IN THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

IN RE WILLIAM E. PAPLAUSKAS, JR.

No. 2018-161-M.P
UPLC 2015-6

ON REPORT OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE AND THE STEPHEN HOPKINS CENTER FOR CIVIL RIGHTS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Rule 16(h) of the Supreme Court Rules of Appellate Procedure and this Court's Order of June 18, 2018, requesting amicus briefing, the Institute for Justice and the Stephen Hopkins Center for Civil Rights, respectfully submit this brief as *amicus curiae* in support of Respondent William E. Paplauskas, Jr.[1] Amici offer this brief because the recommendations of the Unauthorized Practice of Law Committee pose a threat to the Rhode Island Constitution's protections for economic liberty and the First Amendment to the U.S. Constitution's protections for free speech.

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend economic liberty, the Institute litigates against unreasonable licensing regulations that stand in the way of people's ability to earn an honest living in the occupation of their choice and that harm consumers by restricting honest competition. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (challenge to state regulation prohibiting individuals not licensed as funeral directors from selling caskets); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012) (challenge to Utah's cosmetology/barber licensing regime as applied to natural hair braiders). Much of the Institute's free-speech practice centers on protecting individuals' right to earn a living by speaking, most often over the objections of various state or local licensing authorities. *See, e.g.*, *Hines v.*

[1] Amici's views are applicable to each of the three real-estate services unauthorized practice of law cases now before this Court: *In re William E. Paplauskas, Jr.*, No. 2018-161-M.P (UPLC 2015-6); *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*, No. 2018-162-M.P. (UPLC 2017-1); and *In re SouthCoast Title and Escrow, Inc.*, No. 2018-163-M.P. (UPLC 2017-7). Because these cases have not been consolidated, Amici have submitted this same brief in each case.

Alldredge, 783 F.3d 197 (5th Cir. 2015) (challenge to state regulation prohibiting licensed veterinarian from emailing advice about animals he had not personally examined); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (challenge to municipal ordinance forbidding unlicensed tour guides from speaking to paying customers about certain topics).

The Stephen Hopkins Center for Civil Rights is a Rhode Island based non-profit, non-partisan organization devoted to defending the civil rights fundamental to the American system of ordered liberty, including economic liberty. Among the rights the Stephen Hopkins Center for Civil Rights and its cooperating attorneys regularly litigate is the right to earn an honest living. In addition to our work in the courts, our affiliated and cooperating attorneys regularly publish on economic liberty in academic reports and the popular press. Protecting the right to earn an honest living helps Rhode Islanders and all Americans achieve the American dream through entrepreneurship and protects consumers by lowering costs and increasing competition. The Stephen Hopkins Center respectfully believes its legal expertise and public policy experience will assist this Court in its consideration of this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Unauthorized Practice of Law Committee has made recommendations to this Court in three pending matters regarding real estate transactions. *In re SouthCoast Title and Escrow, Inc.*, No. 2018-163-M.P. (UPLC 2017-7); *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*, No. 2018-162-M.P. (UPLC 2017-1); *In re William E. Paplauskas, Jr.*, No. 2018-161-M.P (UPLC 2015-6). Between these three cases, the Committee has recommended that (1) conducting a title examination to determine the marketability of title, (2) conducting a real estate closing, and (3) drafting certain real estate-transaction related documents—a deed, residency affidavit,

and power of attorney—constitute the practice of law and such services should, therefore, be restricted to lawyers.

Whether or not these services fall within the "difficult to define" practice of law, *R.I. Bar Ass'n v. Auto. Serv. Ass'n*, 179 A. 139, 140 (R.I. 1935), is not the concern of Amici here. Rather, Amici are concerned because the Committee's recommendations violate Rhode Islanders' rights under both the Rhode Island Constitution's protections for economic liberty and the First Amendment to the U.S. Constitution's protections for free speech. Even if these services do fall under the definition of the "the practice of law," there still must be sufficient legitimate reason to preclude anyone other than licensed attorneys from providing these services. This is an inquiry the Committee pointedly did not undertake. Had the Committee done so, it would have found that no sufficient reason justifies its proposed restrictions. The proposed restrictions would prevent potentially thousands of Rhode Islanders from earning an honest living in occupations they have been practicing for years. To protect these individuals' rights and to protect the public, this Court should reject the Committee's recommendations.

ARGUMENT

The recommendations made by the Unauthorized Practice of Law Committee to this Court in each of the three "unauthorized practice of law" cases currently pending, *In re SouthCoast Title and Escrow, Inc.*, No. 2018-163-M.P. (UPLC 2017-7); *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*, No. 2018-162-M.P. (UPLC 2017-1); *In re William E. Paplauskas, Jr.*, No. 2018-161-M.P (UPLC 2015-6), threaten Rhode Islanders' constitutional rights. The Committee failed to consider Rhode Islanders' constitutional rights when it made its recommendations. This Court must take those rights into account and reject the Committee's recommendations that this Court (even in the face of contrary legislation from the General

Assembly) allow only lawyers to (1) conduct title examinations, (2) conduct real estate closing, and (3) draft certain real estate-transaction related documents.

In Part I, Amici discuss the Rhode Island Constitution's protections for the "fundamental right to engage in a lawful occupation" and how the Committee's recommendations would impose prohibited "unreasonable interference(s)" on Rhode Islanders' right to earn an honest living. In Part II, Amici discuss the First Amendment's protections of the right to free speech, including the right to speak as part of an occupation, and how the Committee's recommendations would impose impermissible restrictions on Rhode Islanders' right speak as part of earning an honest living.

I. THE COMMITTEE'S RECOMMENDATIONS WOULD VIOLATE THE RHODE ISLAND CONSTITUTION'S PROTECTIONS FOR ECONOMIC LIBERTY AND HARM CONSUMERS.

The Rhode Island Constitution protects the "fundamental" right of an individual to engage in lawful occupations. To protect this right, this Court requires that restrictions on people's ability to earn a living be "reasonable." Here, the Committee's recommended restrictions are not reasonable. They are not supported by any evidence and, indeed, fly in the face of existing evidence. They do not address the less burdensome regulations that already guard against any potential threats to the Rhode Island public. They do not recognize the harm the restrictions would impose on the public. Finally, this Court must be particularly attuned to the lack of reasonableness of the Committee's recommendations because of the threat of regulatory capture.

A. The Rhode Island Constitution meaningfully protects economic liberty and prohibits "unreasonable interference in the pursuit of a livelihood."

Article I, section 2 of the Rhode Island Constitution provides, as is relevant here:

> All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws.

This Court interprets the word "liberty" in Article I, section 2 to include "the right of the individual to engage in the common occupations of life" in support of the "*fundamental right* to engage in a lawful calling." *Riley v. R.I. Dep't of Envtl. Mgmt.*, 941 A.2d 198, 206 (R.I. 2008) (emphasis added). This Court has recognized the constitutional protections for this right for at least 118 years. *See State v. Dalton*, 46 A. 234, 237 (R.I. 1900) ("Liberty, in its broad sense, as understood in this country, means . . . the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.") And this Court has recognized that "[t]his inalienable right is trenched upon and impaired" when the government "prohibits a man from carrying on his business in his own way, provided, always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest." *Id.*

Because the Rhode Island Constitution protects the fundamental right to engage in a lawful occupation, this Court has long recognized that individuals have "the right to be free from unreasonable interference in the pursuit of a livelihood." *Berberian v. Lussier*, 139 A.2d 869, 872 (R.I. 1958); *accord Riley*, 941 A.2d at 206 (analyzing whether commercial fisher license was an unreasonable regulation). This Court's best description of what constitutes "reasonable" regulation was summarized in *Dalton*: The government "may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." *Dalton*, 46 A. at 235 (citations and quotation marks omitted). First, "it must appear . . . that the interests of the public generally, as distinguished

from those of a particular class, require" government "interference" in the pursuit of a livelihood. *Id.* Second, the restrictions must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* Third, in showing a reasonable relation to an alleged public purpose, "a forced or strained relation is not enough." *Id.*

B. The Committee's recommendations are unreasonable in light of the lack of public harm, the lack of a threat to the public, and other less-burdensome regulations already in effect.

The Committee's recommendations here constitute unreasonable restrictions on the right of non-lawyers to work in the real estate industry. The Committee cited no evidence that the public was harmed here. The Committee cited no evidence—because there is none—that the public is generally harmed from non-lawyers working in this industry; a critical non-finding given the long history of non-lawyers providing these services in Rhode Island and elsewhere. And the Committee did not address the numerous less burdensome regulations already in place to protect the public here. Given that there is no public interest that justifies restrictions above and beyond those already imposed by the General Assembly, the Committee's recommendations are based on strained reasons, are unnecessary and unduly oppressive, and are therefore unreasonable.

1. There is no evidence consumers were harmed here.

First, the Committee's recommendations were made in the absence of any harm to the public in these cases. All three cases now before this Court were instigated by lawyer complaints, not consumer complaints. SouthCoast Report at 1-2; Balkun Report at 1-2; Paplauskas Report at 2. The Committee did not find that any of the non-lawyers in these three cases harmed the public. Indeed, the only analysis of whether consumers were harmed in this cases happened in the dissent in *Paplauskas*, which found "no evidence of any harm to the

sellers, buyers, or lender to this transaction," Paplauskas Report at 34, a finding which the majority in that same case all but conceded, *id.* at 27.

2. There is no evidence consumers are generally harmed, even though non-lawyers have long offered these services in Rhode Island.

Second, the Committee's recommendations here were made in the absence of any evidence of harm to the public generally. The Committee viewed its role very narrowly here: only to determine whether these practices fell within the practice of law. Paplauskas Report at 26-29. But in so doing, the Committee essentially *assumed* a threat to the public. *See id.* at 46-47 (dissent). Indeed, the only evidence regarding any threat to the public from non-lawyer services in these cases was provided by the *Paplauskas* dissent. *Id.* at 47 (citing Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423 (1999)). That evidence was a study comparing five states where non-lawyers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of such services.[2] Palomar, *supra*, at 487. And that study recognized that "[t]he only clear conclusion . . . is that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law." *Id.* at 520.

The failure to offer any evidence of harm to the public from non-lawyer services in this area is a critical failure given that these services have long been offered by non-lawyers in Rhode

[2] Notably, the Committee did admit that many other states allow non-attorneys to provide these services. *See* Paplauskas Report at 15 n.17 (listing states). Given this, the Committee's failure to analyze the evidence of the lack of harm from non-lawyer services is another reason this Court should reject the Committee's recommendations.

Island. The Committee itself recognized that its conclusions here would negatively "impact . . . long-standing practice" of non-lawyers providing these services in Rhode Island. Paplauskas Report at 28. For example, Mr. Paplauskas, the subject of one of these cases for conducting a real estate closing, had been "a freelance notary who is hired by 'title companies and other signing agencies' to perform real estate closings in Rhode Island" for years without any incident. *Id.* at 5. Indeed, at least as early as 2002, the Federal Trade Commission found "no indication that [Rhode Island] consumers are harmed under current law [allowing non-lawyers to offer their services], and substantial evidence that consumers benefit from competition between closing services offered by lawyers and non-lawyers." Federal Trade Commission, *Comments on Rhode Island H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities* (2002) 1, 2, https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-honorable-john-b.harwood-et-al.concerning-rhode-island-h.7462-restrict-non-attorney-participation-real-estate-closings/v020013.pdf. Given Rhode Island's "long-standing" experience with non-lawyers providing these services without apparent harm to the public, restricting those services now based on mere assumptions does not meet the demands of *Dalton*.

Moreover, that there is no evidence of harm to the public from non-lawyers providing these services is consistent with existing research on the unauthorized practice of law generally. One recent study found that more than two-thirds of lawyers in charge of state agencies responsible for enforcing unauthorized-practice laws "could not recall an instance of serious public harm in the preceding year." Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2598-99 (2014). And another review found that "there is little evidence that lawyers are

more effective at providing certain legal services or more ethical than qualified nonlawyers," such that "the primary justification for the legal profession's monopoly of the legal services market does not hold up to scrutiny." Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 Fordham L. Rev. 2611, 2615 (2014); *see also* Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 Hastings L.J. 1191 (2016) (comparing non-exclusive legal regulation in the United Kingdom to the United States' monopoly regulatory model). Or, as the Restatement (Third) of Law Governing Lawyers observed,

> [s]everal jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000).

3. The Committee failed to consider the less-burdensome alternatives to restricting these services only to licensed lawyers already in effect in Rhode Island.

Perhaps most critically, the Committee's recommendations fail to take into account the numerous less-burdensome regulations already put in place by the General Assembly. This Court acts as a regulator when considering the practice of law. *In re Town of Little Compton*, 37 A.3d 85, 88 (R.I. 2012). There is widespread, bipartisan consensus that regulators must consider less burdensome regulatory alternatives to licensing to avoid unduly restricting the right to earn a living. *E.g.*, Federal Trade Commission, Comment on Nebraska LB299 (2018), https://www.ftc.gov/news-events/press-releases/2018/01/ftc-staff-issues-comment-proposed-occupational-licensing-reform; Dick M. Carpenter, et. al, *License to Work: A National Study of*

Burdens from Occupational Licensing 32 (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf; Dep't of the Treasury Off. of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, *Occupational Licensing: A Framework for Policymakers* 1, 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

Rhode Island already has less burdensome regulatory alternatives to prohibiting all non-lawyers from providing these services. The General Assembly has passed numerous regulations affecting real estate transactions. The Rhode Island Title Insurers Act, R.I. Gen. Laws §§ 27-2.6-1, *et seq.*, for example, contains numerous regulations to protect the public in such transactions. These regulations include licensing (just not *also* as an attorney), *id.* §§ 27-2.6-1 & -6; capital requirements, *id.* § 27-2.6-7; ethical and practice constraints, *e.g.*, *id.* §§ 27-2.6-12 through -16; and various penalties, including monetary, injunctive, and license revocation, for violation of these laws, *id.* §§ 27-2.6-19 & 42-14-16. And similar public-protection regulations, less burdensome than requiring licensure as a lawyer, can be found in the statutes governing real estate brokers, salespersons, and facilitators. R.I. Gen. Laws §§ 5-20.5-1, *et seq.*; §§ 5-20.6-1, *et seq.*; and §§ 5-20.8-1, *et seq.*; *see also* Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) (recognizing alternative regulatory regimes, such as common law and statutory consumer-protection measures, that can protect the public while allowing non-lawyers to provide services).

In considering these less burdensome alternatives, Amici take no position on who can regulate the practice of law. Rather, Amici note that these other regulations already exist and already protect the public in the real estate transaction context. In light of these other, less restrictive, regulations already in place, it was incumbent on the Committee to explain how there

was a reasonable, not a "forced or strained" (or assumed) relation between *further* restricting these practices to only licensed attorneys and protecting the public and why these *further* restrictions were not "unduly oppressive." The Committee did not do so.

This Court must consider the existence of these less-burdensome regulations when it determines whether to restrict the practices at issue here to only licensed lawyers. Because these less burdensome regulations exist and non-lawyers have long provided services subject to these regulations without any evidence of harm to the public, there is not sufficient proof that restricting these practices only to lawyers is a "reasonable" restriction of the non-lawyers' right to an occupation.

* * *

Ultimately, the *Paplauskas* dissent accurately describes what the Committee has done in all three cases here: "*assume[]* that the public will endure more harm when laypersons close real estate transactions than when attorneys perform those services." Paplauskas Report at 47. Just as "a forced or strained relation" between a restriction and public benefit "is not enough" to justify such restrictions, *Dalton*, 46 A. at 235, an assumed relation between the committee's proposed restrictions and a benefit to the public is also not enough. Such an assumption is especially unreasonable here, where there was no harm to the public in these transactions; no evidence of harm to the public from non-lawyers providing these services, even though it is a long-standing practice in Rhode Island (and other states) for non-lawyers to provide these services; and there are regulations already in the Rhode Island statutes that protect the public while being less of a burden on the right to earn an honest living. For these reasons, even if provision of the services at issue here are considered the "practice of law," they cannot, consistent with the Rhode Island Constitution, be restricted to the exclusive domain of licensed attorneys.

C. The Committee's recommendations will harm consumers by reducing competition and increasing prices.

By unnecessarily restricting who may provide these services, the Committee's recommendations threaten competition and therefore threaten consumers. It is well-recognized that the public benefits when non-lawyers can compete with lawyers. If this Court adopts the Committee's recommendations, the public will be worse off.

The Federal Trade Commission has previously found that applying practice of law restrictions to Rhode Island real estate closings would harm the public by forcing them to pay more. FTC, *Comments on Rhode Island H. 7462*, *supra*. The FTC found, based on its experience and the experience in other states, that Rhode Island consumers would likely pay higher costs by eliminating competition and forcing consumers to pay (more expensive) attorneys for services that (less-expensive) non-lawyers were already providing. *Id.* at 6-7.

Relatedly, by increasing costs, the Committee's recommendations will likely result in Rhode Islanders receiving less assistance than they do today. "Many people who cannot afford a licensed attorney need some help, and many of them could probably pay something reasonable for it, but those options are not available" under broad practice of law restrictions. Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 Fordham L. Rev. 2587, 2684 (2014). Thus, studies have found that "the public would be better served if more nonlawyer representatives—who were subject to educational and licensing requirements—could provide more legal services to the public." Levin, *supra*, at 2615.[3]

[3] These observations are not limited to the provision of legal services. Research has linked stricter licensing for dentists and optometrists to worse dental and eye health outcomes, stricter licensing for veterinarians to higher risks of rabies and brucellosis, and stricter licensing for electricians with higher rates of death by accidental electrocution. Sidney L. Carrol & Robert J. Gaston, *Occupational Restrictions and the Quality of Service Received: Some Evidence.*, 47(4) S. Econ. J. 959 (1981); Sidney L. Carrol & Robert J. Gaston, *Barriers of occupational licensing of veterinarians and the incidence of animal diseases.*, 30 Agric. Econ. Rev. 37 (1978). The reason

As noted, the Committee's recommendations here essentially assumed the public would be better off if only lawyers were allowed to provide the services at issue. Not only were these assumptions based on no evidence, these assumptions contradict actual evidence that the restrictions here will harm the public. Given that "unauthorized-practice law needs to increase its focus on the public rather than the profession's interest and that judicial decisions and enforcement practices need to adjust accordingly," Rhode & Ricca, *supra*, at 2588, this Court should reject the Committee's recommendations.

D. The Court must guard the Rhode Island Constitution's protections for economic liberty against regulatory capture of the Committee by licensed attorneys.

Article I, section 2 of the Rhode Island Constitution not only protects an individual's right to earn an honest living, it also recognizes that laws "should be made for the good of the whole." This necessarily means that restrictions on the right to pursue an honest living must be based on a benefit to the public, not on a benefit to a particular economic interest group. *See Dalton*, 46 A. at 235 (noting that "it must appear . . . that the interests of the public generally, as distinguished from those of a particular class, require" government "interference" in the pursuit of a livelihood). Accordingly, this Court has recognized that the practice of law is to be "regulate[d] and control[led] . . . so that the public welfare will be served and promoted." *R.I. Bar Ass'n*, 179 A. at 143. By comparison, "[a]ssuring protection to duly licensed attorneys and counsellors against invasions of their franchise by unauthorized persons is only incidental or secondary to this primary purpose." *Id.* In fact, protecting attorneys from competition from non-attorneys is an improper purpose for restricting non-attorneys' right to pursue an honest living.

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stricter licensing is linked to greater harms is that stricter standards raise prices, causing some people, especially the poor, to go without those licensed services or instead try to do those services themselves.

This Court must be on guard to ensure that the Unauthorized Practice of Law Committee's recommendations are based on public interest, not lawyers' private interests.

Lawyers have long tried to use the power of government to protect their monopoly for their own benefit under the guise of "self-regulation."[4] *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, 2582-85 (1999) (describing the history of lawyers attempting to monopolize the "practice of law"). Here, the dissent in *Paplauskas* presciently warned that the Committee was "spring-boarding" this Court

> into a long-raging "turf war" between lawyers (bar associations, unauthorized practice of law committees) and non-lawyer real estate professionals (title companies, realtors) without the benefit of either a full-scale review of industry practices, consumer rights, or actual harm to the public, or input from the various stakeholders whose perspectives are incredibly relevant to this well-known, heated debate.

Paplauskas Report at 30.

The "capture" of the regulation of the practice of law, like the capture of the regulation of any occupation, results in regulation for the benefit of the powerful industry, rather than for the public good. It is by now well recognized that regulations—especially economic regulations—are often implemented and used to benefit powerful industry insiders. *See generally* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory*

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[4] Indeed, lawyers' desire to more fully control their own monopoly contributed to conflicts between state courts and state legislatures over which branch was allowed to regulate the practice of law. *See* Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers" – The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 Cal. W. L. Rev. 65, 68-71 (2009) (after failing to achieve strong practice of law restrictions in state legislatures, in part owing to the lobbying efforts of other interest groups such as title companies and realtors, lawyers changed tactics and focused on arguing that only the courts could regulate the practice of law, assuming a more welcome reception for their protectionist interests because judges "shared membership in the legal profession").

Capture, 106 Q.J. Econ. 1089 (1991) (explaining role of interest groups in "capturing" government decision-making for their own economic advantage); George J. Stigler, *The Theory of Economic Regulation*, Bell J. Econ. & Mgmt. Sci., Spring 1971, at 3-21 (demonstrating that industries and professional associations pursue economic regulations to advance their own economic self-interest); Morris M. Kleiner & Kyoung Won Park, *Battles Among Licensed Occupations: Analyzing Government Regulations on Labor Market Outcomes for Dentists and Hygienists*, NBER Working Paper No. 16560 (Nov. 2010) (analyzing effects of regulatory competition between dentists and dental hygienists). For example, the United States Supreme Court recently recognized that a regulatory board consisting almost entirely of dentists had used the power of government to protect dentists from competition from non-dentist teeth whiteners, despite the absence of any evidence of consumer harm. *N.C. State Board of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108, 1117 (2015); *see also id.* at 1117 (Alito, J., dissenting) ("Professional and occupational licensing requirements have often been used" to benefit industry insiders and not the public.).

Given the captured structure of the Committee here, it may not be considering the public's interest, rather than lawyers' interests. Just as the board in *N.C. State Board* consisted almost entirely of dentists, the Committee here consists almost entirely of lawyers; just one of the current thirteen members is not a lawyer. Rhode Island Judiciary Unauthorized Practice of Law Committee, https://www.courts.ri.gov/PublicResources/unauthorizedpracticeoflaw/Pages/default.aspx.[5] Because the Committee is overwhelmingly controlled by lawyers—by market

[5] Every member of the panel that heard *SouthCoast* and *Balkun* was an attorney and every member voted to find unauthorized practice. SouthCoast Report at 1 n.1, Balkun Report at 1 n.1. In *Paplauskas*, however, the panel split 3-2, with the majority consisting entirely of lawyers and the dissent one lawyer and the one non-lawyer on the Committee. Paplauskas Report at 1 n.1.

participants—it cannot be trusted to regulate in the public's interest, rather than lawyers' interests. *N.C. State Board*, 135 S. Ct. at 1114 ("The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules."). Given this, it is incumbent on this Court to make a "pointed re-examination" of the Committee's recommendations. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 362 (1977), and be politically accountable for any choice to protect lawyers at the cost of the public. *N.C. State Bd.*, 135 S. Ct. at 1116.

* * *

This Court should reject the Committee's recommended findings of the unauthorized practice of law in each of these three cases. Whether or not these services are deemed the practice of law, they cannot be restricted to just lawyers. The Rhode Island Constitution requires any restriction on the right to earn an honest living—whether that restriction is imposed by the General Assembly or this Court—to be reasonable. The recommendations here are not reasonable. They threaten to upend decades of settled understanding that has allowed untold numbers of non-lawyers to earn a living. *See* Paplauskas Report at 16, 40 (non-lawyer closing are "evidently a common practice throughout this state"). The recommendations are based on no evidence of harm to the public, even in the face of untold numbers of non-lawyers already providing these services in Rhode Island and elsewhere. The recommendations, if adopted, would actually harm the public. And the body that has made these recommendations consists almost entirely of lawyers, such that the public is justified in believing this is just another effort by lawyers to monopolize services for lawyers' benefit. Accordingly, this Court should reject the Committee's recommendations.

II. THE COMMITTEE'S RECOMMENDATIONS WOULD VIOLATE THE FIRST AMENDMENT'S PROTECTIONS FOR FREE SPEECH.

For the reasons given above, this Court should reject the Committee's recommendations based on the Rhode Island Constitution's protections for the right to earn an honest living. If this Court does not do that, however, this Court faces an additional issue: The Committee's recommendations would also violate Rhode Islanders' First Amendment rights. The threat to First Amendment rights is most stark in the *Paplauskas* case but present in every case involving real estate closings. The Committee accuses Mr. Paplauskas of the unauthorized practice of law because he conducted a real estate closing. But a review of the record and the Committee's findings indicates the only "impermissible" thing he did at the closing was speak: After fully informing everyone at the closing that he was not an attorney, he explained common real estate closing documents to the buyers. This provision of "advice," legal advice or not, and for compensation or not, is protected by the First Amendment, as the United States Supreme Court just reaffirmed. There is no exemption to the First Amendment's ordinary protections of speech here.

A. The Committee's decisions—especially in the *Paplauskas* case—demonstrates the Committee is regulating speech.

In all three cases currently before the Court, the Committee determined that real estate closings are the practice of law. While the Committee's description of what occurs at a real estate closing is mostly perfunctory, those descriptions demonstrate that the Committee is recommending that this Court regulate speech protected by the First Amendment.

In both the *SouthCoast* and *Balkun* cases, the Committee described a closing as follows:

> During a real estate closing, the person conducting the closing functions to facilitate a valid conveyance of the property. This involves receiving the necessary items from the seller (i.e. the deed to the property and the keys) and also, most prominently, presenting the buyer with a series of documents for his or her review and signature. These "closing documents" are generally provided to

> the closer by the buyer's lending institution (in a mortgage transaction) and include, among other things, the mortgage, the closing disclosure (previously referred to as a "HUD-1 Statement"), the promissory note, and other assorted financial documents usually required by the buyer's lender in a mortgage transaction to secure financing for the property. The closer then presents these documents in successive order to the buyer for signature, which are often times notarized by the closer, after which the documents are collected for recording and final settlement.

SouthCoast Report at 29-30; Balkun Report at 46. In both the *SouthCoast* and *Balkun* cases, the Committee also noted that those involved in closings provide the buyer with an "explanation and overview of each document," SouthCoast Report at 30, or "a brief explanation or brief description of what the document is," Balkun Report at 46, before obtaining the buyer's signature and moving to the next document.

Beyond noting that "a real estate closing is an important transaction with monumental legal consequences," the Committee did not explain in particular which of the actions at a closing constituted the practice of law. SouthCoast Report at 30, Balkun Report at 47. This, even though the precedents the Committee relied on recognize that "'[m]any of the discrete services and activities that may fall within the penumbra of modern conveyancing do not qualify as the practice of law, and the talismanic invocation of the word "conveyancing" is not sufficient to require that all of them be performed by or under the supervision of an attorney.'" SouthCoast Report at 21, Balkun Report at 37 (both quoting *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 946 N.E.2d 665, 675 (Mass. 2011)).

Although the Committee did not explain what "discrete services and activities" of the closing triggered unauthorized practice of law restrictions in *SouthCoast* or *Balkun*, the majority and dissent in *Paplauskas* do shed light on the Committee's reasoning. In *Paplauskas*, the Committee majority again adopted and quoted at length the rationale of *Real Estate Bar Ass'n for Massachusetts*. Paplauskas Report at 17-18. Notably, however that Massachusetts case

recognized that "'[i]f the attorney's only function is to be present at the closing, to hand legal documents that the attorney may never have seen before to the parties for signature, and to witness the signatures, there would be little need for the attorney to be at the closing at all.'" Paplauskas Report at 17 (quoting *Real Estate Bar Ass'n*, 946 N.E. 2d at 685). But in the *Paplauskas* case, Mr. Paplauskas had only been present at the closing, handed legal documents (which he did not draft) to the parties for signature, witnessed the signatures, gathered up the documents finalized to return to the lender, and did one more thing: Explained the documents he had the parties sign. Paplauskas Report at 5-12. That is, the only "discrete service or activity" performed by Mr. Paplauskas identified by the Committee majority as the practice of law was the giving of advice. *See id.* at 13 ("The complaint filed by Attorney Pagliarini alleged that, on the occasion of the subject real estate closing, Paplauskas explained or otherwise advised the buyers of the property on the substance of the closing documents before them[.]"). Similarly, the dissent focused on Mr. Paplauskas's speech about the closing documents as the only potential "unauthorized practice of law." *Id.* at 38.

It therefore appears very clear that the only discrete "practice" at the closing in *Paplauskas*, and most likely also in *SouthCoast* and *Balkun*, was the provision of advice about closing documents. But providing advice, even about real estate closing documents, even for pay, and even when that speech is deemed the "practice of law," is speech protected by the First Amendment. The Committee's recommendation that such speech be reserved for lawyers therefore threatens Rhode Islanders' First Amendment rights.

B. The First Amendment protects the provision of individualized advice, even for pay, and even when that advice is subject to professional licensing.

Providing specialized advice to listeners is speech protected by the First Amendment. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*");

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). Speech is protected by the First Amendment whether or not it is done for compensation. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than being given away") (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). Not surprisingly then, the Court has recently reaffirmed that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371-72. These principles apply to the explaining of or otherwise advising people about documents at a real estate closing at issue here.

In *Holder v. Humanitarian Law Project*, the Supreme Court held that a regulation that "generally functions as a regulation of conduct" is subject to First Amendment scrutiny when the regulated "conduct" consists only of speaking. 561 U.S. at 27-28. In *Holder*, a group of individuals and nonprofits wanted to provide training to groups designated as terrorist organizations on how to use humanitarian and international law to peacefully resolve disputes. *Id.* at 14. But federal law prohibited the provision of "material support" to such organizations and defined "material support" as including "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance" including "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* at 12-13, 27. The Court recognized that the prohibition on "material support" to terrorist groups, "most often does not take the form of speech at all." *Id.* at 26. Nevertheless, the Court found that "as applied to [the] plaintiffs[, in *Holder*] the conduct triggering coverage under the statute consist[ed] of

communicating a message" and therefore that the First Amendment applied to plaintiffs' provision of training and advice. *Id.* at 28.[6]

In *NIFLA*, the Court recognized that, under *Holder*, the First Amendment protects the right to provide advice to clients as part of practicing a profession. *NIFLA* involved a state regulation of the speech of certain licensed family planning and pregnancy-related clinics. 138 S. Ct. at 2368-69. The regulation was a content- and speaker-based restriction of the clinics' speech, but the government defended its regulation on the grounds that the First Amendment did not really apply to "professional speech"—speech within the context of a licensed profession. *Id.* at 2371. The Court rejected "'professional speech' as a separate category of speech." *Id.*, *see also id.* at 2375 ("All that is required to make something a 'profession,' according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."). Instead, the Court reemphasized the importance of "drawing the line between speech and conduct." *Id.* at 2373. The Court recognized that its "precedents have long protected the First Amendment rights of professionals." *Id.* at 2374. And, pointing again to *Holder*, the Court further recognized that providing specialized advice to listeners is indeed protected by the First Amendment because it is speech, not conduct. *Id.* at 2374.

Following *NIFLA*, it is clear that speech that is deemed part of a profession is still protected by the First Amendment. Indeed, the Court recognizes just two circumstances in which

[6] In fact, *Holder* applied strict scrutiny to the prohibition in that case because the regulation was a content-based restriction on speech. The Court upheld the restriction because it was narrowly tailored to the compelling government interest of "combating terrorism." 561 U.S. at 28–33, 39.

the speech of a professional is "afforded less protection" than ordinary speech, and neither of these circumstances "turn[] on the fact that professionals [are] speaking." *Id.* at 2372.[7] The first circumstance applies to the mandatory disclosure of "factual, noncontroversial information in [professionals'] 'commercial speech.'" *Id.* The second circumstance is that "States may regulate professional *conduct*, even though that conduct *incidentally* involves speech." *Id.* (emphasis added). Neither circumstance applies to speech about closing documents.

C. The Committee's findings demonstrate it is impermissibly regulating speech protected by the First Amendment.

Given the "discrete service or activity" identified by the Committee as prohibited in the *Paplauskas* case—advice about closing documents—it is clear that the First Amendment applies in his case.[8] As explained in Part II.A, Mr. Paplauskas' only "activity" was speech, meaning under *Holder* and *NIFLA,* the First Amendment applies. Moreover, as explained below, neither of *NIFLA's* exceptions apply here, meaning Mr. Paplauskas' provision of advice about real estate closing documents is subject to ordinary First Amendment protections.

1. *Paplauskas* does not involve disclosures in commercial speech.

The first *NIFLA* exception—the mandatory disclosure of "factual, noncontroversial information in [professionals'] 'commercial speech'" 138 S. Ct. at 2372—does not apply

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[7] The *Paplauskas* dissent recognized that "it is not illegal for a layperson to discuss the law or to talk about legal documents," and instead took the position that "[d]iscussions about the law or legal documents are unlawful in Rhode Island only where an individual is tendering advice on a legal question for consideration." Paplauskas Report at 38. But whether a person is giving advice for consideration or for free, the First Amendment protects that speech equally. *City of Lakewood*, 486 U.S. at 756 n.5. After all, "a great deal of vital expression" is protected under the First Amendment even if it "results from an economic motive." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citations omitted).

[8] It may also apply in *SouthCoast* and *Balkun*, though the Committee's limited findings make this less clear.

because *Paplauskas* does not involve disclosures in commercial speech. First, Mr. Paplauskas's speech about documents at a closing is not commercial speech. Although Mr. Paplauskas is involved in commerce—he is paid for his services—his speech is not "commercial speech" as the Supreme Court has defined that term. "[T]he core notion of commercial speech [is] speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quotation marks and citation omitted). Here, Mr. Paplauskas is not advertising his services, he is speaking with people already engaged in a closing transaction—the people at the closing—as a part of the transaction itself. Second, the Committee's recommendation here is not a disclosure law; a requirement that Mr. Paplauskas must say something more than he does at a closing.[9] Rather the Committee recommends that Mr. Paplauskas be *prohibited* from speaking at the closing. Because the Committee's recommendation is not about disclosures in commercial speech, Mr. Paplauskas's speech is protected under *NIFLA*.

2. *Paplauskas* does not involve the regulation of professional conduct that incidentally involves speech.

The second *NIFLA* exemption—applicable to regulation of "professional conduct, even though that conduct incidentally involves speech," 138 S. Ct. at 2372—does not apply because there is no conduct in Mr. Paplauskas's case. *NIFLA* makes clear that permissible "incidental" regulations of speech must actually regulate conduct; where there is no conduct to be regulated, the regulation of speech is subject to the First Amendment. *Id.* at 2373. "While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it and the

[9] Indeed, Mr. Paplauskas fully disclosed that he was not a lawyer at the closing. Paplauskas Report at 7.

line is long familiar to the bar." *Id.* (internal citations and quotations marks omitted). And, while it is true that much of what lawyers do looks like speech, the legal analysis in *NIFLA* directs courts to focus on what the government is doing; on whether the thing that triggers the licensing restriction is itself communicating a message. Here, the Committee proposes to regulate speech precisely because of its communicative aspects. That means the Committee wants to regulate "speech as speech," *id.* at 2374, in the face of the First Amendment.

Mr. Paplauskas's speech about documents in a closing is not tied to any "conduct." In *NIFLA*, the Court rejected the argument that the regulation was an "incidental" regulation of speech because there was no non-expressive "conduct" being regulated by California. 138 S. Ct. at 2373. As an example of "incidental" regulation, the Court pointed to laws requiring doctors who perform abortions—a type of non-expressive professional conduct—to make certain factual disclosures to their patients about the procedure. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). But in *NIFLA*, the regulation was "not tied to a procedure at all," it applied to all interactions between the clinics and their customers, regardless of if any procedure was sought. *Id.* Accordingly, the Court determined that California was "regulat[ing] speech as speech." *Id.* at 2374.

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), cited approvingly in *NIFLA*, conducted the same analysis and stands for the proposition that a law imposes more than an incidental burden when the "commerce" being regulated is the sale of protected speech. In *Sorrell*, the Vermont law at issue prohibited the sale, disclosure, or use by pharmacies of "prescriber-identifiable information"—valuable, federally required data about the drugs that a given doctor prescribes—for marketing purposes. *Id.* at 557-59, 580. The law allowed that information to be "sold or given away for purposes other than marketing," including to "private or academic

researchers," such that "insurers, researchers, journalists, the State itself and others [could] use the information." *Id.* at 562–63, 572. Thus, "pharmacies [could] share prescriber-identifying information with anyone for any reason save one: They [could] not allow the information to be used for marketing." *Id.* at 572.

Vermont argued that banning the sale of information for marketing purposes was "a mere commercial regulation," which—if true—would make it permissible for the law to "impos[e] incidental burdens on speech." *Id.* at 567–68. But the Court rejected this argument because a restriction on the sale of protected speech was not an "incidental" restriction. Rather, incidental restrictions are those that spring directly from the regulation of non-expressive conduct. *Id.* This explains the "incidental" burden cases and "why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, why an ordinance against outdoor fires might prohibit burning a flag, and why antitrust laws can prohibit agreements in restraint of trade." *Id.* at 567 (internal quotation marks omitted) (citing *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 62 (2006); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992); and *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The unifying theme to such cases is that they involved conduct—race-based hiring, outdoor fires, and consolidating a monopoly—that did not constitute "speech" under any reasonable definition of that term.

Here, again, the only "prohibited conduct" that the Committee pointed to in *Paplauskas* is that Mr. Paplauskas explained or otherwise advised the buyers of the property on the substance of the closing documents. Paplauskas Report at 5-13, 38. There was nothing else; no conduct that could give rise to the narrow "incidental" regulation of speech. Thus, under the rigorous speech/conduct distinction required by the First Amendment, *NIFLA*, 138 S. Ct. at 2373, the Committee recommendation in the *Paplauskas* case at least is the regulation of protected speech.

Granted, most applications of most state licensing laws will have no First Amendment implications at all. But when they do, the First Amendment must apply. *Holder*, 561 U.S. at 26-27. Indeed, the importance of adhering to the rigorous speech/conduct distinction required by the First Amendment is increasingly clear as more and more people earn a living through speech purportedly subject to regulatory boards (especially captured regulatory boards). Drawing these distinctions will not be exclusively necessary in the practice of law. Courts have already had to wrestle with these distinctions in cases involving doctors, *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), tour guides, *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014), fortunetellers, *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013), *overruled by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and even family psychologists who write advice columns, *Rosemond v. Markham*, 135 F. Supp. 3d 574, 583–84 (E.D. Ky. 2015).

A clear example of the importance of a rigorous speech/conduct distinction comes in the context of prescription drugs. The government cannot stop anyone—doctor or not—from advising a person that they should take a particular medication. *E.g.*, *Conant v. Walters*, 309 F.3d 629, 637-39 (9th Cir. 2002) (the First Amendment protects right of a physician to recommend medical marijuana). But writing a prescription for a particular medication is different. When a doctor writes a prescription it is "speech" in the sense that a prescription is words on paper. But the government's restriction of prescribing authority to doctors has nothing to do with the communicative aspect of those words and everything to do with the legal effect of the words, which is to give someone the legal right to access controlled substances. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (government may restrict the manufacture and distribution of medical marijuana).

In the circumstances presented in these cases, it may well be that some "speech-like" conduct is not subject to the First Amendment because the regulation is not of communication but rather of legal effect. For example, the government may not restrict anyone from communicating an intent (their own or someone else's) to transfer property, even if that intent is written. But a "deed" is more than the written communication of an intent, it is a document that has the independent legal effect of establishing property rights. *See* R.I. Gen. Law § 34-11-1 ("Every conveyance of lands . . . shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence . . . provided, however, that the conveyance, if delivered, as between the parties and their heirs, and as against those taking by gift or devise, or those having notice thereof, shall be valid and binding though not acknowledged or recorded."). Thus, when the government restricts the content or authorship of a "deed," it is doing so because of the independent legal effects of the document, not because of the communicative aspect of the words on the paper, and the First Amendment would not apply.[10]

As the discussion above demonstrates, there is a critical difference between creating a "deed" and merely giving advice about the deed, or any other legal document. Here, the Committee's own findings are clear that Mr. Paplauskas only explained or otherwise advised the buyers of the property as to the substance of the closing documents, he did not create documents that have independent legal effect. Paplauskas Report at 5-13, 38. Accordingly, the First

[10] Recognizing that the First Amendment would not apply is not a concession that the government may restrict the creation of a deed. For the reasons set forth in Part I, such a restriction separately violates the Rhode Island Constitution. Again, non-lawyers have been drafting deeds in Rhode Island for years, and there is no evidence in these three cases that the public has been harmed or, more specifically, that non-lawyers have done a worse job than lawyers, such that it is "reasonable" to restrict such services to the lawyers' monopoly.

Amendment strictly applies in the *Paplauskas* case and it is up the Committee to justify the restriction of Mr. Paplauskas's speech. The committee has failed to justify its speech restrictions. For the reasons set forth in Part I, the Committee has put forth no evidence that (1) that there is a compelling interest in prohibiting Mr. Paplauskas or any other non-lawyer from providing advice; (2) that anyone (other than the lawyers' monopoly) would be benefited by this restriction; or (3) that an outright prohibition on non-lawyer advice is narrowly tailored in the face of the less burdensome regulations already in place.

CONCLUSION

The Committee never considered the negative effects its recommendations would have on Rhode Islanders' constitutional rights or on the Rhode Island public in general. This Court must. For the reasons set forth above, the Committee's recommendations would violate the Rhode Island Constitution's protections for economic liberty and harm consumers and would also violate the First Amendment's protections for free speech. Accordingly, whether or not the services at issue here are "the practice of law," these services cannot be monopolized by lawyers and this Court should reject the Committee's recommendations.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I filed an original plus nine (9) copies of the foregoing Amicus Curiae Brief of the Institute for Justice and the Stephen Hopkins Center for Civil Rights in Support of Respondent. I also sent one copy of the foregoing brief to each of the Following by United States first class mail.

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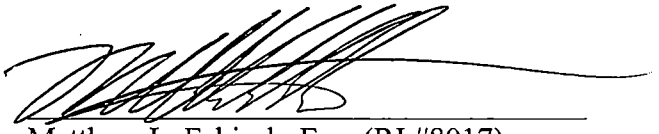

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