IN THE SUPREME COURT OF TENNESSEE

IN RE: PETITION TO ADOPT CHANGES TO RULES OF PROFESSIONAL CONDUCT ON LAWYER ADVERTISING

NO. M2012-01129-S C-RL1-RL

COMMENTS OF THE TENNESSEE FIRST AMENDMENT SOCIETY

(Prepared by Gregory A. Beck, Washington, DC)

March 11, 2013

The petitions on which this Court requested comments propose sweeping new lawyer advertising restrictions that would limit competition in the legal-services market by prohibiting or seriously restricting a wide range of common advertising content—including the use of actors and celebrities, visual depictions, statements about the quality of a lawyer's services and past cases, and background sounds—that are essential to effective advertising and that have no reasonable possibility of misleading consumers. The most notable feature of the proposed restrictions is that the majority are based on the rules of other states that federal courts have within the past few years held to violate the First Amendment. The petitions follow in the footsteps of similar efforts to comprehensively restrict lawyer advertising in New York, Florida, and Louisiana. In each of those states, federal courts rejected the states' asserted interests in restricting the precise forms of advertising that petitioners urge the Court to restrict here. *See Pub. Citizen v. La. Attorney Advertising Bd.*, 632 F.3d 212 (5th Cir. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010); *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011), *on remand from* 608 F.3d 1241 (11th Cir. 2010).

Adopting the proposed rules would inevitably invite similar First Amendment challenges in Tennessee. And because the state has no real interest in prohibiting commonplace advertising techniques that could not realistically mislead anyone, such constitutional challenges would likely succeed. We therefore respectfully urge the Court to deny both petitions.

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HISTORICAL BACKGROUND

1. Restrictions on lawyer advertising in the United States originated with the American Bar Association's adoption of its ethics canons in 1908. *See* American Bar Association, *Laywer Advertising at the Crossroads* 33 (1995). Before then, many of the country's most prominent firms and respected lawyers, including Abraham Lincoln, advertised their services in newspapers, handbills, or pamphlets. *See id.* at 30-32. The 1908 canons, ultimately adopted in every state, changed that longstanding practice by adopting an absolute prohibition on advertising. *Id.* at 33. There is no evidence that the change was prompted by concerns about protecting consumers. Rather, the canons were more likely designed to "limit entry into the profession and restrict trade" in response to a large influx of new lawyers at the time. *Id.* at 33.

Lawyer advertising remained largely prohibited in every state until 1977, when the U.S. Supreme Court declared Arizona's version of the canons unconstitutional under the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). By that time, evidence was mounting that the advertising ban had left "a substantial portion of the public … ill-informed about its rights, fearful about going to an attorney, and ignorant concerning how to choose one." *Id.* at 366. The Court in *Bates* rejected the state's argument that lawyer advertising would "undermine the attorney's sense of dignity and self-worth" or "tarnish the dignified public image of the profession." *Id.* at 364. As the Court noted, "[b]ankers and engineers advertise, and yet these professions are not regarded as undignified." *Id.* at 369-70. On the contrary, citing evidence that "[t]he absence of advertising may be seen to reflect the profession's failure to reach out and serve the community," the Court concluded that "the fact that [the legal profession] long has publicly eschewed advertising" had likely led to "public disillusionment" and "cynicism with regard to the profession." *Id.* at 370-71. Advertising restrictions, the Court noted, also isolate

lawyers from competition, thus reducing "the incentive to price competitively" and "perpetuat[ing] the market position of established attorneys." *Id.* at 377.

Following *Bates*, states began to follow the lead of the American Bar Association's revised model rules by broadly permitting lawyer advertising as long as it was not false or misleading. *See In re Rules Regulating The Fla. Bar*, 494 So. 2d 977, 1071–72 (Fla. 1986) (discussing the history of post-*Bates* advertising regulation). Remaining state restrictions on common advertising techniques were subjected by the courts to rigorous and skeptical scrutiny and, for the most part, held unconstitutional under the First Amendment. *See, e.g.*, *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626; *In re RMJ*, 455 U.S. 191 (1982).

2. The Florida Supreme Court abruptly broke with the developing national consensus in 1990, adopting a "complete overhaul" of the state's rules "in response to the proliferation of attorney advertising in the wake of *Bates*." *See In re Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d 451 (Fla. 1990). In an attempt to ensure that lawyer advertising would "provide only useful, factual information presented in a nonsensational manner," the Court restricted a range of common advertising content. *Id.* Those restrictions—many of which are the basis for the amendments proposed by the petitioners here—included prohibitions on "reference[s] to past successes or results obtained," statements that "describ[e] or characteriz[e] the quality of the lawyer's services," visual or verbal depictions considered to be "manipulative," and background sounds. *Id.* Dissenting from the order adopting the rules, Florida's Chief Justice wrote that many of the prohibited devices "can be, and undoubtedly ha[ve] been, used effectively to provide the consumer with clear and truthful information concerning the availability of important legal services." *Id.* at 474. The majority was, he complained "out of frustration and annoyance, swatting at a troublesome and persistent Bar fly with a sledgehammer." *Id.*

For many years, Florida stood alone as the most restrictive jurisdiction on lawyer advertising. Aside from a comprehensive set of restrictions in Mississippi held unconstitutional in *Schwartz v. Welch*, 890 F. Supp. 565, 577 (S.D. Miss. 1995), most states continued to follow the ABA in disclaiming any intent to regulate advertising based on "[q]uestions of effectiveness and taste." Model R. Prof'l Conduct 7.2, cmt. But even after the Eleventh Circuit concluded that the state's prohibition on statements regarding the "quality of the lawyer's services" lacked "any sort" of evidentiary support and thus violated the First Amendment, *Mason v. The Florida Bar*, 208 F.3d 952, 957–58 (11th Cir. 2000), the state continued to maintain and expand its comprehensive set of advertising regulations. In 2007, the Court rejected a proposed amendment that would have repealed the ban on "manipulative" ads as too vague and difficult to apply, and adopted—over the unanimous objection of the task force appointed to study the issue—a new rule requiring lawyers to file their advertisements for review and approval by Florida Bar staff. *In re Amendments to The Rules Regulating The Florida Bar*, 971 So. 2d 763 (Fla. 2007).

3. Over the past decade, a few states began moving closer to Florida's model. In June 2006, the Appellate Division of the New York Supreme Court requested comments on what the court described as "sweeping new restrictions on lawyer advertising" designed to "ensur[e] that the image of the legal profession is maintained at the highest possible level." *Significant Restrictions on Lawyer Advertising To Be Adopted in New York*, June 15, 2006.[1] Among other things, New York's proposed rules would have restricted the use of actors, client testimonials, celebrity spokespeople, reenactments, and fictional scenes. *See id.* But in response to public comments—including a warning by the Federal Trade Commission that the proposed rules would "unnecessarily restrict truthful advertising and may adversely affect prices paid and services received by consumers"—

[1] *available at* http://www.courts.state.ny.us/press/pr2006_13.shtml.

the court withdrew most of the proposed amendments. *See* Letter from FTC Staff to Michael Colodner (Sept. 14, 2006).[2] The rules ultimately adopted by the court, which restricted advertising that "implies an ability to obtain results," depicts actors portraying judges, or includes "techniques to obtain attention," were declared unconstitutional on the ground that evidence supporting a need for the restrictions was "notably lacking." *Alexander v. Cahill*, No. 07-cv-117, 2007 WL 2120024, at *6, 8 (N.D.N.Y. July 23, 2007). That decision was affirmed by the Second Circuit, which agreed that the state had not proved that consumers would be harmed by "the kind of puffery that is commonly seen, and indeed expected, in commercial advertisements generally." *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010).

While New York's appeal in *Alexander* was pending in the Second Circuit, the Louisiana Supreme Court in 2008 adopted its own set of "comprehensive amendments" taken mostly verbatim from the Florida and New York rules. La. Supreme Court, *Press Release*, July 3, 2008.[3] Over the FTC's objection that the rules would stifle competition and make it more difficult for consumers to find a lawyer, the Court approved new prohibitions on "portrayal of a client by a nonclient," "portrayal of a judge or a jury," references to "past successes or results obtained," reenactments and fictional scenes, and celebrity spokespeople. *See* Order of July 3, 2008;[4] Letter from FTC Staff to Richard Lemmler (Mar. 14, 2007).[5] The Court later amended those rules, after a First Amendment challenge had been filed, to allow actors playing clients, reenactments, and celebrity spokespeople when accompanied by a disclaimer that was both "spoken aloud" and written in "a print size at least as large as the largest print size used in the advertisement." *See* La.

[2] http://www.ftc.gov/os/2006/09/V060020-image.pdf.

[3] *available at* http:/www.lasc.org/press_room/press_releases/2008/2008–13.asp.

[4] *available at* http:/www.lasc.org/rules/orders/2008/ROPCnewrule.pdf.

[5] *available at* http://www.ftc.gov/be/V070001.pdf.

Supreme Court, Press Release, June 4, 2009;[6] Order of June 9, 2009.[7] Despite the amendment, a federal district court declared the celebrity-endorsement rule unconstitutional on the ground that the state had not proved that the required disclaimer was either necessary or effective. *Pub. Citizen v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539 (E.D. La. 2009). And the Fifth Circuit on appeal held unconstitutional the remaining disclaimer requirements (for actors portraying clients, reenactments, and fictional scenes), as well as the blanket prohibitions on portrayal of judges and references to past results. 632 F.3d 212 (5th Cir. 2011).

Shortly after the Fifth Circuit's decision, a federal district court in Florida declared Florida's rules against statements related to quality of services, "manipulative" advertisements, and background sounds unconstitutional under the First Amendment. *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011). The decision in *Harrell* came on remand from the Eleventh Circuit, which reversed the district court's earlier dismissal of the plaintiff's claims for lack of standing. 608 F.3d 1241 (11th Cir. 2010) (holding that the plaintiff had "convincingly explained" why the prohibitions were vague enough to cause him to "steer wide of any possible violation lest [he] be unwittingly ensnared"). The Florida Bar then petitioned the Florida Supreme Court to "eliminate the existing rules in their entirety and replace them" with rules that were "easier for advertising lawyers to understand and the [state bar] to apply, and. easier and less costly to defend." Pet. to Amend the Rs. Regulating the Fla. Bar, July 5, 2011.[8] On January 31, 2013, the Court granted the petition, thus eliminating the remaining rules on which the petitioners' proposed amendments are based.[9]

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[6] *available at* http:/www.lasc.org/press_room/press_releases/2009/2009-13.asp

[7] *available at* http:/www.lasc.org/rules/orders/2009/ROPC_ARTICLE_XVI.pdf.

[8] available at http:/www.floridasupremecourt.org/decisions/probin/sc11-1327_Petition.pdf.

[9] *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf.

ANALYSIS

Because lawyer advertising is a form of commercial speech protected by the First Amendment, a state may restrict it 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). Unless the restricted advertising is false or misleading or involves illegal goods or services, the state must satisfy the three-part test first set forth by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), by showing: (1) that "the asserted governmental interest is substantial," (2) that the regulation "directly advances the governmental interest asserted," and (3) that the regulation "is not more extensive than is necessary to serve that interest." *Thompson*, 535 U.S. at 367 (internal quotation marks omitted). The Court has stressed that this 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 harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

Given the well-established and heavy burden of justifying restrictions on speech, it is remarkable that neither petition cites *any* evidence that the prohibited forms of advertising would mislead consumers or that the proposed rules would serve any other valid purpose. The petitioners identify no 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 they ask this Court to prohibit. Instead, the petitioners uncritically adopt language from the most restrictive lawyer advertising rules of other states. But the evidence on which those states relied has already been examined by federal courts and found wanting. *See Pub. Citizen*, 632 F.3d 212; *Alexander*, 598 F.3d 79; *Harrell v. Florida Bar*, 08-0015, 2011 WL 9754086 (M.D. Fla. Sept. 30, 2011). The proposed rules, at least in the absence of additional evidence,

would harm consumers by restricting competition in the market for legal services, and fail to satisfy the First Amendment's requirements for the same reasons as the unconstitutional rules on which they are based.

I. The Proposed Amendments Would Harm Consumers by Restricting Access to Information about Legal Services and Inhibiting Competition.

As the U.S. Supreme Court has emphasized, 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). That principle holds true for lawyer advertising as much as for advertising for other products and services. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646–47 (1985). Indeed, lawyer advertising is undoubtedly *more* valuable than other forms of advertising" because it can educate consumers about their rights, inform them when they may have a legal claim, and enhance their access to the legal system. *Zauderer*, 471 U.S. at 647-48. As this Court recognized in adopting the current rules, the importance of advertising "is particularly acute in the case of persons of moderate means who have not made extensive use of legal services." Tenn. R. Prof'l Conduct 7.2, cmt. The legal needs of such consumers often go unmet because they fear the perceived costs of legal services or do not know how to locate a competent attorney. *See Bates*, 433 U.S. at 376–77; *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"). The sorts of common advertising techniques that the proposed amendments would prohibit can "be an effective way of reaching consumers who do not know how legal terminology corresponds to their experiences and problems," and can therefore be "useful to consumers in identifying suitable providers of legal services." FTC Letter to Colodner, at 3; *see also Grievance Comm. v. Trantolo*, 470 A.2d 228, 234 (1984) ("[T]elevision and radio are the informational media of choice for many, and of necessity for others.").

Restrictions on advertising for legal services would also harm consumers by inhibiting competition in the marketplace for legal services—thus frustrating consumer choice, and ultimately increasing prices while decreasing quality of service. *See, e.g.*, FTC Letter to Colodner at 2–3 & 3 n.10. By acting "as a barrier to professional entry," advertising restrictions "skew[] the market … in favor of established attorneys who are already known by word of mouth." *Ficker v. Curran*, 119 F.3d 1150, 1153 (4th Cir. 1997); *see also Bates*, 433 U.S. at 378. It is thus not surprising that, in every case of which we are aware, state restrictions on lawyer advertising were prompted not by consumer complaints, but by complaints of other lawyers. The vast majority of members of petitioner Tennessee Association for Justice, for example, do not run television advertising and thus have an economic interest in the amendments they propose.

For these reason, the FTC has consistently opposed restricting techniques that "are related to the style and content of media advertising but do not necessarily target deception." *See id.* at 1–2; *see also* Federal Trade Commission Staff, *Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising* ix (Nov. 1984) (detailing research showing that fewer restrictions on lawyer advertising "tends to lower prices, stimulate competition, and … enable millions of Americans to find an affordable attorney who can help them resolve or represent legal problems"). In its comments on the proposed restrictions here, the FTC concluded that the rules would likely "limit competition and harm consumers of legal services in Tennessee." Letter from FTC Staff to Michael W. Catalano (Jan. 24, 2013).

II. The Tennessee Association for Justice's Proposed Restrictions Advance No Legitimate State Interest And Would Be Unconstitutional Under the First Amendment, the Constitution's Privileges and Immunities Clause, and the Dormant Commerce Clause.

The Tennessee Association for Justice (TAJ) proposes three new restrictions on lawyer advertising in Tennessee. Of these, the first two—which would prohibit portrayal of clients and

"manipulative" advertising—are derived from Louisiana and Florida rules recently held to violate the First Amendment. *See Pub. Citizen*, 632 F.3d 212 (actors portraying clients); *Harrell*, 2011 WL 9754086 ("manipulative" depictions). The third—requiring all advertising lawyers to have a "bona fide office" in Tennessee—has never faced constitutional challenge because no other state has ever adopted it. The rule's admittedly protectionist purpose not only fails to justify the restriction under the First Amendment, but would independently render it unconstitutional under the Privileges and Immunities Clause and the dormant Commerce Clause of the U.S. Constitution.

A. The Proposed Rule Against Portrayal of Clients Would Impose an Overly Burdensome Restriction on a Practice that Has No Reasonable Chance of Misleading Anyone.

1. Proposed Rule 7.1(1)(D) would impose a blanket prohibition on lawyer advertisements in which "an actor and/or model portrays a client." TAJ Pet. 3. By entirely prohibiting the practice, the proposed rule would be even more restrictive than the Louisiana rule held unconstitutional in *Public Citizen v. Louisiana Attorney Advertising Board*, 632 F.3d 212. Unlike the proposed rule here, Louisiana's rule required only a *disclosure* that actors appearing in advertisements were not actual clients. *Id.* at 228. The Fifth Circuit thus subjected the rule to a relaxed standard of review, requiring a showing only that the rule was "reasonably related to the State's interest in preventing deception of consumers." *Id.* Nevertheless, the court held the rule unconstitutional because the large and intrusive disclosures the rule required were unnecessary for achieving the state's purported purpose. *See id.*; *see also Alexander v. Cahill*, 598 F.3d 79 (declaring unconstitutional the portrayal by actors of judges).

If Louisiana's *disclosure* requirement violated the First Amendment, the petitioner's proposed *categorical ban*—at least in the absence of additional evidence—would necessarily violate it as well. Because the proposed amendment would impose an "affirmative limitation on speech" rather

than a disclosure requirement, the state's "heavy" burden under *Central Hudson* would apply rather than the "less exacting scrutiny" applied by the Fifth Circuit. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010). The petition's unsubstantiated assertion that ads featuring actors are "inherently misleading" even if they "do not appear to be false or misleading on their face," TAJ Pet. 10, is no substitute for satisfying that burden. The First Amendment requires *proof*, not "speculation or conjecture," that speech is inherently misleading. *See Edenfield*, 507 U.S. at 770.[10]

2. Nor is there even a common-sense reason to believe that consumers are likely to be confused by the use of actors. Like almost every other sort of advertising, lawyer ads frequently use actors to portray, for example, generic scenes of lawyers conferring with clients in law firm or courtroom settings or illustrating one of the lawyer's practice areas. That common practice is allowed in every state except Texas, and there is no reason to believe that Tennessee or the 48 other states that allow the portrayal of clients have been unable to effectively protect consumers.[11] Moreover, neither the ABA's model rules nor the FTC's rules against unfair and deceptive trade practices prohibit use of actors, and the FTC has consistently opposed efforts to adopt such restrictions. *See, e.g.*, FTC Letter to Catalano (stating that this "common advertising method[]" is not deceptive).

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[10] *See also 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").

[11] *See* Tex. Disciplinary Rules of Prof'l Conduct R. 7.02(a)(7). Although Texas's rule, to our knowledge, has never been subjected to constitutional challenge, its constitutionality is controlled by the Fifth Circuit's decision in *Public Citizen* that a less-restrictive rule violated the First Amendment.

After more than a half-century of acculturation to television and radio commercials for all manner of products and services, consumers are by now accustomed to the notion that those appearing in television commercials and other advertisements are very often played by actors or models. They are thus particularly unlikely to make the credulous assumption that everyone appearing in a television commercial is in fact the character he or she is portraying. *See* FTC Letter to Lemmler (stating that similar practices were "unlikely to hoodwink unsuspecting consumers, because consumers are usually familiar with them"). The U.S. Supreme Court, recognizing that consumers are not so easily misled by stock advertising techniques, has refused to credit similar "paternalistic assumption[s]" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel*, 496 U.S. at 105.

Even if a consumer did make such a mistake, there is no reason to believe that it would likely influence the client's decision to hire the lawyer. Whether a person depicted in an advertisement is an actor will rarely have anything to do with the price or quality of the lawyer's service, and a consumer's inability to identify an actor would thus almost certainly be immaterial to the consumer's decision. *See* Tenn. R. Prof'l Conduct 7.1 (prohibiting "*material* misrepresentations of fact or law" (emphasis added)); *id.* R. 1.0(o) (defining "material" as "something that a reasonable person would consider important in assessing or determining how to act in a matter"); *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"). As the U.S. Supreme Court explained in *Zauderer*, "because 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.

Indeed, a consumer who made the important decision about hiring a lawyer based on the appearance of clients in advertising would be acting entirely irrationally.

3. At the very least, the proposed restriction is overbroad. Although the stated basis for the amendment is that "[s]ome advertisements currently distributed in Tennessee show young, attractive, and healthy individuals leading active lives after receiving large settlements," TAJ Pet. 10, the proposed rule would prohibit even portrayal of clients who appear old or seriously injured. It would also prohibit use of actors by lawyers practicing family, immigration, or other areas of law in which clients do not seek settlements for injuries. The state cannot ban *all* portrayal of clients on the ground that "*some*" such portrayals may be 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"); *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, even if petitioners could substantiate their assertions that all portrayals of clients are "inherently misleading," the rules could address the problem by requiring lawyers to disclose the use of actors, as eight other states currently do. *See Alexander*, 598 F.3d at 96 (holding that a disclosure that judges are played by actors would accomplish the state's purpose without restricting speech).[12] As the current rules recognize, "the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to … mislead a prospective client." Tenn. R. Prof'l Conduct 7.1, cmt. Although the Fifth Circuit's decision in *Public Citizen* makes clear that disclosure requirements still have the potential to violate the First

[12] *See* 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).

Amendment if unnecessary or unduly burdensome, requiring disclosure would at least be less restrictive than an outright ban.

B. The Proposed Prohibition on "Manipulative" Depictions Is Unworkably Vague And Based on Misguided Assumptions About the Public's Perception of Lawyer Advertising.

1. The second proposed restriction would prohibit "visual or verbal descriptions, depictions, illustrations, or portrayals" that are "deceptive, misleading, manipulative, or likely to confuse the viewer." TAJ Prop. R. 7.1(2). To the extent the proposed rule would prohibit advertisements that are genuinely misleading, it is unobjectionable but unnecessary. Existing Rule 7.1 already prohibits all "false or misleading communication[s] about the lawyer or the lawyer's services," including "material misrepresentation[s] of fact or law" and omissions of "fact necessary to make the statement considered as a whole not materially misleading." Because the First Amendment does not prohibit restrictions on false or misleading commercial speech, *see Thompson*, 535 U.S. at 367, it would not prohibit this Court from adopting a separate rule specifically targeting misleading "descriptions, depictions, illustrations, or portrayals"—or, for that matter, from adopting additional rules prohibiting misleading business cards, billboards, refrigerator magnets, or any other conceivable means of communication. Dividing the rules by medium, however, would serve only to increase the rules' complexity, while doing nothing to protect consumers.

2. In contrast, the rule's proposed prohibition on "manipulative" depictions would be more than just useless—it would violate the First Amendment. Indeed, like the proposed prohibition on portrayal of clients, the rule's language is based on the recently invalidated rule of another state. *See Harrell*, 2011 WL 9754086. As the Eleventh Circuit in *Harrell* explained in its decision reversing summary judgment for the Florida Bar, "almost every television advertisement employs visual images or depictions that are designed to influence, and thereby 'manipulate,'' the viewer into following a particular course of action, in the most unexceptional sense." *Harrell*, 608 F.3d at

1255. That broad scope, combined with the lack of "meaningful standards" to guide interpretation and enforcement, *id.*, inevitably led to arbitrary and unpredictable enforcement of Florida's rule. The state at various points concluded, for example, that the image of a tiger's eyes and a claim to have the "strength of a lion in court" were manipulative, but an image of two panthers was not; that an image of a fortune teller was manipulative, but an image of a wizard was not; and that an image of an elderly person looking out of a nursing home window to represent nursing home neglect was manipulative, but an image of a man looking out of a window to represent victims of drunk driving was not. *See id.* at 1255-56. The result was confusion and frustration among lawyers in the state. *See* Nathan Koppel, *Objection! Funny Legal Ads Draw Censure*, Wall Street Journal, Feb. 7, 2009, at A1.[13]

Based on the Eleventh Circuit's reasoning in *Harrell*, the district court on remand granted summary judgment for the plaintiffs. *Harrell*, 2011 WL 9754086. The rule's vague language and the Bar's history of arbitrary enforcement, the court wrote, "fail[ed] to adequately put members of the Bar on notice of what types of advertisements are prohibited" and gave the state "unbridled discretion in determining which advertisements it wishes to prohibit … even where there appears to be no actual misrepresentation." *Id.*; *see also United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (finding the term "aesthetically pleasing" to be impermissibly vague because it is not susceptible to an objective definition).[14]

[13] *available at* http://online.wsj.com/article/SB120234229733949051.html.

[14] As the Eleventh Circuit held in *Harrell*, the possibility that a lawyer could obtain an advisory opinion about the permissibility of an advertisement did not mitigate the rule's vagueness. *Harrell*, 608 F.3d at 1264 n.8. The availability of a procedure for obtaining the "necessarily arbitrary opinions" of state officials did nothing to render those opinions less arbitrary. *Id.*

After spending years issuing interpretations in an attempt to give meaning to the rule, Florida's contradictory decisions succeeded only in making it more unpredictable. We urge the Court not to take up that task where Florida left off.

3. Even setting aside the rule's inherent vagueness, petitioners have not shown a state interest in the rule sufficient to survive First Amendment scrutiny. The rule is intended to prohibit "[s]ensationalistic and dramatic visuals in advertisements" that "undermine the public's perception of attorneys." TAJ Pet. 4. But the U.S. Supreme Court has repeatedly held that the protection of the legal profession's reputation is not an interest that justifies restricting speech. In *Bates*—the first decision to recognize First Amendment protection for lawyer advertising—the Court rejected an attempt by the Arizona Bar to justify advertising restrictions on the ground that lawyer ads "undermine the attorney's sense of dignity and self-worth" and "tarnish the dignified public image of the profession." 433 U.S. at 364. 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. If petitioners are correct that the public reacts negatively to certain advertisements, it is a problem for the marketplace, not the state, to resolve. Consumers, after all, are unlikely to hire lawyers based on ads they find distasteful, and lawyers are not likely to invest in advertisements that drive away potential clients. *Cf. Central Hudson*, 447 U.S. at 557 ("Most businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers.").[15]

[15] *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);

In any event, the petition supplies nothing beyond unsupported speculation on which to conclude that "sensationalistic" or "dramatic" commercials in fact damage the public's perception of lawyers. Although many lawyers are quick to blame advertising for a decline in the reputation of the profession, the available evidence does not back up that assumption. In the most comprehensive study on the issue, the American Bar Association found that consumers responded with neutral or positive reactions to advertisements that lawyers tended to view negatively. *Lawyer Advertising at the Crossroads* 109. And when asked open-ended questions about factors affecting the profession's reputation, most consumers identified the honesty and ethical conduct of lawyers, the availability of affordable representation, and the quality of legal services. *Id.* Only two percent named advertising. *Id.*

The evidence on which the Florida Bar relied in its unsuccessful defense of its rule against "manipulative" ads is consistent with these findings. The Bar's own consumer survey concluded that attorney advertising "doesn't change opinions about the Florida justice system." Florida Bar, *Florida Consumer Opinions of Lawyer Advertisements* (Apr. 2005).[16] And participants in a focus group conducted by the Bar, after watching six lawyer advertisements on videotape, were *less* likely to attribute negative influences on the justice system from lawyer advertising than they were before being shown the ads. *Harrell v. Florida Bar*, No. 08-0015, 2011 WL 9754086.[17]

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*, 425 U.S. at 748 ("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.").

[16] *available at* http://www.floridasupremecourt.org/clerk/comments/2005/05-2194_Exhibit%204.pdf

[17] Contrary to the view of many lawyers, there is no evidence that the public's view of lawyers today is worse than it has been historically. *See generally* Marc Galanter, *The Faces of*

Ironically, state ethics rules that restrict commonplace advertising techniques are likely to evoke the very negative reactions they seek to prevent. By limiting lawyer advertisements to depictions of bland "talking heads," these rules make lawyer ads appear dated and cheap compared to the "stylish," professionally produced advertisements consumers are accustomed to seeing in the media. *See* William E. Hornsby, Jr., *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 Geo J. Legal Ethics 325, 350-56 (1996). Advertising restrictions also reduce the perceived availability of legal services and contribute to the profession's "elitist" image—both factors that evidence *does* suggest negatively influence the public's opinion of the profession. *See* Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States?*, 27 J. Legal Stud. 503, 508, 512 (1998).

C. The "Bona Fide Office" Requirement Would Discriminate Against Out-of-State Lawyers for a Protectionist Purpose And Would Thus Violate the First Amendment, the Privileges and Immunities Clause, and the dormant Commerce Clause.

1. The TAJ's third proposed rule—which would prohibit *all* advertising in Tennessee by lawyers who lack a regular place of business in the state—has never faced constitutional challenge because it has never been adopted by any other state. The rule would require all lawyer advertisements to state the location of "a bona fide office in the state of Tennessee," which the rule defines as a "physical location maintained by the lawyer" where the lawyer "reasonably expects to furnish legal services in a substantial way on a regular and continuing basis." TAJ Pet.

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."). Public distrust of lawyers long predates television advertising. *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."); *see, e.g.*, Ambrose Bierce, *The Devil's Dictionary* (1911) ("LAWYER, n. One skilled in circumvention of the law."); Charles Dickens, *Bleak House* (1853) ("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.").

4 (Prop. R. 7.2(1)). The proposed restriction is not merely a disclosure requirement akin to the existing rule that advertisements must disclose the lawyer's name and address. Rather, because the rule would require the location of the office disclosed to be "in the state of Tennessee," lawyers who are not present in the state on a "regular and continuing basis" cannot comply with the rule, and thus cannot run *any* advertisements in the state. The proposed rule makes that point expressly, providing that lawyers who "do not have a bona fide office in the state of Tennessee may not advertise here." *Id.*

The proposed rule's stated purpose is to prevent "[o]ut-of-state attorneys practicing here [who] limit the client base of Tennessee attorneys." TAJ Pet. 10. Tennessee, however, has no legitimate interest in providing an economic advantage to lawyers in Tennessee that would justify a restraint on speech. The rule's admittedly protectionist purpose threatens a core concern of the U.S. Constitution—to prevent "the tendencies toward economic Balkanization that had plagued relations" among the States. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The petitioner's asserted interest thus not only fails to satisfy the First Amendment, but would itself render the rule unconstitutional under both the Privileges and Immunities Clause and dormant Commerce Clause of the U.S. Constitution. *See Supreme Court of Va. v. Friedman*, 487 U.S. 59, 66 (1988); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985).

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art IV § 2. As its text indicates, the Clause places "the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869). The right of nonresidents to "ply their trade, practice their occupation, or pursue a common calling" unhindered by state boundaries, *Hicklin*, 437 U.S. at 524, is "one of the most fundamental of those privileges protected by the Clause."

United Bldg., 465 U.S. at 219. For the same reason, the Clause also prohibits states from granting special employment privileges to residents of particular localities *within* a state. *See id.* at 219 (declaring unconstitutional a law that preferred residents of a city for municipal construction jobs).

The proposed rule is exactly the sort of discriminatory prohibition that the Privileges and Immunities Clause is intended to prohibit. It is well-established that a "nonresident's interest in practicing law on terms of substantial equality with those enjoyed by residents is a privilege protected by the Clause." *Friedman*, 487 U.S. at 66; *see also Piper* 487 U.S. at 280–81. The U.S. Supreme Court has thus held unconstitutional restrictions on the right to practice law within a state on terms of substantial equality with resident lawyers. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (holding unconstitutional a New Hampshire rule excluding nonresident attorneys from the state Bar); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (holding unconstitutional a Virginia rule allowing only resident attorneys to be admitted on motion); *see also Schoenefeld v. New York*, No. 09-0504, 2010 WL 502758 (N.D.N.Y. Feb. 8, 2010).

And there is also little question that the "bona fide office" requirement would unconstitutionally restrict that protected privilege. A discriminatory law need not provide for "the total exclusion of nonresidents from the practice of law" to violate the Clause. *Piper*, 470 U.S. at 66. Rather, the relevant question is "whether the State has *burdened* the right to practice law … solely on the basis of citizenship or residency." *Id.* (emphasis added). In *Ward v. State*, the Supreme Court held unconstitutional a Maryland law that charged out-of-state salespeople higher licensing fees for the privilege of "offering … or exposing for sale" their goods "by written or printed tradelist or catalogue," and from selling goods "under their name or the name of their firm." 79 U.S. 418, 424 (1870). Here, the proposed requirement that lawyers maintain a "regular and continuing" practice in the state is far more burdensome than the fee held unconstitutional in *Ward*—it does not merely *burden* advertising by out-of-state citizens, but virtually prohibits such

advertising. Indeed, the law's expressed purpose is to "prevent out-of-state attorneys from taking business out of Tennessee." TAJ Pet. 12.

The proposed rule's protectionist and anticompetitive purpose also demonstrates its unconstitutionality under the dormant Commerce Clause. "Time and again," the U.S. Supreme Court has reiterated that, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 (internal quotation marks omitted). A state law that "discriminates against interstate commerce," whether on its face or in its practical effect, "is virtually per se invalid." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2009) (internal quotation marks omitted). The proposed rule would stifle competition, and, if other states followed Tennessee's lead, would create precisely the "economic Balkanization" that the Framers sought to eliminate. *Granholm*, 544 U.S. 472.

2. Having already admitted the rule's blatantly unconstitutional purpose, the petition also asserts, without substantiation, that advertising by out-of-state attorneys "creates difficulties in bar oversight as to whether or not Tennessee citizens are being treated in an ethical manner by out of state attorneys." TAJ Pet. 10. But the petition fails to explain why it is more difficult to oversee advertising by out-of-state lawyers than advertising by lawyers within the state. As the U.S. Supreme Court noted in rejecting a similar argument, a state "has the authority to discipline *all* members of the bar, regardless of where they reside." *Piper*, 470 U.S. at 285-86 (emphasis added); *see also Barnard v. Thorstenn*, 489 U.S. 546, 556–57 (rejecting argument of the Virgin Islands that its inability to "monitor the ethical conduct of nonresident practitioners" justified discriminatory treatment). If anything, enforcement of advertising rules against out-of-state lawyers would be *easier* than enforcement of other rules, such as rules against conflicts of interest,

because advertisements are publicly distributed and thus often accessible to enforcement authorities.

Regardless, difficulty of enforcement would not justify a blanket ban on speech protected by the First Amendment. "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.

II. The Rules Proposed by Matthew C. Hardin's Petition Are Extreme And Have Been Virtually Abandoned by the Only State to Have Adopted Them.

A. The Proposed Amendments Would Make Tennessee's Rules the Most Restrictive in the Nation.

In addition to endorsing the proposed amendments in the TAJ's proposal, lawyer Matthew C. Hardin proposes numerous new rules—not endorsed by the TAJ—that would impose a litany of even harsher restrictions on lawyer advertising in the state. The amendments would prohibit, among other things, any communication that "contains any reference to past successes or results obtained," "describ[es] or characteriz[es] the quality of the lawyer's services," "includes … any celebrity whose voice or image is recognizable to the public," or, in the case of broadcast advertisements, "contains … any background sound other than instrumental music." The petition also proposes that lawyers be required to file advertisements with the Board of Professional Responsibility for evaluation.

These lengthy, complicated, and redundant proposals take their structure and the majority of their language from the Florida Bar's recently abandoned advertising rules, which long stood apart from the rules of every other state as the most restrictive in the nation. Most of the significant proposed amendments have either been declared unconstitutional in Florida or the Florida Bar has recognized their likely unconstitutionality. Acknowledging that the "complexity"

and "ambiguity" of its rules has led to confusion and excessive litigation costs, the Bar in 2011 petitioned the Florida Supreme Court to "eliminate the existing rules in their entirety and replace them" with rules that were "easier for advertising lawyers to understand and the [state bar] to apply, and easier and less costly to defend." Pet. to Amend the Rs. Regulating the Fla. Bar, July 5, 2011. On January 31, 2013, the Court granted the Bar's petition.[18]

If adopted by this Court, the amendments would thus make Tennessee's lawyer advertising rules the most restrictive of any state. It would also undo the Tennessee Bar Association's long and careful effort to simplify the rules and bring them into conformity with the rules of other jurisdictions, an effort that only recently culminated in this Court's 2010 adoption of comprehensive amendments to the Rules of Professional Conduct. For that reason alone, the Court should deny the petition in its entirety.

B. The Petitioner Fails to Show Any State Interest Sufficient to Justify Burdensome Restrictions on Commercial Speech.

Although the petition proposes numerous amendments that would change the rules in many subtle ways, several stand out as proposing dramatic changes in this Court's policy toward lawyer advertising regulation. Each of these proposed rules would violate the First Amendment.

a. Statements of Past Results. Proposed Rule 7.1(c)(1)(F) would prohibit advertisements that "contain[] any reference to past successes or results obtained." The Fifth Circuit in *Public Citizen* held Louisiana's materially identical rule unconstitutional under the First Amendment. 632 F.3d 212. As the court explained, the rule would prohibit publication of even "verifiable facts" about a lawyer's record, for which the First Amendment's protection is "well established." *Id.* at 222. The court rejected Louisiana's argument that such ads have the "potential for fostering unrealistic expectations in consumers," holding that "the First Amendment does not tolerate

[18] *available at* http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf.

speech restrictions that are based only on a 'fear that people would make bad decisions if given truthful information.'" *Id.* (quoting *W. States Med. Ctr.*, 535 U.S. at 359). The court also held that the rule was unconstitutional as applied to statements "not susceptible of measurement or verification" because the state had not proved that such statements are misleading or that any confusion could not be alleviated by a less-restrictive disclaimer requirement. *Id.*

Following *Public Citizen*, Florida was the only state that retained a comparable prohibition on references to past results. *See* Fla. Rules of Prof'l Conduct R. 4-7.2(c)(1)(F).[19] And the Florida Bar has now successfully petitioned the Florida Supreme Court to abandon its rule as well, arguing that "the public wants this information available to them." Fla. Pet. 14. In a public survey conducted by the Bar, 74% of respondents said "past results are an important attribute in choosing a lawyer." *Id.* at 14. And as the Bar acknowledged, "[t]he U.S Supreme Court has generally struck down regulations restricting advertising truthful information." Fla. Pet. 14.

Like the Louisiana and Florida rules, the proposed rule here would deprive the public of truthful and relevant information about an attorney's record without evidence that the prohibited statements are misleading or could not be addressed with the less-restrictive alternative of a disclaimer. Accordingly, the proposed rule would violate the First Amendment.

b. Quality of Services. The petition also seeks to prohibit statements that "describ[e] or characteriz[e] the quality of the lawyer's services," Prop. R. 7.2(c)(2), which the petitioner contends are "*likely* to be unsubstantiated and have the *potential* to effectuate unreasonable expectations in clients." Hardin Pet. 5 (emphasis added). The language of the proposed prohibition, and the Florida rule from which it originates, is extraordinarily broad in scope.

[19] 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).

Given that the primary purpose of advertising is to convey information about the quality of a product or service, the rule, if applied literally, would prohibit virtually *all* advertising. *See Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 499 (5th Cir. 2000) (holding that, if statements of quality and routine puffery were considered misleading, "the advertising industry would have to be liquidated in short order" (internal quotation marks omitted)). As the Eleventh Circuit noted in *Harrell*, the rule's broad language and lack of limiting standards has resulting in unpredictable and contradictory applications of the rule by the state's enforcement authorities. 608 F.3d at 1256. The state, for example, has concluded that the slogans "When who you choose matters most" and "MAKE THE RIGHT CHOICE!" improperly characterized quality of services, but "Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely" did not; and that "you need someone who you can turn to, for trust and compassion with this delicate matter" violated the rule, but "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time" was permissible. *Id.*

As with the rule against references to past result, Florida currently stands alone as the only state to prohibit the practices prohibited by this proposed rule, and the Florida Bar has also proposed to abandon the restriction. In its 2011 petition to amend the rules, the Florida Bar concluded that "such a prophylactic bar would be unlikely to meet the *Central Hudson* test" and would restrict the "free flow of truthful information to the public that is necessary for the selection of a lawyer." Pet. 16. And also like the past-results rule, the rule has been declared unconstitutional by federal courts. The Eleventh Circuit in *Mason v. The Florida Bar* rejected Florida's contention that truthfully claiming to have received the "highest rating" from Martindale-Hubbell would "mislead the unsophisticated public," noting that the Bar had "presented no studies, nor empirical evidence of any sort" to back up its alleged concern. 208 F.3d 952, 957–58 (11th Cir. 2000) (holding that the Bar's concerns were "mere speculation" and

"unsupported conjecture"). And the rule was again held unconstitutional in *Harrell v. The Florida Bar* as applied to the slogan "Don't settle for less than you deserve," which the state had interpreted to violate the rule. *Harrell* at 36–37; *see also Public Citizen*, 632 F. 3d at 223 (holding that the state had not proved that unverifiable statements of quality are "so likely to be misleading that a complete prohibition is appropriate"); *Alexander*, 598 F.3d at 93 (declaring unconstitutional New York's rule against statements that 'imply the ability to obtain results in a matter," which the state had sought to apply against the slogan "The Heavy Hitters.").

Like the Florida Bar, petitioners have no evidence that statements of quality—a feature present in nearly every advertisement—is misleading to consumers. This rule too would thus be unconstitutional.

c. Use of Celebrities. The petition would prohibit lawyers from using in their advertisements any celebrity "whose voice or image is recognizable to the public." Prop. R. 7.1(c)(14). Although, as far as petitioners are aware, the constitutionality of the Florida rule on which this proposed rule is based has not been adjudicated, the district court in *Public Citizen* held a watered-down version of the rule unconstitutional under the First Amendment.

Louisiana in 2008 adopted a prohibition on celebrity spokespeople modeled on Florida's rule, but, in the face of a First Amendment challenge, amended the rule to allow any "non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as that spokesperson shall provide a spoken and written disclosure" that the spokesperson is not a lawyer but a paid spokesperson. *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 545 (E.D. La. 2009). Despite the amendment, the district court in *Public Citizen* held the rule unconstitutional based on the rule's "lack of evidentiary support"—a determination that the state did not appeal.

Id. at 557. Other than Florida, only Pennsylvania continues to maintain a rule comparable to the one petitioner proposes.[20]

Once again, the petition provides no evidence to suggest that the 48 states allowing celebrity endorsements in lawyer advertisements have been unable to adequately protect their citizens from misleading ads. Nor does it even attempt to show that Tennessee could not adequately protect consumers with a less-restrictive disclosure requirement. The FTC's *Guide Concerning the Use of Testimonials and Endorsements in Advertising*, for example, allows celebrity endorsements in all forms of advertising provided that the celebrities disclose their financial interest in contexts (such as press interviews) where that fact would be relevant but not obvious to consumers. *See* 16 Fed. Reg. Part 255; *see also* Va. R. Prof'l Conduct 7.2(a)(1) (requiring celebrity endorsements to disclose that the celebrity is not a client and is being paid). For example, the credibility that consumers are likely to give a tennis star's statement in a talk-show interview that her tennis game has been greatly improved by laser eye surgery at a particular clinic would likely be affected by the knowledge that she is being paid to promote that clinic. *Id.* Such concerns are not implicated by typical commercial advertising, for which consumers understand that a celebrity will "be reasonably compensated for his appearance in the ad." *See id.*

d. Background Sounds. In a rule applicable only to "[a]dvertisements on the electronic media such as television and radio," the proposed rules would prohibit "any background sound other than instrumental music." Prop. R. 7.7(b)(1)(C). Again, the petition presents no evidence that this commonplace advertising technique is harmful to consumers. The Florida rule from which this language is derived—which, before the Florida Supreme Court's recent amendments,

[20] *See* Pennsylvania Rule 7.2(d) ("No advertisement or public communication shall contain an endorsement by a celebrity or public figure"). As with Florida's rule, the constitutionality of Pennsylvania's restriction has apparently never been adjudicated.

was the only such rule in the nation—was routinely applied to prohibit advertising that is not even arguably misleading, such as "the sounds of kids playing with a bouncing ball; the sound of a computer turning off; the sound of a light switch turning off; the sound of a seagull in the background; and the sound of a telephone ringing." *Harrell*, 608 F.3d at 1251 (modifications omitted). The Florida Bar in its successful petition to eliminate the rule recognized that a prohibiting such harmless sounds "would be unlikely to meet the *Central Hudson* test." And, indeed, the district court in *Harrell* held the rule unconstitutional, concluding that the prohibition did not advance the state's asserted interest in preventing misleading advertisements. 2011 WL 9754086. The petition presents no evidence to counter that conclusion, and its proposed rule would thus be equally unconstitutional.

C. The Heavy Costs of the Proposed Filing Requirement Would Substantially Outweigh Any Limited Benefit.

The petition's final, and most elaborate, proposed rule would require lawyers to file a copy of each of their advertisements with the Board of Professional Responsibility for evaluation of compliance with the rules. Recognizing the prior-restraint implications of a pre-clearance requirement, however, the petition is careful to provide that a lawyer may publish the filed advertisement even without a Board determination of compliance. The resulting proposed rule is in principle similar to the filing requirement in this Court's former Rule 7.2(b), which the Court eliminated in 2011 in favor of the current rule's less burdensome rule that a lawyer retain a copy of all advertisements for two years following public distribution. *See* Tenn. Pet. at 184. But in stark contrast to this Court's simple, one-paragraph former filing requirement, the petition proposes nearly four pages of complicated, redundant, and confusing requirements and exceptions. Prop. R. 7.8, 7.10. It appears that the most significant of these additions are:

(1) the Board is *required* to evaluate *every* filed lawyer advertisement for compliance with the rules and notify the lawyer of its determination within 15 days of receipt, Prop. R. 7.8(a)(1)(C);[21]

(2) the Board's determination of compliance is, subject to certain exceptions, "binding" on the Board, Prop. R. 7.8(a)(1)(F), (b)(1)(F);[22] and

(3) lawyers are required to pay a $150 fee for each filed advertisement "to offset the cost of evaluation and review."

Given the proposed rule's express provision that lawyers may distribute advertisements regardless of Board approval, the primary practical effect of the mandatory review process appears to be that the "binding" nature of the Board's approval of a particular advertisement provides a sort of safe harbor against later prosecution.[23] But to achieve that purpose, the rule would impose a substantial burden on the Board, requiring it to review and issue written compliance determinations for *every* broadcast and print advertisement run in the state. The Florida Bar's implementation of its comparable screening requirement is costly—its advertising

[21] The proposed rule actually sets forth two separate filing requirements for broadcast and non-broadcast advertisements, which differ in subtle and inexplicable ways. For example, the proposed rule would require non-broadcast advertisements to be filed contemporaneously with their first public distribution, but provides no deadline for filing broadcast advertisements. The petition does not explain the purpose of this distinction, or of other differences between the two requirements.

[22] For non-broadcast advertisements, the rule provides that a determination of compliance is not binding on the Board if the "advertisement contains a misrepresentation that is not apparent from the face of the advertisement." Prop. R. 7.8(a)(2)(F). But the rule contains no such exception for broadcast advertisements. *Id.* R. 7.8(a)(1)(F). Again, the petition does not explain this different treatment for broadcast ads.

[23] As to broadcast advertisements, the benefit of this safe harbor is significantly undermined by the rule's proviso that "approval shall not prohibit the Board of Professional Responsibility from reviewing advertisements for compliance with these Rules after a written complaint is made to the Board of Professional Responsibility by an attorney licensed in Tennessee or member of the public." Prop. R. 7.8(a)(1)(C); *see also* Prop. R. 7.8(a)(1)(F) (providing that the "binding" nature of the Board's determination is "[s]ubject to a written complaint"). In that case, the rule provides only that an "attorney's reliance on compliance found by the Board of Professional Responsibility shall be a mitigating factor in application of any discipline." *Id.*

department alone spends more than $850,000 per year, mostly in staff salaries and office expenses. Florida Bar, *Proposed Budget for Fiscal Year 2012-13*.[24] To be sure, the cost of additional staff required by the rule would be partially offset, as it is in Florida, by the proposed filing fee. But the fee is itself a costly burden on lawyers, who the rule would require to pay $150 every time they run a new advertisement or modify an existing one, even if they do not need or want the safe harbor.

The limited benefits of the proposed safe harbor do not justify these high costs. If the Court wishes to provide certainty to those lawyers who are concerned about the lawfulness of their ads, it could achieve that with a *voluntary* filing and review process. Even better, it could decline to adopt rules that are so difficult to understand and apply that providing lawyers with certainty about their meaning would require creation of a new state bureaucracy devoted to their interpretation.

[24] *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/73A35E28803FF27C852579DB004EFDD8/$FILE/ProposedBudget12-13n.pdf?OpenElement.

CONCLUSION

This Court should deny the petitions to amend the Rules of Professional Conduct.

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