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SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 21011

COMMONWEALTH SERVICING GROUP, LLC, *et al.*,

Plaintiffs-Appellees,

v.

STATE OF CONNECTICUT DEPARTMENT OF BANKING,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF NATIONAL CREDITORS BAR ASSOCIATION AND CONNECTICUT CREDITORS BAR ASSOCIATION

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CERTIFICATE OF INTERESTED ENTITIES OR INDIVIDUALS PER SECTION 60-4

National Creditors Bar Association and Connecticut Creditors Bar Association certifies pursuant to Practice Book §60-4 the following:

1. There are no parent entities for National Creditors Bar Association and Connecticut Creditors Bar Association.
2. The following individuals own or control an interest of 10 percent or more of National Creditors Bar Association and Connecticut Creditors Bar Association: None.
3. There are no known direct or indirect ownership, controlling or legal interests in National Creditors Bar Association and Connecticut Creditors Bar Association which could reasonably require a judge to disqualify himself or herself under Code of Judicial Conduct Rule 2.11.
4. National Creditors Bar Association and Connecticut Creditors Bar Association are bar associations.

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The National Creditors Bar Association (NCBA) is the only nationwide, not-for-profit bar association for attorneys dedicated to practicing all areas of creditors' rights law. Its members include just over 400 law firms and individual members, totaling over 2,500 attorneys who are licensed to practice law across the United States and bound by their bars' respective rules of professional conduct. NCBA's Code of Ethics imposes on its members additional obligations of self-discipline beyond those of their respective governing state rules of professional conduct.

The Connecticut Creditors Bar Association (CCBA) is a not-for-profit bar association for attorneys licensed by the Connecticut Supreme Court who engage in the practice of creditors' rights law.

NCBA and CCBA member firms and their attorneys dedicate themselves to the practice of promoting and protecting creditors' rights, including through the practice of debt collection. As creditors' rights attorneys, NCBA and CCBA members are some of the most highly regulated attorneys. Not only are NCBA and CCBA members bound by their respective jurisdictions' rules of professional conduct but they are also subject to strictures of the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692*, et seq.*, its implementing regulation, Regulation F ("Reg. F"), 12 C.F.R. Part 1006, and various state debt collection and consumer protection statutes and regulations.

Both NCBA and CCBA strongly believe in the independence of the judiciary. Although often on the opposite end of the spectrum from

the Plaintiff-Appellees in this case, the NCBA and CCBA have a strong interest in ensuring that licensed attorneys engaged in the practice of law are governed by the rules set forth by their jurisdictions' highest authority whether it be a state bar association, state supreme court, or other judicial disciplinary enforcement office. As a result, NCBA and CCBA members have a strong interest in ensuring that statutes governing their conduct are interpreted and applied in a consistent manner that allows them to execute their ethical duties in advancing their clients' legitimate interests—within the bounds of existing law. The NCBA, under its current and former name (National Association of Retail Collection Attorneys), has participated as *amicus curiae* in cases advancing this objective before the United States Supreme Court. *See, e.g., PHH Mortg. Corp. v. Guthrie*, No. 23-785 (2024); *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019); *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019); *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019); *Midland Funding, LLC v. Johnson*, 581 U.S. 224 (2017); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995).

The facts of this case present a clear threat to the independence of the practice of law; any decision that would allow an executive branch agency ("Banking Department") to regulate the practice of law (which is the sole prerogative of the judicial department) creates a slippery slope for the independence of the judiciary and infringes upon the separation of powers doctrine. Therefore, the *Amici* have a substantial interest in this litigation.

II. SUMMARY OF ARGUMENT

Since the ratification of the United States Constitution and the revisions of the Connecticut State Constitution in 1818 and 1965, the separation of powers and independence of the judiciary have been pillars of the republican form of government. Because of the explicit grant of authority to the judiciary branch over judicial matters, including the licensing of attorneys, the NCBA and CCBA believe that the judiciary is the only branch which can regulate attorneys regarding the practice of law. The NCBA and CCBA want this Court to reaffirm this cornerstone principle. The actions taken by the Banking Department in the underlying case threaten to allow an executive department agency to regulate what is within the sole purview of the judiciary, namely what constitutes the practice of law.

Additionally, the Court must consider how the Banking Department's actions would impact the Rules of Professional Conduct which govern both how an attorney may conduct their business of practicing law as well as supervising non-lawyer paraprofessionals. We, as *amici*, are concerned that the Banking Department's actions will erode the authority of the judicial department by seeking to redefine what constitutes the practice of law.

III. THE COURT SHOULD REAFFIRM THAT ATTORNEYS IN THE PRACTICE OF LAW CAN ONLY BE REGULATED BY THE JUDICIAL DEPARTMENT

Like the Constitution of the United States, the Connecticut State Constitution adopts the principle of separation of powers: "The powers of government shall be divided into three distinct departments,

and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Conn. Const. Art. II., Sec. 1. By creating a fully independent judiciary, the framers of the Connecticut State Constitution implicitly adopted the thinking of the Framers of the United States Constitution, including the belief that an independent judiciary is crucial for maintaining our republican form of government. *See, e.g., Mistretta v. U.S.*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."). The authority of the judiciary extends to the officers within it, such as attorneys.

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 422 (1979).

The authority of the Judicial Department to regulate attorneys flows from the courts' need to maintain their independence and integrity and to ensure the proper administration of justice.

> The power, however, is not an arbitrary and despotic once, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

Ex parte Secombe, 60 U.S. 9, 13 (1856)

This Court has held similarly, stating that

> An attorney is an officer of court exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness through evidence of his possession of satisfactory legal attainments and fair private character. For the manner in which this privilege or franchise is exercised he is continually accountable to the court, and it may at any time be declared forfeited for such misconduct, whether professional or

> nonprofessional, as shows him to be an unfit or unsafe person to enjoy the privilege conferred upon him and to manage the business of others in the capacity of an attorney.

In re Durant, 80 Conn. 140, 147 (1907) (internal citations omitted).

The phrase "manage the business of others in the capacity of an attorney" is particularly poignant in the present circumstance. The Practice Book § 2-44A defines the practice of law (or to use the phrase from the *Durant* court "manage the business of others in the capacity of an attorney"):

> The practice of law is ministering to the legal needs of another person and apply legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:. . . (2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations, or liabilities.

Practice Book § 2-44A(a).

The Banking Department's actions risk upsetting the delicate balance of the separation of powers by seeking to alter the definition of

"manage the business of others in the capacity of attorney." This is a clear definition from the Judicial Department upon which the Executive must not infringe. No law (or executive branch agency) should regulate the process by which an attorney represents its client when counseling their clients regarding any matter—whether it is about settling a matter outside of court (which both NCBA and CCBA members do, as well as the attorney Plaintiff-Appellees in this case) or litigating a matter in the courthouse.

While usually at odds with NCBA and CCBA members over the particulars of a certain consumer or debt, the NCBA and CCBA recognize that an attorney licensed in Connecticut who is "[g]iving advice or counsel" to a consumer "with respect to their legal rights" regarding a debt certainly encompasses the practice of law. In fact, NCBA and CCBA members regularly "[g]iv[e] advice or counsel" to their creditor-clients "with respect to their legal rights" on "matter[s] involving the applicable of legal principles to rights"; usually that is the right to be re-paid on a particular account under a particular contract whereas for the attorney Plaintiff-Appellees it may involve advising a consumer on their obligations of repayment or impact of non-payment on an account. In either instance, however, those attorneys are practicing law as governed by the license granted to them by the Judicial Department. The attempts by the Banking Department, an executive branch agency, to regulate that activity are an impermissible infringement on both the independence of the judiciary and separation of powers.

In the seminal case *Persels & Assocs., LLC v. Banking Comm'r*, 318 Conn. 652 (2015), this Court confirmed "that there are a number of services that may be legally provided by laypeople but, when performed by attorneys, constitute the practice of law." 318 Conn., at 677. Since the "[r]egulation of the actual practice of law. . .remains the ***sole*** province of the judiciary." *Id.*, at 672, *citing Lublin v. Brown*, 168 Conn. 212, 228 (1975), the NCBA and CCBA urge this Court to reaffirm its holding from *Persels* that attorneys licensed by this State engaged in the practice of law cannot be regulated by any department other than the Judiciary.

This Court already "clarified that the authority of the legislature to regulate attorney conduct is limited to 'the entrepreneurial or commercial aspects of the profession of law.'" *Persels*, 318 Conn., at 672, *quoting Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 35, 699 A.2d 964 (1997). Similarly, in *Massameno v. Statewide Grievance Committee*, 234 Conn. 539 (1995) this Court affirmed that the Connecticut Constitution "carefully sets out the separate powers held by each branch of government." *Id.*, at 553. Perhaps most importantly, "The judiciary has the power to admit attorneys to practice and to disbar them; to fix the qualifications of those to be admitted; and ***to define what constitutes the practice of law***." *Id.*, at 553-54 (cleaned up) (emphasis added). And yet, the Banking Department's actions clearly show that it is attempting "to define what constitutes the practice of law" which directly attacks the independence of the judiciary.

The Banking Department attempted this before in *Persels*, a case with very similar facts. The Court found that "A statute violates the constitutional mandate for a separate judicial magistracy only if it [1] represents an efforts by the legislature to exercise a power which lies exclusively under the control of the court. . ." or "where there was a clear invasion of judicial power by the legislature." *Persels*, 318 Conn. at 669-70. By seeking to re-define what constitutes the practice of law (a second time), the Banking Department is clearly attempt to "exercise a power which lies exclusively under the control of the court." *Id.* Indeed, this Court "made clear that no statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law." *Id.*, at 671-72 (cleaned up).

Despite being rebuffed by this Court in the *Persels* case in its attempt to infringe of the Judicial Department's clear mandate to define practicing law, the Banking Department attempts again to regulate Connecticut licensed attorneys in the practice of law. The NCBA and CCBA urge this Court to reaffirm its holding in *Persels* that only the judiciary can define "what constitutes the practice of law" and only the judiciary can regulate those attorneys so licensed.

IV. EXECUTIVE DEPARTMENT ATTEMPTS TO REGULATE THE PRACTICE OF LAW RUN AFOUL OF THE RULES OF PROFESSIONAL CONDUCT

The NCBA and CCBA are concerned about the impact the Banking Department's actions would have on the Rules of Professional Conduct which govern attorney conduct. The Department's action risks disrupting attorney oversight of paraprofessionals under the

attorney's supervision, attorney-work product, and attorney-client privilege, including protecting client confidences.

The Rules of Professional Conduct not only govern attorneys, but also nonlawyers who are "employed or retained by or associated with a lawyer." RPC 5.3. Specifically, "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." RPC 5.3(2). In other words, paraprofessional "employed or retained by or associated with a lawyer" are held to the same standard as the attorney. The attorney is responsible for ensuring that the nonlawyer adheres to the Rules of Professional Conduct. RPC 5.3(3).

Therefore, to the extent that the Banking Department seeks information from a nonlawyer, paraprofessional that is "employed or retained by or associated with a lawyer," the Banking Department is essentially directing the nonlawyer, paraprofessional to violate the Rules of Professional Conduct by handing over information protected as attorney-client privilege (including client confidences) or attorney-work product.

In order to obtain any information from the attorney Plaintiff-Appellees or their paraprofessionals, the Banking Department necessarily must receive information about the underlying attorney-client relationship which is a direct attack on the attorney's duty to protect client confidences. Furthermore, the attorney-client privilege cannot be waived by the attorney or paraprofessional because it does not belong to them, but rather to the client. The Banking Department

would thus need to obtain a waiver of the privilege from each consumer. "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d)." RPC 1.6(a).[1] The Banking Department's actions seek to disrupt the duties the attorney Plaintiff-Appellees owe to their client to protect client confidences which, according to the Rules of Professional Conduct, extend to nonlawyer, paraprofessionals who are "employed or retained by or associated with a lawyer."

The NCBA and CCBA urge the Court to consider the potential disastrous consequences of allowing the Banking Department to seek information that is otherwise protected by the attorney-client relationship, which is imputed to nonlawyer, paraprofessionals "employed or retained by or associated a lawyer."

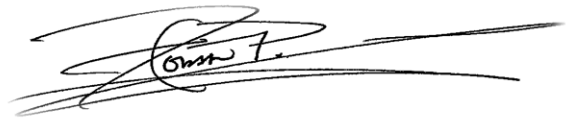
V. CONCLUSION

For the reasons stated herein, *amici curiae* National Creditors Bar Association and Connecticut Creditors Bar Association respectfully urge this Court to reaffirm its holding in *Persels*, affirm the trial court's order of April 12, 2023, and confirm that the judiciary is the

[1] The subsections which allow for disclosure of confidences contain situations where a client may be committing criminal or fraudulent acts or otherwise seek to violate the law; none of those situations are present here.

sole disciplinary body which can regulate the practice of law by licensed Connecticut attorneys.

NATIONAL CREDITORS BAR ASSOCIATION AND CONNECTICUT CREDITORS BAR ASSOCIATION,AMICUS PARTIES



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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on October 21, 2024:

1. A copy of the amicus brief has been electronically sent to each counsel of record in compliance with Section 62-7.
2. The amicus brief being filed with the appellate clerk is a true copy of the brief that was submitted electronically pursuant to §67-2A(f).
3. The brief has not been redacted as it does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.
4. The e-brief contains 2584 words.
5. The brief complies with all applicable Rules of Appellate Procedure.
6. No deviations from the rules were requested or approved.

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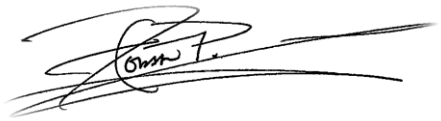

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