

In The  
**Supreme Court of the United States**

—◆—  
THE NORTH CAROLINA STATE  
BOARD OF DENTAL EXAMINERS,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fourth Circuit**

—◆—  
**BRIEF OF LEGALZOOM.COM, INC., RESPONSIVE  
LAW, FILERIGHT LLC, JUSTANSWER LLC, JUSTIA  
COMPANY, SHAKE, INC., AND LAW PROFESSORS  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**

—◆—  
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## TABLE OF CONTENTS

	Page
Table of Authorities .....	iii
Interest of <i>Amici Curiae</i> .....	1
Summary of Argument .....	6
Argument .....	8
I. PETITIONER’S EFFORT TO UNDO THIS COURT’S PRECEDENTS HOLDING THAT STATE AGENCIES CONTROLLED BY FINANCIALLY SELF-INTERESTED PARTIES ARE PRIVATE ACTORS SUBJECT TO ANTITRUST OVERSIGHT THREATENS ACCESS TO AFFORDABLE LEGAL SERVICES .....	8
A. Anticompetitive use of state bar regulatory authority is causing substantial harm to consumers and plays a major role in the American crisis of access to justice .....	8
B. This Court correctly treats financially self-interested market participants as private parties, even when a state gives them regulatory power and calls them a state agency.....	14
C. The Board of Dental Examiner’s unsupervised, anticompetitive regulation of its self-defined market monopoly closely resembles the unsupervised, anticompetitive actions of some state bar associations.....	16

TABLE OF CONTENTS – Continued

	Page
1. Anticompetitive state bar UPL opinions.....	19
2. Anticompetitive state bar ethics opinions.....	21
II. SUBJECTING STATE BAR ASSOCIATIONS TO ANTITRUST OVERSIGHT WHEN THEY POLICE THE BOUNDARIES OF THEIR MONOPOLY ON LEGAL SERVICES DOES NOT UNDERMINE THEIR ABILITY TO PROMOTE ETHICAL AND COMPETENT BEHAVIOR BY THEIR MEMBERS.....	23
Conclusion.....	24

## TABLE OF AUTHORITIES

Page

## CASES

<i>Allied Tube &amp; Conduit Corp. v. Indian Head, Inc.</i> , 486 U.S. 492 (1988).....	15, 16
<i>Bates v. Arizona State Bar</i> , 433 U.S. 350 (1977) .....	13
<i>California Retail Liquor Dealers Ass'n v. Mid-cal Aluminum, Inc.</i> , 445 U.S. 97 (1980) .....	15, 19
<i>Continental Ore Co. v. Union Carbide &amp; Carbon Corp.</i> , 370 U.S. 690 (1962).....	15
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975).....	14, 15, 18, 21, 23
<i>Hallie v. Eau Claire</i> , 471 U.S. 34 (1985).....	15
<i>In re Nolo Press/Folk Law, Inc.</i> , 991 S.W.2d 768 (Tex. 1999) .....	13, 18
<i>Lafayette v. Louisiana Power &amp; Light Co.</i> , 435 U.S. 389 (1978).....	15
<i>New York County Lawyers' Ass'n v. Dacey</i> , 287 N.Y.S.2d 422 (N.Y. 1967), <i>aff'ing on dissenting op. below</i> , 283 N.Y.S.2d 984 (N.Y. App. 1967) .....	13
<i>Patrick v. Burget</i> , 486 U.S. 94 (1988).....	15, 16

## OTHER AUTHORITIES

Gillian K. Hadfield, <i>The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law</i> , 38 INT'L REV. L. & ECON. 43 (2014).....	11
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## TABLE OF AUTHORITIES – Continued

	Page
Gillian K. Hadfield, <i>Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets</i> , DÆDALUS (forthcoming 2014) .....	9
Gillian K. Hadfield & Jamie Heine, <i>Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans</i> , in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS, S. Estreicher and J. Radice (eds.) (forthcoming 2015) .....	9, 10
Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, <i>Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights</i> , 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law (Feb. 27, 2013) .....	8, 9
LegalShield, <i>Decision Analyst Survey: The Legal Needs of Small Business</i> (2013), <a href="http://www.legalshield.com/about-us/pressmedia-kit/the-legal-needs-of-small-business/">http://www.legalshield.com/about-us/pressmedia-kit/the-legal-needs-of-small-business/</a> .....	11
Jonathan Lippman, <i>State Courts: Enabling Access</i> , DÆDALUS at 28, Summer 2014 .....	8
Laurel A. Rigertas, <i>The Legal Profession's Monopoly: Failing to Protect Consumers</i> , 82 FORDHAM L. REV. 2683, 2694 (2014) .....	11
Matthew Rotenberg, Note, <i>Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources</i> , 97 MINN. L. REV. 709 (2012) .....	17
Deborah L. Rhode, ACCESS TO JUSTICE (2005) .....	9

## TABLE OF AUTHORITIES – Continued

	Page
Deborah L. Rhode & Lucy Buford Ricca, <i>Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement</i> , 82 FORDHAM L. REV. 2587 (2013-14).....	12, 13
World Justice Project, <i>Rule of Law Index 2014</i> , <a href="http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf">http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf</a> (2014).....	8

**INTEREST OF *AMICI CURIAE***<sup>1</sup>**Alternative Service Provider *Amici***

**LegalZoom.com, Inc.** provides affordable online legal solutions for individuals and small businesses. LegalZoom has helped over two million Americans create their own legal documents addressing a variety of routine legal matters. LegalZoom has been subject to anticompetitive actions taken by self- and financially-interested regulatory agencies controlled by private market participants that have threatened to restrict the market choices available to consumers.

**Consumers for a Responsive Legal System (Responsive Law)** is a non-profit organization that seeks to make the legal system more affordable, accessible and accountable by educating consumers, improving access to online legal resources, championing innovative lawyers and promoting alternative legal services.

**FileRight, LLC** operates a website located at [www.fileright.com](http://www.fileright.com) where it provides an online platform for consumers to create their own immigration documents.

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<sup>1</sup> The accompanying brief was not written in whole or in part by counsel for any party, and no persons other than *amici* have made any monetary contribution to the preparation or submission of this brief. The parties have blanket consents on file for the filing of *amicus* briefs. The law professors' institutional affiliations are provided for identification purposes only, and imply no endorsement of the views expressed herein by any of the institutions or organizations listed.

**JustAnswer LLC** operates a website at [www.justanswer.com](http://www.justanswer.com), where it makes fast, affordable online help from thousands of independent professionals, including licensed attorneys, available to consumers.

**Justia Company** operates a website at [www.justia.com](http://www.justia.com) where it provides free case law, codes, regulations and legal information for lawyers, business, students and consumers worldwide.

**Shake, Inc.** operates a website at [www.shakelaw.com](http://www.shakelaw.com) where it provides a technology platform making the law accessible, understandable and affordable for consumers and small businesses.

### **Law Professor *Amici***

**Richard L. Abel** is Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law. His recent publications include *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* (Oxford University Press 2010) and *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (Oxford University Press 2008).

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Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law” (International Review of Law and Economics 2014). She is on LegalZoom’s Legal Advisory Council and the Advisory Board for JustAnswer.com. She has no financial interest in either company.

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## SUMMARY OF ARGUMENT

These *amici curiae* comprise alternative legal information and service providers and a group of prominent law professors who research, analyze and teach about access to justice and the market for legal services. These *amici* strongly believe that the Fourth Circuit's ruling below was correct, and that Petitioner and its allied *amici's* effort to undermine this Court's precedents that subject state agencies to antitrust scrutiny when they are controlled by private market participants is misguided.

There is an ongoing and worsening access-to-justice crisis in the United States. Increasing numbers of low- and middle-income Americans simply cannot afford to hire lawyers to address legal issues they routinely face. This access crisis is caused, in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry. Bar associations, similar to the dental board Petitioner here, are often run by active participants in the very market they are empowered to regulate and control, without meaningful state policy direction or active oversight. As a result, individuals, families, entrepreneurs and small businesses lack access to legal information, resources and assistance.

The research of *amici* law professors and the real-world experience of *amici* market participants provide useful insight to this Court's evaluation of why antitrust oversight remains necessary to deter

the use of state authority to regulate and control markets in self-interested ways.

The first section of this brief outlines the contours of how restricted access to legal services is harming American citizens and businesses. The second section provides illuminating anecdotes of how some state bar associations and their committees have used state-granted enforcement authority to restrict perceived competition with their members, in ways that defy judicial review and are inconsistent with basic due process checks and balances. The final section explains that continued antitrust oversight of financially self-interested parties' enforcement of their members' legal monopoly does not threaten their ability to assure ethical and competent behavior by their members.



**ARGUMENT****I. PETITIONER'S EFFORT TO UNDO THIS COURT'S PRECEDENTS HOLDING THAT STATE AGENCIES CONTROLLED BY FINANCIALLY SELF-INTERESTED PARTIES ARE PRIVATE ACTORS SUBJECT TO ANTI-TRUST OVERSIGHT THREATENS ACCESS TO AFFORDABLE LEGAL SERVICES.****A. Anticompetitive use of state bar regulatory authority is causing substantial harm to consumers and plays a major role in the American crisis of access to justice.**

The World Justice Project reports that the U.S. is currently tied with Kyrgyzstan, Mongolia and Uganda in terms of the affordability and accessibility of its civil justice system.<sup>2</sup> As leaders in the American judiciary have recognized (and no reasonable observer disputes), the U.S. faces a crisis in access to justice.<sup>3</sup> For instance, in New York, over 90% of people involved in housing, family, and consumer problems are

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<sup>2</sup> World Justice Project, *Rule of Law Index 2014*, [http://worldjusticeproject.org/sites/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/files/files/wjp_rule_of_law_index_2014_report.pdf) (2014).

<sup>3</sup> *E.g.*, Jonathan Lippman, *State Courts: Enabling Access*, DÆDALUS at 28, Summer 2014; Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, *Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights*, 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law (Feb. 27, 2013).

forced to appear in court without legal representation.<sup>4</sup> Studies in other states generally find that the proportion of unrepresented individuals exceeds 80%.<sup>5</sup>

At hourly rates that do not dip much below \$200 and which routinely exceed \$300, few average Americans can afford to pay lawyers for assistance with everyday legal needs, such as simple estate planning, obtaining elder care, arranging child custody, obtaining child support, addressing consumer debt and foreclosure, managing disputes over employment conditions or pay, and obtaining entitlements to health care, education and public services.<sup>6</sup>

Surveys of legal needs of low- and moderate-income Americans find that roughly 50%-60% of households faced an average of two significant legal problems in the previous year. Lack of access to legal representation leads Americans to take no action to address their legal problems at rates much higher than in countries such as England and the Netherlands

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<sup>4</sup> Jefferson, *Liberty and Justice for Some*.

<sup>5</sup> Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS*, S. Estreicher and J. Radice (eds.) (forthcoming 2015).

<sup>6</sup> Deborah L. Rhode, *ACCESS TO JUSTICE* (2005); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 *INT'L. REV. L. & ECON.* 43 (2014); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, *DÆDALUS* (forthcoming 2014).

that impose fewer restrictions on who may provide legal advice and assistance: roughly 25%-30% compared with 5%-10%.<sup>7</sup> Shockingly, the number of Americans obtaining help from a lawyer appears to be falling: a 1995 ABA study found that 29% of the poor and 39% of those of moderate means facing a serious legal problem had help from a lawyer or other legal service provider, but surveys conducted in the past ten years found that those percentages have dropped to about 15%.<sup>8</sup> Conservative estimates based on census data indicate that households facing legal problems in 2012 purchased an average of only one and half hours of lawyer services per problem; this is less than half of the amount purchased in 1990.<sup>9</sup> These numbers are only the tip of the iceberg, as they represent erupted legal problems such as a child custody fight, foreclosure, eviction or bankruptcy. Beneath the surface lies a great need for legal help that might prevent or minimize these crises before they erupt.<sup>10</sup>

Small businesses and entrepreneurs – the biggest drivers of new employment – also face enormous hurdles in obtaining affordable legal services. They

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<sup>7</sup> Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS*, S. Estreicher and J. Radice (eds.) (forthcoming 2015).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



form business entities, file for trademarks and patents, take on debt or equity investments, determine their regulatory obligations, file taxes and manage contracts with customers, suppliers, franchisors and the public. A 2012 survey found that nearly 60% of small businesses had faced serious legal problems in the preceding two years – collections, contract review, supplier disputes, security breaches, products liability, employee theft, tax audits, employee confidentiality issues, threats of customer lawsuits, etc.<sup>11</sup> Close to 60% of small businesses faced these problems without lawyer assistance.<sup>12</sup> For those that did hire lawyers, the average expenditure was \$7,600 – an enormous cost for a small business.<sup>13</sup>

This crisis in access to justice has many causes, including the complexity of American legal process, cuts to court budgets and limited legal aid funds. But a significant factor is the high price of legal services, and the excessive degree of regulation of U.S. legal markets contributes substantially to those high prices.<sup>14</sup>

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<sup>11</sup> LegalShield, *Decision Analyst Survey: The Legal Needs of Small Business* (2013), <http://www.legalshield.com/about-us/pressmedia-kit/the-legal-needs-of-small-business/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014); Laurel A. Rigertas, *The Legal Profession's* (Continued on following page)

Although some access-reducing restrictions result from rules adopted by state legislatures and supreme courts, others result from the actions of state bar associations. Like Petitioner North Carolina State Board of Dental Examiners, many state bar associations (including *amici* bar associations appearing here) are controlled by active practitioners who may have a direct financial self-interest in maintaining restrictions on who can practice law and how they can do so, and in defining the scope of that monopoly broadly. Like Petitioner, state bar associations routinely operate without active state supervision and may seek to limit competition from alternative legal services providers. A recent survey of state bar unauthorized practice committees and enforcement agencies found that most complaints about alleged unauthorized practice of law (UPL) are made by lawyers or the bar association itself, not by consumers.<sup>15</sup> Nearly 70% of those surveyed could not recall a single instance of serious injury to the public from alleged unauthorized practice in the previous year.<sup>16</sup> The vast majority of complaints never result in court proceedings where enforcement actions can be supervised by state court judges – rather, they are resolved unofficially through bar and committee investigations,

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*Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014).

<sup>15</sup> Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2013-14).

<sup>16</sup> *Id.*

pressure and consent agreements.<sup>17</sup> Ironically, the access-to-justice crisis often leaves those accused of unauthorized practice without legal representation themselves.

Modern technology has spawned a proliferation of innovative alternative legal service providers – software and Internet-based legal document completion and filing services; unbundled legal information and communication platforms; client and lawyer matching services, among a variety of other new business models. Alternative providers of such services, including *amici* here, have a critical role to play in reducing the cost of legal information and services and improving access to justice. Alternative providers may provide low-cost access to legal forms, legal information and support for people navigating legal processes. They may provide easier and cheaper ways to find attorneys willing to represent them. But these innovators – like innovations introduced into the legal market in the past<sup>18</sup> – are perceived as a threat

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<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g., Bates v. Arizona State Bar*, 433 U.S. 350 (1977) (First Amendment prevents state bars from punishing lawyers for publishing truthful advertisements); *New York County Lawyers' Ass'n v. Dacey*, 287 N.Y.S.2d 422 (N.Y. 1967), *aff'ing on dissenting op. below*, 283 N.Y.S.2d 984 (N.Y. App. 1967) (layman's publication of *How to Avoid Probate!* book with legal forms and instructions protected by First Amendment from local bar association's effort to ban its publication); *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 773-75 (Tex. 1999) (mandamus action arising from state UPL committee's effort to ban legal self-help publications and software).

by some practicing lawyers and bar associations. This Court should not accept Petitioner and its supporting *amici*'s request to tear down the existing bulwark against the potential anticompetitive abuse of state power by financially self-interested regulators.

**B. This Court correctly treats financially self-interested market participants as private parties, even when a state gives them regulatory power and calls them a state agency.**

This Court's precedents hold that financially self-interested market participants – such as the board of dental examiners here and many state bar associations – are private entities subject to Sherman Act scrutiny when they regulate competition in their own markets. Designating a dental board or bar association controlled by market participants a “state agency” “does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). In *Goldfarb*, this Court treated the Virginia State Bar as a private actor when the Bar took a variety of actions to enforce a minimum fee schedule for legal services that had been set by a county bar association. Enforcing those minimum fees was “essentially a private anticompetitive activity” and was not beyond the reach of the Sherman Act. 421 U.S. at 792.

This Court has recognized that the threat of unregulated anticompetitive conduct increases when a

decision-making body “is composed, at least in part, of persons with economic incentives to restrain trade” and “the restraint is imposed by persons unaccountable to the public.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 (1988) (citing *Goldfarb* and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962)). “We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.” *Allied Tube & Conduit Corp.*, 486 U.S. at 501 (quoting *Hallie v. Eau Claire*, 471 U.S. 34, 45 (1985)).

Financially self-interested agencies escape Sherman Act scrutiny only when the competitive restraints they impose are “clearly articulated and affirmatively expressed” as state policy, and their regulatory actions are “‘actively supervised’ by the State itself.” *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (“*Midcal*”) (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Clear articulation of state policy and active state supervision of such agencies are required because, without those limitations, “there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

**C. The Board of Dental Examiner’s unsupervised, anticompetitive regulation of its self-defined market monopoly closely resembles the unsupervised, anticompetitive actions of some state bar associations.**

Typically, professional self-regulatory bodies like the dental board here and state bar associations are elected by and accountable to their members, rather than to the public. This Court’s concern in *Allied Tube* that private actors given regulatory authority tend to act “on their own behalf” is borne out by the facts in this case, by scholarly research, and by the actual experience of legal market innovators.

The dental board here mailed cease-and-desist letters to perceived competitors for teeth-whitening business and to their landlords without a clear articulation in state legislation that teeth-whitening was “dentistry” under state law, and without state supervision of its enforcement actions. The board’s threatening letters exceeded its power under state law, and the letters’ *in terrorem* effect reduced competition and increased prices. The board’s control by active, practicing dentists gave no assurance that its cease-and-desist letter campaign promoted state policy rather than the private interest of dentists. *See Patrick*, 486 U.S. at 101 (no assurance that private parties’ unsupervised anticompetitive conduct promotes government policy, rather than private interest).

The dental board’s letter campaign closely resembled – indeed, was modeled after – the North Carolina State Bar’s enforcement practices in the legal services market. Like the dental board, that state bar conducts investigations and issues cease-and-desist letters to non-lawyers, accusing them of the unauthorized practice of law or UPL. Not coincidentally, that state bar and several others are *amici* supporting Petitioner, asking this Court to abandon the requirement of active state supervision over their power to enforce the legal monopoly granted to their members.

State bar UPL enforcement – especially when challenging perceived competition from non-lawyers – often suffers from the same inadequacies as the dental board’s actions here. There is often no clearly articulated state policy on what constitutes “the practice of law.”<sup>19</sup> What constitutes UPL is notoriously poorly defined, often treated on a case-by-case basis, leaving state bars with broad discretion to choose targets for enforcement.<sup>20</sup> State bars face little supervision by the state or scrutiny by the public. Their UPL investigations often take place behind closed doors and outside the reach of public information statutes.<sup>21</sup> Increasing

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<sup>19</sup> Matthew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 717-18 (2012).

<sup>20</sup> *Id.*

<sup>21</sup> For example, until corrected by judicial rule-making, the Texas Unauthorized Practice of Law Committee claimed that not  
(Continued on following page)

this opacity, some state bars hold short of taking formal enforcement actions that would subject their UPL enforcement to independent judicial review. Rather, they rely on closed-door investigations, cease-and-desist letter demands, and opinions released by small committees of members, typically volunteers. Even without judicial enforcement, such “official” actions effectively suppress competition for legal services.

Some state bars’ UPL committees – usually composed of volunteer attorneys in private practice – issue *sua sponte* opinions determining that certain actions or even specifically-named companies are violating state law. Likewise, state bar ethics committees composed of volunteers in private practice issue ethics opinions that conclude, without judicial oversight, that attorneys who choose to participate in innovative legal service models risk professional discipline. Un-supervised and issued by financially self-interested practitioners, these opinions restricting law practice have the same effect as concerted refusals to deal. *See Goldfarb*, 421 U.S. at 781-82.

Recent examples of how some state bars have used this unsupervised power to suppress perceived

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only were its investigations private, but also that its *rules* and its *membership* were secret from the public and from the parties it investigated. *See In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 773-75 (Tex. 1999).



competition may shed light on this Court’s consideration of whether to retrench on *Midcal*’s “clear articulation” and “active supervision” requirements, as Petitioner and the state bar *amici* request.

### **1. Anticompetitive state bar UPL opinions.**

Responding to “many informal inquiries” by its members, the Connecticut Bar Association’s UPL committee in early 2008 *sua sponte* published an “informal opinion.”<sup>22</sup> The opinion specifically named *amicus* LegalZoom and another alternative legal provider and accused both of violating Connecticut law. The committee based its opinion solely on what it saw on the Internet – it gave the companies no notice it was considering the issue; it gave them no opportunity to be heard; it sought no public input; and it conducted no hearing. The bar took no enforcement action – that would have brought independent judicial review. Nonetheless, this state “agency” opinion remains online, derogating and discouraging perceived competition from non-lawyers.<sup>23</sup>

In 2008, *amicus* North Carolina State Bar published a “cease-and-desist” letter addressed to LegalZoom, claiming that its services were “illegal in North

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<sup>22</sup> Ct. Bar Ass’n UPL Comm. Informal Op. 2008-01 (2008) (available at <http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf>).

<sup>23</sup> *Id.*

Carolina and must end immediately.”<sup>24</sup> The letter directly contradicted a letter the bar had sent to LegalZoom in 2003, telling LegalZoom it was *not* engaged in the unauthorized practice of law.<sup>25</sup> The bar’s unexplained about-face shows that its market regulation is not following a clearly-articulated state policy nor is it actively supervised by the state. Like the Connecticut bar, the North Carolina bar took no direct enforcement action for five years, avoiding judicial review of its action.

Unsupervised, financially self-interested market regulation emboldens other financially self-interested regulators. In 2010, the Pennsylvania Bar Association’s UPL committee, relying on the Connecticut and North Carolina bars’ actions, issued its own “formal opinion,” concluding that only attorneys could provide online legal document services “beyond the supply of pre-printed forms selected by the consumer.”<sup>26</sup> Like the Connecticut bar, the Pennsylvania bar gave no notice to affected parties; it provided no opportunity to be heard; sought no public input; and conducted no hearing.

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<sup>24</sup> See Original Complaint at 8, *LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11-CVS-15111 (Super. Ct., Wake County, N.C. Sept. 30, 2011).

<sup>25</sup> *Id.* at 6-7.

<sup>26</sup> Pa. Bar Ass’n UPL Comm. Formal Op. 2010-01 (2010) (available at <https://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf>).

## 2. Anticompetitive state bar ethics opinions.

While operating as a limitation on their own members' actions, professional responsibility standards also may effectively discourage innovation and competition in the legal services markets, reinforcing bar members' monopoly while disserving consumers. *Goldfarb*, 421 U.S. at 781-82. The attorney price-fixing in *Goldfarb* is just one example; bar associations have a history of informal, unsupervised market regulation.

For example, in 2005, with no public input or hearing, the Texas State Bar Professional Ethics Committee (comprised entirely of licensed attorneys) issued an opinion holding that attorneys could not participate in an innovative online system that matched attorneys with prospective clients.<sup>27</sup> This system not only helped licensed attorneys find prospective clients, but by simplifying the process for consumers, increased access to lawyers while allowing competition to lower prices. Texas attorneys risked sanctions if they participated, effectively preventing such systems from operating in Texas. The next year, after an effected entity objected and another opinion was sought, the committee substantially

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<sup>27</sup> Tex. Bar Ass'n Prof. Ethics Comm. Op. 561 (2005) (available at <http://www.legaethicstexas.com/Ethics-Resources/Opinions/Opinion-561.aspx>).

reversed its position, but again with no public input or hearing or state supervision.<sup>28</sup>

More recently, again with no public input, the South Carolina Bar issued an advisory opinion holding that its members could not participate on *amicus* JustAnswer's question-and-answer internet site.<sup>29</sup> This site provides consumers with prompt, low-cost access to legal information that would not be readily available otherwise. The bar gave JustAnswer no notice or opportunity to be heard. It sought no public input and it conducted no hearing. Because South Carolina lawyers risk disciplinary proceedings by participating, the "informal" opinion effectively stifled innovation and competition with no state supervision or judicial review.

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<sup>28</sup> Tex. Bar Ass'n Prof. Ethics Comm. Op. 573 (2006) (available at <http://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-573.aspx>).

<sup>29</sup> S. C. Bar Ass'n Ethics Adv. Op. 12-03 (2012) (available at <http://www.scbars.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1211/Ethics-Advisory-Opinion-12-03.aspx>).

**III. SUBJECTING STATE BAR ASSOCIATIONS TO ANTITRUST OVERSIGHT WHEN THEY POLICE THE BOUNDARIES OF THEIR MONOPOLY ON LEGAL SERVICES DOES NOT UNDERMINE THEIR ABILITY TO PROMOTE ETHICAL AND COMPETENT BEHAVIOR BY THEIR MEMBERS.**

The state bar association *amici* supporting Petitioner vastly overstate the impact of the Fourth Circuit's decision below. It will not lead to new layers of bureaucracy – under *Goldfarb*, state bars are *already* subject to antitrust scrutiny when they use their informal powers to benefit their members, rather than to promote a clearly articulated state policy.

The promulgation of admission and disciplinary rules is typically done with adequate process and review. Bar members and applicants have substantial incentive to monitor the scope and application of those rules. Admission decisions and disciplinary proceedings are ultimately supervised by state courts. The state bar *amici* provide no examples – either case law or anecdotal – that *Goldfarb* has restricted their ability to ensure ethical and competent behavior by their members.

The state bar *amici* supporting Petitioner incorrectly conflate actions promoting ethical and competent behavior by bar members with enforcement by bar members of their own monopoly over the practice of law. Self-regulation and monopoly-enforcement implicate very different state interests. It is not essential that private, financially self-interested market

participants conduct both functions. Bar associations may effectively regulate their members' admission and professional conduct without also holding the power to enforce their members' monopoly against non-members. Unauthorized practice restrictions may be enforced by numerous state officials who, unlike state bar associations, do not have a direct financial interest in suppressing perceived competition. Judges, state and federal prosecutors, administrative agencies and attorneys general all typically have the power to take action against the unauthorized practice of law.

The Fourth Circuit's decision follows this Court's existing precedent that treats private parties as such when acting in their own interests, including restricting competition within their regulated market. Petitioner and its allied state bar *amici* seek a dangerous change in the law that would remove meaningful review of financially self-interested private parties empowered by state law to enforce their own monopolies. Nothing in the Sherman Act or this Court's precedent supports, let alone requires, this disquieting result.



## CONCLUSION

No doubt many, if not most, private attorneys given the power by states to enforce the professional bar's monopoly over the practice of law are honorable individuals. However, logic, academic research and the real-life experience of consumers and innovative

service providers show that actual, active state oversight of financially-interested market participants remains a fundamental check on the potential for abuse. This Court should decline the request of Petitioner and its allied *amici* to undermine this existing and necessary bulwark against the unfettered ability to use state power to advance private interests at the expense of the free market.

Respectfully submitted,  
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