No. _____

In The
Supreme Court of the United States

CAPITAL ASSOCIATED INDUSTRIES, INC.,
Petitioner,

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 THE NORTH CAROLINA STATE BAR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: August 30, 2019

QUESTIONS PRESENTED

In *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967), the Court held that the First Amendment provides a labor union—a non-profit association of employees—"the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-222. Yet in North Carolina, it is a criminal offense for a non-profit association of employers, such as Petitioner Capital Associated Industries, Inc. (the "Association"), to hire attorneys on a salary basis to assist its members with legal questions.

More recently, the Court held in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), that lower courts should apply strict scrutiny to professional licensing regimes that censor speech based solely on its content. Yet the lower court characterized North Carolina's content-based censorship of the Association's speech as a conduct regulation with only an incidental impact on speech, and applied lesser scrutiny.

The questions presented are:

1. Do the North Carolina statutes prohibiting the Association's attorneys from providing legal assistance to its members violate the freedom of association guaranteed by the First and Fourteenth Amendments?

2. Are the North Carolina statutes prohibiting the Association's attorneys from providing legal assistance to its members a content-based restriction on speech that must be reviewed under strict scrutiny?

PARTIES TO THE PROCEEDINGS

Capital Associated Industries, Inc. was the plaintiff in the district court and appellant in the court of appeals.

Defendants Josh Stein, Nancy Lorrin Freeman, and J. Douglas Henderson were defendants in the district court and appellees in the court of appeals.

Defendant North Carolina State Bar was intervenor-defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Capital Associated Industries, Inc. is a non-profit corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (M.D.N.C.)

Capital Associated Industries, Inc. v. Stein, No. 1:15-cv-83 (Sept. 19, 2017)

United States Court of Appeals (4th Cir.)

Capital Associated Industries, Inc. v. Stein, No. 17-2218 (Apr. 19, 2019)

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PETITION FOR WRIT OF CERTIORARI

Capital Associated Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a-24a) is reported at 922 F.3d 198. The District Court's opinion (App. 25a-57a) is reported at 283 F. Supp. 3d 374.

JURISDICTION

The Fourth Circuit entered judgment on April 19, 2019. On June 19, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including August 30, 2019. No. 18A1321. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, U.S. Const. amend. I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, U.S. Const. amend. XIV, provides:

> All persons born or naturalized in the United States and subject to the

> jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 84-2.1(a) of the North Carolina General statutes provides, in pertinent part:

> The phrase "practice law" … is defined to be performing any legal service for any other person, firm or corporation, with or without compensation[.]

Section 84-5(a) of the North Carolina General Statutes provides, in pertinent part:

> It shall be unlawful for any corporation to practice law[.]

Section 84-7 of the North Carolina General Statutes provides:

> The district attorney of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged

> are violating the provisions of G.S. 84-4 to 84-8, and 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 provisions of G.S. 84-4 to 84-8.

Section 84-8(a) of the North Carolina General Statutes provides:

> Any person, corporation, or association of persons violating any of the provisions of G.S. 84-4 through G.S. 84-6 … shall be guilty of a Class 1 misdemeanor.

INTRODUCTION

Petitioner Capital Associated Industries, Inc. (the "Association") is a non-profit association of more than 1,100 North Carolina employers that exists to help its members address common management and employment issues. The Association advances its mission of helping employer-employee relations by sharing best management practices, educating members about labor and employment regulations, and advocating on public policy issues. Many of the Association's members are too small to employ in-house counsel or human-resources professionals to help them navigate the web of existing federal, state, and local labor-and-employment laws. To assist its members, the Association offers access to a team of human-resources professionals—which includes licensed attorneys—that answers questions about human-resources issues.

Each year, however, the Association's attorneys must decline to answer hundreds of questions from

Association members. North Carolina's unauthorized practice of law statutes ("UPL statutes") prohibit them from doing so if the answer constitutes legal advice. In that case, answering is a criminal offense. N.C. Gen. Stat. §§ 84-5(a), 84-8(a).

The UPL statutes plainly abridge the Association's First Amendment right to freedom of association. In *United Mine Workers of America, District 12 v. Illinois State Bar Association*, the Court recognized "the right of an association to provide legal services for its members." 389 U.S. 217, 222 (1967). The Court held that a labor union had "the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-222. This decision does not stand alone. In three other cases decided decades ago, the Court held that UPL statutes cannot be used to prohibit non-profit associations from offering legal assistance to members. *NAACP v. Button*, 371 U.S. 415, 428-429 (1963); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5 (1964); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971).

The Association brought this case to vindicate the same rights recognized in *Mine Workers* and this Court's other cases. Describing the question as "admittedly close," App. 11a, the Fourth Circuit nonetheless held that, as applied to the Association, "North Carolina's UPL statutes only marginally affect[] … First Amendment concerns," App. 13a (internal quotation marks omitted). The Fourth Circuit characterized the Association—a non-profit organization governed by its members that seeks to provide legal advice in furtherance of its mission—as too "commercial" to have the same First Amendment

rights as labor unions and other non-profit associations. App. 11a. Indeed, the court held that it "need not examine whether the state's interests suffice to justify" the UPL statutes' restrictions on the Association. App 13a.

In so holding, the Fourth Circuit joined the Seventh Circuit in adopting an unduly narrow view of the First Amendment protections afforded to non-profit associations that seek to provide legal help to their members. *See Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386-1387 (7th Cir. 1992). Those courts stand in contrast to the New Hampshire, California, and Wisconsin Supreme Courts, which have correctly recognized that UPL statutes impose substantial burdens on associational rights.

This case presents an ideal vehicle for the Court to address the split in authority that has developed over the past 40 years in an area that has important, nationwide consequences for access to cost-effective legal services. As Justice Gorsuch has recognized, "a more nuanced approach" to lawyer regulation could "preserve (or even enhance) quality while simultaneously increasing access to competent and affordable legal services." Neil Gorsuch, *Access to Affordable Justice*, 100 Judicature 46, 49 (2016).

North Carolina's UPL statutes also abridge the Association's freedom of speech. The Association is only free to speak with its members if its speech does not constitute legal advice. The Court made clear in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("NIFLA"), that restrictions on "professional speech" are generally subject to strict scrutiny. The Fourth Circuit, however, applied less scrutiny to the UPL statutes

because the court described them as part of a licensing regime that regulates conduct with only an incidental impact on speech.

The practical effect of the Fourth Circuit's holding is that a state may restrict the speech of disfavored speakers through professional licensing regimes. The Court specifically warned against this very danger in *NIFLA*, explaining that subjecting so-called "professional speech" to a lower First Amendment standard would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375. Lawyers are not the only group affected. As the Court recognized in *NIFLA*, licensing regimes impact "a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and … even … fortune tellers." *Id.* The Court should not permit the Fourth Circuit to render *NIFLA* toothless just months after it was decided.

STATEMENT

A. Capital Associated Industries

In the 1960s, roughly two dozen employers in the Raleigh-Durham area of North Carolina gathered together to find solutions to common management and employment issues. C.A.J.A. 161, 470. These employers soon established the non-profit Association. C.A.J.A. 161-162. The Association now includes more than 1,100 North Carolina employers, including for-profit businesses, non-profits, and governmental organizations. C.A.J.A. 162, 249-252. Most members have fewer than 100 employees. C.A.J.A. 164.

Fifty years later, the Association remains a non-profit that is self-governed by its members that reinvests all of its membership dues into its mission of promoting healthy employer-employee relations. App. 4a; C.A.J.A. 161-163. The Association serves its members by advocating on public policy issues that affect employers, sharing best practices on common management and human-resources issues, and assisting members in navigating the web of labor-and-employment rules that impact their operations. C.A.J.A. 161-162, 165.

Many Association members are too small to employ in-house legal counsel or human-resources professionals. C.A.J.A. 164. The Association serves members, and furthers its mission, by offering them unlimited access to an Advice & Resolution Team (the "A&R Team"), which is staffed by experienced human-resources professionals. App. 4a; C.A.J.A 164, 166. The A&R Team receives 7,000 to 9,000 inquiries a year. *Id.*

However, the Association's members can receive answers to only *some* of their compliance questions. Though the Association employs North Carolina licensed attorneys, North Carolina's UPL statutes forbid the Association's attorneys from offering legal advice to members. App. 4a; C.A.J.A. 170-171. In fact, it is a crime. N.C. Gen. Stat. §§ 84-5, 84-8(a). When an Association attorney determines that the answer to a question may constitute legal advice, the attorney tells the member that the Association cannot answer the question and advises the member to hang up and call a law firm. App. 4a; C.A.J.A. 170-171, 556. The Association is forced to censor itself in this way hundreds of times each year. C.A.J.A. 171.

Frustrated Association members often find outside law firms too expensive or slow. C.A.J.A. 172-173, 527-528. Rather than obtaining sound advice from a licensed attorney, members resort to self-help solutions like "spend[ing] a lot of time online looking up stuff," conducting Google searches, asking other employers what they might do, or "wing[ing] it." C.A.J.A. 468-469, 554-555, 603-604.

The Association and its members want the Association's licensed attorneys to answer members' routine legal questions about labor-and-employment issues as part of their annual dues. C.A.J.A. 170, 172-174, 537, 556-557, 620-621, 647-648. This would include counseling members on how to comply with laws and regulations that govern specific employee situations, such as the application of unemployment laws, workers' compensation rules, the Family and Medical Leave Act, and Title VII. C.A.J.A. 166. For members needing more time-intensive help—for example, drafting employment and separation agreements or reviewing employee policies and handbooks—the Association would collect a surcharge to be fair to other members. C.A.J.A. 172-174, 309-310. The Association does not intend to help members with litigation, or specialized topics like the Employee Retirement Income Security Act, National Labor Relations Board matters, immigration law, or tax law. C.A.J.A. 170, 417.

The Association has proposed specific, additional safeguards, beyond the ethical rules imposed upon all licensed attorneys, to protect its attorneys' professional independence. These safeguards include paying attorneys on a salary basis, vesting them with full control over legal services, and training non-attorney staff to honor the attorney's ethical

responsibilities. C.A.J.A. 174, 359-360. The Association would remain a non-profit, self-governed by its members, that continues to reinvest its revenues in furtherance of its mission. C.A.J.A. 161-163

B. North Carolina Law

North Carolina enacted its UPL statutes in 1931, at a time when the organized bars in many jurisdictions worked to enact legislation protecting lawyers. App. 3a; Richard Abel, *American Lawyers* 116, 118-119, 124, 159 (1989); *see also* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Fences Really Make Good Neighbors—or Even Good Sense?*, 159 Am. B. Found. Res. J. 159, 191-192 (1980); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 Mo. L. Rev. 151, 162 (2000). State bars were concerned about competition from "the growth of a creature of the lawyer's own creation, the modern business corporation." Christensen, 159 Am. B. Found. Res. J. at 178.

North Carolina's UPL statutes make it "unlawful for any corporation to practice law." N.C. Gen. Stat. § 84-5(a). The practice of law includes providing any "legal advice or counsel" to a third party, including "advis[ing] … upon the legal rights of any person, firm or corporation." *Id.* §§ 84-2.1, 84-4. The breadth of "legal advice" is so vast that, according to the North Carolina State Bar, it could include advising a driver of the speed limit. C.A.J.A. 670-673. Unauthorized corporate practice is a Class 1 misdemeanor. N.C. Gen. Stat. § 84-8(a). State prosecutors are obligated to bring criminal charges against the corporation

upon receiving information of a violation. *See* App. 3a-4a; N.C. Gen. Stat. § 84-7.

In 2013, the Association requested permission from the North Carolina State Bar to provide its members the legal assistance they desired. The Association explained that it wanted to guide members responding to unemployment or discrimination complaints, instruct members on changes to employment rules and regulations, review employee handbooks and affirmative action plans, and advise members on applying state and federal workplace laws to live situations. C.A.J.A. 1043-1044. The State Bar responded that the Association could not offer any "legal advice to a member of the association about the member's specific legal problem" because it "would be the unauthorized practice of law." *Id.*

C. District Court Proceedings

The Association filed suit in the United States District Court for the Middle District of North Carolina against the North Carolina Attorney General and the two district attorneys who would be responsible for prosecuting the Association for a violation of the UPL statutes. C.A.J.A. 16-38. The Association sought a declaration that North Carolina's UPL statutes, as applied to the Association, violate the First Amendment.[1] The North Carolina State Bar intervened to defend the UPL statutes. App. 26a.

The Association contended that the First Amendment right to freedom of association endowed

[1] The Association made other legal challenges not at issue here.

it with the right to provide legal assistance to its members. App. 46a. The Association also argued that the UPL statutes are a content-based restriction on the Association's speech that cannot survive strict scrutiny. App. 42a.

The District Court granted summary judgment to the defendants. App. 57a. The district court concluded that the Association's associational rights claim failed because the Association's "proposed provision of legal services would not further the exercise of any protected First Amendment activity." App. 49a. The district court also denied the Association's free-speech claim, reasoning that the UPL statutes are a professional regulation "that is not subject to First Amendment scrutiny on freedom of speech grounds." App. 44a.[2]

D. Appellate Court Proceedings

The United States Court of Appeals for the Fourth Circuit affirmed, conceding that the associational rights claim was "admittedly close." App. 11a.[3]

The panel held that the UPL statutes "do not substantially impair[] the associational rights of [the Association]." App. 13a (internal quotation marks omitted). Though the Association is a self-governed

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[2] The district court relied on then-binding Fourth Circuit precedent, which provided that state regulation of "professional speech" should receive lessened First Amendment scrutiny. App. 43a (citing *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013)). As discussed below, this Court has since disapproved of that Fourth Circuit precedent. *NIFLA*, 138 S. Ct. at 2371-2372.

[3] The Fourth Circuit held that the Association had standing because it faced a credible threat of prosecution. App. 7a n2.

non-profit that seeks to offer legal assistance to its members in furtherance of its mission, the court stated that the Association's proposed activities "would be for commercial ends." App. 11a. Because the panel determined that the application of the UPL statutes to the Association "only marginally affect[s] ... First Amendment concerns," the court determined that it "need not examine whether the state's interests suffice to justify them." App. 13a. (internal quotation marks omitted).

Turning to the free-speech claim, the panel recognized that this Court had rejected the Fourth Circuit's so-called "professional-speech doctrine" in *NIFLA*, which held that content-based restrictions on professional speech should be subject to strict scrutiny. App. 13a-14a. However, the panel determined that "North Carolina's ban on the practice of law by corporations fits within *NIFLA*'s exception for professional regulations that incidentally affect speech." *Id.* The panel reasoned that "any impact the UPL statutes have on speech is incidental to the overarching purpose of regulating who may practice law." App 15a.

The panel then applied intermediate scrutiny and held that the UPL statutes survived because "[p]rofessional integrity could suffer if the state allows lawyers to practice on behalf of organizations owned and run by nonlawyers" and because "[n]onlawyers would likely supervise lawyers representing third-party clients …, which could compromise professional judgment and generate conflicts." App. 18a.

REASONS FOR GRANTING THE PETITION

I. THE FIRST QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

North Carolina is one of many states that has enacted broad statutes that prevent corporate entities—including non-profits and voluntary associations—from employing licensed attorneys to provide legal advice to third parties. The Fourth Circuit correctly recognized that "[a]lmost all other states have similar laws on the books" that forbid "corporations from practicing law." App. 3a n.1; *see, e.g.*, Ark. Code Ann. § 16-22-211; Ga. Code. Ann. § 15-19-51(b); La. Rev. Stat. § 37:213(A)(1); Mass. Gen. L. ch. 221, § 46; Mich. Comp. Laws § 450.681; Mo. Rev. Stat. § 484.020; N.H. Rev. Stat. § 311.11; S.D. Codified Laws § 47-13A-10.[4]

In the 1960s and early 1970s, this Court recognized that state UPL laws may abridge the First Amendment right to association when applied to non-profit associations like the NAACP and labor unions. *See Button*, 371 U.S. at 428-429; *Trainmen*, 377 U.S. at 5; *Mine Workers*, 389 U.S. at 222; *United Transp. Union*, 401 U.S. at 580 (collectively "*Button* and the Union Cases"). But the Court has not returned to the subject for more than forty years. In that time, a split of authority has developed in the lower courts, rendering the First Amendment rights of non-profit organizations inconsistent and, in many cases, unduly narrow.

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[4] North Carolina and other states generally permit the practice of law by (1) corporations owned entirely by lawyers (*i.e.*, law firms), (2) certain legal services corporations (*i.e.*, public interest law firms), and (3) in-house counsel representing their employers. App. 4a; *see* N.C. Gen. Stat. §§ 55B-8, 84-5(a), 84-5.1.

A. The First Amendment Right To Association Varies By Jurisdiction

1. The Fourth Circuit and Seventh Circuit have narrowed the associational rights of non-profit associations

The Fourth Circuit below adopted a very narrow view of the Association's First Amendment rights, concluding that, as applied to the Association, the UPL statutes "'only marginally affect … First Amendment concerns.'" App. 13a (quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 459 (1978)). The Fourth Circuit joined the Seventh Circuit in its hostility to associative rights. The Seventh Circuit previously held that UPL regulations could prohibit an unincorporated association from providing free legal advice to callers because the statutes did not put a "fundamental right … at issue." *Lawline*, 956 F.2d at 1387. The Seventh Circuit concluded that the right of laypersons to associate with lawyers recognized by this Court in *Mine Workers* only applied when "necessary … in order to realize their right to free speech, petition and assembly." *Id.* As with the Fourth Circuit, the Seventh Circuit held that First Amendment protections are only triggered when association lawyers are needed "to obtain meaningful access to the courts." *Id.*; App. 12a.

Because the Fourth and Seventh Circuits do not recognize the significant burdens that UPL statutes impose on the rights of non-profit associations, they apply little, if any, scrutiny to the justifications for restricting non-profit associations from providing legal assistance.

In fact, the Fourth Circuit was clear that it would apply no scrutiny whatsoever. Having concluded that North Carolina's UPL statutes "do not 'substantially impair[] … associational rights,'" App. 13a (quoting *Mine Workers*, 389 U.S. at 225), the court determined that it "need not examine whether the state's interests suffice to justify" the restrictions imposed by the UPL statutes. *Id.* The Fourth Circuit expressly relied on the Seventh Circuit's *Lawline* decision, which it described as "declining to apply heightened scrutiny because there was no deprivation of associational rights." *Id.* (citing *Lawline*, 956 F.2d at 1387). Indeed, the *Lawline* panel explained that an association's ability to offer legal services was a subject of State discretion. *See* 956 F.2d at 1387.

Thus, in the Fourth and Seventh Circuits, the States may forbid the practice of law by non-profit associations with little, if any, justification.

2. New Hampshire, California, and Wisconsin have correctly recognized that the application of UPL statutes to non-profit organizations implicates significant First Amendment interests

At least three state appellate courts of last resort understand this Court's First Amendment teachings differently—and correctly. Had the Association's appeal been heard in one of those states, the result would have been different.

In 1988, Justice David Souter, then serving on the New Hampshire Supreme Court, wrote an opinion that addressed a non-profit's right to practice law despite New Hampshire's UPL statutes. *See In re N.H. Disabilities Rights Ctr., Inc.*, 541 A.2d 208 (N.H. 1988). At the time, New Hampshire law limited

corporate practice of law to serving "the poor," and the Disability Rights Center sought to expand its practice to include others. *Id*. at 209.

The New Hampshire Supreme Court recognized that the Center's "claim under the first and fourteenth amendments [was] substantial" in light of this Court's decisions in *Button* and the Union Cases. *Id.* at 212. The opinion aptly described the import of those cases:

> Organizations, their members and their staff lawyers may assert a protected first amendment right of associating for non-commercial purposes to advocate the enforcement of legal and constitutional rights of those members …. When such advocacy may reasonably include the provision of legal advice …, the organization may itself provide legal representation to its members … despite State regulations restricting legal practice and the solicitation of clients, provided that the organization and its lawyers do not engage in the specific evils that the general State regulations are intended to prevent.

Id. at 213.

The New Hampshire Supreme Court rejected the State's contention that First Amendment concerns were limited to rectifying a lack of access to the courts. Justice Souter recognized that the labor unions in *Trainmen* and *Mine Workers* "were not responding to any unavailability of counsel," rather they were responding "to the inadequacies of the representation that was at hand" and seeking to

improve the legal services available to their members. *Id.* at 214. This reasoning contrasts starkly with the Fourth Circuit, which distinguished this Court's decisions because the Association's activities "would not facilitate access to the courts." App. 11a.

The New Hampshire Supreme Court also differed from the Fourth Circuit and Seventh Circuit because it applied heightened scrutiny to New Hampshire's UPL statutes, explaining that "[t]he threat of evil must … be concrete and immediate before it can justify enforcement of State restrictions that impinge on first amendment interests." *Disabilities Rights Ctr.*, 541 A.2d at 215. The New Hampshire court rejected the State's speculative justifications for the UPL statutes, noting that "the Court in *Mine Workers* held that the general possibility of conflicting interests between the association and the individual client is too speculative to support enforcement." *Id.* In contrast, the Fourth Circuit concluded that the mere possibility that the Association's legal practice "could" compromise independence or "could" cause a breach of loyalty was sufficient to determine that the UPL statutes implicated no First Amendment rights whatsoever. App. 12a.

The California Supreme Court has also recognized the important associational rights of non-profit organizations. *Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408 (Cal. 2006). The California court explained that "[t]he broad import of [this Court's] cases is to 'uphold[] the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable.'" *Id.* at 418 (quoting *United Transp. Union*, 401 U.S. at 580). Indeed, the California court quoted at length Justice

Souter's explanation of this Court's decisions in *Button* and the Union Cases. *Id.* at 419.

The New Hampshire and California courts are not alone. A decade earlier, the Supreme Court of Wisconsin recognized that UPL statutes could not prevent a non-profit association from providing legal information to constituents. The Wisconsin court held that it "would infringe upon First Amendment rights recognized by [this] Court" in *United Transportation Union*, *Mine Workers*, and *Trainmen*. *Hopper v. Cty. of Madison*, 256 N.W.2d 139, 145 (Wis. 1977). The Wisconsin court correctly understood the Court's precedent to "uphold the principle that the First Amendment guarantees of free speech, petition and assembly protect the right of persons to unite to assert their legal rights as effectively and economically as possible." *Id.*

The split in authority between the Fourth and Seventh Circuits and the Supreme Courts of New Hampshire, California, and Wisconsin is intractable. The state decisions and the Seventh Circuit decision are longstanding and will not be reconsidered absent intervention by this Court. Moreover, the split will only deepen as more courts address this issue. Accordingly, this case, which cleanly and clearly presents the issue, is an ideal vehicle for the Court to clarify the law in this important area.

B. Applying UPL Statutes To Non-Profit Associations Burdens Access To Important Legal Services With No Meaningful Benefit

Legal commentators have recognized that the lack of access to affordable, useful legal representation is a serious problem in the United States. As Justice Gorsuch put it, "[m]ost everyone agrees that in the

American civil justice system many important legal rights go unvindicated, serious losses remain uncompensated, and those called on to defend their conduct are often forced to spend altogether too much." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 47. The reality is that "[l]egal services in this country are so expensive that the United States ranks near the bottom of developed nations when it comes to access to counsel in civil cases." *Id.*; *see also* Benjamin Cooper, *Access to Justice Without Lawyers*, 47 Akron L. Rev. 205, 205 (2014) (noting that the United States ranked "twentieth out of the twenty-three countries … in its income group" on "access to civil justice").

While commentators often focus on legal services for low-income individuals, small businesses, which make up a substantial portion of the Association's membership, face similar problems. Indeed, the North Carolina Commission on the Administration of Law & Justice recently reported that "[s]mall- and medium-sized businesses … find it increasingly unaffordable to hire lawyers to address the legal issues that inevitably arise in modern business." N.C. Comm'n on Admin. of L. & Justice, *Final Report: Recommendations for Strengthening the Unified Court System of North Carolina* 49 (March 2017). The result is that "many parties try to represent themselves" and resort to inadequate self-help remedies. *Id.*; *see also supra* p. 8.

It is also widely understood that "entry barriers in legal services," such as UPL statutes, "have created inefficiencies" and prevent important innovation that would make the delivery of legal services more efficient and democratic. Clifford Winston & Quentin Karpilow, *Should the U.S. Eliminate Barriers to the Practice of Law? Perspectives Shaped by Industry*

Deregulation, American Economic Review: Papers and Proceedings, 1 (2016). As Justice Gorsuch observed, one might "wonder if a profession entrusted with the privilege of self-regulation is at least as (or maybe more) susceptible than other lines of commerce to regulations that impose too many social costs compared to their attendant benefits." Gorsuch, *Access to Affordable Justice*, 100 Judicature at 48.

Here, the Association and its members have proposed a common-sense plan to provide members high-quality legal advice "as effectively and economically as practicable." *United Transp. Union*, 401 U.S. at 580. The Association's members face similar legal questions that are likely to arise infrequently for individual members. But the issues arise frequently within the group. In short time, the Association's attorneys will know the recurring issues facing the membership and the relevant law—making them uniquely situated to provide sound advice quickly and affordably.[5]

Justice Souter recognized this benefit in *Disabilities Rights Center*, where it was undisputed that the Center's "lawyers are more conversant in the relevant law than are most lawyers practicing privately." 541 A.2d at 214. He concluded that this was reason to believe that the Center's expanded legal practice "will probably result in better representation ... and more effective service to all … whose interests the [Center] is organized to advance." *Id.*

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[5] In addition, the Association's attorneys, because of their recurring contacts with members, often will be familiar with the factual background giving rise to the legal issues. The record reflects that legal questions often arise after the Association has already been working with a member on an employee issue. C.A.J.A. 614, 617-618.

The benefit to the Association's members would be substantial. Members come to the Association seeking the information necessary to comply with labor and employment law. C.A.J.A. 253. Rather than resorting to self-help and "wing[ing] it," members want the Association to offer them timely legal advice from knowledgeable attorneys. C.A.J.A. 172, 554-555, 603-604. Such advice would help members operate more efficiently, avoid costly problems, and protect their employees. Indeed, employees will benefit when their employers have access to good legal advice. Employers of all types and sizes will be better informed about their legal rights and obligations, promoting "the predictability and uniformity that underlie our society's commitment to the rule of law." *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 50 (1981) (Blackmun, J., dissenting). The model of accessible specialized knowledge proposed by the Association could also be replicated by other non-profit associations in North Carolina and other states.

In contrast to the clear benefits of the Association's plan, the State offers only "theoretical possibilit[ies]" of harm to justify the severe imposition on associational rights. *Mine Workers*, 389 U.S. at 223; *see* App. 12a. The Court specifically rejected the "theoretically imaginable divergence between the interests of union and member" in *Mine Workers*, recognizing that it had also rejected such a contention in *Button*. 389 U.S. at 224; *see Button*, 371 U.S. at 441-443; *see also Disabilities Rights Ctr.*, 541 A.2d at 215 ("[T]he general possibility of conflicting interests between the association and the individual client is too speculative to support enforcement of an otherwise valid State regulation, when enforcement

would compromise a demonstrated first amendment interest.").

There is no evidence of any actual conflict arising in the voluntary offer of legal assistance by a non-profit association to its members. *See Mine Workers*, 389 U.S. at 224 (noting that "the Illinois Supreme Court itself described the possibility of conflicting interests as, at most, 'conceivabl[e]'"). Indeed, three peer employer associations operate in other states and provide the type of legal assistance that the Association seeks to provide in North Carolina. C.A.J.A. 182-185, 198-200, 214-217. Uncontroverted record evidence establishes that these associations, collectively, have offered legal services for over a century without a single attorney being disciplined for ethical issues. C.A.J.A. 182-183, 186-187, 202, 218.

Here, the North Carolina State Bar conceded that any conflicts are speculative and, even if they arise, attorneys are trained to handle them. *See* C.A.J.A. 745-746, 751-752. The Association seeks only to assist its members with relatively routine legal questions, which are unlikely to raise substantial ethical concerns. *See supra* p. 8-9. The Association has proposed numerous safeguards to limit the potential for any conflicts. *Id.* In addition, legal advice would only be provided by licensed attorneys who are already bound by professional ethical standards. C.A.J.A. 174, 348-349. The State Bar has ample means to police any conflicts of interest and any other problems through its existing disciplinary powers over the Association's attorneys. *See* C.A.J.A. 696, 708-709, 762-764, 822.

The Association is governed by its members and is seeking only to offer legal advice to members who want it. *See supra* p. 7-9. No member would be bound to use the Association's attorneys for legal advice. Every member would be free to rely on any counsel—or none at all—when legal questions arise. The Association and its members simply believe that their plan provides a needed service that furthers the Association's mission.

II. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THE FIRST AMENDMENT AND THIS COURT'S PRECEDENT

The Fourth Circuit "admitted[]" that the Association's associational rights claim was "close." App. 11a. The panel's candor is indicative of its struggle to explain why the Association—a voluntary, non-profit association of employers—was not entitled to the same First Amendment protections that this Court repeatedly recognized for associations of employees and other non-profit organizations. The much simpler—and correct—understanding of the First Amendment is that it affords the Association the right "to act collectively to obtain affordable and effective legal representation." *United Transp. Union*, 401 U.S. at 584.

A. The First Amendment Protects The Right Of Non-Profit Associations To Offer Legal Assistance To Their Members In Furtherance Of Their Mission

The Court recognized the associational rights of non-profit organizations to provide legal services to their members in furtherance of their collective

mission in a series of cases decide in the 1960s and 1970s.

In *Button*, the Court recognized that Virginia's UPL statutes could not be used to restrict the NAACP's right to solicit and represent members. 371 U.S. at 419-422. The Court held that the Virginia UPL statutes "violate[] the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association." *Id.* at 437. The Court explained that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. The Court recognized that "the Constitution protects expression and association without regard … to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Id.* at 444-445.

Soon after *Button*, the Court in *Trainmen* upheld against Virginia's UPL statutes the right of a labor union to recommend pre-approved attorneys to members injured on the job. *Trainmen*, 377 U.S. at 1. The Court explained that "[i]t cannot be seriously doubted that the First Amendment's guarantees … give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting … statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow." *Id*. at 5-6.

Then, in *Mine Workers*, the Court held that the Illinois UPL statutes could not be used to prohibit a union from employing a salaried attorney to represent members in workers' compensation cases. 389 U.S. at 217. The Court recognized the general "right of an association to provide legal services for its members."

Id. at 222. In doing so, the Court explained that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* at 223. The Court elaborated that "[g]reat secular causes, [along] with small ones, are guarded" under the First Amendment, and its protections "are not confined to any field of human interest." *Id.* (internal quotations omitted). The Court dismissed "theoretical" concerns about the union interfering with the lawyer's duty to represent members. *Id.* The Court specifically held that the First and Fourteenth Amendments gave the union "the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-222.

In *United Transportation Union*, the Court then held that a union's practice of recommending pre-approved attorneys with union-dictated legal rates was protected by the First Amendment. 401 U.S. at 577. The union's practice helped members avoid excessive legal fees, and the Court held that the union's members had the right "to act collectively to obtain affordable and effective legal representation." *Id.* at 584-585.

Finally, in *In re Primus* the Court held that a state bar could not prohibit a lawyer associated with the ACLU from advising a potential litigant that the ACLU could offer the litigant free legal assistance. 436 U.S. 412, 414 (1978). The Court summarized *Button* and the Union Cases as recognizing a First Amendment right to engage in "collective activity" that includes "provid[ing] low-cost, effective legal representation." *Primus*, 436 U.S. at 426.

B. The Fourth Circuit's Decision Conflicts With This Court's Longstanding Precedent

The Association is a self-governed non-profit that seeks to provide legal advice to its members in furtherance of its mission. But the Fourth Circuit held that the UPL statutes "do not substantially impair the associational rights of CAI" and "only marginally affect[] … First Amendment concerns." App. 13a (internal quotation marks omitted). As a result, the court held that it need not apply any scrutiny to the UPL statutes. *Id.*

To reach its holding, the court concluded that the case was not governed by *Button* and the Union Cases, and instead held that the case was closer to this Court's decision in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). App. 11a. In *Ohralik*, the Court rejected a *free speech* challenge to an Ohio restriction on lawyer solicitation of clients, reasoning that the First Amendment could yield to a state's interest in imposing limits on a proposed commercial transaction. 436 U.S. at 455-457, 468. The Court only touched on associational rights in a single paragraph that begins by noting that associational rights were not at issue in the case. *Id.* at 458. The Court was careful to distinguish a private attorney's "solicitation" of clients for profit, which could be regulated, from the "mutual assistance in asserting legal rights that was at issue in *United Transportation* …, *Mine Workers* …, and *Railroad Trainmen*." *Id.* at 458-459.

Just like the labor unions at issue in those cases, the Association is a non-profit that seeks to provide mutual assistance to its members in furtherance of the Association's goals. Nonetheless, the Fourth

Circuit concluded that, as applied to the Association, "North Carolina's UPL laws are closer to the [solicitation] statute in *Ohralik* than the [UPL] statutes in [*Button* and the Union Cases]." App. 11a. In so holding, the Fourth Circuit accepted arguments that this Court has already rejected, and reached a result that impermissibly burdens First Amendment rights.

For example, the Fourth Circuit reasoned that First Amendment rights were not implicated because the Association sought "to accomplish … commercial ends" and to "address only private concerns." App. 11a. The court distinguished *Button* and *Primus* as protecting groups that were "expanding and guarding [members'] civil rights," whereas the Association merely "want[s] to help its members 'resolv[e] private differences.'" App. 11a (quoting *Button*, 371 U.S. at 429).

The Fourth Circuit misread those cases and ignored the Union Cases, each of which involved the resolution of private disputes. For example, in *Mine Workers* the Court held that the First Amendment protected a union's efforts to secure effective representation in workers' compensation cases—legal work that was "not bound up with political matters of acute social moment." 389 U.S. at 223. *United Transportation Union* likewise concerned union members' effort "to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act." 401 U.S. at 577. As the Court explained in *Mine Workers*, under the First Amendment "'[g]reat secular causes, with small ones, are guarded.'" 389 U.S. at 223 (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). After these decisions, there can be no

meaningful doubt that the First Amendment protects the right of associations "to act collectively to obtain affordable and effective legal representation" to resolve private disputes. *United Transp. Union*, 401 U.S. at 584.

The panel equated the Association to a "private attorney" practicing law for "commercial ends" because its provision of legal assistance to members could increase membership and revenues. App. 11a. The court determined that this was a reason to deny the Association First Amendment protection. *Id*. However, the Court in *Primus* rejected the "suggestion that the level of constitutional scrutiny … should be lowered because of a possible [financial] benefit to the ACLU" from its legal practice. 436 U.S. at 428. More broadly, financial motives do not strip expressive activity of First Amendment protection. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) ("Some of our most valued forms of fully protected speech are uttered for a profit."). To the extent the Association's motives might impact the analysis, the Fourth Circuit's analogy is inapt. The Association is not seeking to generate personal wealth; it is a non-profit seeking to advance its mission of helping employer-employee relations. C.A.J.A. 173, 430, 518-524.

The Fourth Circuit also ignored the Court's more recent teaching that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Education and instruction are forms of expressive activity. *See id.* at 644, 650; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring); *see also Sanitation & Recycling Indus. v. Cty. of N.Y.*, 107 F.3d 985, 998 (2d Cir. 1997) (holding

that trade association is an expressive association based on its "educational function, helping [members] comply with complex regulations governing [their] business"). The Association seeks to accomplish its mission of helping employer-employee relations by educating and instructing members on how to comply with the law, but North Carolina abridges its right to do so.

The Fourth Circuit stated that the First Amendment is only at issue when UPL statutes prohibit an organization from providing "meaningful access to the courts." App. 12a (internal quotation marks omitted). The court dismissed the Association as only seeking to "reduce some of its members' legal bills." *Id.*

Again, the Fourth Circuit ignored this Court's teachings. *United Transportation Union* expressly recognized the right "to act collectively to obtain *affordable* and effective legal representation." 401 U.S. at 584 (emphasis added). The Court reversed the Michigan Supreme Court for "fail[ing] to follow" *Button*, *Trainmen*, and *Mine Workers*, which recognized "the First Amendment principle that groups can unite to assert their legal rights as effectively and *economically* as practicable." 401 U.S. at 579-580 (emphasis added). *Button* found a First Amendment violation when there was "neither claim nor proof" that the NAACP's members "have desired, but have been prevented from retaining, the services of other counsel." 371 U.S. at 443-444.

Finally, the Fourth Circuit pointed to supposed "ethical concerns" that prevented the First Amendment from protecting the Association. The panel did not identify any specific problems, but

instead stated that the proposed structure in which licensed attorneys would be supervised by non-attorneys "*could* compromise the independence and professional judgment of the lawyers" and "the corporation's interests *could* trump loyalty to clients." App. 12a (emphases added).

The Court rejected these speculative harms fifty years ago in *Mine Workers*, describing the "dangers of … conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State." 389 U.S. at 223; *Button*, 371 U.S. at 443 (rejecting similar arguments where "the aims and interests of [the] NAACP have not been shown to conflict with those of its members and nonmember … litigants"). The Fourth Circuit did not identify any "substantive evils flowing from [the Association]'s activities, which can justify the broad prohibitions … imposed." *Button*, 371 U.S. at 444.

The panel also ignored a robust record establishing that North Carolina universally tolerates ethical pressures on attorneys in other settings. *See* C.A.J.A. 877-878, 887 (in general); 333-335, 901-902, 922-923 (prepaid legal services plans); 745-746, 875, 879 (law firms); 862-863, 879-886 (insurance defense); 817 (in-house counsel); 863-865 (public defenders). The North Carolina State Bar has itself acknowledged that attorneys supervised by non-attorneys can comply fully with ethical rules. 2013 N.C. State Bar Formal Ethics Op. 9 (Oct. 25, 2013), *reprinted in* North Carolina State Bar, The 2014 Lawyer's Handbook 10-249 (2014).

Rather than applying no scrutiny to the UPL statutes, the Fourth Circuit was bound to apply strict scrutiny because the UPL statutes impose a

substantial burden on the Association's associative rights. *See, e.g.*, *Primus*, 436 U.S. at 432; *Button*, 371 U.S. at 438. Had the panel done so, the UPL statutes would have clearly failed, just as similar restrictions did in *Button* and the Union Cases. In the absence of any actual harm, the Fourth Circuit's purely speculative concerns about what "could" happen, App. 12a, are insufficient justification for the wholesale restriction of the Association's associative rights.

III. THE UPL STATUTES ARE AN UNCONSTITUTIONAL CONTENT-BASED RESTRICTION ON THE ASSOCIATION'S SPEECH

The UPL statutes impose a substantial, content-based burden on the Association's speech. The Fourth Circuit's decision to apply intermediate scrutiny to the statutes conflicts with this Court's settled First Amendment jurisprudence and permits the States great leeway to burden speech through licensing regimes.

The Association's licensed attorneys are competent to answer members' questions, and both the Association and the members desire that they be able to answer; but the UPL statutes prohibit them from doing so whenever the answer might contain legal advice. *See supra* p. 9-10. This is content-based censorship of speech: the Association "want[s] to speak to [its members], and whether [it] may do so under [the law] depends on what [it] say[s]." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

The Fourth Circuit upheld this censorship without strictly scrutinizing the UPL statutes. The Fourth Circuit nodded at this Court's recent decision in *National Institute of Family and Life Advocates v.*

Becerra, 138 S. Ct. 2361, 2375 (2018), but ignored this Court's teaching that courts should subject restrictions on professional speech to strict scrutiny, as they should all other content-based restrictions. This Court specifically warned about the dangers that licensing regimes pose to free speech, and yet the Fourth Circuit adopted a rule that allows broad prohibitions on speech so long as they are part of a professional licensing regime.

Given the protectionist history of the UPL statutes, there is little doubt that the content-based censorship they impose was intended to benefit certain speakers at the expense of others. *See supra* p. 9. Nonetheless, the Fourth Circuit held that the UPL statutes' impact on speech was "merely incidental to the [State's] primary objective of regulating the conduct of the profession" of law. App. 16a; *see also id.* at 15a ("[A]ny impact the UPL Statutes have on speech is incidental to the overarching purpose of regulating who may practice law."). The censorship of the Association's speech, however, is not "incidental"—it is direct, substantial, and content-based.

A. The UPL Statutes Regulate Speech, And Their Impact Is Substantial, Not Incidental

The Fourth Circuit's holding that the UPL statutes are a regulation of conduct that cause only an incidental impact on speech cannot be squared with this Court's recent decision in *NIFLA*. In *NIFLA*, the Court recognized that the Fourth Circuit and some other appellate courts "except[ed]" so-called "professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."

138 S. Ct. at 2371. *NIFLA* rejected the idea that "professional speech" is "a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. The Court recognized, however, that it had applied less scrutiny to laws that "regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. As examples of regulations on conduct that have an incidental impact on speech, the Court pointed to regulations of conduct that itself causes identifiable harm, such as professional malpractice, anticompetitive agreements, and failure to give informed consent. *Id.* at 2373; App. 14a.

In *NIFLA*, the Court nowhere suggested that the practice of an entire profession could qualify as the regulated conduct. To the contrary, the Court warned about the danger of licensing requirements that regulated entire professions. 138 S. Ct. at 2375-2376. However, the Fourth Circuit held that the UPL statutes, as applied to censor the Association's legal advice, are a conduct regulation—identifying the conduct as the "practice [of] law." App. 15a. This reasoning conflicts with *NIFLA* and longstanding precedent.

In *NIFLA*, the Court noted that legal advice is protected speech. The Court explained that its decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), "emphasized that [a] lawyer's statements ... would have been 'fully protected' if they were made in a context other than advertising." 138 S. Ct. at 2374 (quoting *Zauderer*, 471 U.S. at 637 n.7). Notably, the speech in *Zauderer*, which, absent the advertising content, would have been fully protected, was "statements regarding the legal rights of persons injured"—in other words: legal advice. 471 U.S. at

637 n.7. *NIFLA* likewise highlighted the decision in *Humanitarian Law Project*, which strictly scrutinized a federal law that censored "organizations that provided *specialized advice about international law*." *NIFLA*, 138 S. Ct. at 2374 (emphasis added).

The Court's decision in *Humanitarian Law Project* further elucidates the error in the Fourth Circuit's treatment of the UPL statutes. There, the Government defended a statute that prohibited offering "material support" to terrorist groups as a conduct regulation. 561 U.S. at 8-9, 27-28. The Court rejected that argument, explaining that, although "[t]he law here may be described as directed at conduct ... [,] as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Thus, the statute "regulates speech on the basis of its content. Plaintiffs want to speak to [certain groups], and whether they may do so under [Section] 2339B depends on what they say." *Id.* at 27. The Court analogized Section 2339B to the breach-of-peace law in *Cohen v. California*, 403 U.S. 15 (1971), which the Court strictly scrutinized because it was directed at Cohen due to "what his speech communicated." 561 U.S. at 27–28 (citing *Cohen*, 403 U.S. at 18-19). In the end, the Court in *Humanitarian Law Project* strictly scrutinized the censorship of the speech. *See id.* at 28-39.

As the Court has recognized, the practice of law involves substantial speech—speech that is not necessarily incidental to conduct. In censoring the Association's legal advice, "[t]he only 'conduct' which the State [seeks] to punish is the fact of communication.'" *Cohen*, 403 U.S. at 18. The UPL

statutes' impact on the Association's speech is not "incidental"; the censorship is direct and substantial.

B. The Fourth Circuit's Holding Permits States To Impose Significant Speech Restrictions Through Licensing Regimes

By identifying the "practice [of] law" as the *conduct* regulated by the UPL statutes, the Fourth Circuit effectively reestablished the so-called "professional speech doctrine" that the Court rejected just months ago in *NIFLA*. The court held that the wholesale exclusion of categories of speakers—in this case, non-profit associations—would receive reduced scrutiny because the censorship was part of a "licensing regime," App. 14a, that "regulat[es] the conduct of the profession." App. 16a.

The Court warned against the dangers of licensing regimes in *NIFLA*. In rejecting the professional-speech doctrine, the Court recognized that lower "courts define 'professionals' as individuals who … are subject to 'a generally applicable licensing and regulatory regime.'" 138 S. Ct. at 2371 (quoting *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013)). The Court explained that such a broad definition gave "the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement" that excluded disfavored speakers. 138 S. Ct. at 2375. Nonetheless, the Fourth Circuit below held that the "[l]icensing laws" at issue had a "merely incidental" impact on the Association's speech. App. 16a. Although the Court cautioned just months before that the States could not "choose the protection that speech receives" through the use of licensing regimes, the Fourth Circuit

permitted North Carolina to do just that. 138 S. Ct. at 2375.

The panel compounded the problem by failing to apply any meaningful scrutiny to the UPL statutes. The Fourth Circuit purported to apply "intermediate scrutiny," App. 18a, which requires that the regulation be narrowly tailored to serve a substantial governmental interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The panel identified the state's substantial interest as "protect[ing] clients"; however, the panel described the threat to clients as speculative harm that "*could*" occur. App. 18a (emphasis added). The panel then held that a *blanket prohibition* on the Association offering legal advice was "sufficiently drawn" to address this narrow, speculative interest. *Id.* This is not narrow tailoring. A tailored remedy would require non-profit associations to implement safeguards to ensure client loyalty—something the Association has proposed, and that the state *already requires* of other non-profit organizations that are allowed to offer legal services. *See* N.C. Gen. Stat. § 84-5.1.

The Fourth Circuit's continued willingness to tolerate the censorship of professional speech through licensing regimes poses grave dangers to speech of all kinds. Here, North Carolina's licensing regime censors the speech of non-profit corporations. This is but one example. As *NIFLA* recognized, licensing regimes impact "a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and … even … fortune tellers." 138 S. Ct. at 2375. As this case demonstrates, they may also impact corporate entities. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342

(2010) ("The Court has recognized that First Amendment protection extends to corporations.").

Under the Fourth Circuit's rule, the States may continue to regulate the speech of disfavored speakers on many topics and in many fields by imposing licensing requirements that exclude—or place substantial burdens upon—these speakers. That contravenes the clear teaching of *NIFLA*, and puts the free speech of many at risk.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2019

APPENDIX

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[ENTERED: April 19, 2019]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2218

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.

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)

Argued: December 13, 2018
Decided: April 19, 2019

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

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

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.

DIAZ, Circuit Judge:

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

[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.

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 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.

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. *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.

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)).

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.*

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[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 (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 (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.

III.

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 (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.

The Court emphasized that for the NAACP, litigation is "not a technique of resolving private differences; it is a means for achieving the lawful

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[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 (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).

objectives of equality of treatment." *Id.* at 429. 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. Thus, what was at stake was "secur[ing] constitutionally guaranteed civil rights," not commercial ends. *Id.* at 442–43. 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.

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 (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. 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. 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 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 (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. 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 (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. 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 (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; *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.*, 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 (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.

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; *Primus*, 436 U.S. at 428–30. 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. 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 (quoting *United Transp. Union*, 401 U.S. at 585). 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. 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.

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; *Trainmen*, 377 U.S. at 6; *Primus*, 436 U.S. at 422, 429–30. 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. 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; *see also Lawline*, 956 F.2d at 1387 (declining to apply heightened scrutiny because 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)*, 138 S. Ct. 2361, 2371–72, 2375 (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.

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.

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 (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 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 (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*, 137 S. Ct. 1144, 1150–51 (2017); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (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; *Giboney*, 336 U.S. at 502. 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 (opinion of O'Connor, Kennedy, & Souter, JJ.).

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 greater than intermediate scrutiny.[4]

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[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 (1992). Content-based restrictions ordinarily receive strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (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 (1994). Thus, labeling the UPL statutes an identity-based restriction doesn't change our analysis.

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; *Goldfarb*, 421 U.S. at 792. For laws with only an incidental impact on speech, intermediate scrutiny strikes the appropriate balance between the states' police powers and individual rights.

C.

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; *Goldfarb*, 421 U.S. at 792.

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.

Another state legislature might balance the interests differently. But intermediate scrutiny requires only a "reasonable 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 (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.

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).

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 (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.

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 (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 (1989).

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 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.

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. We hold, therefore, that the UPL statutes are not void for vagueness.

VII.

CAI next contends that the UPL statutes violate the state constitution's Monopoly Clause,

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[5] *See State v. Pledger*, 127 S.E.2d 337, 338–39 (N.C. 1962); *Seawell v. Carolina Motor Club*, 184 S.E. 540, 544 (N.C. 1936); *State v. Williams*, 650 S.E.2d 607, 611 (N.C. Ct. App. 2007); *Lexis-Nexis v. Travishan Corp.*, 573 S.E.2d 547, 549 (N.C. Ct. App. 2002); *Duke Power Co. v. Daniels*, 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).

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.*, 193 S.E.2d 729, 735 (N.C. 1973); *see also Am. Motors Sales Corp. v. Peters*, 317 S.E.2d 351, 358–59 (N.C. 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. 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

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

[state constitution] and the Fourteenth Amendment." 341 S.E.2d 517, 523 (N.C. 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, 51 S.E.2d 731 (N.C. 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*, 96 S.E.2d 851, 859 (N.C. 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; *In re Applicants for License*, 55 S.E. 635, 636 (N.C. 1906); *cf. Ohralik*, 436 U.S. at 459–60. Based on the applicable state case law, this court must conclude that the UPL statutes do not violate the Monopoly Clause.

VIII.

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 (1980).

IX.

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

AFFIRMED.

[ENTERED: September 19, 2017]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CAPITAL ASSOCIATED INDUSTRIES, INC.,	)	
Plaintiff,	)	
v.	)	1:15cv83
JOSH STEIN, in his official capacity as Attorney General of the State of North Carolina, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Loretta C. Biggs, District Judge.

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

[1] Josh Stein became the Attorney General of the State of North Carolina on January 1, 2017. Pursuant to Rule 25(d) of

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

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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).

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 under 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, (i*d.* ¶¶ 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 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (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

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*, 134 S. Ct. 2334, 2341 n.5 (2014) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n. 8 (2007)). Accordingly, the Court will consider State Prosecutors' arguments concerning standing and ripeness simultaneously, characterizing the discussion as one involving "standing."

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*,

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[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 (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 (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.

133 S. Ct. 1138, 1146 (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 ("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 unavailing, 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).

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. 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

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[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 (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. 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.)

entities who allegedly violate the UPL Statutes once a district attorney receives notice of the alleged violation. *See Disciplinary Hearing Comm'n v. Frazier*, 556 S.E.2d 262, 264 (N.C. 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

The Court will next address State Prosecutors' right of association argument. 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.)

It appears that State Prosecutors may have misconstrued the Court's Preliminary Injunction Order, in which the Court concluded that "[p]aying 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 (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 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

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[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.

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 (2008)). The Court will consider CAI's as-applied challenge to each of its claims.

1. Substantive Due Process

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.)

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 (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.

A challenged state action will survive rational basis review if it is "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. 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 (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 (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.

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]

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[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*, 127 S.E.2d 337, 339 (N.C. 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.)

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 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 (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 (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").

[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.

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

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 (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 Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)); *see Accountants 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 *Accountants 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 (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 (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

[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).

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.

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 (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

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 ("[W]e have long understood as implicit in the right to engage in activities protected by the First

[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 (1963), *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), and *In re Primus*, 436 U. S. 412 (1978).

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 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 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5–6 (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 (1978), *Bhd. of R.R. Trainmen*, 377 U.S. at 4–5, *Button*, 371 U.S. at 419; (2) a prohibition on the unauthorized practice of law, *United Mine Workers*, 389 U.S. at 218; 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 (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. These First Amendment rights included: (1) the right to free speech, *see In re Primus*, 436 U.S. at 431 (concluding that the appellant's activities "come[ ] within the generous zone of First

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

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 ("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 ("[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 ("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 ("[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 Statues 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 *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 Workers*, *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

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.)

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 (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 (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 (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).

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 (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

("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.

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 ("[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

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

[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.

Clause, and that those decisions bind this Court. (ECF No. 113 at 34–35.)

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*, 341 S.E.2d 517, 523 (N.C. 1986) (concluding that the prohibition of the corporate practice of law does not violate "Article I of the North Carolina Constitution"); *Seawell v. Carolina Motor Club*, 184 S.E. 540, 544 (N.C. 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*, 28 S.E. 517 (N.C. 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*, 60 S.E. 920 (N.C. 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*, 51 S.E.2d 731 (N.C. 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 incompetency 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

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 (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; *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.

This, the 19th day of September, 2017.

/s/ Loretta C. Biggs
United States District Judge