No. 19-281

IN THE

Supreme Court of the United States

CAPITAL ASSOCIATED INDUSTRIES, INC.,
Petitioner,

v.

JOSH STEIN, ATTORNEY GENERAL
OF NORTH CAROLINA, ET AL.
Respondents.

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

BRIEF OF THE EMPLOYER ASSOCIATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Employer Associations of America (EAA) represents and advocates for the interests of its member employer associations (EAs) across the United States. EAs, such as petitioner Capital Associated Industries, Inc. (CAI), provide human resources guidance to employers, helping them to maximize the performance of their businesses in a cost-effective manner. EAA's core purpose is to provide "a dynamic forum for collaboration, leadership, and knowledge through a powerful national alliance" of EAs, and by coordinating and distributing information to EAs through annual conferences and national surveys.[2] EAA's membership includes EAs with offices in 23 States representing members in all 50 States.

EAA supports its members' attempts to use in-house attorneys to provide low-cost legal guidance to employers for the day-to-day employment issues that frequently arise for businesses. State unauthorized practice of law statutes (UPLs) that prohibit not-for-profit membership organizations from providing legal advice to their employer-members burden employers' First Amendment rights of association and speech. EAA therefore urges this Court to grant certiorari and hold that not-for-profit associations like petitioner

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and counsel for all parties received timely notice of *amicus*' intent to file this brief.

[2] EAA, *Vision & Mission*, https://www.eaahub.org/vision_mission (last accessed Oct. 2, 2019).

may provide at least basic legal assistance that both large and small businesses throughout this country need to operate as efficiently and effectively as possible.

SUMMARY OF ARGUMENT

The petition explains that this case implicates a split in authority with state courts of last resort, and provides other compelling reasons to grant certiorari. This brief focuses on the importance of the questions presented, and on the ways that the Fourth Circuit misconstrued this Court's precedents to the detriment of employers, employees, and the justice system as a whole.

I. The questions presented are exceptionally important. Across the country, employers need legal services. They need help drafting basic legal documents, they need advice about how to comply with a labyrinth of state and federal employment regulations, and they need help dealing with their regulators. Many businesses cannot afford to hire their own in-house law departments or pay private law-firm rates to obtain these services. Many respond by forgoing the advice, operating at risk. Others spend the money, incurring significant costs that impose unnecessary drag on their business models.

The problem of obtaining affordable access to good legal advice is especially acute for small businesses, which are a key driver of our Nation's economic dynamism and growth. For small businesses on thin margins, the expense of private legal advice can be daunting—or even prohibitive. These businesses are the most likely to operate without consulting attorneys at all.

That outcome serves nobody. Employers are more likely to err, employees are more likely to suffer violations, and the justice system is forced to take on the ensuing controversies. Litigators might benefit from greater attorney's fees—but everybody else suffers.

One easy solution is to recognize that not-for-profit EAs like petitioner may provide basic legal advice without running afoul of UPLs. As entities dedicated to serving their employer members, EAs are in the ideal position to monitor developments in the law and advise about best practices. EAs could easily assist in the drafting of basic legal documents, provide compliance guidance, and assist members in response to administrative inquiries. If they were able to do so, more businesses would have access to high-quality legal services, and legal problems would be solved far more quickly and efficiently. Indeed, this is already happening in a handful of jurisdictions that have not applied their UPLs to prevent this practice—with positive results.

II. Fortunately, that solution is compelled by this Court's precedents, which recognize that member associations have a First Amendment right to hire attorneys, on a salary basis, to assist their members. This Court has held, for example, that not-for-profit advocacy organizations have a First Amendment right to hire attorneys to represent their members—including not just providing legal advice, but actually litigating those members' cases. It has likewise held that labor unions have a First Amendment right to hire attorneys to represent their members in certain employment disputes. There is no principled distinction between organizations assisting employees and organizations assisting employers in this regard.

The Fourth Circuit reached the opposite result by misconstruing this Court's precedents and hyping up perceived ethical concerns with EAs' provision of advice to their members. But none of these concerns justify the result in this case. The potential for a conflict of interest between an EA and its members is virtually nonexistent for three reasons. First, EAs only seek to provide relatively innocuous legal services, such as the drafting of legal documents, compliance advice, and in some cases assistance in administrative inquiries. The EA itself will have no institutional interest, distinct from its members' interest, in the conduct of that representation. Second, EAs are member-controlled, which further diminishes any prospect that an EA would provide legal advice that does not serve its members. Members can set the rates for EA-provided legal services, and can decide which services they want. Third, EA attorneys are fully regulated by their state bars and by rules of professional responsibility. If they actually act in a manner that is contrary to the interests of their clients, they can be disciplined. That discipline provides an adequate check on potential conflicts of interest, making a blanket ban on the provision of legal services by corporations unnecessary. Moreover, consistent with those professional obligations, EAs have procedures in place to prevent conflicts between themselves and members, and to prevent EA attorneys from engaging in representation that creates conflicts between different EA members.

At bottom, the continued application of UPLs to prevent not-for-profit EAs from providing limited legal services to their members infringes the constitutional rights of EAs and their members. As applied here,

these laws do not protect vulnerable clients from unethical practitioners. Instead, they protect overpriced lawyers from meaningful competition, and prevent needy clients from accessing legal services at a price they can afford. These outcomes are flatly undesirable; they certainly do not provide a compelling reason to burden the First Amendment rights of EAs and their members.

ARGUMENT

As the petition explains, this case presents questions of exceptional importance and implicates a split in authority. Indeed, this case is sufficiently important that it would warrant the Court's review even in the absence of a split. Employers across the country need legal advice about employment matters—but they cannot get it from the entities that are best situated to provide it because of the unconstitutional application of UPLs to this advice. There is no sound reason in law or in policy for States to discriminate against not-for-profit EAs seeking to provide legal guidance to their members when labor unions, public-interest firms, and in-house lawyers at insurers and corporations can all provide similar advice to their constituents.

I. THE QUESTIONS PRESENTED ARE IMPORTANT TO EMPLOYERS NATIONWIDE, AND ESPECIALLY IMPORTANT TO SMALL BUSINESSES.

Certiorari should be granted because unconstitutional restrictions on the provision of legal advice have a broad, nationwide economic impact. This case arises from North Carolina, but this is not a one-state problem. Nationwide, UPLs drive up the cost of basic legal

advice by forcing employers to seek advice from expensive private attorneys and law firms, when attorneys working for not-for-profits like petitioner would gladly provide such advice as a service to members. Two outcomes are commonplace. First, some businesses, unable to obtain affordable legal advice, operate without it—risking compliance problems and unnecessary litigation. Second, some businesses shell out for the advice, diminishing their ability to deliver products and services at a profit. In either case, UPLs unjustifiably burden the economy, and especially small businesses.

1. EAs serve member employers across the country, in diverse sectors of the economy. EAs are member-centric organizations formed by like-minded employers who organize for their mutual benefit. By pooling their resources to organize an EA, members strive to obtain access to the best possible advice for dealing with an increasingly complex business climate.

EAs most directly assist their members by providing advice and support for the sorts of management and employment issues that commonly arise in the workplace setting. Pet. 6-9. Members receive this service in exchange for payment of annual dues. But state UPLs force EAs to stop providing support when members ask questions that would require an answer that could fit within the vague definition of "legal advice." Pet. 6-10.

In North Carolina, for example, N.C. Gen. Stat. § 84-5(a) prevents corporations, including their attorney employees, from practicing law unless those corporations are professional corporations owned exclusively by lawyers. EAs are required to end communications with members when further discussion could

potentially meet the definition of legal advice, and recommend that the member contact a private attorney to answer their questions, even if those questions involve the sorts of rote issues that many businesses face every day. Other UPLs work the same way. Across the nation—with a few exceptions—these UPLs handcuff not-for-profit EAs and prevent EAs from providing support that employers need to most efficiently run their businesses. *See* Pet. 13 (citing relevant statutes); Pet. App. 3a n.1 (explaining that "[a]lmost all" States restrict the practice of law by corporations).[3]

For example, EAs would like to assist members drafting basic legal documents, such as employment contracts, non-disclosure and non-compete agreements, and separation and release agreements. Although member-employers differ in size and scope, templates developed by an EA would provide an ideal starting point that would include most of what each employer would need. The EA could then assist the employer with tweaking the template to fit that employer's specific needs, all as part of the package of benefits each employer receives in exchange for paying annual dues.[4] Many UPLs prohibit this type of tweaking.

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[3] Pennsylvania allows all unincorporated nonprofit associations to practice law. 42 Pa. Cons. Stat. § 2524(b)(1). A handful of other States have tacitly permitted trade associations to provide limited legal advice under their UPL statutes. C.A. J.A. 181-82, 197-98, 213-24. And most States permit *certain* not-for-profit organizations, such as public interest groups and unions, to practice law even under broad UPLs that otherwise would cover those entities.

[4] Depending on the complexity and time needed to tailor these templates to an employer's specifications, EAs could charge an additional, small fee—as set by the members themselves—that

Additionally, EAs would offer their members more detailed guidance on compliance with employment and labor law and regulations. Most attorneys employed by EAs are experts at interpreting the (sometimes) byzantine collection of employment and labor laws and regulations created by a variety of agencies—providing obvious value to their members. Further, because these associations are usually state-specific, those attorneys would provide targeted advice on not just federal law, but also state labor and employment provisions. For example, the Hawaii Employers Council found that its members cite the EA's employment law compliance advice as a leading reason why members join the Council. Members would see even greater benefit if EAs could provide further assistance with understanding these laws and regulations.

This compliance guidance would constitute a sizable portion of the legal advice provided by EAs—petitioner estimated that 70-80% of the legal advice it would provide would involve basic compliance guidelines. Pet. C.A. Br. 8. Such guidance would be synergistic with the human resources discussions EAs are already empowered to have with member employers. No longer would EA attorneys have to end conversations that got too close to the provision of legal advice when discussing basic human resources issues. Instead, the advisor could provide an efficient solution to the member's problem. On the other hand, requiring members to interface with outside attorneys will lead

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would cover the extra time necessary to address these more detailed legal questions. But these fees would be nothing close to what law firms charge for comparable services.

to duplicative discussions, and impose needless inefficiencies on legal matters with which EA attorneys are intimately familiar.

Finally, EAs would be available for a variety of ancillary matters directly related to their member's employment needs. For example, associations could assist members who receive Equal Employment Opportunity Commission inquiries, Department of Labor wage and hour complaints, Occupational Safety and Health Administration complaints, and similar inquiries related to agency investigations. EAs also could work hand-in-hand with new employers in developing workplace policies, such as employee handbooks. *See, e.g.*, Pet. C.A. Br. 5-7. Some associations are limited in their ability to help members develop employment handbooks and policies because their state UPL rules require a final review by a private attorney. *Id.* This leads to another source of inefficiencies for members—the attorney will bill the member for review of the *entire handbook*, making the association's initial assistance largely redundant. Instead of promoting the efficient practice of law, UPLs as applied to not-for-profit EAs add unnecessary roadblocks to employers' compliance with state and federal law.

2. Small businesses, in particular, would benefit from EAs' legal advice. The U.S. Small Business Administration estimates that, as of 2015, there were 30.2 million small businesses in the United States, employing almost 59 million people.[5] That constitutes

[5] U.S. Small Bus. Admin. Office of Advocacy, *2018 Small Business Profile* 1, https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf (last accessed Oct. 2, 2019).

47.5% of the private workforce in the country,[6] and that percentage grows each year. These businesses are responsible for tremendous job creation. In 2015 alone, small businesses created 1.9 million net jobs, with firms of fewer than 20 employees adding 1.1 million of those jobs.[7] The growth of small businesses is accordingly a critical driver of the national economy. And much of those gains come from some of the smallest businesses, including startups.

Those businesses are exactly the entities that would most benefit from assistance by their EA. As these businesses begin to expand, new human resources and legal issues will arise, and they will need to navigate them. But while large corporations can afford their own in-house lawyers or outside counsel, small businesses frequently cannot. Small businesses *need* a cost-effective source of basic legal advice, lest they risk noncompliance.

If that advice is not available, many small businesses will attempt self-help from the Internet. But the risks inherent to businessmen turning to unverified and unsourced legal "advice" on a professional-looking webpage are beyond obvious. A business may not look up the correct body of law; the advice they find may not be sound or up to date; and of course they cannot find what they do not look for—and so if the business itself has not identified all of the pertinent legal questions, it will never find the correct answers. The result is that employers may rely on inadequate legal advice, needlessly risking noncompliance.

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[6] *Id.*

[7] *Id.*

These concerns are not hypothetical. When small employers are faced with an employment issue requiring professional guidance, employers have told their EAs that they are loath to pick up the phone and call an attorney, starting the clock on billing at high rates for straightforward advice. Many small businesses have reported to their EAs that they would rather take the risk of non-compliance than see that attorney's bill.

Businesses acting cautiously suffer as well. Outside counsel (or dedicated in-house counsel) are expensive—and it may very well be the case that obtaining sound legal advice imposes costs that a business cannot afford to bear. While there are some circumstances (*e.g.*, litigation, or dealing with novel and complex issues that require highly fact-specific and individualized strategic assessments) in which businesses should nevertheless hire outside counsel, the same cannot be said for everyday, run-of-the-mill issues such as basic document drafting, compliance guidance, and help with administrative proceedings. For those issues, a business that spends the money to dot the i's and cross the t's risks placing itself at a severe competitive disadvantage.

3. To be clear, EAA's concerns are about much more than businesses trying to save money on legal fees. Employers, employees, and state and federal regulators all benefit when employers receive consistent advice from reliable sources, which allows these businesses to comply with employment and labor laws without having to resort to self-help. As many nascent businesses cannot consistently afford legal advice from traditional law firms, their reliance on self-help cre-

ates more work for regulators—who investigate potential noncompliance—and employees—who face an inconsistent and unreliable environment where lateral mobility could be unintentionally restricted by employers who do not fully understand the ins-and-outs of employment law. And both state and federal courts benefit from accurate legal advice because, if employers comply with the law, then court resources will not be tied up to resolve these clearly avoidable disputes.

There is an obvious solution to all of these problems: the provision of accurate, up-to-date legal advice by not-for-profit EAs would fill an important gap in the market, and ensure that businesses of all sizes can access reliable, cost-effective legal advice from licensed attorneys. *See* Neil M. Gorsuch, *Access to Affordable Justice*, 100 Judicature 46, 49 (2016) (noting the need for a "more nuanced approach" to UPLs that would provide greater "access to competent and affordable legal services."); *see also* Neil M. Gorsuch, *A Republic, If You Can Keep It* 254-58, 267 (2019) (arguing for greater access to affordable justice). EA attorneys are ready to provide this advice, and employers are eager to receive it. The only real obstacle standing in the way is the overbroad application of UPLs.[8]

II. THE FOURTH CIRCUIT'S DECISION IS WRONG.

A. The Fourth Circuit's Decision Contravenes This Court's Precedents.

As detailed by CAI's petition, the Fourth Circuit erred in concluding that North Carolina's UPL did not

[8] EAA, like petitioner, does not believe that UPLs should be facially invalidated. EAA instead supports petitioner's argument that UPLs are unconstitutional as applied to not-for-profit EAs.

violate petitioner's First Amendment rights to free association and speech. Pet. 23-37. The court incorrectly interpreted the associational rights established by this Court's decisions in *NAACP v. Button*, 371 U.S. 415 (1963), and *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217 (1967) (*UMW*), as applying to certain not-for-profit associations like employee unions and public interest organizations while excluding not-for-profit EAs that serve the interests of their employer members. Pet. 23-31. The Fourth Circuit also ignored this Court's recent clarification of the scope of free speech rights available to professional organizations in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), in essence readopting the "professional speech doctrine" that *NIFLA* explicitly rejected. Pet. 31-37. These substantial errors justify review by this Court.

This Court has recognized the value that not-for-profit organizations provide to their members as a centralized advocate and support system. The Court has repeatedly found that the limited legal advice EAs want to offer to their members would be protected by the First Amendment when given by unions to their *employee* members, *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971), or by public interest firms on behalf of their members, *In re Primus*, 436 U.S. 412 (1978); *Button*, 371 U.S. 415.

There is no principled distinction between those cases and this one. This Court's opinion in *UMW* is particularly instructive. In *UMW*, a "Union had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the

Illinois Industrial Commission," and a state bar association claimed that this constituted "unauthorized practice of law." 389 U.S. at 218. This Court rejected the argument, explaining that "the freedom of speech, assembly, and petition . . . gives [the union] the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." *Id.* at 221-22. The Court recognized that state UPLs are intended to "protect the public and . . . preserve . . . the administration of justice," but can "in their actual operation significantly impair the value of associational freedoms." *Id.* at 222. Reconciling these competing imperatives, the Court held that the "distant possibility of harm" from potential conflicts of interests "could not justify a complete prohibition" on collective efforts to obtain representation. *Id.* at 223.

This holding applies with full force to EAs like petitioner, and the sorts of legal services they wish to provide. Like a union, EAs are member-led organizations that employ licensed attorneys on a salaried basis to provide limited legal advice to members. Just like unions, EAs have associational freedom that the First Amendment protects. And any ethical concerns, as explained *supra*, are purely hypothetical. Indeed, this Court already concluded that overbroad application of UPLs is "not needed to protect the State's interest in high standards of legal ethics." *UMW*, 389 U.S. at 225.

The Fourth Circuit distinguished EAs from other not-for-profits because it believed that the advice they provide would be "for commercial ends," Pet. App. 11a. That is both inaccurate—given that these organizations do not exist to derive profit, but merely to provide useful assistance to their members—and irrelevant—

as "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *UMW*, 389 U.S. at 223. Indeed, in *UMW* itself, the representation the union provided to its members related to indistinguishable commercial matters (workmen's compensation disputes).

The Fourth Circuit also erred by construing this Court's precedents as emphasizing "access to the courts"—as opposed to access to legal services more broadly. Pet. App. 11a. This Court's precedents are not so limited. In *United Transportation Union v. State Bar of Michigan*, the Court explained that "[a]t issue is the basic right to group legal action" and "enabling their members to meet the costs of legal representation." 401 U.S. at 585-86. And in *UMW*, the challenged practices involved representation before a state agency—the Illinois Industrial Commission—not a court. 389 U.S. at 218-22; *see also id.* at 222 (noting that the right at issue was "the right of an association to provide legal services for its members," not limited to services in connection with litigation). Thus, this Court has established a protected interest in having affordable access to legal services, not just access to courts. That makes sense because access to this broader array of legal services is, for most businesses, an essential prerequisite to deciding whether to go to court.

At bottom, the Fourth Circuit simply missed that *UMW* controls this case. Only this Court can reverse that holding.

B. The Fourth Circuit's Policy Concerns Do Not Justify Its Result.

To justify its decision, the Fourth Circuit emphasized perceived ethical concerns arising from EAs providing legal services to members. In this analysis, the court of appeals gave short shrift to the employers' interest in access to cost-effective legal advice, and failed to credit the limited nature of the legal advice EAs seek to provide to their members. Pet. App. 3a-4a. Instead, the court took the N.C. State Bar at its word that the provision of *any* legal service to third parties by attorneys employed by non-lawyer-helmed corporations would create intractable conflicts of interest dangerous to attorney-client relationships and the legal profession. *Id.* at 5a-6a, 11a-13a, 18a-19a. On closer examination, the Fourth Circuit's concerns are overblown, and do not justify restricting EAs from providing legal advice.

As an initial matter, the State Bar's claims deserve close scrutiny. An entity seeking to restrict associational freedom should not be permitted to do so only on the basis of speculation. Absent some evidence that conflicts of interest—or other behaviors that harm clients—are likely to arise, the State Bar's argument should fail. In this case, there is at least some experience, in the handful of States that permit EAs to provide legal advice to their members, refuting the State Bar's speculation about harm. *See supra* note 3. That experience undermines any empirical foundation for the Fourth Circuit's holding. For the reasons given below, the court of appeals' reasoning is also wrong as a matter of logic and law.

1. As explained above, EAs seek to supplement their traditional role in providing human resources assistance so that members can avoid litigation, either by complying with the law or resolving matters quickly, efficiently, and economically while still in administrative proceedings. EAs have no desire to be a one-stop-shop for all legal issues that an employer might face, and have no intention to displace law firms altogether, even within the sphere of employment and labor law.

Thus, EAs do not anticipate representing members in litigation before courts, or providing advice on complex areas of law like tax or bankruptcy that are not within their traditional bailiwick. For example, CAI has disclaimed providing "legal assistance with NLRB, ERISA, immigration, tax, employee-benefit matters, or litigation." Pet. C.A. Br. 8. And while other EAs may seek to assist members in administrative proceedings before agencies, that assistance would end before the member undertook any proceedings in court.

This matters because the relief petitioner and other EAs seek is not a wholesale restructuring of the practice of law that might reasonably raise concerns about the integrity of the legal profession. Instead, petitioner and other EAs seek only an incremental expansion of their ability to serve their members—similar to what those members can already get from in-house counsel (if they could afford it). This is consistent with existing practice in some jurisdictions. A number of EAs provided affidavits below stating that they have attorneys on staff that have provided limited legal advice to member employers for some time, and

these attorneys act under detailed restrictions imposed by the EA to prevent against any potential ethical concerns. *See, e.g.*, C.A. J.A. 175-76, 182-84, 198-201, 214-19. State bars have not attempted to stop this practice in these jurisdictions, apparently recognizing that more limited, existing ethical bars, such as the requirement that licensed attorneys maintain their independence and professional judgment, provide all of the protection necessary to overcome ethical concerns. Restricting the overbroad application of UPLs to not-for-profit EAs in States like North Carolina therefore would not require the Court to restructure state ethical rules on any large scale.

It also matters because the limitations that EAs would impose on the types of legal advice provided to members diminish the potential for conflicts of interest. Drafting assistance with employer handbooks, employment contracts, and severance agreements, along with basic compliance advice and regulatory support under generally applicable labor and employment law is unlikely to place the associations' attorneys at loggerheads between their duties to their employer-clients and their position as employees of the associations.

This case is accordingly *a fortiori* from cases in which this Court has held that attorneys employed by advocacy organizations can represent their members in court. In those cases, one could imagine that an advocacy organization's interests might diverge from the interests of an individual member: the organization, for example, might want to set a precedent, while the member might just want a favorable settlement, even if that means forgoing an opportunity to develop the law. The organization's attorneys might therefore find

themselves conflicted between their duty to their employer and its mission, and their duty to their client. But this Court held that even in those circumstances, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Button*, 371 U.S. at 439. The balance between First Amendment rights and the State's interests in preventing conflicts of interest tilts even more heavily in favor of associations here because the potential for conflict in this case is much lower.

2. The structure of EAs also makes conflict between an EA and a member unlikely. Although many EAs are controlled by non-attorneys, their not-for-profit status and institutional purpose insulate them from the economic opportunism that generally justifies the ethical bars on the corporate practice of law. EAs do not exist to make a profit—they are created by employers to provide assistance with the every-day difficulties that arise when owning a business.

Members control EAs and therefore would set the rates for legal services provided by the association, either through annual dues or through affordable hourly rates. There is no incentive for members to set high fees—as those fees would come from their own pockets. Other incentives dissuade against enacting low fees or setting a small budget for legal advice—it is difficult to attract the best attorneys to work for the EAs unless they are good paying jobs. Moreover, because members serve on the governing boards of each association, they can ensure the quality of the legal advice provided by EA attorneys. As the entity both receiving the legal advice and setting the fees for said advice, there is no conflict created by provision of legal advice by the EAs *own employees* to its *own members*. The interests of the

only two relevant parties are aligned—members set the fees paid to the attorneys for legal advice through determining attorney salaries, and the attorneys act in the best interest of their clients, who also happen to be their employer since the association exists solely at its members' behest.

On the other hand, for-profit businesses provide services to non-related individuals or organizations, such that often there is no relationship between the provider of services and the recipient. Because those corporations would not be harmed by setting high fees for legal advice provided to unrelated third-parties (except through basic competition for services), there is at least the potential for conflicts of interest. Those employee attorneys would be caught between maximizing profit for their employer and providing efficient legal advice to the third-party client. By hiring and paying their own attorney employees to provide services only to members, EAs avoid these potential ethical pitfalls. *See UMW*, 389 U.S. at 224 ("[T]here was absolutely no indication that the theoretically imaginable divergence between the interests of the union and member ever actually arose[.]").

EAs are most similar to public-interest organizations, unions, insurance company staff attorneys that provide representation to insureds, or in-house attorneys working at a business, which are frequently exempted from the scope of UPLs because (like EAs) they lack the ethical pressures that exist in a for-profit environment. *See, e.g.*, N.C. Gen. Stat. § 84-5.1.

3. Third, EAs utilize a variety of protective measures similar to those used by law firms to protect against ethical violations. Importantly, the lawyers

who work for EAs are fully regulated by their respective state bars and rules of professional responsibility. EA attorneys would be subject to the same disciplinary proceedings and malpractice suits that would apply if an attorney at a law firm provided improper compliance advice or disclosed confidential client information. Those disciplinary rules and proceedings—which actually target wrongful conduct—are the right way to ensure that conflicts of interest do not taint legal representation because they are properly tailored to legitimate ethical concerns. A blanket ban on representation by corporations, on the other hand, is both unnecessary and overbroad—just like the restrictions that this Court invalidated in *Button*, *UMW*, and *Trainmen*.

EAs also have policies in place to prevent conflicts from arising *between* members when providing advice. EAs employ written policies covering the confidentiality of member information. Pet. C.A. Br. 9. And, in the rare instance where a conflict between members could arise, EAs seek a conflict waiver or choose not to represent the members any further to avoid that conflict. *Id.* For example, an EA could be asked to provide legal advice to a member with interests directly adverse to another member, such as a member seeking to assert a non-compete agreement against an employee hired by another member. In such situations, the EA will decline to provide advice to either member and will refer both members to private counsel for further advice, removing the potential for any conflicts between members.

4. Permitting EAs to provide limited legal advice is also consistent with the best institutional thinking

in this area. In 2002, for example, the America Bar Association (ABA) attempted to determine how UPLs should be applied by examining the term "practice of law." The ABA Task Force concluded that a single model definition of when nonlawyers should be authorized to practice law was inappropriate.[9] Instead, the Task Force recommended that States consider factors such as "public protection and consumer safety," "access to justice," "preservation of individual choice," and "efficient operation of the marketplace" in deciding how to apply UPL statutes.[10] All of these factors support a supplemental role for EAs in providing legal advice to their members.

Most strikingly, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) provided joint comments to the Task Force, expressing concern that an overly broad definition of practice of law "could restrain competition between lawyers and nonlawyers to provide similar services to American customers," "raise costs for consumers," and "limit their competitive choices," while "[t]here is no evidence . . . of which we are aware that consumers are hurt by this competition and there is substantial evidence that they benefit from it."[11] Thus, "consumers generally benefit from

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[9] *See generally* ABA Task Force on the Model Definition of the Practice of Law, *Report* (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.pdf.

[10] *Id.* at 5.

[11] DOJ & FTC, *Comments on the American Bar Association's Proposed Model Definition of the Practice of Law* 3 (Dec. 20, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf. Within those comments, DOJ and FTC provide a list

lawyer-nonlawyer competition in the provision of certain services,"[12] and the EA's goal of providing limited legal advice to provide their members fits perfectly within this paradigm. In comments submitted during a later rulemaking by the Supreme Court of Hawaii, DOJ and FTC noted that broad application of UPLs "could preclude use of a number of services that provide reasonable options for some consumers, such as . . . human resources management and other specialists advising employers about . . . federal, state and local labor . . . and other regulatory compliance issues."[13] Even the federal government has recognized the unnecessary harm and overblown ethical concerns raised by application of UPLs to *exactly* the limited legal advice at issue here.

At bottom, the provision of limited legal services by EAs strikes an ideal balance between the day-to-day legal needs of employers with the obvious value that outside counsel and law firms would provide those members in the rare situations, like litigation, that require individualized advice. As the provision of legal advice by not-for-profit EAs would not raise any significant ethical concerns, the only remaining justification for application of UPLs here is naked economic protectionism by private practice attorneys who would lose

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of similar comments submitted to state bar associations. *Id.* at 4 n.14.

[12] *Id.* at 4; *see also id.* at 8 ("Experienced lay employees advising their employer about what their firm must to do comply with state labor laws" was an example of "lawyer-nonlawyer competition that might be eliminated" by an overly broad rule).

[13] DOJ & FTC, *Comments on Proposed Definition of the Practice of Law* 2 (Jan. 25, 2008), https://www.justice.gov/sites/default/files/atr/legacy/2008/02/07/229962.pdf.

the profit opportunities created by denying individual businesses access to an additional source of legal advice. This is entirely unsurprising considering that protectionist concerns motivated attorneys during the Great Depression to convince States to adopt many of the UPLs that exist today. Pet. 9. UPLs created to suppress competition in the marketplace for legal advice should not be wielded under the guise of upholding the high ethical standards of the legal profession when those ethical concerns are not implicated by not-for-profit EAs assisting their members with certain legal matters.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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