foreign jurisdiction "did not, without more, constitute the 'practice' of law in this State"); *People v. Divorce Associated & Publ.*, 95 Misc.2d 340, 343 (N.Y. Sup. Ct. 1978) (enjoining the seller of self-help divorce kits from "giving legal advice by . . . assisting individual customers in filling out legal forms").

II. The regulation of legal advice is overly broad and only selectively formally enforced.

New York case law prohibiting nonlawyers from offering "legal advice" turns on a distinction between standard information directed at a general audience and individualized advice as applied to the facts of a particular case. For instance, New York courts have held that publishing

a book about how to avoid probate, or an article about the legal rights of psychiatric patients, are not "the practice of law" because they do not involve individualized advice to a particular client. *See Matter of N.Y. Cty. Lawyers' Ass'n v. Dacey*, 28 A.D.2d 161, 174 (N.Y. App. Div. 1967) (Stevens, J., dissenting) (finding book was not the practice of law because there was "no personal contact or relationship with a particular individual"), *rev'd on dissenting opinion*, 234 N.E.2d 459 (N.Y. 1967); *Matter of Rowe*, 604 N.E.2d 728, 731 (N.Y. 1992) (finding similarly for article).

In contrast, courts have taken the broad view that providing *any* individualized advice about how to respond to a legal problem amounts to the practice of law, no matter how basic or straightforward the advice. *See Sussman v. Grado*, 746 N.Y.S.2d 548, 552–53 (N.Y. Dist. Ct. 2002) (holding a paralegal who helped a client fill out a form without the supervision of an attorney engaged in the unauthorized practice of law); *State v. Winder*, 42 A.D.2d 1039, 1040 (N.Y. App. Div. 1973) (finding the sale of a do-it-yourself divorce kit with forms and instructions was not itself the practice of law, but providing advice to a particular purchaser was); *Spiegel v. Ahearn*, No. 101251/2016, 2018 WL 4743366, at *4 (N.Y.

Sup. Ct. Oct. 2, 2018) (finding a nonlawyer engaged in the unauthorized practice of law "by discussing Defendants' legal problems with them and advising them what they needed to do to resolve those problems.").

Yet the line between standard and individualized advice is not always easy to draw and becomes especially problematic in contexts involving the provision of basic legal information to individuals at scale (like the facts giving rise to this appeal). For instance, during the COVID-19 pandemic, the Center for Disease Control issued an order prohibiting evictions under certain circumstances, such as nonpayment of rent and related fees. While some courts made information about the order available to tenants facing eviction, and provided copies of the required form, other courts declined to provide any information or the required form, viewing it as prohibited "legal advice." *See* Lauren Sudeall, *The Overreach of Limits on "Legal Advice,"* 131 THE YALE L.J. FORUM 637, 638 (Jan. 3, 2022). Courts also take inconsistent positions as to whether clerks may supply information about possible courses of action or the types of evidence relevant to a legal form or hearing; or translate applicable law into more accessible language. *Id.* at 646 (discussing the "the wide range of legal advice definitions in use across state courts"). "In

the absence of guidance . . . court personnel often default to silence—even when it comes to providing basic logistical information that most courts find unobjectionable." *Id.*; *see also* John M. Greacen, *"No Legal Advice from Court Personnel": What Does that Mean?*, 34 JUDGES' J. 10, 10 (1995) (arguing that "legal advice" has no inherent meaning and that many clerks cannot themselves define it); *id.* at 12 ("An easy way to 'get rid of' [self-represented litigants], particularly on the telephone, is to cut the questions short with the useful phrase, 'I am not allowed to give legal advice.'").

The profession has responded to the difficulty of defining "legal advice" through overregulation. Bar associations and unauthorized practice committees have fought the distribution of self-help manuals, forms, and software even in the absence of personal contact with a particular individual, and without any showing of harm. *See, e.g.*, *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, Civil Action No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 24030, at *21 (N.D. Tex. Aug. 13, 1999) (enjoining the sale of self-help legal software despite the absence of personal contact, stating: "If Parsons believes such a personal contact requirement should be included in the Statute, it should address

these concerns to the Texas legislature."); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.* 179 F.3d 956 (5th Cir. 1999) (per curiam) (vacating the injunction and remanding in light of an amendment to the Texas statute); Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 722 (2012) (noting that most unauthorized practice claims against internet providers are brought by lawyers rather than consumers and settled without any showing of harm); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2605 (2014) (discussing bar association lawsuits against LegalZoom despite high rates of customer satisfaction).

In the for-profit context, courts have endorsed vigorous enforcement against even defunct nonlawyer providers, explicitly repudiating the need to produce evidence of actual harm. *See, e.g.*, *Fla. Bar v. TIKD Servs. LLC*, 326 So. 3d 1073, 1082 (Fla. 2021) ("There is . . . no requirement in cases involving the unlicensed or unauthorized practice of law that the Bar produce evidence of actual harm to the public[.]"). A 2014 national survey of unauthorized practice of law enforcement found that, in 75% of

cases involving nonlawyer providers, courts did not even consider the issue of public harm. *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2604 (2014); *see also* Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 321 (2019) (arguing that "existing research does not support the breadth of lawyers' monopoly" over basic legal assistance).

Regulators also use the threat of enforcement to shut down legal assistance by nonlawyers without state court oversight. For example, regulators have opened investigations and issued cease-and-desist letters that are not accessible to the public. *See* National Center for Access to Justice, *"Unauthorized Practice of Law" Enforcement in California: Protection or Protectionism?*, 3–4 (2022) (discussing the use of cease-and-desist letters against nonlawyer providers in California), *available at* https://tinyurl.com/NCAJ-report; Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1217 n.88 (2016) ("[M]ost regulatory oversight and intervention is carried out by bar committees composed entirely of practicing attorneys who open

investigations and send out warnings or cease and desist letters without state court oversight . . . ."). These methods of regulation, which avoid judicial scrutiny, can be strategic in that they allow regulators to evade political and legal accountability for regulation. *See*, *e.g.*, Br. of LegalZoom.com, Inc. *et al.* as *Amici Curiae*, in Supp. of Resp't, *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, No. 13-534, 2014 WL 3895926, at *20 (Aug. 6, 2014) (describing the North Carolina bar's informal efforts to regulate LegalZoom and noting that the "bar took no direct enforcement action for five years, avoiding judicial review of its action"); *see also* Benjamin H. Barton, *The Lawyers' Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3089 (2014) (noting that "truly aggressive . . . [enforcement] would be likely to draw federal antitrust and congressional attention"); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 8, 10–11 (2012) (arguing that current restrictions on nonlawyer assistance are vulnerable to First Amendment challenges).

The mere threat of enforcement can be enough to deter nonlawyers from engaging in conduct that might be construed as the unauthorized practice of law. *See*, *e.g.*, National Center for Access to Justice, *"Working*

with Your Hands Tied Behind Your Back": Non-Lawyer Perspectives on Legal Empowerment, 12–14 (2021) (discussing nonlawyers' frustration and "fear of being 'shut down' or otherwise sanctioned for providing unauthorized legal advice"), *available at* https://tinyurl.com/NCAJ-Working-With-Your-Hands. The threat of enforcement, coupled with the breadth of prohibited activity, effectively paralyzes potential providers and the community and civil rights organizations seeking to assist them in improving public access to basic legal advice. This chilling effect serves as a systemic barrier to legal assistance for low- and moderate-income individuals. *See* W. Bradley Wendel, Foreword: *The Profession's Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563, 2565–66 (2014) (noting the profession's "vigorous efforts to enforce its monopoly over the provision of legal services is exacerbating existing social disparities").

III. The State's vigorous effort to enforce a monopoly over basic legal advice is inconsistent with current practice and evidence.

Nonlawyers currently provide legal assistance in numerous state and federal contexts without evidence of public harm. In New York, nonlawyers are authorized to provide legal information outside court or agency proceedings and to provide legal advice (not just information) in

some court and agency proceedings. *See* New York City Bar Association, *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners*, 12 (2013), *available at* https://tinyurl.com/Narrowing-the-Justice-Gap. For instance, New York City Civil Court clerks may help debtors answer a complaint by helping them complete a pre-printed form (the "Consumer Credit Transaction Answer in Person"), which provides a list of defenses. "The clerk fills out the form based on information provided by the debtor, sends the answer to the plaintiff, and advises the debtor of the hearing date." *Id.* at 15–16. Nonlawyers also are authorized to advise and represent clients in state unemployment and workers' compensation proceedings, subject to various training and licensing requirements. *Id.* at 257; *see* Fact Sheet, New York State Unemployment Insurance Appeal Board; N.Y. Comp. Codes R. & Regs. tit. 12, § 460.6; N.Y. Comp. Codes R. & Regs. tit. 12, § 302-1.1.

Many federal agencies also authorize nonlawyers to advise and represent people appearing before them. For instance, the Social Security Administration allows nonlawyers to represent claimants seeking Social Security disability insurance benefits, provided the representative is "capable of giving valuable help" in connection with the claim. *See* 20

C.F.R. § 404.1705. In Medicaid administrative proceedings, parties can choose anyone they want to assist them and often get assistance from social workers. 42 C.F.R. § 435.908(b) (permitting Medicaid applicants to choose anyone to assist in the application or renewal process); *see also* N.Y. City Bar, Comm. on Prof'l Ethics, Formal Op. 2017-4 (discussing the permissible role of nonlawyers working with not-for-profit legal services organizations), *available at* https://tinyurl.com/Formal-Op-2017-4. In special education hearings, parties may be accompanied and advised by anyone "with special knowledge or training with respect to the problems of children with disabilities," such as other parents who have experience with the process. 20 U.S.C. § 1415(h)(1). Federal regulations also allow "accredited representatives" of a recognized nonprofit organization to participate in Immigration Court proceedings to the same extent as attorneys; and allow other "reputable individuals" to appear on an "individual case basis" at the noncitizen's request. *See* 8 C.F.R. § 292.1.

States also have created *ad hoc* and *de facto* carve-outs for nonlawyer assistance in specific contexts of need. For instance, New Jersey recently authorized nonlawyers to advocate for parents in special education cases outside of administrative hearings. *See* N.J. Unauthorized

Practice of Law Comm., Op. 57 (Apr. 2021), *available at* https://tinyurl.com/NJ-UPL-Op-57. The committee recognized that, although advocating outside the hearings is the practice of law and is not specifically authorized by federal law, the need for advocates "far exceeds" the supply of available lawyers and parents would benefit from this assistance. *Id.* ("There are far more non-lawyer advocates offering services pro bono through various non-profit organizations than there are lawyers offering such services . . . . [N]on-lawyer advocates are generally helpful to parents . . . [and] there is little demonstrable harm to the public by permitting them to operate . . . .").

Some state courts also allow a *de facto* carve-out for nonlawyer advocates in protective order hearings, where most petitioners are unrepresented. A recent study of roughly 275 protective order hearings in two states found that courts allow nonlawyer domestic violence advocates to "provide the full range of services one might expect from a lawyer, short of appearing in court," including assisting petitioners with the preparation of pleadings and the development of evidence, and advising petitioners as to "whether to pursue legal recourse, how to select remedies, and how to clear procedural hurdles, such as service of

process." *See* Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan and Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1331–32 (2021).

States may be reluctant to experiment more broadly with nonlawyer providers based on lawyers' opposition and speculation about possible harm. *See id*. at 1316–17 (noting that judges' extensive reliance on domestic violence advocates is "hidden behind the scenes"); *see also* Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law*, 91 FORDHAM L. REV. (forthcoming 2023) (criticizing state courts' reluctance to experiment "based on shopworn assumptions about the harms that nonlawyers might inflict or . . . optimism about alternative cures, such as the expansion of pro bono assistance"). But existing evidence suggests that "[c]onsumers value . . . legal services from providers who are not fully qualified attorneys," and "[t]he legal work produced by nonlawyers can be as good as—and sometimes better than—that of lawyers." *See* Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 283, 312 (2020); *see also* Br. of Rebecca Sandefur

as *Amicus Curiae* Supporting Plaintiffs-Appellees, *Upsolve, Inc. v. James*, No. 22-1345 (2d Cir. January 11, 2023).

IV. The advice at issue is indistinguishable from everyday speech about the law.

Rather than pursuing a blanket ban on "all advice . . . in matters connected to the law," *see Alfani*, 227 N.Y. at 336, the State should encourage efforts to train nonlawyers to provide basic legal advice in specific contexts of need. The program at issue is carefully designed to train community volunteers to provide basic information and advice in a specific, narrow context using a standardized form provided by the State. Advice about how to fill out a standardized form calls for less legal knowledge and skill than assistance that nonlawyers are lawfully permitted to give in many other legal contexts. Volunteers will not hold themselves out to be lawyers or offer any form of assistance beyond merely speaking to people who seek this specific advice. Such advice is indistinguishable from everyday speech about the law.

Many people facing legal problems turn to their immediate social networks for help. *See* Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, 11 (2014) (conducting a random sample of more than 3,000 adults

and finding that people facing civil justice problems rarely turn to lawyers for help and instead are more likely to turn to friends, family, and others in their immediate social network), *available at* https://tinyurl.com/Accessing-Justice. States do not attempt to police this type of free, incidental, individualized advice, which presumably varies widely in quality and, under the State's theory, constitutes the unauthorized practice of law.

The program at issue is designed to promote both the quality and availability of everyday, free advice about a specific, widespread problem by providing training and support for volunteers within affected communities. Such community-based assistance could serve as a valuable resource for people without access to (or knowledge about) other forms of assistance. Unless the State proposes to ban all forms of everyday advice about the law, it has no principled basis for banning free legal advice in this context.

CONCLUSION

Upsolve proposes to train community volunteers to offer basic legal advice in a specific context of widespread legal need. The State has mounted a vigorous appeal of the narrow, as-applied judgment below,

characterizing it as a threat to all State regulation of the practice of law. But the State's position is inconsistent with historic and current practice and unsupported by existing evidence, and the advice at issue is indistinguishable from everyday speech about the law. The Court should affirm the injunction and invite further efforts to improve public access to basic legal assistance in specific contexts of widespread legal need.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Miles E. Coleman
Miles E. Coleman
2 W. Washington Street / 4th Floor
Greenville, SC 29601
(864) 373-2352
E-Mail: miles.coleman@nelsonmullins.com

Counsel for *Amici Curiae*

January 11, 2023

APPENDIX—LIST OF *AMICI CURIAE**

Richard L. Abel, Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor, UCLA School of Law

Benjamin Barton, Helen and Charles Lockett Distinguished Professor of Law, University of Tennessee College of Law

Raymond Brescia, Hon. Harold R. Tyler Chair in Law and Technology, Albany Law School

Elizabeth Chambliss, Henry Harman Edens Professor of Law, University of South Carolina School of Law

Benjamin P. Cooper, Frank Montague, Jr. Professor of Legal Studies and Professionalism, University of Mississippi School of Law

Scott Cummings, Robert Henigson Professor of Legal Ethics, UCLA School of Law

Hannah Demeritt, Clinical Professor of Law, Duke University School of Law

David Freeman Engstrom, LSVF Professor in Law, Stanford Law School

Nora Freeman Engstrom, Ernest W. McFarland Professor of Law, Stanford Law School

Cynthia Godsoe, Professor of Law, Brooklyn Law School

Gillian Hadfield, Schwartz Reisman Chair in Technology and Society, University of Toronto Faculty of Law

William D. Henderson, Stephen F. Burns Professor of Law, Indiana University Maurer School of Law

* Institutional names provided for identification purposes only.

Sung Hui Kim, Professor of Law, UCLA School of Law

Renee Knake Jefferson, Professor of Law and the Joanne and Larry Doherty Chair in Legal Ethics, University of Houston Law Center

David Luban, University Profession and Professor of Law and Philosophy, Georgetown University Law Center

Martha Minow, 300th Anniversary University Professor, Harvard University

Daniel B. Rodriguez, Harold Washington Professor, Northwestern University Pritzker School of Law

Tanina Rostain, Agnes Williams Sesquicentennial Professor of Justice Innovation, Georgetown University Law Center

Colleen F. Shanahan, Clinical Professor of Law, Columbia Law School

William H. Simon, Arthur Levitt Professor of Law Emeritus, Columbia University

Abbe Smith, Scott K. Ginsburg Professor of Law, Georgetown University Law Center

Lauren Sudeall, Professor of Law, Georgia State University College of Law

* Institutional names provided for identification purposes only.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because this brief contains 4,010 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

January 11, 2023

/s/ Miles E. Coleman
Miles E. Coleman

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2023, I caused the foregoing Brief of *Amici Curiae* to be filed with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following:

Robert J. McNamara
Brian Morris
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

Counsel for Plaintiffs-Appellees

Letitia James
Attorney General
Barbara D. Underwood
Solicitor General
Judith N. Vale
Deputy Solicitor General
Cleland B. Welton II
Assistant Solicitor General of Counsel
28 Liberty Street
New York, New York 10005
(212) 416-6197

Counsel for Defendant-Appellant

/s/ Miles E. Coleman
Miles E. Coleman

Counsel for *Amici Curiae*

22-1345

IN THE

United States Court of Appeals

FOR THE

Second Circuit

UPSOLVE, INC., REVEREND JOHN UDO-OKON,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

AMICUS BRIEF OF PROFESSOR REBECCA L. SANDEFUR AND 22 EMPIRICAL SCHOLARS IN SUPPORT OF APPELLEES

Peter Karanjia
DLA PIPER LLP (US)
500 Eighth Street, N.W.
Washington, DC 20004
(202) 799-4135
peter.karanjia@us.dlapiper.com

Counsel for Amici Curiae Professor Rebecca L. Sandefur & Empirical Scholars

TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Crisis of Access to Civil Justice 4

A. Impact on Individuals Facing Debt Collection Actions 4

B. Impacts on the Courts and the Justice System 12

II. Social Science Research Demonstrates the Safety and Effectiveness of Legal Services and Solutions Provided by Nonlawyers 15

A. Common Law Countries Outside the United States Have Demonstrated Success in Responding to Access to Justice Issues with Nonlawyer Solutions 17

B. Communities in the United States Have Also Begun to Successfully Rely on Trained Nonlawyers to Address the Access to Justice Gap 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Penson v. Ohio,
488 U.S. 75 (1988).....12

Turner v. Rogers,
564 U.S. 431 (2011).....24

Other Authorities

American Bar Association, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, (2017), https://www.americanbar.org/content/dam/aba/administrative/pro bono_public_service/ls_pb_supporting_justice_iv_final.pdf.....8

Matthew Burnett & Rebecca L. Sandefur, *Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*, RDP, Brasília, 19 20

Anna E. Carpenter, Alyx Mark, & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 Law & Soc. Inquiry 1023 (2017).....23

Committee on Civil Court & Consumer Affairs, New York City Bar, *Report on the Consumer Credit Fairness Act* (May 28, 2021), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-the-consumer-credit-fairness-act#_ftnref9.....7

Congressional Research Service, R46554, *Unemployment Rates During the Covid-19 Pandemic,* (Aug. 20, 2021), https://sgp.fas.org/crs/misc/R46554.pdf. 11

Consortium on Legal Services & the Public, American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans*, (1994), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.pdf.....5

Citizens Advice, *Who We Are and What We Do*, https://www.citizensadvice.org.uk/about-us/about-us1/introduction-to-the-citizens-advice-service/ 18

J. Dugard & K. Drage, *To Whom Do the People Take Their Issues? The Contribution of Community-Based Paralegals to Access to Justice in South Africa*. Justice and Development Working Paper Series, no. 21. World Bank Group, Washington, DC. 2013.....21

Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation & Arbitration* (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf.....7

Hazel Genn & Yvette Genn, *The Effectiveness of Representation at Tribunals* (London: Lord Chancellor's Department 1989) 17, 19

Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law*, 91 Fordham L. Rev. 15 (2023).....15

Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urban L.J. 129 (2010).....8

Human Rights Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* (Jan. 20, 2016) https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor#_ftn96 .....9, 16, 24

Institute for the Advancement of the American Legal System & Hague Institute for the Innovation of Law, *Justice Needs & Satisfaction in the United States of America* (2021) https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf 5, 11, 12

Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica, Oct. 8, 2015, https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.....10

Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 113 (1998) 23, 26

Sheldon Krantz, *There Is No Justice When Low & Modest Income DC Residents Are Forced to Represent Themselves in Civil Cases*, 24 U.D.C. L. Rev. 18 (2021) 21

The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (2010) https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf 6

Legal Services Commission's 'Money Advice Outreach Pilot,' Money & Pensions Service Financial Capability Secretariat, https://www.fincap.org.uk/en/evaluations/legal-services-commission-s-money-advice-outreach-pilot#key-findings 18

Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low income Americans, 6* (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf 10

Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 Fordham L. Rev. 2611 (2014) 26, 27

Sharon Miki, *Lawyer Statistics for Success in 2022*, CLIO Blog, Dec. 21, 2021, https://www.clio.com/blog/lawyer-statistics/ 7

National Center for State Courts, *State of the State Courts in a (Post) Pandemic World: Results from a National Public Opinion Poll,* (2020), https://www.ncsc.org/__data/assets/pdf_file/0005/41000/COVID19-Poll-Presentation.pdf 14

Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come From Lawyers?*, NY Times, Jan. 25, 2022, https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html 6

Judges, New York City Small Claims Court, https://nycourts.gov/COURTS/nyc/smallclaims/welcome.shtml 13

Welcome, New York City Small Claims Court, https://nycourts.gov/COURTS/nyc/smallclaims/welcome.shtml.....13

Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York,* 22 (Nov. 2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/2015_Access_to_Justice-Report-V5.pdf.....8

Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York* 29 (Nov. 2018) ww2.nycourts.gov/sites/default/files/document/files/2018-12/18_ATJ-Comission_Report.pdf.....6

Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York,* 18 (Nov. 2022), www.nycourts.gov/LegacyPDFS/accesstojusticecommission/22_ATJ-Commission_Report.pdf.....7, 9, 10, 15

The Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts,* (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt- collectors-to-consumers.pdf 6, 7

Rebecca L. Sandefur & Emily Denne, *Access to Justice and Legal Services Regulatory Reform*. Ann. Rev. Law Soc. Sci. 2022. 18:7.1–7.16 26

Rebecca L. Sandefur, *Access to What?*, 148 Daedalus 49 (2019) 6

Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. Irvine L. Rev. 753 (2021).....6

Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOYOLA L.A. LAW REV. 949 (2009).....22

Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J. Soc. Just. 51 (2010) 17

Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 Stanford J. Civil Rights & Civil Liberties 283 (2020).....*passim*

Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Oxford Univ. Press 2009).....8

Marisol Smith & Ashish Patel, *Money Advice Outreach Evaluation: Cost and Effectiveness of the Outreach Pilots,* (2008), http://www.infohub.moneyadvicetrust.org/content_files/files/debtoutreachcosteffectiveness.pdf.....18, 19

Social Security Administration, *Your Right to Representation* (2020), https://www.ssa.gov/pubs/EN-05-10075.pdf 26

Recognized Organizations and Accredited Representatives Roster by State and City, U.S. Dep. Justice, https://www.justice.gov/eoir/recognized-organizations-and-accredited-representatives-rosterstate-and-city 26

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Dr. Rebecca L. Sandefur is a leading scholar and sociologist with expertise in access to civil justice. She is Professor in the College of Liberal Arts and Sciences at Arizona State University and Faculty Fellow at the American Bar Foundation (ABF), an independent, non-partisan research organization focused on the study of law and legal processes. In 2018, Professor Sandefur was named a MacArthur Fellow for her development of a new evidence-based approach to access to civil justice for low-income people.

Professor Sandefur has served on a number of commissions exploring ways to improve access to justice in the United States and globally, including with the American Bar Association, the American Academy of Arts and Sciences, the Organisation for Economic Co-operation and Development (OECD), and the World Bank. She co-chaired a project at the American Academy to improve the collection and use of data about civil justice in the United States. Her work, which has been funded by the National Science Foundation, has received numerous awards, including from the National Center for Access to Justice (2015) and the National Center for State Courts (2020). In 2013, she was The Hague Visiting Chair in the Rule of Law.

[1] No counsel for a party authored Professor Sandefur's *amicus* brief in whole or in part, and no party or party's counsel contributed money to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

In this *amicus* brief, Professor Sandefur is joined by 22 empirical scholars who study the legal profession, the provision of legal services across jurisdictions, and people's interaction with the legal system. The full list and qualifications of *Amici* joining this *amicus* brief are included in the appendix. In the brief, *Amici* review social science research that supports Appellees' claim that qualified nonlawyers can perform an essential role in helping people to protect their rights in debt collection proceedings. *Amici*'s knowledge of the field is a product of research over several decades on the barriers that prevent people from securing access to justice.

Specifically, *Amici* provide the Court with data documenting the gravity of this problem, including its detrimental effects on not only the individuals directly involved, but also on the courts and the justice system more broadly. *Amici* also discuss the effectiveness of alternative solutions, such as Upsolve's "Justice Advocates" program, that rely on trained nonlawyers. The evidence shows that these nonlawyers can be highly effective in providing quality advice to help bridge the access to justice gap, especially where legal aid and *pro bono* legal representation are in short supply.

SUMMARY OF ARGUMENT

Echoing broader national trends, New York faces an increasingly acute crisis of access to civil justice that places hundreds of thousands of unrepresented people

in debt collection proceedings and undermines the legitimacy of the courts, as well as the rule of law itself.

Like countless others across the country, the vast majority of New Yorkers facing debt collection actions cannot afford counsel and are unable to adequately represent themselves. As a result, they frequently fail to appear in court to assert their legal rights, and state courts routinely enter default judgments against them. This crisis was already severe before the Spring of 2020, when the COVID-19 pandemic commenced. Since then, it has reached emergency proportions. A relentless onslaught of legal challenges continues to severely burden ordinary Americans, including debt enforcement proceedings, as well as employment matters, and disputes over rent and healthcare coverage. This crisis has hit low-income households, racial minorities, and rural communities particularly hard, and it has magnified the already deeply entrenched social and economic inequalities in this country.

One underexplored option for addressing the justice gap is the use of trained nonlawyers who, the evidence shows, can rapidly become experts in legal processes. Such legal processes—including, for example, handling actions in small claims court—can be unfamiliar even to many attorneys. Research concerning programs in other States, common law jurisdictions, and federal programs demonstrates the success of trained nonlawyers in helping overcome three access to justice barriers:

1) helping the individuals involved in these proceedings recognize the legal nature of their problems; 2) increasing the likelihood that these individuals will more actively engage with the legal process, including attending their court hearings; and 3) helping overburdened courts decide more cases on the merits, thereby improving procedural justice and the rule of law.

In each of these ways, Upsolve's program likewise can improve the fairness and effectiveness of our civil justice system. Given the scarcity of legal aid and *pro bono* resources for the hundreds of thousands of New Yorkers who cannot afford to hire counsel to vindicate their rights in civil debt collection proceedings, Upsolve should be allowed to deploy its well-designed and focused nonlawyer training to substantially improve access to justice for those who desperately need it.

ARGUMENT

I. The Crisis of Access to Civil Justice

A. Impact on Individuals Facing Debt Collection Actions

The access to justice crisis in this country has existed for decades and persists to this day, including in New York. In 1992, the American Bar Association commissioned a landmark study (*Legal Needs and Civil Justice*) that found approximately half of American households surveyed "faced some situation that raised a legal issue[,]" with 47% of low-income households and 52% of moderate-

income households reporting at least one legal need.[2] Of those households facing legal issues, 41% of low-income households and 42% of moderate-income households were forced to deal with them without legal assistance, and an additional 38% of low-income households and 26% of moderate-income households took no action at all.[3] Only 29% of low-income households turned to the civil justice system to attempt to resolve their issues, and only 39% of moderate-income households did so. According to the report, "[t]he predominant reasons for low-income households not seeking legal assistance were a sense that it would not help and that it would cost too much."[4]

Thirty years later, the situation is unfortunately no better. For example, a 2020 study commissioned by the Institute for the Advancement of the American Legal System (IAALS) surveyed over 10,000 Americans nationally. The IAALS study found that Americans experience over 250 million civil justice problems annually, of which fully 120 million go unresolved.[5]

---

[2] Consortium on Legal Services & the Public, American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans*, 9 (1994), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.pdf.

[3] *Id.* at 17.

[4] *Id.* at 20.

[5] Institute for the Advancement of the American Legal System & Hague Institute for the Innovation of Law, *Justice Needs & Satisfaction in the United States of America*, 6 (2021) (hereinafter *IAALS Report*),

Cases involving consumer debt are emblematic of this broader trend. According to Pew, each year approximately four million Americans are sued in debt collection matters. Of those, over 90% reportedly receive no legal representation at all.[6] The problem is even more acute in New York State, where in 2018 and 2019, a total of 265,000 consumer debt suits were filed in city and district civil courts; in over 95% of them, the defendants were not represented by a lawyer, and 88% did not even respond to the suit.[7] This is in line with other reports, reflecting that debt collection suits in New York favored the debt buyer the vast majority of the time.[8]

---

https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf; *see also* Rebecca L. Sandefur, *Access to What?*, 148 Daedalus 49, 49-55 (2019); Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. Irvine L. Rev. 753, 753 (2021).

[6] The Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts,* 1 & 14 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf.

[7] Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come From Lawyers?*, NY Times, Jan. 25, 2022, https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html. In this respect, debt collection proceedings reflect a broader access to justice gap that persists in this State; *see* Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York* 29 (Nov. 2018) (hereinafter *2018 Annual Report*), ww2.nycourts.gov/sites/default/files/document/files/2018-12/18_ATJ-Comission_Report.pdf ("Data suggests that the number of unrepresented litigants statewide remains unacceptably high, with percentages in particular case types, such as child support and consumer debt, near or above 90%.").

[8] The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,* 8-9 (2010) (hereinafter *Debt Deception*), https://www.neweconomynyc.org/wp-

Again, this echoes the broader crisis across the country, with over 70% of Americans losing debt collection suits by default.[9] In sum, there continues to be a "growing need for legal assistance in consumer matters," especially given that "[d]uring the pandemic, the prevalence of consumer problems increased exponentially, particularly medical debt and consumer credit issues."[10]

This lack of representation is not surprising. With attorneys' average hourly rates of $300 by early 2021,[11] finding counsel is out of reach for many. And both in New York and nationwide, legal aid and *pro bono* resources are simply insufficient

---

content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf; Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York,* 18 (Nov. 2022) (hereinafter *2022 Annual Report*), www.nycourts.gov/LegacyPDFS/accesstojusticecommission/22_ATJ-Commission_Report.pdf ("There are over 100,000 default judgments against consumers per year in New York State.").

[9] The Pew Charitable Trusts, *supra* note 6, at 2. *See also* Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation & Arbitration,* 7 (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf (Federal Trade Commission estimate that, nationwide, between "sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults[.]").

[10] *2022 Annual Report* 54; Committee on Civil Court & Consumer Affairs, New York City Bar, *Report on the Consumer Credit Fairness Act* (May 28, 2021), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-the-consumer-credit-fairness-act#_ftnref9.

[11] Sharon Miki, *Lawyer Statistics for Success in 2022*, CLIO Blog, Dec. 21, 2021, https://www.clio.com/blog/lawyer-statistics/.

to meet the acute need. Research confirms that *pro bono* assistance nationwide does not come close to bridging the access to justice gap. Economist and legal scholar Gillian Hadfield, for example, estimates that to offer just one hour of legal advice to every American facing civil legal problems, every one of the nation's more than one million lawyers would need to volunteer 100 hours annually.[12] Yet, according to a 2016 study by the American Bar Association, only half (52%) of all lawyers engaged in any *pro bono* work—the equivalent of an average 37 *pro bono* hours per lawyer.[13]

Recent reports from the Permanent Commission on Access to Justice confirm that "[p]ro bono programs still receive more requests for assistance than they can satisfy . . . ."[14] For example, in New York City, CLARO provides *pro bono* legal

---

[12] Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urban L.J. 129, 152 (2010).

[13] American Bar Association, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, at v (2017), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf (analyzing *pro bono* commitments in calendar year 2016). A further challenge is that lawyers' *pro bono* contributions are often counter-cyclical with respect to legal need: When the economy contracts and lost employment and income leads Americans to have more problems with issues such as debt, the extent of lawyers' *pro bono* service decreases. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* 99-114 (Oxford Univ. Press 2009).

[14] Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York,* 22 (Nov. 2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-

advice to low-income consumers, but the demand is overwhelming, with dozens of people lining up to speak to volunteers.[15] Even assuming the accuracy of Appellant's unsupported assertion (Br. at 25, 64) that services that currently exist for low-income defendants in debt collection suits "do not turn away clients," the abundant empirical data indisputably show a widespread need that is not being fulfilled. Simply put, *pro bono* volunteers and legal aid are, to be sure, important contributors to narrowing the access to justice gap—but they come nowhere close to meeting it.

Although access to justice is a widespread concern, it hits certain households and groups in a more pernicious and pervasive manner. According to the Legal Services Corporation, lower-income households bear the brunt of this hardship. In 2017, 71% of low-income households experienced a civil legal problem (for example, a debt collection complaint or eviction proceeding), and 86% of those

---

04/2015_Access_to_Justice-Report-V5.pdf; *see* 2022 *Annual Report* 17-18 (Samantha Aguam, Deputy Executive Director of Volunteer Lawyers Project of Central New York testifying that there is a "relative lack of pro bono legal services outside of New York City"; and that "[t]here are over 100,000 default judgments against consumers per year in New York State" and "only about 4% of people are represented when sued for debt").

[15] Human Rights Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* (Jan. 20, 2016) (hereinafter *Rubber Stamp Justice*), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor#_ftn96.

problems received inadequate or no legal help.[16] The same is true for rural communities in New York.[17]

The impact on low-income households is more pronounced for racial minorities, especially Black Americans. For example, even before the pandemic, elevated levels of default judgments against residents of predominantly Black communities were apparent. One study, which surveyed judgments over five years in St. Louis, Chicago, and Newark, New Jersey, concluded that "even accounting for income, the rate of judgments was twice as high in mostly black neighborhoods as it was in mostly white ones."[18]

The COVID-19 pandemic has exacerbated the legal problems faced daily by ordinary Americans. The pandemic has caused widespread job loss and the many cascading problems that emerge when people lose income—from unemployment insurance claims to unpaid bills and debts to unpaid rent and missed mortgage

---

[16] Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low income Americans,* 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

[17] *2022 Annual Report* 17-18.

[18] Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica, Oct. 8, 2015, https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

payments. During the pandemic, unemployment rates rose as high as 14.8%,[19] and U.S. consumer debt rose by $800 billion (by 6%, the highest annual growth rate recorded in a decade) to a record high of $14.88 trillion.[20] More generally, in 2020, 33% of Americans facing money problems attributed those problems to the pandemic.[21]

The pandemic has also accentuated the disproportionate effect of the access to justice crisis on racial minorities and low-income households. According to one study, in 2020, "Black and Hispanic Americans . . . experienced higher unemployment rates during the pandemic than other groups[,]"[22] and "[p]oorer Americans, women, Black (non-Hispanic) and Hispanic Americans, and young people were more likely to identify an employment problem as their most serious legal problem."[23] Overall, during the same period, multiracial (non-Hispanic) and Black (non-Hispanic) Americans encountered legal problems at higher rates than other racial/ethnic groups, at 74% and 71%, respectively.[24] And Black Americans

---

[19] Congressional Research Service, R46554, *Unemployment Rates During the Covid-19 Pandemic, ii* (Aug. 20, 2021), https://sgp.fas.org/crs/misc/R46554.pdf.

[20] *IAALS Report* at 211.

[21] *Id.* at 202.

[22] *Id.* at 195.

[23] *Id.*

[24] *Id.* at 36.

typically experienced the most serious problems, including precarious housing, job losses, and lost income.[25]

In sum, the extraordinary hardships inflicted by the pandemic have exacerbated longstanding inequalities, including the acute lack of representation experienced by low-income—and, in particular, minority—communities in debt collection and other proceedings that have serious implications for their livelihoods. When people do not assert their legal rights (including, for example, by raising defenses to meritless collection actions), the result is adverse judgments that often cause a snowball effect on their lives and their communities, including mushrooming debt and, potentially, bankruptcy and housing insecurity.

B. Impacts on the Courts and the Justice System

These profound consequences of the access to justice crisis are not limited to the individuals named as defendants in debt collection proceedings. They also extend to the courts and the justice system as a whole.

"The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?* 61 A.B.A.J.

[25] *Id.* at 29, 60.

569, 569 (1975)). While there is no constitutional right to counsel in most categories of civil (rather than criminal) matters, it remains the case that justice and the rule of law are advanced in our adversarial system when courts are able to hear competent arguments on both sides of a dispute. Yet where, as here, the overwhelming majority of debt collection cases heard by New York courts—by some counts, more than 85%[26]—result in default judgments because the defendant failed to appear in court to assert any defense, the system is not working as it should.

The lack of *any* legal assistance for these individuals (including, for example, the nonlawyer Justice Advocates that Appellees seek to provide) does a great disservice to the courts struggling to adjudicate the tidal wave of these cases.[27] In particular, it places a greater burden on these courts (which already manage very heavy case-loads[28]) to determine, without the benefit of hearing from the alleged debtor defendant, whether the collection action in question suffers from jurisdictional or other legal defects, such as a statute-of-limitations bar.

---

[26] *See* notes 7 & 8, *supra*.

[27] *See* note 7 *supra* (noting that more than 265,000 debt collection actions were filed in New York courts in 2018 and 2019).

[28] The Small Claims Court of the New York City Civil Court is "one of the busiest Small Claims Courts in the world." *See Welcome*, New York City Small Claims Court, https://nycourts.gov/COURTS/nyc/smallclaims/welcome.shtml. With over 40,000 cases filed each year, divided evenly among the 140 Civil Court judges, each judge would have an annual docket of 333 new cases. *See also id.*, *Judges*.

Our courts deserve better. In particular, they would benefit from having defendants appear and assert relevant defenses—aided by trained and experienced Justice Advocates—rather than attempting to do justice in a one-sided system where repeat-player attorneys for debt collection firms handily outmatch unrepresented and low-income individuals who do not understand the complexities of the legal process they must navigate and consequently often fail to appear. As noted, there is simply not enough legal aid and *pro bono* representation available for individuals in these sorts of state court proceedings. Thus, there can be no doubt that the advice provided by trained Justice Advocates is superior to no representation at all. Indeed, as discussed below, these nonlawyer representatives can provide high-quality assistance that may be superior even to that of attorneys who are not specialists in the relevant field.

The currently one-sided system also undermines public confidence in our justice system and the rule of law.[29] Where more than eight out of ten defendants

[29] Public confidence in the courts is already especially weak among many historically marginalized communities, including those who most acutely experience the lack of representation in legal proceedings. According to the National Center for State Courts' 2015 survey, for example, "only 32% of African Americans believe state courts provide equal justice to all." National Center for State Courts, *State of the State Courts in a (Post) Pandemic World: Results from a National Public Opinion Poll,* 4-5 (2020), https://www.ncsc.org/__data/assets/pdf_file/0005/41000/COVID19-Poll-Presentation.pdf. And as discussed, Black Americans experience a disproportionate number of default judgments for economic issues.

have default judgments entered against them without the court hearing any defense or explanation of their side of the case,[30] the public cannot have confidence that the system is working as it should.

Appellant repeatedly stresses (e.g., Br. at 25, 26, 35, 36, 53) that New York's unauthorized practice of law statute has been in effect for 125 years. But tradition alone cannot justify perpetuating a flawed system that has been under increasingly acute strain in recent years as the access to justice gap has turned into a chasm.[31]

II. Social Science Research Demonstrates the Safety and Effectiveness of Legal Services and Solutions Provided by Nonlawyers

This problem is large and complex—but it is not without potential solutions.[32] Those solutions are found in the nonlawyer practice currently utilized by millions of

---

[30] *2022 Annual Report* at 18.

[31] Appellant's reliance (Br. at 55) on licensing requirements for other professions (medicine, in particular) also misses the mark. Apart from the fact that those fields involve different skills and qualification requirements from those relevant here, the medical profession is hardly supportive of Appellant's position. As explained in a recent article, "the medical profession has established stratified roles for many different categories of medical professionals, many of whom do not need as much training and experience as medical doctors[,]" and "there is plenty of evidence that the legal profession can serve the public equally well or better by expanding the range of people who are trained and certified to perform certain legal tasks for clients on their own, essentially as the medical profession has done with certain medical tasks." Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law*, 91 Fordham L. Rev. 15 (2023).

[32] Advocate *Amici* in the district court claim that the main problem is "sewer service," "the practice of falsely claiming to serve litigants with notice of the lawsuit when no notice was ever provided." Brief of Advocate *Amici*, ECF No. 57

people in other countries, as well as growing numbers of people within the United States. As discussed below, nonlawyers have provided high-quality representation that courts have commended—and they have routinely done so without the involvement of any lawyers.

Broadly speaking, "legal advice" is the application of knowledge about law, legal principles, or legal processes to specific facts or circumstances; creating an analysis of the situation (a diagnosis of its legal aspects); and suggestions about courses of action (proposed treatments).[33] Nonlawyers are well equipped to provide legal advice in many straightforward, routine settings. Indeed, the studies examining these practices in various contexts outside and within the United States reflect a consistent theme: nonlawyer providers can be highly effective when they are (1) trained and specialized, and (2) the issues at hand do not raise complex questions of substantive law. That is precisely the situation that Upsolve rightly seeks to target.

("Advocate *Amici* Br.") at 4-5, 21-22 & n.17. But Advocate *Amici* provide no statistical data to support that speculative claim. Furthermore, the "sewer service" issue is a longstanding problem that New York state has already taken steps to address, including by in 2014 imposing enhanced filing requirements on debtor plaintiffs proving service. *Rubber Stamp Justice* (citing New York State Unified Court System, *New Consumer Credit Rules and Resources*, 2015, https://www.nycourts.gov/rules/ccr/ (accessed Dec. 21, 2022)). Regardless of the precise source of the crisis—which is likely too multifaceted to reduce to "sewer service" alone—Upsolve offers one well supported solution.

[33] Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 Stanford J. Civil Rights & Civil Liberties 283, 286-87 (2020) (hereinafter *Legal Advice*).

A. Common Law Countries Outside the United States Have Demonstrated Success in Responding to Access to Justice Issues with Nonlawyer Solutions

The United States is certainly not alone in experiencing a lack of access to justice. In the late 1970s, the United Kingdom began to study its own access to justice problems and consider creative solutions.[34] Research in the United Kingdom showed that access to justice problems not only affected individual citizens' relationships with the law, but also had far-reaching effects: increasing expenditures on public benefits for loss of employment; increasing expenditures on medical services; and increasing public expense for temporary housing following evictions.[35]

The United Kingdom helped narrow the access to justice gap—in large part, by enabling individuals involved in routine but specialized legal proceedings (such as social security proceedings) to benefit from the advice of nonlawyers who have experience with these specific proceedings. A range of both voluntary sector and commercial services offer legal advice. The most well-known are "Citizens Advice" offices, lay-staffed community advice offices throughout the country. These offices

[34] Hazel Genn & Yvette Genn, *The Effectiveness of Representation at Tribunals* (London: Lord Chancellor's Department 1989).

[35] Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J. Soc. Just. 51, 55 (2010).

now advise millions of people (including in person, online, and by telephone[36]) on justice issues at more than 2,500 locations in the United Kingdom.[37] The civil justice issues on which they advise include a wide range of matters, including debt, public benefits, employment, and family matters.[38]

In 2008, the Legal Services Research Centre studied the impact of nonlawyer advice services on debt in a program that used "partner agencies," including, among others, "community-based organisations" and housing support services.[39] The study found that the "projects were very successful at delivering advice to clients who had not sought advice before[,]" thus reaching many groups who had previously failed to assert their rights in debt claims.[40] The services delivered resulted in

---

[36] Citizens Advice, *Who We Are and What We Do*, https://www.citizensadvice.org.uk/about-us/about-us1/introduction-to-the-citizens-advice-service/.

[37] *Id.*

[38] *Id.*

[39] *Legal Services Commission's 'Money Advice Outreach Pilot,'* Money & Pensions Service Financial Capability Secretariat, https://www.fincap.org.uk/en/evaluations/legal-services-commission-s-money-advice-outreach-pilot#key-findings.

[40] Marisol Smith & Ashish Patel, *Money Advice Outreach Evaluation: Cost and Effectiveness of the Outreach Pilots,* 31 (2008), http://www.infohub.moneyadvicetrust.org/content_files/files/debtoutreachcosteffectiveness.pdf.

"approximately £6m of debt … [being] written off"[41] across 5,863 closed cases, or a debt reduction that averaged over £1,000 (about $1,340) per client.

Alongside legal advice providers, the United Kingdom has long permitted a range of nonlawyer advocates to appear in certain fora, such as social security hearings, immigration hearings, industrial tribunals, and mental health review tribunals. A landmark study conducted by a commission chaired by the Lord Chancellor found that lay specialists had a positive impact in all four types of administrative proceedings and were second to lawyers only in "industrial" (i.e., employment) disputes.[42] The judges presiding over these hearings agreed: "There was little agreement about the need for legal skills, although all tribunals agreed that specialist skills were required. In social security appeals, the view of tribunals was overwhelmingly that specialist lay advisers were *as good, and probably better, than the solicitors* who occasionally represented appellants."[43]

For social security hearings in the United Kingdom, the study found that access to legal advice from nonlawyer advisors almost doubled their odds of success on appeal. "In cases where appellants had not obtained advice before their hearing, appeals were allowed in just over one-quarter of cases (26%). Where appellants had

[41] *Id.* at 6.

[42] Sandefur, *Legal Advice*, *supra* note 33, at 305.

[43] Genn & Genn, *supra* note 34, at 216 (emphasis added).

obtained advice before their hearing, appeals were allowed in about 46% of cases."[44] And this was not the only benefit: Another advantage of obtaining pre-hearing advice was "to increase appellants' chances of succeeding by increasing the likelihood that they will attend their hearing."[45]

Two more foreign jurisdictions merit attention. Canada is another common law country that has successfully expanded the use of nonlawyer resources. Since 2007, Ontario has allowed licensed paralegals to engage in the limited independent practice of law, and today, nearly 10,000 such paralegals have been licensed by the Law Society of Ontario.[46] A study five years into the licensing scheme surveyed 1,000 people who had used these services for "traffic, small claims, landlord/tenant, worker's compensation, real estate, probate, and family issues."[47] Those surveyed stated that they went to paralegals because their services were more affordable, their matters were too simple to require a lawyer, and they believed the paralegals were experienced specialists.[48] And in South Africa, non-lawyer paralegals and community advice offices staffed by non-lawyers have played a fundamental role in

---

[44] *Id.* at 68.

[45] *Id.* at 68-69.

[46] Matthew Burnett & Rebecca L. Sandefur, *Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation*, RDP, Brasília, 19 n. 102, 104-119, at 109.

[47] Sandefur, *Legal Advice*, *supra* note 33, at 294.

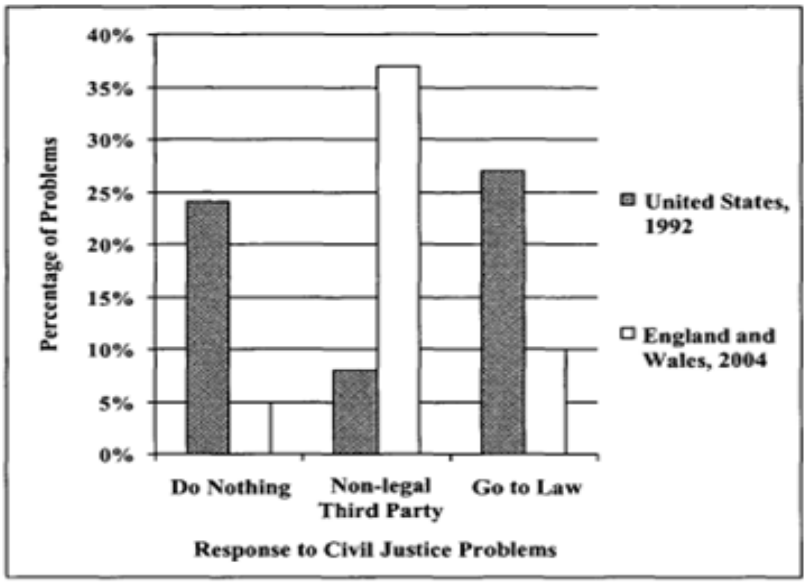
[48] *Id.*

providing legal services for almost a hundred years—including, most notably, during the struggle against the racist Apartheid regime.[49]

Research also suggests that removing antiquated barriers to the use of nonlawyer specialists can increase the likelihood that people will take action to address their civil justice issues. For example, Professor Sandefur has compared studies addressing how people confronting civil access to justice issues respond to those problems in the United States and the United Kingdom. As shown below, the results (whether they reported (i) doing nothing, (ii) using nonlawyer resources, or (iii) retaining lawyers) are striking:

[49] *See* J. Dugard & K. Drage, *To Whom Do the People Take Their Issues? The Contribution of Community-Based Paralegals to Access to Justice in South Africa*. Justice and Development Working Paper Series, no. 21. World Bank Group, Washington, DC. 2013. South Africa's Community Advice Offices are staffed by paralegals and have a "long history of providing advice and information services to people who are marginalized through poverty, social circumstances, and geographical locations dating back to the apartheid era" on legal issues such as benefits, water sanitation, and housing. Sheldon Krantz, *There Is No Justice When Low & Modest Income DC Residents Are Forced to Represent Themselves in Civil Cases*, 24 U.D.C. L. Rev. 18 (2021).

A Comparison of How People Handle Civil Justice Problems Involving Money and Housing: United States (1992) and England and Wales (2004)



Data for the United States are based on 1,077 problems involving housing, real property, personal finances, and consumer needs from a sample of 3,087 households. The reference period for problems is one year.[93] Data for England and Wales are based on 453 problems involving livelihood, other sources of household income, housing security, housing conditions, and debt and credit from a sample of 4,667 individuals. The reference period for problems is three years or since the respondent turned eighteen.[94]

FIGURE 4

Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOYOLA L.A. LAW REV. 949, 969 (2009).

The chart above shows that in the United States, people with access to justice problems are nearly as likely to do nothing, as to seek help from a legal resource. By contrast, respondents in the United Kingdom (specifically, England and Wales) often availed themselves of nonlawyers, such as the Citizens Advice offices.

This research supports appellees' claims in this case that Justice Advocates who are trained by Upsolve would be a valuable resource, likely to markedly improve the current problem of underrepresentation (even taking into account the limited extent of legal aid and *pro bono* assistance that is available to New Yorkers). *First*, as the District Court recognized (citing Professor Sandefur's *amicus* brief below), it makes sense that trained nonlawyers who have experience with a specialized legal process (e.g., debt collection proceedings or housing court proceedings) would be capable of providing more practical and effective legal advice than many attorneys, especially attorneys who have not handled such matters. A Justice Advocate "who has handled 50 debt collection matters, for example, would likely provide better representation than a patent lawyer who has never set foot in small claims court and last looked at a consumer contract issue when studying for the bar exam."[50] J.A. 202 (quoting *Amicus* Br. for Prof. Sandefur).

Second, even setting aside the ways in which Justice Advocates may be *more effective* than many lawyers, for the hundreds of thousands of individuals facing debt collections actions who cannot afford counsel (or find *pro bono* counsel),

[50] J.A. 204-205. Studies have shown that the effectiveness of lawyers versus nonlawyers turns more on specialized experience than formal qualifications such as a bar license. Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 113 (1998); Anna E. Carpenter, Alyx Mark, & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 Law & Soc. Inquiry 1023, 1028 (2017).

representation by these nonlawyers is plainly better than no representation at all. And supervision of Justice Advocates by *pro bono* counsel is neither necessary nor feasible to effectively address this problem, as the above studies have shown.[51]

Third, the research discussed above shows that a simple but powerful benefit of access to free representation by Justice Advocates (or similar nonlawyer representatives) is that the individuals concerned become more invested in their cases and are much more likely to engage with the judicial process (including appearing in court). In this way, too, the Upsolve program not only helps the individuals facing debt collection actions, but also the courts hearing these cases and the justice system more broadly.

B. Communities in the United States Have Also Begun to Successfully Rely on Trained Nonlawyers to Address the Access to Justice Gap

Courts, civil justice advocates, and scholars across the United States are starting to recognize the access to justice gap and the appeal of nonlawyer solutions. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (refusing to grant a categorical right to counsel in child custody hearings in part because "assistance other than

[51] *Rubber Stamp Justice* ("[E]xperience shows that good results can be achieved simply by helping unrepresented defendants secure independent legal advice."). For example, in the context of landlord-tenant cases, "tenants who received informal legal advice but not formal legal representation achieved better results than average." *Id.* (citing Barbara L. Bezdek, *Silence in the Court: Participation & Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533 (1992)).

purely legal assistance" can help ensure fairness). Many states have responded with models that echo the success of the Citizen Advice offices in the United Kingdom. And when nonlawyers are available, people use them.

In Wisconsin, for instance, nonlawyers are permitted to help individuals involved in certain legal proceedings. In 1991, 22% of all employee representatives in Wisconsin unemployment compensation appeals were nonlawyers; 38% of representatives in state tax appeals were nonlawyers.[52] Other states are in various stages of expanding their own licensed legal practitioners. For example, similar programs can be found in (1) Washington state, which has a licensing program for those who meet specific training, education, insurance, and examination requirements to offer family law services; (2) Utah, whose state supreme court and state bar created a program allowing licensed paralegals to provide legal advice and limited services in certain family disputes, eviction cases, and debt collection cases; and (3) Arizona, where a limited number of legal paraprofessionals are permitted to provide legal advice and representation in certain family law, civil, criminal, and

[52] Sandefur, *Legal Advice*, *supra* note 33, at 290.

state administrative cases.[53] Additionally, certified legal preparers can prepare legal documents in California.[54]

The federal government also allows representation by nonlawyers in certain administrative hearings. For immigration hearings, over 2,000 federally accredited nonlawyer immigration representatives deal with all sorts of legal matters faced by their clients, including representation in immigration court and before the Board of Immigration Appeals.[55] Indeed, many of these services are provided by religious, community, and social services organizations, which are authorized by the U.S. Executive Office for Immigration Review to offer legal advice and representation through non-lawyer staff.[56] To take another example, the Social Security Administration advises claimants appealing determinations of their right to representation, but it does not require that those representatives be licensed attorneys.[57]

---

[53] *See* Rebecca L. Sandefur & Emily Denne, *Access to Justice and Legal Services Regulatory Reform*. Ann. Rev. Law Soc. Sci. 2022. 18:7.1–7.16, at 7.

[54] Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 Fordham L. Rev. 2611, 2615-16 (2014).

[55] Sandefur, *Legal Advice*, *supra* note 33, at 290.

[56] *See Recognized Organizations and Accredited Representatives Roster by State and City*, U.S. Dep. Justice, https://www.justice.gov/eoir/recognized-organizations-and-accredited-representatives-rosterstate-and-city.

[57] Kritzer, *supra* note 50, at 113; *see also* Social Security Administration, *Your Right to Representation* (2020), https://www.ssa.gov/pubs/EN-05-10075.pdf.

To be sure, nonlawyers are not the solution for every case (including in complex cases that present novel questions of law),[58] but this does not mean that they are not a good solution here. To the contrary, the social science research suggests that Justice Advocates will significantly help the hundreds of thousands of New Yorkers who otherwise would be likely to default in response to debt collection actions. This will lead to more just outcomes. It will also help overburdened state courts decide more cases on the merits—rather than on the happenstance of which defendants are unable to afford counsel or otherwise unable to mount their own defense. And it will further public confidence and trust in our legal system.[59]

CONCLUSION

Like lawyers, nonlawyers need to study and train to properly advise people on their legal problems. The program developed by Upsolve, which includes comprehensive training, proposes to do just that. For the sake of the hundreds of thousands of New Yorkers in dire need of these services, and the state court judges drowning in these cases, this Court should affirm the District Court's preliminary injunction allowing Upsolve and its Justice Advocates to provide these much-needed

[58] Professor Sandefur's research suggests that the benefit of representation (as defined strictly by case outcome) varies significantly with the complexity at issue. Sandefur, *Legal Advice*, *supra* note 33, at 306; Levin, *supra* note 54, at 2618.

[59] *See* Sandefur, *Legal Advice*, *supra* note 33, at 301-02.

services without running afoul of New York's restrictions on the unauthorized practice of law while the litigation below is pending.

January 11, 2023

Respectfully submitted,

/s/ Peter Karanjia

Peter Karanjia
DLA PIPER LLP (US)
500 Eighth Street, N.W.
Washington, DC 20004
(202) 799-4135
peter.karanjia@us.dlapiper.com

Counsel for Amici Curiae
Professor Rebecca L. Sandefur
and Empirical Scholars

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(4) and 29(b)(4). It contains 6,097 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: January 11, 2023
Washington, DC

/s/ Peter Karanjia
Peter Karanjia

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the court's CM/ECF system on January 11, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

/s/ Peter Karanjia
Peter Karanjia

APPENDIX

Amici Curiae Scholars

Matthew Burnett, J.D.
Visiting Scholar, Justice Futures Project, Arizona State University
Senior Program Officer, Access to Justice Research Initiative, American Bar Foundation

Matthew Burnett, J.D. is a Visiting Scholar with the Justice Futures Project at Arizona State University and Senior Program Officer for the Access to Justice Research Initiative at the American Bar Foundation (ABF). Prior to joining the ABF, Matthew was Senior Policy Officer at the Open Society Foundations, where he worked to advance community legal empowerment through research, advocacy, litigation and grantmaking in Africa, Asia, Latin America, Eastern Europe and the United States. Over the past 15 years, Matthew's writing on access to civil justice and legal empowerment has appeared in more than 20 publications, and he has given more than 80 presentations and workshops around the world on people-centered justice data, innovation, and regulatory reform. He is currently a collaborator on a National Science Foundation (NSF) funded CIVIC planning grant focused on expanding access to justice through nonlawyer Community Justice Workers in rural and Alaska Native communities and serves as a policy advisor to the National Center for Access to Justice.

Stacy Rupprecht Butler
Director, Innovation for Justice Program (i4J)

Stacy Butler is the Director of i4J and has two decades of experience in community advocacy and expanding the reach of civil legal services for under-represented populations. Her research focuses on the application of human-centered design and innovation to social justice issues including eviction, debt collection, domestic violence, regulatory reform, and online dispute resolution. Prior to launching i4J, she worked in the United States District Court for the District of Arizona and served as an adjunct professor at the University of Arizona James E. Rogers College of Law. Stacy was appointed to the Arizona Supreme Court's Access to Justice Commission in 2021. She received the Association of American Law Schools' Deborah L. Rhode Award in 2022, which honors the contributions, service, and leadership of Deborah Rhode by recognizing new trailblazers in legal education and the legal profession. Stacy received the Arizona State Bar Award of

Special Merit in 2020 for her contributions to the furtherance of public understanding of the legal system, the administration of justice, and confidence in the legal profession. Stacy earned a B.A. from Trinity University and a J.D. from the University of Arizona.

Dr. Thomas M. Clarke
Executive Committee and Board Member, Utah Supreme Court Office of Innovation for Legal Services

Tom Clarke recently retired as the Vice President for Research and Technology at the National Center for State Courts. He worked in that position for fourteen years, after serving with the Washington State court system as research manager and CIO for ten years. Tom led the re-engineering, technology, and access to justice practices at NCSC. Tom currently serves on the Executive Committee and Board of the Utah Supreme Court Office of Innovation for Legal Services.

Professor Stephen Daniels
Senior Research Professor, American Bar Foundation

Stephen Daniels is a Research Professor Emeritus at the American Bar Foundation, an independent, non-profit research institute dedicated to the empirical and interdisciplinary study of law and legal institutions. He holds a Ph.D. in political science from the University of Wisconsin-Madison and his research focuses on law and public policy, legal education, the legal profession, and various aspects of the American civil justice system. He has written on pro bono, access to justice, law school curriculum and financing, law students, trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. He has testified before congressional and state legislative committees about civil justice reform, served as an expert in cases dealing with large jury awards and/or constitutional challenges to civil justice reform, served as a consultant to the ABA's Task Force on the Financing of Legal Education, and long served as a volunteer for Chicago Appleseed and the Chicago Council of Lawyers on local court reform efforts. His current work focuses on law students and public service and on the increasing interest in licensed legal professionals (non-lawyers) as means of promoting greater access to justice.

Professor Catrina Denvir
Associate Professor
Monash University

Catrina is an Associate Professor at Monash University, Melbourne, Australia. She joined Monash from Ulster University where she was Director of the Legal Innovation Centre - a joint initiative between the School of Law and the School of Computer Science and Intelligent Systems. She has previously held research positions at the University of Sydney, University College London, the Australian Commonwealth Attorney-General's Department and the Legal Services Research Centre (London). Catrina brings expertise in a broad range of qualitative and quantitative research methodologies, including: the development and implementation of cutting edge methods of data collection; experimental designs; innovative use of legal service administrative data; large-scale longitudinal and cross-sectional 'legal need' survey research; in-depth qualitative work on ethics and industrial action; methods employing virtual avatars; as well as complex multilevel statistical modelling of survey data and natural language processing techniques. Her research interests include technological innovation in legal services (including the use of artificial intelligence and intelligent systems in law), the role of law in everyday life, public understanding of the law/legal rights, professional ethics and identity, design of legal services, legal pedagogy, access to justice, and research methods. Her research has particular relevance to UN Sustainable Development Goals 16 and 9.

Professor Russell Engler
Professor of Law and Director of Clinical Programs
New England Law | Boston

Professor Russell Engler serves as advisor for the Public Interest Law concentration at New England Law. He also directs the Public Service Project of the law school's Center for Law and Social Responsibility. Before joining the New England Law | Boston faculty in 1993, Professor Engler was director of the Housing Law Unit for Brooklyn, NY, Legal Services. He clerked for the Honorable Francis D. Murnaghan, Jr., of the US Court of Appeals for the Fourth Circuit. During the 1999–2000 academic year, he was a lecturer on law at Harvard Law School and was the 2004 chair of the Association of American Law Schools Standing Committee on Clinical Legal Education. Professor Engler serves on the Massachusetts Access to Justice Commission and is a member of the Steering Committee for the National Coalition for a Civil Right to Counsel. In 2013, he

was appointed to a newly formed Boston Bar Association Statewide Task Force on Civil Legal Aid in Massachusetts.

Professor Nuno Garoupa
Professor of Law & Associate Dean for Research and Faculty Development
George Mason University Antonin Scalia Law School
PhD Economics (U York, UK), LLM (U London, UK).

Nuno Garoupa is Professor of Law & Associate Dean for Research and Faculty Development at George Mason University Antonin Scalia Law School. He recently authored Deregulation and the Lawyers' Cartel, 43 U. Pa. J. Int'l L. 935 (2022), which concerns the legal profession and access to justice.

Bryant G. Garth
ABF Director Emeritus and Affiliated Research Professor

Bryant Garth is an empirical socio-legal scholar who has long-studied the legal profession and access to justice. He has written more than twenty books and one hundred fifty articles and has served in a number of administrate positions, including three times as dean of law schools and for fourteen years as director or the American Bar Foundation. He currently has returned to serve as interim director of the American Bar Foundation. He has been co-editor of the Journal of Legal Education, is currently chair of the Law School of Student Engagement advisory board, and has for more than twenty years served on the executive committee of the After the JD longitudinal study of the legal profession.

Dame Hazel Genn DBE, KC, FBA, LLD
Professor, Socio-Legal Studies, Faculty of Laws, University College London
Director, University College London Centre for Access to Justice

Dame Hazel Genn is Professor of Socio-Legal Studies in the Faculty of Laws at University College London ("UCL") and Director of the UCL Centre for Access to Justice, which she founded in 2013. She is a leading empirical legal researcher and expert on access to civil and administrative justice. She is author of *Paths to Justice: What People Do and Think About Going to Law* (1999). Her work has influenced policymakers in relation to the provision of legal aid and the social and health effects of unmet legal need. In 2016 she developed the activities of the UCL Centre for Access to Justice to include an innovative health justice partnership with a GP practice in East London delivering free social welfare legal services to low income and vulnerable patients within the practice. The services

were provided by a combination of specialist non-legal advisers and qualified lawyers supported by students under supervision. Dame Hazel has been appointed to numerous public service roles, including Judicial Appointments and Standards in Public Life. In recognition of her contribution to the justice system, she was awarded a CBE in the Queen's Birthday Honours List in 2000 and appointed DBE in the Queen's Birthday Honours List in 2006. In 2006 she was also appointed Queen's Counsel *Honoris Causa* and in 2008 she was elected Honorary Master of the Bench of Gray's Inn.

Dr. Robert Granfield, **Ph.D**.
Vice Provost for Faculty Affairs
University at Buffalo, State University of New York

Robert Granfield began his career in 1989 as an assistant professor of sociology at the University of Denver and was promoted to associate professor with tenure in 1995. A noted scholar in the areas of law and society as well as addiction studies, Professor Granfield was recruited to UB in 2004 after serving fourteen years at the University of Denver. He was promoted to Full Professor in 2005 and served as chair of UB's Department of Sociology from 2006 to 2012. He is also an affiliated scientist at UB's Research Institute on Addictions. He is the author or editor of six books and over 80 articles, book chapters, and reviews. He has been principal investigator or co-principal investigation on numerous grants from the National Institute of Health, US Department of Health and Human Services, Woodrow Wilson Foundation, and Law School Admissions Council, among others. He has been a visiting scholar at Harvard Law School, Middlebury College, the Singapore Institute of Management, and the University of Ottawa where he served as the Fulbright Research Chair in International Humanitarian Law and Social Justice. Professor Granfield has an extensive record of leadership at UB. In addition to serving as department chair, he was the founder and former director of UB's Civic Engagement and Public Policy strategic strength, a wide-reaching initiative with participants from 11 of UB's 12 decanal units and the hub for UB's community-based research activities. He was also the founder and director of UB's Institute for the Study of Law and Urban Justice. In addition, Professor Granfield has served in numerous leadership positions in the department of sociology, in the College of Arts and Sciences, and in the wider university. Granfield has also served on several editorial boards, on numerous professional association committees, and has been a faculty mentor on over 50 doctoral dissertations, master's theses, and undergraduate honor's theses. Granfield has a bachelor's degree from the University of Massachusetts and an MA /PhD from Northeastern University.

Professor Herbert M. Kritzer
Professor Emeritus
University of Minnesota Law School

Professor Herbert M. Kritzer is Marvin J. Sonosky Chair of Law and Public Policy emeritus at the University of Minnesota Law School and Professor of Political Science and Law emeritus at the University of Wisconsin – Madison where he taught from 1977 through 2007. He also held positions at the William Mitchell College of Law (2007-09), Rice University (1975–77), and Indiana University (1974–75). He is the recipient of multiple awards from the Law and Society Association: the Ronald Pipkin Service Award (2015), the Legacy Award (2019), and the Harry J. Kalven, Jr. Prize which is awarded annually for "empirical scholarship that has contributed most effectively to the advancement of research in law and society." From 2003 to 2007 he served as editor of Law & Society Review. His empirical research has focused on civil justice, judicial behavior, and judicial selection. At an early phase of his career he also wrote on research methods, which is reflected in his most recent book, Advanced Introduction to Empirical Legal Research (Edward Elgar Publishing 2021). Over the last 15 years his research has focused heavily on judicial selection resulting in two books, both published by Cambridge University Press, Justices on the Ballot: Continuity and Change in State Supreme Court Elections (2015) and Judicial Selection in the States: Politics and the Struggle for Reform (2020). He is the author or coauthor for seven other books, and editor or coeditor of three others. His current research focuses on litigation related to judicial selection in the United States.

Professor Alyx Mark
Assistant Professor of Government
Wesleyan University

Alyx Mark is an Assistant Professor of Government at Wesleyan University and an Affiliated Scholar of the American Bar Foundation, SoDa Labs at Monash University, and the Law of Law Center at the University of Utah. Her research focuses on how institutions empower and constrain legal elites, such as lawyers, judges, and lawmakers, as well as the consequences of institutional design decisions for access to justice. She is currently engaged in a project supported by the National Science Foundation, the Pew Charitable Trusts, and the American Association of University Women on state court responses to the Covid-19 pandemic, as well as studies of judicial behavior in state civil courts and of current efforts to reform the regulation of the legal profession in the United States. She

received her Ph.D. and M.A. in Political Science from The George Washington University in 2015 and her B.A. from Southern Illinois University – Edwardsville.

Professor Lynn Mather
SUNY Distinguished Service Professor Emerita
University of Buffalo School of Law

Lynn Mather is SUNY Distinguished Service Professor Emerita of Law and Political Science at University at Buffalo, New York. She has published extensively in the field of socio-legal studies, including six books and numerous journal articles. Her publications include empirical studies of: pro se representation in family law; when and why private lawyers in the U.S. provide pro bono services; and the extent to which lawyer organizations in selected countries actively support access to justice. Professor Mather was Director of the Baldy Center for Law & Social Policy at University at Buffalo. Prior to moving to Buffalo, she taught at Dartmouth College for thirty years where she was the Nelson A. Rockefeller Professor of Government.

Professor Michael Millemann
Jacob A. France Professor of Law
University of Maryland, Francis King Carey School of Law

Professor Michael Millemann, the Jacob A. France Professor of Law at the University of Maryland-Carey School of Law, graduated from Dartmouth College and Georgetown Law School, and began teaching in 1974. He has taught a broad range of classroom and clinical courses since then and has been a leader in developing the School's Clinical Law Program, as well as the school's Maryland Public Interest Law Project. He also was a leader in developing a number of legal services organizations in Maryland, including the Public Justice Center, Community Law in Action, the Maryland Volunteer Lawyer's Service, St. Ambrose Legal Services Program and Civil Justice. He has supported, through program development and scholarship, innovations in the delivery of legal services, including limited-scope legal representational projects (lawyers) and paralegal representational projects. He wrote the Maryland law authorizing trained paralegals to represent tenants in eviction proceedings and has published extensively in the fields of access to justice and the delivery of legal services, among others.

Professor Richard Moorhead
Professor of Law and Professional Ethics
University of Exeter Law School

Richard Moorhead is Professor of Law and Ethics at the University of Exeter, a Fellow of the Academy of Social Science, and an Honorary Professor of Law at UCL (University College London). A former solicitor he has spent his career researching lawyers and legal services, and has conducted research for the LSB, SRA, Law Society, Civil Justice Council, Ministry of Justice and others on professional competence and access to justice in particular. He has also been a member of the Civil Justice Council and the MoJs Data Science and Evidence Board. He runs the influential lawyerwatch.blog.

Professor Michele Pistone
Professor of Law
Villanova University Charles Widger School of Law

Michele R. Pistone is a law professor at Villanova University Charles Widger School of Law and founding faculty director of VIISTA, Villanova Interdisciplinary Immigration Studies Training for Advocates. She can be reached at pistone@law.villanova.edu. Her website is michelepistone.org.

Professor Emily Taylor Poppe
University of California, Irvine School of Law

Emily S. Taylor Poppe is Professor of Law and (by courtesy) Professor of Sociology at the University of California, Irvine School of Law. She is also Faculty Director of the UCI Law Initiative for Inclusive Civil Justice and a Faculty Affiliate of the UCI Law Center for Empirical Research on the Legal Profession. She holds a PhD in Sociology from Cornell University, a JD from Northwestern Pritzker School of Law and AB degrees in Public Policy and Spanish from Duke University. Her research centers on inequalities in access to civil justice and she has investigated variation in both formal and informal access to legal counsel, the effect of legal representation on case outcomes, and the role of professional regulation, legal technology, and institutional design in enhancing access to justice.

Professor Noel Semple
Associate Professor
Windsor Law

Noel is Associate Professor at the University of Windsor Faculty of Law. He teaches and writes in the areas of access to justice, legal ethics, and civil procedure. His work asks how the law and legal institutions work in real life. It also aspires to improve the ability of law and legal institutions to create justice. Empirical research (quantitative and qualitative) and policy analysis are key tools in his scholarship. Noel draws upon and seek to contribute to the law and society and empirical legal studies traditions. Noel's publications can be found at www.noelsemple.ca.

Professor Carroll S. Seron
Professor Emerita
University of California, Irvine

Carroll Seron is Professor Emerita in the Department of Criminology, Law and Society with a courtesy appointment in the Department of Sociology at the University of California, Irvine. Carroll Seron studies the organizations and culture of the professions, including law, policing and engineering. Throughout her career, her research asked whether and to what extent organizations deliver services fairly, equitably and effectively. She was the lead researcher and co-author of "The Impact of Legal Counsel on Procedural Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment." [Law & Society Review. (2001) 35:419-434]. Seron has also published in Criminology, Work & Occupations, Annual Review of Sociology, Annual Review of Law and Social Sciences and American Sociological Review among other peer reviewed journals and law reviews. Carroll Seron is a former Editor of Law & Society Review, Volumes 42 to 44 and was President of the Law & Society Association from 2013-2015.

Professor Michele Statz
Assistant Professor
University of Minnesota Medical School

Michele Statz is an Assistant Professor at the University of Minnesota Medical School. She is also affiliated faculty with the University of Minnesota Law School and an Affiliated Scholar with the American Bar Foundation. Michele is an anthropologist of law and a leading empirical scholar in rural / Indigenous access

to justice. Her work has appeared in Law & Society Review, Law & Social Inquiry, Harvard Law & Policy Review, and American Journal of Public Health, among others, and has been generously funded by the National Science Foundation, American Bar Foundation, and JPB Foundation. Michele is also a member of the Legal Services Corporation Rural Justice Task Force and is a founding member of the Law and Rurality Collaborative Research Network.

Professor Jessica Steinberg
Professor of Law
The George Washington University Law School

Jessica Steinberg's research interests are in the areas of civil procedure, state courts, access to justice, and poverty law, with an emphasis on original empirical research. Her recent scholarship has appeared or is forthcoming in leading journals, including the Columbia Law Review, NYU Law Review, Georgetown Law Journal, Stanford Law Review, Harvard Law Review Forum, and UCLA Law Review, among others. Professor Steinberg has been named a Bellow Scholar for her research on lawyerless courts and is a former Chair of the Association of American Law Schools' Section on Poverty Law. Professor Steinberg teaches civil procedure and criminal procedure. Prior to this, she taught the Prisoner & Reentry Clinic, which performed groundbreaking work on behalf of prisoners and returning citizens. The clinic freed more than two dozen men from prison and terminated parole and supervised release for many more. The clinic developed the first-ever parole treatise for DC prisoners incarcerated in the federal Bureau of Prisons and regularly testified on bills to promote "second chance" laws for people with felony records. The clinic's work on clemency under President Obama's campaign to release nonviolent, low-level drug offenders was featured on the front page of the New York Times.

Professor Steinberg is a primary author of several bills to promote a fair criminal justice system in the District of Columbia, including legislation to create compassionate release for older prisoners, expand good time credits for people serving long terms of incarceration, and increase employment opportunities for individuals with criminal records. For her role in developing a Compassionate Release Clearinghouse to expand representation for prisoners during the COVID-19 pandemic, Professor Steinberg received the Wiley A. Brant Award for "dismantling injustice" from the Washington Lawyers' Committee for Civil Rights. Prior to joining the GW Law faculty, Professor Steinberg served as the Jay M. Spears Fellow at Stanford Law School, and an Equal Justice Works Fellow for the Legal Aid Society of San Mateo County. Professor Steinberg earned a BA

magna cum laude and Phi Beta Kappa from Barnard College and a JD from Stanford University.

Professor Kathryne M. Young
Associate Professor of Law
The George Washington University Law School

Kathryne M. Young is an Associate Professor of Law (with tenure) at the George Washington University Law School and is Secretary-elect of the Law & Society Association. She is also a former Assistant Professor of Sociology at the University of Massachusetts, Amherst and a former Access to Justice Scholar at the American Bar Foundation. She holds a JD and a PhD from Stanford University and has published sociolegal work in numerous law reviews and peer-reviewed journals, including California Law Review, Harvard Law Review, Law & Society Review, and Law & Social Inquiry.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

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

Plaintiffs-Appellees, : **22-1345**

-against-

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

Defendant-Appellant :

----------X

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL CENTER FOR ACCESS TO JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES UPSOLVE, INC. AND REV. JOHN UDO-OKON

David Udell
Lauren A. Jones
National Center for Access to Justice
150 West 62nd Street
New York, NY 10023
dudell@fordham.edu

Bruce A. Green
Louis Stein Center for Law and Ethics
150 West 62nd Street
New York, NY 10023
bgreen@fordham.edu

Attorneys for Amicus

The National Center for Access to Justice ("NCAJ"), proposed Amicus Curiae, is a non-profit organization based at Fordham University School of Law that is committed to expanding access to justice: the ability of people to learn their rights, assert legal claims and defenses, and obtain a fair resolution under the rule of law. NCAJ uses rigorous research and analysis to highlight barriers that prevent people from accessing justice, and to persuade policymakers to embrace solutions that eliminate those barriers.

The barrier at issue here is New York's unauthorized-practice-of-law ("UPL") regime that prohibits, on pain of criminal sanction, Plaintiff-Appellee Reverend John Udo-Okon from speaking with members of his community in the South Bronx about how to address their concerns when facing debt-collection suits. All the Reverend seeks to do is help parishioners and others in his community deal with debt-collection suits by providing free advice about how to complete an official, state-drafted, answer form. But unless this Court affirms the injunction entered below, the UPL laws bar the Reverend from having those critically important conversations.

NCAJ respectfully requests that the Court grant it leave to file the annexed Brief of *Amicus Curiae* in Support of Reverend John Udo-Okon and Upsolve, Inc., the Plaintiffs-Appellees, pursuant to Federal Rule of Appellate Procedure 29. NCAJ's participation as amicus is warranted for the following reasons:

1. NCAJ actively supports the steadfast work of legal services organizations in their efforts to protect the civil legal rights of low-income persons. Indeed, NCAJ also has long supported the movement to establish a right to counsel in civil legal matters in which fundamental rights are at stake. But, recognizing that there is not yet a civil right to counsel in most categories (including in debt litigation), and that there are not enough free civil legal aid lawyers to meet the level of unmet need in our society (including in debt litigation), NCAJ has also long studied and supported alternate means of providing limited legal advice when, as is all too often the case, counsel is unavailable.

2. NCAJ proposes to submit the annexed amicus brief to inform the Court about the importance of allowing community members to discuss with Reverend Udo-Okon (and others who also receive training from Upsolve) how to respond to debt litigation. NCAJ believes that absent this critically important opportunity for speech, many debt-collection defendants would have nowhere to turn for the assistance they need.

3. NCAJ has conducted research and written a report about how social services providers (like the Reverend) embedded in low-income communities are stymied in their efforts to communicate with residents about their pressing legal problems by the threat of criminal penalty from UPL laws. *See* NATIONAL CENTER FOR ACCESS TO JUSTICE, "WORKING WITH YOUR HANDS TIED BEHIND YOUR

BACK": NON-LAWYER PERSPECTIVES ON LEGAL EMPOWERMENT (2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf. NCAJ's proposed amicus brief is an outgrowth of this work and its other initiatives to ensure that vulnerable people in our society are not prevented by UPL prohibitions from obtaining the basic assistance they need to protect their legal rights. *See Legal Empowerment*, NATIONAL CENTER FOR ACCESS TO JUSTICE, https://ncaj.org/tools-for-justice/legal-empowerment. (last visited, Jan. 9. 2023).

4. Of late, NCAJ has focused on the flood of debt-collection cases in the state courts and on the problems that creates for individuals, communities, and the courts themselves. The research is clear: debt-collection defendants often have defenses that are never raised, including that an alleged debt does not exist, that the wrong amount is sought, that an incorrect person has been sued, that the action is time-barred, or that the defendant was not properly served. *See, e.g.*, PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 17 (2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts; LEGAL AID SOCIETY ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS, 8–10, 26 n. 91 (2010), http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-

DECEPTION.pdf; HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR, 28-31 (2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor. We are currently analyzing aspects of debt-collection-litigation policy that unfairly disadvantage vast numbers of people facing debt-collection lawsuits, including the various causes of astronomical default rates (as high as 88% in New York City). *See* Andy Newman, *They Need Legal Advice on Debts. Should it Have to Come from Lawyers?,* N.Y. TIMES (Jan 25, 2022), https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html.

5. Given its mission to expand access to justice, NCAJ has a significant interest in ensuring that New York City residents facing debt-collection lawsuits can speak freely with individuals in their communities who hold their trust, such as Reverend Udo-Okon, about how to fill in the blanks in an Answer form created by the New York court system for lay people. Absent such assistance many people will continue, unnecessarily, to face the consequences of debt-collection lawsuits without any help at all.

6. For these reasons, NCAJ seeks leave to file the enclosed amicus brief urging affirmance of the order of the Hon. Paul Crotty, below, preliminarily enjoining enforcement of the New York's UPL rule, as applied to the specific facts

of this case, against the Reverend Udo-Okon, Upsolve and others it would train.

Dated: January 11, 2023

New York, New York

/s

David Udell
Lauren A. Jones
National Center for Access to Justice
150 West 62nd Street
New York, NY 10023
dudell@fordham.edu

Bruce A. Green
Louis Stein Center for Law and Ethics
150 West 62nd Street
New York, NY 10023
bgreen@fordham.edu

Attorneys for Amicus

PROPOSED *AMICUS* BRIEF

22-1345

United States Court of Appeals

for the

Second Circuit

UPSOLVE, INC., REV. JOHN UDO-OKON,
Plaintiffs-Appellees,

- v. -

LETITIA JAMES, in her official capacity
as Attorney General of New York,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE*, NATIONAL CENTER FOR ACCESS TO JUSTICE, IN SUPPORT OF PLAINTIFFS-APPELLEES UPSOLVE, INC. AND REVEREND JOHN UDO-OKON

David Udell
National Center for Access to Justice
150 West 62nd Street
New York, NY 10023

Bruce A. Green
Louis Stein Center for Law and Ethics
150 West 62nd Street
New York, NY 10023

Attorneys for Amicus

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Center for Access to Justice is not owned by any parent corporation. No publicly held corporation owns any stock in *amicus*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE DISTRICT COURT PROPERLY ENJOINED APPLICATION OF THE UPL LAWS TO THE REVEREND'S DISCUSSIONS WITH COMMUNITY MEMBERS ABOUT COMPLETING COURT-DESIGNED ANSWER FORMS IN DEBT CASES. . 7

A. There is Urgent Demand for the Advice the Reverend Udo-Okon Could Provide to People in his Community 8

B. The Record Shows that, But for New York's UPL Prohibition, Reverend Udo-Okon Would Provide Free Advice to Many Members of his Community 14

C. Claims about the Complexity of Legal Practice Miss the Point that the Reverend, with Upsolve's Support, Could Help Many People 16

II. THERE IS GROWING AWARENESS OF THE VALUE OF RELYING ON PEOPLE WHO ARE NOT LAWYERS TO PROVIDE BASIC LEGAL ADVICE 18

A. The Role of People Who are Not Lawyers is Recognized in the Caselaw 18

B. People Who are Not Lawyers Already Play Important Roles in the Federal and State Systems 20

C. In Regulatory Sandboxes and Other Initiatives States are Learning that People who are Not Lawyers Can Successfully Provide Individualized Assistance on Certain Legal Matters 22

III. APPLIED TO PLAINTIFFS-APPELLEES, THE UPL RULE THAT PROHIBITS LAY PROVISION OF LEGAL ADVICE IS NOT NARROWLY TAILORED 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Pages**

Hackin v. Arizona,
389 U.S. 143 (1967) 19

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,
564 U.S. 721 (2011) 25

People v. Alfani,
227 N.Y. 334 (1919).....19, 25, 26

Turner v. Rogers,
564 U.S. 431 (2011) 18

Regulations

20 C.F.R. § 404.1705 20

42 C.F.R. § 435.908(b).....20

42 C.F.R. § 435.908(b)(3) 20

42 C.F.R. § 435.908(c).....20

N.Y. Comp. Codes R. & Regs. tit. 12, § 460.5 21

N.Y. Comp. Codes R. & Regs. tit. 12, § 460.6 21

N.Y. Comp. Codes R. & Regs. tit. 12, §§ 302-1–302-2.....22

Other Authorities

76 Fed. Reg. 45184, 45186-89 (July 28, 2011).....20

Aebra Coe, "Where 5 States Stand on Nonlawyer Practice of Law Regs," *Law360 (Feb. 5, 2021)* 23

Andy Newman, *They Need Legal Advice on Debts. Should it Have to Come from Lawyers?, N.Y. Times (Jan 25, 2022)*.....2, 8, 12

Attorney Access, National Center for Access to Justice.....2

Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law* (Nov. 7, 2022), 91 *Fordham L. Rev. (2023)*.....26

D. James Greiner, Dalié Jiménez & Lois Lupica, *Self-Help, Reimagined*, 92 Ind. L.J., 1119 (2017) 12

Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (2016).....9

Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (2010).....9

Legal Empowerment, *National Center for Access to Justice*.....3

Legal Paraprofessional Program, *Ariz. Cts*.....23

Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 9 (2022) 11, 12, 13

National Center for Access to Justice, "*Working With Your Hands Tied Behind Your Back": Non-Lawyer Perspectives on Legal Empowerment (2021)*.....3, 15

News Release, Arizona Supreme Court Administrative Office of the Courts, Arizona Supreme Court Leads Nation in Tackling Access to Justice Gap with New Tier of Legal Services Providers (December 9, 2021) 22

Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York 55 (2022).....9

Pew Charitable Trusts, How Debt Collectors Are Transforming the Business of State Courts 8 (2020) ..... *passim*

Unemployment Insurance Review Board, Important Information About What Lawyers or Representatives Can Charge Clients 21

What We Do, *Off. of Legal Servs. Innovation* 23

"Answering a Case" in *COURT Help, New York State Unified Court System* 5

"State Scores and Rankings" in *Justice Index*, *National Center for Access to Justice* 1

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Center for Access to Justice ("NCAJ") is a non-profit organization based at Fordham University School of Law that brings rigorous research and analysis to the task of expanding access to justice in America.[1] We define access to justice as the ability of people to learn about their rights, assert their legal claims and defenses, and obtain a fair resolution under the rule of law.

NCAJ advocates for policies such as requiring use of plain language in courts, assuring quality interpreting and translating services, providing notice of the right to accommodations for disabilities, and deploying innovative technologies such as e-filing. To that end, NCAJ collects, analyzes and publishes data, researches and writes reports, convenes experts, and engages with reformers and regulators, including through formal comment on proposed regulatory and legislative reform. Our flagship project, the Justice Index, analyzes and ranks states on their adoption of select best policies for assuring access to justice. *See* "State Scores and Rankings" in *Justice Index*, NATIONAL CENTER FOR ACCESS TO JUSTICE, https://ncaj.org/state-rankings/2021/justice-index (last visited Jan. 10, 2023). This

[1] Upsolve's co-founder, Rohan Pavuluri, is a member of NCAJ's Board of Directors. Neither he nor Upsolve's counsel authored this brief in whole or in part. No money was contributed from any source (including Plaintiffs or their counsel), to fund the preparation or submission of this brief.

ranking system has spurred several states to eliminate or lower barriers in order to increase access to justice.

Our most recent project involves an extensive study of laws, rules, and policies that States should adopt to increase fairness in debt-collection litigation. Debt-collection cases account for approximately 25% of all civil cases filed in state courts. *See,* PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 8 (2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts ("Pew Report"). NCAJ's analysis focuses on the factors that drive the debt-collection default judgment rate, which averages close to 70% nationwide, *see id.* at 2, and is as high as 88% in New York City. *See* Andy Newman, *They Need Legal Advice on Debts. Should it Have to Come from Lawyers?,* N.Y. TIMES (Jan 25, 2022), https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html. When low-income people face debt-collection litigation without basic advice, massive injustice results.

Thus, NCAJ has long advocated for making counsel available to those who are unable to afford it when fundamental rights are at stake. For example, the Justice Index reports each state's count of civil legal aid lawyers, and each state's progress in establishing a right to counsel in certain civil cases. *See Attorney Access,* NATIONAL CENTER FOR ACCESS TO JUSTICE, https://ncaj.org/state-

rankings/justice-index/attorney-access (last visited, Jan. 10, 2023). While the effort to encourage states to fund more civil legal aid lawyers has gained traction, increased public funding of civil legal aid lawyers is unlikely to substantially increase the number of lawyers for people facing debt-collection cases.

Even assuming optimistically that governments will fund a substantial expansion of civil legal services, debt-collection litigation still would present a crisis for many low-income people who, for a variety of reasons, never seek counsel. *See infra* at 12-13. Thus, NCAJ has encouraged policymakers to reevaluate sweeping prohibitions that prohibit the unauthorized practice of law to ensure that UPL laws do not prevent low-income people facing legal problems from obtaining even the basic advice they sometimes seek from trusted community members. *See Legal Empowerment*, NATIONAL CENTER FOR ACCESS TO JUSTICE, https://ncaj.org/tools-for-justice/legal-empowerment (last visited, Jan. 10, 2023).

NCAJ believes that people facing debt-collection lawsuits should be able to talk about these suits with social services providers in their communities, known and trusted by the residents, and able to answer the kinds of questions that routinely surface in consumer-debt cases. In a recent report, NCAJ interviewed social services professionals about the impact of the UPL laws on their efforts to help low-income people. *See* NATIONAL CENTER FOR ACCESS TO JUSTICE, "WORKING WITH YOUR HANDS TIED BEHIND YOUR BACK": NON-LAWYER

PERSPECTIVES ON LEGAL EMPOWERMENT (2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf. These individuals reported that their efforts to help residents with simple legal problems are often frustrated by broad UPL laws, such as those at issue here. *See id.* at 12-15.

NCAJ submits this brief as *amicus curiae* to offer its perspective as an organization dedicated to expanding access to justice for low-income communities. Specifically, NCAJ supports Reverend Udo-Okon's efforts to speak with his parishioners and neighbors, with the benefit of Upsolve Inc.'s training, about how to complete a court-created form designed by the New York Courts to assist lay people in answering debt-collection claims.

SUMMARY OF ARGUMENT

Consumer debt litigation is often catastrophic for people without access to advice about how to solve their legal problems. Reverend Udo-Okon with the support of Upsolve, Inc. ("Upsolve"), seeks to provide free, limited advice to people in his South Bronx community. He wants to speak with members of his community who face debt-collection litigation about how to fill in the blanks on a court-designed Answer form. The Court below correctly enjoined New York from banning this important speech through enforcement of its UPL laws against

Reverend Udo-Okon and against Upsolve, which seeks to train the Reverend and others like him about how best to deliver that advice.

In seeking reversal of that order, the Attorney General, and the Amici supporting Defendant-Appellant, downplay the demand for limited advice from trusted community figures about how to respond to debt-collection lawsuits as merely "speculative." Their briefs also incorrectly speculate that Upsolve's program will harm, rather than help, those low-income community residents currently left to navigate debt-collection cases entirely on their own. In fact, the record shows that, but for the application of the UPL laws, the Reverend would be providing advice to many members of his community, thereby ameliorating the disastrous impact that debt-collection claims have on unrepresented people.

The Attorney General and Amici likewise portray debt-collection law as complicated, incomprehensible to lay people, and understandable only by lawyers. But that characterization is inaccurate. The court system itself publishes a pro-se fill-in-the-blank Answer form. This form and the court-provided instructions for completing it, are posted on the New York Courts' website under the heading "Find the Help You Need to Represent Yourself in NY Courts." *See* "Answering a Case" in COURT HELP, NEW YORK STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/Courthelp/MoneyProblems/answer.shtml (last accessed Jan. 10, 2022). The New York Courts thus acknowledge both that people routinely

navigate these cases without a lawyer, and that providing basic help to them is necessary.

Not every debt-collection matter is simple. To the contrary, Upsolve's training manual requires its volunteers to refer more complex matters to legal services providers. (J.A. 45, 48, 51, 53, 57.) Yet, most cases are relatively straightforward and low-income defendants would benefit greatly from advice from a trained lay person such as the Reverend about how to respond to a complaint, including how to complete and file the court-approved answer form. Many who find the forms daunting can complete them successfully with a modicum of informed advice. But without access to advice from the Reverend and those like him, many low-income debt-defendants inevitably will be left confused, and potentially stymied upon being served with a debt-collection complaint.

Everyone agrees that New York has a compelling interest in protecting consumers. The Attorney General is justified in enforcing UPL laws to protect the public from laypeople falsely holding themselves out as lawyers, and in regulating those who charge money for giving legal advice. But that rationale does not apply here, where there is no deception of any kind, and none of the integrity-risking incentives the profit motive can foster. Nor would enforcement of UPL laws against the Reverend protect members of his community from relying on uncompensated but harmful advice. The Reverend wishes to provide his free and

well-informed advice to members of his community who know and trust him, only on the narrow topic of how to complete a court-designed form. His information and advice will reach people who cannot afford or for other reasons might not obtain a lawyer's advice. Common sense suggests, and experience shows, that allowing community members to be educated and then talk to each other in this way will go a long way toward bridging the justice gap for many debt-collection defendants.

Applying New York's UPL prohibitions to the speech of Reverend Udo-Okon and Upsolve violates the First Amendment because the prohibition is not narrowly tailored to serve a compelling consumer-protection interest. In fact, as applied to Plaintiffs-Appellees, the law *undermines* that interest by preventing Bronx residents faced with debt-collection litigation from obtaining help they seek from the Reverend even though they would benefit from his advice were he permitted to provide it. The District Court therefore properly enjoined application of the UPL laws to the Reverend and Upsolve.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED APPLICATION OF THE UPL LAWS TO THE REVEREND'S DISCUSSIONS WITH COMMUNITY MEMBERS ABOUT COMPLETING COURT-DESIGNED ANSWER FORMS IN DEBT CASES.

Judge Crotty correctly found that Reverend Udo-Okon and Upsolve have standing to bring this action because potential enforcement of New York's UPL

prohibition against them poses a cognizable injury that the requested injunction would redress. (J.A. 181-84.) Seeking to avoid scrutiny on the merits, the Attorney General and the Amici challenge this threshold finding, arguing that one can only speculate that there are low-income people in the Reverend's community who would seek his help in completing the court-designed Answer if the UPL laws did not prohibit those discussions. Appellant's Brief ("App. Br.") at 32-35; Brief of Amici Curiae in Support of Defendant-Appellant ("Am. Br.") at 31-32. That argument ignores both the record and reality.

A. There is Urgent Demand for the Advice the Reverend Udo-Okon Could Provide to People in his Community

Nationwide, debt-collection cases comprise approximately one quarter of all civil state court filings. *See* Pew Report at 8. The plaintiffs in these cases are either creditors or bulk debt buyers that almost always have lawyers, whereas 90% of defendants are unrepresented. *Id.* at 13. This imbalance is even more extreme in New York, where approximately 95% of consumer debt defendants lack counsel. *See* Andy Newman, *They Need Legal Advice on Debts. Should it Have to Come from Lawyers?,* N.Y. TIMES (Jan 25, 2022), https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html (96% of consumer credit defendants are unrepresented in New York City, and 97% are unrepresented outside of the City). Lack of legal assistance for debtor defendants results in terrible injustice: the

overwhelming majority of cases end in default judgment because the defendants never participate, even though many of the cases are meritless.

> Hundreds of thousands of consumer credit matters are filed annually in New York, with a significant majority of the cases being decided on default. In a high percentage of cases, consumers are being sued for debts they do not owe or for which creditors have no proof to establish their right to collect the debt. Creditors and their attorneys' practices depend on default judgments. . .

PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 55 (2022), https://www.nycourts.gov/LegacyPDFS/accestojusticecommission/22_ATJ-Comission_Report.pdf. *See also* Pew Report at 15, 17; HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR, 28–31 (2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor; LEGAL AID SOCIETY ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS, 8–10, 26 n. 91 (2010), http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf. These widespread defaults have created a crisis in low-income communities.

Yet in 71 pages of briefing, the Attorney General never mentions, let alone addresses, the default rate in New York debt-collection litigation and never once acknowledges the justice gap faced by defendants left to defend debt-collection suits without the benefit of any individualized advice on how to proceed. Her

arguments on appeal thus are entirely divorced from the real-world catastrophe facing New York's low-income debt-collection defendants.

For their part, the Amici acknowledge "the distressingly high rate of default judgments" and admit that "the great majority of defendants in debt collection lawsuits do not benefit from full representation" and that their own organizations provide "advice and pro se assistance," Am. Br. at 33-34, yet incongruously claim there is no need for the free lay advice the Reverend seeks to provide. *Id.* at 33. They assert that "many" of the Amici organizations "rarely, if ever" turn away a low-income person seeking representation in a debt-collection case, noting that when they do, they refer such persons to another legal services organization. *Id*. at 34. They also assert there is no need for the advice the Reverend seeks to provide because defaults are primarily caused by "sewer service" meaning that defendants are unaware they need to answer a complaint and thus unable to secure the services offered by Upsolve-trained volunteers. *Id*. at 33.

Neither assertion is correct. First, the assertion that the legal services bar rarely if ever turns away a debt-collection defendant seeking assistance paints an incomplete picture.[2] While many legal service providers, often with insufficient resources, do an admirable job providing counsel to people, they cannot serve all

[2] The Amici provide no data on the number of debt-collection defendants they represent, or other support for this assertion.

who seek their assistance, and there are many more who never make it to the door of legal aid, for a variety reasons.[3] The Legal Services Corporation ("LSC") – the umbrella funding organization for civil legal aid organizations across the country, including the Amici organization Legal Services for New York City – has documented that legal services organizations must turn away 49% of those who come to them for legal assistance. LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2022) ("Justice Gap Survey"), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1. Moreover, that report concludes that those who seek out legal assistance are only the tip of the iceberg of those in need. "Low-income Americans sought legal help for 19% of their collective civil legal problems," *id*. at 44, and the number was even lower (14%)

[3] There is no support in the record, and the Amici cite none, for their claim that "sewer service" is the *primary* cause of defaults. "Selection bias" offers a possible explanation insofar as people who learn of being sued only when their wages are garnished are likely to seek legal services counsel, especially if previously unaware of an alleged debt. Moreover, the potentially large population of people with means above the civil legal aid eligibility cut off may never seek out counsel at a legal aid office that limits eligibility to those with less means. Sewer service has also been the target of concerted efforts by regulators, legislators, legal service providers (including some of the Amici) that have reduced its incidence in New York since its height in the 2008 financial crisis. *See* "Public Interest Lawyers are Key in Passage of Landmark Legislation to Stem 'Sewer Service' in New York City," Clearinghouse Review Journal of Law and Poverty, Vol 44, Nos. 7-8 (Nov.-Dec. 2010), http://mobilizationforjustice.org/wp-content/uploads/Public-Interest-Lawyers-Are-Key-in-Passage-of-Landmark-Legislation-to-Stem-Sewer-Service-in-NYC.pdf.

for those experiencing consumer legal problems. *Id*. at 45.[4] LSC's empirical assessment is consistent with data that shows that only 5% of debt defendants are represented, and that 88% of them default. *See id; see also* Newman, *supra*, 8. Unfortunately, there is no support for the Amici's suggestion that their organizations are meeting the legal needs of New Yorkers facing debt-collection lawsuits.

Second, many factors other than "sewer service" cause the extremely high default rate in debt-collection cases. Academic studies of interventions to reduce the default rate posit that defaults result from "a variety of cognitive, emotional, and behavioral challenges, ranging from immobilizing feelings of shame, guilt, or hopelessness to lack of self-agency as well as failures in plan making and plan implementation." D. James Greiner, Dalié Jiménez & Lois Lupica, *Self-Help, Reimagined*, 92 IND. L.J., 1119, 1125 (2017). Other research shows that some defendants are intimidated by the legal system or too embarrassed by their financial circumstances to seek out a lawyer or defend the lawsuit. Some, particularly when sued by a debt-buyer rather than the original creditor, do not

[4] LSC's 2023 funding request bears out how few people facing debt-collection litigation it is actually able to serve, noting that the 2022 Justice Gap Survey found that 44% [of low-income Americans] experienced at least one money or debt-related civil legal problem in the past year but that in 2020, LSC's grantees handled only 69,000 such cases *nationwide*. *See* LSC 2023 Budget Request, 40, https://lsc-live.app.box.com/s/ip5pqq3dht40qvrl6hxz3l68fnivdssg.

recognize the plaintiff and do not understand the need to respond. Others do not believe that they will be treated fairly in the legal system. Many debt defendants also face practical obstacles such as language barriers or lack of internet access, childcare, time off from work, or transportation, that deter or prevent them from seeking legal advice or responding to debt-collection complaints. *See* Pew Report at 16 (citing practical realities in consumers' lives; a sense of futility, confusion or intimidation; non-recognition of the plaintiff (when a debt-buyer rather than the original creditor brings suit), and lack of notice as contributors to the default rate).

LSC's own research substantiates this analysis. Its 2022 Justice Gap Survey analyzes why Americans with civil legal problems never seek help from a lawyer and identifies three principal types of barriers: Knowledge, attitudinal and cost. *See* Justice Gap Survey at 49. The data reveal a "low level of awareness" on the part of survey respondents that lawyers can help, *id.*, and significant doubt that the legal system will treat them fairly or help protect their rights. *Id.* at 50-51. Fifty-three percent of those polled by LSC expressed that they did not know they could find a lawyer they could afford. *Id.* at 52.

The Reverend and Upsolve of course will not be able to help all defaulting debtor defendants or solve the default crisis in debt-collection cases. Yet, for individuals served with debt-collection complaints who might otherwise default for one or more of these reasons, advice from Reverend Udo-Okon or other Upsolve-

trained volunteers would help them make more informed decisions and potentially avoid default if the UPL laws did not prohibit such advice. Given this reality, the District Court correctly concluded that "Plaintiffs' program does not need to reach every potential client to strengthen the judicial system." (J.A. 204.)

B. The Record Shows that, But for New York's UPL Prohibition, Reverend Udo-Okon Would Provide Free Advice to Many Members of his Community

The record below reflects the reality described above. The Reverend's declaration makes clear that, but for the UPL rules, he would be speaking, without charge, to his parishioners and neighbors about how to prepare their answers in response to debt-collection lawsuits. He would base these conversations on Upsolve's training and would gear them towards filling out the court-provided fill-in-the-blank Answer form.

The Reverend's declaration recounts his firsthand experiences with members of his community who cannot get help from attorneys: "[T]here also are not many consumer lawyers based in my neighborhood, and there are very few lawyers who reflect the diversity of my community." (J.A. 81.) He has sworn that "people frequently come to [him] with legal problems they cannot solve on their own," and that when he refers them to agencies for legal assistance, they report that "they are put on long waiting lists before even receiving legal advice, even though in most cases their situations are quite time sensitive and having to wait means losing the

ability to access their rights." (J.A. 81-82.) He explains that because "members of my community cannot afford to pay for a lawyer, cannot access free lawyers quickly enough, and cannot understand the system of their own, they are left without any guidance, and often without any ways to move forward." (J.A. 82.) Noting that these problems are "especially severe" when it comes to debt-collection lawsuits, he explains that "[o]ne thing is consistent: People do not know what to do when they are sued on a debt and have nowhere to turn for help." (J.A. 82.) He concludes that "people seek advice [on how to respond to debt collection lawsuits] from me directly. However, due to New York's unauthorized practice of law regulations, I am unable to provide that advice for fear that I will be arrested or fined." (J.A. 83.)

The Reverend's experience is common. NCAJ's research shows that librarians, social workers, and other social services professionals are regularly approached by community members with basic legal questions but operate with the understanding that the UPL laws require them to turn those people and their basic legal questions away. See NATIONAL CENTER FOR ACCESS TO JUSTICE, "WORKING WITH YOUR HANDS TIED BEHIND YOUR BACK": NON-LAWYER PERSPECTIVES ON LEGAL EMPOWERMENT (2021), https://ncaj.org/sites/default/files/2021-06/NCAJ%20Working%20With%20Your%20Hands%20Tied%20Behind%20Your%20Back.pdf at 4, 10, 12–15. These social services professionals often have

language skills, education, relevant cultural knowledge, and most importantly, relationships of trust with community members – all factors that enable them to help people fill out forms, navigate websites, organize and synthesize evidence, and respond to their questions and requests for help. *See id.*

The unchallenged record evidence shows that Plaintiffs-Appellees have standing. The Reverend's declaration reflects the trust and confidence his community has in him and shows that when – not if – members of his community face debt-collection lawsuits in the future and turn to him for help, he is ready, willing, and able to offer them advice in answering those complaints.

C. Claims about the Complexity of Legal Practice Miss the Point that the Reverend, with Upsolve's Support, Could Help Many People

In an effort to support their contention that the law is too complicated to risk having the Reverend discuss court-designed pro se forms with the unrepresented residents of his community, Appellant and the Amici point to alleged errors in the initial training manual created by Upsolve. App. Br. at 16–18; Am. Br. at 7–14.[5] Even assuming the training materials are imperfect, these arguments distract from the reality that vulnerable people confronted by garden-variety collection claims typically face their adversaries without the benefit of any advice at all. Surely

[5] Plaintiffs-Appellees have responded to some of these critiques, *see* Plaintiffs-Appellees' Br. at 15-17, n 1. Moreover, Upsolve has provided a revised training manual to the District Court to reflect changes in the law. *See* Letter from Upsolve, *Upsolve, Inc. v. James*, No. 22-cv-00627, ECF 89 (Dec., 2022).

individuals trying to use the form Answer will fare better if helped by a trained and trusted community member than if left to tackle it on their own.

The Attorney General offers no support for her warning that "Upsolve's nonlawyer advocates, incorrectly believing themselves to be experts, may readily and overconfidently misadvise clients who would have made better choices acting on their own." App. Br. at 77. NCAJ sees no basis for that hypothetical concern. We know already that people sued in debt-collection cases who lack access to counsel usually default. The Reverend, and others who work within low-income communities, bring literacy, interpersonal, and organizational skills to the task of helping people in their communities. With the additional training provided by Upsolve, advice about how to respond to a debt-collection suit provided by such community leaders plainly will leave low-income members of the community better off than if they are left to fend for themselves. Indeed, as Judge Crotty noted, a nonlawyer specifically trained on debt-collection issues who provides advice only on those issues might very well offer more useful advice than, say, a licensed patent lawyer with no experience with debt-collection litigation. (J.A. 202, n. 13.) (citing Brief of Amicus Curiae Rebecca L. Sandefur, ECF No. 38-1, at 21).

The salient point is that New York faces a crisis of astronomical default rates in debt-collection litigation. A major cause of those defaults is that low-income people often have no access to advice of any kind. NCAJ submits that the relevant

comparison is not between advice provided by trained nonlawyers and advice provided by lawyers; it is between advice from trained nonlawyers and *no advice at all*. The speculation that an error may occasionally occur is no basis for prohibiting a program in its entirety; nor does it justify a broad ban on speech affecting people with desperate needs when a more tailored regulatory approach could achieve the State's legitimate goals.

II. THERE IS GROWING AWARENESS OF THE VALUE OF RELYING ON PEOPLE WHO ARE NOT LAWYERS TO PROVIDE BASIC LEGAL ADVICE

There is growing acceptance that individuals who are not attorneys can provide important assistance to people who are encountering pressing legal needs.

A. The Role of People Who are Not Lawyers is Recognized in the Caselaw

The Supreme Court has acknowledged the importance of lay assistance in certain legal matters. For example, in *Turner v. Rogers*, 564 U.S. 431 (2011), the Court held that a parent facing civil contempt for failure to pay child support did not automatically have a constitutional right to appointed counsel, even though a contempt finding might result in incarceration. *Id.* at 448. Justice Breyer justified this result in part by noting that "sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker)" is sufficient to protect against unwarranted deprivations of liberty. *Id.* This rationale reflects the observation that Justice Douglas made more than fifty years ago that equal justice

may depend on nonlawyers' volunteer efforts not unlike those that Plaintiffs-Appellees offer here:

> It may well be that until the goal of free legal assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning, charitable assistance of laymen. On the contrary, for the majority of indigents, who are not so fortunate to be served by neighborhood legal offices, lay assistance may be the only hope for achieving equal justice at this time.

Hackin v. Arizona, 389 U.S. 143, 152 (1967) (Douglas, J., dissenting from dismissal for lack of federal question).

The New York Court of Appeals also has acknowledged the reality that people discuss legal problems with their friends and neighbors. Although its decision in *People v. Alfani*, 227 N.Y. 334 (1919), is often quoted for its observation that UPL laws "protect the public from ignorance, inexperience and unscrupulousness," *id.* at 339, the Court recognized that UPL laws must have some outer limit, noting that people are free to represent themselves. *Id.* at 341. As pertinent here, the Court then observed that "[p]robably [a person] may ask a friend or neighbor to assist him" with a legal matter. *Id.* As explained below, the UPL law has since been interpreted much more strictly. But the notion that the state could prevent a person from sharing her views about a legal matter with her neighbor defies common sense as well as the First Amendment.

B. People Who are Not Lawyers Already Play Important Roles in the Federal and State Systems

Qualified nonlawyers have a proven track record of successfully advising people on a variety of legal issues. In federal and state agency proceedings, they routinely provide a broad array of individualized legal services.

Nonlawyers have long provided legal assistance in agency settings. For example, Medicaid regulations preempt state UPL laws, requiring states to "allow individual(s) of the applicant or beneficiary's choice to assist in the application process or during a renewal of eligibility." 42 C.F.R. § 435.908(b). The services that lay people may provide include "helping individuals complete an application or renewal, working with the individual to provide required documentation, submitting applications and renewals to the agency, interacting with the agency on the status of such applications and renewals, [and] assisting individuals with responding to any requests from the agency." 42 C.F.R. § 435.908(c). An applicant or beneficiary may also be represented at any hearing before the agency by counsel, or by a relative, friend, or other spokesman. 42 C.F.R. § 435.908(b)(3).[6]

[6] In addition to permitting unpaid lay representatives to assist claimants seeking Social Security disability insurance benefits, 20 C.F.R. § 404.1705, the Social Security Administration also permits the representatives to seek compensation if they meet various educational and training standards, maintain professional liability insurance, and pass a criminal background check. 76 Fed. Reg. 45184, 45186-89 (July 28, 2011), http://www.gpo.gov/fdsys/pkg/FR- 2011-07-28/pdf/2011-19026.pdf.

In New York, qualified individuals may represent clients in Unemployment Insurance appeals and before the Workers Compensation Board. The State Unemployment Insurance Appeals Board maintains a list of "registered representatives" who may present a claimant's case, introduce evidence, cross-examine opposing parties and their witnesses, and give a closing argument. Such nonlawyer representatives must be of good moral character, have a high school degree or its equivalent, and have at least 16 hours of relevant work or academic experience. The nonlawyer may have to pass an exam, and must submit a resume and be interviewed by the Board. The applicant must also indicate whether she intends to engage full-time in representing claimants for a fee, and upon certification must obtain a surety bond of $500. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 460.5. The Board controls and supervises the compensation that both lawyers and nonlawyers may charge for representing claimants. Registered representatives may charge a fee only if their client has won an award. N.Y. Comp. Codes R. & Regs. tit. 12, § 460.6; UNEMPLOYMENT INSURANCE REVIEW BOARD, IMPORTANT INFORMATION ABOUT WHAT LAWYERS OR REPRESENTATIVES CAN CHARGE CLIENTS, https://uiappeals.ny.gov/system/files/documents/2019/06/UIAB_25%20Claimant%20Flyer%2006-19%20%28003%29.pdf (last visited Jan. 10, 2023).

Similarly, the New York State Workers' Compensation Board licenses nonlawyers to practice before it. Applicants must be at least 18 years old, have a high school diploma or its equivalent, and reside in or have a regular place of business in New York. They must have knowledge of the relevant law and regulations, pass a written exam, and submit to possible oral review by the Board. N.Y. Comp. Codes R. & Regs. tit. 12, §§ 302-1–302-2. In these administrative settings, nonlawyers, both trained and untrained, have for years provided valuable guidance and support to people about legal matters.

C. In Regulatory Sandboxes and Other Initiatives States are Learning that People who are Not Lawyers Can Successfully Provide Individualized Assistance on Certain Legal Matters

Recognizing the need to empower more people to provide advice responsive to unmet legal needs, several states have begun to develop new roles for providing advice outside of the administrative setting. For example, Arizona has established an explicit exemption to its UPL laws permitting licensure of "legal paraprofessionals" ("LPs") to provide a broad array of legal services and advice, including about debt-collection litigation. LPs must meet eligibility requirements including core-skills and subject-matter examinations, satisfy education and experience combination requirements, and follow a code of conduct. *See* News Release, Arizona Supreme Court Administrative Office of the Courts, Arizona Supreme Court Leads Nation in Tackling Access to Justice Gap with New Tier of

Legal Services Providers (December 9, 2021), https://www.azcourts.gov/Portals/201/120921LSP.pdf; *see also Legal Paraprofessional Program*, ARIZ. CTS, https://www.azcourts.gov/Licensing-Regulation/Legal-Paraprofessional-Program (last visited Jan. 10, 2022). Similarly, Utah has created a "regulatory sandbox" for which the Office of Legal Services Innovation within the Utah Supreme Court reviews and approves or disapproves of applications for experimental approaches to the provision of legal services (including by nonlawyers) that would otherwise be prohibited under the State's UPL laws. *See What We Do*, OFF. OF LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/about/what-we-do/. California, New Mexico and Illinois are currently exploring potential changes to UPL laws that would increase opportunities for nonlawyers to provide certain types of legal advice. *See* Aebra Coe, "Where 5 States Stand on Nonlawyer Practice of Law Regs," LAW360 (Feb. 5, 2021), https://www.law360.com/access-to-justice/articles/1352126/where-5-states-stand-on-nonlawyer-practice-of-law-regs.[7]

[7] Evaluation of the new models is ongoing, but these programs have been largely successful. In *Legal Innovation After Reform: Evidence from Regulatory Change,* the authors found: "few reported complaints against service providers in Arizona or Utah," and explained that "Data and information reported by Utah and Arizona regulators indicate that authorized entities do not appear to draw a substantially higher number of consumer complaints, as compared to their lawyer counterparts. In particular, Utah's June 2022 data reported one complaint per 2,123 services delivered, and Arizona has received no complaints. This is generally on par with the number of complaints lodged against lawyers." DAVID FREEMAN ENGSTROM,

Arguing, as the Attorney General does, that nothing short of a law degree and admission to the bar can qualify a person to help fill out a court-drafted, one-page form ignores the reality that nonlawyers already commonly provide far more extensive and involved advice on legal matters – in some cases before New York State agencies. The Attorney General's stance is tantamount to arguing that a medical degree and four-year residency is required for an individual to administer CPR, or perform the Heimlich maneuver. Lay people with minimal training save thousands of lives each year because they happen to be where a person needs urgent medical care. Trained nonlawyers like the Reverend can provide free advice that helps address an urgent need in his community.

III. APPLIED TO PLAINTIFFS-APPELLEES, THE UPL RULE THAT PROHIBITS LAY PROVISION OF LEGAL ADVICE IS NOT NARROWLY TAILORED

New York has a compelling interest in enforcing its consumer protection laws, including its UPL regime. But where, as here, such enforcement prohibits speech on the basis of its content, it violates the First Amendment unless the Government proves that the restriction furthers a compelling interest and is

---

LUCY RICCA, GRAHAM AMBROSE, & MADDIE WALSH, LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE 7, Stanford Law School Deborah L. Rhode Center on the Legal Profession (Sept. 27, 2022), https://law.stanford.edu/publications/legal-innovation-after-reform-evidence-from-regulatory-change/.

narrowly tailored to achieve that interest. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

No one questions New York's interest in enforcing UPL laws to protect the public from laypeople falsely holding themselves out as lawyers or otherwise seeking to profit from giving legal advice. Indeed, in the seminal case interpreting the UPL laws, the New York Court of Appeals repeatedly emphasized that the primary evil at which those laws were addressed was falsely posing as a lawyer or otherwise making a business of giving legal advice: "To make it a business to practice as an attorney-at-law not being a lawyer is the crime. Therefore, to prepare instruments and contracts by which legal rights are secured and to hold oneself out as entitled to draw and prepare such [documents] as a business is a violation of the law." *Alfani*, 227 N.Y. at 338; *see also id.* at 339 ("'to practice as an attorney-at-law' means to do the work, as a business, which is commonly and usually done by lawyers in this country"); *id.* at 341 (distinguishing portions of the UPL statutes that permitted lay people to appear in certain courts not of record, in part because such cases "are seldom frequent enough to make it a business").[8]

[8] Although arguably dicta (because Alfani was a nonlawyer who had "for a long period of time drawn legal papers and instruments for hire and held himself out to the public as being in that business," 227 N.Y. at 335-36), the opinion does state that providing any "advice to clients and all actions taken for them" in legal matters constitutes the practice of law. *Id*. at 338. As the Attorney General notes, that view has become the law. *See* App. Br. at 8 (citing cases holding that advice given to a particular person about a legal matter constitutes the practice of law).

To be sure, prohibiting *all* advice about *any* legal topic provided by *any* nonlawyer might achieve the State's interests in protecting consumers. But that approach cannot be squared with the narrow tailoring the First Amendment requires. No compelling state interest is closely served by forbidding the Reverend and other trained non-lawyer professionals from providing free, limited advice to members of their low-income communities about how to address a discrete, but significant legal problem.

More than a century ago in *Alfani*, the Court of Appeals observed that "[a]ll rules must have their limitations, according to circumstances and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. *Probably he may ask a friend or neighbor to assist him*." *Id*. at 341 (emphasis added). Despite the suggestion in *Alfani* that the prohibition on the unlicensed practice of law has practical limitations, New York continues to insist on a sweeping interpretation of the UPL laws. *See* Bruce A. Green, *Why State Courts Should Authorize Non-Lawyers to Practice Law* (Nov. 7, 2022), 91 FORDHAM L. REV. (2023), Fordham Law Legal Studies Research Paper No. 4270508, https://ssrn.com/abstract=4270508 ("over the past century, the state court has never clarified whether neighborly help in drafting legal documents falls on the right side of the line."). This litigation gave New York a chance to reconsider its approach; but the Attorney General has adhered to the view that the UPL laws

prohibit any lay person from giving *any* legal advice, even on the facts here. App. Br. at 7, 8, 66.

But applying the UPL laws to ban the free advice on a narrow topic that the Reverend and Upsolve seek to provide violates the First Amendment. However compelling New York's interest may be in protecting people from the unauthorized practice of law in other contexts, the Attorney General cannot credibly contend that applying the UPL laws to ban the discussions the Reverend wants to have with his neighbors is narrowly tailored to serve that interest. To the contrary, applying those laws to bar the speech at issue serves only to inflict further harm on low-income people facing debt-collection suits.

CONCLUSION

Everyone agrees that there are many legal activities that only licensed lawyers should perform. That is why NCAJ continues to push for more public funding of civil legal aid lawyers who can provide legal services to low-income people in complex court proceedings. Although there are not nearly enough lawyers to meet the need, New York would criminalize the free, basic advice that the Reverend wishes to provide to people in his community about how to complete a court-drafted form in debt-collection cases. By enjoining application of the UPL laws to Plaintiffs-Appellees, the District Court provided critically important relief. The injunction should be affirmed.

Dated: New York, New York
January 11, 2023

Respectfully Submitted,

_____/s_____

David Udell
Lauren A. Jones
National Center for Access to Justice
150 West 62nd Street
New York, NY 10023
dudell@fordham.edu

Bruce A. Green
Louis Stein Center for Law and Ethics
150 West 62nd Street
New York, NY 10023
bgreen@fordham.edu

Attorneys for Amicus

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(4). It contains 6,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: January 11, 2023
New York, New York

/s
David Udell

22-1345-cv

In the United States Court of Appeals for the Second Circuit

UPSOLVE, INC, and REVEREND JOHN UDO-OKON,
Plaintiffs-Appellees,

v.

LETITIA JAMES, in her official capacity as Attorney General of New York,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF RESPONSIVE LAW AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Gregory A. Beck
1250 Connecticut Ave. NW
Suite 700
Washington DC 20036
(202) 684-6339

Counsel for Amicus Curiae

January 11, 2023

TABLE OF CONTENTS

Table of authorities ii

Interest of amicus curiae 1

Introduction and summary of argument 1

Argument 3

I. The purpose and effect of New York's prohibition on unauthorized practice of law is not the protection of consumers from harm, but the protection of lawyers from unwanted competition. 3

II. As applied, New York's law infringes the First Amendment rights of consumers to receive important legal information. 10

Conclusion 20

TABLE OF AUTHORITIES

Cases

Alexander v. Cahill,
598 F.3d 79 (2d Cir. 2010) ..... II, 12

Edenfield v. Fane,
507 U.S. 761 (1993) 12, 15

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) II

NAACP v. Button,
371 U.S. 415 (1963) II

In re Primus,
436 U.S. 412 (1978) ..... II, 12

Reed v. Town of Gilbert,
576 U.S. 155 (2015) 12

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 15

Thompson v. Western States Medical Center,
535 U.S. 357 (2002) 15

Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976). ..... 10, II, 15

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 10

Other Authorities

Richard L. Abel,
American Lawyers 113 (1989) 6

George W. Bristol,
The Passing of the Legal Profession, 22 Yale L.J. 590 (1913). 7

Aebra Coe,
Where 5 States Stand On Nonlawyer Practice Of Law Regs,
Law360, Feb. 5, 2021 13

Derek A. Denckla,
Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 Fordham L. Rev. 2581 (1999) 2, 3, 4, 8, 14, 15, 16, 18

Lawrence M. Friedman,
A History of American Law (3d ed. 2005) 5

Neil Gorsuch,
Access to Affordable Justice, 100 Judicature 46 (2016) 1, 2, 6, 9, 17

Bruce A. Green,
Lawyers' Professional Independence: Overrated or Undervalued?, 46 Akron L. Rev. 599 (2013) 6–7

Gillian K. Hadfield,
Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets, 143 Daedalus 1 (2014) 9, 10

Gillian K. Hadfield,
Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy (2017) 5, 6

Robert Kry,
The "Watchman for Truth": Professional Licensing and the First Amendment, 23 Seattle U. L. Rev. 885 (2000) 3, 4, 8, 9, 13, 14

Alan Morrison,
Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4 Nova L. Rev. 363 (1980) 15, 16

Permanent Commission on Access to Justice,
Report to the Chief Judge of the State of New York (2022),
https://bit.ly/3IFrbNy 16, 19

Deborah L. Rhode,
Access to Justice: A Roadmap for Reform, 41 Fordham Urb. L.J. 1227 (2014) 8

Deborah L. Rhode,
Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1 (1981) 7, 13–14

Deborah L. Rhode & Lucy Buford Ricca,
Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement, 82 Fordham L. Rev. 2587 (2014) 8, 13, 18

Laurel A. Rigertas,
The Birth of the Movement to Prohibit the Unauthorized Practice of Law, 37 Quinnipiac L. Rev. 97 (2018) 2, 3, 4, 5, 7

World Justice Project,
Rule of Law Index (2022), https://bit.ly/3GClqxH..... 9

INTEREST OF AMICUS CURIAE

Amicus Consumers for a Responsive Legal System (Responsive Law) is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. It has testified on numerous occasions to state regulators and to the American Bar Association about the bar's responsibility to give greater weight to increasing access to justice when interpreting rules of professional conduct, and to avoid interpretations that have an anticompetitive impact.

INTRODUCTION AND SUMMARY OF ARGUMENT

New York, like almost every other state, maintains "sweeping and opaque restrictions" on the "unauthorized practice of law"—rules that prohibit anyone who is not a licensed attorney from expressing even the most basic opinions about legal issues faced by another. Neil Gorsuch, *Access to Affordable Justice*, 100 Judicature 46, 48 (2016). As applied here, New York's unauthorized-practice rules prohibit a nonprofit organization from giving free assistance to consumers in filling out a one-page legal form. That restriction violates the First Amendment right of consumers to receive noncommercial legal information—information that is vital to avoiding default judgments, wage garnishments, and liens in pending debt-collection cases.

To restrict the public's right to receive noncommercial information, a state must produce actual evidence—not just speculation—that the restriction serves a compelling state interest. The state's claim that its unauthorized-practice laws serve a compelling

interest in protecting consumers cannot be reconciled with history, evidence, or common sense. Although unauthorized-practice laws are "steeped in rhetoric" about the public interest, that is a post-hac rationalization. Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. 97, 112 (2018). When the laws were enacted, they were justified not by a desire to "protect the public interest," but to "eliminate competition." Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, 2585 (1999).

And the laws have had their intended effect. As Justice Gorsuch has explained, lawyers have successfully "used the expansive UPL rules they've sought and won to combat competition from outsiders seeking to provide routine but arguably 'legal' services at low or no cost to consumers." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 48. The result was to effectively freeze innovation in the market for legal services, driving legal fees beyond the reach of most Americans and creating an access-to-justice crisis in which the public's need for legal services vastly exceeds the affordable services available.

The state cannot claim a compelling interest in protecting consumers when the "protection" it provides cuts off the only legal help that remains available to them. This Court should affirm the district court's decision to enjoin New York's unauthorized-practice rules.

ARGUMENT

I. The purpose and effect of New York's prohibition on unauthorized practice of law is not the protection of consumers from harm, but the protection of lawyers from unwanted competition.

New York defends its interest in restricting the unauthorized practice of law based on what it characterizes as an established practice by the states, dating from before the American Revolution, to protect the public from nonlawyers who are unqualified to give legal advice. That historical account, however, is a fiction. New York's prohibition on legal advice actually arose as part of a wave of state laws adopted in the late nineteenth and early twentieth centuries—not to protect the public, but for the acknowledged purpose of "erecting barriers of entry to protect the professional elite" from unwanted competition. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 112.

A. Contrary to the state's account, "the historical practices at the time of the [First Amendment's] ratification" do not support restrictions on the provision of legal advice. Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 957 (2000). In fact, the historical evidence shows the opposite: that "the licensure of professional advice is inconsistent" with historical practice and "with the original understanding of the First Amendment." *Id.*

True, some colonial courts and legislatures adopted unauthorized-practice rules. *See* Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at

2583. But those rules were "focused on lay persons acting in a representative capacity *in court*." Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 108 (emphasis added). The issue "was raised as a defensive tactic in lawsuits," with the remedy being "dismissal of the lawsuit—not legal consequences for the person engaged in unauthorized practice." *Id.* In contrast, there is "no evidence that colonists concerned themselves with the activities of lay persons outside the courthouse." *Id.* at 104. As long as they were not in court, "nonlawyers were free to engage in a wide range of activities which would be considered UPL today," including "giving legal advice and preparing legal documents"—the same activities the state seeks to prohibit here. Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2583.

The next "hundred years of the American republic marked a liberalization" of even these narrowly crafted unauthorized-practice rules. *Id.* "[M]any legislatures" in the nineteenth century repealed their restrictions on nonlawyer practice, expressly permitting nonlawyers "to appear before the courts." *Id.* The unauthorized-practice laws that remained continued to deal only with "laypersons' activities in court—not with the mere rendering of legal advice." Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 956. Legislators of the era "believed it was inconsistent with democratic ideals to enact licensing requirements," and "would have thought licensing requirements on the advice-

rendering subset of professional practice—which struck much closer to free speech rights—singularly repugnant." *Id.* Indeed, no authority "even pretended … to govern the conduct of lawyers" in providing advice. Lawrence M. Friedman, *A History of American Law* 495-97 (3d ed. 2005).

B. It was not until the late nineteenth and early twentieth centuries that the legal profession began pushing for the sorts of unauthorized-practice restrictions that New York has today. By then, "the expansion of the economy and the shift to a much more formalized and regulated state" had "brought with it a new role for lawyers: planning transactions, advising on compliance, and completing the myriad forms that the newly bureaucratic state required." Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy* 118–19 (2017); *see* Friedman, *A History of American Law* at 703–07. Unlike litigation, this brand of legal work took place in offices, where courts could not monitor or control it. *See* Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 139. That opened the door for "unlicensed competitors—such as banks, trusts, and realtors—to engage in work … that lawyers believed was within their scope of practice." *Id.* at 101–02.

The result was "a turf battle over work outside the courtroom that nonlawyers had occupied without much resistance for some time." *Id.* at 139. In response to these

new forms of competition, the profession "looked to legislatures to prohibit and criminalize" the unauthorized practice of law. *Id.* at 142. The strategy began paying off in 1898, when New York's legislature created the first official register of New York attorneys and made it a misdemeanor to practice law without a license in the state. *Id.* at 117. Other states soon followed suit.

Recognizing that "it was impossible to anticipate all the new types of legal work and new legal providers that were cropping up," proponents of these laws sought the broadest prohibitions possible. *See* Hadfield, *Rules for a Flat World* at 119. Through a combination of lobbying and aggressive litigation, they argued that "no one, other than a bar-licensed lawyer practicing in a law firm or as a solo practitioner, should be allowed to do anything that touched the practice of law." *Id.* at 117; *see also* Richard L. Abel, *American Lawyers* 113 (1989) (explaining that bar associations "sought legislation that would define their monopoly as expansively as possible"). As a result, the definitions of unauthorized practice that states adopted, "usually at the behest of local bar associations, are often breathtakingly broad and opaque"—prohibiting nonlawyers from offering even the simplest of legal opinions and even when they do not charge a fee. Gorsuch, *Access to Affordable Justice*, 100 *Judicature* at 48.

C. The "transparent motivation behind" these efforts "was to protect lawyers' business." Bruce A. Green, *Lawyers' Professional Independence: Overrated or Under-*

valued?, 46 Akron L. Rev. 599, 618 (2013). Lawyers at the time lamented that the legal profession had "suffered much from the inroads of the new financial and business methods." George W. Bristol, *The Passing of the Legal Profession*, 22 Yale L.J. 590, 590 (1913). In an early article on the subject, for example, one New York lawyer complained that title companies had displaced lawyers from their traditional role in providing title searches. *See id.* Although "ten million dollars [were] paid annually by real estate interests in New York City alone," the advent of these companies meant that "only a small portion of the amount paid actually reache[d] the legal profession"—rendering "[o]ne of the most lucrative branches of the lawyer's practice … a thing of the past." *Id.* at 591.

Those anticompetitive motives, however, were not always stated so explicitly. Instead, state bars argued that unauthorized-practice laws were necessary for protecting the public by "increasing the professional status of the bar." Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 112. In the bars' characterization, the enforcement of unauthorized-practice laws was "a selfless enterprise actuated solely by considerations of 'public interest and welfare.'" Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 3, 53 (1981).

That claim, however, is contradicted by "a large body of historical, economic, and sociological literature that suggests that the primary motivation for professional

licensing laws is economic self-interest." Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 888. The evidence shows that consumers do "not desire the 'protection' that the bar and the courts have instituted on their behalf." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2596. Rather, "the principal proponents of licensing laws are typically the occupational groups themselves." Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 888. It is thus unsurprising that "by far and away most UPL complaints come from lawyers rather than clients and involve no specific claims of injury." *See* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 Fordham Urb. L.J. 1227, 1234 (2014). Lawyers are "motivated to report nonlawyers" not to protect the public, but "because they viewed such individuals as taking work away from them." Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2595 (2014).

D. The legal profession's "half-century campaign against UPL" was virtually a complete success. Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2585. Today, all states prohibit the unauthorized practice of law outside of court, with two-thirds imposing criminal penalties. *Id.* at 2587. These laws "greatly enlarged the areas of practice that now must be performed exclusively by lawyers," creating a "lawyer monopoly over a great deal of activity outside of the courts." *Id.* at 2581, 2585. "[I]n recent years," Justice Gorsuch has explained, "lawyers have used the expansive

UPL rules they've sought and won to combat competition from outsiders seeking to provide routine but arguably 'legal' services at low or no cost to consumers." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 48.

By restricting entry into the practice of a profession and insulating themselves from competition, state bars effectively froze innovation in the provision of legal services to an early twentieth-century model, giving the legal profession "a roughly $10 billion annual 'self-subsidy,' in the form of higher prices lawyers may charge their clients compared to what they could charge in a more competitive marketplace." *Id.* at 53; *see also* Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 Daedalus 1 (2014). Lawyers "derived these "monopoly profits at the expense of consumers, who are denied lower-cost alternatives to the professional's services." Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 888.

The consequence is to put legal services beyond the reach of most Americans. "Legal services in this country are so expensive that the United States ranks near the bottom of developed nations when it comes to access to counsel in civil cases." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 47; *see* World Justice Project, *Rule of Law Index* (2022), https://bit.ly/3GClqxH (ranking the United States 115th out of 140 nations on whether "people can access and afford civil justice"). "The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the

claims made against them," routinely going without legal representation when facing eviction, collection, or foreclosure and when seeking child support, custody, or protection from violence or harassment. Hadfield, *Innovating to Improve Access*, 143 Daedalus at 1.

II. As applied, New York's law infringes the First Amendment rights of consumers to receive important legal information.

A. The state, unsurprisingly, does not rely on the anticompetitive justifications that actually motivated adoption of its unauthorized-practice laws. Instead, it puts forward an alternative rationale: that the laws "protect the public 'from the dangers of legal representation and advice given by persons not trained, examined and licensed for such work.'" State Br. at 14 (quoting *El Gemayel v. Seaman*, 72 N.Y.2d 701, 705 (1988)). All that the plaintiffs seek to do here, however, is help unrepresented consumers in selecting checkboxes on a standardized, one-page form. The state has no evidence of a need to "protect" consumers from receiving free assistance in filling out a simple legal form.

Even in the commercial-speech context, the protection of speech is "justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Just as commercial speakers have a First Amendment right to advertise, consumers have a "reciprocal right to receive the advertising." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). In *Virginia Board of Pharmacy*—the first Supreme Court case to

recognize the right to commercial free speech—the plaintiffs were not pharmacists who had been denied the right to advertise, but consumer groups representing their members' right to receive commercial drug advertisements. *Id.* at 754 n.10. As the Court explained, the strong interest that consumers have in receiving such information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. And consumers have an even stronger interest in receiving noncommercial legal information relevant to their pending legal cases. *See In re Primus*, 436 U.S. 412, 431 (1978) (upholding the right to "communicat[e] useful information to the public").

It is true that states have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). But the mere assertion that a law's purpose is to "insure high professional standards" is not enough to justify a restriction on speech. *NAACP v. Button*, 371 U.S. 415, 438–39 (1963); *see also Alexander v. Cahill*, 598 F.3d 79, 91 (2d Cir. 2010). The Supreme Court in *Button* refused to credit similar ethical concerns in the absence of record evidence that the restriction there actually served its purported purpose. 371 U.S. at 441. As the Court explained, a state "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. And the Court has also "required that broad rules framed to protect the public and to preserve respect for the

administration of justice must not work a significant impairment of the value of associational freedoms." *In re Primus*, 436 U.S. at 426.

Rather, as the district court correctly recognized, the state has the burden of proving that its speech restriction satisfies strict scrutiny by demonstrating "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). As applied here, the state's burden requires it to show a compelling interest in preventing a nonprofit organization from helping consumers prepare responses to debt actions. The state, however, devotes just six pages at the back of its brief (at 60–66) to its attempt at satisfying that heavy burden. It cites no consumer complaints, disciplinary records, studies, or empirical research of any kind showing that even a single consumer was ever harmed by a nonlawyer's legal advice—much less by the provision of free assistance in filling out a form.

That alone establishes the rule's unconstitutionality. *See Alexander*, 598 F.3d at 95 (holding that New York "failed to provide evidence that consumers have, in fact, been misled" by the prohibited speech, and thus "failed to meet [its] burden for sustaining [the] prohibition"). Even under intermediate scrutiny, the state must produce actual evidence, not "mere speculation and conjecture," "that the harms it recites are real and that its restrictions will in fact alleviate them." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). The state identifies no such evidence here.

On the contrary, the available evidence "casts doubt on the frequency of client injury" by nonlawyers. Rhode & Ricca, *Protecting the Profession or the Public?*, 82 Fordham L. Rev. at 2595. In a nationwide survey of officials responsible for enforcing laws against unauthorized practice of law, more than two-thirds "could not recall" even a single "instance of serious injury in the past year." *Id.* Moreover, other states allow the provision of legal services by nonlawyers without evidence of public harm. *See* Aebra Coe, *Where 5 States Stand On Nonlawyer Practice Of Law Regs*, Law360, Feb. 5, 2021. Likewise, other nations "permit nonlawyers to provide legal advice and to assist with routine documents." Rhode & Ricca, *Protecting the Profession or the Public?*, 82 Fordham L. Rev. at 2606. The "research available does not suggest that their performance has been inadequate." *Id.* Rather, it shows that, in assisting low-income clients, "nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction." *Id.*

B. Even on its face, New York's post-hac rationalization for its unauthorized-practice rules fails to articulate a legitimate state interest. Given the obvious unsavoriness of the bar's anticompetitive agenda, its asserted interest in "protect[ing] the public" has become the "most common interest asserted to justify professional practice regulation." Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 887. Members of the profession have "strong economic [and] psychological interests in declining to acknowledge that legal work could be done as competently by laymen as by lawyers." Rhode, *Policing the*

Professional Monopoly, 34 Stan. L. Rev. at 1, 3, 53. And that self-interest has been further bolstered by the success of the legal profession's long campaign against unauthorized practice, which "created an expectation among lawyers—no matter how unjustified—and a tradition in practice as to the tasks that only lawyers should perform." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2585.

The profession's self-serving rationale, however, is predicated entirely on the "paternalistic belief that the public needs the protection which the UPL system provides." *Id.* at 2595. Proponents of the theory argue that the public cannot be trusted to "make informed decisions" about hiring nonlawyers. Kry, *The "Watchman for Truth"*, 23 Seattle U. L. Rev. at 888. As the ABA explained it in its Model Code of Professional Responsibility—the national bar's first restriction on the unauthorized-practice of law—a potential client is "not in a position to judge whether he or she will receive proper professional attention" from a nonlawyer on a legal matter concerning "the reputation, the property, the freedom, or even the life of the client." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2593 (quoting Model Code Prof'l Resp. EC 3-4 (1969)).

Because "[t]hose who seek to censor or burden free expression often assert that disfavored speech has adverse effects," courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own

good." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011). Fear that the public "would make bad decisions if given truthful information" is no justification for banning speech. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Rather than adopting that "highly paternalistic approach," states must "assume that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. Bd. of Pharmacy*, 425 U.S. at 770. It is for "the speaker and the audience, not the government, [to] assess the value of the information provided." *Edenfield*, 507 U.S. at 767.

New York's justification for restricting legal assistance by nonlawyers is just the sort of paternalistic speech restriction that the Supreme Court has repeatedly condemned. The argument "assumes that clients cannot be trusted to choose for themselves whether they want to pay for the extra protection of a generalist instead of the narrower protection of a nonlawyer specialist." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2595. But there is no reason to believe consumers are incapable of looking after their own interests in making that choice. Reasonable consumers can be trusted to "recognize that in most situations lawyers will provide better representation." Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 Nova L. Rev. 363, 369 (1980). Nevertheless,

consumers who "are aware of the limitations on the abilities and ethics [rules] of nonlawyers might rationally want to" take advantage of lower-cost nonlawyer services. Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2595. That is particularly true here, where a nonprofit organization seeks to provide legal help without charge. New York's unauthorized-practice laws deny consumers that choice, forcing them to treat "the cost of having a lawyer" as "not a relevant consideration." Morrison, *Defining the Unauthorized Practice of Law*, 4 Nova L. Rev. at 363.

The state's rationale also ignores the well-documented fact that most low-income consumers in New York lack would lack the option of hiring a licensed attorney even if they wanted to do so. Although the state has made efforts to fund legal services and encourage pro-bono assistance, the overwhelming evidence demonstrates that the legal profession still fails to satisfy the legal needs of almost all consumers in the state. *See* Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York* (2022), https://bit.ly/3IFrbNy. The problem is especially acute in consumer-debt cases like those in which the plaintiffs seek to assist consumers here. "Hundreds of thousands of consumer credit matters are filed annually" in New York. *Id.* at 55. But, while "all creditors have attorneys" in these cases, "low-income individuals generally are unrepresented." *Id.* at 54. In particular, there is an "unmet need for civil legal services for low-income New Yorkers faced with medical debt." *Id.* at 11. In the past few years, New

York hospitals have filed tens of thousands of debt-collection lawsuits against mostly low-income consumers. *Id.* Hospitals in these cases "are always represented by professional debt collection attorneys," while "99% of patients are unrepresented." *Id.* at 12.

C. Because most consumers in debt-collection cases lack legal representation, the relevant question is not whether (as the state assumes) they would be better off with the assistance of a lawyer than with that of a nonlawyer. Rather, the question is whether they would be better off with the assistance of a nonlawyer than they would be with no assistance at all. That question answers itself: At least until the profession can guarantee affordable legal representation for consumers, the state cannot claim that it is protecting consumers by cutting off the limited options remaining to them, especially where that help is provided free of charge.

As Justice Gorsuch has noted, "nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 49. "Nonlawyers prepare tax returns and give tax advice. They regularly negotiate with and argue cases before the Internal Revenue Service. They prepare patent applications and otherwise advocate on behalf of inventors before the Patent & Trademark Office. And it is entirely unclear why exceptions should exist to help these sort of niche (and some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving

larger numbers of lower- and middle-class clients." *Id.* Many such "tasks that lawyers now perform exclusively could be competently performed by nonlawyers because" they "do not necessarily require a lawyer's professional judgment." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2595–96. That is the case here: Filling out the 24 checkboxes on the state's one-page answer form "is typically straightforward and does not require significant specialized legal training." JA18.

Even in areas where "lawyers do have special knowledge, they may not be any more competent than a nonlawyer specialist." Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 Fordham L. Rev. at 2594. The available research shows that "[e]xtensive formal training is less critical than daily experience for effective advocacy." Rhode & Ricca, *Protecting the Profession or the Public?*, 82 Fordham L. Rev. at 2606. The district court was therefore correct to recognize that a nonlawyer with experience and limited training in filling out the state's legal form will almost certainly be more useful to consumers than a patent lawyer who has never handled a debt-collection case. JA 202 n.13.

At a minimum, as the court noted, reliance on the plaintiffs' "limited legal training would logically protect clients' interests better than trusting those clients to complete their own forms pro se, with no legal training at all." *Id.* "In a high percentage of cases, consumers are being sued for debts they do not owe or for which creditors have no proof

to establish their right to collect the debt." Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York* at 55. These lawsuits are "clearly meritless, where the defendants sued do not actually owe the amount claimed, or any amount at all." JA177. Yet even when they have strong defenses available to them, consumers without access to legal advice are often too overwhelmed or intimated by the complexities of the court system to respond. As a consequence, "a significant majority" of these cases (98% in medical-debt cases) "are decided in favor of the creditors on default"—often resulting in wage garnishments and liens on patients' homes. Permanent Commission on Access to Justice, *Report to the Chief Judge of the State of New York* at 12, 54. Because creditors who bring these lawsuits "depend[] on never having to litigate—or prove—a case," helping consumers to contest their debts would often allow them to avoid those serious outcomes. *Id.* at 55.

New York's decision to cut off consumers' access to that free assistance cannot be squared with the First Amendment. To justify censorship of noncommercial legal information that is vital to avoiding defaults in pending cases, the state would need—at a minimum—compelling evidence that its restriction is necessary to protect consumers from even more serious harm. The only evidence of harm here, however, is of harm to the financial interest of lawyers. For that reason, the restriction is unconstitutional.

CONCLUSION

This Court should affirm the decision below.

January 11, 2023

Respectfully submitted,

Gregory A. Beck
Gregory A. Beck
1250 Connecticut Ave. NW
Suite 700
Washington DC 20036
(202) 684-6339

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 29.1(c) because it contains 4,697 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Adobe Garamond Pro font.

January 11, 2023

/s/Gregory A. Beck
Gregory A. Beck