ANCHOR LAW FIRM, PLLC and ANDREW M. CARROLL, ESQ.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000052-23
Plaintiffs-Appellants,	Civil Action
v.	ON APPEAL FROM THE JULY 27, 2023 ORDERS ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY
THE STATE OF NEW JERSEY, GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey and MARLENE CARIDE, in her official capacity as Commissioner of Banking and Insurance,	DOCKET NO. MER-L-1186-21
Defendants-Respondents.	SAT BELOW: HON. DOUGLAS HURD, J.S.C.
	SUBMISSION DATE: DECEMBER 11, 2023

BRIEF OF PLAINTIFFS-APPELLANTS ANCHOR LAW FIRM, PLLC AND ANDREW M. CARROLL, ESQ.

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PRELIMINARY STATEMENT

True or false: An attorney licensed in New Jersey will violate a statute and be subject to criminal penalties solely because that attorney is, by some unknown measurement, deemed to be "principally engaged" in one area of legal practice.

Correct answer: True, and Defendants do not contend otherwise.

This case presents a significant legal issue, specifically the constitutionality of a statute that regulates the practice of law and imposes criminal penalties upon any violator. Perhaps the most startling aspect of this regime is that the entity charged with examining attorneys' practices and determining whether attorneys are (or are not) "principally engaged" in representing clients in debt-related matters is *not* the State Supreme Court – it is the Department of Banking and Insurance.

The New Jersey Constitution grants the Supreme Court exclusive jurisdiction over the practice of law. It has exercised that authority by, among other ways, adopting the Rules of Professional Conduct ("RPCs"), issuing opinions construing the RPCs, and establishing numerous committees to regulate attorney conduct. The Legislature has repeatedly recognized that it cannot regulate attorneys engaged in the practice of law. The Legislature originally did so here as well. When it enacted the New Jersey Debt Adjusters Law, N.J.S.A. 17:16G-1 et seq. (the "Act") in 1961, the Legislature exempted attorneys from the Act's coverage.

But the Legislature improperly changed course in 1986, when it amended the Act and narrowed the previously complete attorney exemption to exempt only attorneys that were not "principally engaged" in the practice of representing debtors or creditors in consumer or commercial debt disputes (the "Limited Attorney Exemption"). In short, the 1986 amendment to the Act criminalized attorneys that specialize in bankruptcy work, debt negotiation and debt restructuring.

The Limited Attorney Exemption violates the Separation of Powers doctrine, violates Plaintiffs' and other attorneys' constitutional due process rights for being vague, overbroad and for infringing upon their First Amendment rights to render legal advice to clients. Notwithstanding these constitutional infirmities, the trial court denied Plaintiffs' Summary Judgment Motion, and granted Defendants' Summary Judgment Motion and dismissed the Complaint.

The de novo review of that decision will reveal that the trial court erred in: disregarding the entirety of the deposition testimony of Defendants' designated representative, which testimony is binding on Defendants; applying a presumption of constitutionality to the Act despite the fact that it impinges upon the constitutionally protected right to practice law, and the First Amendment rights of attorneys to advise clients about legal issues; and in ignoring the Supreme Court's exclusive right to regulate the practice of law in the State.

The trial court also failed to address or acknowledge a decision from the Connecticut Supreme Court on a virtually identical statute where that Court held that the statute violated the Separation of Powers doctrine.

Furthermore, the Limited Attorney Exemption sweeps in constitutionally protected conduct, and does not advance any legitimate purpose of the Act of protecting consumers from abusive practices because the Act would prohibit the most experienced and most ethical debtor/creditor attorney from representing a client if that attorney is deemed to be "principally engaged" in that area of the law by some unknown standard.

Accordingly, this Court should reverse the trial court's Orders.

PROCEDURAL HISTORY

Plaintiffs Anchor Law Firm, PLLC ("Anchor") and Andrew M. Carroll, Esq. ("Carroll") (together, "Plaintiffs") submit this brief in support of their appeal dismissing their Complaint against Defendants, State of New Jersey, Attorney General Gurbir Grewal and Marlene Caride, Commissioner of the Department of Banking and Insurance ("DOBI") (collectively, "Defendants").

On June 4, 2021, Plaintiffs filed their Complaint against Defendants. Pa0005. On October 15, 2021, Plaintiffs served a notice pursuant to Rule 4:14-2(c) to take the deposition of a DOBI representative regarding various topics concerning the Act and the Limited Attorney Exemption. Pa0047 at 19:18-20:19.

On February 15, 2022, Plaintiffs deposed Howard Wegener, the Chief of Consumer Finance Operations of DOBI, the only representative designated by DOBI to testify in response to Plaintiffs' deposition notice. Pa0047 at 19:18-20:19.

On April 28, 2023, Plaintiffs and Defendants filed summary judgment motions seeking a final adjudication on all of Plaintiffs' claims. Pa0109. On July 21, 2023, the trial court heard oral argument of the parties' motions. On July 27, 2023, the trial court placed its decision on the record and entered two orders (1) denying Plaintiffs' motion; and (2) granting Defendants' motion and dismissing the Complaint with prejudice. Pa0001-Pa0004; T. at 3:1-32:23.

On September 11, 2023, Plaintiffs filed the Notice of Appeal. Pa0193.

STATEMENT OF FACTS

A. Plaintiffs Represent Clients In The State of New Jersey In Debt Settlement Matters.

Anchor is a law firm that represents clients throughout the State and other states who require legal services in numerous practice areas, including but not limited to, litigation defense and debt settlement. Pa0008, ¶11. Carroll -- a member of Anchor -- is an attorney licensed to practice law in this State who provides legal services to individuals and businesses in various areas of the law, including bankruptcy and New Jersey debtor/creditor matters for Anchor clients. Pa0008, ¶12.

Defendants enforce the Act, promulgate regulations and institute summary actions against any parties they believe to be in violation of the Act. Pa0009, ¶¶15-16; N.J.S.A. 17:16G-8.

B. The Legislature Enacts And Amends A Statute Governing Debt Adjustment Services.

In 1961, the Legislature enacted a predecessor statute, the Debt Adjusters Law, "to bar debt adjusters from transacting business in this State." American Budget Corp. v. Furman, 67 N.J. Super. 134, 137 (Ch. Div.), aff'd, 36 N.J. 129 (1961). Under the Debt Adjusters Law, "***any*** attorney-at-law of this State" was exempt from the statute. Id. at 137 (emphasis added).

In 1979, the Legislature revisited this issue and enacted the Act, which lifted the outright ban on "debt adjustment" and permitted certain nonprofit entities to act as debt adjusters. N.J.S.A. 17:16G-1 et seq.; Pa0035-Pa0036. This initial version of the Act made no reference to attorneys, but under the State's then-existing criminal statutes, "an attorney at law of this State" continued to ***not*** be deemed a debt adjuster and thereby was exempt from the Act. Pa0040.

In 1986, the Legislature amended the Act to define a "debt adjuster" as "a person who ***either*** (a) acts or offers to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or otherwise altering the terms of payment of any debts of the debtor, ***or*** (b) who, to that end, receives money or other property from the debtor, or on behalf of the

debtor, for payment to, or distribution among, the creditors of the debtor." N.J.S.A. 17:16G-1 (emphasis added). The Legislature amended the Act to clarify that "[n]o person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster," and to state that they cannot act as a debt adjuster "without first obtaining a license from the Commissioner of the Department of Banking pursuant to this act." N.J.S.A. 17:16G-2. Notably, the definition of "debt adjuster" does not distinguish between those who represent debtors and those who represent creditors, or between commercial and consumer debts. A person who represents large commercial creditors is thus a "debt adjuster" under the Act.

Significantly, the amendment substantially narrowed the existing attorney exemption (which covered ***all*** attorneys) to exempt ***only*** "an attorney-at-law of this State who is not principally engaged as a debt adjuster" (the "Limited Attorney Exemption"). N.J.S.A. 17:16G-1(c) (2) (a). The Legislature also amended the State's criminal statute's definition of those persons not deemed to be debt adjusters to match the Act's Limited Attorney Exemption. N.J.S.A. 2C:21-19f. Thus, unlike the pre-1986 version of the Act (which broadly exempted all attorneys), the 1986 version of the Act exempts some, but not all, attorneys. N.J.S.A. 17:16G-1(c) (2) (a).

Any person who violates the Act, including any New Jersey-licensed attorneys, "shall be subject to a penalty of $1,000 for the first offense and not more than $5,000 for the second and each such subsequent offense." N.J.S.A. 17:16G-8; N.J.A.C. 3:25-3.1(c). Significantly, a violation of the Act constitutes a ***crime***: "[a]ny person who knowingly and willfully engages in the business of debt adjustment without a license in violation of the Debt Adjuster Act shall be guilty of a crime of the fourth degree pursuant to N.J.S.A. 2C:21-19f." N.J.A.C. 3:25-1.1(d); Pa0063. A person who has been convicted of a crime of the fourth degree may be sentenced to imprisonment "for a specific term which shall be fixed by the court and shall not exceed 18 months." N.J.S.A. 2C:43-6(a) (4).

The purpose of the Legislature's various amendments to the Act in 1986, including the addition of the Limited Attorney Exemption, was purportedly "to correct widespread abuses in the consumer debt adjustment and credit counseling industry." Pa0046.

C. The State Opens An Investigation To Determine Whether An Attorney Has Been "Principally Engaged" As A Debt Adjuster In Violation of the Act.

In or about March 2021, the Office of Attorney Ethics (the "OAE") opened an investigation to determine whether the respondent attorney was principally engaged as a debt adjuster in violation of the Act. Pa0007, ¶8. The OAE has administratively stayed its investigation based on this lawsuit. Pa0025, ¶10.

D. Plaintiffs Filed This Action Against Defendants.

On June 4, 2021, Plaintiffs filed this action against Defendants asserting that the Limited Attorney Exemption violates the separation of powers doctrine and Plaintiffs' constitutionally-protected due process, and First Amendment rights. Pa0005. Plaintiffs are seeking an order declaring the Limited Attorney Exemption as unconstitutionally void and of no effect. Pa0015; Pa0017; Pa0019; Pa0021.

Specifically, in the First Count Plaintiffs allege that the Limited Attorney Exemption substantially encroaches upon the New Jersey Supreme Court's exclusive jurisdiction and domain over the practice of law in violation of the separation of powers doctrine under the State Constitution. Pa0014, ¶49. Plaintiffs allege that the Legislature has placed a severe restriction upon an attorney's license to practice law by prohibiting attorneys from devoting some undefined portion of their practice of law to debt adjustment services – services that constitute the practice of law and fall solely within the province and regulation of the Supreme Court. Pa0013, ¶44.

In the Second Count Plaintiffs allege that the Limited Attorney Exemption is unconstitutionally vague, and therefore violative of Plaintiffs' due process rights. Pa0016, ¶58. Without definitions of "principally engaged" and "attorney-at-law of this State," or any other guidance as how these terms are interpreted or applied, the prohibition fails to give fair notice and warning of, and forces Plaintiffs and all other

lawyers to guess, what conduct is prohibited and subject to penalties, discipline, and even criminal prosecution and imprisonment. Pa0016, ¶56.

Plaintiffs' Third Count alleges that the Limited Attorney Exemption is unconstitutionally overbroad and violative of Plaintiffs' due process rights because it regulates and infringes upon constitutionally-protected activity. Pa0019, ¶64. Plaintiffs allege that while the Act furthers the State's interest to protect debtors from abusive, deceptive and fraudulent practices by exempting some attorneys of the State from its regulations, it fails to advance the State's legitimate interest (and, in fact, has the effect of harming clients) because it not only prohibits certain attorneys from legitimately engaging in the practice of law but prohibits those attorneys who devote the most time and represent the most clients in this area of practice of law (such as bankruptcy attorneys), and thereby have the most experience, expertise and specialization in this area of practice of law, from assisting clients with debt adjustment. Pa0018, ¶63.

Lastly, Plaintiffs contend that Defendants have violated the Federal Civil Rights Act and New Jersey Civil Rights Act by depriving Plaintiffs and other attorneys of their due process rights summarized above. Pa0020, ¶68.

E. Plaintiffs Take The Deposition Of A Designated Representative Of DOBI.

On October 15, 2021, Plaintiffs served Defendants with a notice to take the deposition of a representative of DOBI pursuant to Rule 4:14-2(c). Pa0052.

Specifically, Plaintiffs requested that DOBI designate and produce the person or persons to testify on its behalf on nine specified topics, all of which related to factual information concerning the Act and the Limited Attorney Exemption, and Defendants' enforcement and interpretation thereof. Pa0047 at 19:18-20:19.

On February 15, 2022, Defendants produced Howard Wegener, the Chief of Consumer Finance Operations of DOBI, as its designated representative to testify on its behalf on all of the specified topics. Pa0047 at 19:18-20:10. Wegener understood that he was designated as the sole representative of DOBI to testify about the nine topics. Pa0047 at 20:11-14. Wegener further confirmed that there were no topics to which he could not testify. Pa0047 at 20:17-20.

F. The Act Restricts The Amount Of Debt Adjustment Services That An Attorney Can Provide To Clients.

The Act, as amended, restricts the amount of debt adjustment services that an attorney can provide to clients. N.J.S.A. 17:16G-1. Through Wegener, DOBI confirmed its understanding that the Act places such a restriction on attorneys:

> Q. Based on your knowledge, experience, and training, Howard, if an attorney is licensed as a New Jersey attorney, a full license, they can handle wills and estates, trusts, bankruptcy work, [if] that attorney is principally engaged in debt-adjustment work, they violate the statute?
>
> A. Yes.
>
> ***
>
> Q. So would you agree with me that if an attorney at law in this state is an expert in bankruptcy, debtor/creditor

> relationship, but if that attorney is principally engaged in that work, they are in violation of the statute?
>
> A. Yes.
>
> ***
>
> Q. So wouldn't you agree with me then, to that extent, this statute ***imposes a restriction*** on how much debt-adjustment work a licensed attorney in this state can do?
>
> A. Yes.

Pa0047 at 37:25-38:6; 39:20-25; and 43:5-14 (emphasis added).

G. The Legislature Has Not Defined, And Defendants Have Also Not Defined Or Otherwise Offered Any Guidance, As To The Meaning Of "Principally Engaged" Or "Attorney-At-Law Of This State" As Used In The Act's Limited Attorney Exemption.

Neither the Legislature nor DOBI has made any attempt to define the critical terms "principally engaged" or "attorney-at-law of this State" as used in the Limited Attorney Exemption. N.J.S.A. 17:16G-1; N.J.A.C. 3:25-1.1.

DOBI has issued a few bulletins that reference the Act, but they do not provide any guidance as to the meaning of these critical terms. Pa0082-Pa0086. DOBI issued a bulletin on July 28, 2008 quoting sections of the Act "to remind interested parties of the requirements of N.J.S.A. 17:16G-1 et seq. (the Act)." Pa0082-Pa0084. DOBI also issued another bulletin on December 19, 2008 advising the community that a different set of services -- mortgage modification services -- are also subject to the Act. Pa0086.

DOBI has not issued or published any other writing, or identified any other source providing any guidance as to the meaning of these critical terms. Pa0047 at 52:19-25; 55:24-56:9. These phrases are simply not defined anywhere in any DOBI publication. Pa0047 at 55:24-56:9.

DOBI also confirmed that "up to this point in time" it has not developed a methodology as to the factors to consider in determining whether an attorney is "principally engaged" as a debt adjuster. Pa0047 at 30:13-23. DOBI further confirmed that it "does not have one set of criteria to determine when and how someone is 'principally engaged.'" Pa0047 at 52:15-18. DOBI is not even in the process now of addressing this problem by issuing any regulations on what "principally engaged" means. Pa0047 at 58:22-25.

As a result, DOBI is entirely unable to answer a host of pertinent questions, identify a single source with answers to those questions or otherwise solve the mystery of whether an attorney is "principally engaged" under a particular set of circumstances:

> Q. Well, is "principally engaged" defined in any of those areas, to your knowledge?
>
> A. Not to my knowledge.
>
> Q. Do any of those areas give any hint as to what the factors would be to determine if someone is principally engaged?
>
> A. They do not.

Q. Do any of those sources give a hint whether principally engaged is measured on a daily, weekly, monthly, annual, or some other basis?

A. No.

Q. Do any of those sources give a hint whether principally engaged is based on a number of clients or a number of cases?

A. No.

Q. Do any of those sources give any hint as to whether principally engaged is based on revenue received by an attorney?

A. No.

Q. Do any of those sources give any hint on whether an attorney in a law firm would be looked at separate from the firm to determine whether he or she or the firm is principally engaged as a debt adjuster?

A. No.

Q. So as you sit here right now, Howard, can you give me any single source that a member of the public could look to for a definition of "principally engaged"?

A. I cannot, but I'm sure there, you know, might be some other collective or aggregate sources, which is why we would go and seek counsel in the same way I would recommend.

Q. You can't identify any such source today?

A. As we sit here right now, no.

***

Q. Howard, under the statute if an attorney receives more than 50 percent of his or her revenue from debt-adjustment work, do they violate the statute?

> A. We haven't defined that.
>
> Q. Is the tipping point for when someone is principally engaged as a debt adjuster, is it more than 50 percent or is it a different percentage?
>
> A. It would be based off of the facts and a holistic review.
>
> Q. A what kind of review?
>
> A. Holistic review.
>
> Q. A holistic review. And we've already established that DOBI hasn't determined what those correct facts are?
>
> A. Correct.

Pa0047 at 31:7-33:5; 63:10-64:12.

Thus, what is entirely the lawful practice of debtor/creditor law one day, becomes unlawful and criminal the next day if that attorney is now "principally engaged" in that area of the law. DOBI conceded that different people can define the term "principally engaged" using "different criteria." Pa0047 at 50:18-22. In other words, DOBI "agree[s] that reasonable people could have a different understanding of what 'principally engaged' means." Pa0047 at 75:20-25.

DOBI also acknowledged that it does not have any guidance on what the term "attorney-at-law of this State" means. Pa0047 at 37:5-7. This matters because the New Jersey Supreme Court permits out-of-state attorneys to practice in New Jersey under a variety of circumstances. See RPC 5.5. Specifically, neither the Act, its regulations nor any DOBI bulletins define what "attorney-at-law of this State"

means under the Act. Pa0047 at 37:8-13. DOBI was unable to state whether this term "would apply to someone who is not licensed in New Jersey, but has a pro hac vice admission." Pa0047 at 36:24-37:4.

H. DOBI Acknowledges That The Limited Attorney Exemption Prohibits Attorneys With The Most Experience From Providing Debt Adjustment Services.

While the Act was enacted purportedly to protect consumers, the Act permits a newly admitted, novice attorney to represent clients in debt adjustment matters, while prohibiting an attorney with a concentration in that area and more experience from performing the same work:

> Q. If a consumer needs an attorney in a debt-adjustment case, they can hire someone right out of law school that graduated and was licensed last week and that attorney can handle the case and be compliant with the statute, correct?
>
> A. Yes.
>
> Q. If that same consumer looking to hire John Doe, who graduated last year, or Jane Smith, who devotes her entire practice to debt-adjustment work, is considered by her peers to be an expert, that consumer, they hired the expert, that expert would run afoul of the statute; isn't that correct?
>
> A. As you stated, they do nothing but debt?
>
> Q. Yes.
>
> A. Yes.

Pa0047 at 54:16-55:7.

DOBI confirmed that the Act would even prohibit corporate debt work attorneys such as bankruptcy attorneys, a common type of specialized practice with a concentration and expertise in performing debt adjustment services for clients, from being principally engaged in the performance of such services:

> Q. A bankruptcy attorney representing a client for debt consideration, trying to adjust, compromise, or modify a creditor's claim would be a debt adjuster, right?
>
> A. Correct.
>
> ***
>
> Q. An attorney who's licensed in the State of New Jersey, who does nothing but bankruptcy work, they appear on a regular basis in bankruptcy court, that attorney should be mindful not to be principally engaged in debt-adjustment work because if they are, they would be in violation of the statute?
>
> A. Yes.

Pa0047 at 41:7-11; 58:11-18.

Additionally, DOBI acknowledged that an attorney would violate the Act regardless even if the attorney did excellent work and the client is very happy with the services provided. Pa0047 at 57:11-17.

DOBI was unable to explain how the Limited Attorney Exemption advances the interests of protecting consumers:

> Q. So can you help me understand how does that protect members of the public?

> A. It's not a policy that we -- it's not the language that we came up with. We're enforcing it. So I can't speak to the policy considerations there.
>
> Q. I understand. But can you identify for me, as a person responsible for enforcing the statute, a single policy benefit if the statute is enforced as written under the questions I asked you?
>
> A. And I can't, at this time, do so.

Pa0047 at 55:8-22.

I. The Trial Court Denies Plaintiffs' Summary Judgment Motion, And Grants Defendants' Summary Judgment.

On July 27, 2023, the trial court denied Plaintiffs' summary judgment motion, and granted Defendants' summary judgment motion and dismissed the Complaint with prejudice. Pa0001-Pa0004.

In so ruling, the trial court -- without citation to any supporting legal authority -- first "disregard[ed] the plaintiffs' statements of fact" reciting the binding testimony of the representative designated by DOBI to testify on its behalf (Wegener) on the basis that Wegener merely provided a "lay person's opinion" that was "in no way legally binding on Defendants." T. at 8:15-18; 8:23-9:2.

The trial court then addressed the four counts of the Complaint. The trial court dismissed the First Count of the Complaint based on its finding that the Limited Attorney Exemption "did not violate the separation of powers clause of the Constitution." T. at 9:9-11. The trial court overlooked the fact that the Limited Attorney Exemption impinges upon a constitutional right, ignored the New Jersey

Supreme Court's actual regulation and exercise of power over the practice of law, misinterpreted the holding of a prior decision ruling on the previous version of the Act and wholly ignored a decision in a virtually identical case from a State Supreme Court holding that an exemption similar to the Limited Attorney Exemption violates the separation of powers doctrine. T. at 9:5-17:19.

The trial court dismissed Count Two of the Complaint based on its finding that the "words and phrases in the [Act's] attorney exemption are not unconstitutionally vague and should be interpreted within their ordinary meaning." T. at 17:23-18:2. The trial court made this finding even though it acknowledged that the Legislature has not defined or provided any guidance on defining "principally engaged" or "attorney-at-law of this State." T. at 21:15-20. The trial court applied an incorrect level of scrutiny to the Limited Attorney Exemption even though it imposes criminal penalties and effectively held that a layperson can understand these terms even though DOBI cannot explain them (testimony ignored by the trial court). T. at 19:20-20:4.

The trial court dismissed Count Three of the Complaint contending that the Limited Attorney Exemption is not overbroad based on a holding that the Act "did not regulate the practice of law, but a separate business of debt adjustment." T. at 25:21-23. The trial court added that "Plaintiffs' desire to [do] debt-adjustment services as licensed attorneys does not implicate a fundamental right, like the right

to a particular job, the right to provide debt-adjustment services as licensed attorneys is not constitutionally protected . . . ." T. at 26:25-27:5. The trial court ignored New Jersey law holding that an attorney's performance of debt adjustment services constitutes the practice of law in this State. T. at 24:7-27:7.

The trial court dismissed Count Four of the Complaint as it found that Plaintiffs "failed to establish a violation of their civil rights," and thus were not entitled to relief under Federal and New Jersey Civil Rights Acts. T. at 27:10-13.

In their summary judgment motion, Plaintiffs also argued that the Act improperly infringes on an attorney's First Amendment Rights because it restricts the ability of an attorney to represent certain client and handle certain cases. Pa0110-Pa0112. The trial court failed to even mention -- let alone consider -- Plaintiffs' First Amendment argument in deciding the summary judgment motions. T. at 3:1-32:23.

STANDARD OF REVIEW

The standard of review on appeal from the grant or denial of a summary judgment motion is de novo; that is, the reviewing court applies the same standard as the trial court. E.g., Templo Fuente v. Nat'l Union Fire, 224 N.J. 189, 199 (2016). "[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." E.g., Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010).

Summary judgment is appropriate where the pleadings and other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (1995). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. Rule 4:46-2(c); Coyne v. State, Dep't of Trans., 182 N.J. 481, 490 (2005).

LEGAL ARGUMENT

THE TRIAL COURT IMPROPERLY DENIED PLAINTIFFS' SUMMARY JUDGMENT MOTION, GRANTED DEFENDANTS' SUMMARY JUDGMENT MOTION AND DISMISSED THE COMPLAINT WITH PREJUDICE (Pa0001-Pa0004; T. at 3:1-32:23).

A. The Trial Court Improperly Applied A Presumption of Constitutionality To The Limited Attorney Exemption Despite The Fact That It Impinges On A Constitutionally Protected Right. (T. at 9:12-10:1).

The trial court repeatedly stated throughout its decision that the Limited Attorney Exemption is "presumed to be constitutional" and that Plaintiffs failed to meet their supposed "heavy burden" to overcome this presumption. The trial court's application of this presumption is erroneous because the Limited Attorney Exemption restricts a constitutionally protected right.

The New Jersey Supreme Court has held that "if an enactment directly impinges on a constitutionally protected right, **the presumption in favor of its validity disappears.**" Bell v. Stafford Twp., 110 N.J. 384, 395 (1988) (emphasis added). In those situations, "[c]ourts are far more demanding of clarity, specificity and restrictiveness with respect to legislative enactments that have a demonstrable impact on fundamental rights." Id. at 395; see also Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 612 (2000) (asserting that "when legislation impinges on a constitutionally protected right, we have looked more closely at the State's purported justification"). Courts require the enactor of such legislation to "shoulder the burden of proving its constitutional validity." Bell, 110 N.J. at 395.

In Bell, the Supreme Court found no presumption in favor of the validity of a township ordinance prohibiting billboards within any township zoning district, as it encroached on a fundamental constitutional interest -- freedom of speech and expression -- and struck down the ordinance as facially unconstitutional. Id. at 398; see also Planned Parenthood, 165 N.J. at 612 (finding statute that conditioned a minor's right to obtain an abortion on parental notification unless judicial waiver was obtained, but imposed no corresponding limitation on a minor who sought medical care otherwise related to her pregnancy, violated the State Constitution).

As discussed herein, the Supreme Court's right to be the exclusive regulator of attorneys engaged in the practice of law, and an attorney's right to not have their

right to practice law under their plenary license issued by the Supreme Court unilaterally stripped away by enacted legislation, are constitutionally protected rights upon which the Limited Attorney Exemption impinges. As a result, the trial court erred by applying a presumption of constitutionality to the Limited Attorney Exemption and placing a heavy burden on Plaintiffs in this case.

B. The Trial Court Improperly Dismissed Count One Of Plaintiffs' Complaint In Holding That the Limited Attorney Exemption Does Not Violate the Separation of Powers Doctrine. (T. at 9:5-17:19).

In the First Count of the Complaint, Plaintiffs allege that the Limited Attorney Exemption in the Act is unconstitutional, void, and of no force and effect as it violates the doctrine of separation of powers of the State Constitution because the Act substantially encroaches upon the New Jersey Supreme Court's exclusive jurisdiction and domain over the practice of law. Notwithstanding the clear delineation in the State Constitution granting the New Jersey Supreme Court with ***exclusive*** jurisdiction over the "admission" and "discipline" of attorneys admitted in the State, the trial court held that the Limited Attorney Exemption does not violate this doctrine.

1. The Trial Court Correctly Acknowledged that the New Jersey Supreme Court Has Exclusive Jurisdiction Over the Practice of Law (T. at 16:24-17:2).

As the trial court correctly recognized, the New Jersey Supreme Court has exclusive jurisdiction over the practice of law. The State Constitution authorizes the

Supreme Court to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." N.J. State Const. art. VI, § II, ¶ 3. It also grants the Supreme Court "jurisdiction over the admission to the practice of law and the discipline of persons admitted." Id.[1] **In short, "[t]his Court's authority to regulate the legal profession is of constitutional dimension.**" In re Supreme Court Advisory Comm. on Professional Ethics Op. No. 697, 188 N.J. 549, 554 (2006).

The Supreme Court established in Winberry v. Salisbury, 5 N.J. 240, 255 (1950) that "the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such." Stated differently, "the Supreme Court has exclusive and plenary power to promulgate rules governing practice and procedure in our courts, as distinguished from matters involving substantive law." Siegler Co. v. Norton, 8 N.J. 374, 381 (1952). Since Winberry, the Supreme Court has construed these constitutional provisions to grant it exclusive jurisdiction over the practice of law in this State. See, e.g., Knight v. City of Margate, 86 N.J. 374, 387 (1981) ("The Court's constitutional power over the judiciary and admission to the practice of law is not limited to adjudicating individual charges of alleged misconduct but extends as well

[1] The doctrine of separation of powers is a longstanding concept dating back to the formation of our country. As James Madison noted, "[a]mbition must be made to counteract ambition." The Federalist No. 51 (James Madison) (1788).

to the adoption of rules of general application governing the conduct of judges and attorneys."); In re LiVolsi, 85 N.J. 576, 585 (1981) (observing that "[f]or 33 years this Court has exercised plenary, exclusive, and almost unchallenged power over the practice of law in all of its aspects" and emphasizing "the critical importance of the constitutional power of this Court over the practice of law, and its pervasiveness").

In the face of that constitutionally-mandated separation of powers, the Court should invalidate the Limited Attorney Exemption. To comply with the separation of powers doctrine, the Legislature should have exempted ***all*** attorneys from the Act. That is what the Legislature has done in other circumstances (and, indeed, what it did in 1961 when it enacted the Debt Adjusters Law and what it did in 1979 when it initially adopted the Act). That course of action honors the separation of powers and properly defers to the Supreme Court to make its own determination as to whether it is proper to impose limitations on an attorney's practice or specialization in debt adjustment services.

By failing to exempt ***all*** attorneys from the Act, the Legislature is intruding into the Supreme Court's exclusive jurisdiction. By enacting the Limited Attorney Exemption, the Legislature imposed its own (thus far unexplained and inexplicable) policy choices about which lawyers may practice law in this area (i.e., only New Jersey licensed attorneys), and how much they may practice law in this area (i.e., a little bit, but not too much). The Legislature is, in essence, stating that a New Jersey

attorney who devotes 20% of her time to representing clients in debt adjustment matters is engaged in the lawful practice of law. A New Jersey attorney who devotes 49% of her time in bankruptcy practice, however, may be engaged in criminal conduct (depending on how the fuzzy term "principally engaged" is defined). And a Pennsylvania attorney who devotes 1% of his time to representing clients in this area is almost certainly violating the Act (even though he may be fully compliant with RPC 5.5). That is a direct, impermissible intrusion into the Supreme Court's jurisdiction. See, infra, Persels & Assocs., LLC v. Banking Comm'r, 122 A.3d 592 (Conn. 2015) (holding similar limited attorney exemption in Connecticut's debt negotiation statute violates separation of powers). The trial court erred in not holding the Limited Attorney Exemption unconstitutional on this basis.

2. The Trial Court Erred by Applying the Two-Factor Knight Test to Determine Whether the Limited Attorney Exemption Violates the Separation of Powers Doctrine Because The Supreme Court Has Comprehensively Exercised This Authority (T. at 10:18-17:19).

In determining whether the Limited Attorney Exemption violates the separation of powers doctrine, the trial court mis-applied a "two-prong test" from Knight, 86 N.J. at 389-90. According to the trial court, the court must evaluate the legitimacy of the governmental purpose of the statute, and then the nature and extent of the statute's encroachment upon judicial prerogatives and interests. T. at 12.

The trial court, however, neglected the threshold issue that the Knight Court described ***immediately before*** this "two-prong test" that must be satisfied before the test can be applied, which is whether the Supreme Court's authority over the subject matter "must invariably foreclose action by the other branches of government:"

> ***This is so particularly where the judicial power has not been exercised or fully implemented***, and where such action by the other branches serves a legitimate governmental purpose and, concomitantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain.

Id. at 389-90 (emphasis added).

Had the trial court properly considered this threshold issue, it would have determined that the Supreme Court has fully exercised its constitutional authority over the practice of law in this State in various ways. First, the Court has "carried out its constitutional authority to govern 'the admission to practice and the discipline of persons admitted,' by the adoption of rules governing attorney conduct and by the issuance of opinions construing the rules." Kevin H. Michels, New Jersey Attorney Ethics, § 1:2 (2023). The Court has officially codified the rules governing the conduct of attorneys and members of the bar of all courts in New Jersey in the Rules of Professional Conduct ("RPCs"). Michels, N.J. Attorney Ethics, § 1:2-1 (2023).

Additionally, the Court Rules, which incorporate the RPCs, provide that "[e]very attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in

connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3." Michels, N.J. Attorney Ethics, § 1:2-2 (2023); see also Rule 1:20-1(a); Rule 1:14.

The Supreme Court has further established numerous committees to administer various categories of attorney conduct, including an Advisory Committee on Professional Ethics (pursuant to Rule 1:19-1), District Fee Arbitration Committees (pursuant to Rule 1:20A-1 et seq.), a Disciplinary Oversight Committee (Rule 1:20B-1 et seq.), the Client Security Fund (Rule 1:28-1 et seq.), a Board on Trial Attorney Certification (Rule 1:39-1 et seq.), a Board of Bar Examiners (Rule 1:23-1 et seq.), and a Board on Continuing Legal Education (Rule 1:42-1 et seq.). Michels, N.J. Attorney Ethics, § 1:2-3 (2023). The Advisory Committee's opinions, as well as cases construing the RPCs, Court Rules, and administrative directives are, of course, binding on attorneys. In re Stein, 97 N.J. 550, 565 (1984); In re Eisenberg, 75 N.J. 454, 456-57 n.1 (1978); Michels, N.J. Attorney Ethics, § 1:2-6 (2023).

Our courts have even deferred to the Supreme Court's exclusive jurisdiction over the practice of law, for instance, in crafting a "learned professional" exception to the Consumer Fraud Act ("CFA") exempting attorneys from that statute's purview. In Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div. 1992), the court affirmed the dismissal of the CFA claim against an attorney because the "attorney's

services do not fall within the intendment of the [CFA]." The court recognized that "the practice of law in the State of New Jersey is in the first instance, if not exclusively, regulated by the New Jersey Supreme Court." Ibid. (citing N.J. State Const. art. VI, § II, ¶ 3 & In re LiVolsi, 85 N.J. 576, 583 (1981)); see also Lee v. First Union Nat'l Bank, 199 N.J. 251, 264 (2009) ("The rationale underlying the learned professionals exception is that uniform regulation of an occupation, where such regulation exists, could conflict with regulation under the CFA.").

These facts alone "foreclose action" by the Legislature through the enactment of the Limited Attorney Exemption to regulate debt adjustment legal work – the practice of law that only the Supreme Court regulates. Defendants are thus unable to meet the threshold issue set forth in Knight, and consequently, the trial court erred in applying the "two-prong test" to the Limited Attorney Exemption.

3. Even If the Trial Court's Decision to Apply the Two-Factor Knight Test to the Limited Attorney Exemption Were Correct, the Trial Court Erred in Determining That the Limited Attorney Exemption to the Act Satisfies Both Factors (T. at 10:18-17:19).

In the event this Court finds that the trial court appropriately applied the "two-prong test" from Knight, the trial court erred in finding that the Limited Attorney Exemption satisfies both factors because (1) the Legislature had no legitimate purpose in amending the Act to include the Limited Attorney Exemption; and (2) the Limited Attorney Exemption encroaches upon judicial prerogatives and interests.

a. The Legislature Had No Legitimate Governmental Purpose In Enacting the Limited Attorney Exemption (T. at 12:12-15:16).

With respect to the first Knight factor, contrary to the trial court's ruling, the Legislature did not have a legitimate governmental purpose in enacting the Limited Attorney Exemption. The Limited Attorney Exemption does not advance the Act's overall purported purpose. To the contrary, it serves to defeat that purpose.

DOBI's corporate representative testimony -- erroneously disregarded by the trial court (see Section C., infra) -- demonstrates that the Limited Attorney Exemption fails to advance any legitimate purpose of the statute. The Limited Attorney Exemption permits a newly admitted, novice attorney to represent clients in debt adjustment matters, while prohibiting an attorney with a concentration in that area and more experience from performing the same work. Pa0047 at 54:16-55:7. The Act would even prohibit bankruptcy attorneys, a common type of specialized legal practice, from being principally engaged in the performance of such services. Pa0047 at 41:7-11, 58:11-18. An attorney would thus violate the Act even if they do excellent work and the attorney's client is very happy with the services provided. Pa0047 at 57:11-17. Given these acknowledgments, DOBI simply could not explain how the Limited Attorney Exemption advances the interests of protecting consumers. Pa0047 at 55:8-22.

The trial court stated that the purpose of the Act "is to avoid having debtors further burdened by for-profit entities that may not be qualified and may not have a purpose to foster responsible use of credit and debt management and instead may be looking to profit from the debtor's situation." T. at 12:19-25. The Limited Attorney Exemption, however, ***prevents*** debtors from retaining attorneys ***who are qualified and bound to foster responsible use of credit and debt management under the Rules of Professional Conduct***, and therefore unlikely to engage in any abuses in the consumer debt industry that the Legislature is seeking to curtail.

The trial court then heavily relied upon Furman, supra, and asserted that Plaintiffs' arguments in this case were rejected in that case. The Furman court, however, reviewed the propriety of the predecessor statute -- the Debt Adjusters Law -- ***which exempted all attorneys from the statute's regulation of the business of debt adjustment.*** Moreover, its holding actually supports ***Plaintiffs'*** position.

In Furman, the court reviewed the "classes of persons excepted from the statutory bar," including all attorneys. Id. at 143. The issue there was not the regulation of attorneys, but rather the exclusion of all attorneys from the statute. The court refused to strike the ***all*** attorney exemption ***for the same reasons that Plaintiffs seek the elimination of the Limited Attorney Exemption so that all attorneys are exempt from the Act:***

> Attorneys do not advertise and are subject to a high ethical standard. Moreover, services encompassed by the

> statutory definition of debt adjuster are often an integral and essential part of an attorney's job when he represents a debt-ridden client. ***The exemption of attorneys bears a rational relation to the legislative aim.***
>
> It is quite logical for the Legislature to exempt from the operation of this statute those groups whose activities are not likely to harm the segment of society the statute seeks to protect. These exemptions bear a reasonable relation to the end to be achieved and they operate without arbitrary discrimination upon all those similarly situated.

Id. at 143 (emphasis added). Plaintiffs agree entirely with the Furman court's explanation as to the legitimate purpose of an ***all*** attorney exemption and merely asked the trial court to apply its rationale in striking the Limited Attorney Exemption. The trial court misapplied this critical decision to Plaintiffs' claims.

b. The Limited Attorney Exemption Encroaches Upon Judicial Prerogatives and Interests (T. at 15:17-17:19).

With respect to the second Knight factor, the trial court held that the Limited Attorney Exemption does not encroach upon any judicial prerogatives or interests, because the Act "regulates a distinct business of debt adjustment." T. at 17. The trial court's holding, however, conflicts with decisions from the New Jersey and United States Supreme Courts that debt adjustment ***is*** considered the practice of law, which is exclusively regulated by the Supreme Court.

As an initial matter, the Supreme Court grants a ***general*** license to practice law to attorneys who become licensed. Provided the qualifications for licensure are met, the Supreme Court provides for "plenary admission" to the bar of this State.

Rule 1:27-1. That is, an attorney is not admitted as a civil attorney, a matrimonial attorney or as some other specialist, but rather as an attorney who can structure their practice as they desire, provided they comply with all rules governing the practice.

By enacting the Limited Attorney Exemption, the Legislature has improperly sought to regulate the practice of law in this State and restrict the general license to practice law that attorneys of this State receive. Our courts have long recognized that debt adjustment services, like other transactional services, constitute the practice of law over which the Supreme Court has exclusive jurisdiction to regulate. In Furman, supra, the court observed that "services encompassed by the statutory definition of debt adjuster are often an integral and essential part of an attorney's job when he represents a debt-ridden client" and concluded that "[i]t is plain by now that in their activities debt adjusters may encroach upon the practice of law." Furman, 67 N.J. Super. at 143. A few years later, in Appell v. Reiner, 43 N.J. 413, 416 (1964), the Supreme Court asserted that "[t]here is no doubt" that the attorney's "rendering of advice and assistance in obtaining extensions of credit and compromises of indebtedness" constituted the practice of law.

The United States Supreme Court likewise asserted that "[t]he business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the

various claims against him, remedies existing under state laws governing debtor-creditor relationships or provisions of the Bankruptcy Act — advice that a nonlawyer cannot lawfully give him." Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); see also New Jersey Supreme Court Advisory Committee on Professional Ethics, Providing Debt Resolution Services to Litigants, N.J. Eth. Op. 36 (2001) (finding business's "debt resolution" activities, including reviewing complaints, evaluating claims against its clients, and communications with counsel for creditors in efforts to compromise the claims fell within the practice of law); State v. Rogers, 308 N.J. Super. 59, 66 (App. Div. 1998) ("[I]t is clear that the 'practice of law' is not limited to litigation, but extends to legal activities in many non-litigious fields. Hence, the practice of law is not limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required.").

The Limited Attorney Exemption thus encroaches upon the Supreme Court's exclusive jurisdiction over the practice of law by effectively restricting the plenary license to practice law in this State. The Act, by prohibiting an attorney from being "principally engaged" in debt adjustment legal work, improperly imposes an ***unprecedented*** restriction on the type and amount of services an attorney can provide, directly contrary to the Supreme Court's plenary admission of that attorney to the State bar. The separation of powers doctrine would be rendered meaningless,

and the Legislature could proceed towards regulation of other legal services, if the Legislature can so unilaterally and freely regulate debt adjustment legal work.

The trial court's reliance upon Knight for the proposition that the Act does not interfere with the sound administration of the judicial system is misplaced. In Knight, the Supreme Court found that the New Jersey Conflicts of Interest Law, which prohibited members of the judiciary from any dealings with ***casino entities***, did not violate the Court's authority to prescribe and enforce standards of conduct for judges and attorneys. Knight, 86 N.J. at 394. This statute has nothing to do with the practice of law or provision of legal advice or services; it is a conflict-of-interest statute that serves only to prohibit ***business relationships*** between members of the judiciary and casino and gaming entities. Thus, the Court concluded that the statute did not interfere with its administration of the court system and regulation of the legal profession and practice of law. Id. at 394-95. Thus, in contrast to the Act's Limited Attorney Exemption -- which regulates the practice of law by regulating debt adjustment services (legal services) -- the statute at issue in Knight does not impinge upon the constitutionally-protected practice of law.

Moreover, there are any number of scenarios whereby the Supreme Court and Legislature may be completely at odds regarding an attorney's provision of legal services. For example, an attorney who specializes in debtor/creditor work and properly provides such services for a client would be in complete compliance with

the Rules of Professional Conduct. The Supreme Court would take no issue with those services rendered and the attorney would not be disciplined. On the other hand, the Legislature, under the exact same facts, has deemed the provision of such legal services ***to be a fourth degree crime***. That is the very definition of interference with the Supreme Court's exclusive jurisdiction over the practice of law.

The trial court also ignored the Supreme Court's express rejection of other efforts to limit or restrict an attorney's right to practice law under the rationale that clients are ultimately the parties harmed by such a restriction. The Court has adopted RPC 5.6(b), which prohibits any agreement between private parties to limit an attorney's right to practice law. In Cardillo v. Bloomfield 206 Corp., 411 N.J. Super. 574, 580 (App. Div. 2010), the court invalidated an agreement between the plaintiff's attorney and defendants as part of a settlement where the attorney agreed to restrain from representing clients adverse to defendants in the future. The agreement was deemed unenforceable because it restricted the attorney's right to practice law in violation of RPC 5.6(b). The court noted that the rule is intended to ensure that the public has access to the best available attorneys. The same logic should apply here and is further grounds to invalidate this section of the Act because it impermissibly restricts an attorney from practicing a certain type of law and denies the public the right of access to the best available debtor/creditor attorneys – far afield from the purported purpose of the Act.

The trial court also found no encroachment upon an attorney's general license to practice law because an attorney "principally engaged" in debt adjustment services can still provide such services "under the auspices of a non-profit company." T. at 17. In short, the trial court is suggesting that the Act does not place a burden on attorneys' ability to practice law because they may still provide those services free of charge, or (at a minimum) re-organize their law firms as not-for-profit entities and then provide services through those newly-created entities. That does not withstand scrutiny. Limiting the ability of attorneys to charge for services and/or limiting the type of entities through which they may practice is, itself, a burden on attorneys. It also directly invades the regulatory prerogative of the Supreme Court (which has already promulgated its own rules regarding the type and manner of legal fees attorneys may charge clients and the business entities under which they may choose to organize). There is simply no proscription barring an attorney from charging fees to a client for performing legal services under the attorney's license. The trial court's suggestion only highlights the impermissible encroachments imposed by the Limited Attorney Exemption.

4. The Trial Court Failed to Consider a State Supreme Court Case Directly on Point Holding that an Attorney Exemption in a Debt Negotiation Statute Violates the Separation of Powers Doctrine (T. at 9:5-17:19).

Lastly, the trial court failed to even mention a Connecticut Supreme Court decision that is virtually identical to this case. The Supreme Court of Connecticut

in Persels & Assocs., LLC v. Banking Comm'r, 122 A.3d 592 (Conn. 2015) held that the attorney exemption in Connecticut's debt negotiation statute was unconstitutional because it permitted non-judicial regulation of attorneys' services. Similar to the Act, the Connecticut debt negotiation statute, as initially enacted, exempted all attorneys admitted to practice in that state. The Court commented that this initial broad attorney exception "presumably reflected the legislature's recognition that, under article second of the state constitution, the Judicial Branch has the exclusive authority to license and regulate the practice of law in this state." Id. at 596. The Legislature, however, later amended the statute to exempt only those attorneys "who [engage] or [offer] to engage in debt negotiation *as an ancillary matter to such [attorneys'] representation of a client*." Ibid. (emphasis added).

The plaintiff, a national law firm, sought a declaratory judgment stating that it was exempt from Connecticut's debt negotiation statute. On appeal to the Supreme Court, the plaintiff contended that the legislature impermissibly intruded on the judiciary's exclusive authority to regulate attorney conduct and licensure because the debt negotiation statutes improperly:

> (1) give the commissioner the authority to determine which attorneys in this state have the "character, reputation, integrity and general fitness" to provide debt negotiation services in conjunction with their practice of law; General Statutes § 36a-671(d)(1); (2) require that Connecticut attorneys obtain additional licenses from and pay hefty licensing fees to agencies outside the Judicial Branch in order to offer traditional legal services; and (3)

> impinge on the Judicial Branch's exclusive authority to suspend or disbar attorneys who have engaged in professional misconduct. Id. at 603.

The Supreme Court agreed with the plaintiff and reversed the declaratory judgment. The Court recognized that, under long-settled Connecticut law, the judiciary "wields the sole authority to license and regulate the general practice of law in Connecticut," but "does not exercise exclusive control over attorney conduct insofar as an attorney is not engaged in the practice of law." Id. at 604. The Court concluded that the debt negotiation services provided by the plaintiff constituted the practice of law. The Court explained that the plaintiff's services "bear all the external indicia of the practice of law," were provided "in the context of [other] quintessential legal services," at times included preparation of pleadings and discovery, and representation in court proceedings, and are provided directly by attorneys or staff under their supervision. Id. at 604-06. The Court thus concluded that the regulation of the plaintiff's services "falls under the exclusive authority of the Judicial Branch," and offended the separation of powers provision of the state constitution. Id. at 606; see also Hays v. Ruther, 313 P.3d 782, 789 (Kan. 2013) (asserting that certain statutory remedies may be unconstitutional if they encroach on the traditional exclusive powers of the court, especially the powers relating to issuing and regulating the license to practice law); JK Harris Fin. Recovery Sys. v. Dept. of Fin. Insts., 718 N.W. 2d 739, 746 (Wis. Ct. App. 2006) (recognizing that

attorneys are "already subject to licensing and regulatory oversight of dealings with clients or customers," and thus if the Division of Banking ever sought to regulate them under Wisconsin's debt adjustment statute, "a court may then have to decide whether it may do so despite the legislature's (or supreme court's) creation of distinct regulatory schemes for those occupations").

The trial court should have reached the same conclusion as Persels, and the rationale expressed in Persels, bolstered by Hays and JK Harris. Like in these other states, the New Jersey Supreme Court has exclusive jurisdiction over the practice of law. The Supreme Court has clearly exercised that jurisdiction by establishing series of rules governing the practice of law, including admission to the bar of this State, an attorney's duties owed to a client and the discipline of attorneys.

C. The Trial Court Improperly Disregarded The Binding Deposition Testimony of DOBI's Designated Representative, Howard Wegener. (T. at 8:15-9:4)

The entirety of the trial court's decision is based on the unsupported legal conclusion that the testimony of DOBI's designated representative must be completely "disregarded" as Wegener's responses were mere "lay person's opinion[s]." The trial court's faulty analysis went one step further in holding that Wegener's testimony was not "binding" on DOBI. The trial court's failure to consider any of DOBI's testimony by itself warrants the reversal of its decision.

The trial court ignored bedrock New Jersey law that "when a subject matter designation is made . . . [that] ***testimony will bind the organization*** . . ." Rule 4:14-2(c); Pressler and Verniero, Current N.J. Court Rules, cmt. 3 to R. 4:14-2(c) (2024) (emphasis added). The trial court completely dismissed Plaintiffs' proper service of a deposition notice on DOBI, which requested it to present a "designated representative" to testify on topics pertaining to the Act and Limited Attorney Exemption. Defendants produced Wegener as DOBI's representative. As a matter of law, the trial court was required to evaluate his testimony on behalf of DOBI.

The trial court cannot shirk its duty to consider Wegener's testimony as binding on DOBI by deeming him to be a random "lay person" or describing his responses as legal conclusions. First, DOBI selected and designated Wegener to testify on its behalf, and it did so understanding that his testimony would be binding on the agency. DOBI is the very agency charged with enforcement of the Act; it is hardly a "lay person" with no knowledge or expertise in this area.[2] Furthermore, as shown by the many excerpts of testimony recited in the Statement of Facts, Wegener responded to questions regarding a bevy of ***facts***, including but not limited to, the failure to define terms in the Act, the failure to establish criteria applicable to

[2] Even if Wegener were a mere "lay person," his supposed "lay person opinion" on the definition or interpretation of undefined terms in the Limited Attorney Exemption would, at a minimum, be relevant to Plaintiffs' vagueness argument, which concerns how a person of common intelligence would understand the terms. See Section D, *infra*.

enforcement of the Act, the failure to issue any bulletins or other guidance as to the definition of terms in the Act, and the lack of prior enforcement proceedings that could show how the Act was actually previously enforced and applied.

The trial court's failure to consider Wegener's pertinent testimony on numerous factual issues improperly excluded relevant and compelling evidence from the factual record.

D. The Trial Court Improperly Dismissed Count Two Of Plaintiffs' Complaint In Holding That the Limited Attorney Exemption Is Not Unconstitutionally Vague. (T. at 17:20-24:6).

The Limited Attorney Exemption also violates the vagueness doctrine because it fails to define "principally engaged" or "attorney-at-law of this State," and without any guidance from Defendants as to their definitions, attorneys are unfairly left guessing as to their meaning in determining whether they are violating the Act.

A statute is unconstitutionally vague and void as a matter of due process where "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Pazden v. N.J. State Parole Bd., 374 N.J. Super. 356, 370-71 (App. Div. 2005); Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). The New Jersey Supreme Court has found that "even granting to the Legislature the utmost power which has been claimed for it, it must still be conceded that the exercise of such power requires explicit, unambiguous language." State v. Packard-Bamberger, 123 N.J.L. 180, 184 (1939).

The trial court first erred by applying less stringent scrutiny to the Limited Attorney Exemption even though the Act ***criminalizes*** the practice of debt adjustment services without a license, and also infringes upon an attorney's First Amendment right to provide legal advice to clients. This Court recently reiterated that "[a] criminal statute challenged as vague is subject to sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine than civil enactments." State v. Higginbotham, 475 N.J. Super. 205, 221 (App. Div. 2023). Likewise, laws "implicating First Amendment liberties are subjected to sharper scrutiny and given more exacting assessment." Heyert v. Taddese, 431 N.J. Super. 388, 424 (App. Div. 2013).

The trial court's holding that the meaning of "principally engaged" and "attorney-at law of this State" are "not substantially incomprehensible, and a person of common intelligence is able to understand its essential terms" flies in the face of the record. The Legislature did not define these terms in the Act. DOBI further acknowledged that it did not define these terms, or provide any guidance as to the meaning of these terms, in the regulations promulgated under the Act, in any bulletins that it issued or any other publication. DOBI itself (through Wegener's testimony) cannot identify the meaning of "principally engaged." DOBI could only acknowledge that there are several ***potential*** factors or considerations that ***may*** be reviewed in determining whether an attorney is "principally engaged," including the

attorney's number of clients, matters, and hours spent, and amount of fees billed or collected. It is also unclear as to whether these factors are reviewed on a daily, weekly, or other basis, or the threshold percentage for any of these categories that, once exceeded, constitutes a principal engagement. It is further unclear if these factors are applied to a single attorney or in the context of an entire law firm where multiple attorneys do some debt adjustment legal work. It is impossible to reconcile the ***fact*** that the agency charged with enforcement of the Act cannot understand its terms with the trial court's holding that a person of common intelligence can do so.

The trial court's further resort to Merriam-Webster and Black's Law for separate definitions of "principally" and "engaged" to attempt to show what the combination of the two words means, and "attorney at law," as used in the Act was inappropriate. Cherry picking dictionary definitions of single words to demonstrate that the Limited Attorney Exemption is not vague provides no context whatsoever to how these phrases are used ***in the statute***. As demonstrated above, Defendants provide no answer to that question anywhere: not in any written source that an attorney can review nor in DOBI's testimony. Furthermore, the dictionary definitions do not resolve whether the Act applies to attorneys such as those licensed in other states who are admitted *pro hac vice* to handle New Jersey cases.

The trial court's reliance on a case commenting on the phrase "engaged principally" in a far different context provides no support. In Toxaway Hotel Co. v.

J.L. Smathers & Co., 216 U.S. 439 (1910), the Court was presented with the applicability of a bankruptcy statute provision to corporations "engaged principally" in trading or mercantile pursuits. The Court, in a decision from 113 years ago, provided an overly simplistic analysis of this phrase that did not consider any of the factors that DOBI would need to consider in determining whether an attorney is "principally engaged" in performing debt adjustment services.

The trial court also relied upon Furman, supra, where the court upheld the Act's predecessor statute, the Debt Adjusters Law, to support its conclusion that the Limited Attorney Exemption is not vague. The Debt Adjusters Law did ***not*** have the Limited Attorney Exemption, and thus while Furman is instructive on other contentions by Plaintiffs, it simply has no relevance to their vagueness argument.

Most critically, the Act is ripe for arbitrary and capricious application due to the uncertainty of the definition of these terms. DOBI confirmed that it has not established a set of factors or criteria to be considered in determining whether an attorney is "principally engaged" as a debt adjuster. DOBI thus conceded that "different people" can use "different criteria" to define the term "principally engaged." That is, "reasonable people could have a different understanding of what 'principally engaged' means." Consequently, the Act -- carrying criminal penalties including incarceration -- can be enforced differently against different attorneys by

different representatives acting on Defendants' behalf; that is the absolute epitome of an unconstitutionally vague statute.

E. The Trial Court Improperly Dismissed Count Three Of Plaintiffs' Complaint in Holding that the Limited Attorney Exemption is Not Unconstitutionally Overbroad (T. at 24:7-27:7).

The Limited Attorney Exemption also violates the overbreadth doctrine because it prohibits attorneys who devote the most time and are the most experienced from assisting clients with debt adjustment – the very attorneys who would be best suited to protect consumers' interests.

"The overbreadth doctrine involves substantive due process considerations concerning excessive governmental intrusion into protected areas." United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 34 (App. Div. 2001). "The overbreadth concept rests on principles of substantive due process and whether the reach of the law extends too far. The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the state's interests." Id. at 35.

The trial court's holding that the Limited Attorney Exemption is not overbroad because it "does not reach a substantial amount of constitutionally protected conduct" is based on the fundamental flaw that an attorney's performance of debt adjustment services is not constitutionally protected. As set forth above, the Supreme Court's regulation of the practice of law is exclusive and protected under

the Constitution. And an attorney's performance of debt adjustment services for clients constitutes the practice of law in this State protected by the plenary license granted to the attorney by the Supreme Court and by the First Amendment.

Additionally, the trial court once again ignored the testimony of DOBI with respect to this issue. DOBI confirmed that the Act could apply to the attorneys who are the foremost experts at performing debt adjustment services, and to the attorneys who always satisfy their clients in assisting them with debt. Left unanswered by any party is how a proscription against such attorneys from being "principally engaged" in performing such services leaves consumers in a better position, i.e., advances the purpose of the Act, than having no proscription against attorneys -- already regulated by the Supreme Court -- at all. Indeed, ***DOBI admitted that it could not identify a single policy benefit through enforcement of the Act as written***.

The trial court's reliance on Greenberg v. Kimmelman, 99 N.J. 552 (1985) is misplaced. There, a judge's wife challenged a "casino ethics amendment" to the New Jersey Conflicts of Interest Law, which prohibited full-time members of the judiciary and their immediate relatives from employment with casinos. Id. at 558. The Court held that her right to employment with a casino was not a "fundamental" right. Id. at 573. The right of a person to be employed by a certain entity is a far cry from the right of an attorney, who has qualified for and obtained a plenary license to

practice law in any area of law, to render advice to a client. Only the latter is protected by the First Amendment and regulated exclusively by the Supreme Court.

The Limited Attorney Exemption thereby sweeps in too much constitutionally-protected conduct that would be violative of the Act but would not advance Defendants' interests in protecting consumers. The Limited Attorney Exemption is thus overbroad and should be stricken to allow attorneys to perform debt adjustment services absent a "principally engaged" restriction.

F. The Trial Court Did Not Even Address Plaintiffs' Contention that the Limited Attorney Exemption Violates Attorneys' First Amendment Rights. (T. at 3:1-32:23).

Left entirely unaddressed by the trial court, the Limited Attorney Exemption impermissibly infringes upon an attorney's First Amendment rights. The United States Supreme Court has frequently rejected governmental efforts to proscribe the First Amendment-protected speech of attorneys (i.e., legal advice to their clients). See Matter of Primus, 436 U.S. 412, 432 (1978); United Transp. Union v. State Bar of Mich., 401 U.S. 576, 580 (1971); Brotherhood of R.R. Trainmen v. Va., 377 U.S. 1, 7-8 (1964); National Assn. for Advancement of Colored People v. Button, 371 U.S. 415, 429 (1963). Specifically, the Supreme Court has held that "[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights . . . including advis[ing] another that his legal rights have been infringed." Matter of Primus, 436 U.S. at 432. In Button, the Supreme

Court found constitutionally protected, as modes of expression and association, lawyers' advice to clients "of their constitutional rights, [and] urging them to institute litigation of a particular kind." Button, 371 U.S. at 447.

Similarly, the Supreme Court concluded in Primus that an attorney's letter communicating an offer of free legal assistance by attorneys to a woman seeking redress for an allegedly unconstitutional sterilization procedure was a form of protected expression. Matter of Primus, 436 U.S. at 432. The Limited Attorney Exemption impermissibly bars attorneys (when "principally engaged") from exercising their First Amendment right to advise clients on adjusting their debts.

Notably, this Court has struck down statutes as unconstitutionally overbroad in violation of First Amendment rights as recently as a few months ago in Higginbotham, supra, 475 N.J. Super. at 221.

G. The Trial Court Improperly Dismissed Count Four of Plaintiffs' Complaint Asserting Violations of the Federal and New Jersey Civil Rights Acts. (T. at 27:8-32:23).

Lastly, in the Fourth Count of the Complaint, Plaintiffs allege that their rights under the Federal Civil Rights Act and New Jersey Civil Rights Act have been violated. Because the trial court erred by dismissing all of Plaintiffs' other claims, it in turn erred by dismissing this claim.

Under the Federal Civil Rights Act, "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Similarly, under the New Jersey Civil Rights Act, "[a]ny person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State . . . may bring a civil action for damages and for injunctive or other appropriate relief." N.J.S.A. 10:6-2(c). "In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the Court may award the prevailing party reasonable attorney's fees and costs." N.J.S.A. 10:6-2(f).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's July 27, 2023 orders denying Plaintiffs' summary judgment motion, and granting Defendants' summary judgment motion and dismissing the Complaint.

DATED: December 11, 2023

WILENTZ, GOLDMAN & SPITZER, P.A.
Attorneys for Anchor Law Firm, PLLC and Andrew M. Carroll, Esq.

BY: _____
BRIAN J. MOLLOY

ANCHOR LAW FIRM, PLLC and ANDREW M. CARROLL, ESQ., Plaintiffs-Appellants, v. THE STATE OF NEW JERSEY, GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey and MARLENE CARIDE, in her official capacity as Commissioner of Banking and Insurance, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000052-23 Civil Action On Appeal From The July 27, 2023 Orders Issued By The Superior Court of New Jersey, Law Division, Mercer County, Docket No. Mer-L-1186-21 Sat Below: Hon. Douglas Hurd, J.S.C.

BRIEF OF RESPONDENTS, THE STATE OF NEW JERSEY, GURBIR GREWAL, and MARLENE CARIDE
(Submitted April 11, 2024)

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PRELIMINARY STATEMENT

New Jersey has regulated the debt adjustment field since 1960. Over time, the Legislature enacted civil and criminal statutes to protect the public, including the law at issue here. The New Jersey Debt Adjustment and Credit Counseling Act (the "DACCA"), N.J.S.A. 17:16G-1 to -9, as amended in 2009, protects debtors from exploitation by for-profit entities by limiting who may engage in debt adjustment to licensed non-profit entities and to a small group of individuals under limited exemptions. The exemption at issue here, the DACCA Attorney Safe Harbor, exempts "an attorney-at-law of this State who is not principally engaged as a debt adjuster." N.J.S.A. 17:16G-1(c).

Anchor Law Firm, PLLC, and Andrew M. Carroll, Esq. (collectively "Appellants"), appeal from July 27, 2023 orders of the Honorable Douglas Hurd, J.S.C., dismissing with prejudice their declaratory judgment complaint in its entirety and concluding that the DACCA Attorney Safe Harbor is constitutional.

Appellants could not and cannot overcome the presumption of constitutionality to which all legislation is entitled. The limits placed on who may engage in debt adjustment are supported by a rational basis to protect consumers. Additionally, this limitation is neither overbroad nor vague, nor

does it violate attorneys' First Amendment rights. This court should affirm the July 27, 2023 Orders and decision of the Honorable Douglas Hurd, J.S.C.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

New Jersey enacted the Debt Adjusters Law in 1960. L. 1960, c. 177 (then codified at N.J.S.A. 2A:99A-1 to -4). (Pa121)[2]. That law prohibited and made punishable as a misdemeanor any act or offer to act as a debt adjuster unless the person acting as a debt adjuster fell into a specific statutory exception. L. 1960, c. 177, § 4 (then codified at N.J.S.A. 2A:99A-4.) (Pa121).

The Debt Adjusters Act defined a "debt adjuster" as a person

> who acts or offers to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling compounding, or in anywise altering the terms of payment of any debts of the debtor; and, to that end, receives money or other property from the debtor, or on behalf of the debtor, for payment to, or distribution among, the creditors of the debtor.
>
> [Pa121.]

The 1960 Debt Adjusters Act exempted from the definition of "debt adjuster" any "attorney-at-law of this State" (Pa121) and, after a 1977

[1] Because the Procedural History and Counterstatement of Facts are closely related, they are presented together for efficiency and the court's convenience.

[2] "Pa" refers to Appellants' Appendix. "Ra" refers to Respondents' Appendix.

amendment, certain nonprofit social service agencies, L. 1977, c. 391, § 1. (Pa124).

In 1978, the Legislature incorporated the offense of unlicensed debt adjustment as a crime of the fourth degree into the newly enacted New Jersey Criminal Code, which remains in force today. L. 1978, c. 95, § 2C:21-19(f). (Pa126). The newly adopted criminal provision contained the same "debt adjuster" definition and the same exemption list as the 1960 civil statute, including the exemption for "an attorney-at-law of this State." Compare L. 1978, c. 95, § 2C:21-19(f) to L. 1960, c. 177, § 1. (Pa126).

The next incarnation of the civil debt adjustment statute was the DACCA. L. 1979, c. 16. Enacted in 1979, the DACCA incorporated portions of the 1960 Debt Adjusters Law. Compare L. 1979, c. 16 with L. 1960, c. 177, as amended by L. 1977, c. 391. (Pa130). However, unlike its predecessor, the original DACCA did not define "debt adjuster" or provide any exemptions for attorneys-at-law. That version was far more restrictive because it limited debt adjustment to only nonprofit social service agencies and nonprofit consumer credit counseling agencies that could demonstrate to the Commissioner of the

Department of Banking[3] that they were qualified. N.J.S.A. 17:16G-2, -3. (Pa130).

The DACCA Attorney Safe Harbor came into existence in 1986, when the Legislature, among other things, amended DACCA to re-incorporate a definition of "debt adjuster" and an exemption list. L. 1986, c. 184. N.J.S.A 17:16G-1(c). (Pa134). Like the 1960 Debt Adjusters Act, the 1986 amendment of DACCA provided a narrow exception for "an attorney-at-law of this State." N.J.S.A. 17:16G-1(c)(2)(a). But the exemption was narrower and limited it to only those attorneys who are not "principally engaged as a debt adjuster." Ibid. (emphasis added). (Pa134).[4] The Legislature simultaneous amended the criminal debt

[3] This responsibility now falls on the Commissioner of the Department of Banking and Insurance following the consolidation of the Department of Banking and the Department of Insurance in 1996. L. 1996, c. 45

[4] DACCA also provided other exceptions to the definition of "debt adjuster" that had nothing to do with the practice of law and which are not at issue in this case. These include as defined in N.J.S.A. 17:16G-1(c)(2) as follows: (b) a person who is a regular, full-time employee of a debtor, and who acts as an adjuster of his employer's debts; (c) a person acting pursuant to any order or judgment of court, or pursuant to authority conferred by any law of this State or the United States; (d) a person who is a creditor of the debtor, or an agent of one or more creditors of the debtor, and whose services in adjusting the debtor's debts are rendered without cost to the debtor; (e) a person who, at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for the services rendered in adjusting those debts; or (f) a person who is: (i) certified by the United States Secretary of Housing and Urban Development as a housing counseling

adjustment offense codified at N.J.S.A. 2C:21-19(f) to track the DACCA's restored definition and new exception list. L. 1986, c. 184, § 6. (Pa134).

The DACCA Attorney Safe Harbor provision in N.J.S.A 17:16G-1(c)(2)(a) is the subject of Appellants' challenge in this matter. (Pa134).

In or about March 2021, the Office of Attorney Ethics ("OAE") of the New Jersey Supreme Court opened an investigation to determine whether an attorney at Appellants' law firm was acting as a debt adjuster in violation of the DACCA. (Pa7).

On June 4, 2021, Appellants filed a declaratory judgment action against the State of New Jersey, the New Jersey Attorney General, and the Commissioner of the New Jersey Department of Banking and Insurance (collectively "Respondents") for a declaratory judgment that the DACCA Attorney Safe Harbor is unconstitutional. (Pa5).

During discovery, Appellants deposed Mr. Howard Wegener, Chief of Consumer Finance Operations of the New Jersey Department of Banking and Insurance. (Pa47). During his deposition, Appellants posed several legal hypotheticals to Mr. Wegener, over repeated objections by Respondents'

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organization or agency pursuant to section 106 of Pub.L.90-448 (12 U.S.C. § 1701x); (ii) participating in a counseling program approved by the New Jersey Housing and Mortgage Finance Agency; and (iii) not holding or disbursing the debtor's funds.

counsel: (1) whether a novice attorney is allowed to handle debt adjustment matters; (2) whether the DACCA restricts bankruptcy attorneys; and (3) whether the DACCA restricts attorneys who perform "excellent work." (Pa47 at 1T54:16-55:7, 57:11-17, 58:11-18)[5]. Mr. Wegener is not an attorney and, in his own words, not qualified to opine on legal questions. (Pa47 at 1T65:6-11, 65:21-66:6).

On April 28, 2023, Appellants and Respondents cross-moved for summary judgment. (Pa1-Pa4). In support of their motion, Appellants argued that the DACCA Attorney Safe Harbor violates: 1) the doctrine of separation of powers in the State Constitution; 2) plaintiffs' due process rights because it is unconstitutional vague and overbroad; 3) plaintiffs' first amendment rights and their ability to represent their clients; and 4) plaintiffs' rights under the federal and New Jersey Civil Rights Acts. (2T4:12-23).

On July 27, 2023, the trial judge issued two orders from the bench that denied Appellants' motion and granted Respondents' motion in full, dismissing the Appellants' Complaint with prejudice. (Pa1-Pa4). On July 27, 2023, the trial judge put his oral decision on the record. (2T3:1-32:23).

[5] "1T" refers to the transcript of the February 15, 2023 deposition of Howard Wegener. "2T" refers to the transcript of the July 27, 2023 decision of the Honorable Douglas Hurd, J.S.C.

First, the trial judge correctly concluded that the DACCA Attorney Safe Harbor does not violate the separation of powers doctrine because the law effectuated a legitimate legislative purpose and did not encroach upon judicial prerogatives and interests. Second, he found that the DACCA Attorney Safe Harbor was not unconstitutionally overbroad because there is no constitutional right to engage in a particular business, including debt adjustment or the practice of law, such that the enactment need only be supported by a rational basis. Third, the DACCA Attorney Safe Harbor is not unconstitutionally vague because it is not impermissibly vague in all applications, and it is also not substantially incomprehensible. Fourth, the DACCA Attorney Safe Harbor does not violate attorneys' First Amendment rights because it does not restrict people's access to the court, nor attorneys' solicitation of clients, nor does it regulate any aspects of the attorney-client relation. And, finally, Appellants are not entitled to relief under the federal and New Jersey Civil Rights Acts because they were not deprived of any due process right.

This appeal followed.

LEGAL ARGUMENTS

POINT I

THE DACCA ATTORNEY SAFE HARBOR IS PRESUMPTIVELY CONSTITUTIONAL.

Appellants brought multiple constitutional challenges to the DACCA Attorney Safe Harbor. Appellants could not overcome their burden on any of their challenges to the DACCA, and the trial court correctly dismissed all of these challenges. Appellants raise the same constitutional challenges in this appeal, all of which lack merit. This court reviews these challenges de novo as they are solely issues of law. Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383 (2010).

Because "[s]tatutes are presumed to be constitutional," State v. One 1990 Honda Accord, 154 N.J. 373, 377 (1998), Appellants bear a heavy burden to establish the DACCA Attorney Safe Harbor is unconstitutional. State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 45–46 (1991); Quick Chek Food Stores v. Twp. Of Springfield, 83 N.J. 438, 447 (1980). More specifically, in analyzing the constitutional validity of a statute, courts presume that "the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner." State v. Profaci, 56 N.J. 346, 349 (1970). "Thus, the presumption will not be overcome, and a 'legislative enactment will not be

declared void, unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt.'" Visiting Homemaker Serv. of Hudson Cty. v. Bd. of Chosen Freeholders, 380 N.J. Super. 596, 607 (App. Div. 2005) (citations omitted). None of Appellants' arguments satisfy this high standard.

Appellants contend that the presumption of constitutionality to which ordinary legislation is entitled is categorically inapplicable here because the DACCA Attorney Safe Harbor allegedly impinges on a constitutionally protected right to practice law. (Ab20).[6] In support of this argument, Appellants rely on Bell v. Stafford Twp., 110 N.J. 384 (1988), which held that there was no presumption of validity for a municipal ordinance which "directly and drastically encroache[d] on a fundamental constitutional interest, freedom of speech and expression." Id. at 395.

The reliance on Bell is misplaced for two reasons. First, Appellants incorrectly assume, without citing any authority, that there is a fundamental constitutional right to practice law. Second, Appellants incorrectly posit that the DACCA Attorney Safe Harbor "directly impinges" on the right to practice law. Both premises are incorrect.

[6] The Appellants' brief is referred to as "Ab."

A. There is no fundamental constitutional right to practice law.

It has long been settled that there is no fundamental right to practice law. New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 42 (App. Div. 2006); Potter v. New Jersey Supreme Ct., 403 F. Supp. 1036, 1038 (D.N.J. 1975); see also Edelstein v. Wilentz, 812 F.2d 128, 132 (3d Cir. 1987) ("We have previously held that the right to practice law is not a fundamental right for purposes of due process or equal protection analysis.") This is because the United States Constitution does not create fundamental interests in particular types of employment. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); Greenberg v. Kimmelman, 99 N.J. 552, 573 (1985). Unsurprisingly, against the weight of this authority, Appellants do not cite any contrary authority supporting the existence of a fundamental right to practice law. (Ab20).

The New Jersey Supreme Court's ruling in Greenberg illustrates the point. There, the wife of a judge challenged a "casino ethics amendment" to the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 to -27, which prohibited state officers and employees, including full-time members of the judiciary and their immediate relatives, from employment with casinos. 99 N.J. at 558. The plaintiff argued that the amendment violated her property and liberty-interest rights in obtaining casino employment. She, much like Appellants here,

reasoned that the restrictions under review "are arbitrary, overbroad, and not rationally related to any legitimate governmental objective." Id. at 562.

In denying her challenge, the New Jersey Supreme Court noted that "the right to a particular job, unlike the right to work in general, has never been regarded as fundamental." Id. at 573. Thus, "the right to employment opportunity is subject to reasonable measures to promote the general welfare under both the federal Constitution and New Jersey Constitution." Id. at 571. Employing the rational-basis standard that applies when fundamental rights are not implicated, the Supreme Court went on to uphold the statute's constitutionality on grounds that it was supported by the State's interest in preserving the integrity of the judiciary and confidence in the casino industry. Ibid.

Appellants attempt to distinguish the holding of Greenberg by claiming that the right to a particular employment is a "far cry" from the right of an attorney to practice law. (Ab46). Yet, Appellants do not cite any authority to support an argument that places attorneys in a privileged position above all other individuals who have an interest in pursuing particular paths of employment; they also offer no response to the decisions that have held that there is no fundamental right to practice law. New Jersey State Bar Ass'n, 387 N.J. Super. at 42; see also Edelstein, 812 F.2d at 132 ("We have previously held that the

right to practice law is not a fundamental right for purposes of due process or equal protection analysis."). Thus, the DACCA does not implicate any fundamental constitutional right that could categorically displace the presumption of constitutionality under Bell.

B. Even if there is a fundamental right to practice law, the DACCA does not directly impinge upon it because it concerns only debt adjustment outside of litigation, which can be conducted by both attorneys and non-attorneys alike.

Even if there were a fundamental constitutional right to practice law, Appellants cannot show that the DACCA "directly impinges" on it because the challenged provision does not punish or restrict attorneys, it merely insulates attorneys whose practices may tangentially touch on debt adjustment from liability under the statute. Indeed, the DACCA regulates a completely separate area of endeavor—debt adjustment—which can be conducted by both attorneys and non-attorneys working under the auspices of nonprofit companies. See N.J.S.A. 17:16G-2. Nothing in the statute purports to regulate the practice of law with respect to disputes relating to the adjustment of debt or the conduct of the courts in adjudicating such disputes. Indeed, litigation of any dispute, including for an adjustment of debt, is governed exclusively by the Rules of Court. Pressler and Verniero, Current N.J. Court Rules, cmt. 1 to R. 1:1-1 (2024) ("The rules of court govern practice and procedure in all courts").

The DACCA is not even addressed to attorneys, who are only mentioned once in the entire statute in the list of exemptions at N.J.S.A. 17:16G-1(c). And that sole mention does not restrict or regulate their practice, but instead protects them from the statute's reach by carving a safe harbor for attorneys who engage in debt adjusting as their non-principal activity. N.J.S.A. 17:16G-1(c)(2).

Therefore, the DACCA Attorney Safe Harbor does not "directly impinge" on a constitutionally-protected right, and it is thus presumed valid.

POINT II

THE DACCA ATTORNEY SAFE HARBOR DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE NEW JERSEY CONSTITUTION.

In Knight v. City of Margate, 86 N.J. 374 (1981), the New Jersey Supreme Court articulated a two-prong test to review challenges to statutes on separation of powers grounds. That test considers: (1) the legitimacy of the governmental purpose of the challenged statute, and (2) the nature and extent of its encroachment upon judicial prerogatives and interests. Id. at 389–90. As explained below, under that test, the DACCA Attorney Safe Harbor does not violate the Separation of Powers Clause of the New Jersey Constitution because the Legislature enacted it for the legitimate purpose of protecting consumers from abusive practices in the debt adjustment market, and DACCA does not

encroach upon any judicial prerogatives and interests. Id. at 389–90. Appellants' attempt to manufacture a threshold requirement before the Knight test applies is contrary to binding precedent and should be rejected.

A. There is no "threshold" requirement before applying the two-prong Knight test.

Appellants argue that, before applying the Knight two-prong test, courts must ask the "threshold" question whether the judiciary exercised its authority over a certain subject area. (Ab26). Because the Judiciary exercised authority over the practice of law, their argument goes, no other branch of government may take action that relates to the practice of law. (Ab26-28). But Appellants' creation of a threshold inquiry is contrary to precedent and should be rejected.

As is well understood, the New Jersey Constitution allocates powers among the three branches of government: the legislative, executive, and judicial. N.J. Const. art. III, § 1. To be sure, the New Jersey Constitution grants the New Jersey Supreme Court broad and exclusive jurisdiction to govern the courts and Bar of this State. N.J. Const. art. VI, § 2, ¶ 3. This provision has been interpreted as granting the Court exclusive jurisdiction to regulate all aspects of the practice of law in New Jersey. See In re LiVolsi, 85 N.J. 576, 583 (1981). However, the separation of powers doctrine "does not mean that the [Supreme Court's] authority must invariably foreclose action by the other branches of

government." Knight, 86 N.J. at 389-90. That is precisely the effect that Appellants' purported threshold inquiry would have.

By treating the question of the Court's exercise of authority in this area as dispositive of the separation of powers inquiry, Appellants would read the Court's "constitutional authority to prescribe and enforce standards of conduct for judges and attorneys" as "necessarily impl[ying] an absence of any authority on the part of the other branches of government to deal with the subject." Ibid. That understanding runs directly afoul of the Knight court's express warning not to invest the court's "preeminent authority" over the judicial brunch as foreclosing action by other branches. Ibid. Knight further explained that its exclusive power over the judicial branch implies that it "has the authority . . . to permit or accommodate the lawful and reasonable exercise of the powers of other branches of government even as that might impinge upon the Court's constitutional concerns in the judicial area." Id. at 390-91. And those other branches' exercise of power, under Knight, is subject to review under the two-part test that Appellants are trying to displace. Id. at 391.

Therefore, contrary to the Appellants' position, there is no threshold requirement before applying the Knight two-prong test. And as discussed below, that test squarely shows that the DACCA Attorney Safe Harbor survives Appellants' separation-of-powers challenge.

B. The Legislature had a legitimate purpose in enacting the DACCA Attorney Safe Harbor.

Turning to the Knight two-prong test, Appellants argue that the limits set by DACCA Attorney Safe Harbor does not pass constitutional muster because the Legislature does not have a legitimate governmental purpose for limiting its scope. (Ab28). It is the Appellants' burden, as the challenger to the DACCA Attorney-Safe Harbor, to prove there is no legitimate governmental purpose, not the Respondents' burden to show otherwise, and Appellants have failed to carry it. Caviglia v. Royal Tours of Am., 178 N.J. 460, 477 (2004).

The overarching purpose of the DACCA from 1960 until the present, has been to protect consumers from abusive and exploitative practices of unscrupulous debt adjusters. Such protective legislation is considered remedial and should be construed liberally to give effect to its remedial goal. See Shelton v. Restaurant.com, Inc. 214 N.J. 419, 442 (2013) (holding the Truth in Consumer Contracting Act is remedial despite punitive elements because it was "enacted to curb some specific conduct or practice" to the benefit of New Jersey citizens).

In considering an earlier version of the statute, New Jersey courts have already determined that the Legislature had a legitimate purpose to regulate the business of debt adjustment: to protect consumers from "frauds and abuses." American Budget Corp. v. Furman, 67 N.J. Super. 134, 136 (Ch. Div.), aff'd 36

N.J. 129 (1961). In Furman, a debtor counseling company brought a declaratory judgment action against the New Jersey Attorney General seeking a declaration that then-existing Debt Adjusters Law was unconstitutional. Ibid. Specifically, the company argued that the statute violated due process and equal protection under the Federal and State Constitutions because that version allowed only attorneys to engage in the business of debt adjustment. Id. at 138.

The court rejected those arguments and upheld the Debt Adjusters Law as constitutional. Id. at 137. The court started by highlighting the introductory statement appended to the statute which provided: "The purpose of this bill is to bar debt adjusters from transacting business in this State." Ibid. The judge then correctly noted that "[f]actual support for the legislative judgment is to be presumed. Barring a showing Contra [sic], the assumption is that the measure rests upon some rational basis within the knowledge and experience of the Legislature." Id. at 139.

The judge found a reasonable basis for the Legislature to significantly restrict the business of debt adjustment:

> Consumer credit is a foundation stone of the State's economy.
> . . . .
>
> The Legislature could have concluded that while some debt adjusters performed a commendable service, many others committed frauds and abuses, and added little to

> the smooth functioning of the economy, serving mainly to increase the burden of debt upon the typical user of consumer credit who invokes their aid, without substantially furthering his attempts to liquidate his pre-existing obligations.
>
> [Id. at 141 (relying on "Symposium—Consumer Credit: Developments in the Law—Relief for the Wage Earning Debtor: Chapter XIII, or Private Debt Adjustment?", 55 Nw. U. L. Rev. 372 (1960)).]

The judge held that "Appellants have not overcome the presumption of validity and demonstrated that the Legislature's decision is arbitrary and capricious, or that the act bears no real or substantial relation to a valid public interest under the police power." Id. at 144. Although the Legislature may have amended the DACCA, Appellants cannot reasonably deny that the Legislature has a legitimate governmental purpose in regulating and restricting the business of debt adjustment. The Legislature's decision to further narrow the reach of the Attorney Safe Harbor does not detract from the legitimacy of the law itself.

Ultimately, the legislative purpose behind the law is to protect consumers from unscrupulous practices of debt adjusters of all types, including those who might use their law licenses as a shield to avoid regulation and scrutiny of their debt-adjustment practice by the Department. The potential dangers posed by exploitative attorneys in debt adjustment cases are widely recognized in other jurisdictions as illustrated in the comprehensive report by the Association of the

Bar of the City of New York. (Ra1-188.) Specifically, unscrupulous attorneys employ the "purported attorney model" which involves "the fraudulent and deceptive inducement of consumers into believing that attorneys will be providing legal assistance in helping them address consumer debts with creditors, while the attorneys involved, if any, do not deliver meaningful legal assistance to individual consumers." (Ra78). Thus, these practitioners act as regular debt adjusters but without supervision of state regulators and without regard to various statutory requirements for debt adjustment. (Ra77).

The DACCA Attorney Safe Harbor is aimed to address the dangers of the "purported attorney model." Specifically, it grants safe harbor only to those attorneys who incidentally provide debt adjustment service as part of their regular law practice, in other words those who are not "principally engaged" in debt adjustment.

Indeed, the United States Supreme Court has upheld a comparable restriction on the business of debt adjustment when practiced by attorneys. Ferguson v. Skrupa, 372 U.S. 726 (1963). In that case, the court upheld the Kansas debt adjustment statute which limited the practice of debt adjusting to lawyers "as an incident to the practice of law." Id. at 727. While the Kansas District Court struck down this statute as unconstitutional, the United States Supreme Court reversed and upheld the constitutionality of the "attorney

exemption" of the Kansas debt adjusting statute. Ibid. The Court refused "to sit as a 'superlegislature to weigh the wisdom of legislation.'" Id. at 731. Instead, the Supreme Court held that the Kansas Legislature "was free to decide for itself" that "legislation was needed to deal with business of debt adjusting," and the Kansas statute making it a misdemeanor to engage in the business except as incident to the lawful practice of law could not be held a denial of due process of law. Ibid. Like the "attorney exemption" in the Kansas statute, the DACCA provides a safe harbor only to those attorneys who are not "principally engaged" in debt adjustment. N.J.S.A. 17:16G-1(c)(2). As in Skrupa, such provision does not violate due process, and the Legislature "was free to decide" to create this exemption.

In the face of Skrupa and Furman, Appellants cannot meet their burden to prove that no legitimate governmental purpose supports the DACCA Attorney Safe Harbor. See Caviglia, 178 N.J. at 477.

Appellants attribute outsized significance to the opinions of a Department employee, Mr. Howard Wegener, on questions of law that fall within the province of this court. (Ab29). Appellants point to Mr. Wegener's lay understanding on the following legal hypotheticals: (1) whether a novice attorney is allowed to handle debt adjustment matters; (2) whether the DACCA

restricts bankruptcy attorneys; and (3) whether the DACCA restricts attorneys who perform "excellent work." (Ibid.).

As a preliminary matter, Appellants mischaracterize the relevant issue under the Knight test, which is whether the Legislature had a legitimate governmental purpose to enact the DACCA, and not whether it has specific policy benefits as articulated by Appellants. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); see also Caviglia, 178 N.J. at 478 ("The State, however, was not obligated to present statistical evidence to prove the soundness of the legislation. In the absence of a 'sufficient showing' that the Legislature lacked factual support for its judgment, this Court will assume that the statute is based on 'some rational basis within the knowledge and experience of the Legislature.'"). Additionally, none of the hypotheticals advanced by Appellants undermine the Legislature's legitimate government purpose in regulating the business of debt adjusting in New Jersey.

First, Appellants incorrectly assert that only newly-admitted attorneys are permitted to provide debt adjusting services. (Ab29). Appellants do not cite to any authority for this interpretation and only rely on a layperson opinion of the

Department employee – Mr. Wegener. (Ibid.). In fact, contrary to the Appellants' assertion, the DACCA Attorney Safe Harbor is not depended on an attorney's experience. N.J.S.A. 17:16G-1(c)(2).

Second, Appellants make the puzzling claim that DACCA applies to attorneys "even if they do excellent work." (Ab29). However, the quality of provided services is irrelevant for purposes of the DACCA's application—the only question is whether the debt-adjustment services are incidental to the attorney's practice. Moreover, that the Legislature could have enacted a different Attorney Safe Harbor provision that exempted competent lawyers, does not mean that the Legislature lacked a legitimate governmental purpose to enact the Attorney Safe Harbor in its present form.

Finally, Appellants incorrectly argue that the DACCA "would even prohibit bankruptcy attorneys, a common type of specialized legal practice, from being principally engaged in the performance of such services." (Ab29). To the contrary, the DACCA does not apply to any litigation field in state or federal courts because, once litigation is filed, attorneys are governed by the applicable rules of court. Bankruptcy work in particular does not trigger the DACCA because the bankruptcy process is governed entirely by federal law and is regulated by the federal courts. By local rule, the conduct of attorneys practicing in the District of New Jersey is governed by the "Rules of Professional Conduct

of the American Bar Association as revised by the New Jersey Supreme Court . . . , subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law." Local Civil Rule 103.1(a); see also Local Bankruptcy Rule 9010-1; see also In re Boy Scouts of Am., 35 F.4th 149, 159-60 (3d Cir. 2022) ("The conduct of attorneys practicing bankruptcy is governed by the Bankruptcy Code and the local rules of the court."). Likewise, bankruptcy debtors are protected from predatory practices of creditors by the bankruptcy trustee and the automatic stay provision of the Bankruptcy Code. 11 U.S.C. § 362(a)(6).

Therefore, because the Legislature had a legitimate governmental purpose to create the DACCA and the Attorney Safe Harbor to protect consumers from frauds and abuses, and that legitimate governmental purpose has been upheld by the courts, DACCA meets the first prong of the separation-of-powers test. Further, that purpose is remedial and should be given broad effect by the court.

C. The DACCA Attorney Safe Harbor does not encroach upon any judicial prerogatives and interests.

Appellants fail to demonstrate how the DACCA, or the DACCA Attorney Safe Harbor, encroach upon any judicial prerogatives and interests. To begin, this case arose not out of any rulemaking, enforcement, declaratory, or any other action of Respondents against Appellants. Instead, in March 2021, the Office

of Attorney Ethics, which is not a party to this case, opened an investigation against a certain attorney of the Appellants' law firm to determine if the attorney has been principally engaged as a debt adjuster. (Pa7).

The OAE is an "arm of the Court" which assists the Court with the Court's exclusive "authority and obligation to oversee the discipline of attorneys." Robertelli v. New Jersey Off. of Atty. Ethics, 224 N.J. 470, 476 (2016) (quoting R.M. v. Supreme Ct., 185 N.J. 208, 213, (2005)); R. 1:20-1(a)). Thus, Appellants' argument that the DACCA encroaches on the Supreme Court's authority to regulate attorneys or any other judicial prerogatives unambiguously lacks merit when it was the disciplinary arm of the Supreme Court itself that initiated the investigation into Appellants for possible violations of the DACCA.

As noted above, the DACCA regulates the business of debt adjustment, which is within the State's police power and does not encroach upon judicial prerogatives to regulate the bar. Nat'l City Bank of New York v. Del Sordo, 16 N.J. 530 (1954) (holding police power reaching nearly "every phase of civilized society," including financial security). More recently, the New Jersey Supreme Court found no encroachment on judicial prerogatives in Knight. 86 N.J. at 377. In Knight, several attorneys who were former municipal court judges in Atlantic County brought a declaratory judgment action challenging the constitutionality of a statute that very broadly restricted members of the judiciary and municipal

judges from "dealings" with casinos. Id. at 377. The attorneys argued that the statute was unconstitutional and impinged upon the Supreme Court's exclusive authority over the courts and judges. Ibid. The trial court agreed and invalidated the statute. Ibid. The Supreme Court, however, overturned and held that the statute was constitutional. Id. at 394. The Court reasoned that the statute "serves a significant governmental purpose" and that it does not "in any way interfere with the sound administration of the judicial system or undermine the proper regulation of the ethical conduct of members of the judiciary and the bar." Ibid.

As in Knight, the fact that some debt adjustment activities can also be performed by attorneys does not in any way interfere with the sound administration of the judicial system or attorney conduct. Id. at 394. The DACCA does not impose any requirements on attorneys that it does not impose on others who seek to practice debt adjustment and does not regulate attorney practice or conduct. To the contrary, the DACCA provides a safe harbor for attorneys who incidentally perform debt adjustment, as long as that debt adjustment activity is not their principal activity. N.J.S.A. 17:16G-1(c).

Therefore, because the DACCA does not encroach upon any judicial prerogatives and interests, it meets the second prong of the separation-of-powers test.

D. The Persels case of the Connecticut Supreme Court is not instructive because it involves a materially different statute.

Appellants place a great weight on the Connecticut case of Persels & Assocs., LLC v. Banking Commissioner, 122 A.3d 592 (Conn. 2015). In that case, the Connecticut Supreme Court invalidated a certain provision of the Connecticut Debt Negotiations statute, which exempted from its application "any attorney admitted to the practice of law in this state who engages or offers to engage in debt negotiation as an ancillary matter to such attorney's representation of a client." Conn. Gen. Stat. Ann. § 36a-671(c). Specifically, the Connecticut Supreme Court held that this provision unconstitutionally regulates the practice of law. Id. at 594. Appellants argue that because the Connecticut Supreme Court invalidated that provision, this court should likewise invalidate the DACCA Attorney Safe Harbor. However, this argument is flawed for several reasons.

First, decisions of other state courts are neither binding nor controlling on New Jersey courts, especially on questions of interpretation of the State Constitution. Greenberg, 99 N.J. at 568 ("The ultimate responsibility for interpreting the New Jersey Constitution, however, is ours."). Connecticut has a different Constitution, statutes, and caselaw. Additionally, our courts developed a specific and unique two-prong test to consider challenges to statutes

based on the Separation of Powers Clause of the New Jersey Constitution. Knight, 86 N.J. at 391 (i.e. (1) the legitimacy of the governmental purpose of a statute, and (2) the nature and extent of its encroachment upon judicial prerogatives and interests). The Persels decision was obviously not based on the application of the New Jersey's two-prong test. For this reason, it is not correct to transpose the Persels decision onto New Jersey courts and precedents.

Second, the Persels case involved a materially different statute which has no analog in New Jersey. Specifically, Connecticut has both the Debt Adjusting Law, Conn. Gen. Stat. Ann. §§ 36a-655 to 36a-665, and Debt Negotiations Law, Conn. Gen. Stat. Ann. §§ 36a-671 to 36a-671(f). Both statutes have separate attorney exemption provisions. Conn. Gen. Stat. Ann. § 36a–663; § 36a-671(c). The subject of the Persels case was the attorney exemption in the Debt Negotiations Law, Conn. Gen. Stat. Ann. § 36a-671(c), and not the Debt Adjusting Law.

The DACCA is different from the Connecticut Debt Negotiations statute in the following material regards. First, the Connecticut statute contemplated licensure, supervision, and enforcement actions against attorneys by the Connecticut Commissioner of the Department of Banking. See Conn. Gen. Stat. Ann. § 36a-671(b) ("No person shall engage or offer to engage in debt negotiation in [Connecticut] unless such person has first obtained a license for

its main office and for each branch office where such business is conducted"); § 36a-671(c) (authorizing the Commissioner of the Department of Banking to issue a license); § 36a-671a (authorizing the Commissioner of the Department of Banking to suspend or revoke a license, to review fees, to order a licensee to remove any individual from employment, and to order cease and desist); and § 36a-671f (outlining prohibited practices). The DACCA does not license, regulate nor supervise attorneys. Under the DACCA, only non-profit entities can obtain a license and thus be subject to the Department's supervision. See N.J.S.A. 17:16G-2(a) ("No person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster") and -2(b) ("It shall be unlawful for any nonprofit social service agency or nonprofit consumer credit counseling agency to act as a debt adjuster without first obtaining a license from the Commissioner of the Department of Banking pursuant to this Act.")

Second, the Connecticut statute is triggered immediately upon an attorney's negotiating or negotiating a debt for a single client, whereas the DACCA exempts attorneys who are not principally engaged in debt adjustment, i.e., in relation to the overall practice of that attorney. Thus, the Connecticut statute is fundamentally different from the DACCA.

Finally, for the DACCA to apply, a person must act for a very specific purpose of "settling, compounding, or otherwise altering the terms of payment of any debts of the debtor." N.J.S.A. 17:16G-1(c)(1). In contrast, the Connecticut statute applies even when a person merely assists a debtor in negotiating or attempting to negotiate with creditors. Conn. Gen. Stat. Ann. § 36a-671(a). This difference is material because the DACCA has a narrower application than the Connecticut statute.

Therefore, the Persels case of the Connecticut Supreme Court is not instructive because it involves a materially different statute.

POINT III

THE DACCA ATTORNEY SAFE HARBOR IS NOT UNCONSTITUTIONALLY OVERBROAD.

In Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), the United States Supreme Court outlined the legal standard to approach a dual constitutional challenge to a law, such as the one asserted here, that asserts both unconstitutional overbreadth and vagueness. Id. at 494–95. There, the U.S. Supreme Court explained that "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally-protected conduct. If it does not, then the overbreadth challenge must fail." 455 U.S. 489, 494–95 (1982).

Therefore, before turning to the issue of vagueness (discussed in Point IV), this Court must "determine whether the enactment reaches a substantial amount of constitutionally protected conduct." State v. Badr, 415 N.J. Super. 455, 467 (App. Div. 2010). Because it does not reach such conduct, much less prohibit it, the DACCA Attorney Safe Harbor is not overbroad.

A. The DACCA Attorney Safe Harbor does not "reach a substantial amount of constitutionally protected conduct."

Appellants argue that the DACCA Attorney Safe Harbor is overbroad because it allegedly "prohibits attorneys who devote the most time and are the most experienced from assisting clients with debt adjustment." (Ab45). However, this argument is premised on two false assumptions – (1) that the DACCA outright prohibits debt adjustment by attorneys; and (2) that there is a fundamental constitutional right to engage in a certain employment.

First, the DACCA does not outright prohibit any activity by attorneys. Instead, it provides a safe harbor to attorneys who incidentally perform debt adjusting for their clients. And attorneys who are "principally engaged" in debt adjusting can perform these services under the auspices of a licensed non-profit entity. Attorneys do not, and cannot, apply for a debt adjustment license or be regulated by the Department because the only entity that can hold a license and be regulated by the Department is a non-profit social service agency or non-

profit consumer credit counseling agency. N.J.S.A. 17:16G-2(a) and (b). But any person working for a licensed non-profit company is not separately licensed. Because there is no fundamental right to engage in debt adjusting, it was within the Legislature's power to create this licensing scheme to regulate this activity.

Second, as discussed in Point I, there is no fundamental right to a particular employment. Greenberg, 99 N.J. at 573. Therefore, the DACCA Attorney Safe Harbor does not "reach a substantial amount of constitutionally protected conduct."

B. The lower court correctly rejected Appellants' attempt to rely on the layperson testimony of the Department employee to argue overbreadth of the DACCA.

In their Statement of Facts and throughout their brief, Appellants repeatedly present a layperson's opinion about the meaning of DACCA as fact. (Ab10-14). Specifically, on February 15, 2023, Appellants deposed Mr. Howard Wegener, Chief of Consumer Finance Operations of the New Jersey Department of Banking and Insurance. (Pa47). Appellants then presented his testimony as a legally binding legal opinion of statutory interpretation on Respondents. The trial judge correctly disregarded Mr. Wegener's layperson opinion that was "in no way legally binding on Defendants." (2T8:15-18; 8:23-9:2). This court should likewise disregard this testimony.

Appellants cite to a comment under Rule 4:14-2(c) which states that

"when a subject matter designation is made . . . [a person's] testimony will bind the organization." Pressler and Verniero, Current N.J. Court Rules, cmt. 3 to R. 4:14-2(c) (2024). Appellants do not cite to any reported case, and Respondents are also unaware of any State decision that would bind Respondents to a layperson's legal interpretation of the statute.

Indeed, Mr. Wegener was not testifying as an expert on statutory interpretation, and was in fact a lay witness. (Pa47 at 1T65:6-11, 65:21-66:6). Mr. Wegener's testimony "in the form of opinions or inferences may be admitted" only if it (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue. N.J.R.E. 701. However, Mr. Wegener's opinion on statutory interpretation was not based on his perception because, in his own words, he was not qualified to opine on legal questions. (Pa47 at 1T65:6-11, 65:21-66:6). Also, Mr. Wegener's opinion on statutory interpretation is not related to any fact in issue in this case. Indeed, there are no factual issues in this case, and instead the only issues are legal. "It is the 'court's function,' not a witness's, to answer questions of law. Any opinions given by witnesses, experts or otherwise, on questions of law need not be accepted by reviewing courts and may be disregarded." Kirkpatrick v. Hidden View Farm, 448 N.J. Super. 165, 179 (App. Div. 2017) (internal citations omitted).

The question of statutory interpretation of the DACCA is the ultimate question in this case. This question is purely a question of law, and not a question of fact. The Respondents' legal position on the DACCA statutory interpretation is presented by their counsel in this brief.

In summary, Mr. Wegener's layperson opinions on statutory interpretation were and should be disregarded.

Therefore, the DACCA Attorney Safe Harbor is not unconstitutionally overbroad

POINT IV

THE DACCA ATTORNEY SAFE HARBOR IS NOT UNCONSTITUTIONALLY VAGUE.

Because Appellants could not show unconstitutional overbreadth of the DACCA, the court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is "'impermissibly vague in all its application,'" that is, there is no conduct that it proscribes with sufficient certainty." State v. Cameron, 100 N.J. 586, 593 (1985) (quoting Hoffman Estates, 455 U.S. at 495)).

The DACCA Attorney Safe Harbor is not vague and should be interpreted within its ordinary meaning. "To avoid the pitfall of vagueness, a statute must

enable a person of common intelligence to understand its essential terms." Id. at 619 (citing State v. Lashinsky, 81 N.J. 1, 17 (1979)).

"When the average person would understand the words used in a statute, and the Legislature provides no explicit indication of special meaning, the terms used in the provision will carry their ordinary, well-understood meanings." State v. N.G., 381 N.J. Super. 352, 360 (App. Div. 2005) (citing State v. Afanador, 134 N.J. 162, 170 (1993)). To ascertain the ordinary meaning of words used in a statute, courts often look to a dictionary. Ibid. (citing State v. Mortimer, 135 N.J. 517, 532 (1994)).

In contrast to criminal statutes, "civil statutes in general, and economic regulations in particular, are subject to less stringent scrutiny under the vagueness doctrine." In re Loans of N.J. Prop. Liab. Ins. Guar. Ass'n, 124 N.J. 69, 78 (1991). This is in part "because business entities can be expected to consult legislation considerations in advance of economic action." Ibid. "[A] commercial regulatory statute" will be "held unconstitutionally vague only if it is 'substantially incomprehensible.'" In re Farmers' Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 619–20 (App. Div. 1992) (quoting In re Loans, 124 N.J. at 78).

Because the DACCA is a civil statute, the less-stringent standard applies. Ibid. Applying this less-stringent test, the DACCA Attorney Safe Harbor is not

unconstitutionally vague because it is not "substantially incomprehensible." Contrary to Appellants' assertion, the terms "principally engaged" and "attorney at law" are common phrases.

A. The phrases "principally engaged" and "attorney-at-law of this State" are common phrases requiring no special definition.

While the phrase "principally engaged" was not specifically defined in the Debt Adjustment Act, it is a common phrase that does not require a definition and is thus not vague.

The terms "principally" and "engaged" are common English words with well-understood definitions. The Merriam-Webster English Dictionary defines the adverb "principally" as "relating to principal, "https://www.merriam-webster.com/dictionary/principally, and the adjective "principal" as "most important, consequential, influential." https://www.merriam-webster.com/dictionary/principal. The same dictionary defines the word "engage" as "to do or take part in something." https://www.merriam-webster.com/dictionary/engage. The Black's Law Dictionary defines the adjective "principal" as "chief; primary; most important." Black's Law Dictionary (11th ed. 2019). The same dictionary defines "engage" as "to employ or involve oneself; to take part in; to embark on." Ibid.

Putting these two words together, the phrase "principally engaged in" - means "primarily participating in" or "chiefly participating in." In the context of the debt adjustment business, this phrase means "primarily participating in debt adjustment" or "chiefly participating in debt adjustment."

Likewise, the term "attorney-at-law of this State" has a common well-understood meaning. Merriam-Webster defines the attorney-at-law as "a practitioner in a court of law who is legally qualified to prosecute and defend actions in such court on the retainer of clients." https://www.merriam-webster.com/dictionary/attorney-at-law. Moreover, the phrase "is appointed as an attorney-at-law" appears on the formal certificate of admission issued by the New Jersey Supreme Court pursuant to R. 1:29-1(a).

B. As the U.S. Supreme Court and New Jersey courts have held, the phrase "engaged principally" is not vague.

Importantly, the phrase "engaged principally," has already been adjudicated as not vague by both the U.S. Supreme Court and the New Jersey Appellate Division. Toxaway Hotel Co. v. J.L. Smathers & Co., 216 U.S. 439, 448 (1910) ("'Engaged principally' are plain words of no ambiguous meaning. They need no construction"); Priolo v. Shorrock Garden Care Ctr., No. A-3032-20, 2022 WL 4350133, at *3 (App. Div. Sept. 20, 2022) ("N.J.S.A. 26:2H-2 plainly defines a 'health care facility as 'the facility or institution . . . engaged

principally in providing services for health maintenance organizations, diagnosis, or treatment of human disease, pain, injury, deformity, or physical condition'").

In Toxaway Hotel Co., creditors of a hotel initiated an involuntary bankruptcy proceeding against the hotel. Toxaway Hotel Co., 216 U.S. at 439. The then-existing federal bankruptcy law enumerated the types of businesses which could be adjudicated in an involuntary bankruptcy proceeding. Ibid. Hotels were not one of the enumerated categories, but businesses "engaged principally" in trading and mercantile pursuits were. Ibid. The creditors argued that the hotel was a business "engaged principally" in trading and mercantile pursuits." Id. at 440. The United States Supreme Court held that the hotel was not "engaged principally" in trading and mercantile pursuits. Ibid. In doing so, the Court ruled that "'engaged principally' are plain words of no ambiguous meaning. They need no construction." Ibid.

C. A litany of New Jersey statutes and regulations use the phrase "principally engaged" without specifically defining it which signifies that the phrase does not require a special definition.

A litany of other New Jersey statutes and regulations use the phrase "principally engaged" without specifically defining it. See e.g. N.J.S.A. 52:17B-41.11 ("[A]ll applicants who have been principally engaged as an ophthalmic technician . . . shall be issued a license"); N.J.S.A. 34:1B-243

("Mega project" means . . . a qualified business facility primarily used by a business principally engaged in research, development, or manufacture of a drug or device . . . .); N.J.S.A. 34:1B-185 and N.J.A.C. 19:31–16.2 ("Life sciences business" means a business engaged principally in the production of medical equipment, ophthalmic goods, medical or dental instruments, diagnostic substances, biopharmaceutical products; or physical and biological research; or biotechnology"); N.J.S.A. 44:5-2a (defining "health care facility" as a "private facility or institution, engaged principally in providing services for health maintenance organizations."); N.J.S.A. 26:2H-2, N.J.A.C. 11:3–28.2, N.J.A.C. 5:23-1.4, and N.J.A.C. 8:33-1.3 ("Health care facility" means the facility or institution, whether public or private, that is engaged principally in providing services for health maintenance organizations . . .); N.J.A.C. 3:11-4.1 ("Banks are authorized to subscribe for purchase and hold stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any state thereof, and principally engaged in international or foreign banking . . .); N.J.A.C. 13:18-2.1 ("Rental owner" means, with respect to one or more rental fleets, an owner principally engaged in renting the vehicles of such fleets, with or without drivers."). None of these statutes and regulations have been challenged on constitutional grounds.

Therefore, the DACCA Attorney Safe Harbor is not unconstitutionally vague.

POINT V

THE DACCA ATTORNEY SAFE HARBOR DOES NOT VIOLATE ATTORNEYS' FIRST AMENDMENT RIGHTS.

Appellants cannot satisfy their high burden to establish that the DACCA Attorney Safe Harbor violates attorneys' First Amendment rights because it does not restrict the public's access to the courts or attorneys' solicitation of clients, nor does it regulate any aspects of the attorney-client relation. Moreover, the DACCA does not unconstitutionally regulate possession or speech, and instead it regulates specific conduct: the business activity of debt adjusting.

A. The DACCA does not regulate possession or speech, and instead it regulates specific business activity of debt adjusting.

"The First Amendment to the federal Constitution permits regulation of conduct, not mere expression." State v. L.C., 283 N.J. Super. 441, 450 (App. Div. 1995) (citing State v. Vawter, 136 N.J. 56, 65–67 (1994)). Because the DACCA regulates the specific conduct of debt adjusting and not speech, the First Amendment challenge to the DACCA should fail.

Appellants rely on a recent Appellate Division decision in State v. Higginbotham, 475 N.J. Super. 205 (App. Div. 2023), to argue that the DACCA

prohibits speech. That decision invalidated certain provisions of the criminal statute, N.J.S.A. 2C:24-4, penalizing possession of child erotica materials which "portray a child in a sexually suggestive manner." Id. at 217. The Appellate Division held that the statute was unconstitutional because it was at odds with the various United State Supreme Court cases which more narrowly defined child pornography as "an image of a child engaged in a sex act or the image of a child with their genitals lewdly displayed." Id. at 233. Thus, because the statute penalized "the private possession of child erotica, which, in addition to not qualifying as child pornography, is not defined using the terms of the [United States Supreme Court] obscenity standard, it violated the First Amendment right to free speech. Ibid.

The Higginbotham decision is not applicable to this matter. First, that decision involved a criminal statute, rather than a civil statute, and civil statutes are subject to less stringent scrutiny. Hoffman Estates., 455 U.S. at 498. Appellants' main challenge is to the civil statute DACCA which regulates the business activity of debt adjusting. And while the criminal debt adjusting statute N.J.S.A. 2C:21-19(f) makes a reference to the DACCA in general and not to the DACCA Attorney Safe Harbor specifically, Appellants were not investigated or prosecuted for violations of the criminal statute. Second, the criminal statute in the Higginbotham case involved possession of certain materials that implicated

First Amendment rights. The DACCA, on the other hand, does not prohibit possession or speech, and instead it regulates a specific business activity – i.e. debt adjustment.

B. The DACCA in no way restricts people's access to the court, nor attorneys' solicitation of clients, nor does it regulate any aspects of the attorney-client relation.

Appellants rely on National Association for Advancement of Colored People v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978), both of which invalidated state restrictions infringing on attorneys' right to solicit clients. Both cases are distinguishable.

Specifically, in Button, the United States Supreme Court struck down Virginia statutes "proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." 371 U.S. at 434. The Supreme Court held that such statutes violated the First Amendment freedoms. Id. at 437. In Primus, the United States Supreme Court reversed the South Carolina Supreme Court's decision to issue a private reprimand to an attorney who advised another person of her legal rights and disclosed in a subsequent letter that free legal assistance was available from a nonprofit organization. 436 U.S. at 414. The Supreme Court held that solicitation of prospective litigants by nonprofit organizations that engage in litigation as "a form of political expression" and "political association" constitutes expressive and associational

conduct entitled to First Amendment protection. Id. at 423-24.

Both of these cases are plainly inapplicable to the Appellants' challenge of the DACCA. The import of the Button and Primus holdings 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." United Transp. Union v. Michigan Bar, 401 U.S. 576 (1971). The DACCA in no way restricts people's access to the court or attorney solicitation of clients. In fact, the DACCA does not apply at all once litigation has been filed. Nor does it regulate any aspects of the attorney-client relationship. Any attorney is free to provide legal advice and representation to clients in connection with their defenses to an alleged debt that is owed. As argued before, the business of debt adjustment and the practice of law are separate areas of endeavor. In those cases where these areas overlap, attorneys can still engage in debt adjustment as their non-principal engagement, or under the auspices of a non-profit company.

Therefore, the DACCA Attorney Safe Harbor does not infringe on attorneys' First Amendment rights.

POINT VI

APPELLANTS ARE NOT ENTITLED TO RELIEF UNDER THE FEDERAL AND NEW JERSEY CIVIL RIGHTS ACTS.

Appellants argue that Respondents violated the Appellants' rights under the Federal and New Jersey Civil Rights Acts. (Ab48). Appellants raise this argument not as a constitutional challenge to the DACCA Attorney Safe Harbor, but as a means to obtain injunctive and other relief. This claim fails as a threshold matter because Respondents are immune from these claims because they are not "persons" for purposes of 42 U.S.C. § 1983 and the New Jersey Civil Rights Act. This argument also lacks merit in any case because, as argued above, Appellants have not been deprived of any substantive right under DACCA.

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a "person" acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). Even assuming Appellants could show they were deprived of a constitutional right, only defendants who fall under the definition of "person" may be held liable under § 1983. States, state agencies, and state officials acting in their official capacities are not "persons" under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58,

70-71 (1989). A "State and arms of the State" are "not a 'person' within the meaning of § 1983" and therefore "are not subject to suit under § 1983 in either federal court or state court." Howlett v. Rose, 496 U.S. 356, 365 (1990).

In order to establish a defendant's individual liability under 42 U.S.C. § 1983, the plaintiff must demonstrate the defendant's personal involvement in the alleged constitutional deprivation which falls outside of their official capacities. See e.g., Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210 (3d Cir. 2015). Otherwise, a § 1983 claim may not proceed against a governmental employee in his or her individual capacity. See Rode v. Dellarciprete, 845 F.2d 1195, 1206-07 (3d Cir. 1988).

Here, Appellants have sued the State of New Jersey, and the New Jersey Attorney General and the Commissioner of the New Jersey Department of Banking and Insurance in their official capacities. However, as discussed above, the State and the individual defendants acting in their official capacities are not persons amenable to suit for the alleged constitutional violation. Accordingly, Appellants have not pleaded a cognizable § 1983 claim and Respondents are entitled to sovereign immunity.

Appellants' claims under the New Jersey Civil Rights Act fails for similar reasons. See Brown v. State, 230 N.J. 84, 97-98 (2017); Filgueiras v. Newark Pub. Sch., 426 N.J. Super. 449, 468 (App. Div. 2012) ("The elements of a

substantive due process claim under the [NJ]CRA are the same as those under § 1983."); Martin v. Unknown U.S. Marshals, 965 F. Supp. 2d 502, 548 (D.N.J. 2013) ("[T]he New Jersey Civil Rights Act is interpreted analogously to 42 U.S.C. § 1983"). Because the State and its agencies and officers acting in an official capacity are not "persons" for the purposes of § 1983 and the NJCRA, they are not subject to suit under these statutes. Brown, 442 N.J. Super. at 426; Grohs v. Yatauro, 984 F.Supp. 2d 273, 280 (D.N.J. 2013).

Respondents are immune from suit and the DACCA Attorney Safe Harbor does not implicate any substantive civil rights protected by federal or state law, therefore, Appellants are not entitled to relief under both the Federal and New Jersey Civil Rights Acts.

CONCLUSION

For these reasons, the trial court's July 27, 2023 Order granting Respondents' motion for summary judgment and the July 27, 2023 Order denying Appellants' motion for summary judgment should be affirmed.

Respectfully submitted,

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Re: ANCHOR LAW FIRM, PLLC and ANDREW M. CARROLL, ESQ. v. THE STATE OF NEW JERSEY, GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey, and MARLENE CARIDE, in her official capacity as Commissioner of Banking and Insurance

Docket No. A-000052-23

On Appeal From The July 27, 2023 Orders Issued By The Superior Court of New Jersey, Law Division, Mercer County

Letter Brief of Respondents, The State Of New Jersey, Gurbir Grewal, and Marlene Caride, in Response to the Amicus Curiae Brief of New Jersey State Bar Association

Dear Mr. Orlando:

Please accept this letter on behalf of Respondents, The State of New Jersey, Gurbir Grewal, in his official capacity as Attorney General of the State

of New Jersey, and Marlene Caride, in her official capacity as Commissioner of Banking and Insurance (collectively, "Respondents"), in lieu of a more formal brief in response to the amicus curiae brief filed by the New Jersey State Bar Association ("NJSBA").

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Respondents rely on the procedural history and statement of facts as presented in the Respondents' merits brief submitted on April 11, 2024.

LEGAL ARGUMENT

POINT I

THE DACCA ATTORNEY SAFE HARBOR DOES NOT INFRINGE ON THE SUPREME COURT'S EXCLUSIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.

The NJSBA's challenge to the constitutionality of the New Jersey Debt Adjustment and Credit Counseling Act (DACCA), N.J.S.A. 17:16G-1 to -9, is based on the following flawed syllogism: a) debt adjustment services that are performed by an attorney may constitute the practice of law; b) the New Jersey Supreme Court regulates attorneys; therefore, c) any effort by the Legislature to regulate the practice of debt adjustment violates the Separation of Powers Clause and the exclusive authority of the New Jersey Supreme Court to regulate attorneys. (ACb4-12.)[1] That argument lacks merit.

In analyzing the constitutional validity of a statute, courts presume that "the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner." State v. Profaci, 56 N.J. 346, 349 (1970); (Rb8-9). "[T]he presumption will not be overcome, and a 'legislative enactment will not be declared void, unless its repugnancy to the Constitution is

[1] The NJSBA Amicus Curiae brief is referred to as "ACb."

so manifest as to leave no room for reasonable doubt.'" Visiting Homemaker Serv. of Hudson Cty. v. Bd. of Chosen Freeholders, 380 N.J. Super. 596, 607 (App. Div. 2005) (citations omitted). The burden of proving the unconstitutionality of a statute rests with the challenger. And the arguments of the NJSBA do not overcome the strong presumption that the DACCA is constitutional.

The Legislature has undisputed authority to regulate the practice of debt adjustment, which is primarily performed by non-attorneys. The DACCA Attorney Safe Harbor exemption, N.J.S.A. 17:16G-1(c)(2), provides attorneys with the ability to engage in debt adjustment activities outside of the purview of the statute, as long as these activities are secondary or incidental to the attorneys' primary role of client representation. The Legislature had a legitimate governmental purpose to limit the scope of the Attorney Safe Harbor to protect consumers from potential abuses or unfair practices by unscrupulous attorneys. Therefore, the DACCA, and the Attorney Safe Harbor exemption within the DACCA, withstand constitutional scrutiny.

A. The NJSBA did not acknowledge the legitimate governmental purpose behind the DACCA and its Attorney Safe Harbor.

A constitutional challenge on separation of powers grounds must be evaluated under the following two-prong test: (1) the legitimacy of the

governmental purpose of the challenged statute, and (2) the nature and extent of its encroachment upon judicial prerogatives and interests. Knight v. City of Margate, 86 N.J. 374, 389-90 (1981).

The overarching purpose of the DACCA from 1960 until the present has been to protect consumers from abusive and exploitative practices of unscrupulous debt adjusters. American Budget Corp. v. Furman, 67 N.J. Super. 134, 136 (Ch. Div.), aff'd 36, N.J. 129 (1961); (Rb16-23); (Rb16.)[2] Moreover, the legislative purpose behind the Attorney Safe Harbor is to protect consumers from potential unscrupulous practices of those attorneys who perform debt adjustment services as their principal, standalone activity. (Rb18-19.) The NJSBA makes no effort to address the first prong of the test and presumably agrees with Respondents' position as to the legitimate purposes of DACCA and its Attorney Safe Harbor. For these reasons, the DACCA satisfies the constitutional standard under the Knight test and is thus constitutional.

B. The DACCA regulates debt adjustment services, not the practice of law.

DACCA does not encroach upon judicial prerogatives and interests because it regulates debt adjustment services, not the practice of law as is evident by the DACCA's language and structure. More specifically, the

[2] The Respondents' brief submitted on April 11, 2024 is referred to as "Rb."

DACCA regulates intermediaries between a debtor and a creditor who settle, compound, or otherwise alter the terms of debts of the debtor. N.J.S.A. 17:16G-1(c)(1) (defining "debt adjuster"). The full statute contemplates that debt adjustment services would be provided primarily by non-attorneys, and expressly does not include any limits or controls over the nature or conduct of litigation before any court. N.J.S.A. 17:16G-1 to -9 (permitting anyone to provide debt adjuster services under the auspices of a nonprofit company and making no mention of matters in litigation). To the extent that an attorney provides incidental debt adjustment services, the Attorney Safe Harbor places this representation outside the DACCA.

Under the DACCA, debt adjustment services can only be provided under the auspices of a licensed nonprofit social service agency or a nonprofit consumer credit counseling agency, and not in an individual capacity. N.J.S.A. 17:16G-2(a), -3. The overarching purpose of the DACCA from 1960 until the present has been to protect consumers from abusive and exploitative practices of unscrupulous debt adjusters. American Budget Corp., 67 N.J. Super. at 136. Of all the DACCA provisions, only one—N.J.S.A. 17:16G-1(c)(2) which sets forth the attorney exception to the definition of debt adjuster—mentions attorneys. While debt adjustment may constitute the practice of law when performed by attorneys (see ACb9-11), the Attorney Safe Harbor specifically

excludes this part of the practice of law from the DACCA because, when otherwise providing legal representation, the attorney is not "principally engaged as a debt adjuster." N.J.S.A. 17:16G-1(c)(2). Thus, the Attorney Safe Harbor does not in any substantial way interfere with the authority of the Supreme Court to regulate the practice of law. It only regulates an attorney to the extent that the principal activity is that of a debt adjuster as defined in the statute.

Further, the NJSBA's argument that attorneys are "often exempted from statutory schemes" (see ACb7) indeed is reflected in and supports the constitutionality of the DACCA. The NJSBA analogizes its argument to the facts of Vort v. Hollander, 257 N.J. Super. 56 (App. Div. 1992). In Vort, an attorney sued a client for unpaid fees, and the client counterclaimed for professional misconduct and violation of the Consumer Fraud Act. The Law Division dismissed the counterclaim, and the Appellate Division affirmed. As to the claim under the Consumer Fraud Act, the Appellate Division concluded that "attorney's services do not fall within the intendment of the Consumer Fraud Act." Id. at 62. (App. Div. 1992). The NJSBA's reliance on that case is misplaced.

In contrast to the Consumer Fraud Act, which does not explicitly contain an attorney exemption, the DACCA does, so long as debt adjustment is not the

principal activity. N.J.S.A. 17:16G-1(c)(2). In fact, Vort acknowledges that the Legislature could have subjected attorneys to the Consumer Fraud Act's statutory reach if it had specifically said so in the statute. 257 N.J. Super. at 62 ("Had the Legislature intended to enter the area of attorney regulation it surely would have stated with specificity that attorneys were covered under the Consumer Fraud Act."). This further undercuts any argument about the DACCA premised on Vort and supports the position that the Legislature has the authority to enact statutes that could affect the practice of law without violating the Separation of Powers doctrine.

Because the Attorney Safe Harbor preserves the authority of the Supreme Court to regulate attorneys in all significant aspects, it does not encroach upon judicial prerogatives and interests except when an attorney's principal activity is debt adjustment which is an activity that is not subject to the Court's regulation. As argued in Respondents' merits brief, the DACCA does not interfere with the judicial sphere, and it does not limit the Judiciary's ability to supervise and regulate attorneys and their professional conduct. In fact, in the matter that spurred Appellants to bring this matter, the Office of Attorney Ethics was allegedly relying upon the principles of the DACCA in its oversight of attorney conduct.

C. The DACCA does not regulate debt adjustment services performed by an attorney representing a client.

There is no dispute that attorneys often negotiate with creditors to reduce or settle clients' debts as part of the attorneys' legal representation. In that context, debt adjustment is not a standalone service but rather incidental to the attorney's broader activity to represent the client's interests. In that regard, the Attorney Safe Harbor reflects the Legislature's recognition that attorneys often provide debt adjustment services incidental to their legal representation. By focusing on attorneys who are "principally engaged" in debt adjustment, the DACCA exempts attorneys for whom debt adjustment is not a core activity, i.e. those attorneys who principally provide these services outside of the legal representation of the client. N.J.S.A. 17:16G-1(c)(2). The Attorney General and DOBI recognize that being an attorney does not grant a blanket exception from the DACCA; instead, it requires attorney-provided debt adjustment services be provided within the context of a broader attorney-client relationship to fall outside the statutory purview.

Indeed, the NJSBA's argument that the statute purports to regulate attorneys' representation of clients in foreclosure, bankruptcy and collection proceedings, or the conduct of the courts in adjudicating these proceedings does nothing to further their position. Instead, it demonstrates the wide scope of the

exception. Such debt adjustment activities as part of a representation of a client in a foreclosure, bankruptcy or collections matter fall squarely within the DACCA attorney exception. Nor do the Attorney General and DOBI dispute the NJBSA's contention that, litigation of any dispute in a state or federal court that includes among other things the adjustment of debt, is governed exclusively by the state or federal Rules of Court, respectively. The DACCA does regulate an attorney whose primary activity is debt adjustment, but as noted in Respondents' brief and above, this regulation of attorney conduct does not prevent or preclude judicial oversight of attorney conduct. For these reasons, the DACCA does not regulate debt adjustment services performed by an attorney representing a client in an attorney-client relationship.

D. The DACCA does not impose licensing and regulatory requirements on attorneys and does not subject attorneys to disciplinary actions.

Contrary to the NJSBA's argument, the DACCA does not subject attorneys to licensing requirements or disciplinary actions by the Commissioner of the Department. To the contrary, the DACCA exempts from its statutory reach attorneys who incidentally perform debt adjustment as long as that debt adjustment activity is not their principal activity. N.J.S.A. 17:16G-1(c).

Importantly, the DACCA does not allow any individuals, whether or not they are attorneys, to apply for and obtain a debt adjuster license. These licenses

are reserved exclusively to nonprofit social service agencies and nonprofit consumer credit counseling agencies. N.J.S.A. 17:16G-2(a) and (b). Thus, attorneys do not, and cannot, apply for a debt adjustment license or be regulated by the Department. Any person who is working for a licensed nonprofit company and performing debt adjustment is not separately licensed by the Department. Thus, attorneys who do want their principal activity to be debt adjustment can, just as non-attorneys do, apply to work at a nonprofit agency that is licensed to perform debt adjustment.

While the DACCA empowers the Commissioner of the Department to institute an enforcement action for civil penalties and also seek injunctive relief for a violation of the DACCA, N.J.S.A. 17:16G-8, the Commissioner is not empowered to initiate an attorney disciplinary proceeding for professional misconduct. Indeed, the disciplinary action which was the genesis of Appellants' complaint was initiated by the Office of Attorney Ethics which is an "arm of the Court" which assists the Court with the Court's exclusive "authority and obligation to oversee the discipline of attorneys." Robertelli v. New Jersey Off. of Atty. Ethics, 224 N.J. 470, 476 (2016) (quoting R.M. v. Supreme Ct., 185 N.J. 208, 213, (2005)); R. 1:20-1(a)).

Therefore, the DACCA does not impose any requirements on attorneys that it does not impose on others who seek to practice debt adjustment under the auspices of a licensed nonprofit company.

E. The Persels case involves a materially different statute and provides no assistance to the Court in examining this matter.

The NJSBA's reliance on a Connecticut case of Persels & Assocs., LLC v. Banking Commissioner, 122 A.3d 592 (Conn. 2015), is misplaced. Apart from being non-precedential, R. 1:36-3, it is distinguishable because Persels considered a statute that is materially different from the DACCA.

In Persels, the Connecticut Supreme Court invalidated a certain provision of the Connecticut Debt Negotiations statute, which exempted from its application "any attorney admitted to the practice of law in this state who engages or offers to engage in debt negotiation as an ancillary matter to such its attorney's representation of a client." Conn. Gen. Stat. Ann. § 36a-671(c). Specifically, the Connecticut Supreme Court held that this provision unconstitutionally regulates the practice of law. Id. at 594. However, the Connecticut statute materially differed from the DACCA in the following regards.

First, the Connecticut statute contemplated licensure of, supervision of, and enforcement actions against individuals, which could include attorneys, by

the Connecticut Commissioner of the Department of Banking. See Conn. Gen. Stat. Ann. § 36a-671(b) ("No person shall engage or offer to engage in debt negotiation in [Connecticut] unless such person has first obtained a license for its main office and for each branch office where such business is conducted"); § 36a-671(c) (authorizing the Commissioner of the Department of Banking to issue a license); § 36a-671a (authorizing the Commissioner of the Department of Banking to suspend or revoke a license, to review fees, to order a licensee to remove any individual from employment, and to order cease and desist); and § 36a-671f (outlining prohibited practices). As explained above, the DACCA does not license, regulate nor supervise individuals, let alone attorneys. Under the DACCA, only nonprofit entities can obtain a license and thus be subject to the Department's supervision. See N.J.S.A. 17:16G-2(a) and -2(b).

Second, the Connecticut statute is triggered immediately when an attorney negotiates or arranges a debt on behalf of a single client, regardless of the scope of their practice. In contrast, the DACCA provides an exemption for attorneys who are not principally engaged in debt adjustment, meaning their involvement in debt adjustment activities is evaluated in the context of their overall practice. Compare Conn. Gen. Stat. Ann. § 36a-671(b) (prohibiting any debt negotiation activity without a license) with N.J.S.A. 17:16G-1(c)(2) (exempting attorneys

whose principal activity is not debt adjustment, thereby allowing an assessment of the attorney's overall practice).

Finally, the scope of activities regulated by the Connecticut statute was significantly broader than that of the DACCA. Under the DACCA, a person must act with the specific purpose of "settling, compounding, or otherwise altering the terms of payment of any debts of the debtor" for the statute to apply. N.J.S.A. 17:16G-1(c)(1). In contrast, the Connecticut statute encompasses a far wider range of conduct, applying even when a person merely assists a debtor in negotiating or attempting to negotiate with creditors. Conn. Gen. Stat. Ann. § 36a-671(a).

Given these differences, the statute at issue in Persels was both broader in scope and distinct in its application compared to the DACCA. Therefore, Persels is not instructive on the issue in the present case.

CONCLUSION

For these reasons, Respondents respectfully request that this Court affirm the Orders of the lower court and uphold the constitutionality of the DACCA Attorney Safe Harbor.

Respectfully submitted,

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ANCHOR LAW FIRM, PLLC and ANDREW M. CARROLL, ESQ., Plaintiffs-Appellants v. THE STATE OF NEW JERSEY, GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey and MARLENE CARIDE, in her official capacity as Commissioner of Banking and Insurance Defendants-Respondents	SUPREME COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000052-23 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY DOCKET NO.: MER-L-1186-21 SAT BELOW: HON. DOUGLAS HURD, J.S.C.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

Since the ratification of the United States Constitution and the New Jersey Constitution of 1947, the separation of powers and independence of the Judiciary have been pillars of the republican form of government. Consistent with that concept, the New Jersey Constitution gives the Judiciary exclusive jurisdiction over the practice of law. The New Jersey State Bar Association (NJSBA) asks the Court to reaffirm that authority in this matter.

Specifically, the statute at issue here threatens to allow an executive department agency to regulate and determine what constitutes the practice of law – a power that our Constitution has left exclusively to the Judiciary. The Court must also consider how the Department of Banking and Insurance's (DOBI) actions would impact the application of the Rules of Professional Conduct (RPCs), which govern how attorneys conduct the business of practicing law. If left to stand, the statutory provision at issue in this case and the powers it purports to grant to DOBI and its Commissioner will erode the authority of the New Jersey Supreme Court by seeking to redefine what constitutes the practice of law and potentially limiting the ways in which attorneys currently assist those in need

The principal issue before this Court is whether and to what extent the New Jersey Legislature is empowered to regulate the legal profession. Pursuant to the New Jersey Debt Adjustment and Credit Counseling Act, N.J.S.A. 17:16G-1 to -9

(NJDACCA), "[n]o person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster." N.J.S.A. 17:16G-2(a). Although the statute prohibits debt adjustment for profit, N.J.S.A. 17:16G-1(c)(2)(a) exempts "an attorney-at-law of this State who is not principally engaged as a debt adjuster" (Limited Attorney Exemption). Pursuant to N.J.S.A. 2C:21-19(f), acting as a debt adjuster without a license, unless exempted from licensure, is a crime of the fourth degree.

The NJSBA respectfully urges this Court to hold that the Limited Attorney Exemption is unconstitutional, as applied to New Jersey attorneys. The Limited Attorney Exemption impermissibly infringes on the Supreme Court's exclusive authority to regulate the practice of law. The New Jersey Constitution endows the Supreme Court, not the Legislature or executive branch, with the exclusive jurisdiction over the practice of law. N.J. Const. art. VI, § 2, ¶ 3. The Supreme Court sets the standard for admission to practice law in this State, regulates attorney conduct, promulgates ethical guidelines for the practice of law, adjudicates attorney disciplinary infractions, sanctions attorneys who violate their professional and ethical responsibilities, and, key here, delineates which activities constitute the practice of law. Stated differently, the Supreme Court's constitutional role and authority over the practice of law is *sui generis*.

The NJDACCA, through the Limited Attorney Exemption, violates the doctrine of separation of powers by restricting the amount of "debt adjustment services" that New Jersey attorneys can provide their clients in connection with legal representation without defining what "debt adjustment" is and without explaining what it means to be "principally engaged" as a debt adjustor. DOBI or its Commissioner are free to determine whether an attorney's conduct constitutes the practice of law. This transference of authority infringes on the exclusive authority of the judicial branch to regulate the professional conduct of attorneys in New Jersey.

Case law confirms that the definition of the practice of law encompasses the various types of services that the NJDACCA purports to regulate. Attorneys routinely provide debt adjustment services to clients as part of the assistance they provide. The Supreme Court wields the sole authority to regulate attorney conduct in this area. However, if left to stand, the Limited Attorney Exemption permits regulation over the practice of law by DOBI and its Commissioner.

The NJSBA submits that the Limited Attorney Exemption is unconstitutional, as applied to New Jersey attorneys.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies on the procedural history and statement of facts as presented by the parties.

LEGAL ARGUMENT

POINT I

THE LIMITED ATTORNEY EXEMPTION IMPERMISSIBLY INFRINGES ON THE SUPREME COURT'S EXCLUSIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.

A. Under the New Jersey Constitution, the Supreme Court is Vested with the Exclusive Authority to Regulate the Practice of Law.

Prior to the adoption of the current New Jersey Constitution, all three branches of government were involved in the admission of attorneys to practice, and both the Legislature and Judiciary exercised control over attorney conduct. See State v. Rush, 46 N.J. 399, 411 (1966). The New Jersey Constitution of 1947, however, granted the Supreme Court the exclusive authority to:

> []make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

N.J. Const. art. VI, § 2, ¶ 3. See also State v. Rue, 175 N.J. 1, 14 (2002) (discussing the Court's authority to proscribe disciplinary and procedural rules for attorneys and the practice of law).

Thus the Supreme Court, not the executive or Legislature, is vested with the exclusive authority over the practice of law. See, e.g., State v. Bander, 106 N.J. Super. 196, 200 (Monmouth County Ct.), rev'd on other grounds, 56 N.J. 196 (1970)

("It is now well settled in our State that the Supreme Court has exclusive jurisdiction over the practice of law."); Winberry v. Salisbury, 5 N.J. 240, 255 (1950) (expressly rejecting the possibility that the State Constitution granted the legislature authority over the courts). The Court elucidated this principle in In re LiVolsi, 85 N.J. 576, 585 (1981), stating that:

> For 33 years this Court has exercised plenary, exclusive, and almost unchallenged power over the practice of law in all of its aspects under [the New Jersey Constitution].

The Supreme Court exercises "its constitutional authority to govern the admission to practice and the discipline of persons admitted by the adoption of rules governing attorney conduct and by the issuance of opinions construing the rules." Michels & Hockenjos, New Jersey Attorney Ethics, §1:2. "Exercise of the Court's Authority Through Rules and Opinions" (GANN, 2025). The Rules of Professional Conduct (RPCs) are the Supreme Court's codification of the rules governing attorney conduct in New Jersey. The Supreme Court has also established several committees that consider issues implicated by the RPCs and to address those issues when needed. As a result, the substantive body of law governing attorneys and the practice of law in New Jersey consists of:

> []the Rules of Professional Conduct, the Rules Governing the Courts of the State of New Jersey, the opinions touching on attorney ethics issued by the Supreme Court itself, and the opinions issued periodically by the committees of the Supreme Court, specifically, the Advisory Committee on Professional Ethics, the

> Committee on the Unauthorized Practice of Law, and the Committee on Attorney Advertising.

Id. Every aspect of a lawyer's practice is encompassed by these rules. Everything from the process by which attorneys are admitted to practice, to the manner in which an attorney may leave the practice of law, are regulated. Advertising, accounting of client funds, communication with clients, dealings with third parties, competence of the attorney, conflicts of interest, and the unauthorized practice of law are among the myriad subjects that these comprehensive rules contemplate. The penalty for attorney misconduct in violation of these rules ranges from admonition to censure to disbarment, subject to the recommendations of the Disciplinary Review Board and Office of Attorney Ethics. As evidenced by the promulgation of far-reaching and thorough rules and the efficient enforcement of them, the Supreme Court has demonstrated its commitment to regulating the practice of law and has guarded the public trust inherently implicated by the attorney-client relationship.

The RPCs specifically note that any dual regulation of attorneys should be avoided. The comments to ABA Model Rule 8.5 Disciplinary Authority; Choice of Law (upon which the RPCs are based), state:

> [] [M]inimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the

> determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

ABA Model R. Prof'l Conduct 8.5 Cmt. [3]. In an effort to avoid the type of problem identified in the comments (*i.e.*, multiple sets of potentially conflicting regulations), attorneys are often exempted from the coverage of statutory schemes. In some instances, this is done expressly by the Legislature. In other instances, the judicial branch has exempted attorneys from statutes. See, e.g., Vort v. Hollander, 257 N.J. Super. 56 (App. Div. 1992), certif. denied 130 N.J. 599 (1992).[1] In Vort v. Hollander, the Appellate Division affirmed dismissal of a consumer fraud claim brought against an attorney on the basis that "attorney's services do not fall within the intendment of the Consumer Fraud Act." Vort, 257 N.J. at 62. The Appellate Division further

[1] This is not a minority view. A majority of states agree with New Jersey's approach and have judicially excluded attorneys from consumer protection statutes for the same reasons as New Jersey. See, e.g., Preston v. Stoops, 285 S.W.3d 606, 609 (Ark. 2008) (The Arkansas Deceptive Trade Practices Act does not apply to the practice of law because "[o]versight and control of the practice of law is under the exclusive authority of the judiciary."); Beyers v. Richmond, 937 A.2d 1082, 1092 (Pa. 2007) ("The General Assembly has no authority under the Pennsylvania Constitution to regulate the conduct of lawyers and the practice of law."); Jamgochian v. Prousalis, No. 99C-10-022, 2000 Del. Super. LEXIS 373 (Del. Super. Ct. 2000) (Delaware's consumer protection statute was not applicable to attorney conduct occurring within the practice of law); Rousseau v. Eschleman, 519 A.2d 243 (N.H. 1986) (attorneys were exempted from the provisions of New Hampshire's Consumer Protection Act because the Supreme Court established a professional conduct committee which has responsibility for regulating attorney conduct).

observed that "the practice of law in the State of New Jersey is in the first instance, if not exclusively, regulated by the New Jersey Supreme Court." (citing N.J. Const. art. VI, § 2, ¶ 3).

Specific to this case, however, the NJDACCA provides that "[n]o person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster." N.J.S.A. 17:16G-2(a). Although the statute prohibits debt adjustment for profit, N.J.S.A. 17:16G-1(c)(2)(a) exempts "an attorney-at-law of this State who is not **principally engaged** as a debt adjuster[.]" (emphasis added). In contravention of the separation of powers and the exclusive authority of the Supreme Court to regulate the practice of law, the NJDACCA restricts the amount of debt adjustment services that New Jersey attorneys can provide their clients as part of their legal representation. The NJDACCA does not define what "debt adjustment" is but based on the definition of a "debt adjuster"[2], the statute arguably applies to any New Jersey attorney involved in foreclosure actions, as well as in bankruptcy, insolvency and collection proceedings. Further,

[2] "Debt adjuster" is defined as "a person who either (a) acts or offers to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or otherwise altering the terms of payment of any debts of the debtor, or (b) who, to that end, receives money or other property from the debtor, or on behalf of the debtor, for payment to, or distribution among, the creditors of the debtor." N.J.S.A. 17:16G-1(c)(1).

the phrase "principally engaged" is undefined, rendering it unclear to attorneys when their conduct falls within the ambit of the statute.

Given this overreach, the Appellate Division should find the NJDACCA is unconstitutional as applied to New Jersey attorneys. The practice of law in New Jersey is regulated exclusively by the Supreme Court. The NJDACCA violates the separation of powers provision of the New Jersey Constitution such that it is unenforceable as to New Jersey lawyers engaged in the practice of law. When New Jersey attorneys perform "debt adjustment" services in the context of an attorney-client relationship, they are engaged in the actual practice of law and are subject to the sole province of the Supreme Court.

B. Debt Adjustment, When Performed by an Attorney on Behalf of a Client, Constitutes the Practice of Law.

The NJDACCA impermissibly regulates the conduct of attorneys in furtherance of the legal representation of their clients. A New Jersey licensed attorney who performs debt adjustment services within the context of an attorney-client relationship is engaged in the practice of law. Attorneys routinely provide debt adjustment services to clients as part of their legal representation. See generally, Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (a "debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy

Act – advice which a nonlawyer cannot lawfully give him"); accord N.J. Comm. Unauth. Prac. Op. 36, 136 N.J.L.J. 221 (Jan. 15, 2001).

In Op. 36, the Committee on the Unauthorized Practice of Law determined that "debt resolution" services, which included the review of complaints, evaluation of claims levied against a client, and communications with creditors' attorneys "in an effort to compromise the claims," constituted activity that "falls within the practice of law." In Am. Budget Corp. v. Furman, 67 N.J. Super. 134 (Ch. Div.), aff'd per curiam 36 N.J. 129 (1961), a company engaged in the business of debt adjusting challenged a former statute prohibiting the practice, with certain exceptions. The former statute defined a "debt adjuster, "in part, as a person who:

> acts or offers to act for consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or in anywise, altering the terms of payment of any debts of the debtor…

N.J.S.A. 2A:99A-1(a). The Court in Furman upheld the constitutionality of the statute, finding that "services encompassed by the statutory definition of debt adjuster are often an integral and essential part of an attorney's job when he represents a debt-ridden client." Id. at 143. The Court additionally observed that "[i]t is plain by now that in their activities debt adjusters may encroach upon the practice of law." Id. In Appell v. Reiner, 43 N.J. 313, 316 (1964), the Supreme Court determined that "the rendering of advice and assistance in obtaining extensions of credit and compromises of indebtedness" constituted the practice of law.

The Supreme Court of the United States, in reviewing a similar Kansas statute, determined that the business of debt adjusting involves the practice of law. See Ferguson, 372 U.S. at 732. In Ferguson, the Court elucidated that:

> The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshaling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act - advice which a nonlawyer cannot lawfully give him.

Id. See also In re Pilini, 173 A.2d 828, 831 (Vt. 1961) (individual involved in "debt pooling" service and who attempted to handle litigation on behalf of debtor found to be engaged in the practice of law); Home Budget Service, Inc. v. Boston Bar Ass'n, 139 N.E.2d 387, 390 (Mass. 1957) (actions of corporations involved in the practice of "debt pooling" amount to the practice of law).

Here, the trial court concluded that the "DACCA does not prohibit an attorney's right to practice law; rather, DACCA regulates a distinct business of debt adjustment that contemplates those lawyers licensed in New Jersey can provide debt adjustment services to New Jersey consumers as long as that debt adjustment activity is not their principal activity." T17:L3-9. To be covered by the Limited Attorney Exemption, "an attorney-at-law of this State" must not be "principally engaged as a debt adjuster". N.J.S.A. 17:16G-1(c)(2)(a). The trial court's holdings cannot be reconciled with the United States Supreme Court's recognition that debt adjustment

services performed on behalf of a client constitute the practice of law. To hold otherwise would contravene established precedent. See, e.g., Ferguson, 372 U.S. at 732; see also Furman, 67 N.J. Super. at 143; Appell, 43 N.J. at 336; N.J. Comm. Unauth. Prac. Op. 36.

POINT II

THE LIMITED ATTORNEY EXEMPTION AS APPLIED TO NEW JERSEY ATTORNEYS IS UNCONSTITUTIONAL.

The NJSBA urges this Court to hold that the Limited Attorney Exemption is unconstitutional as applied to New Jersey attorneys. Enforcement of the NJDACCA against practicing attorneys violates public policy and significantly interferes with the Supreme Court's authority to regulate the practice of law. The nature and extent of the Limited Attorney Exemption's encroachment upon the Supreme Court's prerogatives and interests is substantial and deleterious.

Subjecting New Jersey licensed attorneys to the licensing and regulatory requirements imposed by the NJDACCA would, among other things, improperly: (1) give DOBI the authority to restrict an attorney's ability to provide debt adjustment services on behalf of clients during the course of a representation; (2) give the DOBI Commissioner the authority to determine which attorneys in this state are "qualified to be licensed and possess[] the necessary financial resources to

sustain [their] operation"[3] to provide debt adjustment services in conjunction with their practice of law; (3) require that attorneys obtain additional licenses from and pay licensing fees to agencies outside the judicial branch in order to offer traditional legal services; and (4) impinge on the Supreme Court's exclusive authority to suspend, disbar or otherwise discipline attorneys who have engaged in professional misconduct.[4]

First, DOBI is charged with assessing when an attorney is "principally engaged as a debt adjuster" and thus subject to the NJDACCA. Since the statute does not define what "principally engaged" means, this determination is presumably left to DOBI and its Commissioner. Arguably, New Jersey attorneys perform various debt adjustment activities anytime they are involved in foreclosure actions, as well as bankruptcy, insolvency and collection proceedings. The Supreme Court has not – and cannot - delegate its authority to DOBI to regulate attorneys who as a matter of their regular practice of law perform these debt adjustment activities on behalf of clients.

Second, the DOBI Commissioner is empowered to "require information deemed necessary to demonstrate that the applicant is qualified to be licensed and possesses the necessary financial resources to sustain its operation" and prescribe

[3] See N.J.S.A. 17:16G-3.
[4] Unless exempted from licensure, acting as a debt adjuster without a license is a crime of the fourth-degree. N.J.S.A. 2C:21-19(f).

forms for application for a debt adjustment license. N.J.S.A. 17:16G-3. The DOBI Commissioner is also statutorily authorized to "promulgate procedures and standards for the issuance or denial of licenses, [] promulgate grounds for and procedures under which licenses may be revoked, suspended, or reinstated, and [] establish fees necessary to meet administrative costs under [the NJDACCA]." N.J.S.A. 17:16G-4. Since debt adjustment, when performed by an attorney on behalf of a client, constitutes the practice of law, the Commissioner serves as a gatekeeper to attorneys who seek to perform certain services on behalf of clients that fall within the ambit of "debt adjustment." This dual regulation of the practice of law is nowhere found in the Constitution, and it is not proscribed by the Supreme Court.

Third, the NJDACCA imposes burdensome licensure requirements and licensing fees on attorneys to offer traditional legal services that constitute "debt adjustment" under the statute. Under Article VI, § 2, ¶ 3 of the New Jersey Constitution, the Supreme Court is vested with jurisdiction over the admission to practice law and it is the Supreme Court that fixes licensing and fees for attorneys in the state.

Fourth, the NJDACCA infringes on the Supreme Court's exclusive authority to discipline attorneys who have engaged in professional misconduct. It is a crime of the fourth-degree for an attorney to "act[] as a debt adjuster without a license" regardless of whether or not such services are in connection with the attorney's legal

representation of a client. See N.J.S.A. 2C:21-19(f). The statute also allows the imposition of penalties to be imposed on those who violate its provisions, including fines of up to $5,000 and commencement of a summary action brought by the Commissioner.

In Persels & Assocs., LLC v. Banking Comm'r, 122 A.3d 592 (Conn. 2015), the Supreme Court of Connecticut held that a limited attorney exemption in a debt negotiation statute was unconstitutional because it impermissibly intruded on the Judiciary's exclusive authority to regulate attorney conduct and licensure. The debt negotiation statute authorized the Commissioner to license and regulate persons engaged in the debt negotiation business, and provided a limited attorney exemption as follows:

> Attorneys who provide debt negotiation services are not exempted generally from such regulation, except those attorneys 'admitted to the practice of law in [Connecticut] who [engage] or [offer] to engage in debt negotiation as an ancillary matter to such [attorneys'] representation of a client. . .'

Persels, 122 A.3d at 654 (quoting CT Gen. Stat. 36a-671c(1)). The Court in Persels held that debt negotiation services provided by a national law firm were inextricably intertwined with the practice of law by licensed Connecticut attorneys who were regulated exclusively by the judicial branch. Id. at 676. Therefore, the limited attorney exemption violated the separation of powers provision of the Connecticut Constitution such that it was unenforceable as to Connecticut attorneys engaged in

the practice of law. Id. The Persels Court further held that although the legislature could regulate Connecticut attorneys as to entrepreneurial or commercial aspects of the profession of law, when the debt negotiation services were performed by Connecticut attorneys within the context of an attorney-client relationship, it constituted the actual practice of law and remained the sole province of the judicial branch. Id. Integral to the Court's holding in Persels was the finding that:

> [s]ubjecting Connecticut licensed debt negotiation attorneys…to the licensing and regulatory requirements imposed by the debt negotiation statutes would[] improperly: (1) give the Banking Commissioner the authority to determine which attorneys in Connecticut have the 'character, reputation, integrity and general fitness' to provide debt negotiation services in conjunction with their practice of law, Conn. Gen. Stat. § 36a-671(d)(1); (2) require that Connecticut attorneys obtain additional licenses from and pay hefty licensing fees to agencies outside the Judicial Branch in order to offer traditional legal services; and (3) impinge on the Judicial Branch's exclusive authority to suspend or disbar attorneys who have engaged in professional misconduct.

Id. at 670-71.

Here, the reasoning of the Persels Court is persuasive and equally applicable to New Jersey attorneys. The NJDACCA unduly permits DOBI and the Commissioner to interfere with the Supreme Court's regulation of the practice of law. The licensing and regulatory requirements imposed on attorneys by the NJDACCA is not authorized by the Supreme Court and is therefore unconstitutional.

Accordingly, the NJSBA respectfully urges this Court to hold that the Limited Attorney Exemption is unconstitutional as applied to New Jersey attorneys.

CONCLUSION

The NJSBA's membership is troubled by the NJDACCA and its impact on the practice of law in New Jersey and resulting harm to members of the bar and, ultimately, the public they serve. Accordingly, the NJSBA respectfully requests that this Court hold that the Limited Attorney Exemption is unconstitutional as applied to New Jersey attorneys.

Respectfully submitted,
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Dated: February 3, 2025

ANCHOR LAW FIRM, PLLC and ANDREW M. CARROLL, ESQ.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000052-23
Plaintiffs-Appellants,	Civil Action
v.	ON APPEAL FROM THE JULY 27, 2023 ORDERS ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY
THE STATE OF NEW JERSEY, GURBIR GREWAL, in his official capacity as Attorney General of the State of New Jersey and MARLENE CARIDE, in her official capacity as Commissioner of Banking and Insurance,	DOCKET NO. MER-L-1186-21
Defendants-Respondents.	SAT BELOW: HON. DOUGLAS HURD, J.S.C.
	SUBMISSION DATE: APRIL 25, 2024

REPLY BRIEF OF PLAINTIFFS-APPELLANTS ANCHOR LAW FIRM, PLLC AND ANDREW M. CARROLL, ESQ.

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PRELIMINARY STATEMENT

Defendants' opposition brief misconstrues Plaintiffs' appellate arguments and the nature of the New Jersey Debt Adjustment and Credit Counseling Act, N.J.S.A. 17:16G-1 et seq. (the "Act") in seeking to uphold the Act's Limited Attorney Exemption. Plaintiffs are challenging the constitutionality of only the Limited Attorney Exemption, and not the Act in its entirety. Plaintiffs do not quibble with the overall legislative purpose of the Act, but do contend that because the Limited Attorney Exemption violates numerous constitutional doctrines, the trial court's orders should be reversed.

Defendants contend that a presumption of constitutionality attaches to the Act because it does not infringe upon the right to practice law, and even if it did, the practice of law is not a fundamental right. Plaintiffs have demonstrated, however, that an attorney's advice to a client in performing debt adjustment services regulated by the Act implicates not only the Supreme Court's constitutional grant of exclusive jurisdiction over the practice of law, but also an individual's constitutional right to free speech. Moreover, Defendants' newly-pled argument that the Limited Attorney Exemption applies only to debt adjustment services outside of litigation has no support in the text of the Act, is an improper attempt to fundamentally alter the text, and fails to recognize that attorneys performing services outside of litigation are still engaged in the practice of law upon which Defendants have no right to encroach.

The Limited Attorney Exemption violates the separation of powers doctrine. Defendants refuse to acknowledge that the Supreme Court has completely regulated the conduct of attorneys through various sets of rules, judicial opinions, committees and otherwise, leaving no area for the Legislature to address without encroaching upon its exclusive jurisdiction. Even setting that aside, the Legislature had no legitimate purpose in enacting the ***Limited Attorney Exemption*** – it only frustrates the Act's purpose by preventing consumers from contracting with the most experienced and productive attorneys who could best perform services for them.

Defendants' argument that the Limited Attorney Exemption is not vague ignores the deposition testimony of Defendants' witness that the terms "principally engaged" and "attorney-at-law of this State," ***in the context of the Act***, are undefined, and not even explained by Defendants. No matter how many cases or statutes that Defendants cite using a similar term in different contexts, if the very agency responsible for enforcing the Act cannot identify the factors to determine whether an attorney is "principally engaged" in debt adjustment services, surely no person of "common understanding" can do so.

Defendants attempt to defeat Plaintiffs' overbreadth argument by spinning the Limited Attorney Exemption as "protection" and a "safe harbor to attorneys" performing debt adjustment services. The Legislature amended the Act from allowing attorneys to perform ***any*** amount of debt adjustment services to allowing

them to perform only ***some, undefined*** amount of such services. How this ***limitation*** on an attorney, including the most experienced debt adjustment attorney, can be characterized as "protection" is inexplicable and shows that the Limited Attorney Exemption reaches farther than necessary to advance the legislative purpose.

Lastly, the Limited Attorney Exemption impinges upon an attorney's First Amendment rights; an attorney performing debt adjustment services for a client necessarily must communicate with that client and provide advice to that client, speech that is protected under the First Amendment.

Accordingly, this Court should reverse the trial court's Orders.

LEGAL ARGUMENT

THE TRIAL COURT IMPROPERLY DENIED PLAINTIFFS' SUMMARY JUDGMENT MOTION, GRANTED DEFENDANTS' SUMMARY JUDGMENT MOTION AND DISMISSED THE COMPLAINT WITH PREJUDICE (Pa0001-Pa0004; T. at 3:1-32:23).

A. No Presumption of Constitutionality Applies To The Limited Attorney Exemption Because It Impinges On A Constitutionally Protected Right. (T. at 9:12-10:1).

Defendants' argument regarding the presumption of constitutionality to the Limited Attorney Exemption is based on a misconstruction of Plaintiffs' appeal and a new, flawed interpretation of the Act, devoid of any legal basis.

There can be no dispute that legislation (such as the Limited Attorney Exemption) that restricts a constitutionally protected right carries no presumption of

constitutionality. See, e.g., Bell v. Stafford Twp., 110 N.J. 384, 395 (1988) ("[I]f an enactment directly impinges on a constitutionally protected right, **the presumption in favor of its validity disappears**.") (emphasis added).

Defendants first incorrectly claim that Plaintiffs' argument is that "there is a fundamental right to practice law." Plaintiffs instead argue that (1) the Supreme Court has exclusive jurisdiction over the practice of law ***under the Constitution***; (2) an attorney's right to render advice to their client, i.e., free speech, is protected ***under the First Amendment***;[1] and therefore (3) an attorney's performance of debt adjustment services for a client -- which constitutes the practice of law in this State protected by the plenary license granted to the attorney by the Supreme Court and necessarily entails client communications -- is constitutionally-protected conduct.

Defendants also assert an alternative last-ditch argument that the Limited Attorney Exemption does not impinge upon constitutionally-protected conduct because it "concerns only debt adjustment outside of litigation."[2] Defendants even contend that "once litigation is filed, attorneys are governed by the applicable rules of court." Db at 22. Defendants' attempt to fabricate an artificial carve-out of the

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[1] Plaintiffs again refer to the series of United States Supreme Court decisions in which the Court frequently rejected governmental efforts to proscribe the First Amendment-protected speech of attorneys (i.e., rendering legal advice to their clients). See Pb at 38-40.

[2] Defendants did not raise this argument below, and thus the Court should not consider it as it has been waived. E.g., Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 52 (2004).

Act to render it applicable only to debt adjustment "outside of litigation" (and, therefore, outside of the purview of Court Rules) finds no support in the Act, any legislative history or any case law interpreting the Act. Moreover, this purported carve-out does not advance Defendants' opposition; an attorney's debt adjustment services outside of litigation -- just like services in connection with litigation -- still falls within the Supreme Court's exclusive jurisdiction and involves communications with clients protected by the Constitution.

B. The Limited Attorney Exemption Violates The Separation Of Powers Doctrine (T. at 9:5-17:19).

1. Defendants Do Not Meet The Threshold Requirement In Knight And Therefore The Knight Test Does Not Apply To The Limited Attorney Exemption (T. at 10:18-17:19).

Defendants argue there is no "threshold requirement" they must meet before the Court applies the separation of powers test in Knight v. City of Margate, 86 N.J. 374 (1981). Defendants ignore Knight's clear language establishing the threshold issue that must be satisfied that it described ***immediately before*** announcing the "two-prong test": whether the Supreme Court's authority over the subject matter "must invariably foreclose action by the other branches of government" and whether "the judicial power has not been exercised or fully implemented." Id. at 389-90.

Nowhere in Defendants' opposition do they address the myriad of ways in which the Supreme Court has ***fully*** exercised, and continues to ***fully*** exercise, its

constitutional authority over the practice of law in this State. As stated in great detail in Plaintiffs' initial brief, the Supreme Court has "carried out its constitutional authority to govern 'the admission to practice and the discipline of persons admitted,'" by the adoption of the RPCs and the Court Rules (which incorporate the RPCs), the establishment of numerous committees to administer various categories of attorney conduct, and the issuance of binding opinions construing the RPCs, Court Rules, and administrative directives. Pb at 26-27.

These facts alone "foreclose action" by the Legislature through the enactment of the Limited Attorney Exemption to regulate debt adjustment legal work – the practice of law that only the Supreme Court regulates, and which the Supreme Court has ***fully*** and ***thoroughly*** regulated. Defendants are thus unable to meet the threshold issue set forth in Knight, and consequently, the trial court erred in applying the "two-prong test" to the Limited Attorney Exemption.

2. The Limited Attorney Exemption Does Not Satisfy Either Of The Knight Test Factors (T. at 10:18-17:19).

In the event this Court finds that the trial court appropriately applied the "two-prong test" from Knight, it should find that the Limited Attorney Exemption does not meet either prong.

As for the first factor, Defendants emphasize the overarching and remedial purpose of the Act (to protect consumers from unscrupulous practices of debt adjusters), but Plaintiffs do not question this overall purpose and are not challenging

the enactment of the ***entire*** Act. Rather, Plaintiffs are only challenging and seeking to invalidate the Limited Attorney Exemption, which does not advance the Act's overall purpose, but instead serves to defeat that purpose.

The fact that the Limited Attorney Exemption frustrates rather than advances the Act's purpose is plainly established by the binding testimony of DOBI's corporate representative – wholly ignored by the trial court and downplayed by Defendants in their opposition. In short, DOBI cannot explain how the Limited Attorney Exemption advances the interest of protecting consumers. Pb at 29.

Defendants also rely heavily on American Budget v. Furman, 67 N.J. Super. 134 (Ch. Div.), aff'd, 36 N.J. 129 (1961); Plaintiffs agree that Furman carries significance to this matter, but contend that it actually ***supports*** Plaintiffs' position. The Furman court specifically reviewed and confirmed the propriety of the predecessor statute -- the Debt Adjusters Law -- ***which exempted all attorneys from the statute's regulation of the business of debt adjustment.*** Thus, the Furman holding actually supports ***Plaintiffs'*** position, as the issue in that case was not the regulation of attorneys, but rather the exclusion of all attorneys from the statute. The court refused to strike the ***all*** attorney exemption ***for the same reasons that Plaintiffs seek the elimination of the Limited Attorney Exemption so that all attorneys are again exempt from the Act.*** Id. at 143. Plaintiffs agree with the Furman court's explanation as to the legitimate purpose of an ***all*** attorney exemption.

Defendants also rely on Ferguson v. Skrupa, 372 U.S. 726, 732 (1963), but that decision likewise fails to support Defendants' argument that the Legislature had a legitimate governmental purpose in enacting the Limited Attorney Exemption. The debt adjustment statute at issue there limited debt adjustment business ***only to lawyers***. Thus, the Supreme Court was not faced with a statute that regulated the type and amount of debt adjustment services by a debt attorney; the statute properly ***excluded*** attorneys from the statutory restrictions.

Defendants also assert that Plaintiffs make the "puzzling" claim that the Limited Attorney Exemption applies to attorneys "even if they do excellent work," but then reiterate ***Plaintiffs'*** point by asserting that "the quality of provided services is ***irrelevant*** for purposes of the [Act's] application." There is nothing "puzzling" about this proposition, which demonstrates a fatal flaw of the Act: How does prohibiting a high-quality attorney from frequently engaging in debt adjustment services further the Act's purpose of protecting consumers? It simply does not.

With respect to the second Knight factor, Defendants argue that the Limited Attorney Exemption does not regulate any conduct of courts or attorneys, but rather, only "regulates the business of debt adjustment." This is patently false, as debt adjustment ***is*** considered the practice of law, which is exclusively regulated by the Supreme Court, and therefore the Limited Attorney Exemption encroaches on a

judicial prerogative interest. E.g., Furman, 67 N.J. Super. at 143; Ferguson, 372 U.S. at 732; Appell v. Reiner, 43 N.J. 413, 416 (1964).

Defendants further argue that the fact that the Office of Attorney Ethics ("OAE") opened the investigation, which is an "arm of the Court" that assists the Court with the Court's exclusive "authority and obligation to oversee the discipline of attorneys," demonstrates no encroachment upon judicial prerogatives. It is simply not within the province of the OAE or the Court, however, to *sua sponte* strike down a law. Instead, an aggrieved litigant is required -- and enabled -- to challenge the constitutionality of a statute.

Lastly, Defendants' reliance on the decision in Knight is misplaced, as the Supreme Court found that a statute restricting dealings or relationships of members of the judiciary ***with casino entities*** did not violate the Court's authority to prescribe and enforce standards of conduct for judges and attorneys. That statute has nothing to do with the practice of law or provision of legal advice or services; it is a conflict-of-interest statute that serves only to regulate ***business relationships*** of judiciary members and casino and gaming entities.

3. Persels Holds That An Attorney Exemption In A Debt Negotiation Statute Violates the Separation of Powers Doctrine (T. at 9:5-17:19).

Defendants also attempt to downplay and distinguish the Connecticut Supreme Court's decision in Persels & Assocs., LLC v. Banking Comm'r, 122 A.3d

592 (Conn. 2015) – a decision squarely on point to the separation of powers issue. Defendants' attempt to distinguish the Connecticut statute at issue with the Act is the epitome of splitting a hair. Defendants note that Persels involved Connecticut's "Debt *Negotiations* Law" whereas the Act involves debt *adjustment*. Pursuant to the Act, "debt adjusters" are those engaged "for the purpose of settling, compounding, or otherwise altering the terms of payment of any debts of the debtor;" that is the very essence of "negotiating" a debt. There is also no distinction between an intermediary or one who acts on behalf of the debtor; clearly an attorney acting as an intermediary and thus qualifying as a "debt adjuster" under the Act is acting on behalf of the debtor client that retained the attorney.

The Persels Court also addressed the "purported attorney model" argument that Defendants raise on appeal, and still held that the attorney exemption in Connecticut's debt negotiation statute was unconstitutional because it permitted non-judicial regulation of attorneys' services. The Court held that the limited attorney exemption in the Connecticut statute did not address the "dangers" of the "purported attorney model" because, if it were determined that a "debt negotiation company was merely using [] attorneys as a front or facade to circumvent the debt negotiation statutes, then there would be no separation of powers problem and the commissioner would not be barred from exercising his full statutory authority." Id. at 607. In other words, an attorney acting in such an enterprise would never qualify

for the Limited Attorney Exemption because the attorney would not be performing legal services subject to the exclusive jurisdiction of the Supreme Court.

C. The Limited Attorney Exemption Is Unconstitutionally Vague (T. at 17:20-24:6).

Because the Act ***criminalizes*** the practice of debt adjustment services without a license, and also infringes upon an attorney's First Amendment right to communicate legal advice to his or her clients, the Court should apply strict scrutiny to the Limited Attorney Exemption. See State v. Higginbotham, 475 N.J. Super. 205, 221 (App. Div. 2023) ("A criminal statute challenged as vague is subject to sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine than civil enactments."). Defendants ignore this case law.

Regardless of the level of scrutiny applied, the terms "principally engaged" and "attorney-at law of this State" do not leave "persons of common intelligence" able to uniformly understand their meaning and application. First, Defendants do not rebut the fact that the designated corporate representative of DOBI -- the entity charged with the enforcement of the Act -- could not even identify or explain the meaning of these terms. Defendants' resort to Merriam-Webster and Black's Law for definitions of the individual words in an attempt to show what the combination of the words means is meaningless in a vacuum, and offers no assistance to the meaning of these terms in the context of the Limited Attorney Exemption. Indeed, Defendants acknowledge that these terms are not defined in the Act, and that DOBI

has not defined these terms or provided any guidance whatsoever as to the meaning of these terms. As further evidenced by the questioning of DOBI, there are several ***potential*** factors or considerations that ***may*** be reviewed in determining whether an attorney is "principally engaged," including the attorney's number of clients, number of matters, number of hours spent, amount of fees billed or amount of fees collected.

The Court should also reject Defendants' argument based on cases and statutes using terms similar to "principally engaged." In Toxaway Hotel Co. v. J.L. Smathers & Co., 216 U.S. 439 (1910), the Court provided an overly simplistic analysis of this phrase included in a bankruptcy statute that did not consider any factors that DOBI would need to consider in determining whether an attorney is "principally engaged" in performing debt adjustment services. In Priolo v. Shorrock Garden Care Ctr., 2016 WL 4350133 (App. Div. Sept. 20, 2022), the court merely recited a statutory provision containing the phrase "engaged principally" without any analysis of the phrase. Further demonstrating the lack of support these cases and statutes cited by Defendants provide is the decision in Securities Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys., 839 F.2d 47, 63 (2d Cir. 1988), where the court found that the term as used in a statute prohibiting a bank from affiliating with an entity "engaged principally" in underwriting or securities is "***intrinsically ambiguous***." The Court should analyze these terms as used in the Limited Attorney Exemption in the Act – a statute that DOBI cannot even understand or interpret.

D. The Limited Attorney Exemption is Unconstitutionally Overbroad (T. at 24:7-27:7).

Defendants' first contention that the Limited Attorney Exemption is not overbroad because it "does not outright prohibit any activity by attorneys" derives from their position that the Limited Attorney Exemption does not punish or interfere with attorneys, but rather protects and insulates them from liability. Nothing can be further from the truth. The undisputed facts are that the Act (and its predecessor) initially allowed attorneys to perform ***any*** amount of debt adjustment services, but that the Act was later amended to allow attorneys to perform only ***some*** amount of such services. Those attorneys performing more than ***some*** amount of such services can now be convicted of a crime and otherwise penalized. A statute that is amended to ***restrict*** the amount of services that an attorney can perform, and to criminalize the conduct if the amount exceeds a certain threshold, is not a form of insulation or protection by any sense of the definition of these words. And the overbreadth test does not require that an activity be barred in its entirety, only that constitutionally protected activity be prohibited in any way, shape, form or amount.

Defendants also contend that the trial court correctly disregarded all of DOBI's deposition testimony, in which its representative confirmed that the Act could apply to the attorneys who are the foremost experts at performing debt adjustment services, and to the attorneys who always satisfy their clients in assisting them with debt. Left unanswered by Defendants is how a proscription against such

attorneys from being "principally engaged" in performing such services leaves consumers in a better position, i.e., advances the purpose of the Act, than having no proscription against attorneys -- already regulated by the Supreme Court -- at all. DOBI even further admitted that it could not identify a single policy benefit through enforcement of the Act as written.

In light of such damning testimony, Defendants argue that DOBI's testimony is not binding as Plaintiffs only cited to a court rule to support this proposition. The "court rule" and corresponding case law squarely hold that a designated representative of a corporation is binding on the entity. See Rule 4:14-2(c); Pressler and Verniero, Current N.J. Court Rules, cmt. 3 to R. 4:14-2(c) (2024) ("[W]hen a subject matter designation is made . . [that] ***testimony will bind the organization*** . . ") (emphasis added); New Century Fin. Servs., Inc. v. Nason, 367 N.J. Super. 17, 23 (App. Div. 2004) (asserting that the Court Rules are binding on the bench and the bar); Columbus Life Ins. Co. v. Wilmington Tr., N.A., 344 F.R.D. 207, 226 (D.N.J. 2023) (holding that F.R.C.P. 30(b)(6) designated representative testimony is binding on entity and goes beyond the deponent's personal knowledge about the topics); Harris v. N.J., 259 F.R.D. 89, 92 (D.N.J. 2007) (same).[3]

[3] Rule 4:14-2(c) is based on Federal Rule of Civil Procedure 30(b)(6). 42 N.J. Prac., Discovery at § 4.72.

E. The Limited Attorney Exemption Violates Attorneys' First Amendment Rights to Render Legal Advice to Clients (Unaddressed By Trial Court).

Though Defendants appear to acknowledge that "any attorney is free to provide legal advice and representation to clients in connection with the clients' disputes to owed debts," Defendants construe these cases too narrowly. While dealing with different types of communications by attorneys to clients, they can be summed up by the Supreme Court's succinct holding that "[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights." Matter of Primus, 436 U.S. 412, 432 (1978). The Limited Attorney Exemption absolutely restricts a licensed attorney's lawful means of vindicating legal rights; certain attorneys cannot engage in debt adjustment (the practice of law) to vindicate his client's rights vis-à-vis his client's creditors.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's July 27, 2023 orders denying Plaintiffs' summary judgment motion, and granting Defendants' summary judgment motion and dismissing the Complaint.

DATED: April 25, 2024

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