No. SU-2018-161-M.P.

IN THE SUPREME COURT OF RHODE ISLAND

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IN RE WILLIAM E. PAPLAUSKAS, JR.

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ON REPORT OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE

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# BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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## STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws. They also have long advocated that states, as a matter of sound public policy, favor competition in the provision of real estate services. Thus, in 2002-2003, the Department of Justice and the Commission jointly submitted comments to the Rhode Island Legislature opposing bills that would have amended the definition of "practice of law" to require attorneys to represent buyers and borrowers in virtually all aspects of the real estate closing process. The Legislature did not pass the bills, and since at least then the status quo in Rhode Island has been pro-competition: both non-attorneys and attorneys conduct closings. We urge the Court to maintain this beneficial status quo.

## STATEMENT

Respondent Paplauskas is a non-attorney notary public. He is hired by title companies or settlement agents to perform real estate closings in Rhode Island, and has done so for many years. UPLC 2015-6 Committee Report at 5.

ServiceLink, a mortgage services company that provides title and closing services, hired Paplauskas to act as its agent at a residential closing in 2015. Report at 5-6. At the closing, Paplauskas immediately informed the buyers, the only parties to the transaction present, that he was not an attorney and would not provide them with legal advice. The buyers also signed a hold-harmless agreement acknowledging that Paplauskas acted only as a notary public, was not an attorney,

and could not give legal advice or legal explanations about the contents of the closing documents. *Id*. at 7, 31-32. Paplauskas then identified and gave a factual "overview" of each document, obtained the buyers' signatures where needed, and mailed the signed closing documents to ServiceLink. *Id*. at 10-11.

The record contains no evidence of any harm to the sellers, buyers, or lender attributable to Paplauskas' status as a non-attorney. Report at 34. Nevertheless, an attorney for the sellers complained to the Unauthorized Practice of Law Committee that Paplauskas may have engaged in the unauthorized practice of law by conducting the closing and explaining the closing documents.

The Committee held hearings. A three-member majority of the Committee found that the charges in the complaint were sustained by a preponderance of the evidence. The majority recommended that no civil or criminal proceedings be initiated against Paplauskas, but that "the Court make a pronouncement that conducting a real estate closing constitutes the practice of law and must be handled exclusively by an attorney in this state." Report at 29. Two Committee members dissented, arguing that neither the facts—because Paplauskas did not give legal advice—nor precedent, nor Rhode Island statutes—that permit title insurers and financial institutions to conduct closings—support a finding that Paplauskas engaged in the unauthorized practice of law.

## QUESTIONS RAISED

1. Whether Respondent engaged in the unauthorized practice of law.
2. Whether conducting a real estate closing constitutes the practice of law.

## STANDARD OF REVIEW

This is an original proceeding in which the basic facts are undisputed. This Court decides legal questions de novo.

## ARGUMENT

For more than two decades at least, the Department and the Commission consistently have advocated to the states that the public welfare is best served by permitting competition between attorneys and non-attorneys for the provision of real estate settlement services except where specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers. Competition generally protects consumers, and overbroad interpretations of "the practice of law" should not be used to confer a monopoly on attorneys unless restrictions on competition are justified by a proven need and are narrowly drawn to minimize their anticompetitive impact. The federal agencies' submissions to the Legislature in 2002-2003 (attached hereto) embodied those views. Contrary to the Committee majority's remark that those submissions reflect "the tenure of bygone federal administrations," Report at 26, the agencies maintain the same positions today.

## I. Banning Non-Attorneys From Conducting Real Estate Closings Will Harm Consumers.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress[.]" *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

Consistent with this principle, the federal antitrust agencies' 2002-2003 submissions to the Legislature explain that allowing non-lawyers to provide closing services has the potential to increase competition and that competition consistently has resulted in lower prices, better products, and more choices in how and where closing services are provided. The submissions document findings that the use of non-attorney closers has reduced consumer costs in other states. Those submissions further explain that consumers can be protected by measures that restrain competition far less than bans on non-attorney closing services.[1]

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[1] The federal agencies' submissions were not limited to the conduct of closings, but also urged non-attorney competition in closing-related services like title searches, clearing exceptions to title, and disbursing funds. The agencies' views therefore may apply to related cases pending in this Court. *In re Daniel S. Balkun and Balkun Title & Closing, Inc.*, No. 2018-162-M.P.; *In re SouthCoast Title and Escrow, Inc.*, No. 2018-163-M.P.

The Committee cites no evidence that non-attorney closings have harmed consumers in Rhode Island—either in this case or in any other identifiable Rhode Island transaction involving a non-attorney closing. The Committee majority simply assumes that attorneys are necessary because a closing is an important function. The majority seems to derive this assumption from *Real Estate Bar Ass'n for Massachusetts v. Nat'l Real Estate Info. Servs.*, 946 N.E.2d 665 (Mass. 2011). But that decision emphasized that each discrete real estate activity must be examined individually to determine if it constitutes the practice of law, and conducting closings was not one of the activities at issue. A more apposite case is *Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105 (Ky. 2003). There, the Supreme Court of Kentucky vacated a state bar opinion that non-attorney closings should be considered the practice of law, finding that the bar opinion was based on "several faulty assumptions," and concluded that, while "legal issues [no doubt] arise at *some* real estate closings[,] . . . closing[s] are not a setting so fraught with the potential for unauthorized practice that [a] blanket prohibition against lay closing agents is warranted as a prophylactic measure." *Id*. at 127-28 (emphasis added). As here, there was no showing of any harm to consumers from allowing non-attorneys to conduct closings. *Id*. at 125.

## II. Non-Attorney Real Estate Closings Are Common Practice in Rhode Island and Supported by Relevant Statutes.

The Committee recognizes, moreover, that notary closings "are evidently a common practice throughout this state" (Report at 16; *see also id*. at 40), and that the Legislature has "purport[ed] to authorize corporations or non-attorneys to provide certain services, such as closings, which might be considered the practice of law." Report at 20. For example, the Rhode Island Title Insurers Act, G.L. 1956 § 27-2.6-3(18)(ii)(c), defines "[t]itle insurance business" to include the "[h]andling of escrows, settlements or closings." *See also id*. subsection (17), which defines "[t]itle insurance agent" as a person who "[h]andles escrows, settlements or closings," and Report at 41 & n.30 (statute regulating financial institutions allows them to "conduct[] loan closings" under supervision of a title agency or title insurance company *instead of* an attorney).

Title insurers, lenders, and loan brokers are subject to licensing requirements and are regulated in Rhode Island, which affords protection to consumers who seek their services for closings. *See* Report at 43-44. The Department and the Commission therefore do not advocate a completely unfettered market in which anyone can provide closing services, but rather maintaining a status quo that already features substantial consumer protections.

Although we recognize that this Court has the final say in defining the practice of law in Rhode Island, the Court has long accepted that the Legislature

has "permitted a great many services that would have come within the definition of the practice of law to be performed" by non-attorneys. *Unauthorized Practice of Law Comm. v. Dept. of Workers' Comp.*, 543 A.2d 662, 664 (R.I. 1988). And in determining whether a particular services constitutes the practice of law, this Court has "deferr[ed] to the Legislature's assessment of the statutes' necessity." *In Re Town of Little Compton*, 37 A.3d 85, 93 (R.I. 2012). The closing-related legislation cited above, together with the Legislature's rejection of bills that would have required attorneys to represent buyers and borrowers throughout the closing process, reflects the Legislature's policy judgment that the public interest is best served by not restricting closing services to attorneys.

## CONCLUSION

Banning non-attorney real estate closings will increase consumer costs and reduce consumer choice. There is no demonstrated harm from the apparently common historic practice of non-attorney closings in Rhode Island, and less drastic measures than banning non-attorney closings are available if additional consumer protection is required. The Court therefore should reject the Committee's recommendation.

Respectfully submitted.

September 17, 2018

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## PROOF OF SERVICE

I hereby certify that on September 17, 2018, I filed an original plus nine (9) copies of the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Respondent with the Clerk of the Supreme Court of Rhode Island. I also sent one copy of the foregoing brief to each of the following by United States first class mail:

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