No. 19-281

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, *ET AL.*,

Respondents.

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

AMICUS BRIEF OF N.C. CHAMBER LEGAL INSTITUTE, CAROLINAS AGC, INC., CURI AGENCY, LLC, THE EMPLOYERS ASS'N, INDEPENDENT INSURANCE AGENTS OF N.C., N.C. DENTAL SOCIETY, N.C. RETAIL MERCHANTS ASS'N, N.C. AUTOMOBILE DEALERS ASS'N AND N.C. SHERIFFS' ASS'N IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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INTEREST OF AMICI

The amici curiae are a group of North Carolina non-profit member associations – together with a North Carolina business – directly impacted by the decision below.[1] The Fourth Circuit decision precludes the associations from providing legal advice to their members in order to facilitate their various missions such as advocacy on behalf of local law enforcement, promoting a positive environment for business, strengthening the provision of healthcare and shaping sound insurance regulations.

The N.C. Chamber Legal Institute is the litigation arm of the N.C. Chamber, a business advocacy organization that provides legislative advocacy and updates to its members. The Institute is charged with developing legal strategies to protect North Carolina businesses at the legislature and in the courts.

Carolinas AGC, Inc. (formerly The Associated General Contractors of America, Carolinas Branch) is a construction trade association made up of

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[1] No counsel for a party authored the brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. In accordance with S. Ct. R. 37.2(a), notice of the intent to file this amicus brief was provided to all counsel of record for Petitioner and Respondents 10 days prior to the due date for this brief. All parties have provided written consent to the filing of this amicus brief.

contractors and construction-related firms that perform work in North Carolina and South Carolina. The Association's members are both small and large general contractors, specialty contractors, material and equipment suppliers and service providers.

The Employers Association provides human resources and training services to its public and private member organizations in the greater Charlotte, North Carolina area. The Employers Association's HR Advice Line provides its members with specific advisory services related to various employment situations and workplace issues.

The Independent Insurance Agents of North Carolina ("IIANC") is a trade association that represents North Carolina independent insurance agencies. With a vision to advocate for the independent agency system and to fulfill the business and professional needs of its members, the IIANC provides insurance policies to both its member agencies and their clients, technical support for its member agencies, staffing support for its member agencies, as well as consultation on various areas of insurance.

The North Carolina Dental Society provides legislative advocacy, counseling, and other support for its member dentists throughout North Carolina. The support it offers to members includes routine guidance and legal updates regarding compliance pertinent to the dental industry.

The North Carolina Retail Merchants Association ("NCRMA") boasts expertise in North Carolina retail

laws. On top of the various services the NCRMA provides for its member merchants, the NCRMA aims to promote a positive legislative and regulatory environment for the retail industry, and lobbies on behalf of its member merchants.

The North Carolina Automobile Dealers Association ("NCADA") is a trade association representing member automobile, truck and recreational vehicle dealers franchised in North Carolina. The NCADA provides legislative advocacy on behalf of its members as well as other services, including education programs related to pertinent issues within this heavily regulated industry.

The North Carolina Sheriffs' Association is a voluntary, non-profit, statewide association of the 100 elected sheriffs in North Carolina that is recognized as a leading advocate on issues affecting sheriffs in the State. The Association advocates for its members by, among other things, monitoring actions by the North Carolina General Assembly and state and federal courts that affect law enforcement and the criminal justice community, and by providing training and written materials to its members on issues that affect law enforcement and public safety.

Curi Agency, LLC, a North Carolina based medical mutual company, primarily provides medical malpractice insurance to physicians. This business would benefit from cost-efficient legal services that would be offered by non-profit associations in North Carolina if such services were not prohibited by Respondents.

Despite the diversity in their areas of focus, all of the amici associations share a common mission of advancing success in their respective industries or professions, through, in part, assisting their members in various aspects of their industry. Many members of the amici are new businesses, small businesses, or governmental agencies that lack the financial resources to have in-house counsel or pay substantial hourly rates to outside counsel. Thus, it is consistent with the missions of the amici associations to fill that void by providing members with cost-effective legal advice and legal services which would, in turn, promote legal compliance and general goodwill across their diverse industries and professions. Yet, the Fourth Circuit's decision denies them this ability.

The amici have a significant interest in cases affecting the constitutional and associational rights of small businesses and the members of non-profit associations. The Fourth Circuit decision prevents the amici associations and other similar organizations from providing critical services to their members.

SUMMARY OF ARGUMENT

In *NAACP v. Button*, 371 U.S. 415, 430 (1963), this Court held that the First Amendment right of association precludes a State, through laws regulating the legal profession, from prohibiting a non-profit association from offering legal advice to its members in order to advance the association's ideals and beliefs. The Court has extended *Button* to unions and the American Civil Liberties Union.

The Fourth Circuit's opinion attempts to distinguish Petitioner and the legal services that it seeks to provide from the NAACP, ACLU and unions. The minor differences on which the Fourth Circuit relies is not a valid basis for depriving Petitioner and its members of their constitutional right of association.

First, the Fourth Circuit characterized *Button* and its progeny as limited to public interest organizations and concluded that Petitioner fell outside of the scope of this line of cases. The Fourth Circuit, however, failed to recognize that historically much of this Court's precedent regarding the First and Fourteenth Amendments arises from labor and employment disputes. A non-profit association's efforts to educate employers so as to ensure compliance with labor and employment laws serves the public interest – just as the NAACP, ACLU and unions act in the public interest when they provide legal representation in suits against employers who have not complied with these laws.

Second, the Fourth Circuit distinguished *Button* and its progeny based on its view that this line of cases is only applicable to the filing of lawsuits on behalf of members – rather than ensuring that potential defendants have taken all appropriate measures to comply with the law prior to the filing of an action. The Petitioner's mission – though different from the NAACP – shapes the development of the law and is no less worthy of protection.

Third, the Fourth Circuit distinguished *Button* based on the benefits that Petitioner would receive if it were providing compliance advice to its members. As this Court's precedent establishes, this is not a legitimate basis for distinguishing Petitioner from unions, the NAACP or the ACLU. The fact that Petitioner may gain new members or be in a position to increase its membership dues to pay for these new services does not diminish the fact that advising members with respect to compliance issues is crucial to Petitioner's mission and shapes the development of the law.

The petition raises an important constitutional issue on which the circuits and state courts of last resort are split. Moreover, the appropriate resolution of the questions presented will have significant practical impact on small businesses – many of whom would be forced to go without legal advice unless associations, like Petitioner, are allowed to provide these services to its members. Accordingly, the writ of certiorari should be granted.

ARGUMENT

As Petitioner has shown, the opinion below conflicts with multiple decisions of this Court and deepens a conflict among the circuits and state courts of last resort that merits review. Amici submit this brief to amplify two points that further demonstrate certiorari should be granted.[2]

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[2] Both of these points relate to the first question presented. Although Amici concur with Petitioner's argument regarding the second question, that issue is fully developed, and the

I. THE CONSTITUTION PROTECTS THE ASSOCIATIONAL RIGHTS OF PETITIONER'S MEMBERS, JUST AS IT PROTECTS THE RIGHTS OF UNIONS, THE NAACP AND THE ACLU.

In *NAACP v. Button*, 371 U.S. 415 (1963), this Court reiterated that the First Amendment protects "the right to engage in association for the advancement of beliefs and ideals." *Id.* at 430 (internal quotations omitted). The Court held that the NAACP's practice of recruiting litigants to pursue civil rights claims and providing NAACP staff attorneys to represent these individuals was protected by the First Amendment and could not be barred by Virginia law prohibiting solicitation by attorneys.

In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), this Court extended the rationale of *Button* to unions, holding that state regulations of the practice of law could not restrict unions from providing attorneys to advise union members regarding their rights under federal and state laws and to file litigation on their behalf. This Court held that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Brotherhood of R.R. Trainmen*, 377 U.S. at 8. The First Amendment

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Court would not benefit from further briefing by amici on that issue. *See* S. Ct. R. 37.1.

protects the rights of groups to "unite to assert their legal rights as effectively and economically as practicable." *United Transp. Union*, 401 U.S. at 580.

In *In re Primus*, 436 U.S. 412 (1978), the Court held that the First Amendment right of association similarly protects the American Civil Liberties Union from state regulations precluding the solicitation of a prospective litigant by mail. The Court concluded that "the record does not support the state court's effort to draw a meaningful distinction between the ACLU and NAACP." *Id.* at 427.

The Fourth Circuit's analysis of Petitioner's First Amendment right of association hinges on distinguishing this line of cases. The distinctions that the Fourth Circuit relied on, however, cannot withstand scrutiny. The right of association encompasses the ability to obtain meaningful protection of one's legal rights through collective activity. *United Transp. Union*, 401 U.S. at 585. This constitutional right "would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." *Id.* at 585-86.

The Fourth Circuit attempts to distinguish *Button* and its progeny based on three factors: 1) the belief that Petitioner does not promote the common political aims of its members or that its effort to shape public policy is not as important as that of unions and civil rights organizations; 2) the view that this Court's precedent is limited to litigation and does not extend to compliance advice intended to

result in the avoidance of litigation; and 3) the perception that the benefits Petitioner may receive in providing these services are different from the benefits received by the unions and civil rights organizations in the *Button* line of cases.[3] Pet. App. 9a-12a. Each of these distinctions rings hollow.

1. *Petitioner seeks to provide legal services that would shape public policy*.

The Fourth Circuit's opinion bars Petitioner's staff attorneys from providing legal advice to Petitioner's members to facilitate the core mission of the association – ensuring compliance with labor and employment laws. The history of civil rights litigation demonstrates that labor and employment practices have been a foundation for the development of individual rights under the Constitution. In fact, the *Button* decision builds upon a prior decision involving a labor dispute.[4] *Button*, 371 U.S. at 429 (relying on *Thomas v. Collins*, 323 U.S. 516 (1945) – a case involving union recruitment activities). Moreover, countless

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[3] The Fourth Circuit also notes that the fact that Petitioner's staff attorneys would be supervised by non-attorneys raises ethical concerns. Pet. App. 12a. Those concerns, however, are no different than in *Button*.

[4] The Court also relied on an ethics opinion of the American Bar Association involving challenges to the National Labor Relations Act. In that opinion, the ABA concluded that attorneys could represent clients on a pro bono basis to challenge the Act, even though the clients had been recruited by the American Liberty League through a radio address. 371 U.S. at 430 & n.13; American Bar Association, Op. No. 148 of the Standing Committee on Professional Ethics & Grievances (Nov. 1935).

decisions relating to employment matters have shaped our understanding of the Bill of Rights. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (Arkansas statute's "comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers"); *Perry v. Sindermann*, 408 U.S. 593 (1972) (public universities may not deny a benefit to an employee on a basis that infringes his or her freedom of speech); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (constitutional right of expression and association does not prohibit application of Title VII guarantees to decision to grant a female associate at a law firm partnership status); *Frazee v. Illinois Dep't of Emp't Sec.*, 489 US 829 (1989) (Free Exercise Clause bars a State from denying unemployment benefits to someone who refuses to accept specific employment based on sincerely-held religious beliefs).

Petitioner's mission of facilitating compliance with labor and employment laws is different from the political advocacy of the NAACP and the ACLU. Nevertheless, the right of Petitioner's members to associate in furtherance of Petitioner's mission is similarly protected. *See United Mine Workers*, 389 U.S. at 223 (providing legal advice with regard to employment-related claims "is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political"). Moreover, the legal advice that Petitioner seeks to provide its members is essentially the flip-side of the legal advice that

unions are permitted to provide its members. For instance, while the First Amendment protects a union's right to provide its members legal advice with respect to workers' compensation claims, the Fourth Circuit's decision bars Petitioner from providing legal advice to its members (i.e., employers) regarding Occupational Safety and Health Act compliance that would minimize workplace injuries in the first place.

Labor and employment laws in North Carolina, and elsewhere throughout the country, have tended to develop in reaction to workplace injustices and tragic events.[5] Sound compliance advice serves to eliminate those injustices and tragedies in the first instance.

Avoiding workplace injuries and deaths, creating a working environment that is free from discrimination and ensuring compliance with wage and hour regulations benefits the employees, as well as the employer. The cost and uncertainty of a

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[5] For example, following a fire at a chicken processing plant in Hamlet, NC that killed 25 employees in September 1991, the North Carolina General Assembly enacted numerous worker safety laws in response. *See* Act of July 8, 1992, ch. 894, 1991-1992 N.C. Sess. Laws 447; Act of July 15, 1992, ch. 962, 1991-1992 N.C. Sess. Laws 874; Act of July 20, 1992, ch. 994, 1991-1992 N.C. Sess. Laws 938; Act of July 21, 1992, ch. 1008, 1991-1992 N.C. Sess. Laws 987; Act of July 23, 1992, ch. 1020, 1991-1992 N.C. Sess. Laws 1039; Act of July 23, 1992, ch. 1021, 1991-1992 N.C. Sess. Laws 1041. Tragically, compliance with safety laws at the Hamlet plant was virtually non-existent. *See* BRYANT SIMON, THE HAMLET FIRE: A TRAGIC STORY OF CHEAP FOOD, CHEAP GOVERNMENT, AND CHEAP LIVES 63-75 (2017).

lawsuit can cause a small business to shutter its doors or to curtail expansion as its resources are shifted to defending or resolving a claim. Not only does compliance advice decrease these costs and uncertainties, when an industry polices itself and promotes compliance with existing laws, new regulations are more likely to be better tailored to the industry – making government enforcement more efficient and effective and reducing the cost of industry compliance and the government's costs of monitoring compliance.

The legal advice that Petitioner seeks to provide its members would minimize the risk that its members will find themselves as defendants in employment disputes and also reduce additional government regulations to enforce and effectuate existing employment laws. A non-profit association's mission of ensuring compliance with labor and employment laws is not as visible and dramatic as litigation to enforce civil rights. Both, however, play a role in shaping the development of public policy.

2. *Button is not confined to litigation and protects the right of an association to advise its members on compliance with the law.*

The Fourth Circuit takes the remarkable view that *Button* only applies to non-profit organizations that solicit plaintiffs to develop the law through litigation, and that *Button* affords no protection for an association whose members stand as potential defendants rather than potential plaintiffs. *Button*, however, does not hinge on whether a lawsuit has been filed. Efforts to shape public policy through

compliance should be afforded the same First Amendment protections as efforts to shape public policy through litigation. Moreover, the facts of *Button* and its progeny do not support the distinction drawn by the Fourth Circuit. Countless potential plaintiffs recruited by the NAACP never became litigants. *See* Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1697 (2004). *Button* protects the First Amendment right of the association to provide legal advice to its members in order to shape the law. It is immaterial whether a single lawsuit is filed in the implementation of that strategy. The NAACP staff attorneys in *Button* would have been no less protected from Virginia's statutory prohibition against soliciting clients if those solicitations had resulted in no lawsuit being filed.

3. *The right of association is not stripped away simply because Petitioner would receive some benefit from the legal services it intends to provide.*

The Fourth Circuit also attempts to distinguish *Button* because Petitioner would benefit from an increase in membership and revenue if it were able to provide legal advice to its members. Pet. App. 46a. Such an argument has already been rejected by this Court. *In re Primus*, 436 U.S. at 428 (holding that the constitutional analysis is not altered simply because the association may benefit from the provision of legal services). First Amendment rights are no less protected because benefits (whether monetary or non-monetary) may flow from the exercise of those rights. The press does not lose its

freedom of speech simply because it generates revenue from its reporting of the news.[6] *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499 (1952). In determining who is protected by the First Amendment's right of association, courts should not be in the business of dissecting the benefits that an association and its members receive from exercising this constitutional right or their motivations for associating together.

Here, Petitioner has established that it falls within the scope of *Button* and its progeny. As a result, Petitioner and its members have been deprived of fundamental First Amendment rights. Amici and other associations throughout the Fourth Circuit will also be deprived of these rights unless review is granted by this Court.

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[6] Below, Respondents also asserted that *Button* is distinguishable because the record does not establish that Petitioners' members are unable to pay for legal services. NC 4th Cir. Br. at 46. Not only is this not material to the constitutional analysis, it is inaccurate. *See* 4th Cir. J.A. 527-28 (noting that due to the high cost of legal services, small businesses must frequently obtain their legal advice through Google searches rather than hiring an attorney).

II. THE PETITION RAISES AN IMPORTANT FEDERAL QUESTION THAT HAS GREAT PRACTICAL SIGNIFICANCE TO SMALL BUSINESSES AND NON-PROFIT ASSOCIATIONS.

The First Amendment right of association "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). That important constitutional right has been severely restricted by the decision below.

The Fourth Circuit's decision also has significant practical consequences – particularly for small businesses. An excessive spend on legal fees can destroy the ability of a small business to remain competitive, impacting the company's owners, employees, vendors and customers. As the record below establishes, many small businesses have found legal fees too costly to justify and have resorted to attempting to navigate laws and regulations without any legal advice – other than the Internet. Unquestionably, the legal services that Petitioner hopes to provide would enable its members "to meet the costs of legal representation." *United Transp. Union*, 401 U.S. at 585-86.

Small businesses are an integral part of our Nation's economy, accounting for 47% of the private workforce in the United States. U.S. CENSUS BUREAU, ANNUAL SURVEY OF CENSUS ENTREPRENEURS (2016). In North Carolina, the number of small businesses outnumber large companies (having more than 500 employees) by a margin of 100 to one. U.S. SMALL BUSINESS

ADMINISTRATION, 2018 SMALL BUSINESS PROFILE – NORTH CAROLINA. These smaller businesses (approximately 900,000 in North Carolina) – many of whom are start-ups that are hoping to increase their workforce – are among the companies with the greatest need for legal advice. *See id.* Yet, they do not have the resources to have in-house legal counsel or to pay significant hourly rates for outside counsel. The inability of these small businesses to obtain cost-efficient legal services has a substantial cumulative effect – both on small businesses and their employees.

Petitioner sought to respond to this substantial need, by providing its members with legal advice – through staff attorneys licensed to practice law in North Carolina – and thereby reduce its members' costs of legal services. The Fourth Circuit's misreading of this Court's First Amendment precedent has prevented companies, including the amicus business (Curi Agency, LLC), from receiving more effective and lower cost legal services when faced with labor and employment issues.

The decision below also creates a significant disparity between non-profit associations based in the Fourth Circuit versus associations outside of the circuit. Non-profit associations in New Hampshire, California and Wisconsin are permitted to provide legal advice to companies in those States with respect to the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Family Medical Leave Act and other federal labor and employment laws. North Carolina businesses that have a location, for example, in Wisconsin are unable

to get such advice from Petitioner – even though they can get that advice from a similar Wisconsin association. Associations in New Hampshire, California and Wisconsin have a competitive advantage in recruiting companies doing business in multiple States. That disparity weakens the incentive for some employers to associate together in States like North Carolina.

An important constitutional right such as the right of association under the First Amendment cries out for uniformity in its application among the 50 States. That is particularly true when, as here, the incorrect reading of this Court's precedent imposes hardships on small businesses.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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