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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF OF *AMICI CURIAE* CONSUMERS UNION OF UNITED STATES, INC., PUBLIC CITIZEN, AND THE NATIONAL CONSUMER CENTER FOR LEGAL SERVICES, URGING REVERSAL OR, IN THE ALTERNATIVE, VACATION OF ORDER BELOW AND REMAND FOR FURTHER PROCEEDINGS

INTEREST OF *AMICI CURIAE*

Amici are national consumer-oriented organizations whose interests will be directly affected by the disposition of this action. Each *amicus* has a significant organizational interest in improving the availability and efficient delivery of legal services. Further, each represents the interest of its individual members and supporters in obtaining important information about the lawyers who are available to represent them and provide them access to the legal system.

Consumers Union of United States, Inc. ("Consumers Union") is a non-profit membership organization chartered under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income, and to advance the consumer interests of its several hundred thousand members. Consumers Union is supported almost entirely by income derived from the sale of *Consumer Reports* and other publications which carry no advertising and receive no commercial support. Beginning in 1974, Consumers Union has attempted to publish a consumers' directory of lawyers practicing in Northern Virginia but has been unable to do so because of advertising restrictions that are identical to those involved in this action. Suits filed by Consumers Union challenging the constitutionality of those restrictions are currently pending before three-judge district courts in the Eastern District of Virginia and the Northern District of California, with the former case having been submitted to the three-judge court on the basis of an extensive factual record, on May 18, 1976.[1]

Public Citizen is a non-profit organization supported by public contributions from approximately 175,000 individuals. Public Citizen engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws which prohibit advertising by professionals, thereby interfering with consumers' access to vital information. Attorneys for Public Citizen represented the

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[1] *Consumers Union of United States, Inc., et al. v. American Bar Association, et al.*, No. 75-0105-R (E.D. Va.); *Consumers Union of United States, Inc., et al. v. State Bar of California, et al.*, No. C-75-2385 SC (N.D. Cal.).

consumer plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* ___ U.S. ___, 96 S. Ct. 1817 (1976). In addition, Public Citizen has challenged the constitutionality of prohibitions on advertising by physicians, which restrictions interfered with Public Citizen's efforts to publish a consumers' directory of physicians in Prince George's County, Maryland.[2]

The National Consumer Center for Legal Services is a non-profit organization funded by its members, which include labor unions, cooperatives, credit unions, and other groups that represent the consumer interests of their individual members. The Consumer Center represents more than 27,000,000 consumers of legal services throughout the United States. A principal purpose of the Consumer Center is to foster the growth and development of all types of legal service delivery plans and to provide assistance to individuals and organizations wishing to establish such group plans. The successful establishment and operation of effective institutions for the delivery of legal services requires the ability to disseminate information about those institutions through various methods, including advertising.

Amici in this case assert the interests of consumers in having meaningful access to information necessary to enable them, with a minimum of difficulty and cost, to

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[2] *Public Citizen, et al. v. Commission on Medical Discipline of Maryland, et al.*, No. 74-56B, D. Md. (three-judge court), dismissed on abstention grounds June 24, 1976, appeal pending No. 76-1944 (4th Cir.). An identical challenge to a Virginia statute prohibiting physician advertising has recently been upheld. *Health Systems Agency of Northern Virginia, et al. v. Virginia State Board of Medicine, et al.*, No. 76-37-A (E.D. Va.) (three-judge court), decided November 9, 1976.

make informed selections of legal counsel. While the informational interests of consumers may be similar to the commercial interests of lawyers who wish to advertise, they are not identical. For example, *amicus* Consumers Union has been effectively prevented by advertising restrictions identical to those here at issue from publishing a consumer-oriented directory to assist its members and other consumers in finding appropriate counsel. Such directories would contain much information that lawyers may or may not see fit to advertise individually, such as the nature of their practice, the types of clients represented, potential conflicts of interest, and fee information. Consequently, the contentions of *amici* will assist this Court in resolving the constitutional issues raised in the present dispute.

Amici will not address the Sherman Act issues in this case, but will discuss the First Amendment issues only.

SUMMARY OF ARGUMENT

Advertising of the cost and availability of specific legal services implicates fundamental First Amendment rights. *See, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* ___ U.S. ___, 96 S. Ct. 1817 (1976). When a flat prohibition on professional advertising such as Disciplinary Rule 2-101(B) is challenged on First Amendment grounds, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the [prohibition] . . .". *Bigelow v. Virginia,* 421 U.S. 809, 826 (1975).

A series of decisions of this Court beginning with *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963), and running through *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971), have consistently held (1) that in balancing

the interests, the First Amendment values in maximizing lay access to and information about the legal system are so weighty that restricting such values would only be justified if it were demonstrated that the restriction would in fact advance a "compelling" or "paramount" public purpose; and (2) that the restriction must be "no broader than necessary to achieve" that public purpose. The Supreme Court of Arizona has not even addressed this delicate balancing task. Its failure to do so requires reversal.

This Court's analysis in the *Board of Pharmacy* case also makes clear that even if the court below had engaged in a proper balancing of the interests, Disciplinary Rule 2-101(B) could not survive a First Amendment challenge. The Rule conflicts with a lawyer's ethical obligation under Canon 2 to assist lay persons in the selection of counsel and recognition of legal problems. The Rule not only restricts First Amendment rights of speech and press, but suppresses information affecting access to other vital activities protected by the First Amendment. The several justifications for the advertising ban rejected in the *Board of Pharmacy* case are even less supportable in the case of the advertising at issue here. Finally, the Rule is wholly unnecessary to vindicate Arizona's interest in preventing lawyers from disseminating false or misleading information.

In the *Board of Pharmacy* case, this Court noted that a lawyer advertising case might require consideration of various factors bearing on the validity of an advertising ban such as the Rule. Nevertheless, the court below gave no consideration whatsoever to any such factors, made no findings concerning the vary important factual issues raised by the Rule, and made no effort to balance the interests at stake. While those failures plainly require reversal, the obvious overbreadth of the Rule – which on its face prohibits countless truthful statements by lawyers which would

assist consumers in exercising their First Amendment rights – makes a remand unnecessary "because the outcome is readily apparent . . .". *See, Bigelow v. Virginia, supra* at 826-27.

ARGUMENT

ARIZONA'S FLAT PROHIBITION ON ALL ADVERTISING BY ATTORNEYS, BOTH ON ITS FACE AND AS APPLIED, VIOLATES THE FIRST AMENDMENT.

A. The Supreme Court of Arizona Has Failed to Analyze Or Balance the Interests In This Case.

Last term, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* ___ U.S. ___, 96 S. Ct. 1817 (1976) (hereinafter "*Board of Pharmacy*"), this Court prescribed the constitutional standards to be applied in testing advertising prohibitions against the First Amendment. It held that the advertising of the price of prescription drugs was constitutionally protected speech; the State could not, consistent with the First Amendment, "completely suppress the dissemination of concedely truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 1831.[3]

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[3] The Court stressed that "the . . . consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate" (*id.* at 1826), and that from society's point of view, such information "may be of general public interest" and indeed "indispensable" to the formation of rational consumer choice in "a predominantly free enterprise economy." *Id.* at 1827.

After the *Board of Pharmacy* case, therefore, it is clear that advertising of the cost and availability of specific legal services implicates fundamental First Amendment interests. That being so, a delicate balancing of interests is required. As the Court recently stated in *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975):

> . . . Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. . .

And as this Court further stated, "[t]he task of balancing the interests at stake here was one that should have been done by the . . . courts before they reached their decision." *Id.* at 826. As discussed *infra*, the Supreme Court of Arizona has wholly failed to even address this task, and that failure alone requires reversal.

This Court has prescribed how that balancing task must be performed. It has held that although First Amendment rights are not absolute, "these freedoms are delicate and vulnerable, as well as supremely precious in our society." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). Thus, any restriction on their exercise, even one not involving prior restraint and even one that is indirect, is not tolerated unless (1) it achieves a public interest that is "compelling" or "paramount," and (2) its infringement on those rights is "no broader than necessary to achieve" that public interest. *N.A.A.C.P. v. Button, supra* at 438, 444; *Branzburg v. Hayes*, 405 U.S. 665, 680-81 (1972), and numerous cases cited at fns. 18 and 19. Moreover, the *particular* restriction at issue, rather than any generalized justification for

the restriction, must meet this two-part test. *E.g., Bates v. Little Rock,* 361 U.S. 516, 525 (1960) (fundamental state interest in taxation could not justify requirement to disclose membership list).

Thus, the fact that "[t]he interest of the States in regulating lawyers is especially great," *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975), is the beginning of the necessary judicial inquiry, not the end of it. Indeed, this Court has struck down on First Amendment grounds many restrictions imposed by the legal profession purportedly in the interest of regulating professional conduct. In *N.A.A.C.P. v. Button, supra,* for example, the Court explicitly recognized Virginia's valid interest in regulating conduct that resulted in stirring up litigation, conduct traditionally censured at common law. The Court nevertheless concluded that "[t]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions it has imposed." 371 U.S. at 444. It was "no answer," the Court stressed, that the restriction was intended to insure high professional standards, "*[f]or a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.*" (Emphasis supplied). 371 U.S. at 438-39.[4]

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[4] *Accord, Baird v. Arizona,* 401 U.S. 1 (1971), and *In re Stolar,* 401 U.S. 23 (1971), where this Court ruled that a state's interest is making sure that those admitted to practice law were of good moral character was insufficient to force an applicant to answer questions about his beliefs or associations. *See, Nicholson v. Board of Com'rs. of Alabama State Bar Assn.,* 338 F. Supp. 48 (M.D. Ala. 1972) (three-judge court) (state cannot require a bar applicant to take an oath invoking the help of God as a prerequisite to admission to practice).

Subsequent to *Button*, this Court has continued to consistently recognize the legitimate interest of the states in enforcing ethical conduct by attorneys, but has just as consistently refused to be beguiled by the label "legal ethics." In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), *United Mine Workers of America v. Illinois State Bar*, 389 U.S. 217 (1967), and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), the Court struck down ethical rules which had the effect of burdening access to legal services, and the Court did so despite the clearly commercial nature of the legal services in question.[5] Indeed, just last year, the Court while recognizing the state's "compelling interest" in regulating lawyers, struck down the "ethical" principle in question (a minimum fee schedule), and did so on non-constitutional grounds. *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 793-94.

The *United Transportation Union* case is particularly instructive. There, the Court approved an arrangement challenged by the state bar as "unethical," in which the group paid investigators to (1) keep track of ordinary personal injury accidents, (2) visit injured members, taking contingent fee contracts with them, and (3) urge members to

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[5] Thus in *Railroad Trainmen*, the group solicited substantially all of the members' personal injury claims, on a fee basis, for lawyers selected and touted by the union in literature and at meetings. The two dissenters stressed the commercial nature of this activity. 377 U.S. at 9. In *United Mine Workers*, the Court explicitly considered and rejected the argument that *Button* should be limited to efforts to encourage the assertion of political rights. 389 U.S. at 223. And see discussion of *United Transportation Union, infra.*

engage named private attorneys selected (but not employed) by the union who had agreed with the union (not the individual client) to charge a standard fee prescribed in advance. This scheme is especially relevant to the instant case, for even the dissenters agreed that the group could not be prevented from setting standard fees to be charged by the lawyers for specified services *in advance of even a consultation with the member client.* 401 U.S. at 595 and 600. If that conduct is constitutionally protected, then a mere advertisement of the availability and cost of several defined legal services cannot be flatly prohibited by appellee.

The *Button* through *United Transportation Union* line of cases is dispositive of the present case for another reason: the Court in these cases stressed again and again, in the face of analogous restrictions on First Amendment rights, that in balancing the interests, the *quality* of factual evidence required to sustain the bar's predictions of evils flowing from the allegedly "unethical" conduct must be reasonably high. Thus, in *United Mine Workers,* the Court carefully reviewed each of the factual contentions made by the state bars in *Button* and *Railroad Trainmen* and held that the bars' predictions of evils were "far too speculative" (in *Button*) and merely a "theoretical" and "very distant possibility of harm" (in *Railroad Trainmen*). 389 U.S. at 222-24. *See also, United Transportation Union, supra* at 583-84. And very recently, the Court has twice rejected as being without factual support precisely the same "ethical" arguments against advertising that presumably underlie Disciplinary Rule 2-101(B). *Bigelow v. Virginia, supra* at 826-27; *Board of Pharmacy, supra* at 1828-30. In light of the record below, the instant case is plainly *a fortiori.*

B. Disciplinary Rule 2-101(B) Is So Overbroad That It Cannot Be Sustained On This Or Any Other Record.

After the *Board of Pharmacy* case, however, it is apparent that even if the court below had engaged in a proper balancing of the interests, it would have been compelled to invalidate Disciplinary Rule 2-101(B). First, the *Board of Pharmacy* case involved a restriction on pure commercial speech, "speech which does 'no more than propose a commercial transaction,' " and the Court assumed that the advertisers' interest there was "a purely economic one." 96 S. Ct. at 1826. In the instant case, however, appellants have discharged an affirmative *ethical obligation* imposed under Canon 2 of the Code of Professional Responsibility of the American Bar Association, adopted by the Supreme Court of Arizona,[6] to assist lay persons in the selection of counsel and in the recognition of legal problems.[7]

Second, the information suppressed by Disciplinary Rule 2-101(B) does not relate simply to a decision to purchase a product in the marketplace, as in *Board of Pharmacy.* Rather, the information relates to legal services, full access to which enjoys full First Amendment protection. *See, e.g., N.A.A.C.P. v. Button, supra* at 434, 437, 440, 442.

Third, the Court in *Board of Pharmacy* considered at length the numerous alleged evils which might ensue if price advertising were permitted (*e.g.*, tastelessness of some

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[6] Rule 29(a) of the Rules of the Supreme Court of Arizona.

[7] *See, e.g.*, Code of Professional Responsibility of the American Bar Association, Ethical Considerations 2-1 through 2-8.

advertising, loss of an individualized relationship with the lay person, reduced quality, inflated costs, diminished professional status, excessive consumer preoccupation with price factors). In rejecting these speculations, this Court stressed that these purported state interests were "greatly undermined" because (a) the practice of pharmacy was subject to "close regulation" to assure high professional standards, (b) the advertising ban "does not directly affect professional standards one way or the other" but simply keeps consumers "in ignorance of the entirely lawful terms that competing pharmacists are offering," and (c) the information "is not in itself harmful" and can be used by consumers to pursue "their own best interests." *Id.* at 1829.

All of this is true *a fortiori* in the instant case. Although neither the Supreme Court of Arizona nor the State Bar of Arizona made *any* findings of fact with respect to either the purpose or effects of Disciplinary Rule 2-101(B) or the likelihood that certain alleged evils would follow its demise, the State Bar can be expected to offer justifications for Disciplinary Rule 2-101(B) similar to those advanced by the state in *Board of Pharmacy*.[8] They are similarly without merit. Lawyers are more closely regulated than pharmacists, and would remain subject to discipline for the evils which the State Bar has conjured up, even if Disciplinary Rule 2-101(B) were struck down. *See infra.* This Rule does not directly affect professional standards but simply increases lay ignorance about individual

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[8] *See, e.g.*, Brief of the State Bar of Arizona in the court below, pp. 5-8; *see also*, Brief on the Merits filed by American Bar Association and Brief on Behalf of Defendants Virginia State Bar, *et al.*, filed April 23, 1976, in *Consumers Union of United States, Inc., et al. v. American Bar Association, et al., supra.*

lawyers and the legal services which they can provide; indeed, the Rule's justification – like that rejected in *Board of Pharmacy* – "rests in large measure on the advantages of [citizens] being kept in ignorance." *Id.* at 1829. And appellants' advertisement, far from being harmful in itself, informs consumers about the cost and availability of legal services – and indeed about the possibility of dispensing with certain very routine legal services – and is obviously of value.

Additionally, the Court in *Board of Pharmacy* noted that even if the advertising ban were struck down, Virginia remained free to prohibit false or misleading information, and in fact had done so. *Id.* at 1830-31. In the instant case, false or misleading statements by lawyers would be subject not only to the penalties of Arizona's analogous statute,[9] but would constitute grounds for disbarment under Arizona law as well.[10] Indeed, these remedies would almost certainly be more readily enforceable against a published advertisement than against the same representations made orally in the privacy of a lawyer's office.[11]

Perhaps most significantly, the Court in *Board of Pharmacy* rejected the state's "highly paternalistic approach" to the vindication of admittedly legitimate state interests without even determining whether those interests were in

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[9] *See*, Arizona Statutes, Title 44, §§ 1481, 1521-22.

[10] *See*, Arizona Statutes, Title 32, §§ 264, 267(8) and, *e.g.*, Disciplinary Rules 1-102(A)(4) and 6-101(A) of the Rules of the Supreme Court of Arizona.

[11] *See, e.g.*, expert testimony summarized in Plaintiffs' Reply Brief, pp. 20-21 in *Consumers Union of United States, Inc., et al. v. American Bar Association, et al., supra.*

fact served by the restrictions. *Id.* at 1829. It was enough for the Court that Virginia "suppress[ed] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 1831. Here, of course, the court below has permitted the same kind of suppression, and has done so without engaging in any actual analysis at all, much less the delicate balancing of interests required by this Court in *Bigelow v. Virginia, supra* and *Board of Pharmacy.*

The State Bar of Arizona will certainly seek to distinguish *Board of Pharmacy* on the ground that pharmacists dispense standardized, prepackaged drug products, while lawyers, as this Court observed, "render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."[12] *Id.* at 1831, n. 25. *See also,* concurring opinion of the Chief Justice, *id.* at 1831-32. It is important to note that the Court, in this *dictum,* did not attribute any particular constitutional significance to this distinction, but simply stressed that a lawyer advertising case "*may* require consideration of quite different factors." (Emphasis supplied). *Id.* at 1831, n. 25.

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[12] Actually, the Board of Pharmacy argued in that case that the practice of pharmacy was highly professional and closely related to the health and safety of all consumers of prescription drug products. In fact, the professional nature of pharmacy, and its importance to the public welfare, was even stipulated in the record. *See,* Brief of Appellants at 4-7; Stipulation of Facts ¶¶ 11-16. Nevertheless, those professional aspects were not sufficient to offset the consumers' interests in receiving important information in the *Board of Pharmacy* case.

Despite this Court's invitation for further analysis, and despite the heavy burden of justification imposed by *Board of Pharmacy* on advertising bans, one searches the opinion below in vain for *any* "consideration of" the numerous "factors" bearing on whether Arizona's ban on the advertisement published by appellants can meet the rigorous constitutional tests.[13] *The sole fact upon which the court below rendered its decision was that appellants caused an advertisement for their law office to be published.* (Jurisdictional Statement 2a). Accordingly, there were no findings of fact (or, indeed, even any discussion) concerning, *inter alia,* the following factors: what public interests, if any, the Disciplinary Rule is in fact designed to serve; whether that Rule achieves or in fact subverts those purposes; the extent of consumer ignorance about the cost and availability of such services; whether potential consumers of legal services have a greater need for information about such services than they do for other kinds of services and products; the effect of the Rule upon the cost and availability of legal services and upon consumer ignorance about same; the effect of the Rule upon competition among lawyers; the extent to which the cost and availability of legal services can be advertised in a manner that is neither false nor misleading; whether those particular legal services advertised by appellants are relatively standardized; the extent to which the Rule itself facilitates

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[13] One of these factors ignored by the court below – the possibility that the particular legal services advertised by appellants would not be misleading to consumers, while advertising of other, less standardized legal services might be – is suggested by Chief Justice Burger's concurrence in which he opined that advertising the price of "certain" legal services could be misleading. *Id.* at 1832. And, of course, the advertisement in question here made no "claims of superiority." *Id.* at 1832.

deception of and confusion among potential consumers of legal services; whether a less restrictive limitation on advertising of the cost and availability of legal services could achieve the purposes which the Rule purports to serve; whether the Rule is necessary to prevent false or misleading advertising of legal services and deceptive practices by lawyers; whether the enforceability of other prohibitions against false or misleading advertising or other deceptive practices by lawyers would in fact be increased by the publication of some of the terms on which certain legal services are offered; whether advertising of the cost and availability of certain legal services is misleading simply because it contains some but not all of the information that a potential consumer of such services might wish to have; the extent to which other sources of information about the costs and availability of legal services are available to ordinary consumers and the costs of utilizing such sources; the extent to which efforts by the organized bar to dispel consumer ignorance about the cost and availability of legal services have been unsuccessful; and the extent to which the legal profession itself believes that the advertising ban is excessively broad.[14]

The Supreme Court of Arizona, then, has utterly failed to recognize, much less discharge, its obligation to (1) identify the public purposes which Disciplinary Rule 2-101(B) is designed to serve, (2) establish the factual relationship between this Rule and those public purposes, (3) "assess the First Amendment interest at stake and weigh it against

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[14] On November 9, 1976, the Board of Governors of the District of Columbia Bar approved, and recommended that the District of Columbia Court of Appeals adopt, changes in its Code of Professional Responsibility that would permit the kind of advertisement at issue in this case.

the public interest allegedly served by the regulation . . ." (*Bigelow v. Virginia, supra* at 826), and (4) demonstrate that the Rule's destruction of the First Amendment rights of appellants and of consumers is no broader than necessary to achieve those purposes. *E.g., N.A.A.C.P. v. Button, supra* at 444.

Neither the Rule nor the order of the Supreme Court of Arizona can be sustained on this record. Indeed, in view of the obvious, almost universally-recognized overbreadth of the Rule – which on its face prohibits countless truthful statements by lawyers, which statements can assist consumers to exercise their own First Amendment rights to select counsel and invoke the legal system – *amici* respectfully submit that that Rule and the order of the Supreme Court of Arizona cannot be sustained on *any* record. As the Court said in *Bigelow v. Virginia, supra* at 826-27:

> The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above.

CONCLUSION

For the reasons stated, *amici* respectfully urge this Court to reverse the judgment below and direct the Supreme Court of Arizona to dismiss the proceedings against appellants, or, in the alternative, to vacate the judgment and remand the case for further proceedings, which will include a detailed analysis of the factual predicates for Disciplinary Rule 2-101(B), the public interests served thereby, the appropriate breadth of the Rule's intrusions on First Amendment rights, and a careful balancing of the public interests and the First Amendment rights involved.

Respectfully submitted,

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