UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

PUBLIC CITIZEN, INC., *et al.*, Plaintiffs, v. LOUISIANA ATTORNEY DISCIPLINARY BOARD, *et al.*, Defendants.	Civil Action No. 08-4451 SEC. F (JUDGE FELDMAN) MAG. 2 (MAG. JUDGE WILKINSON)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

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On October 1, 2009, sweeping new restrictions on the content of lawyer advertisements will go into effect in Louisiana. The restrictions will limit competition in the legal services market by prohibiting lawyers from communicating truthful and relevant information to the public. The new rules will also restrict a wide range of common advertising content, such as testimonials, use of actors, dramatizations, slogans, and other stock advertising techniques that are essential to effective advertising and that have no reasonable possibility of misleading consumers. Despite longstanding Supreme Court precedent holding that the First Amendment prohibits state restrictions on commercial speech absent evidence that the restrictions are necessary and effective to further a substantial state interest, *see, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Louisiana Supreme Court adopted the amendments without even articulating the interests that the rules are supposed to serve, much less relying on evidence that the rules are necessary and effective to serve those interests. Indeed, the Court adopted the rules more than a year after a federal district court declared unconstitutional New York's recent advertising amendments—on which many of Louisiana's rules are based—because the evidence in support of the amendments was "notably lacking." *Alexander v. Cahill*, No. 07-cv-117, 2007 WL 2120024, at *6, *8 (N.D.N.Y. July 23, 2007), *appeal argued*, No. 07-3677 (2d Cir. Jan. 22, 2009). For these reasons, plaintiffs are entitled to summary judgment on the ground that the rules violate the First and Fourteenth Amendments to the United States Constitution.

BACKGROUND

I. Louisiana's Restrictions on Lawyer Advertising

Lawyer advertising in Louisiana is governed by Part 7 of the Louisiana Rules of Professional Conduct. Prior to the October 1, 2009, effective date of the amendments challenged here, the rules prohibit lawyer advertising if it is "false, misleading or deceptive." La. Rules of Prof'l Conduct R. 7.1(a). Consistent with the American Bar Association's Model Rules of

Professional Conduct, the rules do not impose specific restrictions on the types of factual information or stylistic elements that lawyers may include in their ads, except that lawyers are required to attach disclosures or disclaimers in some situations, including when an advertisement contains "an endorsement by a celebrity or public figure" or the "visual portrayal of a client by a nonclient." *Id.* R. 7.1(a)(vi), (vii); *see* ABA Model Rules of Prof'l Conduct R. 7.1. The rules do not specify whether disclosures and disclaimers should be written, spoken, or both. Nor do they require specific fonts or type sizes.

The process that gave rise to the amendments at issue here began in 2006, when the Louisiana legislature adopted a concurrent resolution stating that "the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived." Sen. Con. Res. 113, 2006 Leg., 32nd Reg. Sess. (La. 2006) ("Concurrent Resolution") (Exh. 1). The resolution noted that the legislature was considering passage of Senate Bill No. 617, which would establish a committee "to address ethical concerns posed by lawyer advertising and to present a more positive message to the citizens of this state." *Id.* To avoid legislative intervention, the resolution called on the Chief Justice of the Louisiana Supreme Court to establish a committee to study lawyer advertising and to recommend changes to the advertising rules by March 1, 2007. *Id.*

In response to the resolution, the Louisiana Supreme Court created the Committee to Study Attorney Advertising ("Supreme Court Committee"). Members of the committee included Justice Catherine D. Kimball, who chaired the committee, Senator Rob Marionneaux, the sponsor of the joint resolution, Rick Stanley, Chair of the LSBA's Rules of Professional Conduct Committee ("LSBA Committee"), and defendant Charles B. Plattsmier. Several other members were personal-injury lawyers in competition with lawyers, including plaintiff Bart, who advertise

on television. Statement of Uncontested Facts ¶ 5.

Senator Marionneaux opened the committee's first meeting on September 15, 2006, by stating his view that billboards and other forms of attorney advertising "appear to denigrate the image of the profession." Minutes, Supreme Court Comm., Sept. 15, 2006 (Exh. 26), at 1. The committee then reviewed and discussed Florida's lawyer advertising rules, which are among the most restrictive in the country, and similar rules that had recently been proposed in New York. *Id.* Although the committee considered developing a survey "to gauge the public's present views on attorney advertising," it ultimately agreed to obtain a copy of Florida's survey evidence rather than conducting a survey of its own. *Id.* at 3. The committee then decided to defer further action while the LSBA Committee drafted proposed amendments to the rules. *Id.*

Between September 21, 2006 and October 6, 2006, the LSBA Committee met four times, assembling a series of proposed amendments taken mostly verbatim from the Florida and New York rules. *Id.* at 1-4; Minutes, LSBA Comm., Sept. 26, 2006 (Exh. 3), at 1, 4. The committee proposed new prohibitions on "portrayal of a client by a nonclient," "portrayal of a judge," "reenactment of any events or scenes or pictures that are not actual or authentic," use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter," and use of "any spokesperson's voice or image that is recognizable to the public in the community where the advertisement appears."[1] The committee also voted to recommend rules against advertisements that contain a "reference or testimonial to past successes or results obtained," or that "promise[] results."[2] Finally, the committee's proposal provided that "a non-lawyer

[1] *Compare* LSBA Comm., Proposed Amendments, Oct. 24, 2006 ("First LSBA Comm. Proposal") (Exh. 4), R. 7.2(b)(1)(F), (G), (J); *id.* R. 7.5(b)(1)(B), *with* N.Y. State Unified Court Sys., Proposed Amendments to Rules Governing Lawyer Advertising, June 2006 (Exh. 6), § 1200.6(d)(3), (4), (6), (8).

[2] *Compare* First LSBA Comm. Proposal, *supra*, R. 7.2(b)(1)(B), (E), *with* Fla. Rules of

spokesperson speaking on behalf of the lawyer or law firm" may be included in television or radio advertising only "as long as the spokesperson's voice or image is not recognizable to the public in the community where the advertisement appears" and the spokesperson "provide[s] a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer."[3]

After the LSBA Committee's proposal was complete, the Supreme Court Committee met again on October 23, 2006, to consider the proposed amendments. Minutes, Supreme Court Comm., Oct. 23, 2006 (Exh. 27). Once again, the only concern of the committee appeared to be ads that it considered to be undignified. *Id.* at 2-3. One member expressed concern that the LSBA Committee had rejected a proposed amendment that would have required lawyer advertisements to "provide only useful, factual information presented in a nonsensational manner." *Id.* at 2. In response, Larry Shea, a member of the LSBA Committee, explained that the provision had been removed because "some felt the addition of the sentence may capture protected speech," but that the committee had "tried in other places to pick up the intent of the problematic language." *Id.* The Supreme Court Committee then returned to a discussion of the need for evidence in support of the rules, noting that the Florida survey had "not [been] helpful, as only one or two questions were germane." *Id.* at 3. Nevertheless, the committee voted to endorse the LSBA Committee's proposal and to "defer a final decision on conducting a survey" because the LSBA Committee was already planning public hearings on the proposed rules, at which "a sufficient record may be developed to obviate the need for a survey." *Id.*

The LSBA Committee held four hearings on the proposed rules between November 2,

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Prof'l Conduct R. 4-7.2(c)(1)(F), (J).

[3] *Compare* First LSBA Comm. Proposal, *supra*, R. 7.5(b)(2)(C), *with* Fla. Rules of Prof'l Conduct R. 4-7.5(b)(2)(B).

2006 and November 16, 2006. Although the committee called them "public hearings," the hearings were not advertised to the general public and amounted to no more than question-and-answer sessions for lawyers who would be affected by the amended rules. *See* Tr. of Public Hearing, Lafayette, Nov. 8, 2006, at 2-3, 103-04 (Exh. 9); Statement of Undisputed Facts ¶¶ 13-14. No testimony or other evidence was developed that the advertising content targeted by the amendments was harmful to consumers or that prohibiting them was necessary to serve any articulable state interest.[4] In addition to the hearings, the LSBA Committee solicited written comments about the amendments. *See* LSBA Comm., Comments to the Rules of Prof'l Conduct (Exh. 12). The lawyers submitting comments in support of the amendments generally stated their belief that lawyer advertising is unprofessional or in poor taste, but did not submit any evidence backing up this belief, demonstrating consumer confusion, or showing any other legitimate need for the rules. *See id.* The majority of commenters objected to the rules as unnecessary, overbroad, or unconstitutional. *See id.* Among these, comments by the staff of the Federal Trade Commission advised that the rules may hurt consumers by inhibiting competition, frustrating consumer choice, and ultimately increasing prices while decreasing quality of service. *See* Letter from FTC Staff to Richard Lemmler (Mar. 14, 2007) (Exh. 13), at 2.[5]

Following the hearings and receipt of written comments, the LSBA Committee adopted only one material change relevant to the rules challenged here: the addition of a new prohibition

[4] See *generally* Tr. of Public Hearing, Baton Rouge, Nov. 2, 2006 (Exh. 8); Tr. of Public Hearing, New Orleans, Nov. 9, 2006 (Exh. 10); Tr. of Public Hearing, Shreveport, Nov. 16, 2006 (Exh. 11).

[5] Plaintiffs Public Citizen, Inc., Morris Bart, and William N. Gee, III, also submitted comments opposing the amendments on the ground that they served no useful purpose and would constitute an unconstitutional restriction on commercial speech. *See* Public Citizen Litigation Group, Comments on the Proposed Rules, June 5, 2007 (Exh. 16); Letter from Morris Bart to Richard Lemmler (Nov. 22, 2006) (Exh. 33); Letter from William N. Gee, III, to Richard Lemmler (Mar. 2, 2007) (Exh. 34).

on "portrayal of a . . . jury." LSBA Comm., Proposed Amendments, Mar. 21, 2007 (Exh. 5), R. 7.2(c)(1)(J). The committee did not explain the basis for this prohibition, which has never been adopted by any other state. The House of Delegates voted on June 7, 2007, to accept the LSBA Committee's proposal and recommend that the Supreme Court incorporate the proposed rules into the Rules of Professional Conduct. *See* Minutes, LSBA House of Delegates, June 7, 2007 ("House of Delegates Minutes") (Exh. 18). In the process, the House of Delegates rejected amendments to the proposal that, because of First Amendment concerns, would have deleted or narrowed many of the restrictions challenged here. *Id.* at 6-8; Resolution of Elizabeth A. Alston (Exh. 29).

On July 3, 2008, the Louisiana Supreme Court adopted the rules recommended by the LSBA, characterizing them in a press release as "comprehensive amendments" to the advertising rules. *See* Press Release, Louisiana Supreme Court (July 3, 2008) ("First Press Release") (Exh. 19). The Court's only explanation of the purpose of the amendments was the "need to improve the existing rules in order to protect the public from unethical forms of lawyer advertising." *Id.* No surveys or other studies of the need for the rules had been performed. Moreover, although the Court did not publicly acknowledge it, all the New York rules on which its amendments were based had either been abandoned or declared unconstitutional on the ground that they were not supported by any evidence. *See* N.Y. State Unified Court Sys., Amendments to Rules Governing Lawyer Advertising, Jan. 2007 (Exh. 7), § 1200.6; *Alexander*, 2007 WL 2120024.

II. This Lawsuit and Louisiana's Response

Before the original December 1, 2008, effective date of the rules, plaintiffs filed suit and moved for a preliminary injunction against enforcement. In response, the Louisiana Supreme Court postponed the rules' effective date until April 1, 2009. While the amendments were on hold, the LSBA commissioned a survey on the attitudes of consumers and lawyers toward

lawyers and lawyer advertising. *See* SCI Research, *Research Findings* (Exh. 37). The results showed a wide divergence between the general public and lawyers in their opinions about lawyer advertising. By at least 2-1 margins, public respondents said that they did not think lawyers who used testimonials, portrayals of judges and juries, celebrity endorsements, or accident scenes in their advertising had "more influence on Louisiana courts than other lawyers." *Id.* at 19, 20, 21. Members of the Louisiana Bar, however, felt differently: 72% of Bar members agreed that client testimonials "imply that the endorsed attorney can obtain a positive result without regard to facts or law," while 62% said the same regarding celebrities and 54% regarding accident scenes. *Id.* at 19, 21. Similarly, half of the Bar members responding to the survey stated that ads portraying a judge or jury "imply to the public that the lawyer advertised can assert more influence over judges or juries than other lawyers." *Id.* at 20. The survey did not ask any questions relevant to whether consumers believed ads to be misleading when they contained information about a lawyer's past results, non-celebrity spokespeople, depictions of scenes other than accidents, promises of results, or "nickname[s], moniker[s], motto[s] or trade name[s] that state[] or impl[y] an ability to obtain results in a matter."

After the survey was complete, the Louisiana Supreme Court on February 18, 2009, ordered that the effective date of the amendments be deferred until October 1, 2009, "to allow the LSBA and the Court to further study certain rules in light of the constitutional challenges that have been raised." Press Release, Louisiana Supreme Court (Feb. 18, 2009) ("Second Press Release") (Exh. 35). On March 11, 2009, the Louisiana Supreme Court asked the LSBA Committee to review several of the challenged rules. *See* LSBA Comm., *Findings and Recommendations of the LSBA Rules of Professional Conduct Committee*, April 15, 2009 ("Findings and Recommendations") (Exh. 38), at 1. The LSBA Committee reported back on

April 15, 2009, informing the Court that it "remained of the strong opinion" that the amendments were necessary and appropriate. *Id.* at 2. The committee asserted that the rules against testimonials and references to past results, promises of results, and portrayals of judges and juries target advertising that is "inherently misleading" and recommended that those rules not be modified. *Id.* at 6-8, 13-16. However, the committee recommended that the Court modify the rules against celebrity spokespeople, scenes, and actors playing clients to allow those devices when accompanied by a disclaimer or disclosure. *Id.* at 8-13. The committee also recommended that the Court require the disclaimer or disclosure to be both "spoken aloud" and written in "a print size at least as large as the largest print size used in the advertisement." *Id.* at 11-12.

On June 4, 2009, the Louisiana Supreme Court adopted the LSBA Committee's recommendations, leaving the October 1, 2009, effective date in place. Press Release, Louisiana Supreme Court (June 4, 2009) ("Third Press Release") (Exh. 36).[6]

III. Plaintiffs

Plaintiff Public Citizen, Inc. is a national, nonprofit public interest organization with more than 60,000 members nationwide, including approximately 250 in Louisiana. Statement of Uncontested Facts ¶ 27. The state's restrictions on lawyer advertising injure Public Citizen's Louisiana members, who are consumers of legal services, by preventing them from receiving information that they have an interest in receiving. *Id.*

Plaintiff Morris Bart is a practicing lawyer in New Orleans and owner of the firm Morris Bart, L.L.C. *Id.* ¶¶ 22-24. Plaintiff William Gee, III, is a lawyer practicing in Lafayette and owner of the law offices of William N. Gee, III, Ltd. *Id.* ¶¶ 25-26. Both Bart and Gee advertise their services to the public through broadcast media, print advertisements, and the Internet in

[6] All references to the amended rules are to the final version of the amendments adopted by the Louisiana Supreme Court on July 3, 2007, as amended on June 4, 2009. A copy of these rules is included as an attachment to this memorandum.

ways that will be prohibited after the advertising amendments become effective on October 1, 2009. *Id.* ¶¶ 29-38. Absent a declaration that the amended rules are unconstitutional and an injunction, plaintiffs will be forced to abandon these ads and develop new ones at great expense, losing in the process the public recognition that their current advertising campaigns have developed over time. *Id.* ¶ 34.

IV. Defendants

Defendants are the Louisiana Attorney Disciplinary Board ("LADB"), the state agency responsible for investigating, prosecuting, and adjudicating violations of the advertising provisions of the Louisiana Rules of Professional Conduct, as well as the board's chair and chief disciplinary counsel (in their official capacities), who are primarily responsible for supervising and carrying out the board's disciplinary functions. *See* Rules of the La. Supreme Court R. XIX, sections 2, 4. Plaintiffs seek summary judgment and a permanent injunction prohibiting defendants from enforcing the challenged rules.

ARGUMENT

"[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007). Thus, "on summary judgment and at trial, the government bears the burden of justifying the challenged enactment by introducing sufficient evidence." *J & B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 373 (5th Cir. 1998). Here, the state cannot meet its burden because it has no valid interest in regulating the sorts of truthful, non-misleading information about legal services that are the subject of the disciplinary rules. Indeed, some of the rules on which Louisiana based its amendments have already been declared unconstitutional on the ground that the evidence supporting them is "notably lacking." *Alexander*, 2007 WL 2120024, at *6, *8. Moreover, the rules are too vague to give adequate guidance to lawyers and disciplinary authorities and will inevitably lead to

discriminatory application and a broad chill on commercial speech. For these reasons, the Court should grant summary judgment to the plaintiffs.

I. The Challenged Rules Unconstitutionally Restrict the Content of Commercial Speech.

Lawyer advertising is a form of speech protected by the First Amendment. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). As the Supreme Court has explained, society has a strong interest in freedom of commercial speech: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

To justify a restriction on commercial speech, a state must demonstrate—with actual evidence—"that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Unless the advertising restricted is provably false or misleading, the state must satisfy the three-part test first set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). "First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (internal quotation omitted). The Supreme Court has described the state's burden under *Central Hudson* as a "heavy" one. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996). The Court has repeatedly subjected state justifications for blanket restrictions on particular forms of lawyer advertising to rigorous and skeptical scrutiny

and has, for the most part, rejected those claims. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136 (1994); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re RMJ*, 455 U.S. 191 (1982); *Bates*, 433 U.S. 350.

Louisiana cannot satisfy its heavy burden under the *Central Hudson* test. The state adopted the rules at issue not to protect consumers from false and misleading advertisements, but to regulate speech that it considers to be undignified or in bad taste—an interest the Supreme Court has held insufficient to justify restrictions on commercial speech. *Zauderer*, 471 U.S. at 647-48. Moreover, the Louisiana Supreme Court adopted its amendments without the support of any evidence that they are either necessary or effective to satisfy any other state interest. Finally, the rules are vastly overbroad, prohibiting all use of certain forms of advertising content even though this content is regularly used in ways that are not misleading or even undignified, and even though the state did not consider whether its purposes could be achieved in a way that imposes a lesser burden on speech.

A. None of the Amendments Is Supported by a Legitimate State Interest.

"Unlike rational-basis review, the *Central Hudson* standard does not permit [a court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768. Therefore, only the purpose on which the state actually relied in support of its rules is relevant here. *See Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 410 (5th Cir. 2007) (holding that, as a starting point, the state "must at least articulate regulatory objectives to be served"). Louisiana, however, adopted the rules at issue here without even articulating the purpose for the rules or the problem they were intended to address. Neither the LSBA Committee nor the House of Delegates made any statements about the purpose motivating their approval of the amendments. *See* Resolution, LSBA Comm., Mar. 23, 2007 ("LSBA Comm. Resolution")

(Exh. 17). Nor did the Louisiana Supreme Court, which adopted the LSBA's recommendation, explain why it had adopted the rules. *See* First Press Release, *supra* p. 8. The only public indication of the Court's purpose was a press release stating that the Court adopted the amendments "to improve the existing rules in order to protect the public from unethical forms of lawyer advertising." *Id.* That explanation, however, is circular. The Court did not explain why the prohibited forms of advertising are "unethical," how they harm consumers, or why the current rules are insufficient.

Only after this lawsuit was filed did the state set out to articulate any reasons for the amendments and to seek out evidence supporting those reasons. The state now appears to put forward two general types of justification. First, it asserts that certain forms of advertising harm the reputation of the legal profession. *See* Third Press Release, *supra* p. 8. Second, the state asserts that certain forms of advertising are "potentially" misleading and thus subject to restriction. *Id.* The most notable thing about the state's reliance on these claimed interests is that the U.S. Supreme Court has already rejected both of them as insufficient to support restrictions on commercial speech.

1. Preserving Lawyer Dignity Is Not a Valid Basis for Restricting Commercial Speech.

As the Louisiana Supreme Court has now made clear, the central purpose behind the amendments is the preservation of the dignity of lawyers and the legal profession. *Id.* In its press release announcing further amendments to the rules, the Court noted that the amendments were "triggered" by the legislature's 2006 concurrent resolution on lawyer advertising, which called on the Louisiana Supreme Court to require lawyers to "present a more positive message to the citizens of this state." *See* Third Press Release, *supra* p. 8; Concurrent Resolution, *supra* p. 2. That lawyer dignity was the central purpose behind the amendments is confirmed by the

procedural history of the Supreme Court Committee. Committee members expressed concern about ads that "appear to denigrate the image of the profession" and that lawyers "found to be . . . offensive." Minutes, Supreme Court Comm., Sept. 15, 2006, *supra*, at 1; Minutes, Supreme Court Comm., Oct. 23, 2006, *supra*, at 2-3. Moreover, after enacting the rules, the Court publicly explained that the amendments were intended to "preserve the integrity of the legal profession" and "prevent erosion of the public's confidence and trust in the judicial system." Third Press Release, *supra*, at 8.

Lawyer dignity, however, is not a sufficient basis to justify the restriction of commercial speech. The state in *Bates* advanced this same justification for its restrictions on lawyer advertising, arguing that such advertising would hurt the profession by "undermin[ing] the attorney's sense of dignity and self-worth." 433 U.S. at 368. The Court rejected the state's concern as a basis for restricting speech, finding the "postulated connection between advertising and the erosion of true professionalism to be severely strained." *Id.* Since then, the Court has reaffirmed the principle that lawyers have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the bar. *Zauderer*, 471 U.S. at 647-48. Here, the state's prohibition on advertising in an attempt to change the way the public "perceive[s]" lawyers and to "present a more positive message," Concurrent Resolution, *supra* p. 2, is no more than an effort to manipulate public opinion by suppressing speech. No justification for speech restrictions is more offensive to the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

disagreeable.").[7]

2. A State May Not Ban Speech Because It Is "Potentially Misleading."

After plaintiffs filed suit and argued that protecting the dignity of lawyers was not a valid reason to restrict speech, the state articulated a second reason in support of its rules: the prevention of "potentially misleading" speech. *See* Third Press Release, *supra* p. 8 (citing the "need to . . . protect the public from . . . potentially misleading forms of lawyer advertising"). Once again, however, the state's asserted interest flies in the face of well-established Supreme Court precedent. The Court has repeatedly held that the *potential* for misuse alone does not justify restricting whole categories of commercial speech. *Zauderer*, 471 U.S. at 644-47. Indeed, in almost every constitutional challenge to lawyer advertising rules, defendants have argued that the rules are intended to prohibit potentially misleading ads, and the Supreme Court has consistently rejected that argument.[8]

In *Zauderer*, for example, the state enacted broad prophylactic rules against the use of illustrations in advertisements, claiming that such illustrations have the potential to mislead the

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[7] *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (internal quotation omitted); *RMJ*, 455 U.S. at 205-06 (holding unconstitutional a prohibition on commercial speech that was "at least [in] bad taste," but where the state had no evidence it harmed consumers); *Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) ("[T]he Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive, or undignified.").

[8] *See also Ibanez*, 512 U.S. at 146 (holding that courts "cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden"); *Peel*, 496 U.S. at 111 (plurality opinion) ("[C]oncern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment"); *Shapero*, 486 U.S. at 476 (holding that the potential "for isolated abuses or mistakes does not justify a total ban"); *RMJ*, 455 U.S. at 203 (holding that a state "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive").

uninformed public. *Id.* at 644-45. The Supreme Court rejected this justification, holding that a state cannot ban commercial speech simply because it can be abused in individual cases. *Id.* As the Court noted, if states could prohibit advertising practices that are potentially misleading, there would be no limit on their power to restrain commercial speech. *Id.* at 648-49. Illustrations, after all, are just a non-verbal method of communicating ideas, and thus, like all methods of communication, are inevitably subject to occasional misuse. Even the English language—a *verbal* method of communication—is frequently used to communicate ideas that are false or misleading, but that does not justify banning the use of English in advertising. Thus, even if there were a risk that the devices prohibited by the amendments at issue here could be misused—and there is no reason to believe the risk as to this content is any worse than the risk as to any other kind of advertisement—the state still could not prohibit them as long as there are situations where lawyers could use them in a non-misleading manner.

Several of the survey questions on which the LSBA Committee relied in support of the rules are invalid for this reason. In support of the rule against statements of past results, the survey asked respondents whether they believe client testimonials to be "*completely* truthful," and in support of the rule against actors playing clients, the survey asked whether respondents can "*always* tell if a testimonial in a lawyer advertisement is made by a client and not by an actor." *Research Findings*, *supra*, at 18, 19. Even assuming these questions were otherwise relevant, they set too low of a hurdle for the state to overcome in a First Amendment case. No advertising device is "completely" and "always" truthful. If anything, the unwillingness of consumers always to believe testimonials shows that they are appropriately skeptical about advertising and, thus, that they are *less* likely to be misled. Indeed, in the very act of agreeing that lawyer ads are potentially misleading, consumers are making clear that they themselves are

not likely to be misled.

B. The State Has No Evidence that Any of the Amendments Are Necessary or Effective.

Even if the state could show that its interests were legitimate, it would still have to prove that the specific rules it chose to adopt would be effective at furthering those interests. *See Edenfield*, 507 U.S. at 770 ("That the [state's] asserted interests are substantial in the abstract does not mean . . . that its blanket prohibition . . . serves them."). Here, the state cannot meet that burden.

1. The Prohibitions on Testimonials and References to Past Results (Amended Rule 7.2(c)(1)(D))

Amended Rule 7.2(c)(1)(D) prohibits advertisements that "contain[] a reference or testimonial to past successes or results obtained" except when the information is requested by a client. The LSBA Committee claimed that this rule was necessary to "protect[] the public from false, misleading and/or deceptive information." Findings and Recommendations, *supra*, at 6. The survey on which the LSBA Committee relied, however, asked no questions about past results and thus elicited no information about whether an attorney's truthful statements about the results of previous cases are misleading or otherwise harmful to consumers. *See Research Findings*, *supra*, at 6. Although the survey asked respondents about "[c]lient testimonials in lawyer advertisements," past results and client testimonials are not the same thing. Both Bart and Gee, like many other lawyers, include information about verdicts in past cases that is not presented in the form of a client testimonial. Statement of Uncontested Facts ¶ 29. Although there is no evidence about the public's reactions to such advertisements, they would nevertheless be prohibited by the rule.

As already explained, the state's survey questions show, at most, that testimonials are potentially misleading. But the state has no evidence, in the form of disciplinary records, studies,

surveys, or empirical research of any kind, suggesting that either past results or testimonials have ever been misused by lawyers in Louisiana. To the contrary, in response to suggestions that the advertising rules should be tightened, defendant Charles B. Plattsmier, who, as Chief Disciplinary Counsel is primarily responsible for enforcing the rules, wrote that only an "extraordinarily small proportion" of the complaints to his office involved lawyer advertising, and that even the few complaints he had received were "largely from other attorneys." Letter from Charles B. Plattsmier to Harvey J. Lewis (Mar. 1, 2000) (Exh. 30), at 1-2. Indeed, Plattsmier stated that "*no* advertising has been submitted to this office which, based upon its content, was found to be misleading." *Id.* at 2. (emphasis added). Thus, although Louisiana has allowed lawyers to use testimonials and references to past results for many years, as forty-eight other states continue to do, there is no evidence that consumers have ever been misled.[9]

The state may attempt to argue that past results are misleading because consumers will irrationally conclude that a lawyer's success in past cases will necessarily lead to the same result in the future. Even setting aside the fact that the state has no evidence to support this contention, it would still be an insufficient justification on which to base a restriction on commercial speech. The Supreme Court has uniformly rejected state attempts to restrict advertising based on the "fear that people would make bad decisions if given truthful information," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002), and has refused to accept the assumption that "the public is not sophisticated enough to realize the limitations of advertising, and . . . is better kept

[9] The ABA's model rules do not restrict references to past results. ABA Model Rules of Prof'l Conduct R. 7.1. Six states allow such references if accompanied by a disclaimer. *See* Mo. Rules of Prof'l Conduct R. 4-7.1(c); N.M. Rules of Prof'l Conduct R. 16-701(A)(4); N.Y. Code of Prof'l Resp. DR 2-101(e); S.D. Rules of Prof'l Conduct R. 7.1(c)(4); Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(2); Va. Rules of Prof'l Conduct R. 7.2(a)(3). Only Florida prohibits them completely. Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(F).

in ignorance than trusted with correct but incomplete information." *Bates*, 433 U.S. at 375.[10]

Louisiana's largest and most respected law firms routinely advertise their past results, yet nobody would accuse these firms of engaging in unethical or misleading advertising. Jones Walker, for example, distributes an advertising brochure titled "Solutions," containing "success stories" that "describe Jones Walker's role in finding winning solutions for [its] clients facing difficult environmental issues." Brochure, Jones Walker Envt'l & Toxic Tort Practice Group at 1, 2, *available at* http://www.joneswalker.com/assets/attachments/environmental_ brochure_ version_20.pdf ("Jones Walker Brochure") (Exh. 22). The brochure features cases where Jones Walker prevailed in court or reached successful settlements, including specific cases where it cleared the way for property development, obtained dismissal of a criminal indictment, and, in a class action, "substantially reduce[d] the potential class size . . . saving the client untold costs in defending numerous dubious actions." *Id.* at 3, 4, 9, 11. Similarly, Stone Pigman ran an advertisement in *Forbes* stating that the firm had won "precedent-setting court decisions involving class actions and federal removal jurisdiction." Advertisement, *Businesses Rely on Stone Pigman When Venturing South*, *available* at http://www.stonepigman.com/pdf/ SPadvertorial.pdf (Exh. 23). The ad specifically mentions a case where the firm "won for R.J. Reynolds a reversal of the trial court's order certifying a nationwide class of nicotine-addicted plaintiffs," and another case where it "won reversal in the appellate court" on behalf of pizza

[10] *See also 44 Liquormart*, 517 U.S. at 516 (Stevens, J., concurring) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *Va. State Bd. Board of Pharmacy*, 425 U.S. at 765 ("There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."); *Allstate Ins. Co.*, 495 F.3d at 167 ("Attempting to control the outcome of the consumer decisions . . . by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.").

company Papa John's. *Id.* It goes on to claim that the firm's lawyers have "compiled an equally impressive record of success in handling business transactions for their clients," listing specific examples of its successes in this area. *Id.* Though none of these statements is misleading, all would be prohibited by the amended rules.[11]

The prohibition on advertising these sorts of past results not only rests on an "underestimation of the public," *Bates*, 433 U.S. at 375, it prevents consumers from learning one of the facts most relevant to their choice of a lawyer. Most rational consumers would prefer to hire a lawyer who has experience in the area of law at issue and who has successfully litigated similar cases in the past. Under the state's prohibition on testimonials, however, a consumer would not be able to distinguish an advertisement by a lawyer who has never won a case and whose clients have consistently been disappointed by his performance from one by a lawyer who has successfully litigated dozens of cases and whose clients are satisfied with the quality of his work. In this way, the state deprives consumers of the ability to make a choice based on all the relevant information. *See Pruett*, 499 F.3d at 415 n.35 ("The benefits attending commercial speech flow not just to the speaker, for increased consumer knowledge about any product aids

[11] The amended rules do not prohibit posting past results on a lawyer's or firm's website. *See* Rule 7.9(b). Nevertheless, the nearly universal practice among large law firms of posting this information casts serious doubt on the state's assumption that the information is misleading. Jones Walker's site, for example, claims a "long track record of successfully protecting [its] clients' interests," asserting that it is "often able to persuade plaintiffs to dismiss lawsuits without payment" and has "successfully defended a broad spectrum of claims." http://www.joneswalker.com/practices-2.html; http://www.joneswalker.com/practices-22.html. In class actions, the firm claims to have "been successful in aggressively removing cases to federal court," "succeeded in limiting discovery to class issues only," and "ultimately defeated certification" in various cases. http://www.joneswalker.com/practices-2.html. Moreover, the state's counsel in this case, Phillip A. Wittmann, has an online biography listing cases where he obtained a "favorable settlement," won dismissal under Federal Rule of Civil Procedure 12, and successfully argued for class decertification on appeal. http://www.stonepigman.com/ attorneys/phillip_a_wittmann.html. His biography further claims that one toxic-tort trial "resulted in several zero awards and generally favorable defense verdicts." *Id.* Indeed, defendant LADB's *own* website states that Board Chair Dennis W. Hennen served as counsel in a class action that settled for $85 million.

consumer choice and increases competition."); *Allstate Ins. Co.*, 495 F.3d at 167 (holding unconstitutional a statute prohibiting insurance companies from recommending auto shops in which they own an interest, and recognizing that "[c]onsumers benefit from more, rather than less, information") (internal quotation omitted).

2. The Prohibitions on Commonplace Advertising Content (Amended Rules 7.2(c)(1)(I), 7.2(c)(1)(J), and 7.5(b)(2)(C))

In addition to the prohibition on testimonials, the amendments target a variety of stock advertising devices that are pervasive in modern advertising and harmless to consumers. Amended Rule 7.2(c)(1)(I) restricts the depiction of "any events or scenes or pictures that are not actual or authentic," a provision that appears to be targeted at fictional vignettes and dramatizations, such as a generic car accident scene to illustrate that a firm does accident cases. Rule 7.2(c)(1)(I) also targets the use of actors by prohibiting advertisements that "include[] a portrayal of a client by a non-client," while Rule 7.2(c)(1)(J) prohibits advertisements that "include[] the portrayal of a judge or a jury." Originally, the amendments imposed blanket bans on these advertising techniques, but, after this case was filed, the Louisiana Supreme Court further amended the rules to allow scenes and portrayal of clients when accompanied by a "disclaimer." *See* Findings and Recommendations, *supra* at 8-13. The Court also deleted the new prohibition on celebrity spokespeople, instead requiring any advertisements that includes a "non-lawyer spokesperson speaking on behalf of the lawyer or law firm" to "identify[] the spokesperson as a spokesperson, disclos[e] that the spokesperson is not a lawyer and disclos[e] that the spokesperson is being paid to be a spokesperson, if paid." *Id.* at 17-19. Rule 7.2(c)(10) requires that these disclaimers—and any other disclaimers required by the rules—be both stated verbally and written in a font "at least as large as the largest print size used in the advertisement or unsolicited written communication." The Court, however, maintained its blanket ban on

portrayals of judges and juries, adopting the LSBA's unexplained conclusion that "a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public." *Id.* at 13.

The state's conversion of the rules from blanket prohibitions to disclosure and disclaimer requirements does not relieve the state of its burden under *Central Hudson*. "Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000). Thus, the Supreme Court in *Ibanez* struck down a disclaimer requirement where the state failed to prove any real risk to consumers. 512 U.S. 136. There, the Florida Board of Accountancy reprimanded a Florida lawyer for truthfully stating in her yellow pages listing, on her business card, and on her stationery that she was a Certified Financial Planner ("CFP"). *Id.* at 138. Like the state here, Florida argued in *Ibanez* that the commercial speech was "potentially misleading" and therefore that the state could require her to include a clarification in the form of a disclaimer. *Id.* at 146. Specifically, the state required the lawyer to include a disclaimer "in the immediate proximity" of the CFP designation, stating "that the recognizing agency is not affiliated with or sanctioned by the state or federal government" and setting out the "recognizing agency's requirements for recognition, including, but not limited to, educatio[n], experience[,] and testing." *Id.*

Ibanez left open the possibility that a disclaimer might "in other situations or on a different record . . . serve as an appropriately tailored check against deception or confusion." *Id.* Given the state's "failure . . . to point to any harm that is potentially real, not purely hypothetical," however, the Court held the rule to be an "unduly burdensome disclosure requirement[] that offend[ed] the First Amendment." *Id.* (internal quotation omitted). As the Court noted, the "detail required in the disclaimer . . . effectively rule[d] out . . . . the designation

on a business card or letterhead, or in a yellow pages listing." *Id.* at 146-47.

Similarly, the Eleventh Circuit in *Tillman v. Miller*, held unconstitutional a law that required any television advertisement soliciting clients in workers' compensation cases to include a notice about the criminal penalties for filing a fraudulent claim, which the law required to be in boldface 36-point type and remain on the screen for at least five seconds. 133 F.3d 1402, 1403 & n.1 (11th Cir. 1998). The court first noted that the state had failed to present evidence that the lawyer's ads were misleading without the disclaimer or that the law served any other legitimate state purpose. *Id.* at 1403. The court also noted that the burden was "not a trifling one," given that the plaintiff's ads lasted thirty seconds and the "state wants to share five . . . of them for its general education message." *Id.* at 1404 n.4. The court concluded that the state was "not justified in placing, on a television advertiser, the burden of the cost of educating the public about the criminal penalties for fraudulent claims." *Id.* at 1403-04.

Like *Ibanez* and *Tillman*, Louisiana's disclosure requirement imposes an unreasonable burden on plaintiffs' speech. Because advertisements typically include a law firm's name or slogan in large text as an attention-getting device, the rules at issue here will make the required disclaimers unreasonably and prohibitively large. Statement of Uncontested Facts ¶ 39. Indeed, the enormous type size required by Louisiana's disclaimer rule is far more extreme than the lawyer advertising requirements of any other state. Several states, for example, require simply that disclosures be "conspicuous," Missouri Rule 4-7.1(h), or "clearly legible or audible," Alabama Rule 7.2(e). One state requires a disclaimer to be in "9-point or larger type." Iowa Rule 32:7.3(d). Others set the size based on the type size of some other text in the advertisement, such as the lawyer's phone number, Nevada Rule 7.3(b) & (c), or "the *smallest* type size appearing in the advertisement." Wyoming Rule 7.2(g) (emphasis added). But no other state requires

disclaimers to be the same size as the largest headline in the advertisement. Requiring lawyers to use disclaimers of that size will force them to create advertisements that are ugly and ineffective and will reduce the amount of useful information that the ads can convey to consumers. Statement of Uncontested Facts ¶ 39. It will also "effectively rule out" many advertisements, including relatively small ads where space is at a premium. *Ibanez*, 512 U.S. at 146-47. Louisiana has no evidence that all the other states have been unable to protect their consumers without imposing such burdensome restrictions on speech.

Not only does Louisiana impose the most onerous written disclaimer in the country, it also requires an additional *verbal* disclaimer. This additional, unnecessary disclaimer will substantially cut into the time available during short television and radio ads and will make it prohibitively difficult or impossible to run five- and ten-second broadcast ads. *Id.* ¶ 36. The rule is based on a similar verbal disclosure requirement in Florida that applies to use of spokespeople. The Florida Bar, however, recently petitioned the Florida Supreme Court to revoke the requirement, writing that it is "overly burdensome to lawyers because most television advertisements are 10-60 seconds in length" and that such advertising was not misleading to the public. *Petition to Amend the Rules Regulating the Florida Bar*, Oct. 7, 2008 (Exh. 39).[12]

To make matters even worse, the amendments expressly apply the font-size and verbal disclaimer requirements to *all* disclosures and disclaimers required by the rules. Rule 7.2(c)(10). Thus, in addition to noting the use of actors, scenes, and spokespeople, lawyers will be forced to include burdensome disclosures of the lawyer's name and office location, Rule 7.2(a), the client's responsibility for costs, Rule 7.2(c)(6), and the jurisdictions in which the lawyer is

[12] Because the verbal disclosure rule applies to "electronic" communications, it would apply on its face to websites as well as broadcast advertising. *See* Rule 7.2(c)(10). Thus, lawyer websites, in addition to being filled with large blocks of headline-size disclaimers, will apparently have to speak the same information out loud to the visitor.

licensed to practice law, rule 7.6(b). The resulting jumble will be far more intrusive than the disclosures held unconstitutional in *Ibanez* and *Tillman*.

The state has no evidence that would justify such burdensome restrictions on advertising. The common thread among the advertising techniques subject to disclosures or disclaimers is that they prohibit harmless techniques frequently used by lawyers and others in effective advertising. The Supreme Court has refused to credit "the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105 (plurality opinion). Consumers are accustomed to the notion that scenes, actors, and spokespeople appear in commercials, and it defies common sense to assert that they would be misled by these devices. *See* Letter from FTC Staff to the N.Y. Office of Court Admin. (Sept. 14, 2006) (Exh. 15) (concluding that the New York rules on which Louisiana's amendments are based "are unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them"); *see also Grievance Comm. v. Trantolo*, 470 A.2d 228, 234 (Conn. 1984) (holding that lawyer advertisements depicting humorous fictional scenes were informative and neither false nor misleading). For example, most law firm websites (including the websites of plaintiffs' firms) have stock photographs showing scenes of lawyers in law firm settings or illustrating the firm's areas of practice, such as generic factory or maritime scenes. Statement of Uncontested Facts ¶ 31. Stone Pigman's website, for example, includes a variety of generic office scenes as well as scenes showing men in hardhats, a drug manufacturing plant, a television control room, power cables, stock traders, and a boat. *See* http://www.stonepigman.com/practice/index.html (click on practice areas). Although it is possible that some of these scenes represent actual lawyers and clients of the firm, no rational consumer would care whether or not that were the case. The images are not included to

document actual events, but to serve the same purpose as dramatizations in television advertisements: to draw attention, to make the advertisement visually pleasing and to efficiently communicate with the viewer using representative images (such as a construction site to represent a firm's work with development companies or a boat to illustrate a firm's maritime practice).[13]

Finally, the state has no evidence that the restricted advertising techniques have a negative impact on the image of lawyers. *See Edenfield*, 507 U.S. at 770 ("That the [state's] asserted interests are substantial in the abstract does not mean . . . that its blanket prohibition . . . serves them."). As the Supreme Court wrote in *Bates*, other professions such as bankers and engineers advertise (often using methods similar to those used by lawyers), "and yet these professions are not regarded as undignified." 433 U.S. at 369-70. Although the committee considered the questions in Florida's survey not to be "germane" to the rules at issue, the survey in fact directly contradicted the committee members' assumptions about the impact of lawyer advertising, concluding that lawyer advertising "doesn't change [the public's] opinions about the Florida justice system." Frank N. Magid Assocs., *Florida Consumer Opinions of Lawyer Advertisements*, April 2005 (Exh. 32). Moreover, although several of the state's survey questions ask respondents whether they believe that the targeted advertising techniques will "improve" the image of the legal profession, Findings and Recommendations, *supra* at 8-13, no court has ever

[13] The state's restriction on portrayal of judges and juries is likewise supported by no evidence. The state's evident concern regarding such advertisements, however, is that such portrayals imply an improper judicial endorsement. The rule, however, prohibits *portrayal* of a judge by an actor, and there is no evidence to suggest that consumers are confused by the commonplace use of actors in commercial dramatizations. Moreover, as the court concluded in *Alexander v. Cahill*, any lingering risk of confusion could be eliminated by requiring disclosure of actors playing judges. 2007 WL 2120024, at *8. The state provides no reason why a reasonable disclaimer would not work here. In any case, this explanation for the prohibition on portrayal of judges would not explain why the rule also prohibits portrayal of a jury.

held that a state may restrict speech because it does not portray a sufficiently positive message. At least without evidence that advertising is misleading or otherwise harmful, the state cannot impose on plaintiffs the cost of disseminating the state's own preferred image of lawyers. *See Tillman,* 133 F.3d at 1402; *see also United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that the government cannot compel advertisers to promote a product).

Finally, the survey covered the wrong market. Since *Bates*, the Supreme Court has recognized that lawyer advertising is particularly important to segments of the population that have traditionally lacked access to legal services, including low-income consumers. *See Bates*, 433 U.S. at 376-77 (noting that many legal needs of those of low-income consumers go unmet because consumers fear the perceived costs of legal services or do not know how to locate a competent attorney); *see also Peel*, 496 U.S. at 110 (recognizing that advertising "facilitates the consumer's access to legal services and thus better serves the administration of justice"). Although it is these consumers who primarily make up the clientele of the plaintiff law firms, Statement of Uncontested Facts ¶ 40, the audience who responded to the survey is predominantly middle- and upper-class. That plaintiffs' legal advertising did not improve the respondents' opinion of the judicial system is therefore most easily explained by the fact that the respondents are not in the advertisements' target market.

3. The Prohibitions on Trade Names and Slogans (Rules 7.2(c)(1)(E) and 7.2(c)(1)(L))

Two amended rules prohibit the use of certain trade names, mottos, and slogans. First, Rule 7.2(c)(1)(E) prohibits advertisements that "promise[] results." If this rule were limited to cases where a lawyer makes a literal promise of a particular result that is beyond that lawyer's ability to guarantee (for example, "I promise that you will win at trial," when the outcome at trial is uncertain), it would be unobjectionable. The rule, however, is taken from an identical rule in

Florida, which applies even to statements that are inherently subjective and unprovable, such as "Don't let an incident like this one ruin your life," "Don't allow the American dream to turn into a nightmare," and "Attorneys Righting Wrongs." Florida Bar, Relevant Decisions by the Standing Committee on Advertising, Second Harrell Decl. Exh. 12, *Harrell v. Fla. Bar*, No. 08-cv-015 (M.D. Fla. Sept. 15, 2008) (No. 29, Attach. 1) ("Relevant Decisions") (Exh. 26), at 21, 28, 36.

The other rule, Rule 7.2(c)(1)(L), prohibits advertisements that "utiliz[e] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." This restriction is even broader than the rule against promising results because nearly any positive statement about a lawyer or firm could be read to imply an ability to achieve results. In other states, similar rules have been applied to prohibit lawyers from using the slogan "the Heavy Hitters" and from truthfully stating that they were included in "Super Lawyers" magazine. *See* N.J. Ethics Op. 39 ("When a potential client reads such advertising and considers hiring a 'super' attorney, or the 'best' attorney, the superlative designation induces the client to feel that the results that can be achieved by this attorney are likely to surpass those that can be achieved by a mere 'ordinary' attorney."); *Alexander*, 2007 WL 2120024, at *1.

As with the other amendments, these rules would prohibit practices widespread among law firms, most of which use some sort of trade name or slogan that would at least arguably be prohibited by the new rules. For example, Jones Walker uses the mottos "Progress in Motion" and "The solution exists, look to Jones Walker to help you find it," both of which arguably "impl[y] an ability to obtain results."[14] These mottos would also likely run afoul of the rule

[14] *See* http://www.joneswalker.com/ (cycling image on home page); Jones Walker Brochure*, supra*, at 2. Many other law firm mottos in Louisiana would also likely be prohibited under this rule, including: "Out in Front," Adams & Reese, http://www.adamsandreese.com/,

against "promis[ing] results," as would the firm's claims that it "focus[es] on achieving the *best results* in the *most* efficient manner," "has the appropriate attorney for any court or jury demographic," can "deliver the *best possible* legal representation given any crisis, market condition, or specific situation," has the "ability to bring a matter to a quick resolution," and can present issues for a "*successful* appeal."[15] In addition, law firms and individual lawyers often claim recognition by various publications such as "Super Lawyers" and "Best Lawyers in America." Among these is defendant Pesnell, whose bio on the LADB's website states that "he has been listed in 'The Best Lawyers in America' since 1989." *See* http://www.ladb.org/board_ member_ profiles.asp.

The state once again has no evidence suggesting that these kinds of statements are likely to mislead consumers. The survey on which the LSBA Committee relied in formulating the

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"Precise. Aggressive. Relentless," Galloway, Johnson, http://www.gjtbs.com/, "Insight and experience," Lemle & Kelleher, http://www.lemle.com/, "Preserve, Pioneer," McGlinchy Stafford, http://www.mcglinchey.com/, "The right firm. The right lawyers," and "Smart enough to map out the right course. Focused enough to lead the way to safe passage. Tough enough to go the distance," Phelps Dunbar, Brochure at 2, 9, *available at* http://www.phelpsdunbar.com/ pages/images_subpages/content.pdf (Exh. 24), and "We earned our reputation. And we like living up to it," Stone Pigman, http://www.stonepigman.com/.

[15] *See* http://www.joneswalker.com/about.html (emphasis added); http://www. joneswalker.com/practices-22.html (emphasis added). Similarly, Adams and Reese's website states that it "solve[s] problems and get[s] results," http://www.adamsandreese.com/about_the_ firm/about.html, and its brochures states: "When it comes to a solution, we're sure of it." Adams and Reese, Brochure at 2, *available at* http://www.adamsandreese.com/pdf/ ARFirmBrochure0108.pdf (Exh. 25). Galloway, Johnson claims to have an "aggressive approach" that "gives clients the ability to resolve cases more quickly." http://www.gjtbs.com/ productsLiability.html. McGlinchy Stafford's website states that it "manage[s] . . . claims efficiently" and "minimize[s] [its] clients' exposure." http://www.mcglinchey.com/ firmgroupDetail.asp?id=4095. Stone Pigman claims that it will "deliver[] superior client service in the form of expert counsel and zealous representation" and will "respond creatively and effectively to clients' needs." http://www.stonepigman.com/firm/; http://www.stonepigman.com/ practice/business/corporate.html. The firm also claims that its legal teams can "solve[] their clients' most difficult problems," "handle the most difficult cases," and "efficiently handle business transactions of any size, complexity or context." *Id.*; http://www.stonepigman.com/ practice/; http://www.stonepigman.com/firm/philosophy.html.

amendments included no questions relevant to the rule against "utiliz[ing] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." The survey asked respondents whether they believed that certain slogans "promise[d] results," but, even if that question could demonstrate that certain slogans run afoul of the rule, it would not show that those slogans harm consumers. Moreover, Louisiana is one of only three states to prohibit each of these forms of advertising content,[16] and there is no evidence that the rules of the forty-seven other states and the District of Columbia have been insufficient to protect consumers. Indeed, New York's identical rule against mottos and trade names was declared unconstitutional for lack of supporting evidence. *Alexander*, 2007 WL 2120024, at *6, and the prohibition on promising results was derived from a 2004 Florida task force report that itself lacked any evidentiary support. *See* Fla. Task Force Report, *supra*, at G-2. As a dissenting member of the Florida task force explained, "the Task Force relied almost exclusively upon the unsupported opinions of the individual Task Force members." *Id.*

On the other hand, courts have repeatedly recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statements upon which no reasonable buyer would be justified in relying" or "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 496 (5th Cir. 2000) (holding that Papa John's slogan "Better Ingredients. Better Pizza" was not actionable as false advertising); *see also Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor

[16] Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(G) (deeming an advertisement misleading if it "promises results"); S.C. Rules of Prof'l Conduct R. 7.1(e) (deeming a statement misleading if it "contains a nickname, moniker, or trade name that implies an ability to obtain results in a matter").

misleading); *see also Mason*, 208 F.3d at 955-56 (rejecting Florida's contention that truthfully claiming to have received the "highest rating" from Martindale-Hubbell would "mislead the unsophisticated public"). As the Fifth Circuit has recognized, if routine puffery and statements of quality were considered misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut,* 227 F.3d at 499 (internal quotation marks omitted).

C. The Rules Are Not Narrowly Drawn.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373. The state here, however, adopted its regulations without any attempt to tailor them to a legitimate state interest or any consideration of readily available alternatives.

1. The Rules Are Not Carefully Tailored to the Purported Harm.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *RMJ*, 455 U.S. at 203. Louisiana's amendments, however, sweep in advertising that is not likely to harm any consumer, or, for that matter, even to be distasteful to them. As already noted, the advertising of many large firms in Louisiana would violate the amended rules, *see supra* pp. 18, 24, 27 & nn.11, 14, 15, though nobody would contend that these firms are undignified or engaged in false advertising. Moreover, the rules are so broad that, if applied to other industries, they would sweep in nearly any advertisements designed for television and most other forms of media. They would restrict, for example, a Life cereal advertisement that includes the catchphrase "He likes it! Hey Mikey!" (a testimonial or reference to past results), a depiction of children eating cereal at a breakfast table (a "scene"), and the use of actors to play the children (the equivalent of Louisiana's rule against "portrayal of a client by a non-client"). *See* http://www.youtube.com/ watch?v=vYEXzx-TINc ("Mikey" ad). They would also prohibit such

famous slogans as "oh what a relief it is" (Alka-Seltzer), "it takes a licking and keeps on ticking" (Timex), "good to the last drop" (Maxwell House), and "it keeps going and going" (Duracell) either because they are "motto[s] that state[] or impl[y] the ability to achieve results" or because they impermissibly "promise[] results." And the rules would prohibit spokespeople such as Tiger Woods (Nike), Wilfred Brimley (Quaker Oats), and Bill Cosby (Jell-O) without burdensome disclaimers.

In any other industry, restrictions on such harmless ads would be unthinkable. The result should be no different for lawyers. As the Supreme Court has explained, "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are . . . equally unacceptable as applied to [lawyer] advertising." *Zauderer*, 471 U.S. at 647. To the contrary, as the Supreme Court observed in *Zauderer*, "[b]ecause it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising." *Id.* at 648-49.

Some of the amendments are also poorly tailored for other reasons. First, because the rules classify websites as "information provided upon request," they allow lawyers to post testimonials and information about past successes on their online biographies and their firms' home pages. Rule 7.6(b)(3). If the state really considered statements about past results to be misleading, this exception would make no sense. Consumers increasingly depend on the Internet to look for goods and services, and there is no logical reason why they would likely be misled when looking up a lawyer in the yellow pages but not when looking up the same lawyer on the Internet. The distinction between these forms of media is especially questionable given that

many lawyers, including plaintiff Morris Bart, post their television commercials on their websites, rendering the television and Internet content indistinguishable. Statement of Uncontested Facts ¶ 23. Indeed, allowing lawyers to post this information on their home pages exposes consumers to the information at a time when they are likely in an active search for legal services, and thus potentially susceptible to being misled by advertising that is genuinely deceptive.

Similarly, the rules regulating the use of spokespeople are undermined by their limitation to television and radio advertising. If consumers were somehow misled by the use of celebrity spokespeople, there is no reason to believe they would be less misled by a celebrity in a newspaper or on the Internet than one on television. *See Bad Frog Brewery*, 134 F.3d at 99-100 (holding that a state does not materially advance its interests under *Central Hudson* if it "authorize[s] only one component of its regulatory machinery to attack a narrow manifestation of a perceived problem").

2. The State Has Ignored Readily Available Alternatives to Address Its Supposed Interests.

Even when the state interest is compelling, "if the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U.S. at 371; *see Pruett*, 499 F.3d at 412. Here, an obvious alternative to enacting Louisiana's new rules would be to enforce its *existing* rules against false and misleading advertisements. Louisiana has not shown that these existing rules are insufficient to protect its citizens from being misled. *See* Plattsmier Letter, *supra*, at 1-2; *see also Alexander*, 2007 WL 2120024, at *8 (declaring restrictions on attorney advertising unconstitutional where the state had "not given the Court any reason to believe that better enforcement of the then-existing rules on a case-by-case basis . . . would not accomplish the desired results").

Moreover, if the state could show that certain forms of speech are likely to mislead consumers, it could impose disclosure or disclaimer requirements to prevent the risk of consumer confusion instead of prohibiting the speech entirely, and it could impose reasonable type-size requirements instead of requiring disclaimers to be as large as the largest headline in the advertisement. *See RMJ*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive."); *Alexander*, 2007 WL 2120024, at *8. The state here, however, did the opposite, deleting former Rule 7.1(b), which provided that, "[i]n determining whether a communication [is false or misleading], the communication shall be considered in its entirety including any qualifying statements or disclaimers contained therein." By removing this provision, the state guaranteed that the rules would be enforced even against advertisements that are not misleading.

As a final alternative to its rules restraining speech, the state could achieve the legislature's goal of promoting a "more positive message," Concurrent Resolution, *supra* p. 2, by conducting its own outreach efforts to educate consumers about the practice of law and the role of lawyers in society. A basic tenet of the First Amendment is that allegedly distasteful speech is best dealt with in the marketplace of ideas, through *more* speech aimed at providing a better or more balanced point of view. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As the Supreme Court wrote in *Bates*, "[i]f the naivete of the public will cause advertising by lawyers to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." 433 U.S. at 375.

II. The Rules Are Unconstitutionally Vague.

The amended rules are not only unsupported by any legitimate state interest, they are also

unconstitutionally vague. Due process prohibits vague regulations for two interrelated reasons: (1) to provide fair notice so that people may avoid unlawful conduct and to prevent the risk of chilling protected expression, and (2) to provide standards to authorities to prevent arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender v. Lawson*, 461 U.S. 352 (1983). Here, the rules fail to satisfy either of these goals because they give lawyers and disciplinary authorities no guidance on what sorts of statements "promise[] results" or "impl[y] an ability to obtain results in a matter" under the rules. Rule 7.2(c)(1)(E), (L); *see* Statement of Uncontested Facts ¶ 35.

As previously explained, Florida interprets the rule against promising results to extend to advertisements that are inherently subjective or unprovable. As interpreted by Florida, this rule has led to arbitrary and unpredictable results. To name just a few of many inexplicable outcomes, the state's standing committee on advertising decided that the phrase "People make mistakes, I help fix them" improperly promises results, but that "People make mistakes, I help them" is permissible; the statement "We'll help you get a positive perspective on your case and get your defense off on the right foot quickly" promises results, but "If an accident has put your dreams on hold we are here to help you get back on track" is permissible; the phrase "[Y]our lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" promises results, but "The lawyer you choose can help make the difference between a substantial award and a meager settlement" is permissible; and the statement "Hiring an attorney experienced in DUI law is an efficient and effective way to ensure that all possible measures are taken to protect your legal rights" promises results, but "Hiring an attorney experienced in DUI law is an efficient and effective way to protect your legal rights" is permissible. *See* Relevant Decisions, *supra*, 2, 5, 25, 29, 71; Minutes, Bd. of Governors of the

Fla. Bar, Apr. 7, 2006, Second Harrell Decl. Exh. 23, *Harrell v. Fla. Bar*, No. 08-cv-015 (M.D. Fla. Sept. 15, 2008) (No. 29, Attach. 1). Because Florida is the only state other than Louisiana to have adopted this rule, Louisiana lawyers have nothing other than these arbitrary decisions for guidance in interpreting the rule as applied to their own ads.

The prohibition on trade names, mottos, and slogans that imply an ability to achieve results has even greater potential for arbitrary application because it is impossible to predict what disciplinary authorities will believe is "implied" by a particular ad. There is nothing obviously misleading, for example, about lawyers calling themselves "Heavy Hitters" or "Super Lawyers." Indeed, Florida's attempt to enforce a similar (but somewhat narrower) rule against statements that are "likely to create an unjustified expectation about results the lawyer can achieve" was so riddled with inconsistencies that the state was forced to abandon it entirely. *See* Fla. Task Force Report, *supra*, at 7 (stating that the rule was "unclear and incapable of adequate definition to provide guidance to Bar members"); *see also* Minutes, Supreme Court Comm., Oct. 23, 2006, *supra*, at 3 (noting the opinion of one committee member that including a pit bull in an advertisement "suggests an outcome"). Even if Louisiana does not enforce these rules as strictly as Florida and other states, the breadth, vagueness, and unpredictability of the rules will inevitably lead to self-censorship on the part of lawyers. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). The high cost of developing advertising and the risk of professional discipline will force lawyers to comply with the broadest possible reading of the rules' language. Moreover, the rules' vagueness raises the risk of arbitrary and discriminatory enforcement against lawyers who are unpopular with state disciplinary authorities. *See Discovery Network*, 507 U.S. at 423 n.19 (noting the "potential for invidious discrimination of disfavored subjects" in vague regulations). For these independent reasons, the amendments are

unconstitutionally vague.

CONCLUSION

This Court should grant summary judgment to the plaintiffs, and declare unconstitutional and permanently enjoin enforcement of the following rules of the Louisiana Rules of Professional Conduct, as amended effective October 1, 2009: Rule 7.2(c)(1)(D), (E), (I) & (L), the prohibition on "portrayal of a judge or a jury" in Rule 7.2(c)(1)(J), and Rule 7.5(b)(2)(C).

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Respectfully submitted,

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