No. 19-281

In The
Supreme Court of the United States

CAPITAL ASSOCIATED INDUSTRIES, INC.,
Petitioner,

v.

JOSH STEIN, in his official capacity as Attorney General of the State of North Carolina, NANCY LORRIN FREEMAN, in her official capacity as District Attorney for the 10th Prosecutorial District of the State of North Carolina, J. DOUGLAS HENDERSON, in his official capacity as District Attorney for the 18th Prosecutorial District of the State of North Carolina, and THE NORTH CAROLINA STATE BAR,
Respondents.

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

REPLY IN SUPPORT OF PETITION

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INTRODUCTION

In the 1960s and 1970s, this Court held that non-profit associations have a constitutionally protected right to further their mission by hiring attorneys to assist their members. Despite this Court's teaching, the lower courts have since diverged in their application of this Court's precedent. The Fourth Circuit misread this Court's prior decisions and deepened that split in authority. It permitted the State Bar and State of North Carolina (collectively, "the State") to use North Carolina's unauthorized practice of law ("UPL") statutes, which include criminal sanctions, to restrict non-profit membership associations like Petitioner Capital Associated Industries, Inc. ("the Association") from providing legal services to their members.

The State does not dispute the significance of the Fourth Circuit's holding. The issue presented in the Association's Petition affects many other states, and it is well-accepted that the cost of legal services from traditional providers places those services out of reach for many. *See* Brief of Employer Ass'ns of Am. in Support of Petitioner at 5-12; Brief of N.C. Chamber *et al.* in Support of Petitioner at 15-17. Nonetheless, the State portrays the Association as a threat, returning to a playbook of speculative fears and accusations of commercialization that other states used—and this Court rejected—decades ago.

To restore the important First Amendment rights of non-profit associations established by this Court, resolve the split in authority that has arisen since this Court last spoke on the issue, and ensure that high quality legal services are more widely available, the Petition should be granted. Without this Court's

intervention, North Carolina and many other states will continue to infringe on the rights of non-profit associations.

The Fourth Circuit also misapplied the Court's recent decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), creating an exception to its holding that swallows the rule it announced. The State barely defends the Fourth Circuit's decision on the merits and fails to address the most relevant discussion in *NIFLA*, which warns against "licensing requirement[s]" that "give[] the States unfettered power to reduce a group's First Amendment rights." *Id.* at 2375. Here, the State indisputably uses its licensing regime to silence disfavored speakers. The State, however, asks this Court to ignore the Fourth Circuit's misapplication of recent precedent so it can "percolate" further. No percolation is necessary, and allowing it threatens the First Amendment rights *NIFLA* protects. The Court should take this opportunity to fix the plain misapplication of its precedent before it affects even more speech.

ARGUMENT

I. THE RELEVANT FACTS ARE SETTLED

The State claims (BIO at 16-17) that the Petition asks this Court to resolve a factual dispute in an area of settled law. That is untrue; the key facts are not in dispute. It is the law that is in obvious disarray.

The Association "is a North Carolina nonprofit corporation" organized "under 26 U.S.C. § 501(c)(6) as a trade association of employers." App. 4a. There is no dispute that its mission is to promote healthy employer-employee relations and that it is governed

by its members. App. 4a; C.A.J.A. 161-163; BIO at 3. The Association introduced significant, undisputed evidence that its membership includes many small businesses and other employers with limited financial resources, which are poorly served by the available options for legal services. Pet. 7-8. To further its mission, the Association wants to employ licensed attorneys on a salaried basis to provide basic legal advice on employment issues to members who seek it. App. 4a, 6a. Dues would cover the services provided for most members, though the Association could apply a surcharge in some instances to ensure fairness. App. 4a. Association members testified, without dispute, "that allowing [the Association] to practice law" in this way "would mean that they could obtain more efficient and cost-effective legal representation." App. 6a.

II. THE FOURTH CIRCUIT ENTRENCHED A CIRCUIT SPLIT AND MISAPPLIED THIS COURT'S PRECEDENT

The Fourth Circuit claimed to find three "considerations" in this Court's jurisprudence that the lower courts should consider when deciding whether a non-profit member organization has a constitutional right to provide legal services to their members. App. 11a. The State describes this as a "well-settled approach" applied by "[t]he federal courts of appeals and state high courts." BIO at 10. It is nothing of the sort. The Fourth Circuit's approach puts it squarely at odds with many state high courts and this Court.

The State accurately describes the three considerations articulated by the Fourth Circuit. *First*, the appellate court "asked whether CAI sought

to practice law 'for commercial ends' or 'for political or otherwise public goals.'" BIO at 10 (quoting App. 11a-12a). *Second*, the court asked "whether the effect of [the Association]'s proposed law practice would facilitate meaningful access to the courts." *Id.* (citing App. 12a). *Finally*, the Fourth Circuit asked "whether [the Association]'s proposed law practice *could* raise ethical concerns that would require state regulation." *Id.* (citing App. 12a) (emphasis added).

No other court has purported to apply this three-factor test—or, indeed, any multi-factor test—to answer the question presented in this case. Certiorari is warranted to resolve this split in authority, clarify the governing legal paradigm, and ensure that the Association's core First Amendment rights are not compromised.

1. The Fourth Circuit reasoned that the Association's activities fall outside the First Amendment's protection because the Association seeks to provide legal services for "commercial ends and would address only private concerns." App. 11a. The Fourth Circuit applied a broad definition of "commercial" that is inconsistent with this Court's precedent, then compounded the error by suggesting that the First Amendment does not protect a non-profit organization's effort to assist its members with private legal disputes. Both elements of its analysis are irreconcilable with this Court's decisions.

The Fourth Circuit stated that the First Amendment does not apply to the Association's provision of legal advice because the Association seeks "to increase revenues and recruit new members who will pay dues." App. 11a. But this Court has already rejected that logic. In *Primus*, the Court

deemed "unpersuasive any suggestion that the level of constitutional scrutiny … should be lowered because of a possible benefit to the" organization seeking to provide legal assistance. *In re Primus*, 436 U.S. 412, 428 (1978). Undoubtedly, the ACLU, NAACP, and labor unions seek to "recruit new members" and "increase revenues," App. 11a, through the provision of legal services. Surely First Amendment protection does not depend on a non-profit offering legal services with the goal of driving away new members and reducing revenues. Barring evidence that the Association is "a group that exists *for the primary purpose of financial gain* through the recovery of counsel fees," it is irrelevant that the Association might obtain some "benefit." *Primus*, 436 U.S. at 431 (emphasis added). There is no such evidence here.

Both the Fourth Circuit and the State rely heavily on *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). BIO 1, 10, 19; App. 10a-13a. That reliance is misplaced. *Ohralik* concerned an individual attorney's free speech challenge to discipline for his "[i]n-person solicitation … of remunerative employment" from a reluctant potential client. 436 U.S. at 457. This Court noted that purely commercial speech is subject to limited protection, *id.* at 456, and that the states could regulate "ambulance chasing," *id.* at 459 n. 16 (citing *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 6 (1964)).

The Association does not propose to chase ambulances or to provide legal services for private financial gain. The Association is not "an organization dedicated exclusively to the provision of legal services," nor is it an entity created "by a group

of attorneys to evade a valid state rule against solicitation for pecuniary gain." *Primus*, 436 U.S. at 429 n.20. The Association has, for more than 50 years, been a non-profit organization, governed by its dues-paying members. In furtherance of its mission, it now seeks to offer legal advice to members who request that assistance.

The Fourth Circuit added to its misunderstanding of the First Amendment when it concluded that the Association's activities were not protected because the Association sought to address "private concerns." App. 11a. The Fourth Circuit contrasted the Association's proposed plan with the NAACP and the ACLU bringing lawsuits to "expand[] and guard[] civil rights." *Id.* But *Mine Workers* "rejected the contention … that the [First Amendment] principles announced in *Button* were applicable only to litigation for political purposes." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) (citing *Trainmen*, 377 U.S. at 8, 10). The Court held that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* Instead, the First Amendment plainly extends to matters of "private concern."

Notably, and unlike the Fourth Circuit, none of the state high courts that have considered this issue have expressed concern about the "commercial ends" of non-profit organizations that seek to provide legal services, nor have they examined whether the organizations intend only to address matters of "public concern." App. 11a. Those courts have correctly recognized that, absent a clear profit motive, indirect benefits to the organization are irrelevant,

and trying to police the difference between matters of "public" and "private" concern is both unnecessary and impossible. *Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408 (Cal. 2006); *In re New Hampshire Disabilities Rights Center, Inc.*, 541 A.2d 208 (N.H. 1988); *Hopper v. City of Madison*, 256 N.W.2d 139 (Wis. 1977).

2. The Fourth Circuit joined the Seventh Circuit as the only two courts to hold that the First Amendment permits the government to prohibit a non-profit association from furnishing legal assistance because the association's activities "would not facilitate access to justice or vindicate its members' constitutional or statutory rights." App. 12a; *see also Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1387 (7th Cir. 1992). The Fourth Circuit reasoned that the Association's "members have consistently had access to legal services," so its proposal would at most "reduce some of its members' legal bills." App. 12a.

The Supreme Court of New Hampshire roundly and correctly rejected this view in *Disabilities Rights*. Justice Souter's opinion recognized that the unions in this Court's Union Cases "were not responding to any unavailability of counsel, *per se*, but to the inadequacies of the representation that was at hand." 541 A.2d at 214. That is, other "counsel were ready to take [union members'] cases," but that counsel was inexperienced or unaffordable. *Id.*; *see also United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (noting that union sought "to protect its injured members … from the injustice of excessive fees at the hands of inadequate counsel"); *Mine Workers*, 389 U.S. at 354 (union hired lawyer because members

"were required to pay forty or fifty per cent of the amounts recovered in damages suits, for attorney fees").[1]

As Justice Souter explained, "it was the improvement of legal services, not the provision of services where there would have been none at all, that was held to be a constitutionally cognizable objective." 541 A.2d at 214. The Supreme Court of Wisconsin has likewise held that the Union Cases teach "the principle that the First Amendment … protect[s] the right of persons to unite to assert their rights as effectively and economically as possible." *Hopper*, 256 N.W.2d at 145.

The Fourth Circuit acknowledged that "CAI's members testified" without dispute "that allowing CAI to practice law would mean that they could obtain more efficient and cost-effective legal representation." App. 6a. Applying this Court's precedent after this factual determination should have been simple. But the Fourth Circuit required the Association to show that its members would have *no access* to legal counsel. This Court has never adopted such a cabined view of the First Amendment. To the contrary, just as the First Amendment protects "the right of workers to act collectively to obtain affordable and effective legal representation," so too does it uphold that right for their employers. *United Transp. Union*, 401 U.S. at 584.

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[1] The State suggests that there is no conflict of authority because the "Fourth Circuit relied on" *Disabilities Rights*. BIO at 1. But the Fourth Circuit cited *Disabilities Rights* only once and the decisions are plainly inconsistent.

3. The Fourth Circuit is the only court that has prohibited a non-profit association from offering legal services based on speculation about concerns that "could" arise. App. 12a; *see also* BIO at 10 (defending the Fourth Circuit's analysis of whether the Association's "proposed law practice *could* raise ethical concerns" (emphasis added)). This Court and the state high courts have repeatedly rejected speculation as a basis for restricting the right of association.

In *Disabilities Rights*, the court explained that "[t]he threat of evil *must … be concrete and immediate* before it can justify enforcement of State restrictions that impinge on first amendment interests." 541 A.2d at 215 (emphasis added); *see also Frye*, 129 P.3d at 419 ("[T]he salutary objectives of the prohibition on corporate practice must yield to first amendment values when their enforcement is unjustified by any specific and immediate threat." (internal quotation marks omitted)). Yet the Fourth Circuit relied on vague, theoretical "threats" to justify its decision.

State bars that sought to enforce UPL statutes in this Court's prior cases made similar arguments, and they were rejected each time. In *Button*, the Court required the State to show "substantive evils flowing from [the association]'s activities, which can justify the broad prohibitions it has imposed." *NAACP v. Button*, 371 U.S. 415, 444 (1963). And in *Mine Workers*, the Court recognized that "there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose." 389 U.S. at 224. The speculative harms identified by the State are

inadequate, as a matter of law, to justify the intrusion on the rights of the Association and its members.

The State also faults the Association for an alleged lack of clarity about its plans to address these theoretical concerns. BIO at 19-20. But that argument turns the burden of proof on its head. As the party seeking to prohibit associational activities protected by the First Amendment, the State must come forward with a compelling reason for the prohibition and evidence that the regulation is sufficiently tailored. *Primus*, 436 U.S. at 433-439. The Association's First Amendment rights are not contingent on its ability to predict and answer every "what if" posed by the State.

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The State is at pains to defend the Fourth Circuit's opinion because that court invented a three-factor test that has never been applied by this Court or any other court. What is more, all three factors that the Fourth Circuit considered are woefully inconsistent with the teachings of this Court and the decisions of three state Supreme Courts. Plainly, this Court's guidance is necessary.

III. THE FOURTH CIRCUIT MISAPPLIED THIS COURT'S FREE-SPEECH PRECEDENT

The State's censorship of the Association's legal advice to its members violates the First Amendment because it is content-based censorship that cannot survive any level of meaningful scrutiny.

Legal advice is speech protected by the First Amendment. *NIFLA*, 138 S. Ct. at 2374; Pet. 33-34. The UPL statutes prohibit the Association from

offering legal advice, thereby censoring its speech. The Fourth Circuit condoned this censorship as "incidental" to a regulation of conduct: namely, the regulation of "who may practice law." App. 15a. The panel did not identify any actual conduct to which the Association's legal advice was incidental; rather, it identified the "practice [of] law" *in its entirety* as the regulated conduct. The Fourth Circuit thus exempted from strict scrutiny any censorship that is "part of a generally applicable licensing regime," App. 14a, resurrecting the professional-speech doctrine that this Court just denounced in *NIFLA*.

As *NIFLA* explained, the professional-speech doctrine "gives the States unfettered power to reduce a group's First Amendment rights by … imposing a licensing requirement," posing a substantial threat to the speech of disfavored speakers. 138 S. Ct. at 2375. Notably, the State has no response to the amicus brief submitted by Responsive Law and Scholars of Access to Justice, which convincingly demonstrates that the UPL statutes were enacted to further protectionist aims, and to prohibit speech by disfavored speakers. *See* Brief of Responsive Law and Scholars of Access to Justice in Support of Petitioner at 4-9.

The State repeats the Fourth Circuit's error, arguing that its censorship merely "concerns *who* may act as a lawyer in particular situations—a classic regulation of conduct." BIO at 24. The government cannot evade strict scrutiny by misclassifying speech as "conduct." *See Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech[.]'").

Conspicuously, the State does not defend the Fourth Circuit's failure to apply meaningful scrutiny to the UPL statutes' burden on the Association's speech. The panel again relied on speculative harms that "could" occur, App. 18a, which falls short of the scrutiny required for a regulation of conduct that incidentally burdens speech, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The State implores the Court to ignore the Fourth Circuit's holding, claiming that certiorari would be "prematur[e]" and would "interrupt useful percolation" below. BIO at 23. The Fourth Circuit has effectively revived the professional-speech doctrine by permitting the State to use a licensing regime to censor a disfavored speaker. Other courts are already applying the Fourth Circuit's misreading of *NIFLA*. *Doyle v. Hogan*, __ F. Supp. 3d __, 2019 WL 4573382 at *4-5 (D. Md. 2019); *American Med. Ass'n v. Stenhjem*, __ F. Supp. 3d __, 2019 WL 4280584, at *10 (D.N.D. 2019). This Court unambiguously declared that the professional-speech doctrine has no place in the First Amendment, and there is no utility in allowing this dangerous precedent to percolate in the lower courts where it continues to threaten free speech.

CONCLUSION

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

Respectfully submitted,

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