No. 09-30925

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# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

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PUBLIC CITIZEN INC.; WILLIAM N. GEE, III; WILLIAM N. GEE, III, LTD.; MORRIS BART; and MORRIS BART, L.L.C.,

*Plaintiffs-Appellants,*

v.

LOUISIANA ATTORNEY DISCIPLINARY BOARD; BILLY R. PESNELL, in his official capacity as Chair of the Louisiana Attorney Disciplinary Board; and CHARLES B. PLATTSMIER, in his official capacity as Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel,

*Defendants-Appellees*.

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Appeal from the United States District Court
for the Eastern District of Louisiana

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## BRIEF FOR PLAINTIFFS-APPELLANTS

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February 24, 2010

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**CERTIFICATE OF INTERESTED PERSONS**

No. 09-30925

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Public Citizen, et. al., Plaintiffs-Appellants,

v.

Louisiana Attorney Disciplinary Board, et al., Defendants-Appellees.

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Public Citizen, Inc.—plaintiff-appellant.

Morris Bart—plaintiff-appellant

Morris Bart, LLC—plaintiff-appellant

William N. Gee—plaintiff-appellant

William N. Gee III, Ltd.—plaintiff-appellant

Gregory A. Beck—counsel for plaintiffs-appellants

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Louisiana Attorney Disciplinary Board—defendant-appellee

Billy R. Pesnell—defendant-appellee

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Phillip A. Wittmann—counsel for defendants-appellees

Kathryn M. Knight—counsel for defendants-appellees

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John H. Beisner—counsel for defendants-appellees

Jessica Davidson Miller—counsel for defendants-appellees

Pursuant to Fed. R. App. P. 26.1, counsel states that Public Citizen, Inc., has no corporate parents and that no publicly held corporation has an ownership interest in it of any kind.

/s/Gregory A. Beck
Gregory A. Beck

Attorney *of record for plaintiffs-appellants*

## REQUEST FOR ORAL ARGUMENT

Plaintiffs-appellants respectfully request that the Court hear oral argument in this appeal. This case involves the intersection of the First Amendment and the Louisiana Rules of Professional Conduct. Oral argument is warranted because the case raises important questions of commercial free speech with the potential to affect the First Amendment rights of all lawyers and consumers in Louisiana. Oral argument would benefit the Court by helping to clarify application of the numerous relevant commercial speech precedents to the various rules challenged here.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. On August 3, 2009, the court entered an order granting in part and denying in part plaintiffs-appellants' motion for summary judgment, and granting in part and denying in part defendants' cross-motion for summary judgment. R.6031-69. The court entered a final judgment consistent with that order on August 24, 2009. R.6070-71. All plaintiffs-appellants filed timely notices of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) on September 17, 2009. R.6072-76. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

Whether the state satisfied its burden of justifying its restrictions on commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), on the ground that common advertising techniques are "undignified" or "potentially misleading" when used by lawyers.

## STATEMENT OF THE CASE AND FACTS

> [L]awyer advertising in the state has become *undignified* and poses a threat to the way the public perceives lawyers in this state. . . . The new rules . . . protect the public from . . . *potentially misleading* forms of lawyer advertising . . . .
>
> Louisiana Supreme Court, Press Release, Feb. 18, 2009 (R.5466) (emphasis added).

> [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find *beneath their dignity*.
>
> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) (emphasis added).

> [T]he states may not place an absolute prohibition on certain types of *potentially misleading* information . . . .
>
> *In re RMJ*, 455 U.S. 191, 203 (1982) (emphasis added).

### I. Louisiana's Restrictions on Lawyer Advertising

The material facts are undisputed. Defendants are the Louisiana Attorney Disciplinary Board, the state agency responsible for investigating, prosecuting, and adjudicating violations of the state's rules governing lawyer advertising, as well as the board's chair and chief disciplinary counsel (in their official capacities), who are primarily responsible for supervising and carrying out the board's disciplinary functions. *See* Rules of the La. Supreme Court Rule XIX, §§ 2, 4. The rules, as set forth in the Louisiana Rules of Professional Conduct, prohibit advertising that is

"false, misleading or deceptive." Rule 7.2(c). Before enactment of the amendments at issue here, Louisiana followed the American Bar Association's Model Rules of Professional Conduct, which do not restrict the factual information or stylistic elements that lawyers are allowed to include in their ads, except to require disclosures or disclaimers in some circumstances. *See* ABA Model Rules of Prof'l Conduct Rule 7.1. The state has no evidence, in the form of complaints, disciplinary records, empirical studies, or anything else, that the pre-amendment rules were ineffective at protecting consumers from false and misleading lawyer ads.

The process that gave rise to the amendments at issue here began in 2006, when the Louisiana legislature adopted a concurrent resolution stating that "the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived." R.4752. The resolution noted that the legislature was considering passage of Senate Bill No. 617, which would establish a committee "to address ethical concerns posed by lawyer advertising and to present a more positive message to the citizens of this state." *Id.* To avoid legislative intervention, the resolution called on the Chief Justice of the Louisiana Supreme Court to establish a committee to study lawyer advertising and to recommend changes to the advertising rules by March 1, 2007. R.4752-53.

In response to the resolution, the Louisiana Supreme Court created the Committee to Study Attorney Advertising ("Supreme Court Committee"). Members of the committee included several personal-injury lawyers who advertise on television in competition with plaintiffs-appellants. R.4742 ¶ 5. Senator Marionneaux, the sponsor of the joint resolution, opened the Supreme Court Committee's first meeting on September 15, 2006, by stating his view that billboards and other forms of attorney advertising "appear to denigrate the image of the profession." R.5414. The committee then reviewed and discussed Florida's lawyer advertising rules, which are among the most restrictive in the country, and similar rules that had recently been proposed in New York. R.5414-20. Although the committee considered developing a survey "to gauge the public's present views on attorney advertising," it ultimately agreed to obtain a copy of Florida's survey evidence rather than conduct a survey of its own. R.5416, 5424.

Between September 21, 2006, and October 6, 2006, the Bar Committee met four times, assembling a series of proposed amendments taken mostly verbatim from the Florida and New York rules. R.5422. The committee proposed new prohibitions on "portrayal of a client by a nonclient," "portrayal of a judge," "reenactment of any events or scenes or pictures that are not actual or authentic," use of "a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter," and use of "any spokesperson's voice or image that is

recognizable to the public in the community where the advertisement appears." R.4765. The committee also voted to recommend prohibiting advertisements that contain a "reference or testimonial to past successes or results obtained," or that "promise[] results." R.4765. Finally, the committee's proposal provided that "a non-lawyer spokesperson speaking on behalf of the lawyer or law firm" may be included in television or radio advertising only "as long as the spokesperson's voice or image is not recognizable to the public in the community where the advertisement appears." R.4767.

After the Bar Committee's proposal was complete, the Supreme Court Committee met on October 23, 2006, to consider the proposed amendments. R.5422. Once again, the central concern of the committee was undignified ads. R.5423-25. One member expressed concern that the Bar Committee had rejected a proposed amendment that would have required lawyer advertisements to "provide only useful, factual information presented in a nonsensational manner." R.5423. In response, another member explained that the provision had been removed because "some felt the addition of the sentence may capture protected speech," but that the committee had "tried in other places to pick up the intent of the problematic language." R.5423. The Supreme Court Committee then returned to a discussion of the need for evidence in support of the rules, noting that the Florida survey had "not [been] helpful, as only one or two questions were germane." R.5424.

Nevertheless, the committee voted to endorse the Bar Committee's proposal and to "defer a final decision on conducting a survey" because the Bar Committee was already planning public hearings on the proposed rules, at which "a sufficient record may be developed to obviate the need for a survey." R.5424.

The Bar Committee held four hearings on the proposed rules between November 2, 2006, and November 16, 2006. R.5422. Although the committee called them "public hearings," the hearings were advertised only to lawyers and amounted to no more than question-and-answer sessions for those directly affected by the amended rules. *See generally* R.4799-5301. No testimony or other evidence was developed that the advertising content targeted by the amendments was harmful to consumers or that prohibiting them was necessary to serve any articulable state interest.

The Bar Committee also solicited written comments about the amendments. R.5302-18. The lawyers submitting comments in support of the amendments generally stated their belief that lawyer advertising is unprofessional or in poor taste, but did not submit any evidence backing up this belief, demonstrating consumer confusion, or showing any other legitimate need for the rules. *Id.* The majority of commenters objected to the rules as unnecessary, overbroad, or unconstitutional. *Id.* Among these, comments by the staff of the Federal Trade Commission advised that the rules may hurt consumers by inhibiting competition,

frustrating consumer choice, and ultimately increasing prices while decreasing quality of service. R.5319-32.

Following the hearings and receipt of written comments, the Bar Committee adopted only one material change relevant to the rules challenged here: the addition of a new prohibition on "portrayal of a . . . jury." Rule 7.2(c)(1)(J); R.4776. The committee did not explain the basis for this prohibition, which has never been adopted by any other state. The House of Delegates voted on June 7, 2007, to accept the Bar Committee's proposal and recommend that the Supreme Court incorporate the proposed rules into the Rules of Professional Conduct. R.5364-66. In the process, the House of Delegates rejected amendments to the proposal that, because of First Amendment concerns, would have deleted or narrowed many of the restrictions challenged here. R.5364-66, 5437-5446.

On July 3, 2008, the Louisiana Supreme Court adopted the rules as recommended, characterizing them in a press release as "comprehensive amendments" to the advertising rules. R.5367. The Court's only explanation of the purpose of the amendments was the "need to improve the existing rules in order to protect the public from unethical forms of lawyer advertising." R.5367. No surveys or other studies of the need for the rules had been performed. Moreover, although the Court did not publicly acknowledge it, all the New York rules on which its amendments were based had by that time either been abandoned or declared

unconstitutional on the ground that they were not supported by any evidence. R.4787-88; *Alexander v. Cahill*, No. 07-cv-117, 2007 WL 2120024, at *6, *8 (N.D.N.Y. July 23, 2007), *appeal argued*, No. 07-3677 (2d Cir. Jan. 22, 2009).

## II. The Lawsuit and Louisiana's Survey

Plaintiff Morris Bart is a practicing lawyer in New Orleans and owner of the firm Morris Bart, L.L.C. R.4746 ¶¶ 22-23. Plaintiff William Gee, III, is a lawyer practicing in Lafayette and owner of the Law Offices of William N. Gee, III, Ltd. R.4746-47 ¶¶ 25-26. Both Bart and Gee previously advertised their services to the public through broadcast media, print advertisements, and the Internet in ways that are now prohibited by the challenged rules. R.4747-50 ¶¶ 29-38. Plaintiff Public Citizen, Inc. is a national, nonprofit public interest organization with more than 60,000 members nationwide, including approximately 250 in Louisiana. R.4747 ¶ 27. 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 their legal rights and the availability of legal services. R.4747 ¶¶ 27-28.

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

attitudes of consumers and lawyers toward lawyers and lawyer advertising. R.5470-5505. The results showed a wide divergence between the general public and lawyers in their opinions about lawyer advertising. By at least 2-1 margins, the members of the public who responded said that they did not think lawyers who used testimonials, portrayals of judges and juries, celebrity endorsements, or accident scenes in their advertising had "more influence on Louisiana courts than other lawyers." R.5488-90. Members of the Louisiana Bar, however, felt differently: 72% of Bar members agreed that client testimonials "imply that the endorsed attorney can obtain a positive result without regard to facts or law," while 62% said the same regarding celebrities and 54% regarding accident scenes. R.5488, 5490. Similarly, half of the Bar members responding to the survey stated that ads portraying a judge or jury "imply to the public that the lawyer advertised can assert more influence over judges or juries than other lawyers." R.5489. The survey did not ask any questions about ads containing information about a lawyer's past results, depictions of scenes other than accidents, promises of results, or slogans that imply an ability to obtain results.

After the survey was complete, the Louisiana Supreme Court on February 18, 2009, ordered that the effective date of the amendments be deferred until October 1, 2009, "to allow the [Bar] and the Court to further study certain rules in light of the constitutional challenges that have been raised." R.5466. On March 11,

2009, the Louisiana Supreme Court asked the Bar Committee to review several of the challenged rules. R.5506. The Bar Committee reported back on April 15, 2009, informing the Court that it "remained of the strong opinion" that the amendments were necessary and appropriate. R.5507. The committee asserted that the rules against testimonials and references to past results, promises of results, and portrayals of judges and juries target advertising that is "inherently misleading" and recommended that those rules generally not be modified. R.5511-13, 5518-22. However, the committee recommended that the Court modify the rules against celebrity spokespeople, scenes, and actors playing clients to allow those devices when accompanied by a disclaimer or disclosure. R.5513-18, 5522-24. The committee also recommended, without explanation, that the Court require the disclaimer or disclosure to be both "spoken aloud" and written in "a print size at least as large as the largest print size used in the advertisement." R.5517. On June 4, 2009, the Louisiana Supreme Court adopted the Bar Committee's recommendations. R.5468.

## III. The District Court's Decision

After the rules were finalized, the parties filed cross-motions for summary judgment, and defendants filed a motion to dismiss for lack of jurisdiction. *See* R.6031. The district court first denied the motion to dismiss. R.6042-6050. The court held that Bart and Gee had demonstrated injury by showing that they were

forced to stop running advertisements containing specific elements that would violate the amended rules, and that plaintiff Public Citizen had standing to sue on behalf of its members. *Id.* It also concluded that the case was "patently ripe for adjudication" because the issues involved were purely legal, no further factual development was needed, and plaintiffs would suffer hardship if the court did not resolve their claims. R.6050.

On the merits, the court held the rule against celebrity endorsements to be unconstitutional on the ground that the state had not proved that the rule was necessary or effective. R.6062.[1] It upheld, however, the remainder of the challenged rules. First, the court upheld the restriction on statements of past results on the ground that such statements, "even if truthful, . . . could also be inherently misleading." R.6054. The court cited the survey's findings that a majority of respondents disagreed that "client testimonials . . . are completely truthful." R.6054 n.5. Although the court acknowledged that the question asked about *client testimonials*, which the rules continue to allow, rather than *references to past results*, which the rules prohibit, it reasoned that statements regarding past results "would seem to cause an attitude of even greater reliance by those seeking lawyers." *Id.* The court also held that the portrayal of a judge or jury is inherently misleading. The court noted the "inconclusive aspects in [the survey] on this

[1] The court in a related case also held several rules unconstitutional as applied to the Internet. The state did not appeal the court's rulings.

point," but concluded that, "the fact remains, and is inescapable, that such material simply conveys an untrue message." R.6055-56. The court declined to "speculate on which recipients of such messages are smart enough to know better." R.6056.

The court next held that the remaining advertising devices restricted by the rules were only "potentially misleading" rather than "inherently misleading," but nevertheless upheld the restrictions. R.6055 n.7, 6056. In support of the rule against actors playing clients, the court relied on a survey finding that 63% of respondents said they could not "*always* tell if a testimonial in a lawyer advertisement is made by a client and not an actor." R.6060-61 (emphasis added). The court "emphasize[d] that such dramatizations are in and of themselves capable of unintended guile or delusion." R.6061. The court also acknowledged that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but engaged in no analysis of whether the huge font sizes and intrusive audio disclaimers required by the rules were unduly burdensome. R.6060.

Finally, the court upheld the restrictions on slogans and trade names that imply the ability to achieve results. R.6063-65. Although the court recognized the Supreme Court's holding that "because an advertisement is 'potentially misleading' is not of itself a sufficient justification to support a general ban on advertising," it held that the challenged rules nevertheless satisfied the state's

"substantial interest in ensuring that the public is not misled." R.6058 n.8. The court held that the state's interest in "maintaining professional dignity and public confidence" in lawyers was an interest "of serious proportions." R.6064. At the same time, the court criticized plaintiffs' "characterization of Louisiana lawyers as members of an 'industry,' rather than a profession," which, in the court's opinion, "seem[ed] to enhance the State's regulatory interest in the current lawyer advertising culture." *Id.*

## SUMMARY OF ARGUMENT

This case is a First Amendment challenge to sweeping new lawyer advertising rules in Louisiana that impose restrictions on the use of slogans, actors, scenes, and similar stock advertising devices. The rules entirely prohibit lawyers from communicating certain kinds of information, including truthful and verifiable information about a lawyer's past cases. They also impose mandatory written and verbal "disclaimers," which, while communicating no useful information, are so large and intrusive that they make it effectively impossible to design a useful advertisement.

As the Supreme Court has recognized, commercial speech is critically important not only to speakers and recipients of speech, but to the functioning of a free enterprise economy. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). Accordingly, a state may restrict commercial speech only in response to evidence

of a serious and intractable problem, and then only when the restriction is "a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The Supreme Court has stressed that the state's burden is a "heavy" one, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996), requiring *actual evidence*, not just speculation and conjecture, that the restrictions are necessary and effective to further an important state interest. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). These principles hold true for lawyer advertising as much as for advertising for other products and services. The Supreme Court has held that "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are equally unacceptable as applied to [lawyer] advertising." Indeed, the Supreme Court has held that lawyer advertising is "undoubtedly more valuable than other forms of advertising" because it "tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985).

Here, the state has failed to satisfy its heavy burden of justifying its restrictions on commercial speech. The state adopted the rules not to protect consumers from false and misleading advertisements, but to regulate speech that it considers in its subjective view to be "undignified"—an interest that the Supreme Court has held insufficient to uphold speech restrictions. *Id.* Only after plaintiffs

filed this case and pointed out that "dignity" is not a legitimate basis for state restrictions on speech did the state propound the theory that the prohibited advertising devices are "potentially misleading." That justification, however, does not help the state either, because the Supreme Court has repeatedly held that calling certain forms of lawyer advertising "potentially misleading" does not justify prophylactic prohibitions on that advertising. *See id.*

Moreover, the state adopted its amendments without the support of any evidence that the rules are either necessary or effective to satisfy its claimed interests. Although privately acknowledging its responsibility to base its rules on evidence, the state made no effort to find that evidence until after it had already enacted the rules and plaintiffs had filed suit. The state then designed a public survey, which, to avoid the self-evident conclusion that consumers are not misled by truthful statements of fact and commonplace advertising devices, largely avoided asking about the specific rules at issue, and instead posed irrelevant questions designed to evoke a generalized distrust of lawyers. As for the few aspects of the rules that the survey even tangentially addressed, the state did not ask whether consumers had ever been misled by the prohibited advertising devices, but whether, in the consumers' *opinions*, those devices might be misleading *in some circumstances*. Even then, consumers by at least 2-to-1 margins said they did not think the prohibited techniques were misleading.

The state also adopted rules that are vastly overbroad, prohibiting all use of certain forms of advertising content even though the content is regularly used in ways that are not misleading or even undignified, and even though the state did not consider whether its purposes could be achieved in a way that imposes a lesser burden on speech. As a result, the restrictions go far beyond the lawyer advertising rules of other states and are so extreme that, if applied equally to other industries, they would render impractical or impossible most advertisements currently running on television and in many other forms of media.

Finally, the rules against statements that imply or promise results are too vague to give adequate guidance to lawyers and disciplinary authorities trying to interpret them. The vagueness, breadth, and unpredictability of the rules will inevitably lead to self-censorship on the part of lawyers and a broad chilling effect on commercial speech.

## ARGUMENT

### I. Standard of Review

This Court reviews a district court's allowance of summary judgment de novo, applying the "familiar standard" for summary judgment. *Gomez v. St. Jude Med. Daig Div. Inc.*, 442 F. 3d 919, 927 (5th Cir. 2006). Under that standard, summary judgment is proper only where "there is no dispute as to any issue of material fact and … the moving party is entitled to judgment as a matter of law."

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, in First Amendment cases, including cases raising issues of commercial speech, the Court "make[s] an independent examination of the whole record." *Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n*, 24 F.3d 754, 755 (5th Cir. 1994).

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

Lawyer advertising is a form of commercial speech protected by the First Amendment. *Bates*, 433 U.S. 350. To justify a restriction on commercial speech, a state must demonstrate—with actual evidence—"that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007) ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). Unless the restricted advertising is provably false or misleading, the state must satisfy the three-part test first set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). A regulation survives the *Central Hudson* test if the state can show that (1) "the asserted governmental interest is substantial," (2) the regulation "directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." *Thompson*, 535 U.S. at 367 (internal quotation omitted). The Supreme Court has described the state's burden under *Central Hudson* as a

"heavy" one. *44 Liquormart*, 517 U.S. at 516. The Court has repeatedly subjected state justifications for restrictions on lawyer advertising to rigorous and skeptical scrutiny under this standard and has, for the most part, rejected those justifications. *See, e.g.*, *Zauderer*, 471 U.S. 626. As with past attempts to impose blanket restrictions on lawyer advertising, the state's rules here fail the *Central Hudson* test.[2]

### A. Louisiana's Articulated Interests Are Not Legitimate Reasons to Restrict Speech.

The first prong of *Central Hudson* requires the state to identify a substantial interest in support of its regulation. *Thompson*, 535 U.S. at 367. "Unlike rational-basis review, the *Central Hudson* standard does not permit [a court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768. Therefore, only the purpose on which the state actually relied in support of its rules is relevant. *See Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 410 (5th Cir. 2007) (holding that, as a starting point, the state "must at least articulate regulatory objectives to be served").

The Louisiana Supreme Court's decision to consider amending its rules here was "precipitated" by the legislature's 2006 concurrent resolution on lawyer advertising, which asserted that "the manner in, which some members of the

[2] *See also Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (plurality opinion); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *RMJ*, 455 U.S. 191; *Bates*, 433 U.S. 350.

Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived." R.4752. Thus, the state's motivating interest appears to have been protecting the public image of lawyers. After plaintiffs filed this case, however, the Court publicly articulated a second interest in support of its rules: the prevention of "potentially misleading" speech. R.5468. In its argument to the district court, the state then transformed its "potentially misleading" rationale into a contention that the prohibited advertising techniques are "inherently misleading." Each of the state's claimed interests runs afoul of well-established Supreme Court precedent.

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

In the district court, the state did not seek to justify the rules based on an interest in maintaining lawyer dignity. The court, however, nevertheless relied on that interest in upholding the constitutionality of the rules, holding that "maintaining professional dignity and public confidence" is an interest of "serious proportions." R.6064. The court also pointedly took issue with plaintiffs' description of lawyers "as members of an 'industry,' rather than a profession," stating that the characterization "seems to enhance the State's regulatory interest in the current lawyer advertising culture." *Id.*

The district court's expressed concern that the practice of law has become an "industry" flies in the face of the Supreme Court's recognition in *Bates* that "the

belief that lawyers are somehow 'above' trade has become an anachronism." 433 U.S. at 368. In *Bates*, the Court rejected the state's attempt to justify advertising restrictions on the ground that such advertising would "undermine the attorney's sense of dignity and self-worth" and "tarnish the dignified public image of the profession." *Id.* Since then, the Court has reaffirmed the principle that lawyers have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the bar. *Zauderer*, 471 U.S. at 647-48.[3]

Although recognizing the Supreme Court's disapproval of dignity as a basis for restricting speech, the district court nevertheless held the opposite, relying on dicta from *Goldfarb v. Virginia State Bar* for the proposition that states have a

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[3] *See also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) ("[A] State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (internal quotation omitted); *RMJ*, 455 U.S. at 205-06 (holding unconstitutional a prohibition on commercial speech that was "at least [in] bad taste," but where the state had no evidence it harmed consumers); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) ("[T]he Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive, or undignified.").

strong interest in "regulating the practice of professions." 421 U.S. 773, 792 (1975); R.6057. To say that states have an interest in regulating the professions, however, only begs the question at issue in this case—whether the state has an interest in regulating *in the ways it has chosen to regulate here*. Although the states undoubtedly have a strong interest in regulating the professions to prevent fraud and protect the public's health and safety, the Supreme Court recognized two years after *Goldfarb* that the states do *not* have a similar interest in protecting lawyers' dignity. *Bates*, 433 U.S. at 368. As the Court wrote in *Bates*, "habit and tradition are not in themselves an adequate answer to a constitutional challenge." *Id.*

To allow states to regulate based on the perceived dignity of ads would put courts in the impossible situation of having to determine whether certain ads are sufficiently dignified. That is not a question that courts are competent to decide. *Cf. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (Holmes, J.) (noting that it is a "dangerous undertaking" for judges to sit as art critics). As the Supreme Court has stressed, it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield*, 507 U.S. at 767. Here, the state's attempt to change the way the public "perceive[s]" lawyers and to "present a more positive message," R.4752, is no more than an effort to manipulate public opinion by suppressing speech. No justification for speech restrictions is more offensive to the First Amendment. *See*

*Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").[4]

Finally, even if the state were correct that the prohibited advertising techniques are distasteful to consumers, the marketplace would solve the problem without the need for government intervention. Improving public opinion of a product or service is, after all, one of the main motivations for advertising, and lawyers are not likely to invest in advertisements that ruin their reputations and drive away potential clients. *See Central Hudson*, 447 U.S. at 557 ("Most businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers.").

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

Like the state's claimed interest in maintaining lawyer dignity, its asserted interest in preventing "potentially misleading" ads flies in the face of well-established Supreme Court precedent. The Court has repeatedly held that the

[4] *See also Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("[N]o line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (2d Cir. 1998) (holding that a beer label depicting a frog making an obscene gesture, even if it conveyed little information, at least served the purpose of proposing a commercial transaction and was thus protected speech); *Alexander*, 2007 WL 2120024, at *4.

*potential* for misuse alone does not justify restricting whole categories of commercial speech. *Zauderer*, 471 U.S. at 644-47. Indeed, in almost every constitutional challenge to lawyer advertising rules, the state argued that the rules were intended to prohibit potentially misleading speech, and the Supreme Court rejected that argument. *See id.*[5]

In *Zauderer*, for example, the state enacted a rule against the use of illustrations in advertisements, claiming that such illustrations have the potential to mislead the uninformed public. *Id.* at 644-45. The Supreme Court rejected that justification, holding that a state cannot ban commercial speech simply because it could theoretically be used in a misleading way. *Id.* The Court noted that, if states could prohibit advertising practices that are only potentially misleading, there would be no limit on their power to restrain commercial speech because nearly *any* advertising device is subject to at least potential misuse. *Id.* at 648-49. Indeed, even the English language is frequently misused to communicate ideas that are false or misleading, but that does not justify banning the use of English in advertising.

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[5] *See also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) (holding that courts "cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden"); *Peel*, 496 U.S. at 111 (plurality opinion) ("[C]oncern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment."); *Shapero*, 486 U.S. at 476 (holding that the potential "for isolated abuses or mistakes does not justify a total ban"); *RMJ*, 455 U.S. at 203 (holding that a state "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive").

The state's re-characterization of "potentially misleading" speech as "inherently misleading" does not change the nature of that speech or of the analysis. The state cannot circumvent the Supreme Court's prohibition on blanket bans of "potentially misleading" commercial speech just by putting a different label on the speech. *See Zauderer*, 471 U.S. at 640-41 & 640 n.9 (rejecting the state's unsubstantiated argument that illustrations in advertisements were inherently misleading); *Bates*, 433 U.S. at 372 (rejecting the state's argument that advertising is "inherently misleading" because "services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement"). Rather, the state must *prove* that speech is inherently misleading. *See Edenfield*, 507 U.S. at 770 (holding that the state's burden is "not satisfied by mere speculation or conjecture"); *Byrum v. Landreth*, 566 F.3d 442, 450 (5th Cir. 2009) (holding that the state "failed to meet its evidentiary burden to show that the terms 'interior design' and 'interior designer' are inherently misleading").

The Supreme Court has repeatedly rejected similar unsubstantiated assertions that advertising is misleading. In *RMJ*, for example, the Court struck down a restriction preventing a lawyer from truthfully advertising that he was a member of the U.S. Supreme Court Bar. 455 U.S. 191. Because admission to the Supreme Court Bar requires no special qualifications and is available to any lawyer licensed by a state bar for more than three years, the Court noted that the claim was

"relatively uninformative" and "could be misleading to the general public unfamiliar with the requirements of admission." *Id.* at 205. Nevertheless, the Court held the restriction unconstitutional because it found "nothing in the record to indicate that the inclusion of this information was misleading." *Id.* at 205-06. Similarly, the Supreme Court in *Peel* held that a state violated the First Amendment by disciplining a lawyer for stating on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy. 496 U.S. 91. The Court rejected the state's assumption that the "average consumer" would be confused and unable to understand the value of such a certification. *Id.* at 105-06 & 106 n.13.

### B. The State Has No Evidence That the Amended Rules Would Advance Its Interests.

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

#### 1. The State Has No Evidence That the Prohibited Advertising Techniques Harm Lawyer Dignity.

As already explained, the state has no valid interest in protecting the dignity of lawyers. Even if that interest were valid, however, the state still would not

satisfy the *Central Hudson* test because the state has no evidence that the sorts of advertising prohibited by the rules, which consumers are used to seeing on television every day, cause any harm to the image of the legal profession. As *Bates* recognized, bankers, engineers, and other professionals advertise (often using methods similar to those used by lawyers), "and yet these professions are not regarded as undignified." 433 U.S. at 369-70. If anything, "stylish" ads, of the sort that consumers are used to seeing on television, are likely to give consumers a better impression of lawyers than the bland "talking head" ads of the sort required by Louisiana's restrictive rules. *See* 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). Lawyer advertising can improve the public's image of the profession by increasing access to legal services and "helping [the profession] to shed its 'elitist' image." Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States?*, 27 J. Legal Stud. 503, 508, 512 (1998).

Although many lawyers are quick to blame television advertising for damaging the profession, public distrust of lawyers is far older than television, and there is no evidence that the public's view of lawyers today is worse than it has been historically. *See* Marc Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* 3 (2005) ("From ancient Greece and the New Testament to our own day,

lawyers have long been objects of derision.").[6] The available survey evidence shows that it is lawyers themselves, not the public, who associate lawyer advertising with a decline in the reputation of the profession. R.5917-5921, 5923. Consumers believe that lawyers can boost their reputations not by prohibiting advertising, but by acting honestly and ethically, charging lower prices, and providing better services. R.5923.

The only question in the state's survey with the potential to shed any light on whether the public sees the prohibited advertising techniques as undignified is a question asking respondents whether "scenes of accidents or accident victims lessen [their] confidence in the integrity of Louisiana lawyers." R.5491. Although a small majority (59%) agreed with this statement, a substantial minority (35%) expressed "[t]otal disagreement" with it. *Id.* At most, the state's survey thus establishes that *some* members of the public respond negatively to ads with accident scenes. To allow the state to restrict speech based on that evidence, however, would reduce the First Amendment to a popularity contest. In a system of government that values and protects individual expression, a majority vote alone

[6] *See, e.g.*, Ambrose Bierce, *The Devil's Dictionary* (1911) ("LAWYER, n. One skilled in circumvention of the law."); Charles Dickens, *Bleak House* ("The one great principle of the English law is, to make business for itself."); William Shakespeare, *Henry VI*, Part 2 ("The first thing we do, let's kill all the lawyers."); *see generally* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 42 UCLA L. Rev. 1069 (1994) ("As a practical matter, lawyers in the United States have almost always had an image problem.").

can never serve as a legitimate basis for restricting speech. *See Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("Access to a public forum . . . does not depend upon majoritarian consent."); *Amidon v. Student Assoc.*, 508 F.3d 94, 102-03 (2d Cir. 2007) (holding that "[u]se of the referendum . . . can place minority views at the mercy of the majority").

The state's survey is also flawed because it was targeted at a segment of the population that is largely not the intended audience for lawyer television ads. The Supreme Court in *Bates* recognized that lawyer advertising is especially important to groups that have traditionally lacked access to legal services, including low-income consumers. *See Bates*, 433 U.S. at 376-77 (noting that many legal needs of those of low-income consumers go unmet because consumers fear the perceived costs of legal services or do not know how to locate a competent attorney); *see also Peel*, 496 U.S. at 110 (recognizing that advertising "facilitates the consumer's access to legal services and thus better serves the administration of justice"). Although these consumers primarily make up the clientele of appellants' law firms, those who responded to the state's survey were disproportionately of middle- and upper-income. R.5697, 5711. Consumers who are not in the target demographic for lawyer ads are less likely to react favorably to those ads. *See* R.5715-17, 5927-28. The First Amendment, however, does not require speakers to appeal equally to all aspects of society to be entitled to protection.

Even taken at face value, the state's survey would not demonstrate the constitutionality of its rules. The subject of the survey question—"accident scenes"—is only a small subset of the advertising regulated by the broader rule against "scenes," and thus shows only that the rule as enacted is vastly overbroad. Moreover, the state's chosen remedy to this type of advertisement is a disclaimer stating that the scene is not "actual or authentic." Such a disclaimer has nothing to do with whether the public is likely to perceive the scene as dignified. Put another way, a so-called "disclaimer" stating the obvious—that the scene depicted is not a real accident—would not cause the public to think more highly of the advertising lawyer than an advertisement that did not include such a disclaimer.

Two other survey questions touch on the issue of dignity, but, rather than asking whether lawyer ads *harm* the image of the legal profession, they ask whether the ads "*raise* [the public's] confidence in Louisiana courts." R.5483-84. Whether ads improve the reputation of the courts, however, is irrelevant to First Amendment analysis. Lawyers cannot realistically improve the image of the legal system with every advertisement they run, and the state cannot constitutionally impose on lawyers the cost of disseminating its own preferred image of the profession. *See Tillman v. Miller*, 133 F.3d 1402, 1403-04 (11th Cir. 1998); *see also United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that the government cannot compel advertisers to promote a product).

### 2. The State Has Not Shown That the Prohibited Advertising Techniques Are Misleading.

The state did not submit any evidence, in the form of consumer complaints, disciplinary records, studies, or empirical research of any kind, demonstrating that even a *single consumer* has ever been misled by any of the advertising techniques at issue here. *See generally* R.5921-23. To the contrary, in response to suggestions that the advertising rules should be tightened, defendant Charles B. Plattsmier, who, as Chief Disciplinary Counsel is primarily responsible for enforcing the rules, wrote that only an "extraordinarily small proportion" of the complaints to his office involved lawyer advertising and that even the few complaints he had received were "largely from other attorneys." R.5448. Indeed, Plattsmier stated that, at least as of March 2000, "*no* advertising has been submitted to this office which, based upon its content, was found to be misleading." *Id.* (emphasis added). The state has presented no evidence of subsequent complaints.

Rather than determining whether any consumers have been misled by the prohibited advertising techniques, the state surveyed members of the public to ask whether, in their *opinions*, client testimonials, portrayals of judges and juries, and accident scenes "imply that Louisiana courts can be manipulated" or that the advertising lawyer has "influence over Louisiana courts." R.5488-90. By at least 2-to-1 margins, consumers responded that the ads did *not* contain any such implications. *Id.* These results cast additional doubt on the state's theory that these

techniques are "inherently misleading," but, otherwise, lack any significance. Consumers are not advertising experts capable of offering an opinion about whether particular kinds of advertisements are misleading in the abstract. If anything, consumers' ability to recognize unstated implications in lawyer ads indicates that they are appropriately aware that advertisements sometimes carry unstated implications, and, thus, that they are unlikely to be misled.

The only other questions related to misleading ads asked respondents to react to *generalizations* about lawyer advertising rather than give their responses to the *particular kinds* of advertising prohibited by the challenged regulations. In response to these questions, 56% of respondents agreed that lawyer advertising in Louisiana is misleading, and 61% agreed that lawyer advertising is less truthful than advertising for other businesses. R.5480-81. But to allow a general mistrust of lawyer ads to justify restrictions on particular kinds of ads would give the states untrammeled power to restrict lawyer advertising. *Bates* would thereby be rendered a nullity.

In addition to these overall defects in the state's evidence, the state's justifications for the individual rules are flawed for other reasons.

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

Amended Rule 7.2(c)(1)(D) prohibits advertisements that "contain[] a reference or testimonial to past successes or results obtained" except when the

information is requested by a client. The Bar Committee claimed that this rule was necessary to "protect[] the public from false, misleading and/or deceptive advertising." R.5511. The district court concluded that this type of advertisement is "inherently misleading" and upheld the state's blanket ban. The evidence, however, does not support the court's contention.

The district court relied on two questions from the Bar's survey in support of its conclusion that the rule prohibits inherently misleading ads. First, the court cited the survey's finding that 83% of the public and 60% of Louisiana Bar members "disagreed" with the statement that "client testimonials in lawyer advertisements are completely truthful." R.6054 n.5. Second, the court relied on the survey's finding that 26% of respondents "agreed" that "lawyers endorsed by a testimonial have more influence on Louisiana courts than other lawyers." *Id.* These questions, however, do not ask about statements of a lawyer's "*past results*"—the advertising device prohibited by the rule—but about "*client testimonials*"—which the rules continue to permit. Past results and client testimonials are not the same thing. Although some client testimonials may include information about past results and would thus be prohibited by the rule, plaintiffs Bart and Gee, like many other lawyers, include information about verdicts and settlements in past cases that is not presented in the form of a client testimonial. R.4747 ¶ 29. Conversely, both lawyers sometimes use testimonials that do not mention past results. *Id.*

The district court acknowledged that the findings did not "specifically reference statements about past results," but nevertheless concluded, without citing any evidence, that statements of past results "would *seem to cause* an attitude of even greater reliance by those seeking lawyers." R.6054 n.5 (emphasis added). The state's rationale for prohibiting statements of past results, however, was not that they cause "an attitude of . . . reliance," but that they are "inherently misleading" because they "are not susceptible of measurement or verification." R.3640, 3645. The state's prohibition on past results is incompatible with that claimed interest because the rule prohibits even truthful, verifiable information about past results while, as the district court recognized, allowing testimonials containing only unverifiable statements of opinion, such as a testimonial stating that a lawyer "was responsive to my needs and helped me with my legal problems." R.6054.

The district court's concern that advertisements cause an "attitude of . . . reliance" appears to assume that consumers are harmed by truthful statements of past results because they will irrationally conclude that a lawyer's success in past cases will necessarily lead to the same result in the future. The Supreme Court, however, has rejected state attempts to restrict advertising based on the "fear that people would make bad decisions if given truthful information," *Thompson*, 535 U.S. at 374, and has refused to accept the assumption that "the public is not sophisticated enough to realize the limitations of advertising, and . . . is better kept

in ignorance than trusted with correct but incomplete information." *Bates*, 433 U.S. at 375. As the Supreme Court stated in *Virginia Board of Pharmacy* in rejecting a blanket ban on drug prices:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. at 765; *see Allstate Ins. Co.*, 495 F.3d at 167 ("Attempting to control the outcome of the consumer decisions . . . by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers.").[7]

There are powerful reasons to believe that these devices are not misleading. Consumers in Louisiana are bombarded every day with ads including testimonials and claims of results for a wide range of products and services, and thus have considerable experience making judgments about how persuasive, credible, and useful particular claims may be. The Federal Trade Commission (FTC), the agency responsible for enforcing federal law against unfair and deceptive trade practices,

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[7] *See also 44 Liquormart*, 517 U.S. at 516 (Stevens, J., concurring) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."); *Pruett*, 499 F.3d at 415 n.35 ("The benefits attending commercial speech flow not just to the speaker, for increased consumer knowledge about any product aids consumer choice and increases competition.").

provides guidelines allowing advertisers to use testimonials and past results as long as they are truthful, requiring only a reasonable disclaimer in limited circumstances. *See* 16 C.F.R. Ch. I §§ 255.0-255.5.

Moreover, Louisiana has allowed lawyers to use references to past results for many years, as forty-eight other states continue to do, yet the state has no evidence that any consumer has ever been misled.[8] Past results are widely used by Louisiana's largest and most respected law firms in circumstances that are self-evidently not misleading. Stone Pigman, for example, ran an advertisement in *Forbes* stating that the firm had won "precedent-setting court decisions involving class actions and federal removal jurisdiction." R.5393. The ad specifically mentioned a case where the firm had "won for R.J. Reynolds a reversal of the trial court's order certifying a nationwide class of nicotine-addicted plaintiffs," and another case where it "won reversal in the appellate court" on behalf of pizza company Papa John's. *Id.* The ad went on to claim that the firm's lawyers have "compiled an equally impressive record of success in handling business transactions for their clients," listing specific examples of its successes in this area.

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

*Id.* Although these ads are potentially useful to prospective clients and nothing about them is misleading, they are nevertheless prohibited by the amended rules.[9]

Even more tellingly, the rules, by classifying websites as "information provided upon request," continue to allow lawyers to post information about past results on their online biographies and their firms' home pages without even the requirement of a disclaimer. Rule 7.6(b)(3). Consumers increasingly depend on the Internet to look for goods and services, and there is no logical reason why they would be misled when looking up a lawyer in the phone book but not when looking up the same lawyer on the Internet. The distinction between these forms of media is especially questionable given that many lawyers, including plaintiff Morris Bart, post their television commercials on their websites. If the state really considered statements about past results to be *inherently* misleading when appearing on television, in print, and in the phone book, it would make no sense to conclude that the same statements do not even need a disclaimer when appearing on the Internet.[10]

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[9] Similarly, Jones Walker distributes an advertising brochure titled "Solutions," containing "success stories" that "describe Jones Walker's role in finding winning solutions for [its] clients facing difficult environmental issues." R.5377. The brochure features cases where Jones Walker prevailed in court or reached successful settlements, including specific cases where it cleared the way for property development, obtained dismissal of a criminal indictment, and, in a class action, "substantially reduce[d] the potential class size . . . saving the client untold costs in defending numerous dubious actions." R.5384.

[10] Many firms post information about past results on their websites. To name

### b. The Restrictions on Scenes and Actors (Amended Rules 7.2(c)(1)(I), 7.2(c)(1)(J), and 7.5(b)(2)(C))

In addition to the prohibition on past results, the amendments target standard advertising devices that are pervasive in modern advertising and harmless to consumers. Amended Rule 7.2(c)(1)(I) restricts the depiction of "any events or scenes or pictures that are not actual or authentic," a provision that appears to target fictional vignettes and dramatizations such as a generic car accident scene illustrating that a firm handles accident cases; Rule 7.2(c)(1)(I) targets the use of actors by prohibiting advertisements that "include[] a portrayal of a client by a non-client;" and Rule 7.2(c)(1)(J) further restricts use of actors by prohibiting advertisements that "include[] the portrayal of a judge or a jury." Originally, the amendments imposed a total ban on these advertising techniques. After this case was filed, the Louisiana Supreme Court further amended the rules to allow scenes

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just a few of many examples, Jones Walker's site claims a "long track record of successfully protecting [its] clients' interests," asserting that it is "often able to persuade plaintiffs to dismiss lawsuits without payment" and has "successfully defended a broad spectrum of claims." http://www.joneswalker.com/practices-2.html; http://www.joneswalker.com/practices-22.html. In class actions, the firm claims to have "been successful in aggressively removing cases to federal court," "succeeded in limiting discovery to class issues only," and "ultimately defeated certification" in various cases. http://www.joneswalker.com/practices-2.html. Moreover, the state's counsel in this case, Phillip A. Wittmann, has an online biography listing cases where he obtained a "favorable settlement," won dismissal under Federal Rule of Civil Procedure 12, and successfully argued for class decertification on appeal. http://www.stonepigman.com/attorneys/phillip_a_wittmann.html. His biography further claims that one toxic-tort trial "resulted in several zero awards and generally favorable defense verdicts." *Id.* Again, nothing about these ads is misleading.

and portrayal of clients when accompanied by a "disclaimer." *See* R.6033. The district court concluded that use of scenes and portrayal of clients were only "potentially misleading" but nevertheless upheld the disclaimer requirement. It held that the prohibition on the portrayal of judges and juries, however, was "inherently misleading" and upheld the state's blanket ban on these devices.

**A.** The required disclaimers on scenes and portrayal of actors are so burdensome that they render the covered forms of advertising essentially unusable. To begin with, Rule 7.2(c)(10) requires that the disclaimers be written in a font "at least as large as the largest print size used in the advertisement or unsolicited written communication," which, because advertisements typically include a law firm's name or slogan in large text as an attention-getting device, requires the disclaimers to be so enormous that it is effectively impossible to run these ads. Moreover, the amendments expressly apply the font-size and verbal disclaimer requirements to *all* disclosures and disclaimers required by the rules. Rule 7.2(c)(10). Thus, in addition to noting the use of actors, scenes, and spokespeople, lawyers will be forced to state the lawyer's name and office location, Rule 7.2(a), the client's responsibility for costs, Rule 7.2(c)(6), and the jurisdictions in which the lawyer is licensed to practice law, Rule 7.6(b), all in an enormous font size. For example, a television advertisement complying with the rules would look like this:



The depiction of a dramatization is rendered meaningless when three-fifths of the screen is covered by a disclaimer. No lawyer would pay for such an advertisement. The purported "disclaimer" is thus a de facto ban.

To make matters even worse, the rules require, in addition to the written disclaimer, that the disclaimer be spoken *verbally* at a normal talking speed. In a fifteen-second commercial that includes a scene and an actor, the required disclaimers would take up at least two-thirds of the available time. Advertisements of ten or fifteen seconds would thus be pointless to produce. The only other state to adopt a similar verbal disclaimer in its lawyer advertising rules is Florida, which applied its rule only to use of spokespeople, rather than, like Louisiana, to all required disclaimers. The Florida Bar, however, recently petitioned the Florida Supreme Court to revoke the requirement, writing that it is "overly burdensome to lawyers because most television advertisements are 10-60 seconds in length" and that such advertising was not misleading to the public. R.5560.

In *Ibanez*, the Florida Board of Accountancy reprimanded a Florida lawyer for truthfully stating in the phone book, on her business card, and on her stationery that she was a Certified Financial Planner (CFP). *Ibanez*, 512 U.S. at 138. The Supreme Court struck down Florida's requirement of a disclaimer "in the immediate proximity" of the CFP designation, stating "that the recognizing agency is not affiliated with or sanctioned by the state or federal government" and setting out the "recognizing agency's requirements for recognition, including, but not limited to, educatio[n], experience[,] and testing." *Id.* As the Court noted, the "detail required in the disclaimer . . . effectively rule[d] out . . . . the designation on a business card or letterhead, or in a yellow pages listing." *Id.* at 146-47.

Similarly, the Eleventh Circuit in *Tillman v. Miller* held unconstitutional a law that required any television advertisement soliciting clients in workers' compensation cases to include a notice about the criminal penalties for filing a fraudulent claim, which the law required to be in boldface 36-point type and remain on the screen for at least five seconds. 133 F.3d at 1403 & n.1. The court also noted that the burden was "not a trifling one," given that the plaintiff's ads lasted thirty seconds and the "state wants to share five . . . of them for its general education message." *Id.* at 1404 n.4. The court concluded that the state was "not justified in placing, on a television advertiser, the burden of the cost of educating the public about the criminal penalties for fraudulent claims." *Id.* at 1403-04.

The required disclosure here is far more burdensome than the disclosures held unconstitutional in *Ibanez* and *Tillman*. Louisiana's disclosure requirement imposes an unreasonable and unjustifiable burden on plaintiffs' speech that will "effectively rule out" many advertisements, especially relatively small ads, where space is at a premium, and television ads of 10 or 15 seconds. *Ibanez*, 512 U.S. at 146-47.

**B.** The state has no evidence to justify such onerous restrictions. Only two questions in its survey were relevant to use of scenes and portrayal of clients. The second asked respondents whether they believed lawyers advertising with "scenes of accidents or accident victims . . . have more influence over Louisiana courts" than other lawyers. A large majority of the public disagreed, a result that is not surprising given that it is difficult to imagine how anyone could construe an accident scene as an indication that a lawyer has a high level of influence over courts. *See Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) ("Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm.").

Consumers are accustomed to the notion that scenes and actors appear in commercials, and it defies common sense to assert that they would be misled by these devices. *See Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) ("Our policy is to leave it to the public to cope for themselves with Madison Avenue

panache and hard sells."). The Supreme Court has refused to credit "the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105 (plurality opinion).

None of the targeted forms of advertising is prohibited by FTC regulations regarding deceptive and misleading advertising. To the contrary, the FTC staff's comments on the proposed Louisiana rules note that banning dramatizations of scenes and other content prohibited by the rules "unnecessarily restrict[s] truthful advertising and may adversely affect prices paid and services received by consumers." R.5320, 5324-5332; *see also* R.5335 (concluding that the New York rules on which Louisiana's amendments are based "are unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them"). Moreover, other than Louisiana, only two states prohibit dramatizations in lawyer advertisements,[11] and only one prohibits actors playing clients.[12] Louisiana has no

[11] Two states impose complete bans on dramatizations. Ark. Rules of Prof'l Conduct R. 7.2(e); Wyo. Rules of Prof'l Conduct R. 7.2(h). Eight others allow dramatizations if accompanied by a disclosure, but do not require the disclosure to be prohibitively large. Cal. Rules of Prof'l Conduct R. 1-400, standard 13; Mo. Rules of Prof'l Conduct R. 4-7.1(i); N.Y. Code of Prof'l Resp. DR 2-101(c)(4); N.C. Rules of Prof'l Conduct R. 7.1(b); Or. Rules of Prof'l Conduct R. 7.1(a)(10); Pa. Rules of Prof'l Conduct R. 7.2(f); R.I. Rules of Prof'l Conduct R. 7.1(c); S.D. Rules of Prof'l Conduct R. 7.1(c)(15).

[12] Texas is the only other state with a blanket ban on actors playing clients. Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(7). Eight other states, plus Louisiana's pre-amendment rules, allow actors to play clients when the

evidence that these states have been unable to protect their consumers without prohibiting these stock advertising devices.

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

For example, most law firm websites (including the websites of plaintiffs' firms) have stock photographs showing scenes of lawyers in law firm settings or illustrating the firms' areas of practice, such as generic factory or maritime scenes. R.4748 ¶ 31. Stone Pigman's website, for example, includes a variety of generic office scenes, as well as scenes showing men in hardhats, a drug manufacturing

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advertisement discloses that fact, but, again, do not require the disclosure to be prohibitively large. Ark. Rules of Prof'l Conduct R. 7.2(e); La. Rules of Prof'l Conduct 7.1(a)(vii); Mo. Rules of Prof'l Conduct R. 4-7.1(i); Nev. Rules of Prof'l Conduct R. 7.2(b); N.Y. Code of Prof'l Resp. DR 2-101(c)(4); Or. Rules of Prof'l Conduct R. 7.1(a)(8); Pa. Rules of Prof'l Conduct R. 7.2(g); Va. Rules of Prof'l Conduct R. 7.2(a)(2); Wyo. Rules of Prof'l Conduct R. 7.2(f).

plant, a television control room, power cables, stock traders, and a ship. *See* http://www.stonepigman.com/practice/index.html (click on practice areas). Although it is possible that some of these scenes represent actual lawyers and clients of the firm, no rational consumer would care whether or not that were the case. The images are not included to document actual events, but to serve the same purpose as dramatizations in television advertisements: to draw attention, to make the advertisement visually pleasing, and to efficiently communicate with the viewer using representative images (such as a construction site to represent a firm's work with development companies or a ship to illustrate a firm's maritime practice).

**C.** The district court upheld the state's blanket prohibition on portrayals of judges and juries on the ground that such portrayals are "inherently misleading." The state's evident concern regarding such advertisements is that appearance by a judge in an advertisement implies an improper judicial endorsement. An endorsement of a particular lawyer by a sitting judge, however, is already prohibited by the Louisiana Rules of Judicial Conduct, which prohibits a judge from "lend[ing] the prestige of judicial office to advance the private interest of the judge or others" and from "convey[ing] or permit[ting] others to convey the impression that they are in a special position to influence the judge." Canon 2(B); *see also* Canon 5(C) (requiring a judge to "refrain from financial and business

dealings that tend to reflect adversely on the judge's impartiality"). The rule at issue here, however, does not prohibit the endorsements of an actual judge, but the portrayal of a judge by an actor.

There is no evidence to suggest that consumers are confused by the commonplace use of actors in commercial dramatizations. A generic courtroom scene with a judge and jury, for example, could not reasonably be expected to cause viewers to believe that the lawyer has improper influence over actual judges. Moreover, the state's explanation for its prohibition on portrayal of judges, even if true, would not explain why the rule also prohibits portrayal of a jury. Given that juries are randomly selected for each case, it would be impossible for a lawyer to exert improper influence over a particular jury in future cases.

**c. The Prohibitions on Trade Names and Slogans That Imply Results (Rules 7.2(c)(1)(E) and 7.2(c)(1)(L))**

Rule 7.2(c)(1)(L) prohibits advertisements that "utiliz[e] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." The district court concluded that these advertising devices are only "potentially misleading," but nevertheless upheld the state's blanket ban.

In upholding the constitutionality of these rules, the district court relied on only one survey question that had anything to do with the rules at issue. That question presented several slogans—including slogans used by Bart ("One Call That's All") and Gee ("Tell them you mean business")—and asked respondents

whether they thought those slogans "promised results." Although the majority of respondents thought that at least some of the slogans promised results, that "finding" reveals nothing about whether ads that "promise results" are misleading or otherwise harmful to the public. At most, the survey suggests that certain slogans, including the slogans that were included in the survey, run afoul of the rules and thus that the rules have a very broad application even to slogans that do not literally promise a result. But plaintiffs-appellants never denied that the rules would be broadly interpreted to prohibit their ads. Indeed, the rules' apparent prohibition of their ads is the reason they sought declaratory and injunctive relief in the first place.

Once again, there is no evidence that such commonplace devices have ever harmed consumers. Louisiana is one of only two states to prohibit either of these forms of advertising content,[13] and there is no evidence that the rules of the forty-seven other states and the District of Columbia have been insufficient to protect consumers. Moreover, a federal court declared unconstitutional the identical New York rule on which Louisiana's rule is based on the ground that it lacked any supporting evidence, *Alexander*, 2007 WL 2120024, at *6, and both Florida and

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

New Jersey recently abandoned similar prohibitions after concluding that they were both unnecessary and too unpredictable in application. R.5373.

As with the other amendments, these rules would prohibit practices widespread among law firms, most of which use some sort of trade name or slogan that would at least arguably be prohibited by the new rules. To name just a few of countless examples, Jones Walker uses the mottos "Progress in Motion" and "The solution exists, look to Jones Walker to help you find it," both of which arguably "impl[y] an ability to obtain results." These mottos would also likely run afoul of the rule against "promis[ing] results," as would the firm's claims that it "focus[es] on achieving the *best results* in the *most* efficient manner," "has the appropriate attorney for any court or jury demographic," can "deliver the *best possible* legal representation given any crisis, market condition, or specific situation," has the "ability to bring a matter to a quick resolution," and can present issues for a "*successful* appeal."[14] In addition, law firms and individual lawyers often claim

[14] *See* http://www.joneswalker.com/about.html (emphasis added); http://www.joneswalker.com/practices-22.html (emphasis added). Similarly, Adams and Reese's website states that the firm "solve[s] problems and get[s] results," http://www.adamsandreese.com/about_the_ firm/about.html, and its brochures states: "When it comes to a solution, we're sure of it." R.5404. Galloway, Johnson claims to have an "aggressive approach" that "gives clients the ability to resolve cases more quickly." http://www.gjtbs.com/productsLiability.html. McGlinchy Stafford's website states that it "manage[s] . . . claims efficiently" and "minimize[s] [its] clients' exposure." http://www.mcglinchey.com/firmgroup Detail.asp?id=4095. Stone Pigman claims that it will "deliver[] superior client service in the form of expert counsel and zealous representation" and will "respond

recognition by various publications such as "Super Lawyers" and "Best Lawyers in America," which the Bar's handbook provides improperly implies results. Among these is defendant Pesnell, whose biographical information on the website of defendant Louisiana Attorney Disciplinary Board states that "he has been listed in 'The Best Lawyers in America' since 1989." *See* http://www.ladb.org/board_member_profiles.asp.

On the other hand, courts have repeatedly recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statements upon which no reasonable buyer would be justified in relying" or "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 496 (5th Cir. 2000) (holding that Papa John's slogan "Better Ingredients. Better Pizza" was not actionable as false advertising); *see also Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor misleading); *see also Mason*, 208 F.3d at 955-56 (rejecting Florida's contention that truthfully claiming to have received the

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creatively and effectively to clients' needs." http://www.stonepigman.com/firm/; http://www.stonepigman.com/practice/business/corporate.html. The firm also claims that its legal teams can "solve[] their clients' most difficult problems," "handle the most difficult cases," and "efficiently handle business transactions of any size, complexity or context." *Id.*; http://www.stonepigman.com/practice/; http://www.stonepigman.com/firm/philosophy.html.

"highest rating" from Martindale-Hubbell would "mislead the unsophisticated public"). As this Court has recognized, if routine puffery and statements of quality were considered misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut,* 227 F.3d at 499 (internal quotation marks omitted).

### C. The Rules Are Not Narrowly Drawn.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *RMJ*, 455 U.S. at 203. Even when the state interest is compelling, "if the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U.S. at 371; *see Pruett*, 499 F.3d at 412. The Supreme Court has imposed increasingly rigorous scrutiny on this prong of the test. As the Court wrote in *Thompson*, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." 535 U.S. at 373. The state here adopted its regulations without any attempt to tailor them to a legitimate state interest or any consideration of readily available alternatives. The amendments therefore sweep in a broad spectrum of advertising that has no reasonable possibility of misleading consumers.

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

The rule against statements of past results applies regardless of whether the ads are true or false. It is therefore precisely the sort of "blanket" prohibition on speech that the Supreme Court has repeatedly condemned. An obvious alternative would be to enforce the state's existing rules against false and misleading advertisements. Louisiana has not shown that these existing rules are insufficient to protect its citizens from being misled. *See* R.5448; *see also Alexander*, 2007 WL 2120024, at *8 (declaring restrictions on attorney advertising unconstitutional where the state had "not given the Court any reason to believe that better enforcement of the then-existing rules on a case-by-case basis . . . would not accomplish the desired results").

If the state, as it claims, is concerned about verification of past results, it could simply require lawyers to provide substantiation for their claims, thus protecting consumers without interfering with protected speech. Alternatively, if the state could show that statements of past results are misleading to consumers, it could require, as many other states do, a reasonable disclaimer stating that past results do not guarantee future success. *See RMJ*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive."); *Alexander*, 2007 WL 2120024, at *8 (declaring restrictions on speech

unconstitutional where the state could have instead required disclaimers). Both Bart and Gee already include similar disclaimers in their ads.

### 2. The Restrictions on Scenes and Actors (Amended Rules 7.2(c)(1)(I), 7.2(c)(1)(J), and 7.5(b)(2)(C))

The restrictions on scenes and actors are also overbroad, applying to a wide range of speech that nobody would consider misleading. Indeed, the rules are so far-reaching that they would, if applied to other industries, sweep in nearly any advertisements designed for television and most other forms of media. It is rare that a contemporary advertisement does not contain a "scene" of some sort. Even the most inoffensive ad such as, for example, a commercial depicting children eating cereal at a breakfast table, contains scenes that would be prohibited by the rule if used by lawyers. *See, e.g.*, http://www.youtube.com/watch?v=vYEXzx-TINc (ad for Life cereal). Moreover, the rules prohibit lawyers from using actors in roles related to the practice of law. The prohibition on the use of actors to play judges, juries, clients, and lawyers is equivalent to a prohibition by the athletic shoe industry on the depiction of athletes, referees, and spectators. Such restrictions make it impossible to design effective ads. R.4749-50 ¶¶ 34-38.

Instead of requiring written disclaimers as large as the largest headline in the advertisement and additional intrusive verbal disclaimers, the state could impose reasonable type-size requirements, as do all other states that have disclaimer requirements. Several states, for example, require that disclosures be

"conspicuous," Missouri Rule 4-7.1(h), or "clearly legible or audible," Alabama Rule 7.2(e). One state requires a disclaimer to be in "9-point or larger type." Iowa Rule 32:7.3(d). Others set the size based on the type size of some other text in the advertisement, such as the lawyer's phone number, Nevada Rule 7.3(b) & (c), or "the *smallest* type size appearing in the advertisement." Wyoming Rule 7.2(g) (emphasis added). No other state requires disclaimers to be the same size as the largest headline in the advertisement, and Louisiana has no evidence that these states have been unable to protect their consumers.

Moreover, there is no evidence that consumers are any less capable of distinguishing actors when they play judges and juries than when they play other roles, and the state has no evidence supporting its unexplained claim that "a disclaimer would not be able to cure or prevent the conduct from misleading and/or deceiving the public." R.5518. Therefore, the state could also require disclaimers on these advertising devices rather than imposing a blanket ban. *See Alexander v. Cahill*, 2007 WL 2120024, at *8 (holding that a disclosure that judges are played by actors would accomplish the state's purpose without restricting speech).

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

Like the rules against actors and scenes, the rules against trade names and slogans prohibit devices that are ubiquitous in modern advertising. If these rules were applied to advertising in other industries, they would prohibit such famous

slogans as "oh what a relief it is" (Alka-Seltzer), "it takes a licking and keeps on ticking" (Timex), "good to the last drop" (Maxwell House), and "it keeps going and going" (Duracell), either because they are "motto[s] that state[] or impl[y] the ability to achieve results" or because they impermissibly "promise[] results."

**A.** The prohibition on statements that "impl[y] the ability to achieve results" could be read to prohibit nearly any positive statement about a lawyer or firm. In other states, similar rules have been applied to prohibit lawyers from, for example, using the slogan "the Heavy Hitters" and from truthfully stating that they were included in "Super Lawyers" magazine. *See* N.J. Ethics Op. 39 ("When a potential client reads such advertising and considers hiring a 'super' attorney, or the 'best' attorney, the superlative designation induces the client to feel that the results that can be achieved by this attorney are likely to surpass those that can be achieved by a mere 'ordinary' attorney."); *Alexander*, 2007 WL 2120024, at *1. Because of the difficulty in determining what "implies" the ability to achieve results, and the potential for application to non-misleading advertising, both Florida and New Jersey recently abandoned their equivalent rules, leaving Louisiana virtually alone in prohibiting these devices. R.5373.

**B.** The prohibition on statements that "promise[] results" would be unobjectionable if it were limited to cases where a lawyer makes a literal promise of a particular result that is beyond that lawyer's ability to guarantee (for example,

"I promise that you will win at trial"). The Louisiana rule, however, is taken from an identical rule in Florida, which that state has applied even to statements that are inherently subjective and unprovable, such as "Don't let an incident like this one ruin your life," "Don't allow the American dream to turn into a nightmare," and "Attorneys Righting Wrongs." R.4743 ¶ 9. Indeed, the district court credited the state's survey findings that a majority of Bar members and the public thinks that generic slogans, including plaintiffs' slogans "One call, that's all" and "Tell them you mean business," constitute promises of results that would be prohibited by the rule. R.5483, 5486, 6064.

**C.** As an alternative to its rules restraining speech, the state could achieve the legislature's goal of promoting a "more positive message," R.4752, by conducting its own outreach efforts to educate consumers about the practice of law and the role of lawyers in society. A basic tenet of the First Amendment is that allegedly distasteful speech is best dealt with in the marketplace of ideas, through *more* speech aimed at providing a better or more balanced point of view. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Countervailing speech may, of course, include government speech. As the Supreme Court wrote in *Bates*, "[i]f the naivete of the public will cause advertising by lawyers to be misleading, then it is the bar's role to assure that the populace is sufficiently

informed as to enable it to place advertising in its proper perspective." 433 U.S. at 375.

## III. The Rules Are Unconstitutionally Vague.

The amended rules are not only unsupported by any legitimate state interest, they are also unconstitutionally vague. Due process prohibits vague regulations for two interrelated reasons: (1) to provide fair notice so that people may avoid unlawful conduct and to prevent the risk of chilling protected expression, and (2) to provide standards to authorities to prevent arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender v. Lawson*, 461 U.S. 352 (1983). Here, the rules fail to satisfy either of these goals because they give lawyers and disciplinary authorities no guidance on what sorts of statements "promise[] results" or "impl[y] an ability to obtain results in a matter" under the rules. Rule 7.2(c)(1)(E), (L); *see* R.4749 ¶ 33.

As previously explained, Florida interprets the rule against promising results to extend to advertisements that are inherently subjective or unprovable. As interpreted by Florida, this rule has led to arbitrary and unpredictable results. To name just a few of many inexplicable outcomes, the state's standing committee on advertising decided that the phrase "People make mistakes, I help fix them" improperly promises results, but that "People make mistakes, I help them" is permissible; the statement "We'll help you get a positive perspective on your case

and get your defense off on the right foot quickly" promises results, but "If an accident has put your dreams on hold we are here to help you get back on track" is permissible; the phrase "[Y]our lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" promises results, but "The lawyer you choose can help make the difference between a substantial award and a meager settlement" is permissible; and the statement "Hiring an attorney experienced in DUI law is an efficient and effective way to ensure that all possible measures are taken to protect your legal rights" promises results, but "Hiring an attorney experienced in DUI law is an efficient and effective way to protect your legal rights" is permissible. *See* R.804, 807, 827, 831, 873. Because Florida is the only state other than Louisiana to have adopted this rule, Louisiana lawyers have nothing other than these arbitrary decisions for guidance in interpreting the rule as applied to their own ads.

The prohibition on trade names, mottos, and slogans that imply an ability to achieve results has even greater potential for arbitrary application because it is impossible to predict what disciplinary authorities will believe is "implied" by a particular ad. There is nothing obviously misleading, for example, about lawyers calling themselves "Heavy Hitters" or "Super Lawyers." Indeed, Florida's attempt to enforce a similar (but somewhat narrower) rule against statements that are "likely to create an unjustified expectation about results the lawyer can achieve"

was so riddled with inconsistencies that the state was forced to abandon it entirely. *See* R.5373 (stating that the rule was "unclear and incapable of adequate definition to provide guidance to Bar members"); R.5424 (noting the opinion of one committee member that including a pit bull in an advertisement "suggests an outcome").

Even if Louisiana does not enforce these rules as strictly as Florida and other states, the breadth, vagueness, and unpredictability of the rules will inevitably lead to self-censorship on the part of lawyers. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). The high cost of developing advertising and the risk of professional discipline will force lawyers to comply with the broadest possible reading of the rules' language. Moreover, the rules' vagueness raises the risk of arbitrary and discriminatory enforcement against lawyers who are unpopular with state disciplinary authorities. *See Discovery Network*, 507 U.S. at 423 n.19 (noting the "potential for invidious discrimination of disfavored subjects" in vague regulations). For these independent reasons, the amendments are unconstitutionally vague.

## CONCLUSION

This Court should reverse the district court's denial of summary judgment to plaintiffs and its grant of summary judgment to defendants, and remand with instructions to enter judgment for plaintiffs declaring unconstitutional and

permanently enjoining enforcement of the following rules of the Louisiana Rules of Professional Conduct, as amended effective June 4, 2009: Rule 7.2(c)(1)(D), (E), (I) & (L), the prohibition on "portrayal of a judge or a jury" in Rule 7.2(c)(1)(J), and Rule 7.5(b)(2)(C).

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

3. This brief complies with the requirements for redaction of private information; it is identical to the paper copy of the brief; and the electronic file containing it has been scanned for viruses with an updated version of a commercial virus scanning program and is free from viruses.

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