No. 19-281

In the Supreme Court of the United States

CAPITAL ASSOCIATED INDUSTRIES, INC.,
Petitioner,

v.

JOSH STEIN, et al.,
Respondents.

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

BRIEF OF AMICI CURIAE RESPONSIVE LAW AND SCHOLARS OF ACCESS TO JUSTICE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amicus Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. It has testified on numerous occasions to the American Bar Association and to state regulators about the bar's responsibility to give greater weight to increasing access to justice when interpreting rules of professional conduct, and to avoid interpretations that have an anticompetitive impact.

Amici scholars of access to justice are academics who study regulatory barriers to access to justice, including barriers created by prohibitions on the corporate practice of law. They are:

- Benjamin Barton, Helen and Charles Lockett Distinguished Professor of Law, University of Tennessee College of Law.
- Elizabeth Chambliss, Henry Harman Edens Professor of Law and Director, NMRS Center on Professionalism, University of South Carolina School of Law.
- Robert C. Fellmeth, Price Chair in Public Interest Law and Executive Director, Center for Public Interest Law, University of San Diego School of Law.

[1] All parties were given ten days' notice and have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party and no one other than amici curiae and its counsel made a monetary contribution to the preparation or submission of this brief.

- Bridget Fogarty Gramme, Administrative Director, Center for Public Interest Law, University of San Diego School of Law.
- Gillian K. Hadfield, Schwartz Reisman Chair in Technology and Society, Professor of Law and Professor of Strategic Management, and Director, Schwartz Reisman Institute for Technology and Society, University of Toronto.
- William Henderson, Stephen F. Burns Chair on the Legal Profession, Indiana University Maurer School of Law.
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INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina's prohibition on corporate law practice arose as part of a wave of similar state laws enacted in the early twentieth century for the purpose of limiting innovation in the provision of legal services. Although these laws are typically defended today on the ground that they protect clients from conflicts of interest, that defense is a rationalization. When the laws were enacted, they were justified not by evidence of risk to clients but "by the desire of the legal profession to control competition." Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 Mo. L. Rev. 151, 158 (2000). And the laws have had their intended effect, effectively freezing innovation in the market for legal services and driving legal fees beyond the reach of most Americans.

In concluding that North Carolina's law survived scrutiny under the First Amendment, the Fourth Circuit nevertheless credited the state's claim that corporate law practice could "compromise professional judgment and generate conflicts between client interests and the corporation's interests." But the court cited no evidence to back up that factual assertion—an assertion that is, in any event, nonsensical. In all areas of the economy other than the practice of law, we expect corporate employees to abide by regulations governing their conduct. Engineers, for example, are required to follow stringent safety standards, but nobody contends that corporations should therefore be banned from hiring them. Lawyers are similarly bound by codes of professional conduct to exercise

their independent legal judgment in representing clients, even when taking payment from another. There is no reason to believe that lawyers, alone among the professions, are likely to sacrifice their legal obligations to further the interests of a corporate employer.

Regardless of the standard of scrutiny that applies to North Carolina's restriction on speech and assembly, the state has the burden of providing actual evidence, not just speculation, that the restriction serves important state interests. North Carolina's justification for the law lacks not only evidence, but common sense. For that reason, this Court should reverse the Fourth Circuit's decision below.

ARGUMENT

I. The purpose and effect of North Carolina's ban on corporate law practice is the protection of lawyers from competition.

A. In the first decades of the twentieth century, "the expansion of the economy and the shift to a much more formalized and regulated state brought with it a new role for lawyers: planning transactions, advising on compliance, and completing the myriad forms that the newly bureaucratic state required." Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy* 118–19 (2017); *see* Lawrence M. Friedman, *A History of American Law* 703–07 (4th ed. 2019). Unlike litigation, this brand of legal work took place in offices, where courts could not monitor or control it. That opened the door for "unlicensed competitors—such as banks, trusts, and realtors—to engage in work … that lawyers believed was within their scope of practice." Laurel A. Rigertas, *The Birth of the*

Movement to Prohibit the Unauthorized Practice of Law, 37 Quinnipiac L. Rev. 97, 101–02 (2018).

The result was a "mushrooming array of businesses and professions that provided legal services to a citizenry in need of help to navigate an increasingly law-thick environment: banks and trust companies, collection agencies, trade associations and clubs, title companies, mortgage loan companies, claims adjusters, real estate brokers, protective associations, and automobile clubs." Hadfield, *Rules for a Flat World* at 117. These new market participants had "the capacity to compete effectively with lawyers in providing traditional kinds of legal services." Barlow F. Christensen, *The Unauthorized Practice of Law: Do Fences Really Make Good Neighbors—or Even Good Sense?*, 159 Am. B. Found. Res. J. 159,178 (1980). Indeed, many corporations hired lawyers to provide legal services in direct competition with established law firms and solo practitioners. *See* Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 101–02.

Lawyers at the time lamented the "in-roads of corporations … upon a territory which the lawyer always has claimed as his exclusive and licit domain." Maurice Wormser, *Corporations and the Practice of Law*, 5 Fordham L. Rev. 207, 207 (1936). In an early article on the subject, a New York lawyer tallied millions of dollars that corporate competitors had "taken away from the legal profession" over the course of a year. *See* George W. Bristol, *The Passing of the Legal Profession*, 22 Yale L.J. 590, 598 (1913). The "lawyer's former place in society as an economical factor," he wrote, "has been superseded by this artificial creature

of his own genius, for whom he is now simply a clerk on a salary." *Id.* at 590.

Title companies, for example, displaced lawyers from their traditional role in providing title searches, rendering "[o]ne of the most lucrative branches of the lawyer's practice … a thing of the past." *Id.* at 590. Although "ten million dollars [were] paid annually by real estate interests in New York City alone," the advent of these companies meant that "only a small portion of the amount paid actually reache[d] the legal profession." *Id.* at 591.

B. "As a result of these corporate activities, bar associations … looked to legislatures to prohibit and criminalize the corporate practice of law." Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 Quinnipiac L. Rev. at 142. Recognizing that "it was impossible to anticipate all the new types of legal work and new legal providers that were cropping up," proponents of these laws sought the broadest prohibitions possible. *See* Hadfield, *Rules for a Flat World* at 119. Through a combination of lobbying and aggressive litigation, they argued that "no one, other than a bar-licensed lawyer practicing in a law firm or as a solo practitioner, should be allowed to do anything that touched the practice of law." *Id.* at 117.

The "transparent motivation behind" the bars' efforts "was to protect lawyers' business." Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 Akron L. Rev. 599, 618 (2013). That anticompetitive motive, however, was not always explicit; given the "obvious unsavoriness" of the position, proponents sometimes put forward alternative explanations. Giesel, *Corporations Practicing*

Law Through Lawyers, 65 Mo. L. Rev. at 182–85. Early on, the most commonly given justification was a formalistic one—a corporation could not practice law because it could not satisfy the educational and character requirements for obtaining a law license. *See id.* at 174–75; *see, e.g.*, *In re Co-operative Law Co.*, 92 N.E. 15, 16 (1910). But that rationale failed to explain why laws also prohibited corporations from hiring licensed lawyers (who *did* satisfy those requirements) to represent clients. Commentators at the time thus found it "obvious" that the argument was "an excuse rather than a justification for the rule"—"a cover for competitive advantage." H.H. Walker Lewis, *Corporate Capacity to Practice Law–A Study in Legal Hocus Pocus*, 2 Md. L. Rev. 342, 343, 350 (1938); *see* Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 Minn. L. Rev. 1115, 1121 (2000).

C. The bars' long campaign to shut down corporate law practice was virtually a complete success. "By legislative definition and judicial construction," corporations today have "been excluded from the entire field of modern legal activities" in the United States. *The Practice of Law by Corporations*, 44 Harv. L. Rev. 1114, 1115 (1931). North Carolina is just one state that adopted the proposed restrictions; as the Fourth Circuit noted below, "[a]lmost all other states have similar laws on the books." App. 3a n.1.

With these laws, the bars effectively froze innovation in the provision of legal services to a nineteenth-century model, preventing lawyers from innovating better, less-expensive ways to provide legal services in

a rapidly changing world. *See* Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 Daedalus 1 (2014). The laws deprive lawyers of the investment capital that has "fuel[ed] innovation everywhere else in the economy." *See id.* at 1. And, as Justice Gorsuch has written, a limited capital base means that "the output of legal services is restricted and the price raised above competitive levels." Neil Gorsuch, *Access to Affordable Justice*, 100 *Judicature* 46, 49–50 (2016). Inefficient regulations "result in a roughly $10 billion annual 'self-subsidy,' in the form of higher prices lawyers may charge their clients compared to what they could charge in a more competitive marketplace." *Id.* "So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can't secure similar assistance with a will or a landlord-tenant problem." *Id.* at 49.

The consequence is to put legal services beyond the reach of most Americans. Justice Gorsuch has noted 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.* at 47. "The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the claims made against them," routinely going without legal representation when facing eviction, collection, or foreclosure and when seeking child support, custody, or protection from violence or harassment. Hadfield, *Innovating to Improve Access*, 143 Daedalus at 1. And the problem is not limited to individuals—small businesses, too, are usually priced out of the legal marketplace. As the

petitioner notes, a North Carolina commission recently found 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* (2017). They are thus forced to represent themselves or to resort to inadequate self-help remedies. *See id.*

The Fourth Circuit acknowledged that CAI's "proposed practice might reduce some of its members' legal bills." App. 12a. But it rejected the contention that the North Carolina law restricts those members' access to justice, writing that the members had mostly been able to afford legal services when appearing in court. *See* App. 6a, 12a. But North Carolina's law deprives those members of the "more efficient and cost-effective legal representation" that would otherwise be available. App. 6a. It also deprives them of access to legal advice and services on matters that are not in court—the sorts of services, that is, that the law was intended to prohibit corporations from providing.

II. North Carolina's alternative, post hac rationale for the ban lacks any support in evidence or logic.

A. North Carolina, unsurprisingly, does not rely on the anticompetitive justifications that actually motivated adoption of the ban on corporate law practice. Instead, it puts forward an alternative rationale: that "[p]rofessional integrity could suffer if the state allows lawyers to practice on behalf of organizations owned and run by nonlawyers." App. 18a. As the Fourth Circuit explained it, lawyers at a corporation like CAI would "likely" be supervised by non-lawyers, "which

could compromise professional judgment and generate conflicts between client interests and the corporation's interests." *Id.*

That asserted reason has become the preferred justification for anticompetitive restrictions on the practice of law. *See, e.g.*, Green, *The Disciplinary Restrictions on Multidisciplinary Practice*, 84 Minn. L. Rev. 1115. Lawyers over time have abandoned the more blatantly anticompetitive reasons for such prohibitions, asserting instead that the laws are "meant to protect clients, not simply to protect the bar, or certain of its members, from competition." *Id.* at 1132–33. In the echo chamber of the profession, it is often taken as self-evident that any involvement by nonlawyers in the practice of law will degrade the practice of law and endanger clients' interests.

That reasoning, however, is just a "belated explanation for restrictions that, at their inception, were transparently motivated by the financial self-interest of the bar's leadership." *Id.* at 1145. The actual "proponents of the legislation had no evidence that the corporations then supplying lawyers to clients were harming the public." Green, *Lawyers' Professional Independence*, 46 Akron L. Rev. at 618. On the contrary, there was a "powerful sentiment" among the public "in favor of the performance by corporations of many kinds of legal services" that they could more cheaply and efficiently provide. Wormser, *Corporations and the Practice of Law*, 5 Fordham L. Rev. at 216; *see also* Lewis, *Corporate Capacity to Practice Law*, 2 Md. L. Rev. at 342–43 (noting that "laymen are usually quite sympathetic towards the desirability of associations of this sort"). That remains true today. In a nationwide survey of officials responsible for enforcing laws

against unauthorized practice of law, the majority said that they considered unauthorized practice to be a "public threat." Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2595 (2014). More than two-thirds, however, "could not recall an instance of serious injury in the past year." *Id.* And complaints regarding the unauthorized practice of law are more likely to come from lawyers than from consumers or clients. *Id.* at 2591.

The theory's origin can be traced to the opinion of the New York Court of Appeals in *In re Co-operative Law Co.*, 92 N.E. 15. There, proponents of a ban on corporate law practice relied on explicitly anticompetitive justifications in support of the restriction. Green, *The Disciplinary Restrictions on Multidisciplinary Practice*, 84 Minn. L. Rev. at 1126–29. But they "identified no cases in which the corporations' [clients] … had complained or been harmed," and failed even to explain why "corporations' role in helping clients secure legal services should be a matter of public concern." *Id.* at 1129. Nor did the Court's opinion "substantiate its premise that lawyers employed by corporations would subordinate their clients' interests to the mercenary interests of the corporations' lay directors." *Id.* at 1132–33. "Nonetheless, the court's avowed fear was to become the intellectual foundation for the disciplinary restrictions on multidisciplinary practice." *Id.* at 1133.[2]

[2] The justification adopted in *Co-operative Law* was not really about the risk of conflicts of interest. Rather, the Court's rea-
(continued …)

It is true that numerous lawyers and judges have expressed agreement with the theory North Carolina advances. But although North Carolina undoubtedly has an important interest in regulating professional conduct, the mere assertion that the law's purpose is to "insure high professional standards" is not enough to justify a restriction on expression. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438–39 (1963). This Court in *Button* refused to credit similar ethical concerns in the absence of record evidence that the restriction there actually served its purported purpose. *Id.* at 441. As the Court explained, a state "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

B. Nor is the assumption that "attorney-employees are not independent or capable of independence" supported even by common sense. Giesel, *Corporations Practicing Law Through Lawyers*, 65 Mo. L. Rev. at 178. The fallacy of the assumption, as many commentators have pointed out, is "obvious." *Id.* at 179. Such attorneys "are governed by the same ethical rules, laws, and fiduciary responsibilities as any other attorneys." *Id.* Those "obligations can be met by lawyers simply following the rules they are obligated to

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soning hinged on its premise that, absent the restriction, a corporation could *itself* engage in the practice of law. *See In re Co-operative Law Co.*, 92 N.E. at 16. The lawyer-client relationship, the Court reasoned, would thus run between the client and the corporation rather than between the client and a lawyer that the corporation employs. *See id.* Lacking any privity with the corporation's client, such a lawyer "would be responsible to the corporation only" and "would not owe even the duty of counsel" to the client. *Id.*

follow in any business form." Charles S. Doskow, *Variations on Nonlawyer Ownership of Law Firms: The Full Monty, Accommodation or the (ABA) Stonewall?*, 32 Miss. C. L. Rev. 267, 269 (2013).

Indeed, North Carolina's prohibition on corporate law practice already requires that, in the limited circumstances where it permits representation by an attorney who is an employee, "the attorney providing such representation shall be governed by and subject to all of the Rules of Professional Conduct of the North Carolina State Bar to the same extent as all other attorneys licensed by this State." N.C. Stat. § 84-5. And those rules already "protect the lawyer's professional independence of judgment." N.C. R. Prof'l Cond. 5.4, cmt. 1. Specifically, Rule 5.4(c) prohibits a lawyer from permitting a person who "engages … the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." *Id.* R. 5.4(c). Thus, when "someone other than the client pays the lawyer's fee or salary"—such as when a lawyer is paid by a corporate employer—"that arrangement does not modify the lawyer's obligation to the client." *Id.* R. 5.4, cmt. 1; *see also id.* R. 2.1 ("In representing a client, a lawyer shall exercise independent, professional judgment … ."). Those rules "protect more directly against the evils feared if corporations can practice law via attorneys than does the 'hocus pocus' of the corporate practice of law doctrine." Giesel, *Corporations Practicing Law Through Lawyers*, 65 Mo. L. Rev. at 205.

In all other areas of the economy, employees are required and expected to follow regulations governing their conduct despite receiving a salary from a corporation. Airplane engineers and pilots are subject to

life-or-death safety rules, but nobody would contend that they should for that reason be prohibited from working for airplane makers and airlines. If employment by a corporation were enough to risk compliance with such rules, we could not trust corporations to engage in any regulated activity. There is no reason to believe that lawyers, alone among the professions, are likely to sacrifice their legal obligations in exchange for a corporate paycheck.

Nor is there reason to believe that lawyers are more likely to be compromised by the interests of a corporate employer than they would be by, for example, the interests of a partnership of which they are a member. *See* Lewis, *Corporate Capacity to Practice Law*, 2 Md. L. Rev. at 345. Law firms and solo practitioners "may be as profit-conscious and profit-driven as any Fortune 500 corporation." Giesel, *Corporations Practicing Law Through Lawyers*, 65 Mo. L. Rev. at 181–82. Nevertheless, we expect them to protect their clients' interests in the face of such incentives.

It is particularly illogical to apply North Carolina's rationale to a nonprofit corporation like CAI, which employs attorneys to provide legal advice to its members. Commentators have long noted that any "danger of self interest is clearly absent" in this context, where both the corporation and the lawyers it employs work for the benefit of members. *The Practice of Law by Corporations*, 44 Harv. L. Rev. at 1117. The historical extension of the ban on corporate law practice to such organizations was based not on evidence of such a danger, but on the "absence of a careful analysis." *Id.*

Even under an intermediate standard of scrutiny, a state seeking to justify restraints on expression

faces the heavy burden of demonstrating—with actual evidence—that the purported harms it seeks to address are real and that its chosen restraints will in fact alleviate those harms to a substantial degree. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). North Carolina's ban on corporate law practice is based not on evidence, but on "lazy and wishful thinking." Lewis, *Corporate Capacity to Practice Law*, 2 Md. L. Rev. at 342–43. For that reason, it is unconstitutional.

CONCLUSION

This Court should reverse the Fourth Circuit's decision below.

Respectfully submitted,

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