No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

---

CAPITAL ASSOCIATED INDUSTRIES, INC.,

*Applicant*,

*v.*

JOSH STEIN, in his official capacity as Attorney General of the State of North Carolina; NANCY LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina; J. DOUGLAS HENDERSON, in his official capacity as District Attorney for the 18th Prosecutorial District of the State of North Carolina,

and

NORTH CAROLINA STATE BAR,

*Respondents.*

---

**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS**

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to this Court's Rule 13.5, applicant Capital Associated Industries respectfully requests a 43-day extension of time, to and including August 30, 2019, in which to file a petition for a writ of certiorari in this case.[1] The United States Court of Appeals for the Fourth Circuit entered judgment on April 19, 2019. App. A, *infra*. Absent an extension, therefore, a petition for a writ of certiorari would be due on July 18, 2019.

---

[1] Applicant does not have any parent corporation, and no publicly held company owns 10% or more of its stock.

1. Capital Associated Industries is a trade association of employers in North Carolina that seeks to improve employment relations across the state. North Carolina's unauthorized practice of law statutes forbid Capital Associated Industries from employing licensed attorneys who would offer legal services to its members to further the association's mission.

2. After the North Carolina State Bar adopted an ethics opinion advising that Capital Associated Industries would violate the unauthorized practice of law statutes if it employed lawyers who gave legal advice to its members, Capital Associated Industries brought this lawsuit, naming the North Carolina Attorney General and certain district attorneys as defendants. The North Carolina State Bar intervened as a defendant.

3. The district court granted summary judgment to the defendants, concluding that enforcement of the unauthorized practice of law statutes against Capital Associated Industries would not violate the First Amendment. App. B, *infra.*

4. The court of appeals affirmed the denial on appeal. The court of appeals acknowledged that the case presented an "admittedly close" question of interpreting this Court's precedent regarding the First Amendment freedom of association. App. A at 205; *see In re Primus*, 436 U.S. 412 (1978); *Bhd. of R.R. Trainmen v. Va. Ex rel. Va. State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971). The court also determined that North Carolina's unauthorized practice of law statute is a regulation of professional conduct that incidentally burdens speech, and that the law need only pass intermediate scrutiny. App. A at 207; *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

5. Since the decision below was issued, Applicant has been considering whether to seek this Court's review. Having recently determined that seeking the review of this Court is warranted

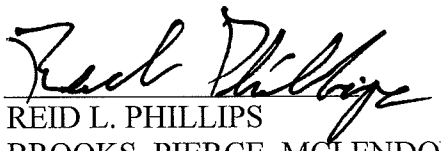
and appropriate, Applicant respectfully requests additional time to prepare and print the petition. The additional time is necessary because of deadlines in other cases for which the undersigned counsel are also responsible.

6. This Court would have jurisdiction pursuant to 28 U.S.C. § 1254(1).

7. The requested extension would not result in unfair prejudice to Defendants. Even if the extension is granted and this Court were to grant certiorari, the case would likely be heard and decided by the Court in the upcoming Term.

For the foregoing reasons, Capital Associated Industries respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended to and including August 30, 2019.

Respectfully submitted.



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June 10, 2019

**PROOF OF SERVICE**

I hereby certify that on June 10, 2019, I caused copies of the foregoing Application for Extension of Time in Which to File a Petition for a Writ of Certiorari to the Fourth Circuit to be served on the following by first-class mail, postage prepaid, and electronic mail as required by the Rules of this Court:

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No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

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CAPITAL ASSOCIATED INDUSTRIES, INC.,

*Applicant*,

*v.*

JOSH STEIN, in his official capacity as Attorney General of the State of North Carolina; NANCY LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina; J. DOUGLAS HENDERSON, in his official capacity as District Attorney for the 18th Prosecutorial District of the State of North Carolina,

and

NORTH CAROLINA STATE BAR,

*Respondents.*

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**APPENDIX**

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A. Decision by the United States Court of Appeals for the Fourth Circuit (Apr. 19, 2019)

B. Summary Judgment Decision by the United States District Court for the Middle District of North Carolina (Sept. 19, 2017)

# A

922 F.3d 198
United States Court of Appeals, Fourth Circuit.

CAPITAL ASSOCIATED INDUSTRIES, INCORPORATED, Plaintiff – Appellant,
v.
Josh STEIN, in his official capacity as Attorney General of the State of North Carolina; Nancy Lorrin Freeman, In her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina; J. Douglas Henderson, In his official capacity as District Attorney for the 18th Prosecutorial District of the State of North Carolina, Defendants – Appellees,
and
North Carolina State Bar, Intervenor/Defendant – Appellee.

No. 17-2218
|
Argued: December 13, 2018
|
Decided: April 19, 2019

**Synopsis**

**Background:** Trade association representing North Carolina employers, which sought to provide legal services for its members, brought action against North Carolina prosecutors, alleging that enforcement of North Carolina's unauthorized practice of law statutes against association was unconstitutional and seeking declaratory and injunctive relief. After North Carolina State Bar intervened as a defendant, the United States District Court for the Middle District of North Carolina, 283 F.Supp.3d 374, granted summary judgment in favor of defendants. Association appealed.

**Holdings:** The Court of Appeals, Diaz, Circuit Judge, held that:

[1] the statutes did not violate association's associational rights under the First Amendment;

[2] ban on practice of law by corporations was a professional conduct regulation that incidentally effected speech;

[3] intermediate scrutiny was appropriate standard for reviewing free speech challenge to statutes;

[4] statutes satisfied intermediate scrutiny under First Amendment;

[5] statutes survived rational basis review under Due Process Clause; and

[6] statutes were not unconstitutionally vague.

Affirmed.

West Headnotes (24)

**[1] Federal Courts**
Determination of question of jurisdiction

Even if the parties briefs do not address standing, the Court of Appeals must assure itself of its jurisdiction.

Cases that cite this headnote

**[2] Corporations and Business Organizations**
Persons entitled to sue;standing

**Declaratory Judgment**
Subjects of relief in general

Trade association representing North Carolina employers, which sought to provide legal services for its members, had standing to bring action against North Carolina prosecutors for declaratory and injunctive relief that would prevent enforcement of North Carolina's unauthorized practice of law statutes against association; association faced a credible threat of prosecution, that injury was traceable to the prosecutors, and enjoining enforcement of the statutes would provide association relief. N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

**[3] Federal Courts**

⇦ Summary judgment

Court of Appeals reviews the district court's grant of summary judgment de novo.

Cases that cite this headnote

[4] **Federal Courts**

⇦ Summary judgment

**Federal Courts**

⇦ Summary judgment

When reviewing a grant of summary judgment, the Court of Appeals applies the same legal standards as the district court, and views all facts in the light most favorable to the nonmoving party.

Cases that cite this headnote

[5] **Constitutional Law**

⇦ Invalidity as applied

"As-applied" challenges test the constitutionality of a statute applied to the plaintiff based on the record.

Cases that cite this headnote

[6] **Federal Courts**

⇦ Constitutional questions

Trade association representing North Carolina employers preserved for appellate review its argument that North Carolina's unauthorized practice of law statutes infringed on its rights as an expressive association; although association largely omitted term "expressive association" before district court, its argument fell within expressive association jurisprudence and district court ruled on the issue. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

[7] **Attorney and Client**

⇦ Constitutional and statutory provisions

**Constitutional Law**

⇦ Freedom of Association

North Carolina's unauthorized practice of law statutes, which barred corporations from practicing law, did not unconstitutionally restrict associational rights of trade association, which represented North Carolina employers and sought to provide legal services for its members; association sought to practice law in order to increase revenues and attract new members, not to express a message, allowing association to practice law would not facilitate access to courts, and association's proposed practice of law could compromise independence and professional judgment of lawyers involved. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

[8] **Constitutional Law**

⇦ Trade or Business

Under the First Amendment, there is more deferential review for requirements that professionals disclose factual, noncontroversial information in their commercial speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**

⇦ Trade or Business

States may regulate professional conduct without violating the First Amendment, even though that conduct incidentally involves speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**

⇦ Unlicensed practice of law

North Carolina's statutory ban on practice of law by corporations amounted to a professional regulation that incidentally affected speech, thus warranting a more deferential review under the First Amendment; ban was part of a generally applicable licensing regime that restricted practice of law to bar members and

entities owned by bar members, and while practice of law had communicative and non-communicative aspects, North Carolina's unauthorized practice of law statutes focused on question of who could conduct themselves as a lawyer, not the communicative aspects of practicing law. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

[11] **Constitutional Law**
⇦ Strict or exacting scrutiny;compelling interest test

Content-based restrictions ordinarily receive strict scrutiny under the First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
⇦ Trade or Business

Intermediate scrutiny is the appropriate standard for free speech challenges to professional conduct regulations that incidentally impact speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
⇦ Intermediate scrutiny

To survive intermediate scrutiny in a First Amendment case, the defendant must show a substantial state interest and a solution that is sufficiently drawn to protect that interest. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] **Attorney and Client**
⇦ Constitutional and statutory provisions

**Constitutional Law**
⇦ Unlicensed practice of law

North Carolina's unauthorized practice of law statutes, which barred corporations from practicing law, were sufficiently drawn to state's substantial interest in regulating the legal profession to protect clients and, thus, survived intermediate scrutiny review under the First Amendment Free Speech Clause; professional integrity could suffer if lawyers were allowed to practice on behalf of organizations owned and run by nonlawyers, and state addressed such problems by proscribing law practice by organizations that posed the most danger, while exempting organizations, such as professional corporations owned exclusively by lawyers and public interest law firms, that posed little danger. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 55B-4(2), 84-5(a), 84-7, 84-8(a), 84-37, 84-5.1.

Cases that cite this headnote

[15] **Constitutional Law**
⇦ Intermediate scrutiny

Under the First Amendment, intermediate scrutiny requires only a reasonable fit between the challenged regulation and the state's interest, not the least restrictive means. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
⇦ Reasonableness, rationality, and relationship to object

To pass muster under rational basis review, legislation challenged on due process grounds need only be rationally related to a legitimate government interest. U.S. Const. Amend. 14.

Cases that cite this headnote

[17] **Attorney and Client**
⇦ Constitutional and statutory provisions

**Constitutional Law**
⇦ Admission and examination

North Carolina had a rational basis for enacting its unauthorized practice of law statutes, which barred corporations from practicing law, and thus statutes did not

violate due process; there was a rational basis to restrict corporate ownership of professional businesses to protect consumers, and availability of less restrictive means was irrelevant for purposes of rational basis review. U.S. Const. Amend. 14; N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

[18] **Constitutional Law**
⇐ Certainty and definiteness;vagueness

A statute is unconstitutionally vague under the Due Process Clause if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S. Const. Amend. 14.

Cases that cite this headnote

[19] **Constitutional Law**
⇐ Certainty and definiteness;vagueness

To determine if a state statute is unconstitutionally vague under the Due Process Clause, courts examine both the statute itself and any limiting constructions from state courts or agencies. U.S. Const. Amend. 14.

Cases that cite this headnote

[20] **Attorney and Client**
⇐ Constitutional and statutory provisions

**Constitutional Law**
⇐ Admission and examination

North Carolina's unauthorized practice of law statutes, which barred corporations from practicing law, provided fair notice of what it meant to "practice law," and, thus, were not unconstitutionally vague in violation of due process; state law defined term "practice law" as "performing any legal service" and provided a lengthy list of what did and did not count as a legal service, statute prohibiting authorized practice of law elaborated on the definition further, and North Carolina courts expounded on the definition at length. U.S. Const. Amend. 14; N.C. Gen. Stat. Ann. §§ 84-2.1(a), 84-2.1(b), 84-2.2, 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

[21] **Constitutional Law**
⇐ Certainty and definiteness;vagueness

Fair notice, as required for a statute to survive vagueness challenge on due process grounds, does not require certainty about every hypothetical situation. U.S. Const. Amend. 14.

Cases that cite this headnote

[22] **Federal Courts**
⇐ Highest court

**Federal Courts**
⇐ Inferior courts

To construe state law, Court of Appeals looks to decisions of the state's highest court or, if needed, decisions of the state's intermediate appellate court.

Cases that cite this headnote

[23] **Antitrust and Trade Regulation**
⇐ Particular Industries or Businesses

**Attorney and Client**
⇐ Constitutional and statutory provisions

North Carolina's unauthorized practice of law statutes, which barred corporations from practicing law, did not violate the Monopoly Clause of the North Carolina Constitution; Monopoly Clause allowed reasonable regulations of commerce with substantial relationship to public health, safety, or welfare, practice of law affected the public interest, and unregulated practice of law could pose a danger. N.C. Const. art. 1, § 34.

Cases that cite this headnote

[24] **Constitutional Law**

⇦ Unlicensed practice of law

**Constitutional Law**

⇦ Advertising

North Carolina's unauthorized practice of law statutes, which barred corporations from practicing law, did not violate free speech rights of trade association representing North Carolina employers, which sought to provide legal services for its members, despite association's argument that it had a right to advertise the legal services it wanted to offer; state was entitled to forbid association from advertising legal services barred by law. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-5(a), 84-7, 84-8(a), 84-37.

Cases that cite this headnote

***201** Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Loretta C. Biggs, District Judge. (1:15-cv-00083-LCB-JLW)

**Attorneys and Law Firms**

ARGUED: Reid Lloyd Phillips, BROOKS, PIERCE, MCLENDON, HUMPHREY, & LEONARD, L.L.P., Greensboro, North Carolina, for Appellant. Alan William Duncan, MULLINS DUNCAN HARRELL & RUSSELL PLLC, Greensboro, North Carolina, for Appellees. ON BRIEF: Jennifer K. Van Zant, Charles E. Coble, Craig D. Schauer, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellant. Stephen M. Russell, Jr., MULLINS DUNCAN HARRELL & RUSSELL PLLC, Greensboro, North Carolina, for Appellee North Carolina State Bar. Joshua H. Stein, Attorney General, Matthew W. Sawchak, Solicitor General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees Joshua H. Stein, Nancy Lorrin Freeman, and J. Douglas Henderson.

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and DUNCAN, Senior Circuit Judge.

**Opinion**

Affirmed by published opinion. Judge Diaz wrote the opinion, in which Chief Judge Gregory and Senior Judge Duncan joined.

DIAZ, Circuit Judge:

***202** Capital Associated Industries, Inc. ("CAI") is a trade association representing North Carolina employers. As part of a plan to expand its membership, CAI wants to provide legal services to its members. But it cannot because state law forbids corporations from practicing law. Following unsuccessful lobbying efforts to change the law, CAI sued state prosecutors to enjoin the enforcement of state unauthorized practice of law ("UPL") statutes against it. After the North Carolina State Bar intervened to defend the statutes, the defendants obtained summary judgment. On appeal, CAI contends that North Carolina's UPL statutes violate its constitutional rights to free association, free speech, and commercial speech; lack a rational basis; are void for vagueness; and violate the state constitution. For the reasons that follow, we affirm.

I.

A.

Since 1931, the State of North Carolina has forbidden corporations from practicing law. N.C. Gen Stat. § 84-5(a). [1] To address the unauthorized practice of law, the State Bar and state prosecutors may sue for an injunction, and prosecutors may bring misdemeanor charges. *Id.* §§ 84-37, 84-7, 84-8(a). The UPL statutes do, however, allow the practice of law by lawyer-owned professional corporations, public interest law firms, and in-house counsel representing their employers. *Id.* §§ 55B-8, 84-5.1.

CAI is a North Carolina nonprofit corporation that claims a tax exemption under 26 U.S.C. § 501(c)(6) as a trade association of employers. It has about 1,100 North Carolina employers as members and describes its mission as fostering successful employment relationships. CAI charges its members an annual fee adjusted for each member's size. It competes with for-profit businesses in providing some services, such as recruiting, background

checks, consulting, training, conferences, and affirmative action planning.

One of the most popular services it provides its members is a call center, where members can speak to CAI's staff of human resources experts. The experts can advise on HR issues. But they can't give legal advice, even if they are licensed attorneys. So, when legal issues arise, CAI's HR experts have to steer the conversation elsewhere, end the conversation, or refer the member to outside counsel.

While it disclaims any interest in representing its members in court, CAI would like to help them draft legal documents (such as contracts or employee handbooks) and answer questions about employment and labor law. If it could practice law, CAI would offer most legal services without charge as part of its membership fees, but ***203** it would charge hourly fees for certain services.

CAI has spent years trying to change the UPL statutes as part of its "2X" development plan to double its membership and reach. In 2011, CAI's lobbyists persuaded state lawmakers to introduce bills that would have allowed corporations to practice law. CAI tried and failed to get the State Bar to support the bills. The State Bar instead actively opposed the bills, and they were not enacted. CAI's lobbying efforts met a similar fate in 2013. That same year, the State Bar adopted a proposed ethics opinion advising that CAI would violate the UPL statutes if it employed lawyers to give its members legal advice.

B.

After two failed bids to achieve its goals through legislation, CAI turned to the courts. It challenged the UPL statutes in federal district court, naming as defendants the attorney general of North Carolina and certain district attorneys. The complaint sought declaratory and injunctive relief that would prevent enforcement of North Carolina's UPL laws against it. It pleaded five claims under 42 U.S.C. § 1983 (concerning due process, free association, free speech, vagueness, and commercial speech) and one claim under the state constitution.

The district court allowed the State Bar to intervene as a defendant. It then denied CAI's motion for a preliminary injunction and the defendants' motions to dismiss and for judgment on the pleadings. *Capital Associated Indus., Inc. v. Cooper*, 129 F.Supp.3d 281 (M.D.N.C. 2015); *Capital Associated Indus., Inc. v. Cooper*, No. 1:15CV83, 2016 WL 6775484 (M.D.N.C. June 23, 2016). After discovery, the parties cross-moved for summary judgment.

Before the district court, State Bar representatives expressed concerns about nonlawyers controlling litigation and receiving attorney fees, confidentiality, excessive fees, and the State Bar's inability to discipline corporations. Regarding CAI, they worried about conflicts of interest due to its large base of members and the fact that its directors and officers don't have to be lawyers and thus wouldn't have obligations under the State Bar's Rules of Professional Conduct.

To assuage these concerns, CAI filed declarations from three trade organizations practicing law in other states, and it outlined a plan to comply with ethics rules. CAI's lawyers would control legal services, make decisions about conflicts of interest, and have sole access to privileged communications. But CAI's directors and president would set the attorneys' salaries and the legal department's budget. And CAI declined to offer assurances that it would require its directors and officers to be attorneys.

Some of CAI's members testified that allowing CAI to practice law would mean that they could obtain more efficient and cost-effective legal representation. But almost all those members said they had received legal advice from private attorneys. Just one member said it had gone without counsel in low-risk situations, but even it found counsel for more serious matters. And according to CAI's President and CEO, no member has left CAI because it doesn't offer legal services.

**[1]** **[2]** Addressing the cross-motions for summary judgment, the district court first held that CAI had standing because it faced "a credible threat of prosecution" if it practiced law. ***204** *Capital Associated Indus., Inc. v. Stein (CAI)*, 283 F.Supp.3d 374, 380 (M.D.N.C. 2017).[2] The district court then turned to the merits and rejected all six of CAI's claims, entering summary judgment for the defendants. *Id.* at 383–92.

This appeal followed.

II.

[3] [4] We review the district court's grant of summary judgment de novo. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017). "[W]e apply the same legal standards as the district court, and view all facts in the light most favorable to the nonmoving party." *Id.* (quoting *Roland v. U.S. Citizenship & Immigration Servs.*, 850 F.3d 625, 628 (4th Cir. 2017)).

[5] CAI framed all six of its claims as as-applied challenges, which test the constitutionality of a statute applied to the plaintiff based on the record. *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013). Thus, CAI was not required to prove that the UPL statutes are invalid in all circumstances. *Id.*

III.

[6] We begin with CAI's claim that the UPL statutes violate its freedom of association. CAI contends that it is an expressive association seeking to improve employment relationships in North Carolina and foster compliance with the law.[3] By forbidding it from practicing law, CAI argues, the UPL statutes restrict its ability to carry out that expressive mission. We agree with the district court, however, that the UPL statutes do not unconstitutionally restrict CAI's associational rights.

To support its argument, CAI relies on a line of cases beginning with *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). In *Button*, the Supreme Court held that a Virginia law forbidding organizations from retaining attorneys to represent third parties infringed on the right of the NAACP and its members "to associate for the purpose of assisting persons who seek legal redress for infringements" of their civil and constitutional rights. *Id.* at 428, 83 S.Ct. 328.

The Court emphasized that for the NAACP, litigation is "not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment." *Id.* at 429, 83 S.Ct. 328. To win civil rights, the Court said, litigation may be the "sole practicable avenue" and the "most effective form of political association." *Id.* at 430–31, 83 S.Ct. 328. Thus, what was at stake was "secur[ing] constitutionally guaranteed civil rights," not commercial ends. ***205** *Id.* at 442–43, 83 S.Ct. 328. And as the Court took time to emphasize, the law as applied against the NAACP did not implicate "professionally reprehensible conflicts of interest." *Id.* at 443, 83 S.Ct. 328.

The Supreme Court has applied *Button* in two contexts. The first, involves public interest organizations like the NAACP. *See In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). In *Primus*, the Court held that South Carolina couldn't forbid the ACLU from advising people of their legal rights and informing them that the ACLU could represent them for free. *Id.* at 431–32, 98 S.Ct. 1893. The Court compared the ACLU's role to that of the NAACP in *Button* and contrasted it with "a group that exists for the primary purpose of financial gain." *Id.* at 427–31, 98 S.Ct. 1893. It cast doubt on whether an organization operating for financial gain would receive the same protection as organizations that promote the common political aims of their members. *Id.* at 429–30, 437–38, 438, 98 S.Ct. 1893 n.32.

The second context involves labor unions. *See Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964). The *Trainmen* Court held that Virginia couldn't bar a union from recommending lawyers to its members for workers' compensation suits. *Id.* at 7–8, 84 S.Ct. 1113. The Virginia law, the Court said, infringed on "the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest" without adequate justification. *Id.*

The Court has extended *Trainmen* twice. First, it held that Illinois couldn't prevent a union from employing attorneys to represent its members in workers' compensation claims. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 223–25, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967). While the Court considered that law unjustified, it emphasized that the state did possess an "interest in high standards of legal ethics." *Id.* at 224–25, 88 S.Ct. 353. Second, the Court held that Michigan couldn't bar a union from recommending to its members certain attorneys who had agreed to a maximum fee. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585–86, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). "At issue," the Court said, "is the basic right to group legal action" and the right to "meaningful access to the courts," which required enabling union members to "meet the costs of legal representation." *Id.*

The "common thread running through" these cases is that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right." *United Transp. Union*, 401 U.S. at 585–86, 91 S.Ct. 1076; *see also Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1387 (7th Cir. 1992) (*United Mine Workers* "supports the proposition that laypersons have a right to obtain meaningful access to the courts, and to enter into associations with lawyers to effectuate that end."). Critically, however, the cases distinguish between the commercial practice of law and "associating for non-commercial purposes to advocate the enforcement of legal and constitutional rights." *In re N.H. Disabilities Rights Ctr., Inc.*, 130 N.H. 328, 541 A.2d 208, 213 (N.H. 1988) (Souter, J.).

The Supreme Court emphasized this distinction in *Ohralik v. Ohio State Bar Ass'n*, the same day it decided *Primus*. 436 U.S. 447, 98 S.Ct. 1925, 56 L.Ed.2d 444 (1978). In *Ohralik*, the Court rejected a challenge to an Ohio law forbidding in-person solicitation of clients. Solicitation of clients for commercial purposes, the Court held, did not implicate "political expression or an exercise of associational freedom" or "mutual assistance in asserting legal rights." *Id.* at 458, 98 S.Ct. 1925.

***206** **[7]** As applied to CAI, North Carolina's UPL laws are closer to the statute in *Ohralik* than the statutes in the *Button* cases. While this case is admittedly close, several considerations distinguish CAI's proposed practice from the *Button* line of cases. First, what CAI seeks to accomplish would be for commercial ends and would address only private concerns. Second, it would not facilitate access to the courts. And third, it would pose ethical concerns not present in the *Button* cases.

When organizations like the NAACP and the ACLU solicit clients and retain lawyers to represent them, they express their commitment to expanding and guarding civil rights. *See Button*, 371 U.S. at 430–31, 83 S.Ct. 328; *Primus*, 436 U.S. at 428–30, 98 S.Ct. 1893. CAI, in contrast, wants to help its members "resolv[e] private differences" by drafting legal documents and advising employers on labor and employment issues. *Button*, 371 U.S. at 429, 83 S.Ct. 328. Its goal, as set forth in its 2X plan, is to increase revenues and recruit new members who will pay dues and additional legal fees. CAI would charge by the hour for some services. While other services would be included in its membership fees, CAI's chairman said the trade association might increase its fees if it could practice law. CAI thus seeks to practice law for commercial ends, like a private attorney—not to associate for political or otherwise public goals. And while we accept that CAI engages in some expressive activity, CAI proposes to practice law for commercial ends, not to express a message.

Nor does CAI propose to engage in "collective activity undertaken to obtain meaningful access to the courts." *Primus*, 436 U.S. at 441, 98 S.Ct. 1893 (quoting *United Transp. Union*, 401 U.S. at 585, 91 S.Ct. 1076). As described in the record, CAI's members have consistently had access to legal services and the courts. And CAI has no intention of litigating in any forum. So, unlike the organizations in the *Button* cases, CAI would not facilitate access to justice or vindicate its members' constitutional or statutory rights. *Cf. Trainmen*, 377 U.S. at 7–8, 84 S.Ct. 1113. CAI's proposed practice might reduce some of its members' legal bills. But nothing in the record shows that CAI's inability to practice law means that its members can't "meet the costs of legal representation" or obtain "meaningful access to the courts." *United Transp. Union*, 401 U.S. at 585–86, 91 S.Ct. 1076.

The Supreme Court has, moreover, extended associational rights only when the proposed practice of law wouldn't raise ethical concerns. *See Button*, 371 U.S. at 443, 83 S.Ct. 328; *Trainmen*, 377 U.S. at 6, 84 S.Ct. 1113; *Primus*, 436 U.S. at 422, 429–30, 98 S.Ct. 1893. CAI's proposed practice, in contrast, does raise ethical concerns. Specifically, its members would pay legal fees for representation by attorneys supervised by officers and directors who are not attorneys. That structure (even if housed in a nonprofit entity) could compromise the independence and professional judgment of the lawyers involved, and the corporation's interests could trump loyalty to clients.

In sum, several features of CAI's proposed practice distinguish it from the organizations in the *Button* cases. As a result, like the solicitation statute in *Ohralik*, North Carolina's UPL statutes "only marginally affect[ ] ... First Amendment concerns." 436 U.S. at 459, 98 S.Ct. 1925. Because they do not "substantially impair[ ] the associational rights" of CAI, we need not examine whether the state's interests suffice to justify them. *United Mine Workers*, 389 U.S. at 225, 88 S.Ct. 353; *see also Lawline*, 956 F.2d at 1387 (declining to apply heightened

scrutiny because *207 there was no deprivation of associational rights). We hold that the UPL statutes do not violate CAI's associational rights.

IV.

Next, CAI argues that the UPL statutes unlawfully burden its freedom of speech. The district court rejected this claim based on the so-called "professional speech doctrine." *CAI*, 283 F.Supp.3d at 385–86. When the district court ruled, this circuit and others applied lesser standards of scrutiny to professionals' speech to clients. *See Pickup v. Brown*, 740 F.3d 1208, 1228–31 (9th Cir. 2014); *King v. Governor*, 767 F.3d 216, 224–25, 228–29 (3d Cir. 2014); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). But after the briefing in this appeal, the Supreme Court disapproved of this doctrine as defined in *Pickup*, *King*, and *Moore-King*. *See Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, — U.S. ——, 138 S.Ct. 2361, 2371–72, 2375, 201 L.Ed.2d 835 (2018).

In *NIFLA*, the Court addressed a California law requiring certain clinics that primarily serve pregnant women to post notices about what services they didn't offer and about free state services. *Id.* at 2368–70. Although the law applied in a professional context, the Court approached the case as it would any other involving compelled speech. *Id.* at 2374–75. It held that the law was content-based. *Id.* at 2371. And because it held that the law could not survive intermediate scrutiny, the Court declined to decide whether strict scrutiny should apply. *Id.* at 2375–77.

[8] [9] The Court did, however, recognize two situations in which states have broader authority to regulate the speech of professionals than that of nonprofessionals. First, there is "more deferential review" for requirements that professionals "disclose factual, noncontroversial information" in their commercial speech. *Id.* at 2372. Second, "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* As examples of this latter category, the Court cited cases about malpractice, anticompetitive agreements, client solicitation, and informed consent. *Id.* at 2372–73.

On appeal, North Carolina describes the ban on corporate law practice as a regulation of professional conduct that incidentally burdens speech, which only needs to survive intermediate scrutiny. In contrast, CAI describes it as a content-based and identity-based regulation of speech that must survive strict scrutiny. As explained below, we agree with the state that the law passes—and only needs to pass—intermediate scrutiny.

A.

[10] North Carolina's ban on the practice of law by corporations fits within *NIFLA*'s exception for professional regulations that incidentally affect speech. 138 S.Ct. at 2372–73. The ban is part of a generally applicable licensing regime that restricts the practice of law to bar members and entities owned by bar members. *Cf. Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) ("We recognize that the States have ... broad power to establish standards for licensing practitioners and regulating the practice of professions."). In this case, any impact the UPL statutes have on speech is incidental to the overarching purpose of regulating who may practice law. *Cf. Lawline*, 956 F.2d at 1386 (holding that an ethical rule prohibiting lawyers from assisting in the unauthorized practice of law has only an incidental impact on speech).

Many laws that regulate the conduct of a profession or business place incidental burdens on speech, yet the Supreme Court *208 has treated them differently than restrictions on speech. For example, while obtaining informed consent for abortion procedures implicates a doctor's speech, the state may require it "as part of the practice of medicine, subject to reasonable licensing and regulation." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.). Bans on discrimination, price regulations, and laws against anticompetitive activities all implicate speech—some may implicate speech even more directly than licensing requirements. But the Supreme Court has analyzed them all as regulations of conduct. *See Expressions Hair Design v. Schneiderman*, — U.S. ——, 137 S.Ct. 1144, 1150–51, 197 L.Ed.2d 442 (2017); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949).

As CAI recognizes, the practice of law has communicative and non-communicative aspects. The UPL statutes don't target the communicative aspects of practicing law, such

as the advice lawyers may give to clients. Instead, they focus more broadly on the question of who may conduct themselves as a lawyer. Licensing laws inevitably have some effect on the speech of those who are not (or cannot be) licensed. But that effect is merely incidental to the primary objective of regulating the conduct of the profession.

B.

Having determined that the UPL statutes regulate conduct, we turn to the appropriate standard of review. CAI urges us to apply strict scrutiny, contending that the UPL statutes restrict speech based on the content and on the speaker. We think the correct reading of Supreme Court precedent, however, is that intermediate scrutiny should apply to regulations of conduct that incidentally impact speech.

When the Supreme Court has reviewed restrictions on conduct that incidentally burden speech, it has not applied strict scrutiny. It has not, for example, demanded that laws against employment discrimination or anticompetitive agreements survive strict scrutiny. *See Rumsfeld*, 547 U.S. at 62, 126 S.Ct. 1297; *Giboney*, 336 U.S. at 502, 69 S.Ct. 684. Price regulations too are not subject to strict scrutiny (though the standard for laws that only restrict communications about prices is unsettled). *Expressions Hair Design*, 137 S.Ct. at 1150–51. Even laws that implicate speech quite directly, such as laws requiring doctors—through spoken words—to obtain informed consent from patients before an abortion have not been subjected to strict scrutiny. *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (opinion of O'Connor, Kennedy, & Souter, JJ.).

**[11]** Although the Court's cases have not been crystal clear about the appropriate standard of review, we do know that the state actors involved were not required to demonstrate a compelling interest and narrow tailoring. And *NIFLA* itself provides ample support for the view that strict scrutiny shouldn't apply to the UPL statutes. As noted, the *NIFLA* Court chose not to decide whether strict or intermediate scrutiny applied to the law at issue. 138 S.Ct. at 2375–77. But the Court did highlight laws regulating "professional conduct" as an area in which it "has afforded *less* protection for professional speech." *Id.* at 2372 (emphasis added). Thus, we can say with some confidence that the standard for conduct-regulating laws can't be ***209** greater than intermediate scrutiny.[4]

**[12]** In sum, we hold that intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech. We think this a sensible result, as it fits neatly with the broad leeway that states have to regulate professions. *See Ohralik*, 436 U.S. at 460, 98 S.Ct. 1925; *Goldfarb*, 421 U.S. at 792, 95 S.Ct. 2004. For laws with only an incidental impact on speech, intermediate scrutiny strikes the appropriate balance between the states' police powers and individual rights.

C.

**[13]** **[14]** We turn then to consider whether North Carolina's ban on the practice of law survives this standard of review. To survive intermediate scrutiny, the defendant must show "a substantial state interest" and a solution that is "sufficiently drawn" to protect that interest. *NIFLA*, 138 S.Ct. at 2375. North Carolina's interest in regulating the legal profession to protect clients is at least substantial. In fact, the Supreme Court has repeatedly described that interest in even stronger terms. *See Ohralik*, 436 U.S. at 460, 98 S.Ct. 1925; *Goldfarb*, 421 U.S. at 792, 95 S.Ct. 2004.

Barring corporations from practicing law is sufficiently drawn to protect that interest. Professional integrity could suffer if the state allows lawyers to practice on behalf of organizations owned and run by nonlawyers and to collect legal fees from clients. Nonlawyers would likely supervise lawyers representing third-party clients at CAI, which could compromise professional judgment and generate conflicts between client interests and the corporation's interests.

The state has addressed these problems by proscribing law practice by organizations that pose the most danger, while exempting organizations that pose little danger. Professional corporations, for example, must be owned exclusively by lawyers. N.C. Gen. Stat. § 55B-4(2). And public interest law firms "must have a governing structure that does not permit" anyone except an "attorney duly licensed ... to control the manner or course of the legal services rendered." *Id.* § 84-5.1. Plus, the restrictions on the fees such firms may receive makes it impossible for them

break even (much less turn a profit) on legal work. Rev. Proc. 92-59, 1992-2 C.B.

**[15]** Another state legislature might balance the interests differently. But intermediate scrutiny requires only a "reasonable ***210** fit between the challenged regulation" and the state's interest—not the least restrictive means. *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (internal quotation marks omitted); *see Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Because North Carolina has established a reasonable fit between its UPL statutes and a substantial government interest, the UPL statutes survive intermediate scrutiny.

V.

**[16]** CAI also argues that the UPL statutes deny it due process because they lack a rational basis. CAI doesn't contend that its due process claim concerns fundamental rights, so the UPL statutes are only subject to rational basis review. *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999) (en banc). To pass muster under rational basis review, legislation "need only be rationally related to a legitimate government interest." *Star Sci. Inc. v. Beales*, 278 F.3d 339, 348 (4th Cir. 2002).

**[17]** The state relies on the same justifications it provided in response to the First Amendment claims. As our precedent counsels, "there is a rational basis to restrict corporate ... ownership of professional businesses" to protect consumers. *Brown v. Hovatter*, 561 F.3d 357, 368 (4th Cir. 2009) (citing *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166–67, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973)). Accordingly, we agree with the district court that the state's justifications suffice. CAI's remaining arguments—such as the availability of less restrictive means—are inapposite for rational basis review. We hold that the UPL statutes do not deny CAI due process.

VI.

**[18]** CAI also contends that the UPL statutes are unconstitutionally vague because they fail to provide fair notice of what it means to practice law. A statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

**[19]** **[20]** To determine if a statute is vague, we examine both the statute itself and any limiting constructions from state courts or agencies. *Martin v. Lloyd*, 700 F.3d 132, 136 (4th Cir. 2012). State law defines the term "practice law" as "performing any legal service." N.C. Gen. Stat. § 84-2.1(a). The statutory definition provides a lengthy but unexhaustive list of what does and doesn't count as a legal service. *Id.* §§ 84-2.1(b), 84-2.2. The statute prohibiting the unauthorized practice of law elaborates on the definition further. *Id.* § 84-4. And North Carolina courts have expounded on this definition at length. [5]

CAI's vagueness challenge fails. The statutes and state case law collectively provide ***211** an extensive definition of what it means to practice law. Between them, a person of ordinary intelligence would have fair notice of what the UPL statutes prohibit. Indeed, CAI itself understood what it means to practice law well enough to avoid giving its members legal advice.

**[21]** CAI points out that State Bar officials couldn't present a clear answer to every hypothetical question asked in their depositions. J.A. 670–76, 791–92. But fair notice doesn't require certainty about every hypothetical situation. *Ward*, 491 U.S. at 794, 109 S.Ct. 2746. We hold, therefore, that the UPL statutes are not void for vagueness.

VII.

**[22]** **[23]** CAI next contends that the UPL statutes violate the state constitution's Monopoly Clause, which provides that "[p]erpetuities and monopolies ... shall not be allowed." N.C. Const. art. I, § 34. To construe state law, we look to decisions of the state's highest court or, if needed, decisions of the state's intermediate appellate court. *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998).

The Supreme Court of North Carolina has interpreted this clause to allow "reasonable regulations" of commerce with a substantial relationship to public health, safety, or welfare. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729, 735 (1973); *see also Am. Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351, 358–59 (1984). That court has long been deferential toward professional regulations, regularly upholding professional licensing requirements. [6]

The state high court has twice upheld the ban on corporate law practice. In *Seawell*, the Supreme Court of North Carolina affirmed an injunction against a corporation for the unauthorized practice of law, holding that "[t]he statute in question offends neither the State nor Federal Constitution." 184 S.E. at 544, 209 N.C. 624. And in *Gardner v. North Carolina State Bar*, that court held that an insurance company could not employ an attorney to represent its insureds, finding that "[t]here is no merit to th[e] argument" that the ban on corporate practice "violates Article I of the [state constitution] and the Fourteenth Amendment." 316 N.C. 285, 341 S.E.2d 517, 523 (1986). Although it is unclear whether *Seawell* and *Gardner* addressed Monopoly Clause arguments, they illustrate the leeway North Carolina courts give the legislature to regulate the legal profession.

*State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), a case relied on by CAI, is not to the contrary. That case concerned a licensing requirement for professional photography, which the court described as "a private business unaffected in a legal sense with any public interest." *Id.* at 735. The court saw no serious dangers from unlicensed photography. *Id.*; *see also Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851, 859 (1957) (invalidating licensing regime for tile layers for similar reasons). In contrast, it is well established that the practice of law affects the public interest and that the unregulated practice of law can pose a danger. *See Seawell*, 184 S.E. at 544, 209 N.C. 624; ***212** *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635, 636 (1906); *cf. Ohralik*, 436 U.S. at 459–60, 98 S.Ct. 1925. Based on the applicable state case law, this court must conclude that the UPL statutes do not violate the Monopoly Clause.

VIII.

**[24]** Last, CAI argues that it has a free speech right to advertise the legal services it wants to offer. But this commercial speech claim is not an independent basis for granting relief, and the state may forbid CAI from advertising legal services barred by law. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 557, 563–64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

IX.

The district court correctly granted the defendants' motion for summary judgment. Its judgment is therefore

*AFFIRMED.*

**All Citations**

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Footnotes

1 North Carolina is not alone in doing so. Almost all other states have similar laws on the books. J.A. 754. One state allows unincorporated nonprofit "association[s]" to practice law. 42 Pa. Cons. Stat. § 2524(b)(1). And CAI points to trade associations practicing law in a few other states. J.A. 181, 197, 213. But at least one of those states bans corporations from practicing law. *See* 705 Ill. Comp. Stat. 220/1.

2 While the parties' briefs don't address standing, this court must assure itself of its jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). We agree with the district court that CAI faces a credible threat of prosecution. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir. 1999). That injury is traceable to state prosecutors, and enjoining enforcement of the statutes would provide CAI relief. *CAI*, 283 F.Supp.3d at 380–81.

3 The Supreme Court has recognized the right to associate "for the purpose of engaging in those activities protected by the First Amendment," which it termed "expressive association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The defendants contend that CAI forfeited review of whether the UPL statutes infringed on its rights as an expressive association. Appellees' Br. at 34–36. CAI did largely omit the term "expressive association"

below. But its arguments fall within expressive association jurisprudence and the district court ruled on the issue, so it is preserved for review. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004).

4 CAI describes the UPL statutes as content-based and identity-based restrictions on speech. Because the statutes regulate conduct, we need not engage with these descriptors. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Content-based restrictions ordinarily receive strict scrutiny. *See Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 2226–27, 192 L.Ed.2d 236 (2015). But in many of the cases concerning conduct, a law had an incidental impact on speech with particular content—such as anticompetitive agreements, discriminatory statements, prices, or informed consent—yet the Supreme Court declined to apply strict scrutiny. The *NIFLA* Court mentioned such cases to illustrate an exception without any indication that they should receive strict scrutiny, *see* 138 S.Ct. at 2372–73, despite the sweeping language about content-based restrictions in some recent cases, *see Reed*, 135 S.Ct. at 2226–27. Finally, the Court has treated identity-based distinctions as part of the inquiry into content-neutrality, not as a separate reason for finding a statute unconstitutional. *See Reed*, 135 S.Ct. at 2230–31; *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Thus, labeling the UPL statutes an identity-based restriction doesn't change our analysis.

5 *See State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337, 338–39 (1962); *Seawell v. Carolina Motor Club*, 209 N.C. 624, 184 S.E. 540, 544 (1936); *State v. Williams*, 186 N.C.App. 233, 650 S.E.2d 607, 611 (2007); *Lexis-Nexis v. Travishan Corp.*, 155 N.C.App. 205, 573 S.E.2d 547, 549 (2002); *Duke Power Co. v. Daniels*, 86 N.C.App. 469, 358 S.E.2d 87, 89 (N.C. Ct. App. 1987); *N.C. State Bar v. Lienguard, Inc.*, No. 11 CVS 7288, 2014 WL 1365418, at *10–12 (N.C. Super. Ct. Apr. 4, 2014).

6 *See State v. Warren*, 252 N.C. 690, 114 S.E.2d 660, 666 (1960) (real estate brokers); *Roach v. City of Durham*, 204 N.C. 587, 169 S.E. 149, 151 (1933) (plumbers); *State v. Lockey*, 198 N.C. 551, 152 S.E. 693, 696 (1930) (barbers); *State v. Siler*, 169 N.C. 314, 84 S.E. 1015, 1016 (1915) (doctors); *St. George v. Hardie*, 147 N.C. 88, 60 S.E. 920, 923 (1908) (riverboat pilots); *State v. Hicks*, 143 N.C. 689, 57 S.E. 441, 442–43 (1907) (dentists); *State v. Call*, 121 N.C. 643, 28 S.E. 517, 517 (1897) (doctors).

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# B

**CAPITAL ASSOCIATED INDUSTRIES, INC., Plaintiff,**

**v.**

**Josh STEIN, in his official capacity as Attorney General of the State of North Carolina, et al., Defendants.**

**1:15cv83**

United States District Court, M.D. North Carolina.

Signed 09/19/2017

**Background:** Employers' association wishing to provide legal services to its members brought action for declaratory and injunctive relief against North Carolina prosecutors, alleging that, as applied to association, enforcement of North Carolina unauthorized practice of law statutes violated the United States Constitution and the North Carolina Constitution. North Carolina State Bar intervened as defendants, and parties moved for summary judgment.

**Holdings:** The District Court, Loretta C. Biggs, J., held that:

(1) association had standing to bring action;

(2) statutes did not violate Fourteenth Amendment substantive due process, as applied to association;

(3) statutes did not violate First Amendment right to freedom of speech, as applied to association;

(4) statutes did not violate First Amendment right of association, as applied to association;

(5) statutes were not void for vagueness under Fourteenth Amendment, as applied to association;

(6) statutes did not violate North Carolina Constitution's Monopoly Clause, as applied to association; and

(7) statutes did not violate First Amendment's protection of commercial speech, as applied to association.

Judgment accordingly.

**1. Declaratory Judgment ⚿300**

Employers' association wishing to provide legal services to its members faced credible threat of prosecution under North Carolina unauthorized practice of law statutes, and thus had standing to bring action for declaratory and injunctive relief against North Carolina prosecutors alleging that, as applied to association, enforcement of statutes violated the United States Constitution and North Carolina Constitution; prosecutors and North Carolina State Bar had vigorously contended that association lacked right to provide legal services to its members, and prosecutors had not stated that they would refrain from prosecuting association. U.S. Const. art. 3, § 2; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**2. Declaratory Judgment ⚿62, 299.1**

The justiciability problem that arises when the party seeking declaratory relief is himself preventing the complained-of-injury from occurring can be described in terms of standing or in terms of ripeness; as applied to that factual scenario, the imminence requirement of standing doctrine and the hardship prong of ripeness doctrine require courts to conduct similar inquiries. U.S. Const. art. 3, § 2.

**3. Federal Civil Procedure ⚿103.2**

Standing doctrine requires a cognizable injury that will occur in the future to be imminent. U.S. Const. art. 3, § 2.

**4. Federal Courts ⚿2120**

Ripeness doctrine requires courts to ask whether a plaintiff will suffer some hardship if the court declines to consider an issue at a certain time. U.S. Const. art. 3, § 2.

**5. Federal Civil Procedure ⚿103.2**
**Federal Courts ⚿2121**

When evaluating the cognizability of a future injury, both standing doctrine and ripeness doctrine ask courts to determine whether that prospective harm will affect the plaintiff soon enough to justify the invocation of federal jurisdiction. U.S. Const. art. 3, § 2.

**6. Federal Civil Procedure ⚿103.2**
**Federal Courts ⚿2101**

Standing doctrine is one element of the case-or-controversy requirement of Article III of the Constitution, and a plaintiff that invokes federal jurisdiction must accordingly establish standing to sue. U.S. Const. art. 3, § 2.

**7. Federal Civil Procedure ⚿103.2, 103.3**

A plaintiff has standing upon demonstrating an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. U.S. Const. art. 3, § 2.

**8. Constitutional Law ⚿699**

A plaintiff has standing to bring a pre-enforcement challenge to a statute when the plaintiff faces a credible threat of prosecution under that law; further, when the State has not disclaimed any intention of enforcing the challenged statute, a plaintiff need not actually violate that statute, or be proactively threatened with prosecution prior to violation, in order to have standing to challenge its constitutionality. U.S. Const. art. 3, § 2.

**9. Attorney and Client ⚿12(26)**
**District and Prosecuting Attorneys ⚿8(3)**

North Carolina law requires the State's district attorneys to indict individuals or entities who allegedly violate the unauthorized practice of law statutes once a district attorney receives notice of the alleged violation. N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**10. Attorney and Client ⚿12(2)**
**Civil Rights ⚿1457(6)**
**Constitutional Law ⚿1440**

Preliminary injunction order did not establish that employers' association was not entitled to First Amendment right of association protection in association's claim that, as applied to association, enforcement of North Carolina unauthorized practice of law statutes to prohibit association from providing legal services to its members would violate its right of association; although order concluded that "paying more than desired" for outside counsel did not place association and members in same category as marginalized individuals actually denied channels to vindicate rights protected by the Constitution or federal law, order also stated that it did not foreclose the possibility the activities association and members wished to undertake could be entitled to First Amendment protection. U.S. Const. Amend. 1; Fed. R. Civ. P. 56; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**11. Constitutional Law ⚿1440**

The right of association protected under the First Amendment extends beyond marginalized individuals who are denied access to the courts. U.S. Const. Amend. 1.

**12. Attorney and Client ⚿12(2)**
**Constitutional Law ⚿4265, 4273(2)**

As applied to employers' association wishing to provide legal services to its members, North Carolina unauthorized practice of law statutes were reasonably related to promotion of legitimate state interests of avoiding conflicts of interest and loyalty and impairment of attorney independence, and thus statutes did not violate association's Fourteenth Amendment right to substantive due process. U.S. Const. Amend. 14, § 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**13. Constitutional Law ⚖4273(2)**

Rational basis review applied to claim that North Carolina unauthorized practice of law statutes violated Fourteenth Amendment right to substantive due process of employers' association which wished to provide legals services to its members; alleged right of a trade association to provide legal services was not an enumerated right and had not been identified as a fundamental right, and association did not ask court to hold the alleged right to be a fundamental right. U.S. Const. Amend. 14, § 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**14. Constitutional Law ⚖3894, 3895, 3901**

When a plaintiff alleges that a state legislative act violates a right entitled to substantive due process protection, a court must first determine whether the right that was allegedly violated is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed; if the court determines that the state action implicates one of those fundamental rights or liberties, the court must apply strict scrutiny to the challenged action, but if the state action implicates a right that is neither fundamental nor enumerated, the challenged state action is subject to rational basis review, which is quite deferential. U.S. Const. Amend. 14, § 1.

**15. Constitutional Law ⚖3877**

A challenged state action will survive rational basis review under the Due Process Clause of the Fourteenth Amendment if it is rationally related to legitimate government interests. U.S. Const. Amend. 14, § 1.

**16. Constitutional Law ⚖3895**

The deferential rational basis substantive due process standard does not require mathematical precision in the fit between justification and means; rather, 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. U.S. Const. Amend. 14, § 1.

**17. Attorney and Client ⚖12(2)**
**Constitutional Law ⚖2042**

As applied to employers' association wishing to provide legal services to its members, North Carolina unauthorized practice of law statutes operated as professional regulation, and thus did not violate association's First Amendment right to freedom of speech, where association, in providing legal services to individual members, would have to exercise judgment on behalf of members in light of their individual needs and circumstances, and association did not plan to engage in public discussion or commentary. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**18. Attorney and Client ⚖12(2)**
**Constitutional Law ⚖1440**

Employers' association's provision of legal services to its members would not further the collective exercise of any protected First Amendment activity, and thus, as applied to association, North Carolina unauthorized practice of law statutes did not violate association's First Amendment right of association, where proposed legal services did not include any assistance with litigation or vindication of statutory rights, would not further right to free speech pertaining to political expression, and would not further right to petition government for redress before a court or agency. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**19. Attorney and Client ⚿12(2)**
**Constitutional Law ⚿4265, 4273(2)**

Employers' association wishing to provide legal services to its members had fair notice of and understood North Carolina unauthorized practice of law statutes' prohibition of "legal advice," and thus, as applied to association, statutes were not void for vagueness under the Due Process Clause of the Fourteenth Amendment, where association's president showed his understanding of the term in a communication with the North Carolina State Bar and in a deposition, and association's complaint in its action challenging statutes also demonstrated an understanding of the term. U.S. Const. Amend. 14, § 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**20. Constitutional Law ⚿3905**

A claim that a statute is void-for-vagueness arises under the Due Process Clause. U.S. Const. Amend. 14, § 1.

**21. Constitutional Law ⚿3905**

A statute will violate due process on vagueness grounds when it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S. Const. Amend. 14, § 1.

**22. Constitutional Law ⚿3905**

The Fourteenth Amendment Due Process Clause's vagueness doctrine does not require perfect clarity and precise guidance, rather it requires only fair notice of prohibited conduct. U.S. Const. Amend. 14, § 1.

**23. Antitrust and Trade Regulation ⚿670**

As applied to employers' association wishing to provide legal services to its members, North Carolina unauthorized practice of law statutes did not violate North Carolina Constitution's Monopoly Clause; the statutes regulated persons and entities North Carolina judged to be qualified to practice law and did not create a monopoly. N.C. Const. art. 1, § 34; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**24. Federal Courts ⚿3008(2)**

A federal court hearing a state-law claim is obligated to apply the law of the state as interpreted by that state's highest court.

**25. Attorney and Client ⚿12(2)**
**Constitutional Law ⚿2042, 2049**

Employers' association had no First Amendment right to advertise legal services it wished to provide its members, and thus, as applied to association, North Carolina unauthorized practice of law statutes did not violate First Amendment's protection of commercial speech by prohibiting such advertisement; association did not have constitutional right to provide legal services, and unauthorized practice of law statutes made such provision unlawful. U.S. Const. Amend. 1; N.C. Gen. Stat. Ann. §§ 84-4, 84-5.

**26. Constitutional Law ⚿1540**

First Amendment protection of commercial speech can only apply when the underlying activity is lawful. U.S. Const. Amend. 1.

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David J. Adinolfi, II, N. C. Department Of Justice, Raleigh, NC, for Defendants.

## MEMORANDUM OPINION AND ORDER

Loretta C. Biggs, District Judge.

Plaintiff, Capital Associated Industries ("CAI"), initiated this action for declarato-

ry and injunctive relief, alleging that the enforcement of Sections 84–4 and 85–5 of the North Carolina General Statutes ("UPL Statutes"), which govern the unauthorized practice of law, violate the United States Constitution and the North Carolina Constitution, as applied to CAI. (ECF No. 1 ¶¶ 1, 100.) Before the Court are three motions for summary judgment brought pursuant to Rule 56 of the Federal Rules of Civil Procedure by (1) Defendants Josh Stein,[1] Nancy Lorrin Freeman, and J. Douglas Henderson (collectively "State Prosecutors"), (ECF No. 100); (2) CAI, (ECF No. 103); and (3) Intervenor–Defendant, the North Carolina State Bar (the "State Bar"), (ECF No. 112). For the reasons stated below, the Court (1) denies State Prosecutors' motion, (2) denies CAI's motion, (3) and grants the State Bar's motion.

## I. BACKGROUND

In its Complaint, CAI describes itself as a tax-exempt, "non-profit employers' association" comprised of approximately 1,080 employers throughout North Carolina that "associate[ ] . . . to promote industrial development and progress." (ECF No. 1 ¶¶ 6, 17.) CAI members pay annual membership dues to CAI to receive "efficient, low-cost human resources-related information, advice, data, education, legislative advocacy, and other benefits and services pertaining to each member's human resources, compliance, and day-to-day management needs." (*Id.* ¶ 17.) In addition to its current offerings, CAI wishes to provide "employment-related legal advice and services to its members through licensed North Carolina attorneys" that it employs, as part of the dues its members currently pay. (ECF No. 105–1 ¶¶ 34, 44.) For a separate fee of $195 per hour, CAI also wishes to offer its members other legal services that would include drafting employment, separation, and non-compete agreements, reviewing employment policies and handbooks, and representation "in charges before the Equal Employment Opportunity Commission." (*Id.* ¶ 44.) The legal services that CAI wishes to offer would not include providing legal assistance with matters related to litigation or "extremely specialized areas of workplace law" including, for example, "[t]ax matters that relate to workplace and employee needs." (ECF No. 106–1 at 64–67.)

In April of 2013, CAI requested from the State Bar an opinion as to whether CAI's proposed plan to provide legal advice and services to its members would constitute the unauthorized practice of law. (ECF Nos. 42 ¶¶ 7–9; 42–1.) On May 28, 2013, the State Bar issued a proposed ethics decision, which notified CAI that its plan would amount to the unauthorized practice of law because of CAI's status as a corporation not authorized to practice law. (*See* ECF No. 42–2.)

On January 23, 2015, CAI filed this lawsuit, seeking declaratory relief and requesting that State Prosecutors be enjoined from enforcing the UPL Statutes against CAI. (ECF No. 1.) CAI alleged that the enforcement of the UPL Statutes, as applied to CAI, would violate (1) its right to substantive due process under the Fourteenth Amendment to the Constitution, (*id.* ¶¶ 45–53); (2) its right of association under the First Amendment, (*id.* ¶¶ 54–63); (3) its right to free speech under the First Amendment on the grounds that the UPL Statutes operate as content-based restrictions and prevent CAI from speaking because it is a corporation, (*id.* ¶¶ 64–72); (4) its right to due process un-

1. Josh Stein became the Attorney General of the State of North Carolina on January 1, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Josh Stein should, therefore, be substituted for Roy Cooper as a defendant in this suit. Fed. R. Civ. P. 25(d).

der the Fourteenth Amendment on the ground that the UPL Statutes are vague, (*id.* ¶¶ 73–82); (5) its right to free speech on the ground that the UPL Statutes prohibit CAI from advertising its proposed legal services, (*id.* ¶¶ 83–91); and (6) the Monopoly Clause of the North Carolina Constitution, (*id.* ¶¶ 92–99). On February 16, 2015, CAI sought a preliminary injunction, requesting that the Court enjoin State Prosecutors from taking any action that would interfere with CAI offering or delivering legal advice and services to its members through CAI attorneys licensed to practice law. (ECF No. 19 at 1.) State Prosecutors moved to dismiss CAI's claims. (ECF No. 10.)

The Court heard oral arguments on the motions on May 29, 2015. On September 4, 2015, this Court entered a Memorandum Opinion and Order ("Preliminary Injunction Order"), denying CAI's motion for a preliminary injunction, and denying State Prosecutors' motion to dismiss. *Capital Associated Indus., Inc. v. Cooper*, 129 F.Supp.3d 281, 308 (M.D.N.C. 2015). State Prosecutors later moved for judgment on the pleadings, and the Court entered an Order that denied that motion. *Capital Associated Indus., Inc. v. Cooper*, No. 1:15CV83, 2016 WL 6775484, at *2 (M.D.N.C. June 23, 2016). Each Party has now moved for summary judgment. (ECF Nos. 100, 103, 112.)

## II. LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if the evidence would permit a reasonable jury to find for the nonmoving party, and "[a] fact is material if it might affect the outcome" of the litigation. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) (quotations omitted). The role of the court is not "to weigh the evidence and determine the truth of the matter" but rather "to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50, 106 S.Ct. 2505 (citations omitted). When reviewing a motion for summary judgment, the court must "resolve all factual disputes and any competing, rational inferences in the light most favorable" to the nonmoving party. *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). When, as here, a court has before it cross-motions for summary judgment, "the court must review each motion separately on its own merits" to determine whether each party is entitled to judgment as a matter of law. *Id.*

## III. DISCUSSION

State Prosecutors have moved for summary judgment on jurisdictional grounds and on CAI's right of association claim only. (ECF No. 100.) CAI and the State Bar have each moved for summary judgment on each of the six claims brought by CAI. (ECF Nos. 103, 112.) As State Prosecutors raise the threshold issue of whether the Court can consider CAI's claims, the Court will first consider their motion.

### A. State Prosecutors' Motion for Summary Judgment

#### *1. Standing and Ripeness*

**[1–5]** State Prosecutors argue that CAI cannot satisfy the requirements of standing doctrine or ripeness doctrine because CAI did not face a credible threat of prosecution before it brought suit. (ECF No. 101 at 6–20.) CAI contends that it does have standing to sue on the ground that such a threat exists. (ECF No. 117 at 4–11.) The Court observes that "the Article

III standing and ripeness issues in this case 'boil down to the same question.'"[2] *See Susan B. Anthony List v. Driehaus*, —— U.S. ——, 134 S.Ct. 2334, 2341 n.5, 189 L.Ed.2d 246 (2014) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n. 8, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007)). Accordingly, the Court will consider State Prosecutors' arguments concerning standing and ripeness simultaneously, characterizing the discussion as one involving "standing."

[6–8] Article III limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2. Standing doctrine is "[o]ne element of the case-or-controversy requirement," and a plaintiff that invokes federal jurisdiction must accordingly establish standing to sue. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013). A plaintiff has standing upon demonstrating an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147. A plaintiff has standing to bring a "pre-enforcement challenge" to a statute when the plaintiff "faces a credible threat of prosecution" under that law. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Further, when "the State has not disclaimed any intention of enforcing" the challenged statute, a plaintiff "need not actually violate" that statute, "or be proactively threatened with prosecution prior to violation, in order to have standing to challenge its constitutionality." *Does 1–5 v. Cooper*, 40 F.Supp.3d 657, 671–72 (M.D.N.C. 2014); *see MedImmune, Inc.*, 549 U.S. at 129, 127 S.Ct. 764 ("The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.").

The Court concludes that CAI has standing to bring its claims because it faces a credible threat of prosecution under the UPL Statutes. The Court's justification for this conclusion remains unchanged from the Court's earlier ruling on this issue:

> State Prosecutors have not stated that they would refrain from prosecuting CAI for violating the UPL Statutes. Nor have State Prosecutors stated that they disagree with the State Bar's proposed ethics opinion issued to CAI. To the contrary, State Prosecutors and the State Bar vigorously contend that CAI lacks the right to provide its members with legal advice and services. CAI need not subject itself to criminal prosecution to establish standing to challenge the UPL Statutes.... With the injury-in-fact requirement satisfied, CAI clears the other two hurdles for standing: causation and redressability.

*Capital Associated Indus., Inc.*, 129 F.Supp.3d at 301–02. State Prosecutors advance several related, yet equally unavail-

2. As the Supreme Court has explained, "[t]he justiciability problem that arises, when the party seeking declaratory relief is himself preventing the complained-of-injury from occurring, can be described in terms of standing ... or in terms of ripeness." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007). As applied to this factual scenario, the imminence requirement of standing doctrine and the hardship prong of ripeness doctrine require courts to conduct similar inquiries. For example, standing doctrine requires a cognizable injury that will occur in the future to be imminent. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Similarly, ripeness doctrine requires courts to ask whether a plaintiff will suffer some hardship if the court declines to consider an issue at a certain time. *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013). Thus, when evaluating the cognizability of a future injury, both doctrines ask courts to determine whether that prospective harm will affect the plaintiff soon enough to justify the invocation of federal jurisdiction.

ing, arguments to counter the conclusion that CAI faces a credible threat of prosecution. (ECF No. 101 at 6–15.)

State Prosecutors contend that CAI lacks standing because (1) the record contains no evidence of a pending prosecution against CAI, (*id.* at 7; *see id.* at 12–13); (2) CAI's plan is insufficiently specific, (*id.* at 7–8; 15–16); (3) the record contains no evidence of UPL prosecutions of "licensed attorneys, business association or corporation attorneys by the Attorney General or these two District Attorneys," (*id.* at 7; *see id.* at 11); (4) North Carolina law does not allow prosecutors to agree to refrain from enforcing the law, (*id.* at 13–15; 17–20); and (5) CAI has provided no evidence to support its "theory that the State Bar, or any other person, association or entity can make a referral to the Attorney General or a District Attorney, and have that referral automatically result in a prosecution for" the unauthorized practice of law, (ECF No. 101 at 16–17).

**[9]** The Court does not find State Prosecutors' arguments persuasive. First, CAI is not required to submit evidence that it faces a pending prosecution in order for the threat of prosecution to be credible. CAI could only satisfy such a requirement by engaging in the prohibited conduct, which the law does not require it to do. *See MedImmune, Inc.*, 549 U.S. at 128–29, 127 S.Ct. 764. Second, CAI's plan is sufficiently specific to allow the State Bar to conclude that the plan would constitute the unauthorized practice of law. (*See* ECF No. 42–2.) This conclusion by the State Bar is sufficient to subject CAI to criminal liability under North Carolina law and thus establish a threat of prosecution. *See* N.C. Gen. Stat. § 84–7.[3] Third, the fact that North Carolina has not prosecuted a business association for the unauthorized practice of law is immaterial to the standing inquiry.[4] Fourth, the question of whether North Carolina law allows district attorneys to disavow their enforcement of state law is also irrelevant. Since State Prosecutors have not refused to enforce the UPL Statutes, CAI faces a credible threat of prosecution. Finally, contrary to State Prosecutors' contention, the Court concludes that North Carolina law requires the State's district attorneys to indict individuals or entities who allegedly violate the UPL Statutes once a district attorney receives notice of the alleged violation. *See Disciplinary Hearing Comm'n v. Frazier*, 354 N.C. 555, 556 S.E.2d 262, 264 (2001) ("The duty imposed on district attorneys by N.C.G.S. § 84–7 is not to be ignored."). The Court concludes that CAI does have standing as a matter of law and thus State Prosecutors have failed to carry their burden. Accordingly, State Prosecutors are not entitled to summary judgment on jurisdictional grounds.

### *2. Right of Association*

**[10]** The Court will next address State Prosecutors' right of association argument.

3. N.C. Gen. Stat. § 84–7 states that: "[U]pon the application of any member of the Bar, or of any bar association, of the State of North Carolina ... it *shall be the duty* of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the [UPL Statutes]." N.C. Gen. Stat. § 84–7 (emphasis added).

4. State Prosecutors rely on *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), to support this argument. (ECF No. 101 at 8.) In *Poe*, the Supreme Court concluded that a state's decision not to enforce a statute over an eighty-year period renders the threat of prosecution too speculative to satisfy federal jurisdictional requirements. *Poe*, 367 U.S. at 508, 81 S.Ct. 1752. However, *Poe* does not support the State Prosecutors' argument because State Prosecutors acknowledge that the State has prosecuted individuals under the UPL Statutes. (ECF No. 101 at 11.)

The Court will address this argument separately from its discussion of the cross-motions brought by CAI and the State Bar because State Prosecutors' argument rests on different grounds. State Prosecutors contend that they are entitled to summary judgment on CAI's right of association claim solely because, according to them, CAI has not produced any evidence "to support CAI's efforts to categorize its members as 'marginalized individuals who were actually being denied channels to vindicate rights.' " (ECF No. 101 at 15 (quoting *Capital Associated Indus., Inc.*, 129 F.Supp.3d at 293).) CAI does not respond directly to this contention. CAI merely states that: "Although the State raises several arguments, the theme of its challenges is the familiar refrain that CAI lacks standing in this case." (ECF No. 117 at 4.)

[11] It appears that State Prosecutors may have misconstrued the Court's Preliminary Injunction Order, in which the Court concluded that "[p]laying more than desired for the assistance of outside counsel does not place CAI and its employer-members in the same category as union workers, minorities, or other marginalized individuals who were *actually* being denied channels to vindicate rights protected by the United States Constitution or federal law." *Capital Associated Indus., Inc.*, 129 F.Supp.3d at 293. In raising this argument, State Prosecutors appear to construe that conclusion as a rule that CAI must satisfy in order to prevail on its right of association claim. However, in the Preliminary Injunction Order, the Court also stated that it "d[id] not foreclose the possibility that the activities CAI and its members wish to undertake may be entitled to First Amendment protection." *Id.* at 292. The right of association protected under the First Amendment extends beyond marginalized individuals who are denied access to the courts. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (concluding that the right of association protects efforts to join "with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"). Accordingly, the Court concludes that State Prosecutors have not met their burden of showing that they are entitled to judgment as a matter of law on CAI's right of association claim. Having concluded that State Prosecutors have failed to carry their burden on the two issues raised in their motion, the Court will deny State Prosecutors' motion for summary judgment.

### B. Cross–Motions for Summary Judgment

The Court next turns to the cross-motions for summary judgment brought by CAI and the State Bar.[5] Each party has moved for summary judgment on each of the six claims brought by CAI.

At the outset, the Court recognizes that CAI has brought an as-applied challenge with respect to each of its claims. (ECF No. 1 ¶ 4; ECF No. 125 at 2 n.1.) The State Bar argues, however, that even

5. State Prosecutors respond to CAI's motion by contending that CAI has abandoned its claims on the grounds that CAI's Motion and accompanying brief "do not mention the State prosecutors in argument ... and offer no evidence in support" of CAI's claims against State Prosecutors. (ECF No. 118 at 5.) State Prosecutors further contend that CAI lacks standing and that its claims are not ripe. (*Id.* at 6.) The Court concludes that CAI has not abandoned its claims as it has briefed each issue. *See Newton v. Astrue*, 559 F.Supp.2d 662, 670 (E.D.N.C. 2008) (concluding that a litigant abandoned her claim when she "ha[d] not briefed [an] issue," and had not "presented it to the Court with any supporting discussion, argument, or authority"). The Court also reiterates its conclusion that CAI has standing to bring each claim and that each claim is ripe.

though CAI cannot succeed on its constitutional claims (whether they are construed as facial or as applied), CAI has presented insufficient facts for the Court to consider CAI's claims on an as-applied basis. (*See* ECF No. 123 at 6–7.) The Court agrees with the State Bar's observation that CAI appears to prefer a limited record. Nonetheless, while this Court previously concluded that the record was too "skeletal" for CAI to meet its burden of demonstrating a clear likelihood of success on the merits, as was required to prevail on its motion for a preliminary injunction, *see Capital Associated Indus., Inc.*, 129 F.Supp.3d at 296, the Court concludes that the record is adequate to consider CAI's as-applied challenge at this stage of the proceedings. Moreover, the Supreme Court has expressed a strong preference for avoiding facial challenges. *See Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 173 (2009) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). The Court will consider CAI's as-applied challenge to each of its claims.

*1. Substantive Due Process*

**[12]** CAI argues that North Carolina's UPL Statutes, as applied to CAI, violate CAI's right to substantive due process because the statutes are not rationally related to any legitimate governmental interest. (ECF No. 104 at 20–22.) The State Bar responds that the UPL Statutes are rationally related to North Carolina's interest in avoiding potential "conflicts of interest and loyalty," as well as its interest in avoiding the "impairment of attorney independence." (ECF No. 113 at 7–11.)

**[13, 14]** Under the Due Process Clause of the Fourteenth Amendment, "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause has "procedural and substantive components." *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996). When a plaintiff alleges that a state legislative act violates a right entitled to substantive due process protection, a court must engage in a two-step inquiry. *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999). A court must first determine whether the right that was allegedly violated is "one of 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' " *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). The second step depends on the outcome of the first. *Id.* If the court determines that the state action implicates one of those fundamental rights or liberties, the court must apply strict scrutiny to the challenged action. *Id.* If the state action implicates a right that is neither fundamental nor enumerated, the challenged state action is subject to rational basis review, *see id.*, which "is quite deferential," *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013). The asserted liberty interest in this case, namely, the right of a trade association to provide legal services to its members, is not an enumerated right, nor has it been identified as a fundamental right. CAI does not ask this Court to hold that this right is a fundamental right. The Court will therefore apply rational basis review.

**[15, 16]** A challenged state action will survive rational basis review if it is "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728, 117 S.Ct. 2258. This deferential standard does not require "mathematical precision in the fit between justification and means." *Star Sci., Inc. v. Beales*, 278 F.3d 339, 348 (4th Cir. 2002) (quoting *Concrete Pipe & Prods.*

*of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 639, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)). Rather, "[i]t 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." *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). This Court's task, therefore, is limited to evaluating whether North Carolina's chosen means of furthering its legitimate interests is "at least reasonably related to their promotion and protection." *Glucksberg*, 521 U.S. at 735, 117 S.Ct. 2258.

The State Bar has identified two legitimate state interests that the UPL Statutes further. Those interests include avoiding "conflicts of interest and loyalty, and impairment of attorney independence."[6] (ECF No. 113 at 8.) The Court concludes that the UPL Statutes are reasonably related to the promotion of these legitimate interests. North Carolina could rationally decide that non-lawyers would be more likely than lawyers to encourage the attorneys whom they supervise to violate the ethical canons that govern the legal profession. *See Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 181, 191–92 (2d Cir. 2017) (concluding that New York law, which "prohibits non-attorneys from investing in law firms ... easily pass[es] muster under rational basis review" because "the regulations preclude the creation of incentives for attorneys to violate ethical norms, such as those requiring attorneys to put their clients' interests foremost"). Accordingly, North Carolina's prohibition on the unauthorized practice of law, as applied to CAI, survives rational basis review.[7]

The Court is not persuaded by CAI's four arguments that the UPL Statutes cannot survive rational basis review, based on its contention that "[t]he facts underlying the general prohibition against trade associations offering legal services are not conceivably true." (ECF No. 104 at 21.) First, CAI argues that "there is no harm to [its] members or the public if the trade association's attorneys comply with their ethical obligations; and North Carolina presumes that attorneys will comply with their ethical obligations." (*Id.*; *see id.* at 14–15.) However, the State can reasonably conclude that an attorney who is supervised by a non-attorney would be more likely to violate those ethical obligations, irrespective of any presumption that the State might have about the conduct of supervised attorneys. Second, CAI contends that "there is no evidence supporting the existence of the public-interest concerns [underlying the UPL Statutes] at trade associations." (*Id.* at 21; *see id.* at 14.) However, the State is under no obligation to submit evidence supporting the reasonableness of its legislative choice. *See Bostic v. Schaefer*, 760 F.3d 352, 393 (4th Cir. 2014) (noting that on rational-basis review, "[a]s long as [the legislature] has a reasonable basis for adopting the classification, which can include rational speculation unsupported by evidence or empirical data, the statute will pass constitutional muster" (second alteration in original) (quotation marks omitted)).

Nor is the Court persuaded by CAI's third argument that "the record shows

6. Relatedly, the North Carolina Supreme Court has observed that North Carolina's ban on the corporate practice of law by entities not managed by attorneys furthers the State's legitimate interest in providing for "the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare." *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337, 339 (1962).

7. The Court rejects CAI's contentions that the UPL Statutes do not further any public interest concern, and that no such concern applies to CAI. (*See* ECF No. 104 at 12–14.)

that North Carolina has determined that the public-interest concerns are tolerated for attorneys in other contexts." (ECF No. 104 at 21; *see id.* at 15–17.) The Court will not consider evidence that compares CAI to other entities that are allowed to provide legal services under North Carolina's UPL Statutes. Such an inquiry necessarily entails a higher level of scrutiny than rational basis review permits the Court to apply. *See Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group."). Finally, the Court is not persuaded by CAI's fourth argument that "North Carolina has the ability to regulate trade associations' legal services through the Rules of Professional Conduct, a registration scheme, and injunctive relief." (ECF No. 104 at 21; *see id.* at 17–18.) The fact that North Carolina could have chosen an alternate means to further its legitimate interests does not disturb the conclusion that its chosen means is reasonable.[8] *See Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (concluding that under rational basis review, as long as the state's chosen means "rationally advances a reasonable and identifiable governmental objective, [the Court] must disregard the existence of other methods that" the Court "perhaps would have preferred").

In sum, the Court concludes that CAI has not met its burden of showing that it is entitled to judgment as a matter of law on its substantive due process claim. The State Bar has met its burden and is accordingly entitled to judgment as a matter of law on this claim.

*2. Freedom of Speech*

[17] CAI next argues that the UPL Statutes violate the freedom of speech guaranteed by the First Amendment, as applied to its proposed provision of legal services. (ECF No. 104 at 27–32.) Specifically, CAI argues that the UPL Statutes restrict CAI's speech on the basis of its content; that the UPL Statutes prohibit CAI from speaking on the basis of its corporate identity; and that this restriction on its speech cannot survive strict scrutiny. (*Id.* at 28–32.) The State Bar argues that the UPL Statutes operate as permissible regulation of a profession and not a restriction on speech that is entitled to First Amendment protection. (ECF No. 113 at 28.)

The First Amendment, as applied to the states through the doctrine of incorporation, establishes that a state "shall make no law ... abridging the freedom of speech." U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). This prohibition of state infringement on the freedom of speech does not, however, entitle every communicative act to constitutional protection. The Fourth Circuit has held that under the professional speech doctrine, "a state's regulation of a profession raises no First Amendment problem where it amounts to 'generally applicable licensing provisions' affecting those who practice the profession." *Moore–King v. Cty. of Ches-*

8. CAI also contends that it could "implement a governing structure that will confirm and protect its attorneys' adherence to the Rules of Professional Conduct, ensure that its attorneys have control over the legal services they provide, establish conflict-screening procedures, ensure that confidential communications and client information are preserved, and establish attorney oversight over any advertising for legal services." (ECF No. 104 at 18.) These purported safeguards do not alter the Court's conclusion for the same reason: this alternative method of furthering the state's legitimate interests does not render North Carolina's chosen means unreasonable.

*terfield*, 708 F.3d 560, 569 (4th Cir. 2013) (quoting *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring)); *see Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) ("Professional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech.").

The Fourth Circuit has discussed the appropriate test to determine whether the professional speech doctrine applies in *Moore–King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), and *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988). These cases instruct that if a speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances," then the statute operates as professional regulation that is not subject to First Amendment scrutiny. *Moore–King*, 708 F.3d at 569 (quoting *Bowman*, 860 F.2d at 604). In contrast, if a speaker "does not purport to be exercising judgment on behalf of any particular individual," *Bowman*, 860 F.2d at 604 (quoting *Lowe*, 472 U.S. at 232, 105 S.Ct. 2557 (White, J., concurring)), but instead "engages in public discussion and commentary," then the statute operates as a restriction on speech that is subject to First Amendment scrutiny, *Moore–King*, 708 F.3d at 569. Accordingly, under this test, a statute either operates as professional regulation that is not subject to First Amendment scrutiny, or a restriction on speech that is subject to First Amendment scrutiny. *See Moore–King*, 708 F.3d at 569.

CAI seeks to provide legal services to individual members, which will require it to exercise judgment on behalf of particular members in the light of those members' individual needs and circumstances. *See Moore–King*, 708 F.3d at 569. CAI does not plan to engage in "public discussion and commentary," *id.*, through the provision of its legal services. Further, the UPL Statutes, as applied to CAI, "amount to 'generally applicable licensing provisions,'" *id.* (quoting *Lowe*, 472 U.S. at 232, 105 S.Ct. 2557 (White J., concurring)). Any "[p]rofessional corporation" that seeks to provide legal services in North Carolina can render those services "subject to the applicable rules and regulations adopted by ... the licensing board," which in this case, is the North Carolina State Bar. N.C. Gen. Stat. §§ 55B–2(4)–(6), 55B–12(a). Therefore, the professional speech doctrine applies in this case. Accordingly, as applied to CAI, the UPL Statutes operate as professional regulation that is not subject to First Amendment scrutiny on freedom of speech grounds.[9]

CAI argues that its proposed legal services are pure speech, as opposed to conduct (ECF No. 104 at 28–30), however this distinction is immaterial. CAI contends that its provision of legal services would constitute speech, and not conduct, because it will be required to communicate in order to provide its proposed services. (*Id.*) There is no question that CAI's provision of legal services would require it to communicate with its member-clients. Rather, the question in this case is whether the type of communication that the UPL Statutes restrict is entitled to First Amendment protection. For the reasons stated above, the Court concludes that CAI's proposed communicative acts fall under the professional speech doctrine and are therefore not entitled to First Amendment protection.

9. The Court will not analyze the UPL Statutes as content-based restrictions, as CAI contends that the Court should. *See Moore–King*, 708 F.3d at 567–70 (analyzing a licensing scheme for fortune tellers under the professional speech doctrine and not as a content-based restriction).

CAI also argues that the UPL Statutes violate freedom of speech because the statutes impermissibly prohibit CAI from speaking on the basis of its identity as a corporation. (ECF No. 104 at 30–31.) The Court rejects this assertion for two reasons. First, as stated above, the UPL Statutes operate as professional regulation that is not subject to First Amendment scrutiny under Fourth Circuit precedent. Therefore, no First Amendment bar to government regulation of speech on the basis of a speaker's corporate identity could apply in this case. *Cf. Citizens United v. FEC*, 558 U.S. 310, 364, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). Second, to the extent that any First Amendment bar to regulatory distinctions based on a speaker's corporate identity could apply to prohibit professional regulation as a general matter, that First Amendment bar would present no issue in this case. North Carolina does not bar CAI from providing legal services "solely because CAI is a corporation," (ECF No. 104 at 30), as CAI contends. The UPL Statutes do "not apply to corporations *authorized to practice law* under the provisions of Chapter 55B of the General Statutes of North Carolina." N.C. Gen. Stat. § 84–5(a) (emphasis added). North Carolina permits corporations to provide legal services, subject to the state's ordinary regulation of the legal profession. *Id.* §§ 55B–2(4)–(6), 55B–12(a). Thus, CAI's corporate identity poses no bar to its ability to engage in professional speech, which nonetheless remains unprotected by the First Amendment.

CAI has failed to carry its burden that it is entitled to judgment as a matter of law on its freedom of speech claim. Conversely, the State Bar has met its burden.

*3. Right of Association*

[18] CAI next argues that its members have a constitutionally protected right to associate to provide group legal services, relying on a line of Supreme Court cases that it characterizes as *NAACP v. Button* and its progeny,[10] to support this argument. (ECF No. 104 at 22–23.) Further, CAI argues that North Carolina's infringement of that right cannot survive strict scrutiny. (*Id.* at 26–27.) The State Bar counters that *NAACP v. Button* and its progeny do not extend the right of association to protect CAI and its plan to provide legal services because CAI's goals are to increase revenue and reduce its members' expenses, which are not entitled to constitutional protection. (ECF No. 113 at 12–28.)

The Supreme Court has recognized the right to associate as a means of protecting the freedom to engage collectively in activities that are entitled to First Amendment protection. *Roberts*, 468 U.S. at 622, 104 S.Ct. 3244 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). In *NAACP v. Button* and its progeny,[11] the Supreme Court held that

**10.** The following cases comprise the line of cases that CAI references as *"NAACP v. Button* and its progeny": *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).

**11.** This Court in its Preliminary Injunction Order engaged in a comprehensive discussion of each of the cases that it refers to as *"NAACP v. Button* and its progeny." The Court references that discussion for context

state actions that regulate the practice of law violate the right of association when those laws burden the collective exercise of protected First Amendment activity. *E.g.*, *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 223, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5–6, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964). The challenged state prohibitions in these cases took many different forms: the regulations included (1) prohibitions on legal solicitation, *In re Primus*, 436 U.S. 412, 418–21, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *Bhd. of R.R. Trainmen*, 377 U.S. at 4–5, 84 S.Ct. 1113, *Button*, 371 U.S. at 419, 83 S.Ct. 328; (2) a prohibition on the unauthorized practice of law, *United Mine Workers*, 389 U.S. at 218, 88 S.Ct. 353; and (3) an injunction that restrained a union from engaging in various activities related to the provision of legal services, *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 579 n.4, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). Despite the differences in the various regulations outlined in these cases, in each, the prohibited state action operated to infringe, not only the right to associate, but also the exercise of some correlating First Amendment right. *See, e.g.*, *In re Primus*, 436 U.S. at 431, 98 S.Ct. 1893. These First Amendment rights included: (1) the right to free speech, *see In re Primus*, 436 U.S. at 431, 98 S.Ct. 1893 (concluding that the appellant's activities "come[ ] within the generous zone of First Amendment protection reserved for associational freedoms," in part, because "[t]he ACLU engages in litigation as a vehicle for effective political expression"); *see also Button*, 371 U.S. at 431, 83 S.Ct. 328 ("The NAACP is not a conventional political party; but the litigation it assists ... makes possible the distinctive contribution of a minority group to the *ideas and beliefs* of our society. For such a group, association for litigation may be the most effective form of *political association*.") (emphasis added)); and (2) the right to petition the government for redress of grievances, *see United Transp. Union*, 401 U.S. at 585, 91 S.Ct. 1076 ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); *see also United Mine Workers*, 389 U.S. at 221–22, 88 S.Ct. 353 ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." (footnote omitted)); *see also Bhd. of R.R. Trainmen*, 377 U.S. at 5, 84 S.Ct. 1113 ("[T]he First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them.").

Here, North Carolina's prohibition under the UPL Statutes as applied to CAI and its' proposed provision of legal services does not violate the right of association because CAI's proposal would not further the collective exercise of any activity entitled to First Amendment protection. CAI proposes to provide its members "employment-related legal advice and services" that could include drafting employment, separation, and non-compete agreements, reviewing employment policies and handbooks, and representation before the EEOC. (ECF No. 105–1 ¶ 34, 44.) In addition, CAI alleges in its Complaint that it is being precluded from "earning revenues by employing licensed attorneys to provide [this] legal advice and services to its members." (ECF No. 1 ¶ 98.) Unlike the clear constitutional objectives advanced by

here. *See Capital Associated Indus., Inc.*, 129 F.Supp.3d at 289–92.

*Button* and its progeny, CAI has failed to provide evidence that any activity for which it claims a right to associate is deserving of First Amendment protection. The proposed legal services would not include assistance with litigation or the vindication of any statutory rights. (ECF No. 106–1 at 64–67.) They would not further the right to free speech pertaining to political expression as in *Button* and *Primus*; nor would they further the right to petition the government for redress before a court or an agency as in *United Transportation Union*, *Trainmen*, or *Mine Workers*, by, for example, advising CAI members as to how they might vindicate their constitutional or statutory rights. CAI's characterization of *Button* and its progeny as establishing a First Amendment right to undertake "a broad range of group legal services" overstates the breadth of these holdings. (*See* ECF 104 at 23.)

Because CAI's proposed provision of legal services would not further the exercise of any protected First Amendment activity, CAI is not entitled to any corresponding First Amendment associational protection merely because the activities would be undertaken collectively. CAI has failed to meet its burden on its right of association claim. The State Bar is accordingly entitled to judgment as a matter of law on this claim.

*4. Vagueness*

**[19]** CAI next argues that the UPL Statutes are unconstitutionally vague as applied to its current and proposed activities, (ECF 104 at 32–34), characterizing them as "sweeping and opaque restrictions that fail to give sufficient guidance as to what constitutes legal advice," (*id.* at 33). The State Bar responds that the UPL Statutes' prohibition on giving legal advice is not vague, because the term "legal advice" is well-defined, and further CAI understands the term. (ECF No. 113 at 30–33.)

**[20, 21]** A claim that a statute is void-for-vagueness arises under the Due Process Clause. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). The statute will violate due process on vagueness grounds when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)). CAI contends that the UPL Statutes fail to provide sufficient notice of the conduct prohibited by the term "legal advice." (ECF 104 at 33.) Despite this contention, CAI appears to understand the term "legal advice" and has repeatedly used the term to describe its current and proposed activities. Bruce Clarke, CAI's President and CEO, demonstrated his understanding of that term in a 2013 communication with the State Bar when he noted that legal advice entails "applying a legal solution to specific facts." (ECF No. 42–1 at 2.) Further, he confirmed in his deposition that he understands a "reasonable definition" of the term following his review of the General Statutes. (ECF No. 113–1 at 124–25.) In its Complaint, CAI alleges that it currently provides its members "non-legal advice" through its "Advice and Resolution Team." (ECF No. 1 ¶¶ 18, 19.) Mr. Clarke also described the proposed services that form the basis of this suit as offering "employment-related legal advice and services." (ECF No. 105–1 ¶ 34, 44.) Indeed, as argued by the State Bar, CAI's Complaint alleges that CAI's attorneys are " 'educated and licensed' with respect to 'giving legal advice,' and 'could render to CAI members competent legal advice.' "

(ECF No. 113 at 31 (quoting ECF No. 1 ¶¶ 34, 37) (emphasis omitted).) There is little question that CAI understands that the UPL Statutes prohibit CAI from offering legal advice as applied to its current and proposed activities. *See Humanitarian Law Project*, 561 U.S. at 22, 130 S.Ct. 2705 (concluding that statutory terms challenged on vagueness grounds "readily and naturally cover[ed] plaintiffs' conduct" when the "plaintiffs themselves ha[d] repeatedly used the terms ... throughout th[e] litigation" to describe their own conduct).

[22] The Court is also not persuaded by CAI's argument that "CAI cannot identify the line between lawful compliance advice and unlawful legal advice." (*See* ECF No. 104 at 34.) The vagueness doctrine does not require "perfect clarity and precise guidance," *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), rather it requires only "fair notice" of prohibited conduct, *Martin*, 700 F.3d at 135. Nor is the Court persuaded by CAI's reliance on hypothetical situations involving the question of whether the term "legal advice" could apply to prohibit a passenger from communicating a speed limit to a driver. (*See* ECF No. 104 at 33–34.) *See Williams*, 553 U.S. at 306, 128 S.Ct. 1830 ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."). Hypothetical situations unrelated to CAI's specific conduct are irrelevant to its as-applied vagueness challenge. *See Humanitarian Law Project*, 561 U.S. at 22–23, 130 S.Ct. 2705.

The Court concludes that CAI's vagueness claim lacks merit because there is no question that CAI has fair notice of the conduct that the term "legal advice" prohibits, as applied to CAI's current and proposed activities. *See Humanitarian Law Project*, 561 U.S. at 21, 130 S.Ct. 2705 ("[T]he dispositive point here is that the statutory terms are clear in their application to plaintiff's proposed conduct, which means that plaintiffs' vagueness challenge must fail."). For the reasons outlined, the State Bar is entitled to judgment as a matter of law on this claim.

*5. Monopoly Clause*

[23] CAI next contends that the UPL Statutes, as applied to its proposed legal services, violate the Monopoly Clause of the North Carolina Constitution.[12] (ECF No. 104 at 35–36.) CAI argues that the UPL Statutes, as applied, "merely protect the economic interests of attorneys by sheltering attorney-owned entities from competition with non-attorney-owned entities." (*Id.* at 36.) The State Bar argues that North Carolina courts have concluded that the UPL Statutes do not violate the Monopoly Clause, and that those decisions bind this Court. (ECF No. 113 at 34–35.)

[24] A federal court hearing a state-law claim is obligated to apply the law of the state as interpreted by that state's highest court. *See Wetzel v. Edwards*, 635 F.2d 283, 289 (4th Cir. 1980) ("[I]t is well-settled that the federal courts are bound by the interpretation placed on state statutes by the highest courts of the state."). The North Carolina Supreme Court has twice held that the state's prohibition on the corporate practice of law does not violate the North Carolina Constitution. *See Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517, 523 (1986) (concluding that the prohibition of the corporate practice of law does not violate "Article I of the North Carolina Constitution"); *Seawell v.*

12. The Monopoly Clause states that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. I, § 34.

*Carolina Motor Club*, 209 N.C. 624, 184 S.E. 540, 544 (1936) (concluding that the prohibition of the corporate practice of law "offends neither the State nor Federal Constitution"). While neither decision presented the precise legal question before the Court in the present case, namely, whether the Monopoly Clause of the North Carolina Constitution tolerates the state's prohibition on the corporate practice of law, as applied to CAI's proposed legal services, the Court finds them instructive, though not dispositive.

The Court finds more persuasive, however, two century-old opinions of the North Carolina Supreme Court, which upheld the state's power to regulate two other professions against challenges that those regulatory schemes violated the Monopoly Clause. In the first, *State v. Call*, 121 N.C. 643, 28 S.E. 517 (1897), the North Carolina Supreme Court held that the state's regulation of the medical profession, as applied to an individual who was indicted for practicing without a license, did not violate the Monopoly Clause. *Call*, 28 S.E. at 517. In so holding, the court reasoned that the state can regulate "persons desiring to practice law or medicine ... or exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency," and that such regulation "is in no sense the creation of a monopoly or special privileges." *Id.* In the second, *St. George v. Hardie*, 147 N.C. 88, 60 S.E. 920 (1908), the North Carolina Supreme Court held that the State's regulation of "pilots and pilotage" did not violate the Monopoly Clause, reasoning that the power to regulate and license pilots "comes within the principle upon which the state prescribes the qualifications of those who are admitted to practice law ... and other callings and professions so related to the public." *St. George*, 60 S.E. at 923.

In this case, CAI's Monopoly Clause challenge fails for the same reasons articulated by the North Carolina Supreme Court in *State v. Call* and *St. George v. Hardie*. *See Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998) ("It is axiomatic that in determining state law a federal court must look first and foremost to the law of the state's highest court, giving appropriate effect to all its implications. A state's highest court need not have previously decided a case with identical facts for state law to be clear. It is enough that a fair reading of a decision by a state's highest court directs one to a particular conclusion."). The UPL Statutes, as applied to CAI's proposal to provide legal services, regulate those persons and entities that North Carolina has judged to be qualified to practice law and are "in no sense the creation of a monopoly," *Call*, 28 S.E. at 517.

CAI does not discuss *State v. Call* and *St. George v. Hardie* in its brief. (ECF No. 104 at 35–36.) Instead, CAI relies heavily on a different case, *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), where the North Carolina Supreme Court held that a licensing scheme that applied to photographers offended the Monopoly Clause. *Ballance*, 51 S.E.2d at 736. The Court does not find *State v. Ballance* persuasive, however, as the North Carolina Supreme Court's conclusion that the licensing scheme for photographers violated the Monopoly Clause followed from its conclusion that photography was "in essence, a private business unaffected in a legal sense with any public interest." *Id.* at 735. The legal profession, in contrast, could not be more different. *See Pledger*, 127 S.E.2d at 339 (concluding that the UPL Statutes were "not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; [the] purpose is for the better security of the people against incompeten-

cy and dishonesty in an area of activity affecting general welfare"). The Court therefore finds that *State v. Ballance* does not apply given the differences between that case and the present one. Accordingly, the Court concludes that the State Bar is entitled to judgment as a matter of law on this claim.

*6. Commercial Speech*

**[25, 26]** Finally, CAI contends that the UPL Statutes unconstitutionally prohibit CAI from advertising legal services. (ECF No. 104 at 34–35.) Specifically, CAI argues that "[b]ecause CAI has a constitutional right to offer legal advice and services to its members, this prohibition is unconstitutional." (*Id.* at 34.) The State Bar argues, on the other hand, that "[t]o have a colorable commercial speech claim [under the First Amendment], CAI must establish that 'the regulated speech concerns lawful activity,' which it cannot do." (ECF No. 123 at 31 (quoting ECF No. 104 at 35).) CAI and the State Bar agree that CAI's commercial advertising claim turns on CAI's contention that its provision of legal services is lawful. (ECF Nos. 104 at 34–35; 113 at 33; 123 at 31.) Here, because CAI has failed to establish that it has a constitutionally protected right to provide legal services, doing so would constitute unlawful activity under the UPL Statutes. The Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), makes clear that First Amendment protection of commercial speech can only apply when the underlying activity is lawful. *Centr. Hudson Gas & Elec. Corp.*, 447 U.S. at 564, 100 S.Ct. 2343; *see Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013). Thus, CAI has no First Amendment right to advertise legal services since its right to provide such services is unlawful under the UPL Statutes. Accordingly, the State Bar, and not CAI, is entitled to judgment as a matter of law on this claim.

## IV. CONCLUSION

For the reasons stated herein, State Prosecutors have not carried their burden of demonstrating that CAI lacks standing or that State Prosecutors are entitled to judgment as a matter of law on CAI's right of association claim. State Prosecutors' motion, (ECF No. 100), must therefore be denied. CAI has not carried its burden of demonstrating that it is entitled to judgment as a matter of law on any of its six claims; CAI's motion, (ECF No. 103), must, therefore, be denied. The State Bar, however, has shown that it is entitled to judgment as a matter of law on each of CAI's claims. Because there is no genuine issue of material fact as to any claim, the Court concludes that the State Bar is entitled to summary judgment and its motion, (ECF No. 112), will be granted, thus dismissing this action.

## ORDER

IT IS THEREFORE ORDERED that State Prosecutors' Motion for Summary Judgment, (ECF No. 100), is DENIED.

IT IS FURTHER ORDERED that CAI's Motion for Summary Judgment, (ECF No. 103), is DENIED.

IT IS FURTHER ORDERED that the State Bar's Motion for Summary Judgment, (ECF No. 112), is GRANTED, and this case is therefore DISMISSED.

A Judgment dismissing this action will be entered contemporaneously with this Order.