No. 19-281

In the Supreme Court of the United States

CAPITAL ASSOCIATED INDUSTRIES, INC.,
Petitioner,

v.

JOSH STEIN,
as Attorney General of North Carolina, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

North Carolina law prohibits corporations from offering legal services. Petitioner Capital Associated Industries, Inc. (CAI) sought to enjoin the enforcement of this prohibition so the company could sell employment-related legal services to its member-businesses.

The questions presented are:

1. Whether North Carolina's regulation of law practice, as applied to CAI, impairs CAI's right of association.

2. Whether North Carolina's regulation of law practice, as applied to CAI, abridges CAI's freedom of speech.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES.......................................iv

INTRODUCTION...1

STATEMENT 3

A. CAI's business 3

B. CAI's plan to practice law and increase its revenues 4

C. CAI's lawsuit 6

REASONS FOR DENYING THE PETITION...........8

I. The First Question Presented Does Not Warrant This Court's Review 8

A. The split in authority that CAI purports to identify is illusory 8

B. CAI's arguments turn on fact questions 16

C. The Fourth Circuit's decision was correct..17

II. The Second Question Presented Does Not Warrant This Court's Review 21

A. There is no split in authority on how *NIFLA* applies to professional-conduct regulations 21

B. The Fourth Circuit's decision was correct...24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Am. Med. Ass'n v. Stenehjem,
No. 19-cv-125, 2019 WL 4280584
(D.N.D. Sept. 10, 2019)....................................23

Box v. Planned Parenthood,
139 S. Ct. 1780 (2019) 22

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 9

Bhd. of R.R. Trainmen v. Va. State Bar,
377 U.S. 1 (1964) 9, 19

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 8, 15

Expressions Hair Design v. Schneiderman,
137 S. Ct. 1144 (2017) 26

Frye v. Tenderloin Hous. Clinic, Inc.,
129 P.3d 408 (Cal. 2006) 11, 12, 13

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 26

Goldfarb v. Va. State Bar,
421 U.S. 773 (1975) 10, 20

Hines v. Quillivan,
395 F. Supp. 3d 857 (S.D. Tex. 2019),
appeal filed, No. 19-40605
(5th Cir. July 2, 2019) 23

Hishon v. King & Spalding,
467 U.S. 69 (1984) 19

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 25

Hopper v. City of Madison,
256 N.W.2d 139 (Wis. 1977) 11, 12

In re N.H. Disabilities Rights Ctr., Inc.,
541 A.2d 208 (N.H. 1988) ....*passim*

In re Primus,
436 U.S. 412 (1978) 1, 9, 18

Lawline v. Am. Bar Ass'n,
956 F.2d 1378 (7th Cir. 1992) 11

McCullen v. Coakley,
573 U.S. 464 (2014) 20

Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n,
457 U.S. 423 (1982) 20

NAACP v. Button,
371 U.S. 415 (1963) ....*passim*

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) ....*passim*

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 1, 10, 19, 26

Otto v. City of Boca Raton,
353 F. Supp. 3d 1237 (S.D. Fla. 2019),
appeal filed, No. 19-10604
(11th Cir. Feb. 13, 2019)..23

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 8, 9, 18

Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47 (2006) 26

United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) 9, 19

United Transp. Union v. State Bar, 401 U.S. 576 (1971) 9

STATUTES

N.C. Gen. Stat. § 84-5 ....5, 25

N.C. Gen. Stat. § 84-5.1 ....5, 25

N.C. Gen. Stat. § 84-7 6

N.C. Gen. Stat. § 84-21 7

N.C. Gen. Stat. § 84-23 7

N.C. Gen. Stat. § 84-28 7

N.C. Gen. Stat. § 84-28.1 7

N.C. Gen. Stat. § 84-37 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 8

RULES

S. Ct. R. 10 ....16, 21

OTHER AUTHORITIES

Restatement (Third) of the Law Governing Lawyers § 16 25

INTRODUCTION

In a series of cases starting with *NAACP v. Button*, this Court has developed a framework for deciding when an organization has a First Amendment right to offer legal services. 371 U.S. 415 (1963). The Court completed that framework with a pair of cases decided on the same day: *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *In re Primus*, 436 U.S. 412 (1978). *Ohralik* recognized that commercial law practice is not First Amendment expressive activity. In contrast, *Primus* confirmed that noncommercial law practice that facilitates meaningful access to the courts has heightened constitutional protection.

The petition here alleges a split in authority on the legal standard that governs a free-association claim by an organization that seeks to practice law. The courts are not actually divided on this issue, however. The lower federal courts and state courts of last resort have agreed on an approach for applying this Court's case law.

The decision below illustrates this agreement. The Fourth Circuit relied on one of the same cases that CAI cites as evidence of an alleged split in authority. The other cases that make up CAI's alleged split did not even decide whether the organizations at issue engaged in expressive activity under the First Amendment.

Instead of identifying a genuine split, CAI's petition asks this Court to resolve fact-intensive issues on how to characterize CAI and the legal

services it wants to sell. The Fourth Circuit stated that the fact-intensive questions in this case are close. Pet. App. 11a. But CAI's disagreement with how the Fourth Circuit applied an established legal standard to the record here does not warrant this Court's review.

This Court's review is not warranted for an additional reason as well: The Fourth Circuit correctly applied *Button* and later decisions. CAI sought to sell employment-related legal services to increase its membership and its revenues. That type of law practice has no expressive aim. It does not facilitate meaningful access to the courts. And it raises professional-responsibility concerns that states have broad authority to address.

CAI also seeks review of the Fourth Circuit's application of *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). CAI has not identified any split in authority on how to apply *NIFLA* to professional-conduct regulations that incidentally affect speech. That should come as no surprise, because this Court decided *NIFLA* just last year. If the Court were to accept review here, it would cut off percolation in this area.

In addition, the Fourth Circuit applied *NIFLA* correctly. North Carolina's ban on the sale of commercial legal services by corporations regulates the fiduciary relationship between lawyer and client. It concerns who may practice law, not what they must say. As a result, the Fourth Circuit correctly held that a ban on CAI's sale of legal services is a conduct

regulation that burdens speech only incidentally. Under *NIFLA*, heightened scrutiny therefore does not apply.

The petition should be denied.

STATEMENT

A. CAI's business

Petitioner Capital Associated Industries, Inc., is a North Carolina corporation that claims a tax exemption under section 501(c)(6) of the Internal Revenue Code. CAI provides human-resources services to more than 1,000 paying members. CAI also sells its services to nonmembers.

CAI is governed by a twelve-person board made up of executives from CAI's member-businesses. C.A. J.A. 239, 490-91. It has no independent directors, and only one director is a lawyer. C.A. J.A. 239, 490-91. CAI rewards its executives and employees with bonuses based on the corporation's profits. C.A. J.A. 161, ¶ 5; C.A. J.A. 309.

CAI's services run the gamut, from affirmative-action plans, to background checks, to trainings and conferences, to employee recruiting and other "customized" human-resources services. C.A. J.A. 1077, 1079, 1081-84, 1086, 1088-89, 1091-96, 1098-1102. These services are available from other providers, including for-profit companies. C.A. J.A. 263-64, 268, 283-84, 287. CAI competes with these other providers. C.A. J.A. 179, ¶ 55.

CAI also operates a hotline for human-resources advice. The hotline is available to members and some nonmembers. About two percent of members' hotline calls may have resulted in a potential referral for legal services. C.A. J.A. 446-48, 1396. CAI's human-resources advisors answer the remaining 98 percent of calls. *See* C.A. J.A. 446-48.

B. CAI's plan to practice law and increase its revenues

CAI sought to add a new line of business as part of a strategic plan, called "2X," that sought to double CAI's membership and increase CAI's revenues. C.A. J.A. 255. Specifically, CAI sought to represent its members in certain nonlitigation legal matters. CAI believed that these legal services would improve its competitive advantage in the human-resources market. C.A. J.A. 1241; *see also* C.A. J.A. 430, 521.

CAI planned to offer some of these proposed legal services as part of its members' annual dues, which could increase as a result. C.A. J.A. 342-43, 369-72, 522-23. For other legal services, CAI intended to charge a separate, additional hourly fee. C.A. J.A. 342-43, 369-72, 522-23; *see also* C.A. J.A. 174, ¶ 44.

CAI did not show that any of its members lacked access to the type of legal services that CAI planned to provide.

Take, for example, CAI member Troxler Electronic Laboratories. Troxler testified that it had relationships with law firms for corporate,

employment, and patent-related issues. C.A. J.A. 569-70. It needed to consult with counsel roughly once every three years on nonpatent matters. C.A. J.A. 573. Troxler was always able to find and afford counsel. C.A. J.A. 573-74, 589-90.

Other CAI members offered similar testimony. CAI member Medical Mutual, for example, employs three in-house lawyers, including a general counsel. C.A. J.A. 471-74. Medical Mutual also retains regional law firms on corporate and employment issues. C.A. J.A. 477-83, 517-17.

CAI nonetheless sought to sell legal services to its members. But North Carolina law generally prohibits a corporation from practicing law. *See* N.C. Gen. Stat. §§ 84-5, 84-5.1 (2017). The North Carolina General Assembly first enacted that prohibition in 1931. As the Fourth Circuit noted, "[a]lmost all other states have similar laws on the books." Pet. App. 3a n.1.

CAI spent several years lobbying for changes to state law to accommodate its proposed law practice. The General Assembly twice rejected the legislation that CAI proposed. C.A. J.A. 143-44, ¶¶ 8-11.

In 2013, CAI sent a memorandum to the North Carolina State Bar, requesting an ethics opinion on whether CAI could practice law by providing legal advice or other legal services to members through its lawyer-employees. C.A. J.A. 998-1001. The State Bar issued an opinion that CAI's proposed business plan, as described in the memorandum, would violate North Carolina law. C.A. J.A. 1043-45.

In that opinion, the State Bar suggested lawful alternatives to CAI's proposed law practice, including organizing a prepaid or group legal-services plan. C.A. J.A. 1045-47. After filing this lawsuit, CAI started a prepaid plan for its members. C.A. J.A. 1144.

According to CAI, its 2013 memorandum to the State Bar is the most complete description of its plan to provide legal services to its members. C.A. J.A. 354-55, 402-03. The memorandum offers few details about this proposed plan. During discovery, CAI's officers testified that CAI had not yet worked out key aspects of its proposed legal-services program, including the reporting structure, how to manage conflicts of interest, and how to define the lawyer-client relationship. C.A. J.A. 362-63, 365-66, 400, 493-94, 529-30. The record does show, however, that CAI's nonlawyer board and management would have extensive authority over the work of CAI's lawyer-employees. C.A. J.A. 345, 347.

C. CAI's lawsuit

In 2015, CAI brought an as-applied challenge to the enforcement of North Carolina's prohibition on the sale of commercial legal services by corporations.

CAI sued North Carolina's Attorney General and two of the District Attorneys who are responsible for enforcing the state's unauthorized-practice-of-law statutes. *See* N.C. Gen. Stat. § 84-7. The North Carolina State Bar, a state agency that also enforces

the statutes, successfully moved to intervene as a defendant. *See id.* § 84-37.[1]

CAI alleged that North Carolina's prohibition on the sale of commercial legal services by corporations would "preclude[ ] CAI from earning revenues by employing licensed attorneys to provide legal advice and services to its members." C.A. J.A. 36, ¶ 98.

CAI asserted six claims. The lead claim alleged violations of CAI's substantive-due-process rights. CAI also alleged violations of its First Amendment rights to free speech and association. Pet. App. 27a-28a.

The District Court granted summary judgment for the defendants on all of CAI's claims. Pet. App. 57a. A unanimous panel of the Fourth Circuit affirmed. Pet. App. 24a.

On CAI's free-association claim, the Fourth Circuit held that CAI's proposed commercial practice of law is not the type of expressive association that the First Amendment protects. Pet. App. 8a-13a. On CAI's free-speech claim, the court held that North Carolina's prohibition on the sale of commercial legal services by corporations is a regulation of professional conduct

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[1] The State Bar's other duties include adopting rules of professional conduct and other regulations, all subject to approval by the North Carolina Supreme Court, and disciplining lawyers who violate those rules. *See* N.C. Gen. Stat. §§ 84-21(b), 84-23, 84-28, 84-28.1.

that only incidentally affects CAI's speech. Pet. App. 13a-19a. CAI now petitions for certiorari.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant This Court's Review.

A. The split in authority that CAI purports to identify is illusory.

In its petition, CAI argues that there is a split in authority on the legal standard for free-association claims. To the contrary, the cases on both sides of CAI's alleged split apply the same well-established legal standard.

The cases that CAI cites address whether a state's regulation of law practice unconstitutionally restricts an organization's First Amendment right to free association. The cases resolve that question by applying a framework developed by this Court.

The First Amendment does not by its terms protect association, but this Court has held that the amendment protects both intimate and expressive association. *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989); *accord* U.S. Const. amend. I. The right to intimate association protects "choices to enter into and maintain certain intimate human relationships." *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). The right to expressive association is "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech,

assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618.

By contrast, "there is only minimal constitutional protection of the freedom of commercial association." *Id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment). As a result, although the right to expressive association "is not reserved for advocacy groups," "[t]o come within its ambit, a group must engage in some form of expression, whether it be public or private." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

The Court has identified a common thread in these expressive-association cases: associations that are "undertaken to obtain meaningful access to the courts" are protected under the First Amendment. *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971).

For example, organizations that facilitate meaningful access to the courts have a First Amendment right to solicit clients for prospective litigation. *In re Primus*, 436 U.S. 412, 431-32 (1978); *NAACP v. Button*, 371 U.S. 415, 434-37 (1963). They also have a right to recommend legal counsel to their members. *United Transportation Union*, 401 U.S. at 580-83; *Bhd. of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 6-8 (1964). And they have a right to employ lawyers to represent their members or third parties. *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 224-25 (1967); *Button*, 371 U.S. at 441-44.

Commercial law practice, in contrast, does not enjoy similar First Amendment protection. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-59 (1978). In commercial situations, states may generally exercise their broad police powers to regulate the legal profession. Indeed, states have "a compelling interest in the practice of professions within their boundaries." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

The federal courts of appeals and state high courts have agreed on an approach for applying this Court's expressive-association holdings to state regulations of law practice. The Fourth Circuit followed that well-settled approach here.

To decide whether North Carolina's regulation of the sale of commercial legal services impaired CAI's right to expressive association, the Fourth Circuit reviewed the purpose and effects of CAI's allegedly expressive activities. Pet. App. 11a-12a. First, it asked whether CAI sought to practice law "for commercial ends" or "for political or otherwise public goals." Pet. App. 11a-12a. Second, it asked whether the effect of CAI's proposed law practice would facilitate meaningful access to the courts. Pet. App. 12a. Third, it asked whether CAI's proposed law practice could raise ethical concerns that would require state regulation. Pet. App. 12a.

CAI alleges that decisions in this area are split. It does not argue, however, that any of the courts on either side of the purported split applied different legal frameworks. Rather, CAI argues only that courts

have applied the same framework in different ways. *See* Pet. 14, 17-18.

Specifically, CAI alleges a split in the details of how courts have analyzed the second question that the Fourth Circuit asked: whether a proposed law practice would facilitate meaningful access to the courts. Pet. 16-17.

According to CAI, the Fourth Circuit and the Seventh Circuit take a relatively narrow view of what it means for an organization to facilitate meaningful access to the courts. Pet. 14 (citing the decision below, as well as *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992)). By contrast, CAI alleges that the New Hampshire, California, and Wisconsin Supreme Courts take a relatively broad view of the same concept. Pet. 15-18 (citing *Frye v. Tenderloin Hous. Clinic, Inc.*, 129 P.3d 408 (Cal. 2006); *In re N.H. Disabilities Rights Ctr., Inc.*, 541 A.2d 208 (N.H. 1988); *Hopper v. City of Madison*, 256 N.W.2d 139 (Wis. 1977)).

These courts are not divided. Indeed, two of the cases that CAI cites do not even decide whether the organizations at issue in those cases engaged in expressive activity by seeking to provide legal services.

For example, the Wisconsin Supreme Court's decision in *Hopper* does not analyze what it means for an organization to facilitate access to the courts. The case does not even concern the practice of law.

Hopper involved a taxpayer's challenge to the City of Madison's appropriation of public funds to the Madison Tenant Union, an organization that helped tenants resolve disputes with landlords. 256 N.W.2d at 132. The taxpayer claimed that the appropriation was illegal because the organization was not authorized to practice law. *Id.* at 133. The Wisconsin Supreme Court affirmed a trial court's factual finding that the organization's nonlawyer dispute counselors gave advice that was "offered in a non-legal capacity" and therefore did not violate Wisconsin's practice-of-law statutes. *Id.*

The California Supreme Court's decision in *Frye* is equally off point. Like *Hopper*, *Frye* does not address what it means for an organization to facilitate meaningful access to the courts. The lack of a complete record prevented the court from reaching a conclusion on that fact-intensive question.

In *Frye*, the plaintiff was a former client of the Tenderloin Housing Clinic, an organization that provided housing-related legal services to low-income residents of San Francisco. *Frye*, 129 P.3d at 410-11. Having successfully represented a client in a lawsuit against his landlord, the housing clinic was awarded attorneys' fees and costs. *Id.* at 411. The client then sued the housing clinic, seeking to recover the fees and costs for himself on the ground that the clinic had failed to register with the state bar. *Id.* at 412.

The clinic raised a free-association defense. *Id.* at 421. The California Supreme Court did not reach that issue, however, because the parties had not developed

an adequate record for the court to decide whether the housing clinic engaged in expressive activity by offering legal services. *Id.* at 422-23.

In the end, even that issue was academic, because the court resolved the case on lack-of-injury grounds. Even if the housing clinic had registered with the state bar, "[u]nder no imaginable circumstance would [the plaintiff] have fared better" than he did in the underlying litigation. *Id*. at 423.

CAI cites only one decision that actually analyzes meaningful access to the courts: Justice Souter's opinion for the New Hampshire Supreme Court in *Disabilities Rights*. But that decision is consistent with the Fourth Circuit's decision here, not in conflict with it. Indeed, the Fourth Circuit relied on the New Hampshire court's decision. Pet. App. 10a.

In *Disabilities Rights*, the court held that New Hampshire could not prevent a disability-rights organization from representing nonindigent clients. 541 A.2d at 209. The court devoted most of its attention to analyzing the record on the services offered by the organization. Although the organization's nonindigent clients could seek representation from other lawyers, the record showed that the organization's lawyers were "more conversant in the relevant law than are most lawyers practicing privately, and more eager to accept cases likely to result in vindicating the rights of the disabled." *Id.* at 214. As the court emphasized, moreover, the organization did not charge for any of its legal services. *Id.* at 213. As a result, the court

found that the organization would probably offer "better representation and readier access to the courts for the non-indigent." *Id.* at 214.

The New Hampshire Supreme Court summarized this Court's precedents as recognizing a First Amendment "right to litigate" when "representation would otherwise have been virtually unavailable, as in *Button*, or would have been second-rate and unreasonably expensive, as in *Trainmen*." *Id.* The court acknowledged that it was unclear whether there is "an associational right to provide mere duplication of legal services on the same terms generally available." *Id.* The court, however, offered no answer to that question. *See id.*

Here, the Fourth Circuit's analysis was consistent with the New Hampshire Supreme Court's reasoning in *Disabilities Rights*.

First, the Fourth Circuit noted that CAI did not propose to provide legal services that were otherwise unavailable to its members. *See id.* To the contrary, the record developed in discovery shows that "CAI's members have consistently had access to legal services and the courts." Pet. App. 12a.

Second, the Fourth Circuit also held that CAI would not improve on its members' pre-existing legal services. *See Disabilities Rights*, 541 A.2d at 214. CAI had "no intention of litigating in any forum." Pet. App. 12a. Instead, CAI proposed to offer garden-variety counseling on employment law—an example of the mere duplication of commercially available legal

services that the New Hampshire Supreme Court mentioned. *See Disabilities Rights*, 541 A.2d at 214.

Thus, the Fourth Circuit's holding that CAI's offer of commercial legal services does not implicate the right to expressive association aligns with the New Hampshire Supreme Court's decision in *Disabilities Rights*.

CAI also tries to create a split by arguing that the Fourth Circuit and the New Hampshire Supreme Court applied different levels of scrutiny to free-association claims. Pet. 15, 17. On the contrary, the different levels of scrutiny in these decisions simply apply this Court's precedents to different sets of facts.

This Court has held that restrictions on the right to intimate or expressive association must survive heightened scrutiny. *Stanglin*, 490 U.S. at 24. If an association's activities are neither intimate nor expressive, however, heightened scrutiny does not apply. *Id*. at 24-25.

The Fourth Circuit held that CAI's proposed commercial law practice only marginally affected First Amendment concerns, so the court did not apply heightened scrutiny. Pet. App. 13a (citing *Ohralik*, 436 U.S. at 459). In *Disabilities Rights*, in contrast, the court held that the organization's free legal services were fundamentally expressive, so heightened scrutiny was appropriate. 541 A.2d at 215. The variations in the two decisions, therefore, stem only from different facts. That type of factual

variation is not a doctrinal split that justifies this Court's review.

Because the first question in CAI's petition involves no split, it does not warrant this Court's review.

B. CAI's arguments turn on fact questions.

As explained above, the lower federal courts and state courts of last resort agree on the framework for reviewing the type of free-association claim that CAI asserts here. CAI argues that the Fourth Circuit incorrectly applied this framework. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10.

That is the situation here. CAI's arguments are intensely fact-dependent. CAI's petition is an effort to involve this Court in a factual dispute on how to characterize CAI and its proposed legal services.

For example, the Fourth Circuit held, based on the record here, that CAI's legal services would be offered not to pursue "political or otherwise public goals," but to increase CAI's revenues. Pet. App. 11a-12a. In this Court, however, CAI hopes to create fact disputes about its allegedly noncommercial motives. Pet. 7, 28. It also tries to raise fact disputes on whether its law practice would facilitate meaningful access to the courts and on whether it would raise conflict-of-interest concerns. Pet. 21-22. The petition cites the

joint appendix in the Fourth Circuit more than thirty times.

As these points illustrate, CAI just disagrees with how the Fourth Circuit applied the law to this set of facts. CAI's disagreement with the Fourth Circuit's application of the law does not warrant this Court's review. S. Ct. R. 10.

C. The Fourth Circuit's decision was correct.

The Fourth Circuit held that North Carolina's regulation of the sale of commercial legal services by corporations, as applied to CAI, did not impair the company's right to association. Pet. App. 8a-13a. That holding applied this Court's expressive-association case law correctly.

In *Button*, this Court warned against relying on "superficial resemblance[s]" between the facts of that case and the facts of other free-association cases. 371 U.S. at 442. That warning applies here. The legal services that CAI sought to provide are materially different from any legal services that this Court has ever recognized as an exercise of expressive association. The differences cover multiple important points.

First, CAI sought to practice law for commercial ends rather than expressive ones. CAI wanted to sell employment-related legal services as part of a plan to increase its membership and revenues. Pet. App. 5a. CAI touts its status as a nonprofit corporation, Pet. 6-

7, but that argument elevates form over substance. CAI competes with for-profit businesses. Pet. App. 4a. It planned to charge its members an hourly fee for certain proposed legal services. Pet. App. 5a.

Many large businesses are organized as nonprofit entities. In case after case, however, this Court has looked not to an association's form, but to the purpose of an association's activities. *See Primus*, 436 U.S. at 431 (noting that the organization did not have a "primary purpose of financial gain"); *Mine Workers*, 389 U.S. at 221 (stressing that when union members recovered on their workers'-compensation claims, the financial recovery went to the member, not to the union or to the lawyer the union employed); *Trainmen*, 377 U.S. at 6 (observing that "commercialization of the legal profession" was not at issue); *Button*, 371 U.S. at 443 (noting that "no monetary stakes [were] involved").

Indeed, the distinction between commercial markets and the marketplace of ideas pervades this Court's First Amendment case law. *See, e.g.*, *Jaycees*, 468 U.S. at 634-35 (O'Connor, J., concurring in part and concurring in the judgment) (collecting cases). The Fourth Circuit correctly applied that distinction here when it noted that CAI sought to engage in law practice to make more money, not to convey a message. *See* Pet. App. 11a-12a.

Second, CAI did not seek to facilitate anyone's access to the courts. CAI conceded that it did not intend to litigate cases on behalf of its members. Pet. App. 12a. Unlike the NAACP in *Button*, CAI did not

show that its members are unable to secure counsel without its services. *Cf. Button*, 371 U.S. at 443-44 (noting "an apparent dearth of lawyers who are willing to undertake" school-desegregation cases). Nor did CAI show that it would improve on legal services that were somehow inadequate. *Compare* Pet. App. 15a, *with United Mine Workers*, 389 U.S. at 219-20, *and Trainmen*, 377 U.S. at 3-4.

CAI might save some legal costs for some members. Pet. App. 12a. But this Court has never held that commercial law practice, even at discounted rates, is constitutionally protected. *See Disabilities Rights*, 541 A.2d at 214 (summarizing this Court's precedents). Such a holding would conflict with this Court's recognition that the commercial practice of law is not inherently expressive activity that the First Amendment protects. *Ohralik*, 436 U.S. at 457-59; *see also Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (commercial law firms do not have associational rights that permit gender discrimination).

Third, CAI's proposed law practice raises ethical concerns. CAI made a strategic decision below not to provide details on how it would manage the ethical problems that arise when CAI's own interests threaten to conflict with the best interests of its clients, or when laypersons control the work of lawyers. *See, e.g.*, C.A. J.A. 362-63, 366, 400; *see also Button*, 371 U.S. at 441 (noting that the Court was not commenting on the issues raised by the role of a "lay

intermediary, who may control litigation or otherwise interfere with the rendering of legal services").

In this as-applied challenge, however, CAI had the burden to come forward with that evidence. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 485 & n.4 (2014) (rejecting potential as-applied First Amendment challenge when plaintiffs had put "insufficient evidence" in "the record before [the Court]"). CAI did not carry that burden. As a result, the Fourth Circuit did not err by holding that the state had an interest in prohibiting CAI's sale of commercial legal services to prevent conflicts of interest. Pet. App. 12a.

Ohralik and *Primus* show how this Court has struck a balance between associational freedom and the states' authority to regulate law practice. Recognizing an associational right to sell commercial legal services would disrupt that balance. Pet. App. 10a-13a.

This Court has long held that states have a compelling interest in regulating the legal profession. "The interest of the States in regulating lawyers," the Court has explained, "is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb*, 421 U.S. at 792 (quoting *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383 (1963)). Accordingly, "States traditionally have exercised extensive control over the professional conduct of attorneys [to promote] 'the protection of the public.'" *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (quoting *In re*

Baron, 136 A.2d 873, 875 (N.J. 1957)). As these points show, CAI's arguments about the policy benefits of its law practice are better addressed to the North Carolina General Assembly, not to this Court.

In sum, the Fourth Circuit applied this Court's teachings when it held that North Carolina's ban on the sale of commercial legal services by corporations did not infringe CAI's right to associate. The court's faithful application of this Court's decisions does not merit this Court's review.

II. The Second Question Presented Does Not Warrant This Court's Review.

A. There is no split in authority on how *NIFLA* applies to professional-conduct regulations.

CAI's second question presented—the application of free-speech principles to this case—does not even allege a split in authority. This point, by itself, counsels strongly against accepting review here. *See* S. Ct. R. 10.

The second question presented does not warrant this Court's review for an additional reason as well: the question has not percolated in the lower federal appellate courts and state courts of last resort.

CAI bases its second question presented on this Court's recent decision in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). As the Fourth Circuit recognized here, *NIFLA*

clarifies the First Amendment framework for evaluating professional regulations that affect speech. Pet. App. 13a.

NIFLA holds that professional speech receives a lower level of protection under the First Amendment only when (1) a regulation requires professionals to make factual, noncontroversial disclosures about their services, or (2) a regulation applies to professional conduct that involves speech only incidentally. 138 S. Ct. at 2372.

The Fourth Circuit faithfully applied *NIFLA* here. It held that North Carolina's regulation of CAI's sale of commercial legal services falls into the second *NIFLA* category: conduct regulations that have only an incidental effect on speech. Pet. App. 14a.

In the short time since *NIFLA* was decided, CAI has identified only one appellate decision that has applied *NIFLA* to professional-conduct regulations—the decision below. When only one appellate court has addressed a legal issue, this Court "follow[s] [its] ordinary practice of denying petitions insofar as they raise legal questions that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood*, 139 S. Ct. 1780, 1782 (2019) (per curiam).

Following that practice makes sense here. It would be premature for this Court to intervene further in the complex area of professional speech without the benefit of additional post-*NIFLA* decisions. That is especially true in the context of the practice of law, an

area where the Court has recognized states' broad regulatory authority.

Additional post-*NIFLA* decisions are likely to be forthcoming. Other lower federal courts are currently deciding how to apply *NIFLA* to professional-conduct regulations that affect speech. *See, e.g.*, *Am. Med. Ass'n v. Stenehjem*, No. 19-cv-125, 2019 WL 4280584, at *10-13 (D.N.D. Sept. 10, 2019) (challenging informed-consent statute); *Hines v. Quillivan*, 395 F. Supp. 3d 857, 864-66 (S.D. Tex. 2019) (challenging state regulation of veterinary telemedicine), *appeal filed*, No. 19-40605 (5th Cir. July 2, 2019); *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1248-70 (S.D. Fla. 2019) (challenging city ordinance on sexual-orientation and gender-identity conversion therapy), *appeal filed*, No. 19-10604 (11th Cir. Feb. 13, 2019). Granting certiorari would therefore interrupt useful percolation on how *NIFLA* applies to professional-conduct regulations that incidentally affect speech.

Indeed, *NIFLA* is so recent that the application of that decision barely percolated in this case itself. *NIFLA* postdates all of the district court proceedings here, as well as the briefing in the court of appeals. Pet. App. 13a. As a result, CAI effectively seeks to brief the implications of *NIFLA* fully for the first time in this Court. That is a further mark of the prematurity that weighs down any *NIFLA* issue here.

B. The Fourth Circuit's decision was correct.

Applying *NIFLA*, the Fourth Circuit held that North Carolina's regulation of the sale of commercial legal services by corporations, as applied to CAI's proposed practice of law, did not abridge CAI's freedom of speech. Pet. App. 13a-18a. That holding was correct.

First, North Carolina's restriction on who is eligible to practice law regulates conduct, not speech. *See NIFLA*, 138 S. Ct. at 2373. As the Fourth Circuit correctly held, North Carolina's prohibition on CAI's sale of commercial legal services does not "target the communicative aspects of practicing law, such as the advice lawyers may give to clients." Pet. App. 15a-16a. The North Carolina statute instead concerns *who* may act as a lawyer in particular situations—a classic regulation of professional conduct. Pet. App. 16a.

North Carolina's focus on who may practice law—as distinguished from what those professionals say—does not raise the same type of First Amendment problems that arose in the cases that CAI cites.

For example, in *NIFLA*, this Court held that California could not compel a group of pregnancy clinics to disclose state-specified information to prospective patients, including information on abortion services that the clinics opposed. 138 S. Ct. at 2371, 2378. North Carolina law, in contrast, does not force CAI to say anything, much less carry a message with which it disagrees.

CAI's analogies to *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), fare no better. In *Holder*, this Court rejected the federal government's argument that a statute that criminalized material support to foreign-terrorist organizations regulated conduct, not speech. *Id.* at 27. Under that statute, if a person imparted "a specific skill" or "specialized knowledge" to a terrorist organization, she would commit a criminal violation of the statute. *Id.* at 12-13. If she relayed only "general or unspecialized knowledge," however, the statute did not apply. *Id.* at 27. That distinction, the Court concluded, directly "regulate[d] speech on the basis of its content." *Id.*

Here, by contrast, the North Carolina statute makes no content-based distinction about CAI's speech. The statute instead regulates who can undertake the fiduciary duties that a lawyer-client relationship entails. *See* Restatement (Third) of the Law Governing Lawyers § 16. North Carolina law seeks to protect that fiduciary relationship by prohibiting a corporation from exercising control over legal services to noninternal clients. *See* N.C. Gen. Stat. §§ 84-5, 84-5.1. This prohibition applies regardless of the content of the advice CAI might offer. Pet. App. 16a.

Second, the Fourth Circuit was right to reject CAI's unsupported assertion that conduct regulations that incidentally affect speech are subject to strict scrutiny. Pet. App. 16a.

This Court has long held that strict scrutiny does not apply to regulations that only incidentally burden

speech, such as price regulations, discrimination statutes, and antitrust laws. *See, e.g.*, *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 this Court reaffirmed in *NIFLA*, "'[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,' and professionals are no exception to this rule." 138 S. Ct. at 2373 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)). The decision below simply applies that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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