

State of Minnesota
In Court of Appeals

NADEEN GRIEPENTROG,

Relator,

v.

EDWARD P. EHLINGER, M.D., Commissioner, and
THE MINNESOTA DEPARTMENT OF HEALTH,

Respondents.

AMICUS BRIEF OF INSTITUTE FOR JUSTICE

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INTEREST OF *AMICUS CURIAE*¹

The Institute for Justice (“IJ”) is a nonprofit, public-interest law firm committed to protecting constitutional rights. A central pillar of IJ’s mission is defending economic liberty — the right to earn an honest living free from unreasonable regulation. Since its inception, IJ has represented entrepreneurs in numerous occupations fighting for their right to pursue the occupation of their choice when the government has placed oppressive and protectionist regulations in their way. This includes entrepreneurs as varied as hair braiders, eyebrow threaders, taxi drivers, food truck vendors, and florists. IJ has litigated to protect the right to earn an honest living under both the United States Constitution and the constitutions of the several states, including Minnesota. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (casket sellers); *Astramecki v. Minnesota Department of Agriculture*, No. A14-1367, 2015 Minn. App. Unpub. LEXIS 470 (Minn. App., May 18, 2015) (home bakers). IJ has also filed briefs as *amicus curiae* in cases nationwide advocating that courts protect the individual right to pursue a lawful calling free from illegitimate government regulation.

¹ Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* Institute for Justice. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the Institute for Justice, which was granted leave to participate as *amicus curiae* by this Court’s Order February 5, 2016.

STATEMENT OF THE CASE

Nadeen Griepentrog has safely performed permanent makeup procedures in Wisconsin for years. She has hundreds of hours of hands-on training and experience in Wisconsin—far more training and experience than what is even required in Minnesota. Rel. Br. 7-8.

But in Minnesota, that is not enough. Despite Nadeen’s qualifications and experience, she cannot work as a micropigmentation artist in this state without obtaining 200 hours of “supervised experience” with a Minnesota-licensed micropigmentation artist. Minn. Stat. § 146B.03, subd. 4(4). Minnesota’s body art licensing scheme, however, sets no standards or guidance for this experience. *See* Minn. Stat. § 146B.01 *et seq.* It only requires prospective licensees like Nadeen to be in the physical presence of a current licensee while a body art procedure is being performed. Minn. Stat. § 146B.01, subd. 28. For Nadeen, this could be obtaining 200 hours of relevant—albeit needless—experience such as observing a current licensee performing micropigmentation procedures, or it could be obtaining 200 hours of mopping the floors or cleaning the bathrooms in a studio where micropigmentation procedures are being performed. The statute permits either result. Further, for those practicing in Nadeen’s area—micropigmentation—only a handful of licensees are even available for prospective licensees to use as supervisors. Rel. Br. 8.

The potential for abuse is clear. When a small group of current licensees are granted complete control over who may enter their field, prospective licensees like Nadeen are at their mercy. Under Minnesota Statutes, section 146B.03, subdivisions 4(4), current licensees — those with a direct interest in limiting competition — can simply refuse to offer supervised experience. They can also set unreasonable terms for obtaining the experience. And even if they agree to offer this experience, current licensees can require even more hours because the statute only requires “a minimum of 200 hours of supervised experience.” *Id.*

In addition to subjecting prospective licensees to the whim of current licensees, the body art licensing scheme lacks any meaningful protection for prospective licensees. Importantly, under this scheme there are no alternative ways for a prospective licensee to obtain this experience, and there is no right of appeal if, after completing 200 plus hours, a supervisor arbitrarily refuses to sign the required affidavit. If prospective licensees are unable to find a current licensee willing to work with them, they are left with only one option: to pursue a different line of work.

FACTS

The Institute for Justice incorporates the facts set forth in Nadeen’s Brief and Appendix.

INTRODUCTION

From Minnesota's founding through the present, the state's judiciary has protected the right to earn an honest living. In case after case Minnesota courts have struck down laws that unreasonably restrict the rights of individuals to work in "the common occupations of life." *Pavlik v. Johannes*, 194 Minn. 10, 13, 259 N.W. 537 (1935) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). This has been true in occupations as varied as vendors, auctioneers, roofers, construction workers, and dairy farmers and is also true in this case: Nadeen has a right to pursue her calling free from protectionist regulation.

The Minnesota Legislature has denied Nadeen her right to earn a living by unconstitutionally delegating its lawmaking power to private parties. Minnesota Statutes, section 146B.03, subdivision 4 gives *current* licensees the unbridled power to determine the experience necessary for *prospective* licensees to obtain a body art license. As such, it violates the Minnesota Constitution's prohibition against delegating the legislature's power. *Amicus curiae* urges this Court to strike down the "supervised experience" requirement in Minnesota Statutes, section 146B.03, subdivision 4, as an unconstitutional delegation of lawmaking power to private parties.

Nadeen's nondelegation claim is supported by a long history of courts relying on separation of powers principles and due process guarantees to protect

citizens from arbitrary and unbridled regulation made by private parties who have been delegated lawmaking power. Collectively this has been known as the “nondelegation doctrine.”

This brief first identifies the historical underpinnings of the nondelegation doctrine and explains how it has been applied to delegations to private parties for centuries. It then synthesizes major decisions and important themes in Minnesota caselaw and in cases across the country where courts have struck down laws that impermissibly delegate broad and unchecked legislative power to private parties. It concludes by urging this Court to find that the “supervised experience” requirement in Minnesota Statutes, section 146B.03, subdivisions 4(4), violates Article III, Section 1, and Article IV, Section 1 of the Minnesota Constitution and fundamental due process guarantees.

ARGUMENT

I. The Nondelegation Doctrine Has Ancient Roots in Numerous Struggles Against the Concentration of Power.

The nondelegation doctrine is based on the ancient principle of separation of powers. Its roots go far beyond the framing of the Minnesota Constitution or even the United States Constitution, to seventeenth century England. In that century England witnessed a struggle between the powers of the Crown and of Parliament. This included Parliament’s resistance to the Stuart kings James I and Charles I, the subsequent English Civil War, and the constitutional settlement of

the Glorious Revolution of 1688. *See generally* Christopher Hill, *The Century of Revolution 1603–1714* (1961).

Before this struggle, the Crown claimed various “prerogatives” for itself, where it asserted it did not need Parliament’s consent to exercise certain powers. The Crown established various “prerogative courts,” tribunals that Parliament did not oversee and were solely subject to the King. *Id.* at 34–35. The most notorious was the Star Chamber, an inquisitorial tribunal that performed a variety of functions. Philip Hamburger, *Is Administrative Law Unlawful?* 55 (2014). One of these prerogatives was licensing private parties to in turn regulate their own trades. This was a form of regulating the economy through allowing the dominant players in an industry to license their own competitors. Hill, *supra*, at 28–29. One example was the Stationers’ Company, a private cartel of publishers which the Star Chamber gave the power to license the press. Hamburger, *supra*, at 399–400n.k.

This use of prerogative power, and enlisting private parties in the Crown’s end-run around Parliament, conflicted with the claimed tradition that only Parliament—not the Crown and not private parties—could make law. This was the stance taken by Lord Coke and others in defiance of the Stuart kings. *See id.* at 46. The Glorious Revolution later made clear that any power the Crown exercised had to be subject to Parliament, and that it had no “prerogative” to

establish its own tribunals. *Id.* at 48, 61. And, Parliament itself could not abdicate this power by transferring it to the Crown or to anyone else, including to private persons. *See id.* at 48 (stating that after 1688 “there was a substantial body of opinion that Parliament could not transfer its lawmaking power”).

These principles were widely understood by the framers of the United States Constitution. *See* The Federalist No. 47 at 301–02 (James Madison) (Clinton Rossiter ed., 1961) (emphasizing the need for separation of powers between the branches of government and upholding the British constitutional system as a model). And, they were understood by the framers of the Minnesota Constitution, which, unlike the U.S. Constitution, explicitly recognizes the separation of powers. Minn. Const. art. III, § 1 (“The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”). Thus, the nondelegation has a lineage going back hundreds of years, from the adoption of the Minnesota Constitution in 1857, to the Philadelphia convention of 1787, to the time of the Stuart kings. Among other things, it “ensures that public officials cannot evade a carefully constructed constitutional scheme, federal or state, by delegating their lawmaking power to unaccountable private parties.” Paul J. Larkin, Jr., *Public*

Choice Theory and Occupational Licensing, 39 Harvard J.L. & Pub. Pol'y 209, 317 (2016).

II. The Minnesota Constitution Strictly Forbids Granting Unbridled Lawmaking Power to Unaccountable Private Persons.

The Minnesota Constitution's separation of powers and vesting clauses unequivocally prohibit private parties from exercising unbounded legislative power. This is especially true when private parties are granted the privilege to act in their own self-interest. Minnesota's vesting clause is found in Article IV, Section 1 of the Minnesota Constitution, stating "The legislature consists of the senate and house of representatives." This clause vests the legislative power *only* in the senate and house of representatives. Further, under Article III, Section 1 of the Minnesota Constitution, "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others."

In analyzing the validity of private delegations, the Minnesota Supreme Court has looked to these clauses and has also considered the Minnesota Constitution's due process guarantees when laws provide no hearing or meaningful safeguard for those affected by the law. The Minnesota Supreme Court has not hesitated to strike down laws granting private parties arbitrary and unchecked power.

For example, in *State ex rel. Foster v. Minneapolis*, 255 Minn. 249, 97 N.W.2d 273 (Minn. 1959), the Minnesota Supreme Court struck down a provision in an ordinance that permitted a city council to alter a comprehensive zoning scheme only if a property owner secured consent from two-thirds of neighboring property owners. *Id.* at 274. If the property owner could not obtain this consent, the city council could not change the zoning classification for the property. *Id.* Applying Minnesota's nondelegation doctrine, the court invalidated this provision in the ordinance because it granted adjoining property owners the right to empower the city council to impose property restrictions where it ordinarily would have been unable to do so. *Id.* at 275.

The court was particularly concerned that private parties – whose decisions would ultimately control – were given the absolute right to make these decisions without any rule, standard or guidance. *Id.* at 275. This meant that “[w]him or caprice may be the sole motivating factor” and affected property owners had no means of recourse. *Id.* at 276. This was a legislative power that private parties could not hold. *Id.* (citing *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912) (finding that a standardless ordinance permitting two-thirds of property owners on a street to request the determination of a building line on the street violated principles of due process because it permitted some property owners “to virtually control and dispose of the proper rights of others”)).

The Minnesota Supreme Court again invalidated a statute that delegated legislative power to private parties in *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 102 N.W.2d 528 (Minn. 1960). That case involved a challenge to the state's Fair Trade Act, which required any person with notice of any agreement made by a distributor and retailer or wholesaler to abide by the minimum prices in that agreement, regardless of whether or not they were a party to the agreement. *Id.* at 530–31. The court found this provision to be an unlawful delegation because “it grant[ed] to a private party the privilege of creating a right of action for its own benefit or suspending that right at its will.” *Id.* at 534–35. Further, “no hearing [wa]s provided for to safeguard or protect the unwilling retailer or the consumer.” *Id.* at 535. The court found that “the fixing of minimum prices is a legislative power since it prescribes a rule governing conduct for the future which is binding upon those who do not consent.” *Id.*

Concerns for separation of powers and due process guided the holding in *Remington*. The court explained that “pure legislative power, which can never be delegated, is the authority to make a complete law — complete as to the time it shall take effect and as to whom it shall apply — and to determine the expediency of its enactment.” *Id.* at 534. The court explained that this was different from granting a commission or board discretionary power to ascertain facts by which a law may apply, which was permissible under the constitution because it did

not create law. *Id.* Without hesitation, the court therefore ruled this statute an unconstitutional private delegation. *Id.*

These cases should guide this Court in analyzing Nadeen's nondelegation claim. The common theme in these cases is that Minnesota offers robust protection for individuals subject to regulation delegated to private parties.

Three rules emerge from these cases. First, the Minnesota Constitution bars open-ended regulation which gives a private party "the arbitrary right to make the law operative on his own terms." *Remington*, 102 N.W.2d at 534. Second, in order for a legislative delegation to be valid, the delegation must contain a reasonably clear policy or standard of action which controls and guides administrative officers "in ascertaining the operative facts to which the law applies, so that the law takes effect by virtue of its own terms, and not according to the whim or caprice of the administrative officers." *Id.*; see also *State ex rel. Foster*, 97 N.W.2d at 274. Third, any private delegation should have meaningful safeguards for those who are affected by the law. *Remington*, 102 N.W.2d at 535.

Applying the rules from these cases to this case, the "supervised experience" requirement of Minnesota Statutes, section 146B.03, subdivisions 4(4) cannot stand. First, this requirement gives current licensees the arbitrary ability to control who may obtain a license, and, second, it lacks any standards to guide current licensees in determining the experience required to qualify for a

license. The only standard given in the statute is that a prospective licensee must be in the presence of a licensee performing a body art procedure for a minimum of 200 hours. This is not meaningful because there are no performance standards or guidelines. As such, licensees have the power to determine more than the facts by which the law may apply. They have the power to determine the law – the qualifications and experience the state requires to obtain a body art license.

Third, this scheme also lacks any safeguards for applicants who are denied the opportunity to obtain and complete this experience. If a supervising licensee refuses to sign an affidavit for a prospective licensee, even after completing the 200 hours, there is nothing the prospective licensee can do. In short, this scheme subjects prospective licensees to the whim of current licensees, who are granted the absolute privilege to act to their exclusive benefit. These concerns led the Minnesota Supreme Court to invoke the state's nondelegation doctrine to protect those affected by private regulation in *State ex rel. Foster and Remington Arms Company, Inc.* and should drive this Court to invoke this doctrine again and declare the "supervised experience" requirement of Minnesota Statutes, section 146B.03, subdivisions 4(4) to violate Minnesota's nondelegation doctrine.

III. Other State Courts Have Routinely Invalidated Laws that Grant Lawmaking Power to Private Parties Under Their State Constitutions.

Minnesota is not the only state that limits private delegations. Across the country, state courts have become increasingly skeptical of delegations of legislative power to private parties. And like Minnesota, these courts have repeatedly relied on principles of separation of powers and due process to strike down impermissible delegations of legislative power to private parties. This is especially true when individual rights are at stake.

The following examines these decisions, first those involving vesting clauses, then those involving due process clauses.

A. State Vesting Clauses Provide Meaningful Protection Against Private Delegations.

Like Minnesota, many other states have relied on vesting clauses in their state constitutions to limit standardless, private delegations. A common theme in these cases is that delegations to private parties must contain adequate standards to guide those parties and to prevent them from regulating in their own, protectionist, interest. Absent these standards, private parties have legislative power—the power to make basic policy choices and to determine to whom the law applies.

In Pennsylvania, for example, a statute required all licensed chiropractors to attend a conference of a particular private chiropractic society to satisfy

continuing education requirements. *State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 272 A.2d 478, 479 (Pa. 1971). The statute, however, did not provide the society with guidelines or criteria. *Id.* at 479–80. Relying on the state’s vesting clause, which mirrors Minnesota’s vesting clause, the Pennsylvania Supreme Court found that the statute was unconstitutional because it granted the society the power “to determine the quality and nature of chiropractic continuing education, and [wa]s an abrogation by the [legislature] of its constitutional legislative duties.” *Id.* at 481; *see* Pa. Const., art. II, § 1 (“The legislative power of this Commonwealth shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.”).

Important to this appeal, the Pennsylvania Supreme Court found that the state’s vesting clause “requires that the basic policy choices involved in ‘legislative power’ actually be made by the legislature.” *Id.* In other words, only the legislature could determine the content of continuing education. The court cautioned that for any delegation to be lawful, the “legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Id.*

Arizona is another state that relies on its state vesting clause and separation of powers principles to strike down impermissible private regulation. Similar to the Minnesota Constitution, the Arizona Constitution clearly vests the

legislative power in the legislature and explicitly prohibits any branch from exercising a power belonging to the other branch. *See* Ariz. Const., art. III; *id.* at art. IV, pt. 1, § 1 (“The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives.”).

The Arizona Supreme Court relied on these principles to strike down an impermissible legislative delegation in *Industrial Commission of Arizona v. C & D Pipeline*, 607 P.2d 383 (Ariz. Ct. App. 1979). In that case a state statute charged the state industrial commission with setting a general prevailing wage rate for public works projects, and contractors on state public works projects were required to pay their employees with these rates. *Id.* at 384–85. The statute did not give the commission any discretion in determining the prevailing rate other than adopting the wage rates fixed by private labor unions and their employees. As such, the commission had no right to determine the reasonableness of the rate, and there were no standards in place to guide the labor unions and their employees. *Id.* at 384–85, 87. The Arizona Supreme Court found the statute to be an unlawful delegation of legislative power because it forced the commission to simply adopt and record rates set by private parties. *Id.* at 386.

In another case, the California Court of Appeals invalidated a statute that granted timber owners the exclusive power to formulate forest practice rules because of separation of powers concerns. *Bayside Timber Co. v. Board of*

Supervisors, 97 Cal. Rptr. 431 (Cal. Ct. App. 1971). The statute granted the state forestry board the power to approve or disapprove the rules, and any approved rules were made law. The board had some control over which rules were approved, but the court was nevertheless concerned with the fact that the board could only approve rules that were given to it by a private, self-interested group. The court noted that “when legislative authority without standards for its guidance is delegated to an agency or group of individuals with a pecuniary interest in its subject matter,” it is particularly suspect. *Id.* at 438.² The court was principally concerned with the public injury that would “inevitably result from placing exclusive control of the logging industry in the hands of persons who may be expected to profit most.” *Id.* at 439. Again, it was the unbridled power given to a self-interested private group that concerned the court. These cases directly apply to this appeal. Like the Stationers’ Company of old discussed in Part I, in these cases a self-interested small group of licensees have the ability, under a standardless delegation of power, to exercise exclusive control of an entire profession. And like the Stationers’ Company, these groups violate

² Like the Minnesota Constitution, the California Constitution explicitly vests the legislative power in the legislature and clearly establishes separation of powers. *See* Cal. Const., art. 4, § 1 (“The legislative power of this State is vested in the California Legislature”); *see also id.* at art. 3, § 3 (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”).

fundamental principles limiting the delegation of lawmaking power into private hands.

As will be explained in the next section, in addition to separation of powers principles, courts have also relied on state guarantees of due process to invalidate private regulation.

B. Delegations of Lawmaking Power to Self-Interested, Unaccountable Private Parties Violate States' Due Process Guarantees.

Driven by due process concerns, state courts have routinely invalidated delegations that grant unaccountable private parties the exclusive privilege to act in their own self-interest. These cases all have one theme in common: Any private delegation should include meaningful safeguards for those affected by the law.

For example, in *Revue v. Trade Commission*, 192 P.2d 563 (Utah 1948) the Utah Supreme Court invalidated a law that allowed a seventy percent majority of a barber industry group to set certain prices and hours for barber shops. The prices and hours were subject to approval or disapproval by the state barber board, but the board was only permitted to approve those of the private group of licensed barbers. *Id.* at 563–65. The law did not give any other group of citizens the ability to affect the outcome if the group of licensed barbers acted in their own self-interest. *Id.* at 568. The board also could not act on its own initiative. *Id.*

at 567–68. The Utah Supreme Court found that the law violated principles of both separation of powers and due process. Because the public had no ability to influence what the prices and hours should be and the state barber board could not act on its own initiative, the court was particularly concerned that the prices and hours “may subsequently become a yoke around the neck of the public.” *Id.* at 568.

Similarly, the New Mexico Supreme Court invalidated a private delegation in *Deer Mesa Co. v. Los Tres Valles Special Zoning District Commission*, 712 P.2d 21 (N.M. Ct. App. 1985), that could obstruct public access to public lands.. The law allowed private individuals to create a special zoning district without any limitation on the size and location of the district. *Id.* at 27. All that was required to create the special zoning district was fifty-one percent approval of registered electors in an area with 150 single family dwellings. *Id.* The court found the law to be unconstitutional because it granted private persons the absolute ability to determine the size and location of these districts, which could even include public lands, streams, wildlife refuges and monuments. *Id.* at 27–28. With this unchecked power, the court cautioned that “the possibilities, and potential abuses, are constrained only by one’s imagination.” *Id.* at 29. In particular, the court was concerned that the public would be detrimentally affected by this

delegation and would have no ability to constrain the private parties' own self-interested actions. *Id.* at 28–29.

In our neighboring state of Iowa, concerns about a lack of public accountability led the Iowa Supreme Court to strike down a statute that granted eight named veterans' organizations the authority to select five commissioners to be responsible for erecting military buildings and monuments. *Gamel v. Veterans Memorial Auditorium Commission*, 272 N.W.2d 472 (Iowa 1978). The Iowa Supreme Court found that private individuals could not be empowered to select boards to spend public funds, no matter how qualified the individual may be. *Id.* at 476. The court held that decisions regarding use of public funds should only be made by elected, accountable public officials. *Id.*

In addition, in *Potter v. State*, 509 P.2d 933 (Okla. Crim. App. 1973) due process concerns drove the Oklahoma Court of Criminal Appeals to invalidate a state law that exempted certain films depicting explicit sexual acts from state criminal laws. The statute only exempted films that had been given a seal of approval from the Motion Picture Association or the U.S. Customs Office and set no standards prescribing guidelines or rules to be followed in determining which motion pictures would be exempted. *Id.* at 934. As such, the court found that the statute unconstitutionally delegated legislative power to the Motion Picture Association and the U.S. Customs office because it was “a grant of power

unfettered by guides, restrictions or standards” and provided “for no hearings and no review procedure” for those affected. *Id.* at 935. The court noted that a delegation is “repugnant to . . . due process . . . where it permits arbitrary exercise of powers by such individuals.” *Id.*

And lastly in Texas, the Texas Supreme Court relied on principles of both due process and separation of powers to analyze the validity of private regulation. In *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997), the Texas Supreme Court struck down a statute that authorized a private, nonprofit foundation of cotton growers to operate a boll weevil eradication program and to assess cotton growers for costs. *Id.* The statute required referendum approval from affected cotton growers. *Id.* A group of growers who were detrimentally affected by the foundation’s actions challenged the statute arguing that the legislature had improperly delegated legislative authority to a private organization. *Id.* at 460. Acknowledging that in some circumstances private regulation may be constitutional, the court introduced eight factors to examine the appropriateness of private delegation. These factors focus on due process and separation of powers concerns.³

³ *Id.* at 472 (detailing the eight factors of appropriateness) (“(1) Are the private delegate’s actions subject to meaningful review by a state agency or other branch of state government? (2) Are the persons affected by the private delegate’s actions adequately represented in the decision-making process? (3) Is the private delegate’s power limited to making rules, or does the delegate also apply the law

The court balanced these factors and found the delegation unconstitutional. *Id.* at 474. The court was particularly concerned that the lack of statutory standards gave the foundation free range to incur significant debt to be repaid by the growers, even if the growers decided to discontinue the program. *Id.*

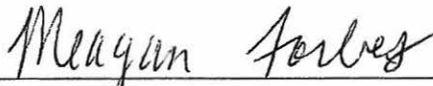
Although the facts in all of these cases vary, the courts' concerns are the same. Whether relying on principles of separation of powers, due process, or both, these courts have questioned private delegations that (1) lack standards or guidance from the legislature; (2) grant to private parties an exclusive privilege to act in his or her own self-interest at the expense of those affected by the regulation; and (3) lack meaningful protection or safeguards for those affected by the regulation. These are the same concerns that drove the Minnesota Supreme Court to strike down the laws in *State ex rel. Foster* and *Remington*, and they are the same concerns that are present in this case. The Minnesota Constitution contains parallel guarantees of separation of powers and due process to those relied on in these cases. This Court should rely on the Minnesota Constitution to protect Nadeen from the legislature's broad delegation to current licensees.

to particular individual? (4) Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function? (5) Is the private delegate empowered to define criminal acts or impose criminal sanctions? (6) Is the delegation narrow in duration, extent, and subject matter? (7) Does the private delegate possess special qualifications or training for the task delegated to it? (8) Has the legislature provided sufficient standards to guide the private delegate in its work?"

CONCLUSION

The “supervised experience” requirement of Minnesota Statutes, section 146B.03, subdivision 4 violates longstanding jurisprudence in Minnesota and across the country. This caselaw is based on basic understandings of separation of powers and due process, understandings that have protected individuals from unconstrained private regulation for centuries. Nadeen has a right to earn a living in her chosen occupation in Minnesota free from private, anticompetitive regulation. This Court should protect that right and declare the “supervised experience” requirement unconstitutional. Further, because Nadeen has otherwise fulfilled the requirements of the statute, this Court should order that Respondents grant her a license.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the Amicus Brief of the Institute for Justice conforms to the requirements of Minn. R. Civ. App. P. 128.02 and 132.01, subds.1 and 3(a) for a brief produced with a proportional font.

2. The length of the foregoing brief is 5,037 words.

3. The foregoing brief was prepared using Microsoft Word 2010 in 13-point Book Antiqua.

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