

No. 25-948

In the Supreme Court of the United States

UPSOLVE, INC., ET AL.,

Petitioners,

v.

LETITIA JAMES, ATTORNEY GENERAL OF NEW YORK,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit*

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

Thomas A. Berry
Counsel of Record
Dan Greenberg
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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QUESTION PRESENTED

Is a law whose application is triggered by communicating about a particular topic nonetheless content-neutral so long as the law can be described as aimed at the “purpose, focus, and circumstance” of the speech rather than at its content?

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in constitutional law cases.

This case interests the Cato Institute because one of Cato's missions is to protect free speech from government overreach. In this case, New York's content-based speech restrictions should be subjected to the strict scrutiny they deserve.

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case rests on straightforward First Amendment doctrine: When a law prohibits speech based on the topic or message expressed, that is a content-based restriction subject to strict scrutiny. The government cannot evade the strict scrutiny this restriction requires by characterizing that restriction as targeting the speech’s “purpose” or “function.”

New York seeks to enforce its prohibition of the unauthorized practice of law² (“UPL”) against Petitioners (the nonprofit Upsolve, Inc., and one of its unpaid volunteers). In consumer debt actions, New York allows defendants to use a one-page, state-created answer form that streamlines responses through a series of checkboxes. Pet. App. 29a (“App.”). Upsolve seeks to train nonlawyer volunteers to help low-income individuals complete these forms at no cost. These volunteers would walk defendants through the forms, explaining the relevant terms and defenses. Petitioners would not draft or file any legal documents, nor would they appear in court. Yet New York’s UPL regime criminalizes this speech because it constitutes individualized legal advice, transforming a conversation into a crime based solely on its content.

If Petitioners advise someone about financial strategies for managing debt, that’s lawful; if

² See N.Y. JUD. LAW §§ 476-a, 478, 484–85.

Petitioners advise someone about the legal implications of debts or alleged debts, that's a crime. This content-based speech restriction intrudes on fundamental First Amendment rights and therefore requires strict scrutiny. Accordingly, the district court granted a preliminary injunction. App. 67a, 69a. But the Second Circuit reversed, holding that the restriction is content-neutral because it regulates the “purpose, focus, and circumstance” of the speech rather than its content. That court remanded for application of intermediate scrutiny. App. 21a–22a.

The Second Circuit's reasoning presents a distinction without a difference: It would allow states to suppress speech on any topic subject to occupational licensing. And the decision below deepens confusion about how the First Amendment applies to speech delivered in a professional or advisory setting.

Unfortunately, the decision below is an instance of a regrettable trend. Some lower courts have treated occupational-licensing laws as categorically distinct from ordinary speech regulations, applying diluted scrutiny whenever speech occurs in a professional setting. But this Court rejected that approach in 2018, explaining that speech does not receive lower constitutional protection merely because it comes from a professional or touches on a regulated field. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 585 U.S. 755, 767–68 (2018). There is no “licensing” exception to First Amendment scrutiny. Nonetheless,

the decision below shows that some courts continue to effectively apply such an exception.

Further, this case exemplifies how occupational licensing can serve as a device for rent-seeking rather than for consumer protection. The history of UPL prohibitions underscores why this case warrants review and why rigorous First Amendment protection is essential. State bar associations—composed of licensed attorneys with direct interests in restricting competition—lobbied for these prohibitions. When such self-interested licensing boards restrict speech, deference to bare assertions of consumer protection can have grave consequences. Indeed, such deference hobbles competition and harms consumers. The Second Circuit’s “purpose, focus, and circumstance” rule immunizes a cronyist bargain from proper constitutional scrutiny.

The reasoning of the decision below would open the door for licensing boards across a multitude of professions to evade strict scrutiny by relabeling content-based restrictions as purpose-based. The test creates a First Amendment loophole wherever occupational licensing exists—precisely where incumbent professionals have strong incentives to suppress competitive speech. Only this Court can resolve the growing confusion among the circuits in these matters. This Court should grant certiorari to reaffirm that content-based speech restrictions require strict scrutiny regardless of their occupational licensing context.

ARGUMENT**I. NEW YORK'S SPEECH RESTRICTION ON THE UNLICENSED PRACTICE OF LAW IS CONTENT-BASED.**

The Second Circuit determined that New York's prohibition on providing "legal advice"³ is content-neutral. But that reasoning cannot be squared with this Court's precedents. The distinction between legal advice and other forms of advice that the statute implies is a perfect example of a content-based restriction. This Court should grant certiorari to correct the lower court's error and reaffirm that the government cannot circumvent strict scrutiny through semantic gamesmanship.

The statute's subject-matter discrimination triggers strict scrutiny. That trigger is pulled if the law, in operation, "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *Reed*, the Court declared that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169. Such a regulation "is subject to strict scrutiny regardless of the government's benign motive, content-

³ See N.Y. Jud. Law §§ 476-a, 478, 484–85; *Matter of Rowe*, 80 N.Y.2d 336, 341–42 (1992) ("The practice of law involves the rendering of legal advice and opinions directed to particular clients.").

neutral justification, or lack of animus toward the ideas contained in the regulated speech.” *Id.* at 165 (internal quotation marks omitted).

Here, Petitioners seek to train volunteers to advise individuals facing debt-collection lawsuits—specifically, to provide advice on how to complete New York’s standardized answer form. These volunteers will not appear in court, file documents, establish attorney-client relationships, or undertake any professional responsibilities. They will simply speak: They will explain how the form works and suggest how to complete it. New York prohibits such speech solely because of its content. Both courts below agreed that New York’s prohibition restricts speech. App. 5a. Their only difference of opinion is whether that restriction is content-based or content-neutral—a classification that determines whether strict or intermediate scrutiny applies.

The force and effect of New York’s restriction is straightforward: The speaker who gives advice about the law (as opposed to, say, advice about love lives or workplace conflicts) is subject to criminal prosecution—unless that speaker is licensed by the state. The trigger for regulation is not the volume of speech, the time of day, or the location. It is the *subject matter* of what is said.

Consider the operation of the statute in practice. Upsolve’s volunteers wish to help low-income New Yorkers respond to debt-collection lawsuits by advising them on a one-page state-provided form. A

volunteer may permissibly tell a client, “You might be able to avoid high-interest costs by paying down your credit card debt.” But a volunteer may not tell a client, “You might be able to avoid paying an illegitimate debt obligation by checking this box because the statute of limitations may have expired on the debt.” The second statement constitutes a crime. The distinction between lawful and unlawful speech turns entirely on the *content* of the communication.

New York’s UPL regime explicitly distinguishes between permitted and forbidden speech based on *what* is being communicated. The content-based nature of the prohibition is undeniable. Petitioners may advise debt-collection defendants about a variety of topics related to their debts, but not about the legal dimensions of their debts. If Petitioners nonetheless provide advice on legal matters, they commit a crime.

Nevertheless, the Second Circuit held that this distinction is “content neutral” because New York’s statute targets the “purpose, focus, and circumstance” of “rendering such legal advice and opinions directed to particular clients”—not “the content of the legal advice conveyed.” App. 20a–21a (internal citations and quotation marks omitted). According to the court, once speech is determined to be legal advice, New York does not make further content-based distinctions within that topic. *See* App. 20a–21a. Therefore, the prohibition is content-neutral.

This reasoning is circular. A statute that singles out speech associated with the “purpose of rendering

legal advice” is simply performing an exercise in relabeling: What is being identified is speech with a certain kind of *content*. Those who speak with the “purpose of rendering legal advice” are necessarily rendering legal advice. The “purpose” of such speech is inseparable from that speech’s content. The label of “purpose” adds nothing; it is simply a description of the content itself. If a regulation prohibits speech because it concerns legal topics as opposed to other topics, it is content-based—whether or not the government characterizes its target as the speech’s “purpose,” “focus,” “circumstance,” or “content.” In short, the Second Circuit’s test is a fundamentally cosmetic endeavor: It would allow any content-based restriction to escape strict scrutiny through artful relabeling.

Labeling a content restriction as a “purpose” restriction does not change its character. “[A] regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a ‘function or purpose’ proxy that achieves the same result.” *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022). “Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to *strict scrutiny*.” *Reed*, 576 U.S. at 163–64 (emphasis added).

The Second Circuit’s approach would permit any subject-matter restriction to evade strict scrutiny simply by reframing the restriction—a maneuver that *Reed* and *City of Austin* forbid. This stratagem swaps the obvious subject-matter distinction (legal advice versus other advice) for a purpose-based proxy (speech with the purpose of rendering legal opinions versus speech with other purposes). But the proxy achieves the same result: speech is regulated based on its communicative content. Unlike the sign ordinance in *City of Austin*, which only required determining whether a sign was related to activities at the sign’s location—a determination that does not discriminate based on the “topic discussed or the idea or message expressed”—New York’s statute requires determining whether a statement constitutes a legal opinion. *City of Austin*, 596 U.S. at 73–74 (internal quotation marks omitted). That requires discriminating based on the topic, idea, or message expressed.

The Second Circuit’s reasoning resurrects a doctrine this Court expressly interred in *NIFLA*. There, the Court confronted the argument that “professional speech” receives reduced First Amendment protection—an argument that would permit content-based regulation under a lower standard of scrutiny. 585 U.S. at 766–67. The Court rejected this argument in unequivocal terms: “This Court’s precedents do not recognize such a tradition for a category called ‘professional speech.’” *Id.* at 768. If the Court accepted that doctrine, it would give “the

States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *Id.* at 773. The First Amendment forbids such manipulation.

The Second Circuit’s approach would undo *NIFLA*’s central holding and undermine the logic of *Reed* and *City of Austin*. Under the lower court’s reasoning, any licensing law that purports to restrict speech based on its “purpose, focus, and circumstance” would qualify as content-neutral. Thus, professional speech regulations would escape strict scrutiny so long as they were framed in terms of the speech’s function rather than its content. However, as explained above, this is a distinction without a difference. A law that restricts speech about legal matters (or health matters, or financial matters) regulates speech based on content, whether or not the government characterizes the restriction as targeting the speech’s “purpose.”

The principle that content-based restrictions trigger strict scrutiny is fundamental to First Amendment protection. As Justice Alito explained in his *Reed* concurrence, joined by Justices Kennedy and Sotomayor, content-based restrictions “present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint.” *Reed*, 576 U.S. at 174 (Alito, J., concurring). And those dangers don’t disappear when regulating professional speech. *NIFLA*, 585 U.S. at 771. When the government restricts speech based on its subject matter—whether framed as targeting “legal advice” or any other

communicative content—the First Amendment demands justification of the highest order. The Second Circuit’s contrary holding threatens to erode this core protection and should not stand.

II. NEW YORK’S SPEECH RESTRICTION ON THE UNLICENSED PRACTICE OF LAW HARMS CONSUMERS.

UPL restrictions did not emerge from a groundswell of demand for consumer protection. They emerged from a well-documented campaign by incumbent lawyers to insulate themselves from competition. This history of private rent-seeking dressed in public-interest clothing counsels in favor of rigorous judicial scrutiny, not the intermediate scrutiny the court below applied. If this Court upheld the judgment below, it would perpetuate and expand the opportunity for rent-seeking operations to carve a hole in the First Amendment.

A. UPL Restrictions Are a Twentieth-Century Invention, Not a Longstanding Tradition.

For most of American history, legal advice was freely given and freely received without government restriction. Indeed, the years following the Revolution “saw a concerted attack upon the privileges of the legal profession,” and by the time of the Civil War, “no significant restrictions remained.” George C. Leef, *The Case for a Free Market in Legal Services*, CATO INST.

POL’Y ANALYSIS NO. 322, at 18 (Oct. 9, 1998).⁴ Several states had statutes or constitutional provisions affirmatively declaring that every citizen was entitled to practice law. *Id.*

Individuals who wished to provide legal assistance were free to prepare themselves however they saw fit—by reading law independently, as Abraham Lincoln did; by serving an apprenticeship, as Clarence Darrow did; or by attending one of the small number of law schools then in existence. *Id.* Aspiring practitioners weighed the costs and benefits of various approaches to legal education and chose among them based on their circumstances and ambitions. *Id.* The market sorted out competence from incompetence without requiring state licensure as a precondition to speech.

The district court below recognized this history’s significance: “Simply put, the historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem.’” App. 60a (quoting Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 957 (2000)).

⁴ Available at <https://tinyurl.com/8m65wjw4>.

B. UPL Laws Serve Licensed Attorneys' Economic Interests.

Occupational licensing restrictions follow a predictable pattern. Incumbent professionals, organized through trade associations, lobby legislatures to create barriers to entry that restrict competition. The restrictions are invariably couched in justifications based on protecting consumers from incompetent or fraudulent practitioners. But the primary beneficiaries of these restrictions are the licensed professionals themselves, who face reduced competition and can therefore charge higher prices. The costs—higher prices and fewer choices—are diffused across millions of consumers, each of whom has little incentive to organize opposition to regulations they may not even know exist. Leef, *supra*, at 1, 21–22. This is the classic public-choice dynamic that economists have documented across licensed occupations. *Id.* at 22.

Thus, practitioners in regulated industries—not consumers—typically demand and benefit from licensing regimes. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). As Thomas Sowell explains, licensing restrictions

almost invariably exempt existing practitioners, who thereby reap increased earnings from the contrived scarcity, without having to pay the costs they impose on new entrants in the form

of longer schooling, tougher qualifying examinations, or more extended apprenticeship. . . . Although “the public interest” is a prominent rhetorical feature of occupational licensing laws and pronouncements, historically the impetus for such licensing comes almost invariably from practitioners rather than the public, and it almost invariably reduces the quantity of new practitioners through various restrictive devices, and the result is higher prices.

Leef, *supra*, at 21 (quoting THOMAS SOWELL, KNOWLEDGE AND DECISIONS 200 (1980)).

The legal profession exemplifies this pattern. The modern UPL regime emerged from the organized bar’s desire to restrict competition, not from consumer demand. *Id.* at 19. Roughly a century and a half ago, the legal profession pressed for legislation establishing minimum educational qualifications for bar membership. *Id.* at 18. The public-interest rationale may have been “sincerely believed by some,” but raising admission standards provided extraordinary benefits to incumbent lawyers who faced a rising lawyer-to-population ratio and increasing complaints about “overcrowding at the bar.” *Id.*

In 1930, the American Bar Association appointed its first Committee on Unauthorized Practice of Law. State and local bar organizations followed suit, ultimately engineering the passage of statutes that prohibited the “unauthorized” practice of law in every

state. *Id.* at 19. As the late Professor Deborah Rhode of Stanford documented: “Although the organized bar has often suggested that the campaign against lay practice arose as a result of a public demand, the consensus among historians is to the contrary.” *Id.* (quoting Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 1 (1981)).

Only licensed attorneys were thereafter permitted to “practice law”—a vague prohibition that allowed sympathetic courts to determine on a case-by-case basis what professional conduct was in or out of bounds. *Id.* at 19. This imprecision served the bar’s interests: it made it easy for bar committees to threaten legal action against any nonlawyer whose activities could plausibly be characterized as “services traditionally rendered by lawyers.” *Id.* (quoting *People v. Title Guarantee & Trust Co.*, 125 N.E. 666, 671 (N.Y. 1919)).

The content and scope of UPL prohibitions have expanded steadily since their emergence.⁵ Their expansion parallels the organized bar’s growing influence. The organized bar does not stop at limiting

⁵ Joseph J. Avery, Patricia Sánchez Abril, & Alissa del Riego, *ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI*, 26 YALE J.L. & TECH. 64, 76 (2023) (“Over the ensuing decades, numerous states created their own statutory rules regarding UPL, with each successive round of rules seemingly more expansive than the last.”).

entrants into the profession: It aggressively polices information sharing. The prohibition on providing legal advice, even when divorced from court representation and document filing, restricts the flow of information that could reduce demand for licensed attorneys' services. Speech restriction thus becomes a tool of anticompetitive suppression.

Consider the application of New York's UPL laws here. Upsolve wishes to train volunteers to help low-income New Yorkers use a one-page checkbox form—a form New York itself created to simplify responding to debt-collection lawsuits. That form exists because New York recognized that the legal system was failing these defendants. Yet the state now invokes its UPL laws to prohibit anyone other than licensed attorneys from explaining what the form's checkboxes mean.

New York's response to this access-to-justice crisis is revealing. Rather than expanding the pool of people permitted to provide basic assistance, the state clings to restrictions that block entry into this particular labor market. Only licensed attorneys are permitted to guide individuals through a state-created, one-page checkbox form. This is incumbent protection masquerading as consumer protection.

The First Amendment protects against the government's tendency to restrict speech that threatens established interests. "Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo." *Reed*, 576 U.S. at 174

(Alito, J., concurring). New York’s application of UPL restrictions here is a paradigm case.

The Cato Institute has long warned that occupational licensing often serves private interests rather than public welfare. The costs of such licensing fall disproportionately on those least able to bear them: aspiring workers who lack the resources to complete extensive training requirements—and consumers who must pay higher prices for restricted services.

The rent-seeking origins of UPL laws are not merely historical curiosities. They illuminate a structural problem that persists today: self-interested regulators restricting speech that threatens their economic interests. When licensing boards controlled by incumbent professionals suppress communication, courts have particular reason to scrutinize the justifications offered for such restrictions rather than to defer to assertions about the public interest.

The First Amendment provides a counterweight to that dynamic. By requiring the government to justify content-based restrictions on speech with evidence of compelling necessity, not bare assertions of consumer protection, the First Amendment ensures that such incumbent-protecting regulations cannot survive judicial scrutiny merely because they are dressed in public-interest language. The Second Circuit’s deferential approach fails to perform this checking function, and this Court should grant certiorari to

restore it. Without intervention, this rent-seeking behavior will continue to encroach on the First Amendment.

III. NEW YORK'S SPEECH RESTRICTION ON THE UNLICENSED PRACTICE OF LAW EXACERBATES AN ACCESS TO JUSTICE CRISIS.

States have legitimate interests in regulating the practice of law, particularly courtroom advocacy and the establishment of attorney-client relationships with accompanying fiduciary duties. But New York's UPL statute sweeps far beyond these core concerns, criminalizing even free, limited-scope assistance with filling out simple forms. The access-to-justice and debt-collection crises at the heart of this case demonstrate the damage already done by encroachment on free speech. Rather than protecting vulnerable populations, New York's approach prevents them from receiving the help they need. In practice, many of them receive no help at all. The state has banned speech that would almost certainly help far more consumers than it could ever harm. Thus, there is a pressing need for this Court to grant review of this case to put a stop to the State's violation of the First Amendment.

Respondent appears to argue that New York's access-to-justice crisis is irrelevant unless and until Petitioners can prove that no other help for those denied access exists. More precisely, Respondent argues that legal-aid groups "do not turn away

clients”⁶ and that there is “no evidence”⁷ Petitioners’ prospective clients could not obtain free advice from licensed attorneys. But the Constitution does not require Petitioners to prove that they provide the sole cure to some given problem; rather, the Constitution prevents state governments from silencing speech that would make meaningful help more available to those who are, in practice, denied access to justice.

A. The Access to Justice Crisis Is Vast and Well-Documented.

Supply of affordable legal services is now vastly outpaced by demand. “[M]illions of Americans each year cannot get meaningful help with legal issues impacting their lives. Priced out of the market for lawyers and left to navigate a complex and even Byzantine legal system alone, they often face harmful and even devastating consequences for themselves, their families, and their communities.”⁸ According to the Legal Services Corporation’s 2022 Justice Gap Study, “Low-income Americans do not get any or enough legal help for 92% of their substantial civil

⁶ N.Y. Opening Br. at 71, *Upsolve, Inc. v. James*, No. 22-1345 (2d Cir. Oct. 5, 2022).

⁷ N.Y. Reply Br. at 35, *Upsolve, Inc. v. James*, No. 22-1345 (2d Cir. Feb. 8, 2023).

⁸ David Freeman Engstrom, Natalie Knowlton, & Lucy Ricca, *Legal Innovation After Reform: Five Years of Data on Regulatory Change*, STAN. L. SCH. 5 (June 2025), <https://tinyurl.com/4xdbvrvv>.

legal problems.” *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVS. CORP. 7, 8 (April 2022).⁹ Nearly three-quarters of low-income households experienced at least one civil legal problem in the prior year, and 39% experienced five or more. *Id.* at 8, 32.

The supply of legal assistance falls far short of the demand. A 2023 American Bar Association study found only 2.8 paid civil legal aid lawyers nationwide for every 10,000 people in poverty. *Achieving Civil Justice*, AM. ACAD. OF ARTS & SCIS. 9 (2024).¹⁰ In 2021, LSC-funded legal aid organizations turned away an estimated 1.4 million civil legal problems—71% of the problems brought to their doors—because they lacked the capacity to help. LEGAL SERVS. CORP., *supra*, at 9. The result is a civil court system in which self-representation has become the norm. A 2015 study found that only 26% of civil defendants had representation. Anna E. Carpenter, et al., *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 258 n.29 (2018).

UPL rules exacerbate this problem. Engstrom, *supra*, at 10. Under most regimes, “any nonlawyer who offers legal advice, even simple legal advice for free, potentially exposes herself to criminal liability.” *Id.* As

⁹ Available at <https://tinyurl.com/mv777dju>.

¹⁰ Available at <https://tinyurl.com/2x6e6d65>.

a result, the supply of legal services for the poorest Americans is greatly diminished.

B. Debt Collection in New York Exemplifies the Crisis.

New York's legal aid organizations report that they must turn away eligible clients due to lack of organizational capacity, and the vast majority of low-income individuals facing civil legal problems receive no professional assistance. *See Report to the Chief Judge of the State of New York*, N.Y. PERMANENT COMM'N ON ACCESS TO JUST. 14, 22, 36, 41 (Nov. 2019).¹¹ Pro bono representation from licensed attorneys is laudable, but it cannot satisfy New Yorkers' needs. Legal aid organizations face overwhelming demand. They lack the resources to assist most debt-collection defendants.

Ultimately, the vast majority of debt-collection defendants proceed pro se. More accurately, they do not proceed at all, and so they are burdened with default judgments. They do not choose between licensed and unlicensed assistance; Upsolve tried to let them choose between unlicensed assistance and no assistance at all. But New York's prohibition eliminates the former option and forces defendants into the latter one.

Debt-collection lawsuits constitute approximately one-quarter of all civil cases in New York's court

¹¹ Available at <https://tinyurl.com/4dx667sc>.

system. App. 6a, 28a. Default rates range from 70 to 90 percent. *Id.* Many of these lawsuits are “clearly meritless”—brought by third-party debt collectors against defendants who do not owe the amounts claimed or owe nothing at all. *Id.* A default judgment can have devastating consequences, including wage garnishment, eviction, vehicle repossession, bankruptcy, bank account seizures, and a lowered credit score. App. 6a, 29a. Default judgments in this realm are often unrelated to the absence of a valid defense. Rather, default judgments are typically caused by a defendant’s inability to navigate a convoluted system that attends more to the interests of the lawyers who inhabit it than to the parties who are enmeshed in it.

C. New York Has Alternatives.

Respondent warned that enjoining enforcement here would “further damage the public interest” by “ratifying plaintiffs’ substandard program” and “encouraging others to lower the bar even further.” N.Y. Reply Br. at 34, *Upsolve, Inc. v. James*, No. 22-1345 (2d Cir. Feb. 8, 2023). That speculative prediction rests on the premise that individualized, limited-scope legal advice is too dangerous for the wrong speaker to supply. But if New York policymakers believe that competence, disclosure, supervision, or accountability rules are needed, they have the power to pursue narrower measures directed to those concerns. What they may not do is invoke hypothetical systemic harms

to justify a categorical ban on speech based on its content.

Respondent's line of argument implies a parade of horrors: If New York cannot apply its UPL prohibition to Upsolve's aid program, the consequences will allegedly be devastating. The state's argument is that letting this program survive would leave New York with no way to regulate the legal profession or to protect consumers of legal services. But there is very little evidence for this view and a good deal of evidence for the contrary one.

Across the country, many jurisdictions and legal scholars have recognized that the traditional model of UPL restrictions leaves too many people without meaningful help. *See* Engstrom, *supra*, at 6 (examining the substantial reforms made by states across the nation to expand who may provide legal assistance). There is little to no evidence that these reforms harm consumers. *Id.* at 32–33. New York has numerous alternatives short of a categorical prohibition that would protect consumers without suppressing speech.

New York could permit unlicensed assistance for specific, simple tasks while reserving complex representation and court advocacy to licensed attorneys. Many states across the country have enacted reforms to expand who may provide legal assistance, and many more are considering similar measures. *Id.* at 6. Instead of thwarting groups like Upsolve, several states—including Alaska, Delaware,

Hawaii, Arizona, and Utah—are authorizing such groups to deploy nonlawyers to provide limited legal services. *Id.* See also Rebecca L. Sandefur & Thomas M. Clarke, *Roles Beyond Lawyers: Summary, Recommendations, and Research Report of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects*, AM. BAR FOUND. (Dec. 2016) (finding nonlawyer navigators effective in helping self-represented litigants).¹²

New York could also require unlicensed advisors to clearly state that they are not attorneys and cannot provide legal representation. Such disclaimers enable informed consent while allowing assistance to proceed. Upsolve already does this.

These reforms demonstrate what should be obvious: consumer protection does not require total prohibition of nonlawyer legal advice. Targeted regulations addressing specific risks—such as disclosure requirements, scope-of-practice limitations, and supervision arrangements—can protect consumers without eliminating their access to assistance entirely.

Furthermore, even if New York eliminated all UPL restrictions, it could prosecute fraud, negligence, and breach of contract when they occur. Common law remedies protect consumers against actual harm while avoiding prior restraints on speech.

¹² Available at <https://ssrn.com/abstract=2949038>.

Experience in analogous fields casts further doubt on New York’s consumer protection justification. Tax preparation, for instance, is largely unregulated: The market for tax preparation services works without criminalizing tax advice. *See* Leef, *supra*, at 34 (discussing minimal regulation of tax preparation and its maximization of consumer value). Because of the rigid structure of UPL regimes, “the legal profession has not seen the diversification in service providers that has been so successful in the medical field, where nurse practitioners, physician assistants, phlebotomists, and providers in other roles perform a range of needed services at lower cost and in a more holistic way.” Engstrom, *supra*, at 10.

IV. THE SECOND CIRCUIT’S RULE THREATENS FIRST AMENDMENT PROTECTION ACROSS LICENSED PROFESSIONS.

The stakes in this case extend far beyond legal advice. The Second Circuit’s holding that speech restrictions are “content-neutral” when they target the “purpose, focus, and circumstance” of speech creates a loophole that licensing boards across all professions could exploit. Occupational licensing pervades the American economy, and licensing boards are typically controlled by incumbent professionals with strong economic incentives to suppress competitive speech: That means that the Second Circuit’s rule is likely to create additional First Amendment-free zones wherever licensing exists.

That effect could be sweeping. Occupational licensing has exploded in the United States and now covers more than 20% of the workforce,¹³ and some estimates have put it closer to 30%.¹⁴ By 2003, in at least one state, it was estimated that approximately 1,100 occupations required a license, certification, or registration.¹⁵ Many of these occupations “consist primarily, if not entirely, of speech.” Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2015). The Second Circuit’s “purpose, focus, and circumstance” test threatens to transform occupational licensing into a general-purpose tool for evading First Amendment scrutiny. That test would allow policymakers to characterize a speech restriction as regulating professional “purpose” rather than content—and thus neatly evade strict scrutiny. If licensing boards can decide to deter occupation-related speech and such decisions can evade strict scrutiny, vast swaths of American discourse would move into a First Amendment-free zone. This cannot be reconciled with the principle that

¹³ Chris Edwards, *Occupational Licensing*, in EMPOWERING THE NEW AMERICAN WORKER: MARKET-BASED SOLUTIONS FOR TODAY’S WORKFORCE 59 (Scott Lincicome ed., 2022), <https://tinyurl.com/mtpfuus8>.

¹⁴ Morris M. Kleiner, *Reforming Occupational Licensing Policies*, THE HAMILTON PROJECT 14 (Mar. 2015), <https://tinyurl.com/2yrha6c2>.

¹⁵ *Id.* at 8.

content-based speech restrictions are presumptively unconstitutional. *Reed*, 576 U.S. at 163.

This Court rejected the Second Circuit’s approach in *NIFLA*. It should grant certiorari to make clear that *NIFLA* means what it says: states cannot “reduce a group’s First Amendment rights by simply imposing a licensing requirement.” 585 U.S. at 773.

CONCLUSION

The Second Circuit’s “purpose, focus, and circumstance” test cannot be reconciled with this Court’s precedents. A law that prohibits speech because that speech constitutes “legal advice” targets the content of the communication. A restriction that rests on semantic “purpose” does not change its substantive character. This Court made clear in *Reed*¹⁶ and *City of Austin*¹⁷ that lawmakers cannot use such cosmetic detours to route around First Amendment scrutiny.

If the Second Circuit’s line of argument were allowed to stand, the consequences would be far-reaching. The decision below offers a blueprint for licensing boards across all professions to evade strict scrutiny by reframing content-based restrictions as regulations of professional “purpose”—precisely the result this Court foreclosed in *NIFLA*. *See* 585 U.S. at 767–68, 773. Here, that doctrinal error shields a

¹⁶ 576 U.S. at 163–64.

¹⁷ 596 U.S. at 74.

regime that springs less from consumer demand than from organized rent-seeking—one that leaves millions of low-income Americans without assistance in a legal system they are ill-equipped to navigate alone. The First Amendment does not permit the government to criminalize helpful speech just because incumbent professionals prefer less competition.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Dan Greenberg
Alexander M. Xenos
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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