No. 09-30925

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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.

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

REPLY BRIEF PLAINTIFFS-APPELLANTS

Dane S. Ciolino
DANE S. CIOLINO, LLC
P.O. Box 850848
New Orleans, Louisiana
70185-0848

Gregory A. Beck
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
Phone: (202) 588-1000
Fax: (202) 588-7795

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Counsel for Plaintiffs-Appellants

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Last month, the Second Circuit held unconstitutional the set of amendments to New York's lawyer advertising rules on which Louisiana's challenged amendments are based—including two rules materially identical to rules at issue here. *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010). The court struck down restrictions on client testimonials, portrayals of judges, attention-getting techniques, and trade names that imply an ability to obtain results, holding that these techniques are not inherently misleading and that the state failed to prove under *Central Hudson* that the rules were "tailored in a reasonable manner to serve a substantial state interest." *Id.* at 95 (internal quotation and emphasis omitted). For essentially the same reasons set forth in *Alexander*, the Louisiana advertising rules at issue here are unconstitutional.

As *Alexander* recognized, the First Amendment imposes a heavy burden on the state to prove not only that the purported harms it seeks to address are real, but that its chosen restraints will in fact alleviate those harms to a material degree. *Id.* at 91-96. Like the state in *Alexander*, the state here has failed to meet that burden. It has produced no disciplinary records, complaints, or empirical research of any kind suggesting that its amended rules address anything but non-existent problems or that even a single consumer has ever been misled by the prohibited advertising techniques. Nor has it explained why it requires written disclaimers so large and

verbal disclosures so intrusive that it is effectively impossible to advertise with them.

Instead, the state argues that two of the challenged rules—the prohibition on depictions of judges and juries, and the restriction on statements that impliedly "promise results"—prohibit communications that are "inherently misleading" and thus may be "freely regulated" by the state without *any* evidentiary showing. Appellees' Br. at 23-29. There is no basis, however—other than the state's unsubstantiated assertion—on which to conclude that such ads are in fact inherently misleading to consumers. Neither the Supreme Court nor this Court has ever sanctioned a blanket ban on commercial speech based on a state's unproved assertion that the speech is misleading.

As to the remainder of the rules, the state relies on an opinion poll of consumers taken after appellants filed this case in the district court. The poll asked no questions about some of the challenged rules and elicited irrelevant information about others. Even taken in the most generous possible light, the state's survey can be read as showing only that some of the prohibited techniques can, in particular cases, be used in a misleading way. But *any* advertising technique can be used in a misleading way, and, for that reason, the Supreme Court has repeatedly warned that a state may not ban advertising merely because it is potentially misleading. *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 146 (1994); *see*

Appellants' Br. at 23 & n.5 (citing cases). To hold otherwise would give the state unchecked authority to restrict commercial speech.[1]

I. The State's Assertion That the Advertising Techniques at Issue Are "Inherently Misleading" Does Not Excuse the State From Its Evidentiary Burden.

Labeling speech "inherently misleading" is not, as the state suggests, a talisman against judicial scrutiny of commercial speech restrictions. To be sure, this Court has said that a state may bypass the *Central Hudson* test in cases where advertising "deceives or is inherently likely to deceive" consumers. *Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n*, 24 F.3d 754, 756 (5th Cir. 1994). That point, however, does not excuse the state from its burden of *proving* that the speech at issue is in fact inherently likely to deceive. Rather than accepting a state's characterization, courts require the state to submit evidence in support of their claims that specific kinds of speech are inherently misleading. *See id.* (finding "[a]mple evidence in the record" that the speech at issue was inherently misleading).[2]

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[1] In its jurisdictional statement, the state makes a drive-by attack on this Court's jurisdiction, suggesting, without argument or authority, that the Court should sua sponte raise the issues of appellate jurisdiction, standing, and ripeness. Because the state articulates no argument in support of its suggestion of jurisdictional deficiency, and, in particular, does not dispute the facts set forth in appellants' opening brief establishing that this Court has jurisdiction under 28 U.S.C. § 1291, there is nothing in the statement to which appellants can respond.

[2] *See also Byrum v. Landreth*, 566 F.3d 442, 450 (5th Cir. 2009) (holding (continued ...)

The state relies on *Zauderer v. Office of Disciplinary Counsel*, in which the Supreme Court upheld a commercial speech restriction on the ground that the "possibility of deception" was "self-evident." 471 U.S. 626, 652-53 (1985). The portion of *Zauderer* that the state cites, however, involved a requirement that lawyers disclose their clients' responsibility for costs, not a ban on particular advertising techniques. As the Supreme Court recently explained, "the less exacting scrutiny described in *Zauderer* governs" when "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010).

As to a separate rule imposing a ban on illustrations, *Zauderer* took a very different approach, holding that the state's characterization of such advertising as "inherently misleading . . . cannot justify [the state's] decision to [impose] discipline." *Id.* at 640-41 & n.9. When, as in the *Zauderer* illustration ban, a rule "prohibit[s] attorneys from advertising" rather than merely requiring a disclosure,

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that the state "failed to meet its evidentiary burden to show that the terms 'interior design' and 'interior designer' are inherently misleading"); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 753 (5th Cir. 2006) (rejecting state's contention that trade names were inherently misleading); *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) ("[T]he Supreme Court has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm."); *Revo v. Disciplinary Bd.*, 106 F.3d 929, 933 (10th Cir. 1997) (rejecting state's argument that lawyer advertising was inherently misleading where the state presented "no evidence that anyone was actually deceived").

courts apply the rigorous *Central Hudson* test. *See Milavetz*, 130 S. Ct. at 1340. The Supreme Court in *In re RMJ*, for example, rejected a state's argument that advertising membership in the Supreme Court Bar was inherently misleading where it found "nothing in the record to indicate that the inclusion of this information was misleading." 455 U.S. 191, 205-06 (1982).[3]

In these and other commercial speech decisions, the Supreme Court has never upheld a prophylactic ban on commercial speech without *evidence* that the challenged speech would mislead or otherwise harm consumers. If the mere assertion that particular speech is "inherently misleading" were sufficient to satisfy the government's burden, states could restrict such speech without the need to prove a legitimate interest in doing so, and without showing that the restrictions are either necessary or effective to achieve the state's goals. Such a test would turn *Central Hudson* on its head, replacing the state's heavy burden of proof with what amounts to a presumption that a state can prohibit speech it alleges to be "inherently misleading." *See Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp.

[3] The state relies on *Farrin v. Thigpen*, 173 F. Supp. 2d 427 (M.D.N.C. 2001), as an example of a case where a court found speech to be "inherently misleading" without applying the *Central Hudson* test. The court in *Farrin*, however, did not uphold a blanket ban on advertising. Instead, it found that a single advertisement materially misrepresented an insurance company's settlement process and was thus false and likely to mislead consumers. *Id.* at 440. The court based its finding not on the state's characterization of the ad, but on trial testimony indicating that a dramatization in the ad materially misrepresented an insurance company's settlement process. *Id.* at 441-42.

2d 1168, 1180 (D. Colo. 2001) ("It is not enough for the legislature to claim that speech is 'inherently misleading.' The restricted speech must actually be inherently misleading."); *Mark v. J.C. Christensen & Assocs., Inc.*, 2009 WL 2407700, at *7 (D. Minn. 2009) ("To hold otherwise would permit Congress to shield restrictions on commercial speech from First Amendment scrutiny by simply declaring the speech subject to the restrictions as being inherently misleading.").

Here, the district court concluded that three of the challenged rules govern inherently misleading speech: Rule 7.2(c)(1)(D), which prohibits a "reference or testimonial to past successes or results obtained," Rule 7.2(c)(1)(E), which prohibits lawyer advertisements that "promise[] results;" and Rule 7.2(c)(1)(J), which prohibits a lawyer advertisement that "includes the portrayal of a judge or jury." On appeal, the state defends the district court's decision only on Rules 7.2(c)(1)(E) and Rule 7.2(c)(1)(J). Even as to those two rules, the state has failed to provide evidence that the prohibited devices are inherently, as opposed to just potentially, misleading.

A. Statements Regarding Past Results (Rule 7.2(c)(1)(D))

The district court upheld the state's restriction on statements regarding past results based on its speculation that such statements, "even if truthful, . . . could

also be inherently misleading." R.6054.[4] The state does not defend that determination here, instead arguing that statements regarding past results are potentially misleading. Appellees' Br. at 38, 40.

As the state appears to recognize by its failure to argue the issue, there is nothing "inherently likely to deceive" about statements of past results. Appellants cited numerous examples in their opening brief (at 36-37 & nn. 9-10) of advertisements in which Louisiana law firms use past results in ways that are not only truthful and nonmisleading, but informative to the reader. If an advertising device can be used in a non-misleading way, it is, at most, *potentially* misleading and thus may not be prohibited by the state. *See RMJ*, 455 U.S. at 203; *see Revo*, 106 F.3d at 933 ("For a particular mode of communication to be inherently misleading, it must be incapable of being presented in a way that is not deceptive."). Indeed, the state's decision to *allow* past results on websites—without even the requirement of a disclaimer—is virtually an admission that such devices can, and often are, used in ways that are not misleading. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (holding that "exemptions and inconsistencies" in a challenged regulation "bring into question the [regulation's] purpose," and concluding that the regulation "cannot directly and materially advance its asserted interest because of [its] overall irrationality").

[4] Citations in this brief to pages in the Record on Appeal take the form R.__.

The Supreme Court in *Zauderer* rejected an argument essentially identical to the one adopted by the district court here. There, the state contended that a lawyer's use of an illustration representing a Dalkon Shield was "inherently misleading" because it supposedly communicated the fact that the lawyer had represented women in Dalkon Shield litigation and thus implied that the lawyer had knowledge and experience in that area of law. *Zauderer*, 471 U.S. at 640-41 & n.9. The Court flatly rejected that argument, holding that the First Amendment "do[es] not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Id.* at 640 n.9.

B. Depiction of Judges and Juries (Rule 7.2(c)(1)(J))

In support of its restriction on the depiction of judges, the state argues (at 26-27) that it is false or misleading for a lawyer to suggest "a special ability to influence a judge." Appellants agree that the state could constitutionally prohibit such a suggestion, either on the ground that it is false or, if true, that it advertises an illegal activity. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). But the state's conclusion that this interest justifies prohibiting *all* portrayals of judges by actors is a non sequitur. The state presented no evidence that actors playing a judge in a generic courtroom scene are likely to

draw the conclusion that the advertising lawyer can exert an improper influence over a real judge.

In declaring unconstitutional a materially identical rule—on which the Louisiana rule at issue here was based—the Second Circuit in *Alexander v. Cahill* recognized that judges can be portrayed in many ways that do not suggest improper influence. 598 F.3d at 93. The court noted that a commercial that depicts a judge, while stating that the judge is there to "make sure [the trial] is fair," would "not imply an ability to influence a court improperly," "is not misleading," and "may, instead, be informative." *Id.* The state attempts to distinguish *Alexander* on the ground that the state there "asserted only that the rule targeted 'potentially misleading speech'" rather than "inherently misleading" speech. Appellees' Br. at 28-29. The state misreads *Alexander* on this point. As here, the state in *Alexander* argued that the portrayal of judges "implies that the lawyer has the ability to influence improperly a court," and thus "regulate[s] speech that is not entitled to First Amendment protection at all." *Alexander*, 598 F.3d at 89, 93. The Court rejected the state's contention, squarely holding that the speech at issue was *not* inherently misleading. *Id.* at 89 (holding that the prohibited techniques are "not inherently false, deceptive, or misleading"); *see also id.* at 96 (holding that portrayals of judges are "no more than potentially misleading").

Here, the state relies in support of its rule on the 27% of survey respondents who said that when a lawyer's ad "portray[s] a judge or a jury," they "assume the lawyer being advertised has more influence on Louisiana courts than other lawyers." R.5489. But the survey failed to distinguish between portrayal of an actual *judge* and portrayal of a judge by an *actor*. Its findings therefore show, at most, that consumers might draw a conclusion of improper influence if a sitting judge endorsed a lawyer in one of the lawyer's ads—something that is prohibited by the state's Code of Judicial Conduct. *See* Canon 2(B); *see also* Canon 5(C). Neither the survey results nor common sense supports the view that consumers will draw the same conclusion on seeing the portrayal of a generic courtroom scene.[5]

Although the district court here recognized the "inconclusive aspects of the survey," it refused to "speculate on which recipients of such messages are smart enough to know better." R.6056. It does not require speculation, however, to know that the public is capable of understanding the difference between a real judge endorsing a lawyer and an actor playing a generic judge in a courtroom scene. The

[5] The subject of the focus-group discussion regarding portrayal of judges and juries was similarly ambiguous. R.5503. Several participants expressed uncertainty about whether they were discussing commercials depicting a real judge or an actor. *Id.* Another participant stated that the effect of a judge would depend on the context of the ad. *Id.* In any event, a total of seven generalized and diverging opinions about hypothetical advertisements comes nowhere close to the evidence that courts have found sufficient to satisfy a state's evidentiary burden in commercial speech cases. *See Fla. Bar v. Went For It*, 515 U.S. 618 (1995) (citing 106-page study of statistical and anecdotal data).

district court's refusal to give the public even that much credit flies in the face of the Supreme Court's admonishment against the "paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 105 (1990); *see also Farrin*, 173 F. Supp. 2d at 442 ("[N]o one contends that, through the dramatization, viewers will mistake the actors for actual insurance adjusters."). Even if the state were able to show that consumers are likely to make such a mistake, it could solve the problem simply by requiring a reasonable disclosure stating that the judge is an actor. *See Alexander*, 598 F.3d at 96 (holding that, rather than banning portrayals of judges entirely, the state could have imposed a disclosure requirement).

To be sure, one can imagine ads in which an actor purporting to be a real judge falsely suggests that a lawyer has improper influence. But the state has not brought forward a single example of such an ad or shown that any consumer has ever been confused by a depiction of a judge in a lawyer's ad. If an ad conveying an impression of improper influence were to appear, the state would be free to prohibit it under its general rule against false and deceptive advertisements. The state cannot, however, ban *all* images of judges on the ground that it might one day encounter one that is misleading. *See Peel*, 496 U.S. at 111 (holding that the state's "concern about the possibility of deception in hypothetical cases" did not render

lawyer advertising "inherently misleading"). Although administering broad prophylactic rules may be easier than prosecuting specific false or misleading ads, the state cannot broadly suppress nonmisleading advertising "merely to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646; *see Alexander*, 598 F.3d at 96 (holding that, because portrayals of judges are "no more than potentially misleading, the categorical nature of New York's prohibitions would alone be enough to render the prohibitions invalid").

Finally, the state's explanation for its prohibition on the portrayal of judges would not, even if true, provide a basis for also prohibiting portrayal of a jury. Given that juries are randomly selected in each case, no consumer could believe that that the lawyer had an ability to exert improper influence over the different jurors who would sit in future cases.

C. Promises of Results (Rule 7.2(c)(1)(E))

Appellants have never disputed the state's authority to prohibit a lawyer from promising a result in a particular case when an outcome cannot be assured. Indeed, such a statement would be false and, therefore, subject to prohibition on that basis alone under the state's general rule against false and misleading ads. The basis of appellants' challenge to Rule 7.2(c)(1)(E) is that the rule prohibits not only actually false statements, but a broad range of subjective statements that either are

true or are unprovable statements of opinion. The state's advertising handbook makes clear to advertising lawyers in the state that it plans to interpret "promises of results" to include such inoffensive slogans as "he can help you too" and "The Golden Retriever." R.3742, 3776; *see also* R.3743-44. Such harmless puffery cannot reasonably be expected to harm consumers. *See Pizza Hut, Inc. v. Papa John's Int'l, Inc.,* 227 F.3d 489, 499 (5th Cir. 2000) (holding that, if courts considered puffery like "Better Ingredients. Better Pizza" misleading, "the advertising industry would have to be liquidated in short order" (internal quotation omitted)).[6]

In response, the state suggests (at 25) that it might not apply the rule to appellants' slogans. That suggestion is baffling given the state's reliance on the results of a survey question that specifically asked consumers about the slogans of appellants Morris Bart ("One Call That's All") and William Gee ("Tell them you mean business"). R.5486, 5679-80 ¶ 3, 5685-86 ¶ 4. The only relevant fact arguably established by that question is that consumers view Bart's and Gee's slogans as promising results, and thus in violation of the rule. Indeed, the state has never said that it will *not* apply the rule to appellants' slogans, instead urging that

[6] *See also Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) ("Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells."); *American 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).

this Court "decline to speculate about possible applications." Appellees' Br. at 25. The state's admission that it cannot say whether the rule prohibits appellants' slogans cannot be reconciled with its contention, in response to appellants' vagueness claim, that the rule is clear and straightforward to apply. *See* Part III, *infra.* If the state were correct that the rule is clear, nothing would prevent it from setting forth its interpretation in this litigation. If, however, even the state cannot tell whether appellants' slogans violate the rule, the rule is vague.

Nor has the state has shown that prohibiting the sorts of slogans used by Bart and Gee will mislead consumers in any way. The survey results on which the state relies establish at most that—in the opinion of consumers—certain ads run afoul of the prohibition on promises of results. R.5486. But the results do nothing to establish whether such ads are misleading or otherwise harmful to consumers. The state's question is analogous to a hypothetical question in support of the ban on the portrayal of judges, in which the state asks consumers whether they believe an ad contains a portrayal of a judge. Such a question might establish that the ad does in fact portray a judge, but it does not suggest that the portrayal harms consumers. For the same reason, consumers' belief that certain slogans "promise results" does not show that those slogans are misleading.[7]

[7] Although the survey asks a few questions about "the lawyer ads that contain the statements," it does not ask about the effect of the statements (continued ...)

II. The State's Evidence Does Not Show That the Remaining Prohibited Techniques Are Misleading Or Otherwise Harmful to Consumers.

As to the remaining rules, the state concedes that it bears the burden of proving under *Central Hudson* that the prohibited speech is harmful to consumers. To satisfy its burden, the state primarily argues an interest in prohibiting "potentially misleading" advertising, contending that "such speech may be regulated if the three-pronged test announced in *Central Hudson* is satisfied." Appellees' Br. at 22. Even assuming that the state could otherwise meet its burden under *Central Hudson*, however, "[i]t is not clear . . . that a state has a substantial interest in prohibiting potentially misleading advertising, as opposed to inherently or actually misleading advertising." *Alexander*, 598 F.3d at 91 n.8. The Supreme Court has repeatedly warned that a state "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *RMJ*, 455 U.S. at 203; *see* Appellants' Br. at 23 & n.5 (citing cases).

The state also relies on *Alexander* for the proposition that "preventing the erosion of confidence in the [legal] profession" is a legitimate state interest. *Alexander*, 598 F.3d at 102. *Alexander*, however, was not concerned with ads that

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themselves. R.5485-86. There is no way to tell from the survey whether respondents are reacting specifically to the slogans or generally to the advertisements of lawyers whose slogans they recognize.

"cause offense to the recipient," but with ads that cause "harmful effects" that "extend beyond the recipient" to "tarnish[] the reputation of a professional group." *Id. Alexander* thus suggests that the state may have an interest in regulating lawyer advertising when the advertising damages the public's confidence in the legal system by directly injuring consumers—such as by invading their privacy, causing them emotional harm, or defrauding them. *Alexander* does not hold, however, that a state may prohibit speech based on its belief that the communication itself is unprofessional or undignified. As the Supreme Court emphasized in *Florida Bar v. Went For It*, "[t]here is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism." 515 U.S. 618, 632 n.2 (1995).[8]

In support of these interests, the state relies *only* on the survey it conducted in response to this lawsuit. Although the state also purports to rely on a report by the Louisiana Bar, the report only summarizes the results of the survey and recites the state's litigation position that the prohibited forms of speech are potentially or

[8] The other interests cited by the state are circular. For example, the Louisiana Supreme Court claimed it intended the rules "to improve the existing rules in order to protect the public from unethical forms of lawyer advertising." R.3700. The Court, however, did not explain why the prohibited forms of advertising are "unethical," how they harm consumers, or why the current rules are insufficient.

inherently misleading. The committee conducted no other research, studies, or surveys, and relied on no other evidence, to determine what kinds of advertising are likely to mislead the public. The unsubstantiated opinions of committee members—expressed only after appellants had filed suit and moved for a preliminary injunction in the district court—have no more evidentiary value than the state's brief. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (holding that the state's burden is "not satisfied by mere speculation or conjecture"); *Byrum*, 566 F.3d at 442 (rejecting state's reliance on legislative report and survey that included no evidence in support of the state's burden).

As to each of the challenged rules, the state's evidence fails to satisfy its heavy burden.

A. Statements Regarding Past Results (Rule 7.2(c)(1)(D))

Although the district court concluded that Rule 7.2(c)(1)(D) prohibits inherently misleading speech, the state argues that it prohibits *potentially* misleading speech. Appellees' Br. at 40; *see also id.* at 38 ("[C]lient testimonials about past results or successes have the potential for creating unrealistic expectations."). The state's survey asked respondents whether they believe client testimonials to be "*completely* truthful" and whether they could "*always* tell if a testimonial in a lawyer advertisement is made by a client and not by an actor." R.5487-88 (emphasis added). Assuming these questions are otherwise relevant,

they set too low a bar in a First Amendment case. No advertising device is "completely" and "always" truthful. As the Second Circuit recognized in *Alexander*, testimonials might mislead in particular cases, "but not all testimonials will do so, especially if they include a disclaimer." *Alexander*, 598 F.3d at 92.

In any event, the survey asked consumers about an advertising device that the state does not prohibit—*client testimonials*—rather than the device prohibited by the challenged rule—*references to past results*. Although some testimonials may include references to past results, testimonials and past results are not the same thing. *See* Appellants' Br. at 33. The state's professed concern that "[c]lient testimonials providing subjective statements about a lawyer's handling of a particular case cannot be objectively verified," Appellees' Br. at 38, has no application to concrete, provable statements of fact regarding a lawyer's past results. For example, the state's chosen rule would prohibit the statement "John Smith . . . helped me recover $100,000.00 for my auto accident," an objective, verifiable fact, while allowing "John Smith . . . was responsive to my needs and helped me with my legal problems," an unquantifiable statement of opinion. Appellees' Br. at 39-40.

The state argues (at 39) that references to past results, even if true and objectively verifiable, may cause consumers to conclude irrationally that the lawyer will prevail in particular future cases. But the Supreme Court has repeatedly

disapproved of speech restrictions designed to protect consumers from making bad decisions based on truthful information. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977) (rejecting the state's argument that lawyer advertising is "inherently misleading" because "such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement"); *see also Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (characterizing as "almost frivolous" the government's argument that certain health claims "have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment at the point of sale," as if they were "hypnotized").

The prohibition on advertising these sorts of past results not only rests on an "underestimation of the public," *Bates*, 433 U.S. at 375, but it prevents consumers from learning one of the facts most relevant to their choice of a lawyer. Many rational consumers would prefer to hire a lawyer who has experience in the area of law at issue and who has successfully litigated similar cases in the past. Under the state's prohibition on testimonials, however, a consumer would not be able to distinguish an advertisement by a lawyer who has never won a case in a particular area of law from one by a lawyer who has successfully litigated dozens of cases in that area.

B. The Prohibition on Scenes and Actors Portraying Clients (Rules 7.2(c)(1)(I) and 7.2(c)(10))[9]

Although the state's rule prohibits *all* use of "scenes" in advertising, the survey on which it relies asks about only a narrow subclass of the prohibited ads—scenes depicting accidents or accident victims. R.5490. Thus, at a minimum, the rule is not reasonably tailored to the state's claimed harm. Even assuming the state is correct that ads depicting accident scenes harm consumers, the survey results would not justify a restriction on *all* scenes. *See* R.5681, Bart Decl. ¶ 8 (hospital scene); R.5687, Gee Decl. ¶ 7 (restaurant scene); R.4747 ¶ 31.

As to accident scenes, 29% of survey respondents said that the scenes implied that the lawyer had "more influence" than other lawyers in Louisiana courts. R.5490. It is difficult to understand how even a minority of respondents could come to that conclusion—there is no apparent logical reason why an accident scene, whether authentic or otherwise, would suggest influence or lack of influence in a court. But even assuming that accident scenes (and scenes in

[9] Appellees are correct that Rule 7.2(b)(2)(C) is not a subject of this appeal. The amended rules adopted by the state while this case was pending in the district court applied to celebrity spokespeople and required "a spoken and written disclosure, as required by Rule 7.2(c)(10)." The district court declared Rule 7.2(b)(2)(C) unconstitutional, and, because the state did not appeal it, the correctness of the district court's determination is not at issue here. Rule 7.2(c)(10), however, remains, and applies by its terms to "[a]ll disclosures and disclaimers required by [the] Rules." Thus, as the state appears to agree, the rule applies to Rule 7.2(c)(1)(I)'s requirement of "a disclaimer" in ads containing scenes and actors playing clients.

general), somehow imply to some minority of people an improper influence, the state's response—requiring a disclosure that the scene is not "actual or authentic"—would do nothing to solve that problem. The state's disclosure requirement is aimed not at dispelling any impression of improper influence, but at ensuring that consumers do not believe that the depicted scene is real.

Dramatizations containing scenes and actors appear on television every day, and the state has not given any reason to believe they are misleading to consumers. No reasonable consumer would believe that a scene of an accident represents actual footage involving one of the firm's clients (and nothing in the survey suggests that any respondents believed that). Even if a consumer did hold such a belief, the state has offered no evidence the belief would materially influence a consumer's selection of an attorney. *Cf. FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (noting that an advertisement is deceptive under the Federal Trade Commission Act only "if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect").

Finally, even if the disclaimer were shown to serve some legitimate purpose, the state has no evidence supporting its decision to make the disclosure so overwhelmingly intrusive. Although the state hinges its defense of the disclosure requirement on the notion that disclosures are generally less intrusive than outright bans, it does not dispute appellants' point (at 39-40) that, under the rules at issue,

the written disclosures are so large and the verbal disclaimers so long that they amount to a de facto ban on these forms of advertising. A prophylactic ban on potentially misleading speech is not reasonably tailored under *Central Hudson*. *See RMJ*, 455 U.S. at 203; *Peel*, 496 U.S. at 109 (noting that the mere potential for misleading "does not satisfy the State's heavy burden of justifying a categorical prohibition").

C. Trade Names that Imply an Ability to Obtain Results (Rule 7.2(c)(1)(L))

Rule 7.2(c)(1)(L) prohibits any advertisement that "utilizes a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter." In *Alexander*, the Second Circuit struck down New York's identical rule, on which the rule at issue here is based. 598 F.3d 79. Appellees attempt to distinguish *Alexander* on the ground that, in that case, the state "failed to supply sufficient evidence in support of the regulation." Appellees' Br. at 46. But Louisiana adopted New York's rule without accumulating any additional evidence, and the survey it conducted after initiation of this case asked no questions about trade names that imply an ability to obtain results. Accordingly, if the rule in New York was not supported by evidence, Louisiana's rule is not either.

Rather than presenting evidence that this kind of advertising is harmful to consumers, the state attempts a sleight of hand—pointing to survey questions that it claims show that the public believes lawyers and lawyer advertising are

untrustworthy *in general*. Appellees' Br. at 6, 38. But the survey's conclusion that some members of the public distrust lawyers sheds no light on the need for the rules at issue. The issue here is not lawyer advertising *in general*, but the *specific kinds* of lawyer advertising restricted by the challenged rules. To hold that a general distrust of lawyer advertising justifies restrictions on particular subsets of lawyer ads would leave the state with unlimited authority to ban any lawyer ads it wished for any reason, or for no reason at all. If anything, however, evidence that consumers distrust lawyers would suggest that they are unlikely to be taken in by the notion that a lawyer with a catchy trade name will achieve better results than another lawyer.

The state's heavy reliance on evidence showing that the public does not trust lawyers and lawyer ads in general shows that the state's real complaint is not with trade names or any other particular advertising technique, but with the fact of lawyer advertising. That view, however, cannot be squared with the Supreme Court's decision in *Bates* and subsequent decisions holding that lawyer advertising is not inherently misleading and cannot be prohibited willy-nilly by a state.

Finally, the speech at issue is, once again, only potentially misleading. *Alexander* noted that New York's identical rule applies to trade names, such as the "Heavy Hitters," that are "not actually misleading." *Alexander*, 598 F.3d at 95; *id.* at 96 (concluding that the rule governed "speech that is potentially misleading, but

is not inherently or actually misleading in all cases"). As in *Alexander*, the state here has no evidence that "that the potential abuses associated with the disputed provisions cannot be combated by any means short of a blanket ban." *Id.* (quoting *Zauderer*, 471 U.S. at 648).

III. The Rules Against Promises of Results (Rule 7.2(c)(1)(E)) and Trade Names That Imply an Ability to Obtain Results (Rule 7.2(c)(1)(L)) Are Unconstitutionally Vague.

The state argues that its rules are not unconstitutionally vague because lawyers can seek advisory clarification of their application from the state disciplinary board. But the availability of such advisory determinations offers no solace for appellants given that the advisory decisions are "purely informal" and "not binding on anyone." R.3782; *see* also Rule 7.7(h) (providing that a determination "shall not be binding in a disciplinary proceeding").[10]

Moreover, the availability of review by the state does not resolve the fundamental First Amendment problems caused by vague laws—the risk that state officials will use the vagueness as a cover to unlawfully discriminate against certain speech and the chilling effect on speakers. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Advisory review does not reduce the risk of discriminatory application because it does not give disciplinary authorities

[10] The state also asserts that its handbook clarifies the reach of the rules, but, as explained above (at 13), the handbook's broad interpretation of the rules is a primary source of the rules' vagueness.

guidance on what sorts of statements "promise[] results" or "impl[y] an ability to obtain results in a matter." Rule 7.2(c)(1)(E), (L). Nor does the offer of advisory review resolve the chilling effect on speech. Lawyers have to produce their advertisements at great expense before they can submit them for review. As a result, they are very unlikely to produce any ads that even arguably run afoul of a vague rule. R.5680 ¶¶ 5-6; *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

The state relies on *Felmeister v. Office of Attorney Ethics*, for the proposition that advisory opinions cure vague laws, but *Felmeister* was about ripeness, not vagueness. 856 F.2d 529, 538 (3d Cir. 1988) (stating that the court "intimate[s] no view" on the vagueness issue). *Felmeister* held that the lawyer plaintiff's claims were not ripe for review because the lawyer failed to describe his proposed advertisements or explain "how or why these ads would run afoul of the [challenged] rule." *Id.* at 536. In contrast, appellants here, as the district court recognized, have described specifically which aspects of their advertising—including their primary slogans—they believe may run afoul of the rules. R.6045 ("[T]he plaintiffs have noted specific advertising campaigns, slogans, and advertising techniques they currently use that would violate the Rules.").

Felmeister, in any event, conflicts with earlier precedent in this Court. The Third Circuit's decision was based on its conclusion that plaintiffs may not bring

pre-enforcement challenges to state restrictions on commercial speech, but must wait to defend their First Amendment rights when a disciplinary charge it brought. The court reasoned that a pre-enforcement challenge is "distinguishable from Supreme Court decisions striking down attorney advertising regulations" because all the decisions up to that time had been brought in the context of disciplinary cases and appealed through the state court systems to the U.S. Supreme Court. *Id.* at 537 n.10. This Court, however, recognized the availability of pre-enforcement challenges in commercial speech cases in *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979). As the Court noted in *Eaves*, "[t]he Supreme Court has been most willing to allow anticipatory claims by plaintiffs" in challenges to commercial speech regulations because the plaintiffs' interest in practicing a profession ensures "that a constitutional challenge grows out of a genuine dispute and is not a contrivance prompted solely by a desire to enforce constitutional rights." *Id.* at 819. Since then, the Supreme Court has decided several anticipatory challenges to commercial speech restrictions brought in the federal district courts, and has repeatedly held that refraining from engaging in prohibited speech is enough to create standing even in the absence of an enforcement proceeding. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Went For It*, 515 U.S. 618; *Edenfield*, 507 U.S. 761.

The state also argues (at 55) that the overbreadth doctrine does not apply in commercial speech cases. Appellants, however, have never relied on the overbreadth doctrine. Overbreadth is a doctrine of standing, providing that a "plaintiff may be allowed to launch [an] attack even though he is not, or will not be, the one suffering the actual or impending injury." *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760 n.4 (11th Cir. 1991). Here, appellants have shown through their declarations that they are directly affected by the challenged rules. They therefore have standing to challenge the rules' vagueness without relying on the overbreadth doctrine. The state does not dispute that, issues of overbreadth aside, the vagueness doctrine applies to commercial speech cases. *See Jacobs v. Fla. Bar*, 50 F.3d 901 (11th Cir. 1995).

Finally, as explained above, the state's argument (at 54) that the rules are clear runs headlong into its assertion (at 25) that it cannot speculate how the rule will be applied to appellants' slogans. If the state cannot determine whether appellants' slogans violate the rules, then appellants cannot be expected to either.

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: Rule 7.2(c)(1)(D), (E), (I) & (L); Rule 7.2(c)(10); and the prohibition on "portrayal of a judge or a jury" in Rule 7.2(c)(1)(J).

Respectfully submitted,

/s/Gregory A. Beck
Gregory A. Beck
Allison M. Zieve
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs-Appellants

Dane S. Ciolino
DANE S. CIOLINO, LLC
P.O. Box 850848
New Orleans, Louisiana 70185-0848
(504) 834-8519

Counsel for Plaintiffs Public Citizen, Inc., William N. Gee, III, and William N. Gee, III, Ltd.
James M. Garner
Joshua S. Force
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.
909 Poydras St., 28th Floor
New Orleans, LA 70112
(504) 299-2100

Counsel for Plaintiffs-Appellants Morris Bart and Morris Bart, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, the foregoing Brief for Plaintiff-Appellant was served through this Court's electronic filing system, upon counsel for the defendants-appellees:

Phillip A. Wittmann
Kathryn Knight
Matthew Almon
Barry Ashe
STONE, PIGMAN, WALTHER & WALTHER & WITTMANN, L.L.C.
546 Carondelet Street
New Orleans, LA 70130-3588
pwittmann@stonepigman
kknight@stonepigman.com
malmon@stonepigman.com
bashe@stonepigman.com

/s/Gregory A. Beck
Gregory A. Beck

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS OF FED. R. APP. P. 32(A) AND WITH THIS COURT'S ELECTRONIC FILING REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6782 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.

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/s/Gregory A. Beck
Gregory A. Beck

Attorney for Plaintiffs-Appellants

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