IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Jacoby & Meyers Law Offices, LLP, *Plaintiff,*	:	No. 3:11-cv-00817 (CFD)
v.	:	
Judges of the Connecticut Superior Court *Defendants.*	:	AUGUST 18, 2011

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The defendants, the Judges of the Connecticut Superior Court ("Defendants"), hereby submit this memorandum of law in support of their Motion to Dismiss. This Court lacks subject matter jurisdiction because the plaintiff, Jacoby & Meyers Law Offices LLP ("Plaintiff"), lacks standing and because its claims are barred by the Eleventh Amendment. To the extent that Plaintiff's claims are not jurisdictionally barred, this Court should refrain from deciding them under the *Pullman* abstention doctrine because the resolution of predicate issues of Connecticut and New York law could eliminate the need to address Plaintiff's myriad federal constitutional claims. Finally, Plaintiff's claims lack merit and fail to state a claim upon which relief may be granted. This Court should therefore grant the motion and dismiss this action in its entirety.

BACKGROUND

Plaintiff alleges that it wishes to expand its business by obtaining investments from non-lawyers in exchange for an equity stake in the firm, but is prevented from doing so by Connecticut Rule of Professional Conduct 5.4 ("Rule 5.4"). Among other things, Rule 5.4 prohibits lawyers from practicing law in a for-profit professional corporation or association if a non-lawyer owns any interest therein. Plaintiff challenges Rule 5.4 on the ground that

Defendants exceeded their statutory and constitutional authority under Connecticut law when they adopted it. Plaintiff also claims that the restrictions set forth in Rule 5.4—which all 50 states have adopted and which have existed in Connecticut without challenge for almost 40 years—are facially invalid and violate several provisions of the state and federal constitutions. Plaintiff seeks a declaration from this Court that Rule 5.4 is unconstitutional and also seeks injunctive relief enjoining Defendants from enforcing it.

The History of Rule 5.4 in Connecticut

Rule 5.4 (attached as Exhibit A) reflects a policy choice that the Connecticut judiciary, exercising its inherent authority to regulate the legal profession, has embraced for almost forty years. Although Rule 5.4 has been periodically updated, Defendants have not seen fit to meaningfully alter its substantive requirements during that time.

The requirements of Rule 5.4 originally were embodied in Disciplinary Rule 3-103, which became effective October 1, 1972 and provided that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." *Tolland Grievance Committee v. Bates*, No. 34498 at 1 n.1, 8 (Conn. Super. Dec. 30, 1985) (attached as Exhibit B). Defendants subsequently enacted the Connecticut Rules of Professional Conduct on October 1, 1986. Wesley W. Horton & Kimberly A. Knox, *Code to Rules: From Black and White to Grey*, 61 Conn. B.J. 146, 146 (1987) (attached as Exhibit C). In doing so, Defendants replaced DR 3-103 with Rule 5.4. After additional minor changes in 2007, Rule 5.4 now provides, in relevant part:

> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
> (1) A nonlawyer owns any interest therein, except that a fiduciary representative

> of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
> (2) A nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
> (3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

Conn. R. Prof. Cond. 5.4(d). Rule 5.4(d) is identical to the ABA's Model Rule of Professional Conduct 5.4(d) (attached as Exhibit D), which all 50 states have adopted in some form or another. *See Compl.*, ¶¶ 13-16, 29; George C. Nnona, *Towards A Reformed Conception of Multidisciplinary Practice*, 56 CLEV. ST. L. REV. 533, 534 n.2 (2008).

Policy Considerations Underlying Rule 5.4

As stated in the official commentary, the primary purpose of Rule 5.4 is "to protect the lawyer's professional independence of judgment" by preventing third parties from "direct[ing] or regulat[ing] the lawyer's professional judgment in rendering legal services to another." (Exhibit A); *see* John D. Messina, Comment: *Lawyer + Layman: A Recipe for Disaster! Why the Ban on MDP Should Remain*, 62 U. PITT. L. REV. 367, 378-80 (2000) (detailing potential impacts on professional judgment and independence). Rule 5.4 also advances the duty of loyalty that lawyers owe to their clients by "minimiz[ing] the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests." *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1385-86 (7th Cir. 1992). These policy goals are critical to the regulation of the legal profession and are reflected throughout the Rules of Professional Conduct. *See, e.g.*, Conn. R. Prof. Cond. 1.7-1.11 and commentary (conflicts of interest).

Rule 5.4 also promotes several other policy goals. By prohibiting non-lawyers from investing in law firms or having ownership interests therein, Rule 5.4 ensures that those

individuals who control the conduct and practice of attorneys are themselves governed by—and subject to discipline under—the Rules of Professional Conduct. Were it otherwise, non-lawyer partners easily could circumvent other important rules that govern the conduct of attorneys, including, for example, the rules governing advertising and solicitation of clients. Conn. R. Prof. Cond. 7.2 and 7.3; *see* Messina, *Lawyer + Layman*, 62 U. PITT. L. REV. 382-83.

In addition, Rule 5.4 enhances the public's trust and confidence in the legal profession by ensuring that clients' information remains confidential. Attorneys owe a strict duty of confidentiality to their clients. Conn. R. Prof. Cond. 1.6. That duty is not shared by many other professions. In fact, professions such as accountants have a mandatory duty to disclose certain information that potentially could stand in direct conflict with an attorney's duty of confidentiality under the Rules of Professional Conduct. *See, e.g.,* 15 U.S.C. § 78j-1 (establishing audit and disclosure requirements for public accounting firms). Permitting partnerships between individuals who are subject to such diametrically opposed ethical and legal obligations inevitably will lead to conflict and diminish the public's trust in the legal profession. *See* Heather A. Miller, Note, *Don't Just Check "Yes" Or "No": The Need For Broader Reconsideration Of Outside Investment In The Law*, 2010 U. Ill. L. Rev. 311, 316 (2010) (noting that "[p]ublic investment presents additional client confidentiality issues because of securities disclosure requirements"); Messina, *Lawyer + Layman*, 62 U. PITT. L. REV. 381 (noting confidentiality conflicts between attorneys and accountants).

ARGUMENT

The policy choices embodied in Rule 5.4 reflect a broad national consensus that lawyers should be prohibited from forming partnerships or sharing fees with non-lawyers to preserve

their professional independence and loyalty to the client. Indeed, all 50 states have made a similar policy choice in the regulation of their own bars. By raising facial challenges to the constitutionality of Rule 5.4 in this case, Plaintiff implicitly claims that every state in the nation has acted irrationally and unconstitutionally in its efforts to regulate the legal profession. Plaintiff's claims lack merit.

It is well established that the State has a compelling interest in regulating the professions within its borders. That interest is especially strong with regard to the legal profession. Although Plaintiff disagrees with the wisdom of Rule 5.4 and claims to be financially disadvantaged by it, Rule 5.4 is a rational way to achieve the policy goals that it embodies and does not interfere with any fundamental rights protected by the constitution. Consequently, this Court should reject Plaintiff's claims and dismiss this action in its entirety.

I. STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Although this Court must accept as true all material factual allegations in the Complaint, it is not "'bound to accept as true a legal conclusion couched as a factual allegation.'" *Lorenz v. Managing Dir., St. Luke's Hosp.*, 2010 U.S. Dist. LEXIS 127746, at *8 (S.D.N.Y. 2010), quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008). The Court should "refrain[] from 'drawing from the pleadings inferences favorable to the party asserting [jurisdiction].'" *Quinones v. Kohler Mix Specialties, LLC*, 2010 U.S. Dist. LEXIS 42779 at *3 (D. Conn. 2010), quoting *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). Moreover, the Court "may refer to evidence outside the

pleadings." *Makarova*, 201 F.3d at 113. Ultimately, the "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2s 868 (2009), quoting *Bell Atlantic v. Twombley*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*, citing Twombley, 550 U.S. at 556. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id.* at 570.

II. PLAINTIFF'S CLAIMS ARE NOT JUSTICIABLE

Plaintiff, as the putative representative of a class including "all entities and persons licensed to practice law in the State of Connecticut, other than Defendants," asks this Court to hold unconstitutional a Connecticut Rule of Professional Conduct that Plaintiff acknowledges is "based upon the American Bar Association Model Rules that have been implemented in virtually every jurisdiction in the United States." *Compl.*, ¶ 13, 34. The Supreme Court recently cautioned that, "[i]n an era of frequent litigation, class actions, sweeping injunctions with

prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). That caution is "all the more necessary [given] . . . the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change." *Id.* Supreme Court and Second Circuit precedent establishes that Plaintiff lacks standing to obtain the far-reaching declaratory and injunctive relief it seeks.

"Standing 'is an essential and unchanging part of the case-or-controversy requirement of Article III'" and Plaintiff bears the burden of establishing each of its elements before it can invoke federal jurisdiction. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 175 (2d Cir. 2006), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To properly allege constitutional standing:

> first, the plaintiffs must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete an particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (quotation marks; citations omitted). Plaintiff has not met its burden on any of those elements.

The first standing element—the requirement that Plaintiff establish injury in fact—involves the overlap of the separate justiciability doctrines of standing and ripeness. *See, e.g.*, *Thompson v. ABA*, 2007 U.S. Dist. LEXIS 27808 at *21 n.9 (D. Conn. 2007) (Droney, J.). "'The

basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 2010 U.S. Dist. LEXIS 114898 at *9-10 (W.D.N.Y. 2010), quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Com'n*, 461 U.S. 190, 200-01 (1983) (internal quotation marks; citation omitted). "Ripeness principles . . . bear heightened importance when, as in the present case, the potentially unripe question presented for review is a constitutional question." *Connecticut v. Duncan*, 612 F.3d 107 n.3 (2d Cir. 2010) (quotation marks omitted). "There must be a genuine threat of enforcement of a disputed state . . . statute before a case or controversy involving that statute may be said to exist." *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41, 44 (2d Cir. 1979).

Here, Plaintiff does not allege that Defendants have threatened to take action against it, nor does it allege that it "ever communicated with defendants or any other [State of Connecticut] officials at all prior to the commencement of this case." *Walsh*, 2010 U.S. Dist. LEXIS 114898 at *10. Plaintiff effectively asks this Court to issue declaratory and injunctive relief against Defendants "for doing nothing, absolutely nothing. They have not prosecuted the plaintiffs. They have not threatened to prosecute the plaintiffs." *Carey*, 605 F.2d at 44.[1] This Court should decline Plaintiff's request. "It is clear that the mere existence of a state . . . statute . . .

[1] The only conduct Plaintiff alleges Defendants engaged in was that they "approved and adopted the Rules of Professional Conduct." *Compl.* ¶ 9. As will be discussed in more detail below, legislative immunity precludes this Court from awarding declaratory or injunctive relief based on that conduct. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 730-34 (1980).

constitute[s] insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." *Poe v. Ullman*, 367 U.S. 497, 507 (1961).

Plaintiff also lacks standing because it cannot satisfy the second or third element. Plaintiff claims that, "[a]s a result of . . . rule [5.4], Jacoby & Meyers cannot allow a non-lawyer to acquire or own an interest in the legal entity (i.e., the law firm) through which it provides legal services to its clients." *Compl.*, ¶ 16. However, Plaintiff will be barred from allowing a non-lawyer to own an interest in Plaintiff no matter what happens in this case.

Plaintiff is a New York-based law firm organized as a Limited Liability Partnership ("LLP") under New York law. *Compl.*, ¶ 8; *N.Y. Dep't of State Official Record of Registration for "Jacoby & Meyers Law Offices, LLP* (Exhibit E).[2] Under New York Partnership law, every partner in a LLP must be a professional in the pertinent field, and a LLP cannot include any limited partners. N.Y. Part. L. § 121-1500(a)(I).[3] Thus, even if this Court were to strike down Connecticut Rule 5.4, Plaintiff still would be unable to allow a non-lawyer to acquire an interest in the firm.

That is fatal to Plaintiff's standing. Plaintiff's claimed injury—the inability to partner with non-lawyers—is guaranteed by New York law governing LLPs and Plaintiff's decision to

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[2] It appears that Plaintiff is neither organized under Connecticut law nor registered to do business in Connecticut as a LLP, as required under Connecticut law. Conn. Gen. Stat. § 34-429 (requiring foreign LLPs to file a certificate of authority to transact business in Connecticut); Conn. Gen. Stat. § 34-430 (providing for penalties for failure to file certificate of authority).

[3] Moreover, other provisions of New York law also appear to prohibit Plaintiff from partnering with non-lawyers. *See, e.g., Ungar v. Matarazzo Blumberg & Associates, P.C.*, 260 A.D.2d 485, 486, 688 N.Y.S.2d 588, 589-90 (N.Y. App. Div. 1999) (holding that "an agreement between a nonlawyer and attorneys to split legal fees . . . is prohibited by Judiciary Law § 491").

avail itself of the advantages that law confers in exchange for complying with its limitations. This action does not challenge those limitations, nor could it. Defendants have no power to alter New York law. Plaintiff's injury is therefore either "the result [of] the independent action of some third party not before the court," or the result of the actions of Plaintiff itself, and the second standing element is absent. *Field Day, LLC*, 463 F.3d at 175 (quotation marks omitted).

Plaintiff likewise cannot meet its burden of demonstrating redressability, the third standing element. "Redressability is the non-speculative likelihood that the injury can be remedied by the requested relief." *Coalition of Watershed Towns v. United States EPA*, 552 F.3d 216, 218 (2d Cir. 2008) (quotation marks omitted). To establish standing, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quotation marks omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Id.*, quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998).

Here, there is no likelihood that a ruling in Plaintiff's favor will redress Plaintiff's claimed injury because New York laws that Plaintiff does not, and could not, challenge in this case pose independent bars to the non-lawyer investment Plaintiff seeks. Plaintiff therefore lacks standing and this Court should dismiss this action. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 228-229 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (holding that the plaintiffs lacked standing where "if the Court were to strike down" the challenged limitations, "it would not remedy . . . plaintiffs' alleged injury because" other limitations "would remain unchanged").

III. THE ELEVENTH AMENDMENT BARS PLAINTIFF'S CLAIMS

The Eleventh Amendment bars Plaintiff's claims against the Judges of the Connecticut Superior Court on several grounds. It is well-established that "when the State itself is named as the defendant, a suit . . . is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984). Thus, the "Superior Court of Connecticut is immune from suit under the Eleventh Amendment as an arm of the State." *Chance v. Conn. Superior Court*, 2004 U.S. Dist. LEXIS 25500 at *6 (D. Conn. 2004); *see also Gollomp v. Spitzer*, 568 F.3d 355, 366-367 (2d Cir. 2009) (holding that the New York State Unified Court System is entitled to Eleventh Amendment immunity). Plaintiff's suit against the Judges of the Connecticut Superior Court as a collective entity—as opposed to any individual Judges—is likewise barred. *See, e.g.*, *Mayercheck v. Judges of the Supreme Court of Pennsylvania*, 2009 U.S. Dist. LEXIS 72021 at *24-27 & n.2 (W.D. Pa. 2009), *aff'd*, 395 Fed. Appx. 839 (3d Cir. 2010) (Eleventh Amendment barred claims against the Judges of the Supreme Court of Pennsylvania collectively, as opposed to individual judges on that court).

Plaintiff's claims would fare no better had it sought to invoke the *Ex parte Young* doctrine, which permits a plaintiff "to sue a state official acting in his official capacity—notwithstanding the Eleventh Amendment—for prospective injunctive relief from violations of federal law." *Deposit Ins. Agency v. Superintendent of Banks (In re Deposit Ins. Agency)*, 482 F.3d 612, 617 (2d Cir. 2007) (quotation marks omitted). "Courts have not read *Young* expansively." *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (citing cases).

"To fall within the *Ex parte Young* exception, . . . the defendant state officer 'must have

some connection with the enforcement of the act, or else [the plaintiff] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *HealthNow N.Y., Inc. v. New York*, 739 F. Supp. 2d 286, 294 (W.D.N.Y. 2010), quoting *Young*, 209 U.S. at 157. "For a state officer to be a proper party, both a 'particular duty to enforce the statute in question' and a 'demonstrated willingness to exercise that duty' are needed." *Id.*, quoting *Young*, 209 U.S. at 161. Put differently, the *Young* "exception only applies when the named defendant state officials have some connection with the enforcement of the act and 'threaten and are about to commence proceedings' to enforce the unconstitutional act." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001).

Plaintiff's complaint does not establish that either of those circumstances is present here. Plaintiff alleges that Defendants "approved and adopted the Rules of Professional Conduct" in "an exercise of the Superior Court's inherent authority to regulate attorney conduct and to discipline members of the Connecticut bar, and pursuant to the authority delegated to them by the legislature to regulate the 'practice' of attorneys." *Compl.* at ¶¶ 9, 13. It also seeks orders declaring that, "in adopting Rule 5.4 of the Connecticut Rules of Professional Conduct, Defendants violated" Connecticut law and the separation of powers. *Id.*, p. 20 ¶¶ 1 & 2. Thus, the focus of at least some of Plaintiff's claims is on the adoption of the Rules, and it is well-established that legislative immunity bars claims for declaratory and injunctive relief based on that conduct to the extent Plaintiffs seek to impact or direct the adoption or alteration of rules. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 730-34 (1980) (holding that legislative immunity barred equitable claims against the Supreme Court of Virginia arising out of adoption of disciplinary rule); *see also State Employees Bargaining Coalition v. Rowland*, 494

F.3d 71, 82-94 (2d Cir. 2007) (recognizing and applying *Consumers Union*).

To the extent Plaintiff's claims challenge the enforcement of the Rule, there is no allegation in the Complaint—or any facts to support an allegation—that Defendants have "'threaten[ed] and are about to commence proceedings' to enforce the unconstitutional act." *Okpalobi*, 244 F.3d at 416. Therefore, Plaintiff "cannot satisfy the requirements of *Ex parte Young* because it has failed to allege that the [Judges of the Superior Court are] . . . involved in an ongoing violation of federal law or ha[ve] threatened an enforcement action that violates federal law." *Goodspeed Airport, LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 632 F. Supp. 2d 185, 188 (D. Conn. 2009).

The Supreme Court has made clear that "[i]n suits such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be *imminent*, for it is the prospect of that suit which supplies the necessary irreparable injury." *Id.* at 189, quoting *Morales v. TWA*, 504 U.S. 374, 382 (1992) (emphasis in *Goodspeed*). "Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Morales*, 504 U.S. at 382.

Here, there is no indication of a threat of suit, imminent or otherwise, by Defendants. Plaintiff does not allege that they have threatened to enforce the Rule against Plaintiff and, indeed, does not allege that Defendants have ever enforced the Rule under analogous circumstances. Nor does Plaintiff allege that the Rule compels it to take certain actions. Rather, Plaintiff "merely claims" that the Judges *could* act under the Rule if Plaintiff chose to violate it

and "wants a ruling on the [validity of the Rule] . . . before taking any action." *Goodspeed*, 632 F. Supp. 2d at 188; *see also HealthNow N.Y., Inc.*, 739 F. Supp. 2d at 296 ("Without a threat of enforcement action . . . the very attenuated possibility raised by Plaintiff that the Attorney General might take action against it is no more than a 'conjectural injury' that fails to meet the 'demonstrated willingness' requirement of *Ex parte Young*."). That is not enough to allow Plaintiff to avoid the Eleventh Amendment and "[P]laintiff's failure to name the proper defendant is fatal to the claim." *HealthNow N.Y., Inc.*, 739 F. Supp. 2d at 295 (quotation marks omitted). Based on the allegations in Plaintiff's Complaint, "this action does not present the exigent adversity which is an essential condition to federal court adjudication" and that is "a sufficient basis for dismissal of [Plaintiff's] . . . complaint." *Mendez v. Heller*, 530 F.2d 457, 460-61 (2d Cir. 1976) (quotation marks and citation omitted).

Even if Plaintiff had properly named an individual defendant with the requisite enforcement authority and a demonstrated willingness to exercise it, the Eleventh Amendment still would bar Plaintiff's claims to the extent they are based on state law. *Compl.*, p. 13-20 (alleging First, Second, Third, Sixth and Eighth Claims that rely, in whole or in part, on the Connecticut Constitution). "[W]hen a plaintiff alleges that a state official has violated state law . . . the entire basis for the doctrine of *Young* . . . disappears." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). That is because "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* "On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of

federalism that underlie the Eleventh Amendment." *Id.*; *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541 (2002) (noting that "we cannot read § 1367(a) [the supplemental jurisdiction statute] to authorize district courts to exercise jurisdiction over claims against nonconsenting States").

IV. ABSTENTION IS APPROPRIATE TO THE EXTENT THIS COURT HAS JURISDICTION

As discussed above, Plaintiff's standing raises questions under New York state law. Plaintiff's Complaint also raises claims under Connecticut law.[4] It is clear both that Plaintiff lacks standing because of the independent bars New York law poses to the non-lawyer investment Plaintiff seeks and that Plaintiff's claims under Connecticut law lack merit. In the unlikely event that Plaintiff is able to cast doubt on either of those premises, the respective states' law is, at best, unclear. This Court should therefore abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), "to allow a state proceeding to address the state law issues in deference to the state court's superior ability to determine unsettled questions of state law." *Temple of Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 182 (2d Cir. 1991).[5]

Federal courts "have a duty to avoid passing on the constitutionality of a statute where possible, especially when we are dealing with state rather than federal law." *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003) (citations omitted). Consistent with that duty, the

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[4] Specifically, the First and Second Claims in Plaintiff's Complaint allege that the Judges of the Connecticut Superior Court violated Connecticut law and the Connecticut Constitution by enacting Rule 5.4 because the Rule encroaches on the Connecticut General Assembly's allegedly exclusive right to regulate commerce. *Compl.*, p. 13-14. Moreover, Plaintiff's Third, Sixth and Eighth Claims rely, in whole or in part, on the Connecticut Constitution. *Compl.*, p. 15-20.

[5] Notably, "*Pullman* abstention does not necessarily involve an ongoing state proceeding" and therefore can apply even though there is no enforcement action in this case. *Abrams*, 930 F.2d at 182.

Second Circuit has recognized that where unclear issues of state law are presented, this Court "must abstain from [exercising its] . . . equity jurisdiction when a federal constitutional ruling could be avoided 'by a controlling decision of a state court,' and a state court decision can be pursued consistent 'with full protection of the constitutional claim.'" *Id.*, quoting *Pullman*, 312 U.S. at 500-01. That is the case here.

First, as to the requirement that the state law issues be unclear, New York law precludes Plaintiff from establishing standing to bring this action and Connecticut Supreme Court precedent forecloses Plaintiff's Connecticut claims. *See supra* Section II (discussing the impediments New York law poses to Plaintiff's standing); *infra* Sections VI & VII (discussing the merits of Plaintiff's claims under Connecticut law). To the extent Plaintiff is able to call those premises into question, the respective states' laws are—at the very least—unclear.

Second, a state court ruling in either state could avoid the need for this Court to address Plaintiff's federal constitutional claims. If the New York courts concluded that Plaintiff is independently precluded from obtaining the investment it seeks, Plaintiff would have no standing to invoke this Court's jurisdiction. If the Connecticut courts agreed with Plaintiff that Rule 5.4 violates Conn. Gen. Stat. § 51-80 and the separation of powers doctrine, the Rule would be invalid and Plaintiff's federal constitutional challenges would be moot.

Third, there is no evident reason why state courts could not protect Plaintiff's rights, and therefore abstention is appropriate. That is particularly true given the nature of the state law issues presented. Plaintiff's standing hinges on issues of New York law, and it makes little sense for this Court to address those issues where Plaintiff has also filed an action in the Southern District of New York raising the same issues and the New York Attorney General's Office's

motion to dismiss in that case squarely presents them. *See Jacoby & Meyers Law Offices, LLP v. Presiding Justices*, 11 Civ. 3387 (LAK)(KNF).

In addition, Plaintiff's Connecticut state law claims go to core principles of the separation of powers between Connecticut's judiciary and its legislature. Those are "of vital importance to the State and its governmental functioning," and "[s]tate autonomy and the relationship between state and federal authority would be impaired were the federal courts to" dictate the proper separation of powers among the branches of the state government. *Pineman v. Oechslin*, 637 F.2d 601, 606 (2d Cir. 1981). Under the circumstances, this Court should abstain if it concludes that this case is not otherwise subject to dismissal on jurisdictional grounds. *See Thompson v. ABA*, 2007 U.S. Dist. LEXIS 27808 at *31-35 (D. Conn. 2007) (Droney, J.) (dismissing challenge to Connecticut Practice Book Rule for lack of standing, but noting that if standing were present "this Court would exercise its discretion to abstain from presently deciding [Plaintiff's] challenge to CBEC's implementation of Practice Book § 2-8(4) under *Pullman*").

V. PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF IS STATUTORILY BARRED AND THIS IS NOT AN APPROPRIATE CASE IN WHICH TO ENTER A DECLARATORY JUDGMENT

Although Plaintiff's Complaint does not cite 42 U.S.C. § 1983, that is presumably the basis for its federal claims. Its Prayer for Relief includes eleven paragraphs, eight of which ask this Court to declare that Rule 5.4 violates either state or federal law. *Compl.*, p. 20-21, ¶¶ 1-8. Paragraph 9 asks this Court to issue "[a]n Order enjoining Defendants from enforcing Rule 5.4 with respect to non-lawyer ownership of equity interests in law firms and enjoining Defendants from undertaking any disciplinary or other actions against Jacoby & Meyers for any putative

violations of these provisions of Rule 5.4." *Compl.*, p. 21, ¶ 9.[6]

Plaintiff's request for injunctive relief is statutorily barred.[7] In 1996, the Federal Courts Improvement Act of 1996 ("FCIA"), Pub.L. No. 104-317, 110 Stat. 384742, amended U.S.C. § 1983 to provide, *inter alia*, that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Plaintiff does not allege the violation of any declaratory decree, or that such relief was unavailable. Therefore, this Court must deny Plaintiff's request for injunctive relief. *See, e.g.*, *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (discussing the FCIA); *Brooks v. N.Y. State Supreme Court*, 2002 U.S. Dist. LEXIS 19914, 6-7 (E.D.N.Y. 2002) (holding that § 1983 barred claims for injunctive relief against the New York State Supreme Court).[8]

That leaves Plaintiff's requests for declaratory relief. The Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995), quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952); *see also* 28 U.S.C. § 2201. "[T]he propriety of declaratory relief in a particular case will depend

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[6] The tenth and eleventh paragraphs of Plaintiff's prayer for relief request fees and costs under 42 U.S.C. § 1988(b) and other legal and equitable relief this Court deems just and proper. *Compl.*, p.22 ¶¶ 10-11.

[7] As discussed above, the Eleventh Amendment also bars Plaintiff's claim for injunctive relief, as well as its other claims.

[8] At least one court has held that the FCIA does not bar claims for injunctive relief against Judges in their enforcement capacities. *LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005). However, that decision relied on a Supreme Court decision that was "effectively reversed . . . with regard to injunctive relief with the enactment of the" FCIA. *MacPherson v. Town of Southampton*, 664 F. Supp. 2d 203, 211 (E.D.N.Y. 2009).

upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Id.* (quotation marks omitted). Federal courts "must be alert to avoid imposition of the jurisdiction through obtaining futile or premature interventions, especially in the field of public law." *Wycoff*, 344 U.S. at 243. "A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case." *Id.*

The Declaratory Judgment Act expressly "limits the declaration to cases of actual controversy." *Id.* at 242. As discussed in section II above, Plaintiff cannot establish standing and that requires dismissal of this action. Even if Plaintiff can somehow establish standing, this Court should decline to enter the requested declaratory judgment because "this dispute has not matured to a point where we can see what, if any, concrete controversy will develop." *Id.* at 245. Plaintiff has not alleged that an enforcement action is pending or threatened, nor has it alleged that the Judges of the Superior Court have ever enforced Rule 5.4 under analogous circumstances. As when a party seeks to invoke *Ex Parte Young*, where a party seeks a declaratory judgment "such as this one, which the plaintiff intends as a 'first strike' to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. TWA*, 504 U.S. 374, 382 (1992) (citing *Wycoff*, 344 U.S. at 240-41).

Issuing a declaratory judgment intended to preclude state enforcement under the circumstances would be "incompatible with a proper federal-state relationship" and "[d]eclaratory proceedings in the federal courts against state officials must be decided with regard for our federal system." *Wycoff*, 344 U.S. at 247. "Anticipatory judgment by a federal

court to frustrate action by a state agency is . . . [not] tolerable to our federalism," particularly where the state entity Plaintiff seeks to frustrate is the state's judiciary. *Id.* If and when Defendants take action against Plaintiff, the state courts "afford ample protection" to Plaintiff and "[s]tate courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to [the United States Supreme Court] by certiorari if a state court has allegedly denied a federal right." *Id.* at 247-48.

VI. PLAINTIFF'S FIRST CLAIM SHOULD FAIL BECAUSE CONNECTICUT COURTS HAVE THE INHERENT AUTHORITY TO REGULATE ATTORNEY CONDUCT

Plaintiff correctly acknowledges that "[t]he Connecticut Superior Court possesses inherent authority to regulate attorney conduct and to discipline members of the Connecticut bar," but then claims that Rule 5.4 must "be stricken" because it exceeds the bounds of Conn. Gen. Stat. § 51-80.[9] *Compl.*, ¶ 37, 39. Plaintiff's claim lacks merit.

Article Fifth, § 1 of the Connecticut Constitution provides that: "The judicial power of the state shall be vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law." Thus, "the Supreme Court and the Superior Court are established by the constitution and may be referred to as constitutional courts." *Adams v. Rubinow*, 157 Conn. 150, 156 (1968). The Connecticut Supreme Court has held that "the General Assembly has no power to make rules of administration, practice or procedure which are

[9] Conn. Gen. Stat. § 51-80, entitled "Admission," provides that:

> The Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor, in accordance with the rules established by the judges of the Superior Court. The judges of the Superior Court may establish rules relative to the admission, qualifications, practice and removal of attorneys.

binding on either of the two constitutional courts and that any attempt on its part to exercise such power is dependent, for its efficacy, upon the acquiescence of the constitutional court involved." *Adams v. Rubinow*, 157 Conn. 150, 156 (1968); *see also State v. Clemente*, 166 Conn. 501, 507 (1974) (similar).[10] Therefore, Conn. Gen. Stat. § 51-80 does not limit Defendants' rulemaking authority and Rule 5.4 cannot be held to violate the statute.[11]

VII. PLAINTIFF'S SECOND CLAIM SHOULD FAIL BECAUSE RULE 5.4 IS CONSISTENT WITH CONNECTICUT'S SEPARATION OF POWERS

Plaintiff's Second Claim, entitled "Separation of Powers," is that Rule 5.4 "regulate[s] commerce . . . [and] inappropriately usurps a legislative function reserved for the legislative branch of State government." *Compl.*, p. 14. That claim rests on a flawed premise and is inconsistent with Connecticut law.

Article Second of the Connecticut Constitution governs the "Distribution of powers" and provides that "[t]he powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." The Connecticut Supreme Court has held that the separation of powers doctrine rising out of that provision "serves a dual function: it limits the exercise of power within each branch yet ensures the independent exercise of that power." *Massameno v. Statewide Grievance Comm.*, 234 Conn.

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[10] In contrast to "the federal system of government, [in which] the legislative branch has long been held to have the power to make rules of court," the Connecticut Supreme Court has long-recognized that "the power to make rules of court was vested in the judiciary." *Clemente*, 166 Conn. at 511 n.5.

[11] Of course, to the extent Connecticut law on this issue could somehow be seen as unclear, this Court should abstain from exercising its jurisdiction for the reasons discussed in section IV above.

539, 552 (1995). "Nevertheless, it cannot be rigidly applied always to render mutually exclusive the roles of each branch of government." *Id.* Rather, the Court has

> recognized, [that] "the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers, of necessity overlap each other, and cover many acts which are in their nature common to more than one department."

Id. (quotation marks omitted). A Rule violates the separation of powers only if it "(1) confers on one branch of government the duties which belong exclusively to another branch . . . or (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions." *Honulik v. Town of Greenwich*, 293 Conn. 641, 650 (2009) (quotation marks omitted).

Those circumstances are not present here.[12] The Connecticut Supreme Court has held—and Plaintiff expressly acknowledges in its Complaint—that "[t]he Connecticut Superior Court possesses inherent authority to regulate attorney conduct and to discipline members of the Connecticut bar." *Compl.*, ¶ 36; *see, e.g.*, *Statewide Griev. Comm. v. Burton*, 282 Conn. 1, 7 (2007) ("The Superior Court possesses inherent authority to regulate attorney conduct and to discipline the members of the bar . . ." (quotation marks omitted)). There can be no reasonable question that an attorney obtaining non-lawyer investment in a law firm is engaging in "attorney conduct." Therefore, the regulation of non-lawyer investment is not a "dut[y] which belong[s] exclusively to another branch." *Honulik*, 293 Conn. at 650 (quotation marks omitted).

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[12] It is evident that Rule 5.4 does not confer the duties of one branch of government on another branch. Therefore, this analysis will focus on whether the Rule encroaches on exclusively legislative duties.

Although Plaintiff correctly recognizes the judiciary's inherent authority "to regulate attorney conduct," it appears to assert that Rule 5.4 violates the separation of powers because the Rule relates to commerce. *Compl.*, ¶¶ 43-44. In contrast to the federal Constitution, however, no provision of the Connecticut Constitution gives the legislature the exclusive authority to regulate commerce. *Cf. Seymour v. Elections Enforcement Comm'n*, 255 Conn. 78, 106-107 (2000) (declining to follow federal precedent on separation of powers issue, and holding that absence of a "parallel clause in the Connecticut constitution" was "fatal to the plaintiffs' argument").

Even if it did, any overlap between Rule 5.4 and the legislature's authority to regulate commerce would not render Rule 5.4 unconstitutional. For example, the Connecticut Supreme Court has recognized that the judiciary has exclusive control over regulating attorney conduct but has also held that statutes exposing attorneys to liability for their conduct are constitutional because "[i]t is no derogation of the judiciary's power over attorneys to recognize that such power is not, in every respect, an exclusive one." *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 524 (1983). Similarly here, even if the General Assembly had the exclusive authority to regulate commerce, Rule 5.4 would not be an unconstitutional derogation of that power. To hold otherwise would be to ignore that Connecticut's separation of powers doctrine "cannot be rigidly applied always to render mutually exclusive the roles of each branch of government." *Massameno*, 234 Conn. at 552.[13]

[13] As discussed in section IV above, to the extent Connecticut law on this issue could somehow be seen as unclear, this Court should abstain from exercising its jurisdiction.

VIII. RULE 5.4 IS NOT UNCONSTITUTIONALLY VAGUE

Plaintiff's Third Claim alleges that Rule 5.4 is void for vagueness "under the Constitution of the United States and the Connecticut State Constitution." *Compl.*, ¶¶ 47-50. The gravamen of Plaintiff's claim appears to be that, although it is clear that Plaintiff's proposed conduct would violate Rule 5.4, defining the term "practice" to include what Plaintiff perceives as "commerce . . . is to apply a definition so vague as to render the term devoid of meaning" and runs the risk that "any human endeavor, or thought, could be drawn into the maelstrom of 'practice,' if the judiciary wished it to be so." *Compl.*, ¶ 49. That claim lacks any merit.

As a threshold matter, Plaintiff's challenge to the Rule is a facial one. *See, e.g.*, *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (holding that "as the unauthorized practice rule has not been applied to the plaintiffs' conduct, it may not be challenged as applied"). "Facial challenges are generally disfavored." *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010). The Second Circuit has recognized "several rationales" for limiting them, including that the issues may not be "concrete and sharply presented," and that they "often rest on speculation." *Id.* (quotation marks omitted). In addition, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quotation marks omitted).

In light of those concerns, courts have permitted facial challenges "particularly—and perhaps only—when the claims are based on the assertion of a First Amendment right." *Id.* at 742. Although Plaintiff claims that Rule 5.4 interferes with its First Amendment rights, section

XIII below establishes that this case does not present a valid First Amendment issue.[14] Therefore, Plaintiff should not be able to pursue its Void for Vagueness claim, given the Second Circuit's recent recognition that "[w]hether a facial void-for-vagueness challenge can be maintained when, as here, a challenge is not properly based on the First Amendment is unsettled" and that its prior panel decisions have held "that if a statute does not implicate the First Amendment, a vagueness challenge can only be brought as applied." *Dickerson*, 604 F.3d at 743 & n.10.

In any event, Plaintiff's Void for Vagueness claim should fail even if it is not *per se* barred. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). As a result, "[t]he 'void-for-vagueness' doctrine is chiefly applied to criminal legislation . . . laws with civil consequences receive less exacting vagueness scrutiny." *Arriaga v. Mukasey*, 521 F.3d 219, 222-23 (2d Cir. 2008). "[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* "Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* "The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the

[14] Even if Plaintiff did raise a valid First Amendment issue, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (quotation marks omitted). For the reasons discussed herein, Plaintiff's challenge to Rule 5.4 would fail even under the "more stringent vagueness test" that applies in the First Amendment context. *Id.*

consequences of imprecision are qualitatively less severe." *Id.* at 498-99.

Those considerations militate against finding Rule 5.4 unconstitutionally vague. Plaintiff's concerns are purely economic, and a law firm—even more than an ordinary business—can be expected to consider the Rules of Professional Conduct before it takes action. In fact this case, and Plaintiff's other cases challenging comparable rules in New Jersey and New York, establish that Plaintiff considered the Rules before obtaining the investments it asks this Court to validate.

To prevail on its facial challenge to the Rule, Plaintiff's "complainant must demonstrate that the law is impermissibly vague in all its applications." *Id.* at 497. Plaintiff alleges that it wants to permit non-lawyers to acquire interests in the firm. Plaintiff does not allege that it is unclear whether Rule 5.4 applies to Plaintiff's proposed conduct. Instead, Plaintiff recognizes that "[a]s a result of this rule, Jacoby & Meyers cannot allow a non-lawyer to acquire or own an interest in the legal entity (i.e. the law firm) through which it provides legal services to its clients." *Compl.*, ¶ 16. That is "dispositive"—the Rule is "clear in [its] application to plaintiff[']s proposed conduct, which means that [its] vagueness challenge must fail." *Holder*, 130 S. Ct. at 2720.

IX. RULE 5.4 DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Plaintiff's Fifth Claim alleges that Rule 5.4 violates the dormant Commerce Clause because, by prohibiting Plaintiff "from obtaining the necessary capital infusion from non-lawyer investors required to fund and expand" its operations, the Rule "discriminates against interstate commerce and/or excessively burdens interstate commerce relative to any putative local benefit

it might otherwise advance." *Compl.*, ¶ 53. Plaintiff's claim should fail for several reasons.

As a threshold matter, the regulation of attorneys is—and historically has been—a state government function. The United States Supreme Court has held that "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 341 (2008) (quotation marks omitted). Instead, federal courts "should be particularly hesitant to interfere with [state government functions] . . . under the guise of the Commerce Clause." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007).

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337-338 (quotation marks omitted). Thus, the Court's first step is to "ask whether a challenged law discriminates against interstate commerce." *Id.* at 338. Although Plaintiff alleges that Rule 5.4 discriminates against interstate commerce, it is difficult to see the basis for that allegation. The Rule treats in-state attorneys "exactly the same as out-of-state ones." *United Haulers*, 550 U.S. at 345. Therefore, the Rule easily satisfies the first part of the dormant Commerce Clause analysis.

Given that the challenged Rule is non-discriminatory, the next step in the analysis is to apply the *Pike* rule, which states that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Rule 5.4 easily survives *Pike* analysis. "The party challenging a law as . . . violative of *Pike* bears the threshold burden of demonstrating that it has a disparate impact on interstate commerce—'[t]he fact that it may otherwise affect commerce is not sufficient.'" *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007), quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998). Put differently, to violate the dormant Commerce Clause, the Rule, "at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004). "[I]f no such unequal burden be shown, a reviewing court need not proceed further." *Id.* at 217-18 (quotation marks omitted). That is because "the similar effect on interstate and intrastate interests assuage[es] the concern that the statute is designed to favor local interests." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003). Plaintiff does not allege an unequal burden, nor could it do so since every state in the nation has adopted the same rule as Connecticut. Consequently, Plaintiff's claim must fail.

Even if Plaintiff could somehow show that the Rule imposes an unequal burden, the Court would need to "consider (1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits." *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). Each of those factors weighs against Plaintiff's claim.

As detailed in the Background section above, Rule 5.4 advances several important benefits in an area traditionally controlled by the State. *See, e.g., Middlesex County Ethics*

Comm'n v. Garden State Bar Ass'n, 457 U.S. 432-33 (1982) (recognizing the "important state obligation to regulate persons who are authorized to practice law"). It protects attorneys' professional independence by preventing outside interests from diluting or diminishing the lawyer's duties and loyalties to the client. Rule 5.4 also ensures that all persons having an ownership interest in a law firm are subject to the rules that Connecticut has prescribed for the practice of law and that the confidential nature of the attorney-client relationship is maintained. By contrast, it imposes little or no burden on interstate commerce. On balance, it is evident that any such burden is not "clearly excessive" when weighed against the benefits Rule 5.4 is intended to advance.

Plaintiff invites this Court to question whether Rule 5.4 is necessary, and claims that where limitations on non-attorney investment have been lifted "the parade of horrors predicted by critics of non-lawyer investment in law firms has not materialized." *Compl.*, ¶ 31. That is a naked plea for this Court to substitute its judgment for that of the judicial systems "in virtually every jurisdiction in the United States." *Id.* at ¶ 13. This Court should reject that plea—it is well-established that courts conducting dormant Commerce Clause analysis "will not second guess the empirical judgment of lawmakers concerning the utility of legislation." *Pataki*, 320 F.3d at 217 (quotation marks omitted). Plaintiffs—and this Court—"may or may not agree with [Connecticut's] approach, but nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary." *United Haulers,* 550 U.S. at 344-45. On balance, it is clear that Rule 5.4 does not discriminate against interstate commerce and that Plaintiff's dormant Commerce Clause claim should fail.

X. RULE 5.4 DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Plaintiff's Due Process claim, like most of its other claims, is nothing more than a plea for this Court to second guess Defendants' policy choices in an area that is within their exclusive jurisdiction. This Court should reject that request.

It is well established that legislative acts regulating economic and professional activity "come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Pension Ben. Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984). This standard is a "paradigm of judicial restraint" that "is very difficult to overcome . . . ." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993); *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997). Legislation will survive rational basis review if it is "supported by a legitimate legislative purpose furthered by rational means." *Gray*, 467 U.S. at 729. In conducting such review, the court need only find "'plausible reasons' for [the] legislative action, whether or not such reasons underlay the legislature's action." *Beatie*, 123 F.3d at 712, citing *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Thus, it is well established that this Court cannot "strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish [or] because the problem could have been better addressed in some other way." *Id.* Similarly, legislation does not violate due process merely because "no empirical evidence supports the assumptions underlying the legislative choice." *Id.* Rather, "[s]o long as they do not burden fundamental rights or single out suspect classifications, lawmakers are free to engage in 'rational speculation unsupported by evidence.'" *Id.*, quoting *FCC v. Beach Communications*, 508 U.S. 307, 315

(1993).

Rule 5.4 clearly satisfies this extremely deferential standard. First, it is well established that the State has a strong interest in regulating the "practice of professions" within its boundaries. *In re Primus*, 436 U.S. 412, 422 (1978). That interest is "especially great" for the legal profession, "since lawyers are essential to the primary governmental function of administering justice." *Id.* Rule 5.4 in particular exists, among other things, to: (1) ensure attorneys' professional independence and prevent outside interests from diluting or diminishing the lawyer's duties and loyalties to the client: (2) ensure that all persons having an ownership interest in a law firm are subject to the rules that Connecticut has prescribed for the practice of law; and (3) ensure that the confidential nature of the attorney-client relationship is maintained. There can be no question that these are legitimate state interests. *In re Primus*, 436 U.S. at 422; *see Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1385 (7th Cir. 1992) (the "state's interest in preserving the professional independence of lawyers is an adequate justification . . . and is within the legitimate interest of the state in governing the legal profession").

Second, although Plaintiff alleges that experiences in Australia and the United Kingdom demonstrate that there are other less burdensome ways to achieve the state interests described above, such allegations are absolutely irrelevant. *See Compl.* ¶¶ 28-32. This Court cannot strike down Rule 5.4 simply "because it may not succeed in bringing about the result it seeks to accomplish [or] because the problem could have been better addressed in some other way." *Beatie*, 123 F.3d at 712. Plaintiff has not alleged any facts to demonstrate that Rule 5.4 goes so far as to be deemed irrational, nor can it do so given that every other state in the nation has

adopted it. Neither Plaintiff nor this Court may second guess Defendants' policy choice.[15] *Lawline*, 956 F.2d at 1386.

XI. RULE 5.4 DOES NOT EFFECT A TAKING OF PLAINTIFF'S PROPERTY

Plaintiff's claim under the Takings Clause lacks merit and should be dismissed because: (1) it is not ripe; (2) Plaintiff does not have a vested property right to potential investments from non-lawyers; (3) Rule 5.4 passes constitutional muster under the deferential regulatory taking analysis; and (4) Plaintiff does not seek relief that is available under the Takings Clause.

First, it is established in this Circuit that "before a plaintiff may assert a federal takings claim, he must first seek compensation from the state if the state has a reasonable, certain and adequate provision for obtaining compensation." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 379-80 (2d Cir. 1995). Thus, a federal takings claim "is not ripe if a remedy potentially is available under the state constitution's provision." *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 109 (2d Cir. 2009) (quotation marks omitted). Because Plaintiff has not sought relief in state court under Connecticut's Taking Clause—Article First, Section 11—its taking claim is not ripe.

Second, "[i]t is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008). "[T]o have a protected property right, [one] must have a 'clear entitlement' to the

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[15] Plaintiff alludes to the possibility that Rule 5.4 impinges on a fundamental right, but does not allege what that unidentified right actually is. *See Compl.* ¶ 58. To the extent that Plaintiff intends to raise such a claim, it is insufficiently pled. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 1954 (2009). Such a claim lacks merit in any event because there is no fundamental right to engage in the practice of law. *See, e.g., Gallo v. U.S. Dist. Ct. For Dist. of Ariz.*, 349 F.3d 1169, 1179 n.4 (9th Cir. 2003) ("there is no fundamental right to practice law and lawyers are not a suspect class"); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1114 (3d Cir. 1997) ("The Supreme Court has indicated that the right to practice law is not a fundamental right for the purposes of the Fourteenth Amendment").

[property interest]." *Carr v. Bridgewater*, 224 Conn. 44, 41, (1992); *see Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (only a "legitimate claim of entitlement" may establish a property right"). That interest must be vested at the time of the alleged taking, and cannot be a mere expectant or contingent right. *Bryant v. Hackett*, 118 Conn. 233, 241 (1934). Thus, "a mere unilateral expectation or an abstract need is not a property interest entitled to protection" under the Takings Clause. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

In this case, Plaintiff has not alleged that any of its own property has been taken. To the contrary, the only "property" identified in the complaint is the potential investments that Plaintiff hopes to obtain from non-lawyers in the future. Plaintiff obviously does not have a clear entitlement to such investments, the receipt of which is dependent on the voluntary choices of third party investors, the elimination of a Rule of Professional Conduct that has existed for decades, and the elimination of other impediments that New York law poses to such investments. Plaintiff's "unilateral expectation" and "abstract need" for investments from non-lawyers simply does not constitute a property interest that is protected by the Takings Clause. *See Webb's Fabulous Pharmacies*, 449 U.S. at 161.

Third, even if a valid property interest is at stake in this case, Plaintiff fails to state a claim that Rule 5.4 effects a regulatory taking of that property. In the context of this case—which involves a regulation of Plaintiff's economic activity—a regulatory taking can occur only if: (1) the "character of the governmental action" is impermissible; (2) the economic impact of the regulation on the claimant is unrelated to its conduct and participation in the regulatory scheme; and (3) the regulation "interfere[s] with distinct investment-backed expectations." *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 225-27 (1986) (internal quotation

marks omitted). None of those factors is remotely satisfied here.

With regard to the first prong, Plaintiff disputes the wisdom of Rule 5.4 but does not, and cannot, dispute that the Rule's purpose—to maintain professional independence and loyalty to their clients—is entirely appropriate. Rule 5.4 is thus part of a "public program that adjusts the benefits and burdens of economic life to promote the common good" and was adopted for a permissible purpose under the Takings Clause. *Id.* at 225.

With regard to the second prong, Plaintiff has not suffered any economic harm at all because Rule 5.4 does not deprive it of any of its own property. To the extent that Plaintiff's conclusory allegation that Rule 5.4 impacts the "going concern" valuation of its business implicates a cognizable economic harm, it is insufficient to demonstrate a taking. The Supreme Court has made clear that a "mere diminution in the value of [a company's net worth], however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993). Absent a total loss of net worth, therefore, economic impacts on businesses in a regulated field are permissible as long as they are related to the businesses' economic activity and are a "necessary consequence" of the regulatory scheme. *See Id.* at 645 (regulation that deprived business of 46% of its net worth did not effect taking); *Connolly*, 475 U.S. at 222, 225-26 (upholding regulation that deprived business of 25% of its net worth). This requirement clearly is satisfied here, since Plaintiff does not allege that the value of its business has been reduced at all and instead merely alleges that it has been prevented from expanding its business. More importantly, any economic impact that Rule 5.4 has is permissible as a direct and necessary consequence of Plaintiff's choice to operate as a for-profit law firm.

Finally, under the third prong, Rule 5.4 clearly does not interfere with any of Plaintiff's

investment backed expectations. The substantive requirements of Rule 5.4 have existed for almost forty years and Plaintiff, like many other law firms in Connecticut, has been subject to the Rule's requirements ever since it began doing business in Connecticut.[16] The **only** expectation that Plaintiff has ever had, therefore, is that it **cannot** accept investments from non-lawyers. Any claim that Rule 5.4 interferes with Plaintiff's investment backed expectations is patently absurd.

Fourth, even if Plaintiff had stated a claim for a regulatory taking of its property, this Court nevertheless should dismiss Count 6 because Plaintiff does not seek relief that is available under the Takings Clause. It is well established that the Takings Clause does not limit the government's power to regulate or take property for a public use, and instead merely requires the government to provide "just compensation" when it does so. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2617 (2010) (Kennedy, J. concurring); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987). Because the Takings Clause does not restrict the government's power to act, therefore, "a party who suffers a taking is only entitled to damages, not equitable relief." *Stop the Beach Renourishment*, 130 S. Ct. at 2617 (Kennedy, J. concurring).

Here, Plaintiff does not seek money damages as "just compensation." Instead, Plaintiff seeks "[a]n order declaring that Rule 5.4 . . . effects a regulatory taking" and "[a]n order enjoining Defendants from enforcing Rule 5.4." *Compl.*, Prayer for Relief ¶¶ 6, 9. Such relief is

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[16] Because Plaintiff has not registered with the Secretary of State as it is required by law to do, it is unclear exactly when Plaintiff began doing business in Connecticut. *See* Footnote 2 of this Memorandum. Plaintiff, however, alleges that it was founded in California in 1972. *Compl.*, ¶ 17. Disciplinary Rule 3-103—the precursor to Rule 5.4—was adopted in that same year and provided that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." *Tolland Grievance Committee v. Bates*, No. 34498 at 1 n.1, 8 (Conn. Super. Dec. 30, 1985).

not available under the Takings Clause.[17]

XII. RULE 5.4 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Plaintiff's Equal Protection claim lacks merit and the Court should reject it. Plaintiff does not allege that Rule 5.4 impacts any fundamental rights protected by the Equal Protection Clause or that it draws any suspect classifications. Like its due process claim, therefore, Plaintiff's equal protection claim is subject to "rational basis" review. *Beatie*, 123 F.3d at 712. In conducting that review, this Court must "presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see Beatie*, 123 F.3d at 711. "[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." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955). For the reasons stated in Section X above, which need not be restated here, Rule 5.4 easily satisfies this standard. *See In re Primus*, 436 U.S. 412, 422 (1978) (State's compelling interest); *Lawline*, 956 F.2d at 1386 (Rule 5.4 is rational).

Even if Rule 5.4 did not have rational basis, however, Plaintiff's claim still fails because Plaintiff cannot satisfy the basic equal protection requirement that Rule 5.4 treats similarly situated persons differently. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994). To satisfy this requirement, Plaintiff attempts to analogize itself to "other professions in

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[17] In addition, the Eleventh Amendment bars Plaintiff's request for declaratory relief holding that Defendants effected a taking because "the result would be a partial 'end run' around" the prohibition on awards of money damages against the state. *See Green v. Mansour*, 474 U.S. 64, 73 (1985); *see also Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008) (holding that the Eleventh Amendment bars claims under the Takings Clause).

Connecticut" and, in particular, to investment bankers. *Compl.*, ¶¶ 66-68. Attorneys, however, are not in any way "similarly situated" to investment bankers. Among other things, the two professions provide different services for different purposes and are governed by an entirely distinct set of legal and ethical regulations that are promulgated by different legislative bodies.

More fundamentally, attorneys serve a unique function in society that requires that they be subject to different ethical and professional constraints. Specifically, lawyers are "officers of the courts" and "are essential to the primary governmental function of administering justice." *In re Primus*, 436 U.S. at 422. This societal role clearly distinguishes lawyers from other professionals, including investment bankers. Because Rule 5.4 treats all lawyers and law firms doing business in Connecticut in exactly the same way, it does not treat "similarly situated" individuals differently and therefore does not violate the Equal Protection Clause.

XIII. RULE 5.4 DOES NOT VIOLATE THE FIRST AMENDMENT

This Court should dismiss Count 8 because the purely commercial associations that Rule 5.4 impacts are entitled to only minimal constitutional protection.

As discussed above, due to the nature of the legal profession and its fundamental role in administering "the primary governmental function of administering justice," the practice of law traditionally has been subject to pervasive governmental regulation. *In re Primus*, 436 U.S. 412, 422 (1978). To balance this compelling regulatory interest with the need to protect core First Amendment values, the Supreme Court has drawn distinctions between the type of speech or association that lawyers seek to engage in to determine the extent to which it is protected by the First Amendment. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S.447, 455–56 (1978).

Regulations that impact the core values of political speech and political association

implicate interests that are entitled to substantial protection under the First Amendment. *See In re Primus*, 436 U.S. at 428, 431-32. Thus, regulations of the legal profession that restrict "the basic right to group legal action . . . to obtain meaningful access to the courts" are subject to strict scrutiny. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *see United Mine Workers of America, District 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

By contrast, "ordinary law practice for commercial ends has never been given special First Amendment protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J. concurring). To the contrary, "[t]here is only minimal constitutional protection of the freedom of *commercial* association," and restrictions on such associations are permissible under the First Amendment if they are "rationally related" to a legitimate state interest. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 473 n.16 (1997), quoting *Roberts*, 468 U.S. at 634, 635 (O'Connor, J. concurring) (emphasis in original); *see also U.S. v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) ("commercial transactions do not entail the same rights of association as political meetings"). The Supreme Court has held, for example, that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Ohralik*, 436 U.S. at 459.

Applying these principles, the Seventh Circuit had no difficulty rejecting a First Amendment challenge to Illinois' version of Rule 5.4. *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1387 (7th Cir. 1992). In doing so, the court emphasized that laypersons do not have a right to associate with lawyers in the abstract, and vice versa. Rather, under Supreme Court

precedent, "laypersons have a right to obtain meaningful access to the courts, and to enter into associations with lawyers to effectuate that end." *Id.* Because the plaintiffs in that case failed to demonstrate that Rule 5.4 prohibited them or their clients from gaining access to the courts or associating with lawyers to pursue goals independently protected by the First Amendment, the court concluded that the rule survived constitutional scrutiny. *Id.*

Similarly here, Rule 5.4 does not impinge on any of the core values that are protected by the First Amendment. Plaintiff does not allege, for example, that Rule 5.4 prevents it from associating with any specific individuals who wish to gain access to the courts to advance their political beliefs or ideas.[18] Nor does Plaintiff allege that Rule 5.4 restricts Plaintiff's—or anybody else's—ability to engage in political speech or associate for political purposes. Rather, Plaintiff alleges that, by restricting its ability to obtain investments from non-lawyers, Rule 5.4 denies Plaintiff and those hypothetical investors of a "mutual benefit" and limits Plaintiff's ability to "expand and grow [its] legal practice." *Compl.*, ¶¶ 72, 73. These purely commercial and financial impacts do not implicate core First Amendment values and are therefore entitled to only "minimal constitutional protection." *Glickman*, 521 U.S. at 473 n.16. Because Rule 5.4 is an eminently rational way to achieve the State's compelling interest in regulating the legal profession, Rule 5.4 does not violate the First Amendment. *Lawline*, 956 F.2d at 1387.

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[18] Plaintiff baldly asserts that Rule 5.4 restricts the general public's access to the courts in general. *See Compl.*, ¶ 72. This conclusory allegation is insufficient to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 1954 (2009). In any event, such an allegation lacks merit and was flatly rejected in *Lawline* because there is no basis upon which to conclude that "laypersons will be deprived of meaningful access to the courts if lawyers are unable to form partnerships with laypersons." *See Lawline*, 956 F.2d at 1387. To the contrary, Rule 5.4 exists in every state—and has existed for decades—and individuals throughout the country are, and have been, able to obtain access to the courts on a daily basis despite its requirements.

XIV. CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion and dismiss this action in its entirety.

Respectfully Submitted,

DEFENDANTS, JUDGES OF THE CONNECTICUT SUPERIOR COURT

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2011, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Michael K. Skold
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