07-3677
07-3900

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES L. ALEXANDER, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

THOMAS J. CAHILL, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of New York

APPELLEE'S PRINCIPAL AND RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Public Citizen, Inc. certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

/s/Gregory A. Beck
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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. On July 23, 2007, the court entered an order granting in part and denying in part plaintiffs' motion for summary judgment, and granting in part and denying in part defendants' cross-motion for summary judgment. A. 227-56. On the same day, the court entered a judgment consistent with that order that disposed of all issues in the case other than the issue of attorneys' fees. A. 258-59. Defendants filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) on August 22, 2007. A. 261. Plaintiffs then filed a timely notice of cross-appeal pursuant to Federal Rule of Appellate Procedure 4(a)(3) on August 29, 2007. A. 264. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Case No. 07-3677

1. Whether the First Amendment allows a state to restrict common advertising techniques that it deems to be "irrelevant" or "unverifiable" without any evidence that the advertisements are misleading or otherwise harmful to consumers or, assuming that such harms exist, that the restrictions alleviate them in a material way.

2. Whether the state satisfied its burden of justifying its newly adopted restrictions on lawyer advertising under *Central Hudson Gas & Electric Corp. v.*

Public Service Commission, 447 U.S. 557 (1980), where the state submitted no evidence in support of the restrictions.

Case No. 07-3900

3. Whether the district court erred in holding that the state's thirty-day moratorium on attorney communications to potential clients in personal injury and wrongful death cases survives constitutional scrutiny under *Central Hudson*, where there is no evidence in the record in support of the moratorium.

RELEVANT STATUTES

22 N.Y.C.R.R. § 1200.8
Solicitation and Recommendation of Professional Employment

. . .

(b) For purposes of this section "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

. . .

(g) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

22 N.Y.C.R.R. § 1200.41-a
Communication After Incidents Involving Personal Injury or Wrongful Death

(a) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident. (b) This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

(b) This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

STATEMENT OF THE CASE

"These new rules will help regulate lawyer advertising so that consumers are protected against inappropriate solicitations and potentially misleading ads . . . ."

-Statement of Chief Administrative Judge Jonathan Lippman on behalf of the Presiding Justices of the Appellate Division of the New York Supreme Court, June 15, 2006

"If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the

words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

-Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.,
512 U.S. 136, 146 (1994)

I. Nature of the Case

This case involves a First Amendment challenge to the amended New York Code of Professional Responsibility, brought against New York's attorney disciplinary authorities by James L. Alexander, the Alexander & Catalano law firm, and Public Citizen, a nonprofit consumer-advocacy organization. A. 16-30. The amended rules, which went into effect on February 1, 2007, enacted sweeping new restrictions on lawyer advertising that forced Alexander & Catalano to pull many of its advertisements off the air and to abandon its slogan "the heavy hitters." A. 47-48 ¶ 15. Plaintiffs sued for a declaratory judgment that the amended rules were unconstitutional restrictions on both commercial and noncommercial speech, and for a preliminary and permanent injunction against enforcement of the rules. A. 29-30. On cross-motions for summary judgment, the district court held several of the restrictions unconstitutional and permanently enjoined their enforcement. A. 237-45. However, the court upheld a rule that created a thirty-day moratorium on communications to potential clients in personal injury and wrongful death cases. A. 248-54.

II. Statement of Facts

A. The Task Force on Lawyer Advertising

In October, 2005, the New York State Bar Association's Task Force on Lawyer Advertising issued a report and recommendation proposing amendments to the advertising provisions of the New York Code of Professional Responsibility. A. 51-179. Developed by the task force over the previous four months, the report set forth detailed rule changes to address what the task force claimed were misleading lawyer advertising practices and practices that the task force thought would "diminish the Bar's professionalism." A. 56.

In developing its recommendations, the task force reviewed the existing lawyer advertising rules in New York and other jurisdictions, First Amendment case law regarding lawyer advertising, and about 250 randomly selected advertisements that had previously been distributed in the state. A. 60-61. Aside from its review of the advertisements, the task force did not conduct any empirical research or surveys to discover what sorts of advertising techniques are likely to mislead the public or to diminish the professionalism of the bar. A. 100-02.

The task force's report recommended a series of revisions to the advertising rules, all of which—with one exception—revolved around a central theme: The state should *not* adopt new content-based restrictions on lawyer advertising, but should instead require disclaimers on potentially misleading ads, step up

enforcement of existing rules, increase efforts to educate lawyers about the rules, and conduct outreach efforts to educate the public about the legal system and the role of lawyers. The one exception was the task force's recommendation of a moratorium on direct-mail solicitations to potential clients in accident or injury cases for fifteen days following the accident or injury. A. 61-62. The task force based this recommendation on its "belie[f] [that] the cooling off requirement would be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence" and by its observation that a similar moratorium was upheld by the Supreme Court in *Florida Bar v. Went For It, Inc.*, 525 U.S. 618 (1995). A. 61-63. Aside from surveying the law of other jurisdictions, the task force did not compile any evidence in support of the moratorium rule. A. 61-63.

B. The Committee of the Administrative Board of Courts

At the same time the task force was formulating its report, the New York Administrative Board of Courts formed its own committee to review the state's advertising rules. A. 56, 223. The committee operated independently of the state bar's task force and did not issue any public reports or recommendations. A. 56. There is no evidence in the record of what, if any, evidence the committee considered or what amendments it suggested.

C. The Amended Advertising Rules

In June 2006, the presiding justices of each of the four departments of the Appellate Division of the New York Supreme Court approved for public comment detailed and extensive amendments to the New York Code of Professional Responsibility that a press release issued by the New York State Office of Court Administration characterized as involving "sweeping new restrictions on lawyer advertising." A. 222. Among other things, the rules banned or regulated use of actors, depictions of judges or courthouses, testimonials, celebrity spokespeople, reenactments of events, and fictional scenes. *Id.* The proposed rules also restricted use of "nicknames, monikers, mottos or trade names" that suggest an ability to obtain results in a matter, Internet pop-up ads, and certain domain names for lawyer websites. *Id.* In its press release, the administrative office stated that the amendments were intended to protect consumers against "potentially misleading" advertisements and to "benefit the bar by ensuring that the image of the legal profession is maintained at the highest possible level." A. 222-23. However, the common thread among the proposed amendments is that they regulated or prohibited many kinds of stock advertising techniques that are widespread in the media and that consumers are used to seeing every day.

According to the press release, the rules were adopted as a result of recommendations by both the court system's own committee and the report of the

state bar's task force on advertising. A. 223. There is no indication in the proposed amendments, however, that they were influenced to any significant degree by the task-force report. The most striking thing about the proposed rules is the stark dissimilarity between the task force's recommendations and the amendments proposed by the courts. Although the task force had rejected new content-based restrictions in favor of additional disclaimers, educational efforts, and tougher enforcement of existing rules, the amendments enacted by the presiding justices implemented detailed new regulations on the content of lawyer ads that were among the most restrictive in the country.

Only one amendment relevant to this appeal bore any resemblance to the recommendations of the task force: a moratorium on contact with victims and victims' families in personal injury and wrongful death cases. A. 61-63. But while the task force had recommended a fifteen-day ban on such communications and had limited the restriction to direct-mail solicitations, the proposed rules contained a *thirty-day* restriction that covered all "communications," a term that includes advertisements in mass media like newspapers, television, and websites that do not intrude on the privacy of consumers. A. 249 n.15.

Over the following five months, the courts received "numerous" comments from the public on the amended rules. Defs.' Br. at 6. Although the state asserts that the presiding justices relied on these comments in formulating the final version

of the rules, *id.* at 5-6, the only comments in the record are those submitted by plaintiff Public Citizen, which argued that the rules violated the First Amendment, A. 189-217, and the Federal Trade Commission, which warned that the rules would not benefit consumers and, in fact, could hurt them by making it more difficult to find a lawyer and by stifling competition in the legal marketplace. A. 181-87.

After the comment period expired, the presiding justices announced final revisions to the rules that moderated some of the restrictions, but left untouched many provisions that were not part of the task force's recommendations and that dramatically restricted the ability of lawyers to advertise in the state. Among other provisions, the justices retained rules prohibiting the use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter," 22 N.Y.C.R.R. § 1200.6(c)(7), portrayals of a judge, *id.* § 1200.6(c)(3), and endorsements or testimonials by clients with regard to matters that are still pending, *id.* § 1200.6(c)(1). The justices also retained the thirty-day prohibition on communications to potential clients in personal injury and wrongful death cases. *Id.* §§ 1200.8(g), 1200.41-a. And the justices added a *new* provision, not present in either the proposed rules or the task-force report, that prohibited advertisements that "rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers

exhibiting characteristics clearly unrelated to legal competence." *Id.* § 1200.6(c)(5).

D. Plaintiffs James L. Alexander and Alexander & Catalano

Plaintiff James L. Alexander is a licensed attorney who has actively practiced in New York for the past twenty-three years. A. 45 ¶ 1. He is the managing partner of Alexander & Catalano LLC, a New York law firm with offices in Syracuse and Rochester. A. 45 ¶ 1-2. The firm employs eight attorneys representing clients in personal injury and wrongful death claims. A. 45 ¶ 2.

Alexander & Catalano communicates its services to the public through broadcast media, print advertisements, and other forms of media. A. 45 ¶ 3. Over the past ten years, the firm has developed a series of advertisements that have brought it substantial name recognition within its market. A. 45 ¶ 3; A. 224 (selection of Alexander & Catalano's television advertisements). These advertisements feature commercials with dramatizations, comical scenes, and special effects, which, for example, depict Alexander and his partner as giants towering above local buildings, running to a client's house so fast they appear as blurs, jumping onto rooftops, and providing legal assistance to space aliens. A. 224. The advertisements also usually feature the firm's slogan, "the heavy hitters," a phrase that the public in Alexander & Catalano's market has come to associate with the firm. A. 224.

When the final version of the amended rules was approved by the presiding justices, Alexander & Catalano found that almost all of its advertisements—which it had been running for years without complaint from state disciplinary authorities—were suddenly prohibited in New York. A. 45-46 ¶¶ 3-4; A. 46 ¶ 6; 47-48 ¶ 15. All of Alexander & Catalano's commercials containing dramatizations and comedic sketches ran afoul of § 1200.6(c)(5) of the amended rules, which prohibits "techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence." § 1200.6(c)(7). Many other common advertising devices appearing in the firm's ads, such as jingles and special effects, were also prohibited by this rule. A. 45 ¶ 3. Even a television commercial showing a list of charities to which the firm has donated appeared to violate the rule against attention-getting techniques, because this advertisement brings attention to the firm and is not related to the firm's legal competence. A. 224.

In addition to the ban on attention-getting techniques, the amended rules' new prohibition on depictions of judges prevented Alexander & Catalano from running one of its advertisements that depicted a judge in the courtroom and stated that the judge is there "to make sure [the trial] is fair." A. 224. Moreover, Alexander & Catalano could no longer use its slogan "the heavy hitters" because it

violated § 1200.6(c)(3)'s prohibition of nicknames, monikers, and mottos that imply an ability to obtain results," as did other slogans that frequently appear in the firm's advertisements, such as "think big" and "we'll give you a big helping hand." A. 46 ¶ 6.

Alexander & Catalano's ads, though at times silly, have been effective at drawing clients to the firm and pose no risk of deception or other harm to consumers. A. 46 ¶ 5, 6. Nevertheless, as a result of the amended rules, Alexander & Catalano was forced to abandon its advertising campaign, withdraw nearly all of its ads, and design new ones—omitting the comical scenes, slogans, and effects—at great expense. As a result, the firm lost the benefit of widespread public recognition of its advertisements and slogans.

E. Plaintiff Public Citizen

Public Citizen is a nonprofit consumer rights organization with approximately 100,000 members nationwide, including approximately 9,450 in New York at the time the case was filed. A. 46-47 ¶¶ 8-9. As an organization devoted to defending the First Amendment and the rights of consumers, Public Citizen has an interest in ensuring that its members are not restricted from receiving communications regarding legal services. A. 46 ¶ 8. Public Citizen is particularly interested in the availability of truthful legal advertising because speech in this context not only encourages beneficial competition in the

marketplace for legal services, but can also educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system. A. 46 ¶ 8. The state's restrictions on attorney advertising injure Public Citizen's New York members, who are consumers of legal services, by preventing them from receiving truthful information that they have an interest in receiving and by making it more difficult for them to learn about their legal rights. A. 46-47 ¶¶ 8-9.

F. The Case Below

On February 1, 2007, the day the rules went into effect, plaintiffs sued defendant chief counsels, who collectively are charged with enforcing the disciplinary rules throughout the state. A. 16-30. Plaintiffs then moved for a preliminary injunction against enforcement of the rules, attaching to their motion the report and recommendations of the Task Force on Lawyer Advertising and pointing out that the rules adopted by the presiding justices did not resemble the task force's recommendations. Doc. 6, nos. 7-8; A. 51. Plaintiffs also attached the transcript of a panel presentation by former Presiding Justice Eugene F. Pigott, one of the four justices who drafted the rules. Doc. 6, no. 10. Justice Pigott's comments during his presentation made clear that his motivation for the rules was founded more on personal distaste for lawyer advertising than protecting consumers from deception or other harm. A. 225; *see also* A. 222.

In its response to plaintiffs' motion, the state argued that the targeted forms of advertising were false or potentially misleading, but presented no evidence in support of its views. Doc. 20. After a hearing, the Court reserved ruling on the motion and scheduled an expedited trial on the merits. Doc. 26. The parties then agreed to stipulate to all relevant facts, including the exhibits attached to the preliminary injunction motion, and filed cross-motions for summary judgment. Doc. 29, 33. Once again, the state failed to present any evidence in support of its speech restrictions, adding only press releases by the New York State Office of Court Administration and the New York State Bar Association. A.219, 222.

The court granted partial summary judgment to the plaintiffs, holding that the state had failed to meet its burden of justifying its restrictions on commercial speech under the standard set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Recognizing the "notable lack of evidence" submitted by the state in support of the rules, the court declared unconstitutional and permanently enjoined enforcement of §§ 1200.6(c)(1), (3), (5), and (7) of the rules. However, as to the thirty-day moratorium, the court held that the state had satisfied its burden and granted summary judgment to defendants. Although the state had never relied on the task-force report in support of its position, the court nevertheless thought that the report's endorsement of a fifteen-day moratorium was sufficient to justify the rule.

The court acknowledged that the moratorium on all "communications" adopted by the state was broader than the direct-mail moratorium recommended by the task force, extending also to television, radio, newspaper, and website communications. Nevertheless, the court concluded that the task force's recommendation was sufficiently close to justify the restriction, holding that "First Amendment jurisprudence does not require that the State adopt the precise restriction that its expert panel recommends." A. 24.[1]

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[1] On appeal, the state does not challenge the district court's ruling that the restriction on pop-up advertisements violates the First Amendment. Defs.' Br. at 14 n.1. Plaintiffs, for their part, do not challenge the district court's decision to uphold the restrictions on domain names, § 1200.7(e). Although the rule is not supported with any evidence, the state and the district court's relatively narrow construction of the statute substantially alleviates plaintiffs' concerns. A. 215. Nor do plaintiffs challenge the district court's rejection of their argument that the rules unconstitutionally restrict nonprofit communications. Plaintiffs continue to believe that the plain language of the rule unconstitutionally restricts noncommercial speech. However, the district court's narrowing construction of the rules, combined with the state's concession that the rules were not intended to cover noncommercial speech, satisfies most of plaintiffs' concerns about the potential for unconstitutional application to core First Amendment speech. Finally, although the district court declared all of § 1200.6(c)(3) unconstitutional and enjoined its enforcement, plaintiffs intended only to challenge the first clause of that section, which prohibits the portrayal of a judge. A. 30 ¶ 1. The state is correct to point out that plaintiffs have not challenged the remainder of the rule, which prohibits "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case."

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, "construe[ing] all the evidence in the light most favorable to the nonmoving party" and "drawing all inferences and resolving all ambiguities in its favor." *Amidon v. Student Ass'n*, 508 F.3d 94, 98 (2d Cir. 2007).

SUMMARY OF THE ARGUMENT

This case involves stringent new rules on attorney advertising in New York that, if they had been evenly applied to advertising in other industries, would prohibit virtually every commercial advertisement currently running in most forms of media. These rules impose restrictions on a wide variety of stock advertising devices, including attention-getting techniques, mottos, testimonials, and depictions of judges that pose no realistic threat of misleading or otherwise harming consumers. The rules also include a moratorium on communications with victims following an accident or disaster that is so overbroad that it interferes even with communications to consumers who are actively looking for a lawyer.

In *Central Hudson*, 447 U.S. 557, the Supreme Court set forth a four-part test for evaluating restrictions on commercial speech such as the rules at issue here. First, the court must determine whether the regulated speech is misleading or involves unlawful activity. If so, then the speech is not protected by the First Amendment. Otherwise, the court proceeds to the next three prongs of the test,

under which the state must prove—with actual evidence—that (1) the state's interests in limiting the speech are substantial; (2) the challenged regulation advances those interests in a direct and material way; and (3) the extent of the restriction on protected speech is narrowly tailored toward the interests served.

The state's primary argument is that the Court should dramatically narrow the range of commercial speech that can survive *Central Hudson*'s first prong to preclude any advertisements that the state determines to be "irrelevant" or "unverifiable." With the possible exception of one or two state-court precedents, however, no court has ever adopted this dangerous—and flatly wrong—interpretation of *Central Hudson*. Rather, the Supreme Court and this Court have repeatedly reaffirmed that speech survives *Central Hudson*'s first prong as long as it is not misleading and does not promote illegal activity. In *Bad Frog Brewery v. New York State Liquor Authority*, this Court specifically addressed and rejected the argument urged by the state. 134 F.3d 87 (2d Cir. 1998). There, the Court held a beer label depicting a frog making an obscene gesture was protected commercial speech under *Central Hudson*. There is no reason why the speech at issue here should receive any less protection.

Likewise, the state has no support for its contention that "unverifiable" speech falls outside the First Amendment's protection. On the contrary, both the Supreme Court and numerous lower courts have held that puffery and boasting—

like the slogan "America's Favorite Pasta," *see Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004)—are not intended to be literally true and are not taken at face value by consumers. Despite the Supreme Court's warning that the state cannot treat consumers like children who are incapable of understanding the nature of advertising, the state in this case is doing exactly that.

The only authority that the state claims supports its position is a 1985 summary reversal by the Supreme Court—which states no holding and cannot be held to silently overrule decades of commercial speech jurisprudence—and a smattering of federal district court and state court cases, none of which is analogous to this case and, to the extent they contain dicta that supports the state's position, are wrongly decided and run headlong into *Bad Frog Brewery* and *Central Hudson*. The state's proposal to adopt language from the Florida Supreme Court's decision in *Florida Bar v. Pape*, 918 So. 2d 240 (Fla. 2005), would not only create an arbitrary and unworkable system, it would give the state the power to prohibit commercial speech at will, without the burden of articulating, must less proving, an interest in doing so. Such a rule would eviscerate the *Central Hudson* test.

Given that the regulated speech survives *Central Hudson*'s first prong, the state has the burden of proving that its rules are necessary, effective, and narrowly tailored to its objectives. Because the state failed to submit any evidence in support

of its rules, it cannot meet any of these evidentiary requirements. As to *Central Hudson's* second prong, although the state claims that its interest in the rules is to prohibit false and misleading speech, the techniques that it targets are at most *potentially* misleading, and the state may not adopt broad prophylactic rules against categories of speech to save itself the trouble of ferreting out individual cases of deception. Moreover, the state does not argue in support of the district court's holding that protecting the "dignity" of the Bar is a valid state interest, and, in any case, that purported interest has been firmly and repeatedly rejected by the Supreme Court.

In addressing *Central Hudson*'s third prong, the state attempts to rely on evidence that was never relied on by defendants in the district court. For the first time on appeal, the state attempts to pick out bits and pieces of language from the state bar's task-force report that are in some way related to its chosen rules. However, the state's reliance on the report is futile, both because the task force's conclusions are the *opposite* of the conclusions drawn by the state, and because, in any case, the report itself is not based on any evidence.

As for the specific restrictions chosen by the state, none serve the state's asserted interests. The restriction on attention-getting techniques, while purportedly targeted at misleading speech, actually prohibits nothing more than commonplace advertising techniques that consumers are accustomed to seeing in

the media every day. The prohibition on nicknames, monikers, mottos, and trade names is supported by no evidence and, given that mottos will usually appear alongside a law firm's name, does not target advertising techniques that are likely to mislead anyone as to the identity of the advertising firm. The state attempts to justify its prohibition on the depiction of judges by appealing to an interest in preventing the appearance of improper influence, but the state provides no evidence that consumers are confused by images of judges or that any attorney has ever abused this device. The prohibition on testimonials of current clients regarding pending matters, which the state claims prevents improper pressure on clients, is likewise unsupported by evidence of past abuse and is so poorly tailored to the state's asserted goals that it cannot possibly justify a restriction on First Amendment rights.

The final section of the brief deals with plaintiffs' cross-appeal, which challenges the district court's decision upholding the constitutionality of the state's thirty-day moratorium on contact with accident victims. In the district court, the state's only justification for the rule was the Supreme Court's decision in *Florida Bar v. Went For It*, 525 U.S. 618, which upheld a much narrower moratorium on direct-mail solicitations. But the Supreme Court's rationale in *Went For It*—that letters directed to a person's home on the heels of a personal tragedy were viewed by consumers as an invasion of privacy—is not served by the state's moratorium

here. Rather than just banning direct-mail solicitations, the state bans all "communications," including advertisements on the Internet and in mass media that do not invade anyone's privacy. The state has not presented any evidence that this much broader moratorium solves any real-world harms, or that it is narrowly tailored toward the state's chosen purpose. Unlike *Went For It*, the state's policy here is justified by nothing more than paternalism. The moratorium, too, therefore fails the *Central Hudson* test.

ARGUMENT

To survive First Amendment scrutiny, a restriction on commercial speech must satisfy the test set forth by the Supreme Court in *Central Hudson*:

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.[2]

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[2] As the state explains, the Supreme Court has alternately described *Central Hudson* as a four-part test, with the First Amendment question being the first part of the test, or as a three-part test, with the First Amendment question characterized as a threshold issue. The briefs in the district court and the district court's opinion used the three-part formulation, but for sake of consistency with the state's brief in this Court, plaintiffs will use the four-part formulation here.

On appeal, the state argues for a dramatic restriction of the first part of the test, contending that, to be protected, speech must not only concern lawful activity and not be misleading, but must also not be "irrelevant," "non-informational," or "unverifiable." As an alternative, the state argues—despite the district court's observation that evidence in support of the rules was "notably lacking," A. 239—that it satisfies the heavy evidentiary burden of *Central Hudson*'s final three prongs. The state is wrong on both counts.

I. The First Amendment Protects Commercial Speech Regardless of Whether the State Considers It "Relevant" or "Verifiable."

Apparently recognizing that the lack of any evidence in support of its rules makes it impossible for it to satisfy its burden under *Central Hudson*, the state's primary argument on appeal is that this Court should hold that commercial speech that is "irrelevant" or "unverifiable" is entirely outside the protection of the First Amendment. According to the state, these broad new categories of unprotected speech include such common devices as puffery, dramatization, exaggeration, statements of opinion, use of absurdity, humor, appeals to emotion, special effects, and anything else that the state concludes—apparently without the need to rely on any evidence—to be "unrelated to rational decisions about selection of counsel." Defs.' Br. at 18. The state posits two main types of speech that should be unprotected: speech that is "irrelevant" or "non-informational," including attention-getting techniques and possibly depictions of judges, and speech that,

although perhaps relevant, is "unverifiable," including mottos and statements of quality.[3]

The Court held in *Central Hudson*, however, that commercial speech satisfies the first prong of the test as long as it "concern[s] lawful activity" and is not "misleading." *Central Hudson*, 447 U.S. at 566. Since then, the Court has never recognized new exceptions to *Central Hudson* for irrelevant or unverifiable speech. Indeed, the Court has repeatedly reaffirmed that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted . . . *only* if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142 (1994) (emphasis added). The state's position is incompatible with these precedents, unworkable in practice, and, if adopted, would effectively eviscerate the *Central Hudson* test.

A. "Irrelevant" Commercial Speech

The first category of commercial speech that the state claims it can prohibit with unregulated authority is advertising containing "irrelevant" or "non-

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[3] The state's prohibition on client testimonials prohibits speech that is both relevant, because potential clients would likely value knowing a current client's experience with a lawyer, and verifiable, because the state could always track down the client who gave the testimonial. Thus, at least this restriction, even under the state's theory, would have to be evaluated under the final three prongs of the *Central Hudson* test.

informational" speech. The state's argument, however, is foreclosed by *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998). In that case, New York sought to prohibit a beer label that depicted a frog extending its middle "finger" (or unwebbed toe) in an obscene gesture. *Id.* at 90-91. The state then argued, as it again argues here, that the commercial speech at issue was not subject to *any* First Amendment protection because it "convey[ed] no useful consumer information." *Id.* at 93, 94. The Court disagreed, holding that the labels "pass[ed] *Central Hudson*'s threshold requirement that the speech 'must concern lawful activity and not be misleading.'" *Id.* at 98. Accordingly, the Court applied the remaining three prongs of the *Central Hudson* test, ultimately rejecting the state's claimed interests and striking down the restriction as unconstitutional. *Id.* at 97-101.

The Court in *Bad Frog Brewery* disagreed with the state's argument that the labels communicated no information, holding that they at least "attempted to identify to consumers a product of the Bad Frog Brewery" and, in addition, "serve[d] to propose a commercial transaction." *Id.* at 96-97. The Court concluded that even "minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in *Central Hudson*." *Id.*; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding that even

advertising the state may consider to be "tasteless" or "excessive" "is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price").

The Supreme Court, too, has rejected the idea that a state may ban commercial speech based on its own conceptions of relevance. In *Bates v. State Bar of Arizona*, the first case to recognize a First Amendment right in lawyer advertising, the state bar argued that such advertising was not protected by the First Amendment because of its potential to "highlight irrelevant factors" in the selection of a lawyer. 433 U.S. 350, 372 (1977). The Court refused to credit the state's asserted interest, noting that it "assumes the public is not sophisticated enough to realize the limits of advertising." *Id.* at 374-75; *see also id.* at 376 (noting that "the basic factual content of advertising" such as "information as to the attorney's name, address, and telephone number, office hours, and the like" were allowed by state rules, but that "an advertising diet limited to such spartan fare would provide scant nourishment").

Since then, the Court has continued to reject similar arguments made in support of advertising restrictions. In *Shapero v. Kentucky Bar Association*, the Court held that the state could not restrict speech just because it was designed to "catch the recipient's attention," nor could it limit lawyer advertising to "a bland statement of purely objective facts." 486 U.S. 466, 479 (1988). The Court held that

"so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those [forms] least likely to gain the attention of the recipient." *Id.*; *see also In re RMJ*, 455 U.S. 191, 205-06 (1982) (holding that an attorney advertisement was "relatively uninformative" and in "bad taste," but nevertheless constitutionally protected in the absence of evidence that "such a statement could be misleading to the general public").

Although the state is correct that the Supreme Court in reviewing the constitutionality of commercial speech restrictions has sometimes noted that commercial speech in general, or the prohibited speech in particular, was relevant and useful to consumers, it does not follow that speech must *always* and in every respect be relevant to be entitled to First Amendment protection. If there were any doubt about that point, *Bad Frog Brewery* settled it. In that case, the Court reviewed many of the same precedents urged by the state here and noted the same sorts of "doctrinal uncertainties" in the Supreme Court's early commercial speech cases about "the degree of protection for commercial advertising that lacks precise informational content." 134 F.3d at 94. The Court concluded, however, that, even if commercial speech does no more than propose a commercial transaction, and

even if it may be offensive to some, it is still protected commercial speech entitled to constitutional protection under *Central Hudson*. *Id.* at 96-97.[4]

B. "Unverifiable" Commercial Speech

Although the Supreme Court in *Bates* rejected the state's argument that attorney advertising should not receive First Amendment protection because of its potential to highlight irrelevant factors, the state correctly notes that *Bates* left open the question of what standard to apply to "advertising claims relating to the quality of legal services," which the Court noted "probably are not susceptible of precise measurement or verification." *Bates*, 433 U.S. at 366. Based on this unanswered question from *Bates*, the state argues that unverifiable advertisements, like irrelevant ones, fall entirely outside the protection of the First Amendment.

Since *Bates*, however, the Court has never held commercial speech to be unprotected solely because it could not be verified. To the contrary, the Court in *Shapero* rejected the state's argument that a mailed solicitation could be prohibited

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[4] This does not mean that all irrelevant speech necessarily survives constitutional scrutiny, because the state in individual cases may still attempt to satisfy *Central Hudson*'s final three prongs. In some cases, giving undue emphasis to irrelevant information may render a communication deceptive. For example, if an attorney were to prominently highlight certification by an organization of which he is the founder and only member, consumers might actually be misled into believing that the certification had some importance that it did not. Even in such cases, however, it is the state's burden to show that the communication is actually deceptive. *See Shapero*, 486 U.S. at 479; *RMJ*, 455 U.S. at 206. In this case, the state has not even argued, much less proved, that any of the advertising at issue creates this kind of deception.

because it included statements—such as "It may surprise you what I may be able to do for you"—that "stat[ed] no affirmative or objective fact," constituted "pure salesman puffery," and were an "enticement for the unsophisticated, which committed [the lawyer] to nothing." 486 U.S. at 478 (internal quotation marks omitted). Recognizing that consumers are not so easily misled by stock advertising techniques, the Court has also refused to credit "the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 105 (1990).

Other courts have also recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statement 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, Inc.*, 227 F.3d 489, 496 (5th Cir. 2000) (holding that that Pizza Hut's slogan "Better Ingredients. Better Pizza" was not actionable as false advertising); *Am. Italian Pasta Co.*, 371 F.3d 387 (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor misleading). Indeed, this Court has held that a statement's inherent unverifiability is a factor *enhancing* its protection under the First Amendment, because "a reader cannot

rationally view an unverifiable statement as conveying actual facts." *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 229 (2d Cir. 1985) (internal quotation omitted).

C. No Authority Supports the State's Position.

1. The Iowa Supreme Court's Decision in *Committee on Professional Ethics v. Humphrey* Did Not Silently Adopt the State's Proposed Rule.

Although it concedes that no Supreme Court authority "squarely" endorses its position, the state suggests that its conclusion is nonetheless mandated by the Supreme Court's summary dismissal in *Committee on Professional Ethics v. Humphrey*, 377 N.W.2d 643 (Iowa 1985), *summarily dismissed by* 475 U.S. 1114 (1986), in which the state argues that the Iowa Supreme Court adopted its position here. The Supreme Court's summary dismissal, however, did not adopt the Iowa Supreme Court's reasoning; rather, the precedential value of such a dismissal is limited to "the precise issues presented and necessarily decided by" the dismissal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). For this reason, it is often difficult or impossible to determine the precedential value of a summary dismissal beyond its binding effect on the dismissed case itself. *Id.*

The meaning that the state reads into the dismissal in *Humphrey*—that irrelevant advertising is unprotected by the First Amendment—is not a *necessary* reading of the dismissal's meaning and thus is not controlling here. Although the

Iowa Supreme Court's opinion is phrased in broad terms, a key factor justifying the decision was the court's conclusion, based on record evidence developed at an evidentiary hearing, that the advertisements at issue were misleading. *Humphrey*, 355 N.W.2d at 567, 570. The court thought that the ads, though not intentionally deceptive, misrepresented the experience of the advertising lawyers, who had tried only a few cases. *Id.* The court was also concerned that, while advertising their availability on a contingency fee basis, the lawyers were "conspicuously silent" about the client's responsibility for costs. *Id.* Although the court's opinion does not discuss the record in detail, and although there was disagreement among the justices about the import of the evidence, the Supreme Court could have decided that the state had satisfied the *Central Hudson* test by proving that the ads were misleading. If that is true, then its summary dismissal would have little precedential value in other cases. *Central Hudson* is a fact-based standard, and the import of the Court's holding is thus necessarily limited to the facts of the case.[5]

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[5] The language on which the state relies is from the Iowa Supreme Court's decision in *Humphrey* that was vacated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). On remand, the Iowa Supreme Court reaffirmed its earlier decision, though it focused its discussion more narrowly on the fact that the lawyers' advertisements were on television rather than in print. If the Supreme Court's summary dismissal could ever have been read to suggest that television advertisements are entitled to less constitutional protection than other forms of advertising—an argument the state does not advance here—it can no longer plausibly carry that meaning. The Court has subsequently applied the *Central Hudson* test to television advertisements. *See Greater New Orleans Broad. Ass'n,*

The Supreme Court has stressed that a summary reversal "is not to be read as a renunciation . . . of doctrines previously announced in [] opinions after full argument" and cannot be "understood as breaking new ground." *Mandel*, 432 U.S. at 176. Especially given the Supreme Court's adoption of the *Central Hudson* test just five years earlier, it is unlikely that the Court would have chosen a summary disposition as a vehicle to announce a major change in the test. Moreover, the import of a summary dismissal is diminished to the extent it is inconsistent with subsequent doctrinal developments. *Id.* After more than twenty years of subsequent decisions on the commercial free speech doctrine, which have gradually elaborated on the state's burden under *Central Hudson* but have never mentioned *Humphrey*, the Court's summary dismissal, whatever it may have meant in 1985, means nothing today.

2. *Florida Bar v. Pape* and Other Cases

In addition to *Humphrey*, the state relies for its proposed rule on a smattering of federal district court and state court decisions, none of which—with one possible exception—adopts the rule it urges here. First, *Farrin v. Thigpen*, 173 F.

Inc. v. United States, 527 U.S. 173 (1999) (striking down restrictions on broadcasting lottery information under the Central Hudson test); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (striking down restrictions on casino advertising); *see also Tillman v. Miller*, 133 F.3d 1402 (11th Cir. 1998) (holding that the state had failed to meet its burden of justifying restrictions on television advertisements); *Schwartz v. Welch*, 890 F. Supp. 565 (S.D. Miss. 1995) (striking down restrictions on a variety of common television advertising techniques).

Supp. 2d 427 (M.D.N.C. 2001), and *In re Zang*, 741 P.2d 267 (Ariz. 1987), both involved advertisements that the courts explicitly found to be deceptive. In *Farrin*, the court upheld a restriction on a particular "fictional vignette," but did not base its decision on the rationale advanced by the state—that dramatizations are not protected by the First Amendment. Indeed, the court disclaimed that interpretation of its holding, noting that "the use of dramatization was not a factor" and that "no one contend[ed] that, through the dramatization, viewers will mistake the actors for actual insurance adjusters." *Farrin*, 173 F. Supp. 2d at 442. Instead, the court, after hearing evidence submitted by the state on the ad's deceptiveness, held that the advertisement at issue was a materially deceptive depiction of an insurance company's settlement process and was thus prohibited by the state's ethics rules against false and misleading ads. *Id.* at 440.

Similarly, in *Zang*, the Arizona Supreme Court upheld disciplinary sanctions against lawyers who starred in "very dramatic" television commercials, 741 P.2d at 274, but not because the commercials were dramatic. Rather, the court concluded, based on record evidence, that the lawyers portrayed themselves in their commercials as skilled trial practitioners, when in fact they had very little trial experience and "scrupulously avoided" taking cases to trial. *Id.* Although the court did generally caution lawyers against overly dramatic advertisements, noting that such advertisements "should be examined carefully to assure that they are neither

false nor misleading," the court specifically stated that dramatic advertisements were not prohibited by the state's rules. *Id.* at 276-78.

Nor do *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995), or *In re Felmeister & Isaacs*, 518 A.2d 188 (N.J. 1986), support the state's position here. Although both these courts upheld restrictions on advertising that could be characterized as irrelevant, both also recognized that the state must satisfy the four-prong *Central Hudson* test to justify a restriction on commercial speech. To be sure, the courts' application of the test was flawed—in *Texans Against Censorship*, it is not always clear what evidence the court was relying on, and in *Felmeister* the court acknowledged that the necessary evidence did not yet exist. But neither court adopted a rule that irrelevant or unverifiable statements are *always* unprotected. Indeed, *Felmeister* recognized that at least some attention-getting techniques in advertising are both useful and constitutionally protected. *Felmeister*, 518 A.2d at 192-95.

The decision that comes closest to endorsing the state's view of the First Amendment is the Florida Supreme Court's decision in *Florida Bar v. Pape*, 918 So. 2d 240 (Fla. 2005). The court in *Pape* upheld restrictions—which it had itself adopted—prohibiting a law firm from using an image of a pit bull in its advertisements. *Id.* at 247-49. Overruling a referee's conclusion that the advertisements were "tastefully done" and that pit bulls as a breed are perceived as

"loyal, persistent, tenacious, and aggressive," *id.* at 243, *Pape* engaged in a lengthy and entirely subjective attack on pit bulls as a breed, citing anti-pit-bull laws and judicial decisions involving pit bull attacks in support of its conclusion that pit bulls are associated with "malevolence, viciousness, and unpredictability." *Id.* at 245. The court expressed concern that if it upheld the use of a pit bull image, "images of sharks, wolves, crocodiles, and piranhas could follow." *Id.* at 247.

The court in *Pape* erred to the extent it concluded that the speech at issue was misleading merely because, in the court's opinion, the speech was not relevant to the selection of counsel. If that were the basis of the court's holding, the case would be incompatible with *Bad Frog Brewery*. 134 F.3d at 96-97. It is difficult to see why a frog with its middle finger extended should be entitled to First Amendment protection but a pit bull should not. However, there is another way to read *Pape*. Although the court discussed the issue of relevance in broad terms, the precise basis for its holding was that the pit bull image suggested that the advertising lawyer would "get results through combative and vicious tactics that will maim, scar, or harm the opposing party." 918 So. 2d at 246. The court concluded that the advertisement thus "suggest[ed] behavior, conduct, or tactics that are contrary to [the] Rules of Professional Conduct." *Id.* Plaintiffs' advertisements in this case, however, do not include any elements that suggest vicious or unethical tactics. Indeed, the overall message portrayed by the

commercials seems to be that Alexander and his partner are friendly and eager to help. *See* A. 224. *Pape* is therefore inapplicable here.[6]

D. The State's Proposed Test Would Be Unworkable and Incompatible with the *Central Hudson* Framework.

Even if the state had a legitimate interest in prohibiting "irrelevant" or "unverifiable" ads, the question whether particular speech falls within these categories is not a decision that the state is competent to make. The state here has not attempted to define the terms or to provide guidelines for courts trying to apply them, and, as the Supreme Court has recognized, "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. Thus, although the state may consider certain information to be "of slight worth," the First Amendment dictates that it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

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[6] The state also relies on the disciplinary rules of other states that have gone "unchallenged." If a restriction on speech could be rendered constitutional merely by reference to unchallenged rules in other jurisdictions, *Bates* would never have been decided because, at the time of that decision, nearly every state banned attorney advertising. Moreover, the rules identified by the state are operative in only a small minority of jurisdictions, most of which have rules substantially less strict than New York's.

In a similar context, the Supreme Court in *Zauderer* struck down rules restricting the use of illustrations or pictures in attorney advertisements, noting that these devices serve the "important communicative functions" of "attract[ing] the attention of the audience to the advertiser's message" and, often, of "impart[ing] information directly." 471 U.S. at 647; *see also Grievance Comm. v. Trantolo*, 470 A.2d 228, 234 (Conn. 1984) (holding that ads containing dramatizations were "informative and in no way misleading or deceptive"). Like illustrations and dramatizations, attention-getting techniques are often used in advertising to communicate ideas in an easy-to-understand form, to attract viewer interest, to give emphasis, and to make information more memorable. As the staff of the Federal Trade Commission noted in their comments to the draft version of the rules, common advertising techniques like dramatizations can "be an effective way of reaching consumers who do not know how legal terminology corresponds to their experiences and problems," and can therefore be "useful to consumers in identifying suitable providers of legal services." A. 182-83.[7]

[7] *Zauderer* provides a useful example of the importance of attention-getting techniques. The attorney in that case was disciplined for including an illustration of an intra-uterine device in his advertisements. The ads that included the image attracted more than two hundred inquiries and led to 106 lawsuits, while a another version of the ad lacking the image attracted no clients. *The Supreme Court, 1984 Term*, 99 Harv. L. Rev. 193, 198-99 (1985).

Although large physical size is not a characteristic related to a lawyer's competence, Alexander & Catalano's television commercial depicting its attorneys as the size of giants illustrates its slogan "think big" in a memorable way, and the firm's commercial depicting a judge illustrates the firm's willingness to go to court on its clients' behalf. With its irreverent humor, Alexander & Catalano also communicates the message that its lawyers are ordinary people, who are not above representing average consumers. In this way, advertisements can make attorneys more approachable by humanizing them in the eyes of consumers who may otherwise view them as elitist and inaccessible.

In those cases where an advertisement really is completely useless to consumers, the problem will be solved by the market without the need for government intervention. Consumers would be unlikely to respond to such advertising, and advertisers would therefore not continue to use it. For this reason, the Supreme Court in *Central Hudson* held that even advertising by a monopoly was subject to First Amendment protection, rejecting the view of the New York Court of Appeals that such advertising "could not improve the decisionmaking of consumers" and "convey[ed] little useful information." 447 U.S. at 556-57. As the Court recognized in *Central Hudson*, "[m]ost businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers." *Id.* at 567.

The state's proposed rule would not only be unworkable in practice, but would effectively eviscerate the careful restraints on commercial speech developed by the Supreme Court over the past thirty years. The categories of speech the state claims to be unprotected are so large—encompassing nearly all forms of common and effective advertising—that they would prohibit virtually every advertisement currently running on television. If the state's position were the law, a state could prohibit, for example, Coca-Cola from using polar bears in its commercials because the state considers them to be "irrelevant," or the slogan "Can't beat the real thing" because it is "unverifiable." If such everyday advertising techniques and routine puffery could be considered misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut*, 227 F.3d at 499 (internal quotation marks omitted). And if Coca-Cola deserves protection against such arbitrary impositions, so does Alexander & Catalano. The Supreme Court has stressed that a state's distaste for lawyer advertisements does not allow it to restrict truthful, nonmisleading advertising to any greater extent than it can restrict similar advertising in other industries. *See Zauderer*, 471 U.S. at 646-47.

The most troubling aspect of the rule advocated by the state is that, by removing certain categories of speech from the *Central Hudson* test that the state deems to be "irrelevant" or "unverifiable," the state would be allowed to impose restrictions on speech without the need to prove or even articulate an interest in

doing so, and without showing that the restrictions are either necessary or effective. Such a test would turn *Central Hudson* on its head, replacing the state's heavy burden of proof with a *presumption* that restrictions are constitutional. This Court should refuse to adopt the state's unworkable and dangerous test.

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

The final three prongs of the *Central Hudson* test provide that a state seeking to justify restraints on speech that is not false or misleading faces the heavy burden of demonstrating—with actual evidence—that the purported harms it seeks to address are real and that its chosen restraints will in fact alleviate those harms to a substantial degree. *Edenfield*, 507 U.S. at 770-71. A state's failure to "provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the . . . regulation." *N.Y. State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994).

Having staked its argument in the district court on its contention that irrelevant and unverifiable speech is entitled to no constitutional protection, the state has made no more than a token effort to satisfy this rigorous test. The state has produced no disciplinary records, studies, surveys, or empirical research of any kind suggesting that its amended rules address anything but non-existent problems or are likely to benefit consumers. Because the record is devoid of *any* evidence in

support of the challenged rules, the rules cannot survive constitutional scrutiny under *Central Hudson*.

A. No Valid Interests Justify the State's Restrictions on Speech.

The state asserts, as its sole interest supporting the rules, an "interest in prohibiting attorney advertisements from containing deceptive or misleading content." Defs.' Br. at 32. The state never claims, however, that the sorts of stock advertising devices prohibited by the rules are actually false, and it defies belief that consumers could be deceived by common advertising devices like attention-getting techniques, actors portraying judges, testimonials, endorsements, and mottos. *See Peel*, 496 U.S. at 105 (warning that states should not treat consumers of legal services as "no more discriminating than the audience for children's television"); *see also FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (noting that an advertisement is deceptive under the Federal Trade Commission Act only "if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect").

As the state acknowledges at several points in its brief, its actual interest in this case is not to prohibit speech that is *actually* false or misleading, but to prohibit speech that is "potentially misleading." Defs.' Br. at 36 ("New York's prohibition of irrelevant, nonverifiable and nonfactual advertisements materially advances New York's interest in ending attorney advertising that is potentially

deceptive or misleading"); *see also id.* at 5, 13, 16, 27, 37-38. This asserted interest corresponds to the only public statement about the purpose of the rules by the drafters, the presiding justices, who announced in a press release that the rules were designed to protect consumers against "potentially misleading ads." A. 223.

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 this argument. *See, e.g.*, *Ibanez*, 512 U.S. at 146 (holding that courts "cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden"). In *RMJ*, for example, the Court struck down a restriction preventing a lawyer from truthfully advertising that he was a member of the United States Supreme Court Bar. 455 U.S. 191. Although the Court noted that the statement "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court," it found "nothing in the record to indicate that the inclusion of this information was misleading." *Id.* at 939. Similarly, the Supreme Court in *Peel* held that the state violated the First Amendment by disciplining a lawyer for stating on his letterhead that the National Board of Trial Advocacy had certified him as a civil trial specialist. 496 U.S. 91 (1990). The Court rejected the state's "paternalistic assumption" that "the average consumer" would be confused or unable to understand the value of the certification. *Id.* at 105-06 & 106 n.13.

Notably, the state does not raise on appeal the second purported state interest relied on by the district court: the "interest in maintaining attorney professionalism and respect for members of the bar." A. 239 n.6. The state's failure to assert that interest forecloses reliance on it here. *Edenfield*, 507 U.S. at 768 ("[W]e must identify with care the interests the State itself asserts. Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."). In any case, the Supreme Court since *Bates* has rejected dignity and professionalism as justifications for restrictions on speech. 433 U.S. at 368 (finding the "postulated connection between advertising and the erosion of true professionalism to be severely strained"). The Court has repeatedly reaffirmed the principle that attorneys 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. Indeed, the principle that the state may not regulate speech that it finds disagreeable is the "bedrock principle underlying the First Amendment." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).[8]

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[8] *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.") (quotation omitted); *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.*

In support of the validity of the purported interest in maintaining "professionalism," the district court relied only on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court in *Went For It*, however, based its decision on entirely different justifications: the interests in the protection of privacy and the well-being and tranquility of the home. *Id.* at 625 (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988)). The Court relied on extensive empirical evidence showing that consumers viewed a targeted direct-mail solicitation coming on the heels of a personal tragedy to be a traumatic invasion of personal privacy, *id.* at 626-27, and considered the state's interest in protecting the privacy of consumers from these solicitations to be an application of the state's power "to protect the public health, safety, and other valid interests," *id.* at 625. The Court mentioned the public's confidence in the bar only as it related to these interests. *Id.* at 625-27.

Went For It did not overrule any of the Court's long line of precedents holding that dignity alone is not a valid state interest. In response to the dissent's contention that the Court was "unsettl[ing]" its precedents, the majority responded

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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."); *In re Shapiro*, 225 A.D.2d 215, 216 (N.Y. App. Div. 1996) (declining to discipline a lawyer for an advertisement that, while "extremely offensive and degrading to the legal profession, [was] nonetheless constitutionally protected hyperbole").

that it was doing "no such thing," emphasizing that "[t]here is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism." *Id.* at 632 n.2. Thus, the state may regulate lawyer advertising when it damages the public's confidence in the legal system by directly injuring consumers—such as by defrauding them or invading their privacy. The state may not, however, prohibit speech because of its belief that *the communication itself* is unprofessional or undignified.

Even if the state did have a valid interest in protecting the image of lawyers, it has no evidence that lawyer advertising in general, and the targeted forms of advertising in particular, have a negative impact on the image of the bar. Almost all advertisements use some sort of attention-getting technique or slogan, and many of them are done tastefully in a way that appeals to consumers. Improving public opinion of a product or service is, after all, one of the main motivations for advertising. 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. 369-70.[9]

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[9] If anything, "stylish" ads, of the sort that consumers are used to seeing, are likely to give consumers a better impression of lawyers than the bland "talking

B. The Rules Do Not Advance the State's Claimed Interests.

Even assuming that the state has asserted a valid interest, it still must "bear[] the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). Although preventing false and misleading advertising is undoubtedly a valid state interest, state regulations cannot advance that interest when they target advertising techniques that are neither false nor misleading. *Edenfield*, 507 U.S. at 770-71.

As the district court observed, the evidence supporting the need for the rules in this case "is notably lacking." A. 239. The only evidence the state relies on in support of its rules is the Report and Recommendation of the Task Force on Lawyer Advertising. A. 51. The state's reliance on the report is new on appeal; the *plaintiffs* submitted the task-force report in the district court, and the state never cited or relied on it there. Doc. 6, nos. 7-8. Nevertheless, the district court, acting on its own initiative, found several passages in the report that it felt satisfied the state's burden on the third prong of the *Central Hudson* test, and the state has now followed the district court's lead in pointing out similar portions of the report. *But*

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heads" ads of the sort required by restrictive state ethics rules. William E. Hornsby, Jr., Regulating *Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 Geo J. Legal Ethics 325, 350-56 (1996) (reviewing an American Bar Association Study).

see Edenfield, 507 U.S. at 768 (holding that the court must rely on the actual interests asserted by the state).

The state's reliance on the report is flawed for two major reasons. First, the state cannot rely on the recommendations of the task-force report in support of its rules because it did not adopt any of the task force's recommendations. The state concedes that the report's suggested rules "do[] not mirror" its chosen regulations, Defs.' Br. at 36, but that is an understatement. The task force specifically ruled out content-based restrictions, A. 55-56, and *none* of the regulations at issue in this appeal—with the partial exception of the moratorium—were proposed or even mentioned in the report.[10]

Second, even if the task force *had* recommended the amendments adopted by the state, it would not be enough to satisfy the state's burden here. Other than reviewing approximately 250 lawyer advertisements, the task force conducted no empirical research, studies, or surveys, and accumulated no other evidence, to determine what kinds of advertising are likely to mislead the public. A. 60-61. As for its review of the lawyer ads, the report does not suggest that any of them contained the sorts of techniques prohibited by the rules or, if they did, whether the techniques misled or otherwise harmed consumers. A. 100-02. The unsubstantiated

[10] Notably, the New York State Bar Association's amicus curiae brief—although defending the district court's decision to sustain the moratorium—does not defend any of the rules declared unconstitutional by the district court.

opinions of the task force members have no more evidentiary value than the unsubstantiated opinion of the state. *Edenfield*, 507 U.S. at 770 (holding that the state's burden is "not satisfied by mere speculation or conjecture").

In addition to these general problems with the state's evidentiary showing, the state's justification for each of the individual amendments is seriously flawed.

1. The Prohibition on Attention-Getting Techniques

Although the state's asserted interest is in prohibiting "false and misleading" ads, it does not argue, much less provide evidence, that the sorts of "techniques to obtain attention" prohibited by § 1200.6(c)(5) are false or misleading, or that this rule will alleviate any problems in a material way. Instead, the state asserts only that the rule "materially advances New York's interest in factual, relevant attorney advertisements." Defs.' Br. at 35. The state's "interest" in relevant advertising is essentially a rehash of its argument that "irrelevant" speech is not protected by the First Amendment and should be rejected for the same reasons.

The state attempts to rely on the task-force report in support of this rule, contending that the task force "explained that its proposed rule barring false, deceptive or misleading communications could also reach puffery" and unverifiable claims. *Id.* But the report does not say what the state claims it says; in fact, the cited portion is part of the commentary to the proposed amendments that encourages lawyers to "strive" not to put "undue emphasis on style and advertising

strategems." A. 146. Not only are the comments purely advisory, they specifically provide that "puffery and claims that cannot be measured or verified" are prohibited only "to the extent that they are false, deceptive or misleading." *Id.* The comments also state:

> Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have imposed extensive restrictions on . . . advertising going beyond specified facts about a lawyer or on "undignified" advertising. . . . Limiting the information that may be advertised . . . assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

A. 145.

The state also points to the task force's adoption of the Monroe County Bar Association's Guidelines, which provide that "all information *should* be relevant to the thoughtful selection of counsel, and devices such as puffery . . . *should* be minimized." A. 124 (emphasis added). But once again, these guidelines are explicitly aspirational in nature, and are framed as "broad principles" that are not intended to "alter the effect" of the rules. A. 122-23. Moreover, as the district court observed, the guidelines explicitly *allow* attention-getting devices; they just advise lawyers to minimize them. A. 124.

2. The Prohibition on Nicknames, Monikers, Mottos, and Trade Names

In support of its prohibition on nicknames, monikers, mottos, and trade names, the state argues that a separate provision of the rules prohibited lawyers

from using trade names even before the recent amendments, and that the challenged rule "therefore directly and materially advances New York's interest in furthering this longstanding policy." Defs.' Br. at 37. A "longstanding policy," however, is not the same as an interest, and there is no evidence in the record here explaining what important state interest is served by the ban on trade names. Instead of presenting evidence in support of its policy, the state notes only that the task-force report "alluded" to the existing prohibition on trade names and "noted their potentially misleading nature in its commentary." A. 37-38. That is true, but the task-force report does not recommend changes to the rule against trade names and provides no evidence that they are misleading.

In the absence of factual support, the state relies on *Friedman v. Rogers*, 440 U.S. 1 (1979), to advocate a per se rule that trade name restrictions are always constitutional. *Friedman*, however, was decided before the Supreme Court had formulated its standard of review for restrictions on commercial speech in *Central Hudson*, and therefore is of limited value today. *See Bad Frog Brewery*, 134 F.3d at 96-97 (noting that Supreme Court doctrinal developments have undermined the holding in *Friedman*); *Michel v. Bare*, 230 F. Supp. 2d 1147, 1150 (D. Nev. 2002) (striking down a restriction on attorney trade names, and noting that *Friedman* appears to allow greater regulation of trade names than would be allowed by *Central Hudson*). Courts now recognize that trade names are entitled to First

Amendment protection. *See Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 753 (5th Cir. 2006); *Bad Frog Brewery*, 134 F.3d at 97; *Sambo's Restaurants v. Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981); *ACLU v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997).

Even assuming that *Friedman* is still good law, it does not sanction the sort of limitless prohibition on trade names that the state attempts to draw from it. *Friedman* relied on the legislative record developed by the state showing that optometrists were deceiving consumers by, among other things, operating under names other than their own. *Friedman*, 440 U.S. at 13-14. Thus, the Court held that the state's interest was not "speculative or hypothetical," but "substantial and well demonstrated." *Id.* at 14-15. The Court did *not* hold that states are free to ban all trade names under any circumstances, even in the absence of evidence of a demonstrated need for such restrictions. *See Michel*, 230 F. Supp. 2d at 1150-51 (detailing the evidence in *Friedman* and noting that the state had not produced similar evidence); *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1013 n.7 (W.D. Mo. 1998) (noting that Friedman relied on "compelling" evidence and never held that all trade names are inherently deceptive).

Finally, even if trade names could be constitutionally prohibited in New York, *Friedman* gives no support for the state's decision also to prohibit nicknames, monikers, and mottos. Alexander & Catalano's motto, "the heavy

hitters," is always displayed alongside the firm's name, so there is no risk that consumers will become confused about who is providing the firm's services. The New York Appellate Division recognized this important point in dismissing disciplinary charges against a lawyer for using the motto "The Country Lawyer." *In re Von Wiegen*, 63 N.Y.2d 163, 176-177 (N.Y. 1984). The court held that "[t]he purpose of the prohibition against trade names . . . is to prevent the public from being deceived about the identity, responsibility and status of those who use the name." *Id.* at 841. Because the motto at issue always appeared alongside the name of the lawyer's firm, the court reasoned that "[t]he use of the motto 'The Country Lawyer' did not deceive in that way." *Id.*

3. The Prohibition on Depiction of Judges

In support of its restriction on the depiction of judges, the state refers to a portion of the task-force report stating that advertisements should not state or imply an improper influence over a court. A. 39. Plaintiffs agree that advertisements meeting that description could be prohibited. However, the state's conclusion that depictions of judges could also be prohibited is a non sequitur. At most, the state's contention satisfies the first prong of the *Central Hudson* test by articulating a valid state interest. The state has not shown, however, how its chosen regulation materially furthers that interest.

There is no reason to believe that consumers seeing a depiction of a judge will draw the conclusion that the advertising lawyer can or would exert an improper influence on a judge. The state has not brought forward even a single example of an ad that is misleading in this way, nor has it provided evidence that any consumer has ever been confused by a depiction of a judge. Alexander & Catalano's commercial portraying a judge is not even arguably deceptive in this way. A. 224. To the contrary, the commercial states that the judge is there to "ensure the trial is fair." *Id.* No reasonable consumer would conclude from the ad that the firm was implying improper influence over the judge.

At most, the restriction is a prophylactic rule designed to protect against hypothetical cases of abuse. Although broad prophylactic rules may be easier to administer than narrowly tailored ones, the state may not broadly suppress truthful advertising "merely to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. If the state encounters a misleading image of a judge, the state can prohibit it under its rules against false and misleading advertising. It may not, however, ban all images of judges on the ground that it might one day encounter a misleading image.

4. The Prohibition on Client Testimonials

To justify its prohibition on client testimonials, the state asserts the "need to preserve the integrity of the attorney-client relationship." Defs.' Br. at 39. This

justification for the rule is new on appeal, and, below, the state never defended this provision or described the justification for its adoption. In any case, the state has no evidence in support of its assertion that such client testimonials will cause the predicted harm. The state's reasoning is apparently that a client might feel undue pressure to agree to give a testimonial, but there is no reason to believe that this kind of pressure is or has ever has been a problem in New York. Even before the amended rules were adopted, lawyers in the state were bound by a variety of rules that prohibited conflicts of interest, including a provision that "a lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will or reasonably may be affected." 22 N.Y.C.R.R. § 1200.20. Yet, the state has not presented any cases where a lawyer was disciplined for applying undue pressure to clients in a way that would violate the rule.

Moreover, if the state's newly asserted interest in protecting the attorney-client relationship is the real reason for its rule, its chosen restriction makes little sense. Other aspects of the lawful advertising rules generally assume that current clients need *less* protection from their own lawyers. Thus, the rules against advertising and solicitation practices do not apply to communications with existing clients. § 1200.6(a). In addition, the rule is dramatically underinclusive for accomplishing the state's asserted purpose. Because the prohibition applies only to testimonials "with respect to a matter still pending," current clients under the rule

could still, under the state's theory, be pressured into giving a testimonial related to a past case, or even to give a general testimonial about the lawyer's quality. *See Bad Frog Brewery*, 134 F.3d at 98 (noting that a rule's underinclusiveness is a relevant factor in determining whether a regulation materially advances the state's interest).

C. The Rules Are Not Narrowly Drawn.

In attempting to satisfy its burden on the final *Central Hudson* prong, the state argues only that the fit between its interest and the regulations "need not be perfect," citing *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The state has to show, however, that the rules' "scope is in proportion to the interest served" and that the rules are "narrowly tailored to achieve the desired objective." *Id.* at 480 (internal quotation marks omitted). Moreover, the state must make this showing with actual evidence. *Shaffer*, 27 F.3d at 844 (striking down a restriction on commercial speech in light of the state's "failure to determine empirically whether less restrictive measures . . . would provide an alternative means for effectively combating" the purported harm). Here, the state has not even attempted to show that its interests cannot be served by the readily available, less restrictive alternatives suggested by the task-force report.

1. The Rules Are Vastly Overbroad.

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 deception." *RMJ*, 455 U.S. at 203. As previously discussed, the amended rules sweep in almost all common advertising techniques, most of which are not false or misleading, nor even likely to be distasteful to any consumer. The state argues that the rules are nonetheless sufficiently narrow because they "allow attorneys to advertise on a wide range of topics." Defs.' Resp. Br. at 41. It is not, however, a justification for restrictions on speech that the state will permit the restricted speaker to say other things. The question is not whether the speaker is gagged completely, but whether the government has achieved its goals in a narrow manner. The state has made no attempt to do so.

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

Although it attempts to rely on the task-force report in support of its rules, the state ignores the actual recommendations of the task force, which would have accomplished the state's goals with less impairment of speech. First, the task force recommended that the state could simply enforce the existing prohibition against false and misleading advertising in 22 N.Y.C.R.R. § 1200.6(a) instead of enacting new content-based restrictions on speech. A. 56, 59, 70, 100-102, 133-35. Second, the task force suggested that the state could impose filing requirements that would allow it to review individual advertisements for false and misleading statements. A. 133-35. Third, it suggested that the state could impose disclosure or disclaimer

requirements to clarify speech that would otherwise be misleading. A. 56. Finally, the task force suggested that the state could educate the public about what qualities it should consider in choosing an attorney. A. 57-58, 60. The state has not provided any reasons or evidence justifying its decision not to adopt the state bar's recommendations and to instead formulate its own content-based restrictions on speech. The state has therefore failed to meet its burden of showing that such means would not suffice to satisfy its purported interests.

III. The Thirty-Day Moratorium on Communications to Potential Clients in Personal Injury and Wrongful Death Cases Is Unconstitutional.

Sections 1200.8(g) and 1200.41-a of the rules impose a blackout on all communications by lawyers to consumers with personal injury or wrongful death claims for thirty days after the incident giving rise to the injury. Like the other restrictions at issue in this case, these rules are not supported by any evidence and thus cannot survive the fact-bound *Central Hudson* test. Unlike the other restrictions, however, the district court decided to uphold the constitutionality of the thirty-day moratorium. The district court's decision on this issue was wrong.[11]

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[11] New York actually adopted two separate thirty-day moratorium rules that, although worded slightly differently, appear on their face to be very similar. The main substantive difference between the two rules, and the only plausible justification for the duplication, was that § 1200.8(g) is limited to advertisements where a primary purpose of the advertising lawyer is to make a profit, while § 1200.41-a applies to *all* communications, including nonprofit communications, between a lawyer and a potential client. To save the rule from unconstitutionality,

A. The State Has Not Shown a Need for the Moratorium Rule.

In the district court, the state explained its need for a thirty-day moratorium solely based on the Supreme Court's holding in *Florida Bar v. Went For It*, which upheld a thirty-day restriction on direct-mail solicitations to injured consumers in Florida based on the Court's conclusion that the state had a legitimate interest in protecting the privacy of Florida residents and the sanctity of their homes from unsolicited direct mailings. 515 U.S. 618. However, *Went For It* not only fails to establish a similar state interest in the context of this case, it actually mandates the *opposite* result here.

Went For It specifically limited its holding to "targeted direct-mail solicitations to victims and their relatives." *Id.* at 620. As the district court concluded in this case, however, the rules here are much broader, prohibiting lawyers from communicating *by any means* with specific injured people or groups of injured people for purposes of informing them of their legal rights or the availability of legal representation. A. 249 n.15. The rule thus prohibits not only in-person, telephone, and direct-mail solicitations, but also advertisements on radio, television, and the Internet that do not intrude on the privacy of consumers. A. 248-

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however, the district court read § 1200.41-a as implicitly adopting a profit-motive standard. A. 252-54. As a result of the district court's ruling, which plaintiffs do not appeal here, the rules are now substantively identical, and will therefore be treated together for purposes of this analysis.

49 n.15 ("The moratorium provisions in this case extend by their plain language to television, radio, newspaper, and website solicitations that are directed to or targeted at a specific client"). For example, a law firm that wished to set up a web page stating its willingness to assist consumers injured by a particular product or in a particular disaster would be blocked from doing so during the thirty-day period. Moreover, if different people were injured by a product at different times, an advertisement addressed to those injured consumers would *never* be allowable because it could always be viewed by an injured person within thirty days of that person's injury.

Unlike direct-mail advertisements, advertisements that are not delivered to a specific consumer "involve[] no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals"—the harms that concerned the Supreme Court in *Went For It.* 515 U.S. at 630. Even if considered by some consumers to be in poor taste, these sorts of ads "can hardly be said to have invaded the privacy of those who [receive them]." *Zauderer*, 471 U.S. at 642. Those who do disapprove of the ads can "effectively avoid further bombardment of [their] sensibilities simply by averting [their] eyes," *Shapero*, 486 U.S. at 475-76 (internal quotation marks omitted), or, in the case of television ads, by changing the channel.

Prohibiting this form of advertising therefore serves no state interest other

than an illegitimate and paternalistic interest in protecting consumers from being offended. *Id.* at 630; *see also id.* at 631 n.2 ("There is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism."). And the task force's proposed rules make clear that this was in fact the state's interest. In explaining the purpose of the rule, the task force's commentary provides only one explanation for the decision to prohibit communications to all accident victims in the state: "the unseemly conduct of a few attorneys." A. 5.[12]

B. The State's Restriction Will Not Mitigate the Purported Harm.

In upholding Florida's restriction on direct-mail solicitations, the Supreme Court in *Went For It* relied on the strength of extensive evidence accumulated by the state of Florida showing that consumers there viewed direct-mail solicitations following an injury to be an egregious violation of their privacy and an invasion into the sanctity of their homes. *Went For It*, 515 U.S. at 626-27. The Court pointedly contrasted the state's evidence with the situation in *Edenfield*, where the Court had struck down regulations that were supported by "no studies." *Id.* at 626.

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[12] The amicus curiae brief of the New York State Bar Association confuses this point, arguing (at 5) that the moratorium serves the state's interest in "preventing the unwanted intrusion into the privacy of victims following a personal injury or wrongful death of a loved one." The bar does not explain how forms of communication such as Internet websites are capable of "intruding" anywhere.

Like the defendants in *Edenfield*, the state here has submitted no empirical evidence of any kind in support of its rule and, for that reason alone, the rule is unconstitutional.

The state argued in the district court that to satisfy its evidentiary burden it should be permitted to utilize Florida's factual findings that were held to be sufficient in *Went For It*. But the state did not rely on the *Went For It* study in enacting its restrictions, and the study is accordingly nowhere in the record. *Compare Chambers v. Stengel*, 256 F.3d 397 (6th Cir. 2001) (upholding a thirty-day restriction on direct mail based not only on the *Went For It* study, which the state put in the record, but also additional evidence, including statistical and survey evidence, demonstrating the need for the rule in the state). Even if the state could rely on evidence referenced by a Supreme Court decision in support of a rule that is *identical* to the rule the Court upheld, the state cannot support an entirely different and much broader rule with evidence that is not in the record, that involves another state, and that is more than a decade old and therefore does not reflect consumers' growing familiarity with lawyer advertising over the past ten years.

The state also argues that it is entitled to rely on a "consensus" of other states that have enacted similar rules. Defs.' Br. at 31. The state's claim of a consensus, however, is seriously undermined by the fact that it identifies only ten

states, including New York, that have adopted any sort of moratorium rule. One-fifth is not a consensus, and even those states that have enacted moratorium rules have generally limited them, like the rule in *Went For It*, to targeted direct-mail solicitations. In any case, the rules of other states cannot justify a rule if the rules of those states are also unconstitutional.

Although the point was not advanced by the state in the district court, the court on its own initiative also concluded that the task force's findings demonstrated a substantial interest in the moratorium rule. The court found relevant a passage of the opinion stating that "the Committee believed the cooling off requirement would be beneficial in removing a source of annoyance and offense to those already troubled by an accident or similar occurrence." A. 249. Plaintiffs do not doubt that the committee members held this belief. However, because neither the committee nor the state relied on any actual evidence in formulating this opinion, the rule cannot survive scrutiny under the *Central Hudson* test. The task force's study of these states' advertising did not gather or analyze the evidence—if any—accumulated by those states in formulating their rules. Instead, the task force's analysis was limited to determining whether states with those rules had "fac[ed] constitutional challenges." A. 115. The committee's work on this issue was therefore not an empirical review of evidence so much as legal research.

Finally, the district court relied in support of the rule on the Aviation Disaster Family Assistance Act, 49 U.S.C. § 1136, a federal statute that prohibits solicitation of a plane crash victim's family for thirty days following the crash. A. 61. In referencing this statute, the task force referenced a congressional report about "concerns" with "overzealous attorneys" contacting victims following a plane crash. A. 62. Because the report is not in evidence, the record does not indicate what Congress's concerns were or whether those concerns are relevant to this case. Regardless, even if the state could rely on an offhand reference to a report not in evidence to justify a restriction on speech, the report would not be relevant because the federal law is substantially narrower than the rule challenged here. First, the federal law is focused on the impact of attorneys following mass disasters, not personal injuries. Although the task force considered adopting a moratorium that was limited in the same way, it instead "came to a different conclusion" in adopting a rule encompassing all personal injuries. A. 61. Second, the federal law restricts only communications "to" a victim or family member of a mass disaster, which effectively covers only direct-mail, phone calls, face-to-face, and similar communications. *See* A. 61-62. New York's rule, on the other hand, prohibits communications that are "directed to, or targeted at, a specific recipient or group of recipients," and thus includes even general advertisements in the mass media as long as the lawyer has a specific target group in mind. The district court

was thus wrong to conclude that the federal statute was identical to or provided support for New York's rule.

Even if the federal statute and other state rules *were* on point, that would not make the rule here any more constitutional. The state has not shown that these other restrictions were adopted based on actual evidence, or that it relied on that evidence in enacting its own restrictions. It has therefore failed to meet its burden under *Central Hudson*.

C. The Rule Is Not Narrowly Drawn.

Finally, the rule adopted by the state is not narrowly tailored toward the state's intended objective. The Court in *Went For It* described the moratorium at issue in that case as "narrow," emphasizing the "other ways for injured Floridians to learn about the availability of legal representation" that remained available during the thirty-day blackout period. *Id.* at 620, 633. Here, however, the rules restrict even alternative sources of information—the "other ways" referred to in *Went For It*—leaving attorneys completely unable to communicate to specific injured consumers or groups of consumers, at least unless the consumers specifically request that information from the attorney.

The state interest upheld in *Went For It* therefore does not justify restrictions on forms of communication—such as websites and television ads—that do not intrude on the privacy of consumers. *See 44 Liquormart, Inc. v. Rhode Island*, 517

U.S. 484 (1996) ("[L]ast Term we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers."). Even Florida, the state whose moratorium rule was upheld by the Supreme Court, recognizes the difference between websites and direct-mail solicitations, noting that "a lawyer's Internet web site is accessed by the viewer upon the viewer's initiative," and thus classifying websites as *solicited*, rather than *unsolicited* communications. *See Amendments to Rules Regulating the Florida Bar*, 762 So. 2d 392, 426 (Fla. 1999).[13]

To be sure, the district court was correct that attorneys may still advertise generally during the thirty-day period, so long as they don't tailor the ads toward any specific target audience of personal injury victims. That is not, however, an "alternative channel[] for the dissemination of information"—as the district court held. It is an alternative *message* that the state seeks to substitute for the lawyer's preferred message. Under the rules, attorneys are prohibited from advertising in *any* media within the thirty-day period to inform injured consumers that they are available and willing to take a particular claim. The state has given no reason for denying consumers access to this information and relegating them instead to a

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[13] The state bar's amicus brief thus gives too much weight to *Went For It* when it argues (at 11) that the distinction between a ban on direct mail and a ban on all communications "is a distinction without a difference." As the Supreme Court has stressed, when assessing restrictions on attorney solicitations, "the mode of communication makes all the difference." *Shapero*, 486 U.S. at 475.

random search through the phone book.

CONCLUSION

The district court's grant of partial summary judgment to plaintiffs should be affirmed. The district court's grant of partial summary judgment to defendants on the issue of the thirty-day moratorium should be reversed and remanded with instructions to enter judgment for the plaintiffs on that issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A). The brief is composed in a fourteen-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002), the brief contains 15,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on February 1, 2008, I caused the original and ten copies of this brief to be sent by first-class U.S. Mail to the Clerk of the Court, and two copies to be sent by first-class mail to the following:

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