UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

WILLIAM H. HARRELL, JR., et al., Plaintiffs, v. THE FLORIDA BAR, et al., Defendants.	) Civil Action No. 3:08-cv-15-VMC-TEM

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS, STRIKE, AND ABSTAIN

This case involves a First Amendment challenge to Florida's lawyer advertising regulations, brought by attorney William H. Harrell Jr., the law firm Harrell & Harrell, and Public Citizen, a nonprofit public-interest group. As set forth in the complaint and plaintiffs' motion for a preliminary injunction, Florida's advertising rules prohibit common and innocuous advertising techniques that are widespread in other industries but that the Bar characterizes as either factually unverifiable or irrelevant to the decision whether to retain a lawyer. The Florida Bar enforces these rules through a system of prior restraint, requiring lawyers to submit advertisements for pre-screening in a process that provides no opportunity for judicial review and leaves discretion in the hands of Bar administrators to decide whether ads are "manipulative," "misleading," "likely to confuse," or violate other similarly vague standards.

The Bar's treatment of Harrell's advertisements is one of countless examples of the Bar's arbitrary decisionmaking under this system. First, the Bar prohibited Harrell from using the phrase "Don't settle for anything less," claiming that it would "create unjustified expectations" among consumers. Harrell Decl. ¶¶ 5-6. At the same time, the Bar announced that the phrase "Don't settle for less than you deserve" was permissible, though it is not clear why one statement

would be likely to confuse consumers while the other would not. *Id.* ¶ 6. Then, after Harrell had spent five years investing in the brand and it had acquired widespread name recognition in his firm's market, the Bar changed course, informing Harrell that "Don't settle for less than you deserve" improperly characterized the quality of his services and was thus prohibited. *Id.* ¶¶ 7-11. As explained in plaintiffs' preliminary injunction motion, this sort of arbitrary and unfair result is not an outlier; it is the usual and inevitable outcome of a system that conditions state approval of commercial speech on vague and amorphous standards that are impossible to understand, much less apply fairly. Mot. for Prelim. Inj. at 9-13.

The Bar now responds by arguing that abstention and ripeness issues prevent this Court from deciding the important questions of federal constitutional law raised by plaintiffs, giving as its reason the very basis for plaintiffs' complaint: that the rules are too unclear for this Court to apply without further clarification. To resolve this purported problem, the Bar asks the Court to abstain from deciding portions of the case or to strike parts of the complaint as unripe, thereby forcing Harrell to submit his ads to the Bar under the same system of prior restraint challenged by plaintiffs and once again subjecting him to the arbitrary decisionmaking of Bar administrators. There is no basis, however, for this Court to avoid deciding First Amendment questions under these circumstances. Indeed, if the Bar is correct that this Court cannot accurately interpret and apply the rules, there is no reason to believe that Harrell and other advertising attorneys, or the Bar staff responsible for enforcing the rules, will be able to understand and apply them either.

In a second motion, the Bar asks this Court to dismiss the complaint as to plaintiff Public Citizen, arguing that it has not alleged a specific enough injury to its members. Plaintiffs have adequately alleged, however, that the Bar's sweeping prohibitions on lawyer advertising restrict

the ability of Public Citizen's members to receive relevant information about their legal rights and the availability of legal services. The Bar's ad rules are so strict that—if applied equally to other industries—they would prohibit essentially every advertisement currently running in most forms of media. *See* Mot. for Prelim. Inj. at 15-17, 19-23. And the effect of the rules stretches far beyond the specific techniques restricted, creating an incentive for lawyers to include only the most innocuous and bland content to avoid censorship by the Bar. *See id.* at 9-10. The resulting widespread chill on speech affects the right of Public Citizen's members and other consumers in the state to receive information, just as it affects the right of advertising lawyers to distribute it.[1]

I. *Pullman* Abstention Is Unwarranted and Unnecessary.

The Bar first argues that this Court should abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). *Pullman* abstention is an "extraordinary and narrow exception" to federal jurisdiction, available only in "exceptional circumstances." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187 (1959); *see also Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) ("[A]bstention is the exception rather than the rule . . . .").

At a minimum, *Pullman* abstention is appropriate only when (1) the case presents an

[1] Neither of the Bar's pending motions addresses Harrell's challenge to the application of Rule 4-7.2(c)(2), which prohibits advertisements that "describ[e] or characteriz[e] the quality of the lawyer's services," to his use of his slogan "Don't settle for less than you deserve." The motions here ask the Court to abstain only as to (1) Harrell's challenge to the application of other rules to his current and planned future ads, and (2) Harrell's challenge to the application of Rule 4-7.2(c)(2) to aspects of his ads other than the slogan "Don't settle for less than you deserve." As to 4-7.2(c)(2)'s effect on "Don't settle for less than you deserve," although it is not in the record, the Bar informed Harrell last week that it had once again changed its position and now maintains that the phrase does *not* characterize quality of services. Whether the Bar can avoid constitutional scrutiny on that issue by changing its position during litigation may be the subject of a future motion, but is not at issue here. *See ACLU v. Fla. Bar*, 999 F.2d 1486, 1494-95 (11th Cir. 1993) (holding that the Florida Bar's assurance that it would not apply a challenged judicial-conduct rule to the plaintiff did not warrant dismissal where there was no guarantee that the Bar would not change its position after dismissal of the case).

unsettled question of state law, and (2) the question of state law is dispositive of the case or would avoid, or substantially modify, the constitutional question presented. *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000). Even when these circumstances are present, abstention may not be warranted. *Id.* (noting that abstention is discretionary). The Court still must "carefully assess the totality of circumstances presented by a particular case," conducting a "broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication." *Duncan*, 657 F.2d at 697; *see also Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers."). The balancing of these factors is "heavily weighted in favor of the exercise of jurisdiction." *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (internal quotation omitted). For several reasons, *Pullman* abstention is unwarranted here.[2]

A. The Importance of Vindicating the First Amendment Rights at Issue Outweighs the Policies Underlying Abstention.

The Supreme Court and the Eleventh Circuit have repeatedly held that *Pullman* abstention is rarely, if ever, appropriate in a First Amendment case. *See Cate v. Oldham*, 707 F.2d 1176, 1184 (11th Cir. 1983) (declining to invoke *Pullman* abstention even where the *Pullman* criteria were satisfied and holding that abstention "is to be invoked particularly sparingly in actions involving alleged deprivations of First Amendment rights"); *see also Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 408 n.2 (5th Cir. 2007) (declining to abstain

[2] A federal court abstaining under *Pullman* generally does not dismiss the case or lose jurisdiction. *See Zwickler v. Koota*, 389 U.S. 241, 244 n.4 (1967). Rather, the court stays the case pending resolution in a state court or agency. *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 416-17 (1964). After the state has resolved the issues of state law, the case returns to federal court for a determination of the constitutional challenge in light of the state decision. *Id.*

under *Pullman* in a commercial speech challenge to restrictions on solicitations by bail bondsmen); *Siegel*, 234 F.3d at 1174 ("In considering abstention, we must take into account the nature of the controversy and the importance of the right allegedly impaired."); *O'Hair v. White*, 675 F.2d 680, 694 (5th Cir. 1982) (holding that courts should abstain "only in the most extraordinary circumstances when fundamental rights . . . are involved"). In First Amendment cases, the importance of the federal rights at stake "outweigh the interests underlying the *Pullman* doctrine." *Sorrell*, 221 F.3d at 385. Indeed, the Eleventh Circuit has *never* held that abstention is appropriate in a First Amendment case. *See Pittman v. Cole*, 267 F.3d 1269, 1285-88 (11th Cir. 2001) (holding that the district court abused its discretion in abstaining in a First Amendment challenge) (internal quotation omitted).

The presumption against abstaining in the First Amendment context is amplified here because abstention would have the perverse effect of forcing Harrell to submit his ads for review in the very system of prior restraint that he is challenging. *See* Mot. for Prelim. Inj. at 9-14. During the time it takes the Bar to decide the legality of Harrell's ads, Harrell would continue to be subjected to prior restraint and censorship by Bar authorities without the prompt judicial review required by the First Amendment. S*ee Harman v. Forssenius*, 380 U.S. 528, 537 (1965) ("Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.") (footnote omitted); *Cate*, 707 F.2d at 1184-85 ("Given that this is a First Amendment case alleging immediate and ongoing irreparable injury, and considering the great costs imposed by abstaining in this type of case, we decline to invoke *Pullman* abstention.") (citations and footnote omitted). In sum, abstention here would itself further the unconstitutional restriction on speech. *See Zwickler*, 389 U.S. at 252 ("[T]o force the

plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.").

B. Abstention Would Not Clarify the Challenged Rules.

Abstention here would be particularly inappropriate because the state could not possibly construe its rules in a way that would render a constitutional challenge unnecessary. First, the Bar's decisionmaking could not be relied on because it would proceed by the same arbitrary and irrational methods that are at the root of the rules' constitutional deficiency. Indeed, the Bar's back-and-forth, contradictory decisionmaking in the past has only *exacerbated* confusion over the rules' meaning. *See* Mot. for Prelim. Inj. at 10-13.

Second, no matter how the Bar construes its rules, their core constitutional infirmity—the prior restraint on speech—would remain. Even if the state were to decide that particular advertisements by Harrell were not "misleading" or "manipulative," and did not violate any other rules, Harrell, and other lawyers in the state, would still be unable to run *future* ads without obtaining the Bar's approval. Thus, Harrell would continue to be forced into self-censorship, limiting his advertisements in an effort to maximize the chances for Bar approval.

Finally, this is not a case, such as those cited by the Bar, where the state could definitively resolve the meaning of a specific provision of state law. The provisions challenged by plaintiffs—including prohibitions on ads that are "manipulative," "misleading," or "likely to confuse"—are so broad and vague that an opinion as to whether any particular ad complies would shed little or no light on their meaning. *See* Mot. for Prelim. Inj. at 3-5, 10-13 (providing examples of the breadth and vagueness of the rules).

This case thus resembles *Baggett v. Bullitt*, where the Supreme Court found abstention inappropriate in a First Amendment challenge to a law requiring teachers and state employees to

swear that they were not "subversive" and that they would "promote respect for the flag and the institutions of the United States." 377 U.S. at 361-62. The state in *Baggett* asked the Court to abstain under *Pullman* on the ground that the Washington state courts had not yet interpreted the meaning of those phrases. *Id.* at 375. The Court refused, noting that the vague statute was "not open to one or a few interpretations, but to an indefinite number." *Id.* at 377-78. Similarly, there is no possibility here that the Bar could, in one pass, provide a meaningful definition of a term like "manipulative" that would not deter constitutionally protected activities. *See Procunier v. Martinez*, 416 U.S. 396, 401 n.5 (1974) ("Where . . . the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. In such a case no single adjudication by a state court could eliminate the constitutional difficulty."); *see also Houston v. Hill*, 482 U.S. 451, 467 (1987) ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."); *Dombrowski v. Pfister*, 380 U.S. 479, 489-490 (1965) ("[A]bstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."). Far from providing a reason for federal abstention, the uncertainty resulting from the rules' vagueness demonstrates why they are unconstitutional.

C. The State Has Already Interpreted and Applied the Challenged Rules.

Abstention would also be futile for another reason. The cases cited by the Bar to justify abstention involved situations where the state had not had the opportunity to interpret the meaning of a particular law. *See, e.g., Am. Inst. of Foot Med. v. N.J. State Bd. of Med. Exams.*, 807 F. Supp. 1170, 1172 (D.N.J. 1992) (noting that "the New Jersey Supreme Court has never

interpreted nor addressed" the challenged regulation). Here, in contrast, the Florida Supreme Court has repeatedly considered the rules and has held that anything other than "objective information" is prohibited. *Fla. Bar v. Pape*, 918 So. 2d 240, 243 (Fla. 2005); *see also Fla. Bar v. Gold*, 937 So. 2d 652, 656-57 (Fla. 2005) (holding that statements characterizing the quality of services are "inherently false, misleading, deceptive, or unfair"); *Fla. Bar v. Lange*, 711 So. 2d 518, 521-22 (Fla.1998) (holding that the slogan "When the Best is Simply Essential" improperly described the quality of the lawyer's services). The court has also held—wrongly in plaintiffs' view—that the prohibited forms of commercial speech are not protected by the First Amendment. *Pape*, 918 So. 2d at 247-49. In these cases, the state gave no consideration to the relevant constitutional standard for restrictions on commercial speech set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Moreover, the Standing Committee on Advertising reviews thousands of advertisements each year and has applied the rules to ads that are materially indistinguishable from Harrell's, as has the Bar's Board of Governors, which reviews Standing Committee decisions. As explained below, these decisions give Harrell a reasonable fear that he will be disciplined based on his current ad campaign.

1. The Prohibition on "Misleading" Ads

Harrell has a reasonable fear that his ads are prohibited under the rules against "misleading" statements. One of the members of the Standing Committee who reviewed and rejected Harrell's "Don't settle for less than you deserve" ad publicly stated that, although it was not the basis of the decision to prohibit the ad, the committee was concerned that the phrase was misleading because "[i]t's a misrepresentation to imply that the client deserves anything or there

will be a settlement." Gary Blankenship, *Suit Challenges Florida's Lawyer Advertising Rules*, The Florida Bar News, Feb. 1, 2008. Although it defies belief that any consumer would actually be misled in this way, discipline against Harrell on this basis would be consistent with the Bar's past interpretation and enforcement of the rules, which consistently interprets advertising in the most literal and paternalistic possible way. *See, e.g.*, Standing Committee on Advertising, *Handbook on Lawyer Advertising and Solicitation*, March 2000 (Harrell Decl. Exh. 2), at 58 (explaining that the statement "Injured? Then you need an attorney" is misleading "because an attorney is not always required"); *Id.* at 60 (explaining that the phrase "EXPERIENCE MAKES THE DIFFERENCE!" is prohibited "[b]ecause experience of the attorneys may not affect the outcome of a particular case").

Moreover, the Florida Supreme Court has defined as "misleading" anything that cannot be objectively verified. *Pape*, 918 So. 2d at 244 (holding that a logo was "inherently deceptive" because there was "no way to measure" whether it "convey[ed] accurate information"). Many statements in Harrell's ads are not capable of precise measurement, such as "we help accident victims fight for justice every day," "fighting for justice is never easy," "we fight to win," and "one goal: justice for all our clients," and would thus be considered misleading under the rules. Harrell Decl. Exh. 2. Many of these statements would also be considered misleading under a comment to Rule 4-7.2 providing that statements are misleading when, although they may be true, are also true for most other lawyers in the state. Rule 4-7.2, cmt. (providing as an example the statement that a lawyer is a member of the Florida Bar). Presumably, most or all lawyers in Florida fight to win and have the goal of justice for their clients.

2. The Prohibition on Characterizing the Quality of Services

Rule 4-7.2(c)(2) prohibits advertisements that "describ[e] or characteriz[e] the quality of

the lawyer's services." The Florida Supreme Court has interpreted this provision to prohibit statements about a lawyer's "character and personality traits." *Pape*, 918 So. 2d at 244. The Bar does not ask the Court to abstain on the constitutionality of this rule as applied to Harrell's slogan "Don't settle for less than you deserve." Even aside from his use of that slogan, Harrell has substantial reason to fear discipline under this rule because his ads contain several other statements that are indistinguishable from ads that the Bar has previously found to be prohibited.

One statement the Bar found to violate this rule, "As your legal advocate, I will work hard to make sure you can get the medical treatment and compensation you legally deserve," Harrell Decl. Exh. 5 at 3, is materially indistinguishable from several statements in Harrell's ads: "we help accident victims fight for justice every day," " we're committed to fight . . . to right those wrongs," and "we fight to win." *Id.*, Exh. 1. Unless the Bar arbitrarily distinguishes the claim that an attorney will "work hard" for results from a claim that the attorney will "fight" for results, the statements are essentially the same. Moreover, the Bar found the statement "you need someone who you can turn to, for trust and compassion with this delicate matter," *id.*, Exh. 6 at 3, to violate the rule, a statement that is materially indistinguishable from a phrase in Harrell's ads: "you need strong legal representation." If anything, an attorney claiming to provide "strong legal representation" characterizes the quality of services more than an attorney claiming to provide "trust and compassion." Telling consumers that they "need strong legal representation" is also materially indistinguishable from an ad telling consumers to "MAKE THE RIGHT CHOICE," which the Bar also found violated this rule. *Id.*, Exh. 5 at 3.

3. The Prohibition on Irrelevant Ads

Various provisions of the rules prohibit common advertising techniques that the Bar considers irrelevant to the selection of counsel. To this end, Rule 4-7.1 requires advertisements

to provide only "useful, factual information presented in a nonsensational manner" and prohibits use of "slogans or jingles." *See also Pape*, 918 So. 2d at 247-49 (holding that the rules permit only "objective information"). Harrell has reason to fear enforcement under this rule because his ads contain various stock advertising techniques that aren't strictly useful or factual, such as lighting effects, fades, and moving text and images. Harrell Decl. Exh. 1. Although the ads do not contain jingles, they do contain upbeat synthesized music, which is neither useful nor factual. *Id.* They also contain slogans, such as "Don't settle for less than you deserve" and "one law firm: Harrell & Harrell." *Id.*

4. The Prohibition on Promising Results

Rule 4-7.2(c)(1)(G) prohibits statements that "promise results." The Bar's Board of Governors recently upheld discipline against a lawyer under this rule for using the slogan "Attorneys Righting Wrongs." Harrell Decl. Exh. 11 at 5. That phrase is nearly identical to a phrase in Harrell's ads: "we're committed to fight . . . to right those wrongs," and is substantially similar to other statements in the ads, such as "I can help," "we can help," and "we fight to win." Harrell Decl. Exh. 1. Harrell thus also has a reasonable fear of discipline under this rule.

5. The Prohibition on Visual and Verbal Depictions

Rules 4-7.2(c)(3) and 4-7.5 prohibit "visual and verbal descriptions" that are "manipulative, or likely to confuse the viewer." The Bar has held that an image of an elderly man in a hospital bed and one of elderly people looking out of a hospital or nursing home window violate this rule. Harrell Decl. Exh. 7 at 16. Although Harrell's ads avoid using any visual depictions, they contain the verbal equivalents: "it is wrong that loved ones in nursing homes are neglected," "nursing home neglect is just wrong," and "our seniors deserve better." *Id.*, Exh. 1. Similarly, a comment to the rules states that "a drawing of a fist, to suggest the

lawyer's ability to achieve results" is prohibited. Rule 4-7.2, cmt. Although Harrell's ads don't contain a similar image, they do say that the firm "fight[s] big insurance companies every day." Harrell Decl. Exh. 1. All these images could not only be said to be "manipulative," but could be accused of "appeal[ing] to the emotions," which is, according to a comment, prohibited by this rule. Rule 4-7.2, cmt. Finally, various other statements in Harrell's ads—such as "if you've been injured in an accident . . . don't give up . . . call Harrell & Harrell for help"—appear to "call for legal services," which is also prohibited. Rule 4-7.2, cmt. There is no reason to believe the Bar would not find Harrell's ads to violate these rules.

6. The Prohibition on "Unsubstantiated" Statements

Harrell also has reason to fear that the Bar will discipline him under rules prohibiting statements that are "unsubstantiated in fact," Rule 4-7.2(c)(1)(D), including statements that "compare[] the lawyer's services with other lawyers' services." Rule 4-7.2(c)(1)(I). The Bar interprets these rules to prohibit statements that could *never* be factually substantiated because they are inherently subjective, such as the statement that a lawyer is "one of the best" or "one of the most experienced" in a field of law. Rule 4-7.2, cmt. Many statements in Harrell's ads are inherently subjective or unverifiable, including "you need strong legal representation," "fighting for justice is never easy," "we fight to win," "we're committed to fight," and "we can help." Harrell Decl. Exh. 1. Moreover, the same Standing Committee member who expressed concern that Harrell's ads are "misleading" also said that the committee had on at least four prior occasions prohibited language under this rule that was identical or similar to "Don't settle for less than you deserve." Blankenship, *supra* page 9.

7. The Prohibition on Background Sounds

Rule 4-7.5(b)(1)(C) prohibits "any background sound other than instrumental music." As

explained in plaintiffs' motion for a preliminary injunction, this rule is strictly enforced and has been applied by the Bar to prohibit sounds such as footsteps, children playing, a flipped light switch, and similar sounds. Mot. for Prelim. Inj. at 5-6. Harrell's advertisements contain synthesized music and sound effects, including a whooshing sound as text moves across the screen. Harrell Decl. Exh. 1. Although these effects are innocuous, they are at least as noticeable as the sound of a light switch and other sounds prohibited by the Bar, and Harrell thus once again has a reasonable basis to fear discipline.

The Bar argues that the Court should abstain from deciding Harrell's challenge to this rule because it is considering whether to amend it. That the Bar is *considering* amending this rule, however, does not mean that the case presents an unsettled question of state law that would justify abstention under *Pullman*. The Bar provides no authority for the proposition that a federal court should abstain in a First Amendment case to give a state the opportunity to amend an unconstitutional statute. Indeed, rather than supporting abstention, the Bar's proposed amendment strengthens plaintiffs' argument for a preliminary injunction. If the Bar does not intend to maintain the rule, it cannot have a strong interest in enforcing it during the time it takes to consider and enact the amendment.

* * *

Harrell therefore has adequate reason to fear application of the rules to his ads. *See Sorrell*, 221 F.3d at 383 (holding *Pullman* abstention improper, despite acknowledging that the challenged statute could have different meanings, where a "literal interpretation" of the statute "could apply to any of a number of types of communication" and "therefore could be applied to [the plaintiff's] activities") (internal quotations omitted). Notably, the Bar never claims that Harrell's ads do *not* violate the challenged rules, nor does it suggest a construction of the rules

that would render the ads permissible. Indeed, it is strange for the Bar to urge abstention here because, unlike a typical defendant, the Bar is *itself* responsible for determining whether or not Harrell's ads comply with the challenged rules. Nothing prevents the Bar from making that determination and articulating its position in this Court rather than in a separate proceeding. If the Bar's problem is that the rules are too vague for it to reach any conclusions, that is not a reason to abstain, but a powerful reason to find the rules unconstitutional. The Supreme Court has "[i]nvariably . . . felt obliged to condemn systems in which the exercise of [prior restraint] authority was not bounded by precise and clear standards." *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

Finally, the Bar's argument for abstention is inappropriate at this early stage of the case. The complaint alleges that the rules are arbitrarily enforced and that Harrell has a reasonable fear that they will be enforced against his advertisements. Compl. ¶¶ 1, 20-22, 33-35. The motion for a preliminary injunction and supporting affidavit substantiate these concerns. Harrell Decl. ¶¶ 8, 19-22. Although the Bar poses its argument as one of law, the question actually depends on prior decisions by the Board of Governors and the Standing Committee on Advertising. The Bar screens thousands of advertisements each year for compliance with the rules, yet it has submitted no evidence—in the form of disciplinary records or otherwise—suggesting that it has not already considered and decided these precise questions. Given the lack of any evidence submitted by the Bar in support of its contentions, abstention would be inappropriate when plaintiffs have had no opportunity to engage in discovery and to review the accuracy of defendants' claims.

II. Plaintiffs' Claims Are Ripe.

Although phrased in somewhat different terms, the Bar's argument that this case is not ripe repeats essentially the same argument that it makes for abstention: that the application of the

rules under these circumstances is too unclear for this Court to make a decision. This argument also fails for substantially the same reasons.

First, Harrell is directly affected by the Bar's prior-restraint rule, which prohibits publication of advertising without first obtaining approval, and subjects applicants to the unbridled discretion of Bar authorities. When, as here, a plaintiff challenges a prior restraint on speech or the use of overly vague or standardless criteria, the lack of prior enforcement against the plaintiff is irrelevant, "because it is the existence, not the imposition, of standardless requirements that causes [the] injury." *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1275 (11th Cir. 2006). To have standing to challenge such a regulation, Harrell thus only needs to show that that he is "subject to" the challenged rules or that the rules "pertain[] to [his] activity." *Id. at* 1275-76. Here, because he is an advertising lawyer, Harrell would be required to submit his ads for review by the Bar. Thus, he is subject to the rules and can challenge them here. *See id.*; *see also Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (holding that standing in a prior restraint case is "not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations").

Moreover, Harrell has alleged and demonstrated that he faces a substantial risk of discipline from application of the advertising rules to his current advertising campaign. In the context of First Amendment restrictions on speech, application of the injury-in-fact requirement is "loosely applied . . . because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced." *Hallendale Prof'l Fire Fighters v. Hallendale*, 922 F.2d 756, 760 (11th Cir. 1991). To establish standing to challenge future enforcement of a restriction on speech, a plaintiff need only show "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Graham v. Butterworth*, 5 F.3d 496, 499 (11th Cir. 1993).

One way to show this injury is to show "a credible threat of prosecution." *Id.* This threat need not be explicit; it is enough to show that the plaintiff "intended to engage in arguably protected conduct, which the statute seemed to proscribe." *Id.*; *see also Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1571 (11th Cir. 1993) ("The mere fact that the City has not enforced the requirement . . . is not sufficient to remove this language from our consideration."). Plaintiffs satisfy that requirement here. As explained in detail in the last section, the Bar rigorously enforces the rules, and in the past has enforced them against ads that are materially indistinguishable from Harrell's. This case is therefore not a situation, as in the cases cited by the Bar, where the state has never enforced the challenged regulations, or where enforcement is imaginary or speculative. *See, e.g.*, *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428-29 (11th Cir. 1998) (noting that the state had "repeatedly and consistently" confirmed that the challenged rule did not apply to the plaintiffs); *Digital Prop., Inc. v. City of Plantation*, 121 F.3d 586, 590-91 (11th Cir. 1997) (noting that the challenged ordinance on its face did not apply to the plaintiff's conduct).

Harrell has also shown that he has refrained from engaging in other sorts of advertising because he feared running afoul of the rules. Harrell Decl. ¶¶ 8, 22. Harrell alleged, and stated in his declaration, that he would run a particular advertisement if not prohibited from doing so by the rules. *Id.* ¶ 8. As stated in his declaration, Harrell planned to create an advertisement that featured his family and dogs, emphasized the family-friendly nature of the firm and its charitable contributions, showed the firm's facilities, including an on-site gymnasium established to promote the health of its employees, and included other scenes and messages that focused on the theme of "family." *Id.* Harrell abandoned plans for this advertisement, however, because it would have violated the rules at issue here, including the rules against characterizing the quality of a lawyer's services, making "unsubstantiated" statements, "manipulative" visual and verbal

depictions, and background noises. *Id.* That in itself is enough to satisfy the requirement of ripeness. *See also Al-Amin v. Smith*, — F.3d —, 2008 WL 60018 (11th Cir. 2008) (holding that in a First Amendment case, no injury beyond the chilling effect on speech need be shown); *Pub. Co. v. City of League City*, 488 F.3d 613 (5th Cir. 2007) (holding that a chilling effect is a sufficient injury to give rise to federal jurisdiction); *N.H. Right to Life v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences."). In these circumstances, the constitutionally significant injury is the plaintiff's self-censorship. *See ACLU*, 999 F.2d at 1492.

Based on this reasoning, the Eleventh Circuit in *Jacobs v. Florida Bar* concluded that attorneys had standing to challenge several of Florida's attorney advertising rules, including predecessors to some of the rules challenged here. 50 F.3d 901 (11th Cir. 1995). The plaintiffs in *Jacobs* alleged that they wanted to run advertisements "which are, or may be violative of the new rules." *Id.* at 903 n.8. The district court dismissed for lack of standing, but the Eleventh Circuit reversed, holding that the plaintiffs had shown a credible threat of prosecution. *Id.* at 904. Similarly, in *Edenfield v. Fane*, the Supreme Court held unconstitutional Florida's restrictions on solicitation by accountants. 507 U.S. 761 (1993). Although the plaintiff had not engaged in the prohibited forms of commercial speech, he alleged that "but for the prohibition" he would have done so. *Id.* at 764. Numerous other courts have also decided commercial speech issues where the state had not yet enforced, or threatened to enforce, its rules against particular plaintiffs. *See, e.g.*, *Fla. Bar v. Went For It*, 515 U.S. 618 (1995) (addressing plaintiffs' challenge to a Florida attorney solicitation rule that the plaintiffs had never violated); *ACLU*, 999 F.2d at 1492 (holding that a plaintiff stating that he "intends to engage in a specific course of conduct arguably affected

with a constitutional interest . . . does not have to expose himself to enforcement to be able to challenge the law"); *Schwartz v. Welch*, 890 F. Supp. 565, 567, 568 (S.D. Miss. 1995) (finding standing for plaintiff-attorneys to challenge advertising restrictions where each had claimed to have restricted or discontinued advertisements as a result of the rules).

III. Public Citizen Has Standing to Defend the First Amendment Rights of Its Members.

The Bar's second motion asks this Court to dismiss Public Citizen's claims for lack of standing. The Bar does not dispute the basic principle that an organization can sue based either on injury to itself or on injury to its members. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996). Rather, it argues that plaintiffs have not alleged "sufficient facts" in the complaint to show that Public Citizen's members have suffered an injury. Mot. to Dismiss at 3.

Public Citizen has alleged more than sufficient facts to establish its standing. The complaint alleges that Public Citizen is a nonprofit public-interest organization with about 5,000 members in Florida that includes as part of its mission the protection of consumer rights and freedom of speech. Compl. ¶ 5. It also alleges that the challenged rules unconstitutionally restrict a wide range of useful and informative advertising by Harrell, his law firm, and other lawyers and thereby injure Florida consumers, including Public Citizen's members, by preventing them from receiving truthful, non-misleading information about their legal rights and the availability of legal services. *Id.* ¶ 36. The complaint further alleges that Public Citizen "has an interest in protecting the right of its Florida members to receive" this information. *Id.* ¶ 39. Given the Bar's broad restriction on common advertising techniques, it is not only likely, but inevitable, that Public Citizen's members will be deprived of advertising as a result of the rules. These allegations more than satisfy Public Citizen's burden under the notice-pleading standard of the

Federal Rules of Civil Procedure.[3]

The Supreme Court's recognition of First Amendment protection for commercial speech was based primarily on the value such speech brings to consumers, and the Court has thus held that consumers, and the groups that represent them, have standing to contest restrictions on commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the first Supreme Court case to recognize the right to commercial free speech, the plaintiffs were not pharmacists who had been denied the right to advertise, but consumer groups representing their members' right to receive commercial drug advertisements. 425 U.S. 748, 754 n.10 (1976). The Court held that the consumer groups had standing to oppose the advertising restrictions, writing that, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [plaintiffs]." *Id.* at 757. Numerous courts have recognized Public Citizen's standing to litigate on behalf of its members, including in cases challenging lawyer advertising regulations. *See Schwartz v. Welch*, 890 F. Supp. 565, 569 (S.D. Miss. 1995) (holding that Public Citizen had standing to contest restrictions on lawyer advertising rules on behalf of its Mississippi members); *Alexander v. Cahill*, No. 07-117, 2007 WL 1202402, at *1 (N.D.N.Y., Apr. 23, 2007) (holding that Public Citizen had standing to challenge lawyer advertising rules in New York on behalf of its members there).

[3] Contrary to defendants' assertions, the Eleventh Circuit has not held than an organization must "allege facts demonstrating with particularity" an injury to its members. Mot. to Dismiss at 4-5. The cases cited by the Bar do not contain any particularity requirement or establish any sort of heightened pleading rule for organizational standing. Rather, these cases were decided in the context of summary judgment or in appeals from agency decisions, where the parties had the opportunity to submit evidence on the question of standing. Here, in contrast, the Bar asks this Court to dismiss Public Citizen based solely on the allegations in the complaint. The Bar is therefore wrong to say that plaintiffs have "requested that this Court render a decision based solely on speculation and conjecture." Mot. to Dismiss at 6. Plaintiffs at this early stage of the case have not asked the Court to make any decisions regarding Public Citizen's standing.

Defendants' contention that plaintiffs must not only allege an interest and an effect on its members, but also provide a specific member that wishes to gain access to a specific advertisement, is unsupported in the law. Plaintiffs rely heavily on *Warth v. Seldin* in support of their argument, but the problem in *Warth* was that the organization had not alleged that its members would experience *any* effect from the challenged law. 422 U.S. 490, 514 (1975) ("We do not understand [plaintiffs] to argue that [their members] have been denied any constitutional rights . . . ."). Here, in contrast, plaintiffs have specifically alleged that "[t]he rules . . . injure . . . members of plaintiff Public Citizen, by preventing them from receiving truthful, non-misleading information about legal services and legal rights." Compl. ¶ 36. Moreover, as the Bar appears to recognize, *Warth* and most of the other cases cited by the Bar are inapplicable to a First Amendment challenge, where the injury requirement is loosened. *See ACLU*, 999 F.2d at 1492; *Hallendale Prof'l Fire Fighters*, 922 F.2d at 760. Although the Bar cites a few cases where organizational standing was denied in First Amendment challenges, those cases also involved organizations whose members were not affected by the restrictions or other flaws that are not present here. *See White's Place v. Glover*, 222 F.3d 1327, 1330 (11th Cir. 2000) (rejecting the "creative[]" argument that a nude dancing club's organizational mission was to support its employees' "dissemination of erotic speech"); *Tanner Adver. Group v. Fayette County*, 451 F.3d 777, 792 (11th Cir. 2007) (holding that a company lacked standing to oppose a restriction on speech that did not affect it).

CONCLUSION

The Court should deny defendants' motion to abstain or to strike certain portions of the complaint, and should deny defendants' motion to dismiss as to Public Citizen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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