No. 09-11910-BB

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM H. HARRELL, JR.; HARRELL & HARRELL, P.A.; and PUBLIC CITIZEN, INC.,

Plaintiffs-Appellants,

v.

ELIZABETH TARBERT, in her official capacity as Chief Ethics Counsel of the Legal Division of The Florida Bar; JAMES N. WATSON, JR., in his official capacity as Chief Disciplinary Counsel, Tallahassee Branch, of the Legal Division of The Florida Bar; SUSAN V. BLOEMENDAAL, in her official capacity as Chief Disciplinary Counsel, Tampa Branch, of the Legal Division of The Florida Bar; JAN K. WICHROWSKI, in her official capacity as Chief Disciplinary Counsel, Orlando Branch, of the Legal Division of The Florida Bar; ADRIA E. QUINTELA, in her official capacity as Chief Disciplinary Counsel, Fort Lauderdale Branch, of the Legal Division of The Florida Bar; and ARLENE K. SANKEL, in her official capacity as Chief Disciplinary Counsel, Miami Branch, of the Legal Division of The Florida Bar,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR PLAINTIFFS-APPELLANTS WILLIAM H. HARRELL, JR.; HARRELL & HARRELL, P.A.; AND PUBLIC CITIZEN, INC.

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July 27, 2009

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

A. Interested Persons

Bateman, Mary Ellen (defendant-appellee)

Beck, Gregory A. (counsel for plaintiffs-appellants)

Bloemendaal , Susan V. (defendant-appellee)

Covington, Hon. Virginia M. Hernandez (U.S. District Judge)

Frank, David (counsel for plaintiffs-appellants)

Harkness, John F. (defendant-appellee)

Harrell & Harrell, P.A. (plaintiff-appellant)

Harrell, William H., Jr. (plaintiff-appellant)

Howard, Hon. Marcia Morales (U.S. District Judge)

Marvin, Kenneth L. (defendant-appellee)

Public Citizen, Inc. (plaintiff-appellant)

Sankel, Arlene K. (defendant-appellee)

Tarbert, Elizabeth (defendant-appellee)

The Florida Bar (defendant-appellee)

Watson, James N., Jr. (defendant-appellee)

Quintela , Adria E. (defendant-appellee)

Wichrowski , Jan K. (defendant-appellee)

Wolfman, Brian (counsel for plaintiffs-appellants)

B. Corporate Disclosure

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

/s/Gregory A. Beck
Gregory A. Beck

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because this appeal involves the constitutionality of an important system of state regulation. Plaintiffs challenged several provisions of the Florida Rules of Professional Conduct, claiming that they infringe the First Amendment rights of advertising lawyers in the state. The district court dismissed the case on grounds of standing, ripeness, and mootness, and held that the Florida Bar's system of advertising review did not constitute a prior restraint on speech. The issues at stake in this case are of great importance for lawyers in the state and for members of the public who are recipients of legal advertising materials. Moreover, the district court's decision is a lengthy and complex application of several independently complex jurisdictional doctrines, and the Court would benefit from oral argument on these issues.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. On March 30, 2009, the court entered an order denying plaintiffs' motion for summary judgment and granting defendants' cross-motion for summary judgment. On March 31, 2009, the court entered a final judgment for defendants that disposed of all issues in the case. Plaintiffs filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) on April 14, 2009. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Do plaintiffs have standing to challenge the restrictions on their speech imposed by the Florida Rules of Professional Conduct?

2. Are plaintiffs' First Amendment claims ripe?

3. Are plaintiffs' First Amendment claims moot?

4. Does the Florida Bar's pre-screening rule violate plaintiffs' First Amendment rights?

STATEMENT OF THE CASE

The Florida Rules of Professional Conduct regulate nearly every aspect of attorney advertising in Florida. The rules ban a wide range of common advertising content, such as statements of quality, comparisons, background sounds, and other stock advertising techniques. Moreover, before Florida lawyers are allowed to publish ads, they must file them with the Florida Bar and obtain an opinion on

whether the ads comply with the rules. Plaintiffs sued the Bar and Bar officials responsible for enforcing the rules, arguing that the rules infringed their First Amendment rights and were an unconstitutional prior restraint. The district court granted the Bar's motion for summary judgment, holding that plaintiffs lacked standing to challenge most of the rules and that their claims were both unripe and moot. The court held that plaintiffs did have standing to challenge the preclearance rule, but held that the rule did not constitute a prior restraint and was therefore constitutional. At issue in this appeal is whether the district court had jurisdiction to decide plaintiffs' First Amendment challenges and whether the preclearance rule violates the First Amendment.

A. Florida's Lawyer Advertising Rules

Members of the Florida Bar are required to comply with extensive restrictions on the content of attorney advertising set forth in the Florida Rules of Professional Conduct. Rules Regulating the Florida Bar § 3-4.2. Violations of the rules are grounds for discipline, including public reprimand, suspension, and disbarment. *Id.* §§ 3-4.2, 3-5.1. In accordance with the Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which held that lawyer advertising is protected by the First Amendment, the rules before 1990 broadly permitted lawyer advertising in the state. *See In re Rules Regulating The Fla. Bar*, 494 So. 2d 977, 1071-72 (Fla. 1986). The rules closely followed the lead of the

American Bar Association, generally prohibiting only ads that were false or misleading and disclaiming any intent to regulate advertisements based on "[q]uestions of effectiveness and taste." *Id.* at 1072. Although the rules required attorneys to keep advertisements on file for a period of time, they explicitly rejected a requirement of "review prior to dissemination," noting in a comment that such a requirement "would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality." *Id.*

The status of lawyer advertising dramatically changed in 1990, when the Florida Supreme Court adopted a "complete overhaul" of the rules "in response to the proliferation of attorney advertising in the wake of the *Bates* decision." (DN 29-1, Exh. 10 at A-1). The Court created new rules and explanatory comments that prohibited a wide range of common advertising content, including slogans, jingles, testimonials, statements that "describ[e] or characteriz[e] the quality of the lawyer's services," statements that would be true for most lawyers practicing in Florida, statements of comparison like "one of the best" or "one of the most experienced," "background sound[s] other than instrumental music," "audio or video portrayals of an event or situation," and depictions that "create suspense" or that contain "exaggerations," "appeals to the emotion," or "call[s] for legal services." *See In re Petition to Amend the Rules Regulating the Fla. Bar*, 571 So. 2d 451 (Fla. 1990). The amendments also required lawyers to file a copy of their

advertisements with the newly created Standing Committee on Advertising, and, although they did not require lawyers to obtain preclearance before running their ads, nevertheless omitted the comment noting that such a preclearance requirement would be burdensome and probably unconstitutional. *Id.* at 464, 467.

The amendments fundamentally reoriented the focus of the rules by replacing the exclusion of "questions of effectiveness and taste" with a requirement that lawyer ads "provide only useful, factual information presented in a nonsensational manner." *Id.* at 463. A new comment to the rules explained that the purpose of the amendments was to prevent "the creation of incorrect public perceptions or assumptions about the manner in which our legal system works, and to promote the public's confidence in the legal profession and this country's system of justice." *Id.* In dissent, Chief Justice Shaw wrote that each of the prohibited devices "can be, and undoubtedly has been, used effectively to provide the consumer with clear and truthful information concerning the availability of important legal services" and complained that "the majority, out of frustration and annoyance, [was] swatting at a troublesome and persistent Bar fly with a sledgehammer." *Id.* at 474-75. Justice Barkett also dissented on the grounds that many of the rules "only regulate[d] decorum," and that "a lawyer cannot be forced to surrender all first amendment freedom as the price of practicing law." *Id.* at 475.

Unsatisfied with the effect of the amendments, a 1997 Bar task force concluded that "further restrictions on lawyer advertising [were] needed if the slide in public respect and confidence in the judicial system is to be reversed." (DN 25-8 at 9-10). The task force petitioned the Florida Supreme Court for a total ban on all television and radio advertising by Florida lawyers. *In re Amendments to Rules Regulating the Fla. Bar*, 762 So. 2d 392, 395-96 (1999). The Court, recognizing that such a blanket ban would be unconstitutional, rejected the proposal. *Id.* Nevertheless, the Court amended the rules to add additional prohibitions on "reference[s] to past successes or results obtained," "[v]isual or verbal descriptions, depictions, or portrayals" that are "manipulative," illustrations that are "likely to . . . confuse the viewer," and "appeals to the emotions." *Id.* at 409, 410, 415.

A final set of amendments relevant to this case came in 2004, when the Florida Supreme Court asked the Bar to do a complete review of the advertising rules to examine whether amendments were needed to "clarify the meaning of the rules and provide notice to Florida Bar members of the rules' requirements," and to consider the possibility of "mandatory review prior to dissemination of advertisements." (DN 29-1, Exh. 10 at 2). A task force created for this purpose, over the objection of members who complained that the task force had neither a clearly defined purpose nor empirical evidence on which to base its decisions,

responded by recommending changes to the rules based on several stated goals, including "protection of the justice system and profession from denigration by improper advertising." (DN 29-1, Exh. 10 at 2, A-4 to A-6, A-28 to 29, A-48).

Among other things, a majority of the task force voted to create a new prohibition on advertisements that "guarantee results." (DN 29-1, Exh. 10 at 7). Several task force members also supported deleting the prohibition on "manipulative" ads, but that amendment failed by one vote after others objected that it would "run[] the risk of significantly lowering the standard for attorney advertising." (DN 29-1, Exh. 10 at A-56). In response to the Florida Supreme Court's charge that the task force consider a pre-screening requirement, the Bar unanimously rejected the imposition of prior review. (DN 29-1, Exh. 10 at 13-14). Task force members expressed concern that such a restriction would likely be an unconstitutional prior restraint on speech, and concluded that the Bar's goals could be achieved by encouraging voluntary submission of ads and stricter enforcement of existing rules. (DN 29-1, Exh. 10 at A-18, A-36 to A-37).

The Bar's Board of Governors voted to accept most of the task force's recommendations, with two important exceptions. First, the Board, without explanation, replaced the proposed restriction on ads that "guarantee results" with one on ads that "promise[] results." (DN 29-1, Exh. 9 at 6, 7). Second, the Board voted to disregard the task force's recommendation against a pre-screening

requirement and recommended one anyway. (DN 29-1, Exh. 9 at 12-15). The Florida Supreme Court adopted the Board's recommendations. *In re Amendments to The Rules Regulating The Florida Bar*, 971 So. 2d 763 (Fla. 2007).

B. Plaintiffs William H. Harrell, Jr. and Harrell & Harrell, P.A.

Plaintiff William H. Harrell, Jr. is an attorney in Jacksonville, Florida, and managing partner of the law firm Harrell & Harrell, P.A. (collectively, "Harrell"). (DN 29-1 ¶ 1). Harrell's firm advertises to the public using television, radio, billboards, a website, and other public media. (DN 29-1 ¶ 4). The Bar has repeatedly rejected Harrell's ad submissions for containing harmless elements such as an illustration of stick figures, a statue of Lady Justice, the scenery outside a window behind him, a picture of one of his already-approved telephone-book advertisements, and the slogan "You Need an Attorney Fighting for Your Rights" (in the last case on the ground that the ad was misleading, because, "[w]hile an attorney can certainly be most helpful to injured individuals, they do not have to have an attorney to bring or settle a civil negligence claim"). (DN 29-1 ¶ 5).

On several occasions, Harrell appealed the Bar's rejection of his ads, arguing to the Standing Committee on Advertising that the ads were harmless to consumers and the restrictions were unconstitutional. (DN 29-1 ¶¶ 6, 14). Each time, the committee affirmed the decision without addressing his arguments. (DN 29-1 ¶¶ 6, 15). After spending seven to nine months appealing to the Board of Governors, two

of the rejections were eventually reversed, and one—regarding a depiction of Harrell in front of his own office building—was affirmed. (DN 29-1 ¶ 7).

In 2002, the Florida Bar informed Harrell that his proposed advertising slogan—"Don't settle for anything less"—was impermissible under the Florida Rules of Professional Conduct. (DN 29-1 ¶¶ 8-9). At the same time, the Bar suggested an alternative slogan, "Don't settle for less than you deserve," which it advised would be permissible. (DN 29-1 ¶ 9). Although the Bar did not explain why one slogan was preferable to the other, Harrell nevertheless followed the Bar's suggestion and adopted "Don't settle for less than you deserve" as the centerpiece of his firm's new marketing campaign. (DN 29-1 ¶¶ 9-10).

After five years of investment in the slogan, however, the Bar informed Harrell that "Don't settle for less than you deserve" improperly characterized the quality of his services and therefore was prohibited under Rule 4-7.2(c)(2), relying as the basis for its decision on the fact that "Don't settle for anything less" and similar slogans had previously been rejected. (DN 29-1, Exhs. 2, 5). Harrell appealed to the Standing Committee, arguing that the Bar had itself suggested the slogan five years earlier, but the committee affirmed, concluding that it was not bound by its prior decisions. (DN 29-1 ¶¶ 14-15). Again, the committee did not address any of Harrell's constitutional arguments. (DN 29-1 ¶ 15).

Harrell then filed this action in the U.S. District Court for the Central District of Florida. His complaint alleged that the Bar's preclearance requirement was a prior restraint on speech and violated his First Amendment rights. (DN 1 at 18, ¶ 1(i)). The complaint also alleged that the rules imposed unconstitutional content-based restraints on his advertising by limiting lawyer advertisements to "useful, factual information presented in a nonsensational manner" and prohibiting "visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events" that are "manipulative, or likely to confuse the viewer;" "background sound[s] other than instrumental music;" and statements that are "unsubstantiated in fact," "promise results," "compar[e] the lawyer's services with other lawyers' services," are true for most lawyers in Florida, or "describ[e] or characteriz[e] the quality of the lawyer's services." (DN 1 at 17-19, ¶ 1(a)-(h)).

C. The Proceedings Below

The Bar filed a motion to dismiss, arguing that the district court had no jurisdiction because the plaintiffs lacked standing and because the challenge was not ripe, and that even if the court did have jurisdiction, it should nevertheless abstain from deciding the case. (DN 12; DN 13). The Bar did not directly attack Harrell's standing to challenge the Bar's rejection of his "Don't settle for less than you deserve" slogan, but argued that his challenge to the rules as applied to other

elements of his advertising was not ripe because the Bar had not issued an opinion on the permissibility of those elements. (DN 12).

The district court denied the Bar's motion. (DN 16). The court held that the chilling effect of the challenged rules on Harrell's advertising created an injury for standing purposes. (DN 16 at 31-32). In response to the Bar's argument that the rules' application to aspects of Harrell's advertising other than his slogan was unclear and that Harrell should therefore be required to first submit his ads for review by the Bar, the court noted that the "Florida Supreme Court has had many opportunities to interpret and apply its attorney advertising rules," and that forcing Harrell to submit his ads to the Bar would subject him to the very system that he claims to be unconstitutional. (DN 16 at 26; 27-28). The court also noted that "the Bar is itself responsible for determining whether Harrell's ads comply with the challenged rules" and that "[n]othing prevented the Bar from making that determination and articulating its position in this Court rather than in a separate proceeding." (DN 16 at 28 n.11).

While the decision on the Bar's motion to dismiss was pending, Harrell received a letter from the Bar's Ethics Counsel, Elizabeth Tarbert, stating that the Board of Governors had reversed the Standing Committee on Advertising's conclusion that Harrell's slogan "Don't settle for less than you deserve" characterized the quality of his services in violation of Rule 4-7.2(c)(2). (DN 29-1

¶ 18). After the Court denied the motion, the Bar filed a second motion to dismiss, arguing that even if plaintiffs had standing to challenge the rules when the complaint was filed, that standing was lost when the Board of Governors reversed the Standing Committee's decision. (DN 22). The court did not immediately decide the Bar's second motion.

At the completion of discovery, the parties filed motions for summary judgment. (DN 25; DN 29). The Court, under a new judge assigned to the case, denied plaintiffs' motion, but granted defendants' cross-motion and entered judgment for defendants. (DN 50; DN 51). The court held that it was not bound by the prior judge's decision holding the case to be ripe because that decision had been issued on a motion to dismiss rather than on a motion for summary judgment. (DN 50 at 26). The court then held that, as to the Bar's rejection of Harrell's slogan, the case was mooted by the Board of Governor's subsequent approval of the slogan during the litigation, and that, as to Harrell's challenge to other aspects of the rules, the plaintiffs lacked standing and the claims were not ripe. (DN 50).[1]

[1] The district court also held that plaintiff Public Citizen lacked standing to challenge the advertising rules. (DN 50 at 51-54). For purposes of this appeal, plaintiffs do not challenge that determination. "So long as one party has standing, other parties may remain in the suit without a standing injury." *Ouachita Watch League v. Jacobs,* 463 F.3d 1163, 1170 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

To show standing, a plaintiff must demonstrate an injury that is traceable to the defendants and redressable by the federal courts. Here, Harrell has shown that he is an advertising lawyer in Florida whose day-to-day business is directly affected by the challenged advertising rules. Harrell's injury is the chilling effect of the rules on his First Amendment right to engage in commercial speech—an injury that this Court held sufficient to support standing in *Jacobs v. Florida Bar*, 50 F.3d 901 (11th Cir. 1995). Moreover, Harrell has shown that the rules impose a financial hardship by requiring him to develop ads that are less effective at attracting clients to his firm.

Harrell's declaration sets forth the ads that he would run if the rules were declared unconstitutional and explains why these ads would violate the challenged rules. Contrary to the district court's holding, Harrell is not required to name a specific date on which he wishes to run the ads. Naming such a date would be both unnecessary (because Harrell's injury arises from the chilling effect on his advertising *now)* and impractical (because Harrell cannot know when the rules will be declared unconstitutional, and thus when he will be able to run the ads). Nor is Harrell required to actually produce copies of the proposed advertisements and file them with the court. Requiring Harrell to undergo the tremendous expense of producing final television ads before allowing his constitutional challenge to go

forward would impose a needless hardship and would frustrate the purpose of a declaratory judgment action.

The district court also erred in holding that Harrell lacks standing unless he can show a specific threat by disciplinary authorities. Harrell has shown that he wishes to run advertisements that the challenged rules prohibit. That is enough to meet his burden of showing a realistic danger of injury—and thus a chilling effect—under the challenged rules. Numerous cases have upheld jurisdiction in similar pre-enforcement challenges to commercial speech restrictions. In such a case, where speech restrictions affect the plaintiff's day-to-day business, there is no question that the plaintiff has a serious interest in violating the restrictions. It is enough that the plaintiff has "some reason [for] fearing prosecution." *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 819 (5th Cir. 1979).

Harrell's claims are also ripe. Courts consider claims to be ripe when the claims are fit for judicial review and the plaintiff would suffer hardship from postponement of adjudication. Here, the case is fit for review because the questions at issue are purely legal and can be decided without reference to any particular advertisement. (DN 50 at 26). Moreover, the district court's failure to decide the case subjects Harrell to substantial hardship because it forces him to continue complying with unconstitutional restrictions on his speech. Indeed, the district court's refusal to adjudicate Harrell's claims until there is a concrete threat of

enforcement entirely deprives Harrell of a federal forum because, once the disciplinary process begins, the federal courts will abstain from deciding the case in favor of the ongoing state proceeding.

The only merits issue decided by the district court was the constitutionality of the Bar's pre-clearance requirement. The court narrowly read the rule to conclude that it did not restrain speech prior to publication. Harrell accepts that narrowing construction for purposes of this appeal, but the pre-clearance rule is still unconstitutional because it imposes a burden on speech without serving any legitimate state purpose.

ARGUMENT

Although the district court analyzed the questions of standing, ripeness, and mootness separately, the doctrines overlap. *See ACLU v. Fla. Bar*, 999 F.2d 1486, 1489-90 (11th Cir. 1993). At the heart of each doctrine is the question whether the case is justiciable—that is, whether the "claim . . . may be resolved by the courts." *Levy v. Miami-Dade County*, 358 F.3d 1303, 1305 (11th Cir. 2004). The justiciability requirement is derived from Article III's limit of federal jurisdiction to "cases" and "controversies," and is intended to ensure that cases in the federal courts are "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1569 (11th Cir. 1994) (internal quotation omitted).

The requirement that a case be justiciable is an important one, but equally important is the corollary principle that, when a case presents an actual controversy between the parties, it is the duty of the federal courts to enforce federal law. In such cases, the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). This is especially true in a case involving an injury to First Amendment rights. Although a plaintiff must still show justiciability in such cases, the requirements are "most loosely applied . . . where First Amendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced." *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001).[2]

I. Harrell Has Standing to Challenge the Rules.

The "most central" of the justiciability doctrines derived from Article III is the doctrine of standing. *Kelly v. Harris*, 331 F.3d 817, 819 (11th Cir. 2003). To demonstrate standing, a plaintiff must make a three-part showing: (1) that the plaintiff has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is

[2] On this point, the district court misinterpreted this Court's precedent. The court quoted *Konikov v. Orange County* as holding that, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 410 F.3d 1317, 1319 n.1 (11th Cir. 2005). *Konikov*, however, was addressing the doctrine of constitutional avoidance, and held only that it would not decide a constitutional question when the plaintiff had already obtained full relief under a separate, statutory claim. *See id. Konikov* did not suggest that the federal courts should leave a plaintiff without *any* remedy for violations of constitutional rights except as a last resort. *See id.*

fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury. *Id.* at 819-20. Harrell easily satisfies these requirements here.[3]

A. Harrell Has Shown That He Is Injured by the Challenged Rules.

The first element of the standing inquiry requires the plaintiff to show that he has "sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged law. *Lujan*, 504 U.S. at 575 (internal quotation omitted). The injury need not be large; "an identifiable trifle" justifies review by a federal court. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009). Even minor and temporary infringement of First Amendment freedoms constitute an injury sufficient to give rise to federal jurisdiction. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976).[4]

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[3] Each element of the test "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the context of summary judgment, "the plaintiff must set forth by affidavit or other evidence specific facts . . . which for purposes of the summary judgment motion will be taken to be true." *Id.*

[4] At one point, the district court suggested that "many of Plaintiffs' challenges are based on the overbreadth doctrine." (DN 50 at 2 n.2). The overbreadth doctrine provides 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). Harrell has never raised such a challenge. Although Harrell does not doubt that the challenged rules exert a chilling effect on many other lawyers in the state, he relies on his own injuries, rather than the injuries of others, to establish his standing.

In *Jacobs v. Florida Bar*, this Court held that lawyer plaintiffs had standing to seek declaratory and injunctive relief against Florida's lawyer advertising rules. 50 F.3d 901. The plaintiffs alleged that they wanted to produce and use advertisements "which are, or may be violative of the [challenged] rules." *Id.* at 903 n.8. The district court dismissed for lack of standing, but this Court reversed. *Id.* at 904. The Court held that the lawyers' allegations established that their speech had been unconstitutionally chilled. The Court wrote: "A plaintiff stating that he intends to engage in a specific course of conduct arguably affected with a constitutional interest . . . does not have to expose himself to enforcement to be able to challenge the law." *Id.* (internal quotation omitted).

These are precisely the allegations that Harrell has made here. Harrell's declaration establishes that he is a practicing lawyer in Florida who has advertised in a variety of media for many years. (DN 29-1 ¶¶ 1-4). Harrell "depend[s] on advertising for the success of [his] firm." (DN 29-1 ¶ 31). He has frequently submitted his ads for review with the Florida Bar in the past and the Bar has rejected many of his proposed ads. (DN 29-1 ¶ 5). Moreover, the challenged rules have forced Harrell to discard "numerous ideas for advertising campaigns" and to adopt a minimalist campaign that he considered to be less interesting and less effective than it could have been had it used the prohibited techniques. (DN 29-1 ¶ 24). Harrell's declaration states that he "intend[s] to run many more

advertisements in the future;" that, if the rules did not restrict him from using the challenged techniques, he would use those techniques in his ads; and that, as a result, his ads would be more effective. (DN 29-1 ¶¶ 24, 31).

1. Harrell Need Not Specify a Particular Date on Which He Wishes to Run His Advertising.

The district court concluded that Harrell's declaration was insufficient to create standing because he did not "not indicate when he would create or publish these proposed advertisements, other than his general allegations that he would develop these advertisements if the challenged rules did not exist." (DN 50 at 43). Relying on *Lujan*, the district court held that Harrell's failure to specify particular dates for creation and publication meant that his claims were not "concrete" or "imminent" enough to give rise to federal jurisdiction. (DN 50 at 43).

Lujan involved a challenge by an environmental group to a regulation promulgated under the Endangered Species Act. 504 U.S. 555. The Act required agencies to consult with the Secretary of the Interior before taking any action that might affect endangered species, but the challenged regulation created an exception to that rule for actions taken in foreign nations. *Id.* at 557-58. To establish injury from the regulation, a Defenders of Wildlife member submitted an affidavit stating that she had gone to Egypt six years earlier and observed the traditional habitat of the endangered Nile crocodile. *Id.* at 563. Though the member had not seen the crocodile itself, she alleged that she "intend[ed] to" return to

Egypt and "hope[d] to observe the crocodile directly." *Id.* The plaintiffs argued that the failure of an agency involved with construction of the Aswan High Dam to consult with the Secretary of the Interior about the crocodile "increas[ed] the rate of extinction of endangered and threatened species," and thus risked depriving the member of the opportunity to see the crocodile the next time she visited. *Id.* at 562-63. The Court rejected this basis for standing, holding that the member's "some day" intentions to return could not support a finding of an "actual or imminent" injury. *Id.* at 564.[5]

The injury at issue in *Lujan* was the reduction in probability that a Defenders of Wildlife member would see an endangered crocodile in Egypt. Such an injury is far more uncertain and attenuated than Harrell's claim that he is affected by rules that regulate every aspect of his advertising practice, which is the basis for his livelihood. Moreover, the injury in *Lujan* (failure to see a crocodile) would happen, if at all, only in the uncertain future, while Harrell's injury (restraint of his speech) is occurring now. As previously explained, a First Amendment violation, no matter how minimal, is always an irreparable injury. *Elrod*, 427 U.S. at 373. Finally, as the Court noted in *Lujan*, the likelihood that one statutorily mandated conference with the Department of Interior would have any effect on the likelihood of seeing a

[5] A second affidavit by another member stated that she had travelled to Sri Lanka eleven years earlier to view endangered species "such as the Asian elephant and the leopard." *Lujan*, 504 U.S. 563.

crocodile was remote. Harrell's injury, however, would be remedied at the moment the advertising rules were declared unconstitutional because he would no longer be subject to the restrictions, even if it took him days, months, or years to complete production of his new advertisements. *Lujan* itself recognized that when a plaintiff is directly subject to the challenged government action, as Harrell is subject to the advertising rules, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." 504 U.S. at 561-62.

In any case, Harrell's allegations are as specific as he could have made them. Although Harrell did not specify any particular dates for running future ads, he did allege that he "would develop and air [the] advertising campaigns if not prohibited from doing so by the Bar." (DN 29-1 ¶¶ 23, 24, 28, 29). As long as the advertising rules remain in place, Harrell cannot publish his planned ads or even set a date on which to run them.[6]

2. Harrell Need Not Actually Produce and File the Advertisements He Wishes to Run.

The district also held that Harrell's declaration was insufficient to establish his standing because, although he alleged that he would make ads that violate the rules if he weren't prohibited from doing so, he did not actually produce copies of

[6] The district court also noted that Harrell did not "indicat[e] when [he] considered [his proposed advertising] campaign," but that question is irrelevant to the question of standing. (DN 50 at 18).

the proposed advertisements and file them with the court. For this reason, the court held that the case lacked sufficient "specificity regarding the precise statements and content of such advertisements." (DN 50 at 43). The same situation, however, existed in *Jacobs*. There, this Court held that the plaintiff had standing to challenge the Bar's advertising rules even though the plaintiff had not submitted any actual copies of ads and only alleged generally that the ads would violate the rules. *Jacobs*, 50 F.3d at 906 n.18.

In this case, Harrell cannot submit actual copies of advertisements that he would run in the absence of the rules because he has never produced such ads. As Harrell's declaration explains, "[i]t is very expensive to produce advertising, and especially television advertising;" and therefore "there is a strong incentive to leave out any elements that even arguably violate the Bar's rules to avoid the cost of having to re-produce the ads at great expense." (DN 29-1 ¶ 27). Nevertheless, Harrell has set forth far more specific information than was available in *Jacobs* about the advertisements he plans to run. Harrell's declaration not only states generally that he has discarded many advertising ideas because they would violate the rules, but also provides specific examples of particular ideas he was forced to reject and explains how those ideas would have violated the rules.

a. Quality of Services

Many aspects of advertisements that Harrell wishes to run would violate the challenged rule against statements of quality. Fla. R. Prof'l Cond. § 4-7.2(c)(2). Indeed, as Harrell points out, the primary purpose of advertising is to convey information about the quality of a firm's services. (DN 29-1 ¶ 25). It is therefore nearly impossible to produce an advertisement that does not contain any statements regarding quality. (DN 29-1 ¶ 25). If such a rule were applied to other industries, it would prohibit slogans like "oh what a relief it is" (Alka-Seltzer), "it takes a licking and keeps on ticking" (Timex), "good to the last drop" (Maxwell House), and "it keeps going and going" (Duracell). *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).

In particular, Harrell details one advertisement he wishes to run that features his family and dogs, and the families of other lawyers at the firm. (DN 29-1 ¶ 28). A major theme of the planned campaign would be to demonstrate that the firm is friendly and accessible to average consumers, and that it treats its clients and lawyers like family. (DN 29-1 ¶ 28). As Harrell's declaration explains, descriptions of the friendly and caring nature of the firm's lawyers would directly violate the rule against "describing and characterizing the quality of the lawyer's services,"

which the Florida Supreme Court has interpreted to prohibit statements about a lawyer's "character and personality traits." *Fla. Bar v. Pape*, 918 So. 2d 240, 244 (Fla. 2005).

The Bar also applies this rule to prohibit even *implicit* statements of quality, such as "Come and experience the Nation difference," "When Who You Choose Matters Most," and "You owe it to yourself." (DN 29-12 at 134; DN 29-13 at 14, 36). Several statements Harrell wishes to make in future advertisements would violate the rule in this regard, including the statements "I can help," "we can help," "we fight to win," "we're committed to fight . . . to right those wrongs," "you need strong legal representation," and "we help accident victims fight for justice every day." (DN 29-1 ¶ 21(d), (f)).

b. Promises of Results

The Bar interprets the rule against "promises of results," Fla. R. Prof'l Cond. § 4-7.2(c)(1)(G), to prohibit ads where the only "result" promised is the provision of assistance to a client, such as the statement "we'll steer you in the right direction." (DN 29-13 at 38). For this reason, the same slogans that would violate the rule against quality of services (such as "I can help," or "we fight to win") would also violate this rule. (DN 29-1 ¶ 21(d)).

The Bar applies the rule against promises of results even where the promise is implicit, or where it is inherently subjective and unprovable, such as in the

slogans "Don't let an incident like this one ruin your life," "Don't allow the American dream to turn into a nightmare," and "Attorneys Righting Wrongs." (DN 29-13 at 21, 28, 36). Statements in Harrell's planned advertisements such as "don't give up" would thus also run afoul of the rule. (DN 29-1 ¶ 21(e)).

c. Comparisons

The rules prohibit any "comparisons" that cannot be "factually substantiated." Fla. R. Prof'l Cond. § 4-7.2(c)(1)(I). The comments to the rules establish that even subjective and unprovable statements like "one of the best" and "one of the most experienced" are prohibited by this rule. *Id.*, cmt.

As Harrell's declaration notes, one of the key functions of advertising is to compare one's services with the services of one's competition, and thus it is very difficult to develop advertisements that do not violate this rule. (DN 29-1 ¶ 25). Slogans outside the legal industry that would run afoul of the rule against comparisons include "the greatest show on earth" (Barnum & Baily), "the best a man can get" (Gillette), and "bring out the best" (Hellmann's). Compliance with this rule is particularly difficult because the rule also prohibits statements about qualities that are *common* to all lawyers. Fla. R. Prof'l Cond. § 4-7.2, cmt. It is nearly impossible to create an advertisement that avoids any statement about the advertising lawyer that is either common to all lawyers or that sets them apart.

Harrell's declaration states that he wished to develop an advertising campaign geared entirely around comparing his firm's services with the services of other firms. (DN 29-1 ¶ 29). The advertisement would explain how consumers could benefit from the relative size and experience of Harrell & Harrell as compared to other firms in the market. (DN 29-1 ¶ 29). Such an advertisement would unambiguously run afoul of the comparison rule.

d. "Manipulative" Advertisements

The rule against "manipulative" elements in lawyer advertising is one of the broadest and most unpredictable aspects of the challenged rules. Fla. R. Prof'l Cond. § 4-7.2(c)(3). In a sense, every advertisement seeks to manipulate the viewer into taking a specific course of action. (DN 29-1 ¶ 1). Moreover, many ads that would be considered manipulative would also seem to "appeal to the emotions." Fla. R. Prof'l Cond. § 4-7.2, cmt. For example, AT&T's "reach out and touch someone" would implicate these rules, as would nearly any Hallmark commercial.

Because he is a personal-injury lawyer, the rule imposes a particular hardship on Harrell because the Bar prohibits as "manipulative" almost any conceivable image with which a lawyer could convey a willingness to take accident cases. These include not only actual scenes of accidents but also images such as a man with crutches, a child in a wheelchair, toy race cars crashing into each other on a toy race track, and even a drawing of a man's head with stars

floating around it, as in a Road Runner cartoon. (DN 29-9 at 58; DN 29-13 at 43, 49; DN 29-17 at 15-16). As Harrell explains in his declaration, it is very difficult to create a modern advertisement that appeals to consumers without using any visual representations such as these. (DN 29-1 ¶ 26).

Harrell's declaration also explains how his planned advertisement featuring the family-friendly nature of the firm would be viewed as "manipulative." (DN 29-1 ¶ 28). In particular, Harrell plans to include in the advertisement his two large mastiff dogs, who live at his firm during the work day. (DN 29-1 ¶ 28(b)). Although the dogs are not dangerous, they are very large, powerfully built animals and are popularly known as guard dogs that ferociously defend their territory. (DN 29-1 ¶ 28(b)). They are therefore prohibited under the Florida Supreme Court's decision in *Pape*, which held that images of dangerous dogs and other animals are "manipulative." 918 So. 2d 240. Other statements that Harrell has run in past ads and that he plans to run again in the future include "nursing home neglect is just wrong," "it is wrong that loved ones in nursing homes are neglected," and "our seniors deserve better." (DN 29-1 ¶ 21(c)). Any one of these could be said to be "manipulative" or to "appeal to the emotions."

e. Backround sounds

As Harrell's declaration explains, nearly any professionally designed advertisement will have some sort of background sound. (DN 29-1 ¶ 26). Harrell's

advertisements make a faint whooshing sound that plays as text moves across the screen. (DN 29-1 ¶ 21(b)). These ads unambiguously violate the rule against background sounds. Rule 4-7.5(b)(1)(C). Harrell has also planned to run advertisements that would include background noises caused by his dogs, gym equipment, and atmospheric noise at the firm. (DN 29-1 ¶ 21(d)). That such sounds are completely harmless is of no importance to the Bar, which has applied the rule to prohibit the sounds of children playing, a person exhaling, a computer turning off, footsteps, a light switch, and a seagull. (DN 29-13 at 45, 46, 51).

f. Other rules

The other challenged rules are so broad that they capture most or all of the advertisements discussed so far. For example, any advertising element that is not strictly factual would run afoul of the general rule prohibiting statements that are "unsubstantiated in fact" and the general rule limiting advertisements to "useful, factual information." Rule 4-7.1, cmt.; 4-7.2(c)(1)(D). The restriction on advertising to useful, factual information is especially onerous because most forms of useful, factual information that are commonly used in lawyer advertisements (including statements about a lawyer's record of success, information about the quality of a lawyer's services, and testimonials of past clients) are prohibited by separate rules, Rule 4-7.2(c)(1)(D), (J); (c)(2), leaving lawyers with little to say.

3. **Harrell Need Not Show a Specific Threat of Enforcement.**

In addition to holding that Harrell had not shown how his ads would violate the challenged rules, the district court held that Harrell could not show injury because he could not show that the Bar would implement disciplinary action against him. (DN 50 at 43). As *Jacobs* recognizes, however, the relevant injury in a First Amendment pre-enforcement challenge is "a *realistic danger* of sustaining direct injury as a result of the statute's operation or enforcement," or, in other words, a "credible threat of prosecution." 50 F.3d at 904 (emphasis added). The "credible threat of prosecution" standard sets a "low threshhold," requiring the plaintiff only to show that the "probability that the challenged provisions . . . will be enforced" is more than "chimerical" or "imaginary." *Eaves*, 601 F.2d at 819. A plaintiff need not show that the statute is likely to be enforced because, even if a prosecution never materializes, the plaintiff will still suffer injury from being "chilled from exercising her right to free expression" and will have to "forgo[] expression in order to avoid enforcement consequences." *Wilson v. State Bar of Georgia*, 132 F.3d 1422, 1430 (11th Cir. 1988); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008) (holding that a chilling effect is enough to give rise to injury for standing purposes); *Houston Chronicle Pub. Co. v. League City*, 488 F.3d 613, 618 (5th Cir. 2007) (same); *N.H. Right to Life v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (same). In these circumstances, the constitutionally significant

injury is not a prosecution by the state, but the plaintiffs' own self-censorship. *See ACLU*, 999 F.2d at 1492.

As already explained, Harrell has good reason to believe that his ads would violate the challenged rules. These facts distinguish the case from *Digital Properties v. City of Plantation*, on which the district court relied. 121 F.3d 586, 588 (11th Cir. 1997). The plaintiff in *Digital* wanted to build an adult bookstore in an area of the city where the zoning ordinance expressly *allowed* bookstores to be built. *Id.* The plaintiff alleged that when he went to file the building plans with the zoning office, a non-supervisory employee nevertheless told him that the city did *not* allow his planned use. *Id.* The employee also said, however, that she was not in charge of accepting business plans and that the plaintiff should talk with the zoning director. *Id.* Rather than contacting the director, the plaintiff immediately left the zoning office and, five days later, filed suit in federal court. *Id.* This Court held that the claim was not ripe, writing that "[a]t a minimum, Digital had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City regarding the application of the zoning scheme to Digital's proposal." *Id.*

The district court read *Digital* for the proposition that a plaintiff lacks standing to challenge a regulation unless an authorized state official confirms that the plaintiffs' planned course of action would violate the challenged law. But key

to the decision was the fact that the ordinance permitted the plaintiff's plans "on its face" and therefore did not "deprive Digital of its . . . rights." *Id.* at 590. Here, the challenged rules on their face prohibit Harrell planned advertisements.

Moreover, the district court's reading overlooks the long line of cases in which courts have upheld anticipatory challenges to commercial speech regulations without any indication that a state official had specifically prohibited the plaintiffs' speech. *Digital*, for example, relied heavily on *Hallandale*, in which this Court held that federal courts have jurisdiction when plaintiffs "definitely and seriously wanted to pursue a specific course of action which they knew was *at least arguably forbidden* by the pertinent law." *Hallandale*, 922 F.2d at 762, 764 n.1 (emphasis added). Similarly, in *Edenfield v. Fane*, the Supreme Court held unconstitutional Florida's restrictions on solicitation by accountants. 507 U.S. 761 (1993). Although the plaintiff had not engaged in the prohibited forms of commercial speech, he alleged that "but for the prohibition" he would have done so. *Id.* at 764. Numerous other courts have also decided commercial speech issues where the state had not yet enforced, or threatened to enforce, its rules against particular plaintiffs. *See, e.g., Fla. Bar v. Went For It*, 515 U.S. 618 (1995) (addressing plaintiffs' challenge to a Florida attorney solicitation rule that the plaintiffs had never violated); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

"The Supreme Court has been most willing to allow anticipatory claims by plaintiffs" in challenges to commercial speech because, in such cases, 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." *Eaves*, 601 F.2d at 819. "[A]ny probability of enforcement, however small, may deter even a genuinely interested plaintiff." *Id.* Indeed, when a plaintiff can show a genuine interest in disobeying the statute, this Court has held that "the probability of enforcement is irrelevant to the existence of an Article III case or controversy." *Id.*[7]

To be sure, an *unreasonable* fear of prosecution is not enough to give a plaintiff standing. *See ACLU*, 999 F.2d at 1492 (the plaintiff must demonstrate that "he reasonably believed that he had to forego what he considered to be constitutionally protected speech in order to avoid disciplinary charges being brought against him"). But as long as there is "some reason [for] fearing prosecution," the requirements of standing are satisfied. *Eaves*, 601 F.2d at 819. Thus, in *Graham v. Butterworth*, 5 F.3d 496 (1993), this Court held that a judicial candidate had standing to challenge a statute restricting his use of certain advertisements even though the prosecutor had expressly declined to prosecute

[7] *See also MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 744 (7th Cir. 2007) ("[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened.").

him. It was enough, the Court held, that Butterworth "intended to engage in arguably protected conduct, which the statute seemed to proscribe." *Id.* at 499.[8]

The district court relied on *ACLU* in support of its holding that Harrell lacks standing, but that case argues strongly for the opposite result. There, a judicial candidate wished to engage in speech that he was concerned would be held to violate a provision of the Florida Code of Judicial Conduct requiring candidates to "maintain the dignity appropriate to judicial office." 999 F.2d at 1488. The Committee on Standards of Conduct Governing Judges had issued an advisory opinion that the proposed speech would violate the code. *Id.* The committee, however, had no power of enforcement, and its opinion was not binding on anybody. *Id.* On the other hand, the agency that *was* charged with enforcing the rule, the Judicial Qualifications Commission ("JQC"), had refused to issue an opinion on the question, and, after a federal court declared a related canon

[8] In an analogous context, plaintiffs in environmental cases also generally proceed on the basis of affidavits alleging future injuries. In *Friends of the Earth v. Laidlaw Environmental Services*, for example, plaintiff environmental groups challenged a water-treatment plant's pollution emissions under the Clean Water Act. 528 U.S. 167 (2000). The plaintiffs demonstrated this injury with affidavits of members who used the affected areas for sports and recreation and who stated that they would be less likely to continue using those areas if the challenged pollution were to continue. *Id.* at 181-83. The Supreme Court held this showing sufficient to demonstrate standing, rejecting the defendants' contention that "demonstrated proof of harm to the environment" was necessary. *Id.* at 181. The courts in *Laidlaw* and other cases have held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.*

unconstitutional, stated in court papers that the provision could not constitutionally be applied to the plaintiff's conduct. *Id.*

This Court held that the plaintiff had standing to challenge the rule because, although the JQC admitted that the canon could not be enforced against the plaintiff, it continued to defend the canon's constitutionality. *Id.* Moreover, the Court noted that the JQC was not bound by its statements in court and remained free to change its mind about the meaning of the statute in the future. *Id.* The Court also observed that the Florida Supreme Court, not the JCQ, was the final arbiter of the statute's meaning and had recently upheld the canon against a First Amendment challenge. *Id.* The Court concluded that the plaintiff "wanted to pursue a specific course of action which [he] knew was at least arguably forbidden by the pertinent law," and that "[a]ll that remained between the plaintiff and impending harm was the defendant's discretionary decision—which could be changed—to withhold enforcement." *Id.* Thus, the plaintiffs had shown standing.

The factors on which the Court relied to find jurisdiction in *ACLU* are present here to an even greater degree. Although the Bar now claims that the rule against statements regarding quality of a lawyer's services does not prohibit Harrell's slogan, nothing prevents the Bar from changing its mind on this issue in the future, as it has done in the past. Moreover, as in *ACLU*, the Bar here has defended the constitutionality of the rules, and the Florida Supreme Court—the

final arbiter of the rules' meaning—has upheld their constitutionality in other cases. *See, e.g.*, *Pape*, 918 So. 2d at 244. Finally, the Bar has never denied that the rules prohibit the sorts of advertising devices that Harrell wishes to run and believes are prohibited by the challenged rules.[9]

4. Harrell Has Standing to Challenge the Rules on Grounds of Vagueness.

Harrell's declaration establishes the ways in which his advertisements seem to run afoul of the challenged rules at a much higher level of particularity than the plaintiffs in *Jacobs*. To the extent, however, that there is still uncertainty about how the Bar will apply the rules to Harrell's advertising, Harrell nevertheless has standing to challenge the rules on grounds of vagueness.

The district court held that Harrell lacked standing to bring his vagueness challenge. (DN 50 at 61 n.42). However, when, as here, a plaintiff challenges the use of overly vague or standardless criteria, the lack of prior enforcement or a specific threat against the plaintiff is irrelevant "because it is the existence, not the

[9] The district court suggested that Harrell failed to establish standing because he had not shown that the Bar applied the rules to him in a discriminatory manner, writing that "[t]he Eleventh Circuit's decision in *Nat'l Alliance* suggests that such a showing is required to satisfy the standing requirement." (DN 50 at 43 n.34). *National Alliance*, however, involved a claim under the Equal Protection Clause rather than the First Amendment. *Nat'l Alliance for Mentally Ill, St. Johns Inc. v. Bd. of County Comm'rs of St. Johns County*, 376 F.3d 1292 (11th Cir. 2004). The only reason this Court required a showing of discriminatory application was because that was the gravamen of the plaintiff's Equal Protection claim. *Id.* Harrell has not asserted an Equal Protection claim here.

imposition, of standardless requirements that causes [the] injury." *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1260 (11th Cir. 2006).

Although the district court expressly did not reach the merits of the vagueness challenge, it "note[d] that Plaintiffs do not explain how the rules are vague, other than conclusory assertions that the rules are all too vague to provide fair notice." (DN 50 at 61 n.42). The district court's assertion is baffling, given that plaintiffs devoted a substantial portion of their briefing to the vagueness issue. Harrell included in the record the decisions of the Standing Committee over the course of about a year. (DN 29-1, Exh. 12). Even a casual perusal of the decisions reveals how unpredictable the Bar's application of the rules has been. To name just a few of countless inconsistencies resulting from this system, the Bar prohibited the image of a fortune teller but allowed the image of a wizard, prohibited a firm from calling itself "Freedom Law" but allowed "Liberty Law," and prohibited a claim to "fight insurance companies" while allowing a claim to "stand up" to them. (DN 29-1, Exh. 11 at 12; Exh. 12 at 17, 26, 31, 57, 61, 66, 79, 80). The Bar typically offers no explanation for these inconsistencies, leaving lawyers like Harrell to wonder why the public needs protection from the slogans "Don't settle for anything less" and "Don't let your family settle for less" but not from "Don't settle for less than you deserve," "To everyone their due," and "You deserve results!" (DN 29-1, Exh. 1; Exh. 5 at 2; Exh. 7; Exh. 12 at 35; Exh. 22 at 1).

Harrell pointed out numerous other examples of unpredictable decisionmaking in support of his vagueness challenge, including:

Quality of Services

- The Bar held that the slogans "MAKE THE RIGHT CHOICE!" and "When who you choose matters most" improperly characterized the quality of the lawyer's services, but allowed "Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely." (DN 29-1, Exh. 12 at 14; Exh. 14 at 3; Exh. 15 at 3).

- The Bar held that the phrase "you need someone who you can turn to, for trust and compassion with this delicate matter" improperly characterized the quality of the lawyer's legal services. The Bar's advertising handbook, however, provides that an essentially indistinguishable phrase would not violate the rules: "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time." The Bar also held that the statement "let us take care of you" improperly promised results, though the handbook provides that "[a]n attorney who cares for your rights" is permissible. (DN 29-1, Exh. 8 at 56, 57; Exh. 12 at 40, 51).

Promises of Results

- The Standing Committee held that the phrase "People make mistakes, I help fix them" improperly promised results but noted, without explanation, that it would be permissible if revised to say "People make mistakes, I help them." The standing committee also held that the statement "We'll help you get a positive perspective on your case and get your defense off on the right foot quickly" promised results, but "If an accident has put your dreams on hold we are here to help you get back on track" did not. (DN 29-1, Exh. 12 at 2, 25, 29).

- The Bar held that the statement "Remember, your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom" improperly promised results, but that "The lawyer you choose can help make the difference between a substantial award and a meager settlement" was permissible. And the standing committee decided that "Hiring an attorney experienced in DUI law is an efficient and effective way to ensure that all possible measures are taken to protect your legal rights" promised results, but recommended that the lawyer change it to "Hiring an attorney experienced in DUI law is an efficient and effective way to protect your legal rights," which, if anything, appears to promise results more than the original slogan. (DN 29-1, Exh. 12 at 5, 71; Exh. 23 at 9-10).

Manipulative Ads

- The Bar prohibited as "manipulative" a close-up image of a tiger's eyes, a lawyer's claim to have the "strength of a lion in court," and a photograph of a lawyer's three-legged dog. The Board of Governors, however, held that an image of two panthers was permissible, and the Bar has also allowed the images of lions in a crest because, in that context, they were "mythical, stylized lions and not actual dangerous animals." The Bar prohibited an attorney from claiming to be a member of the "Law Dragon 3000 Leading Plaintiffs' Lawyers" because it was a "verbal portrayal that is manipulative," but allowed membership in the "Local Law Tigers." (DN 29-1, Exh. 12 at 5, 53, 57, 66, 78, 79, 80; Exh. 14; Exh. 21).

- The Bar classified an image of an elderly person looking out a nursing home window as "manipulative" but concluded that the photograph of a man looking out a window, representing victims of accidents caused by DUI, was not. (DN 29-1, Exh. 12 at 79; Exh. 16 at 15-16).

As defendants themselves pointed out, the rules are so vague that twenty percent of appeals to the standing committee, and nearly half of appeals to the Board of Governors, result in a reversal of the Bar's prior decision, indicating that the Bar's opinions on compliance may not be substantially more accurate than the opinion of the submitting lawyer. (DN 33-3 ¶¶ 5, 9, 10). The inherent unreliability

of the Bar's own review process is even more obvious considering that more than a third of recent standing committee decisions, and a large proportion of Board of Governors decisions, were decided by split vote. (DN 29-1, Exhs. 12, 16-20, 22-23).[10]

Much of the rules' unpredictability revolves around the rule against "manipulative" ads. This is not surprising, given that a majority of the Bar's 2004 advertising task force viewed the rule against manipulative ads as too vague and difficult to apply. (DN 29-1, Exh. 11 at 74). A motion to delete the provision as overly vague failed by only one vote, not because the rule was adequately clear, but because members worried that removing the rule would "run[] the risk of significantly lowering the standard for attorney advertising." (DN 29-1, Exh. 11 at 74). If the Bar cannot consistently determine the meaning of its own rules, then lawyers cannot be expected to either.

B. Harrell's Allegations Satisfy the Remaining Requirements for Standing.

In addition to showing an actual industry, a plaintiff seeking to establish standing must also show that the injury was caused by the defendant and is redressable by the court. *Kelly*, 331 F.3d at 819. An injury is redressable only if there is a "substantial likelihood that a federal court decision in favor of a claimant

[10] Out of the 382 recent ad decisions included in Exhibit 12 to the Second Harrell Declaration, 127, or about 33%, resulted in split votes by the standing committee. (DN 29-1, Exh. 12).

will bring about some change or have some effect." *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159-60 (5th Cir. 2007) (holding in a commercial speech case that "causation and redressability [were] easily satisfied" because the challenged law would impose penalties on the plaintiff and a declaration of unconstitutionality would allow the penalties to be avoided). In many cases, including this one, the last two elements of the test are closely related, because, if the defendant is the cause of the plaintiff's injury, it is likely that a remedy granted against that defendant will redress the injury. *Id.*

The district court held that Harrell had failed to show that his injury was traceable to the Bar's actions for largely the same reasons that it held he had not shown an injury: that he did not describe the ads with sufficient specificity and that the defendants had not threatened any action related to the ads. (DN 50 at 50-51). For the same reasons that Harrell has shown that he is injured by the rules, he has shown that the injury is traceable to the defendants' implementation and enforcement of those rules.

The district court also held that Harrell's injury was not redressable because he had not submitted specific advertisements for review and thus had not shown that the proposed advertisements "complied with *all of the other* advertising rules." (DN 50 at 50). As already explained, however, *Jacobs* does not require a plaintiff to go through the effort and expense of developing a completed advertising

campaign before he can challenge the rules. In *Jacobs*, the plaintiffs alleged that they would engage in certain prohibited advertising techniques *but for* the challenged advertising rules. This Court noted that, because the rules prohibited the challenged techniques "in their entirety," any advertisement containing one of the techniques would violate the rules regardless of the other content in the ad. *Id.* The Court therefore concluded that it "would not benefit from . . . production of a nonmisleading dramatization or testimonial." 50 F.3d at 906 n.18.

The district court relied for its contrary conclusion on *K.H. Outdoor, L.L.C. v. Clay County, Florida*, 482 F.3d 1299 (11th Cir. 2007). There, the Court held that an as-applied challenge to a billboard regulation did not involve a redressable injury because, even setting aside the challenged regulation, the specific billboard at issue was too large to be displayed under the law. *Id.* The plaintiff in *K.H. Outdoor*, however, challenged the regulation only as it was applied to a specific billboard and not, as in this case, in its entirety. Evidence that, regardless of the court's ruling, the billboard could not be displayed therefore established that the injury was not redressable. In other contexts, however, both the Supreme Court and the Eleventh Circuit have made clear that an injury may be redressed by a favorable decision even if hypothetical factors beyond the court's control may ultimately frustrate relief. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will

set aside the agency's action and remand the case-even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001).[11]

II. Harrell's Claims Are Ripe.

The question of ripeness asks "whether the claim is sufficiently mature, and the issue sufficiently defined and concrete, to permit effective decisionmaking by the court." *Konikov*, 410 F.3d at 1322. The doctrine has both constitutional and prudential dimensions. Constitutionally, ripeness implements Article III's case-or-controversy requirement by demanding that a plaintiff show that an injury either has occurred or is imminent enough to create a genuine dispute between the parties. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978). In this respect, ripeness overlaps with standing's requirement of an actual injury. The prudential components of the ripeness test set forth an approach to determining whether judicial intervention is appropriate or should be postponed until events create a greater need for review. Two inquiries are relevant to this

[11] *See also Utah v. Evans*, 536 U.S. 452 (2002) (injury redressible where favorable decision "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly addresses the injury suffered); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (holding that even if a court decision led to the same injury via a different exchange, if the exchange in question was unlawful it must be set aside: "What the parties do after that is up to them, and is not before us.").

question: "1) whether the issues are fit for judicial decision and 2) the hardship to the parties of withholding court consideration." *Konikov*, 410 F.3d at 1322. In this case, both factors strongly support the Court's jurisdiction.

A. Fitness

The "fitness" inquiry focuses on whether the plaintiffs' claims present legal issues appropriate for judicial resolution without more factual development or whether the courts' ability to review the action would be enhanced by awaiting a challenge to a specific application. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967). Cases are particularly likely to be considered fit for review where the issues are purely legal and do not depend on a particular application of a rule. In such cases, the Supreme Court has consistently deemed challenges presumptively fit for review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 756-57 (D.C. Cir. 2003) ("[W]e ask first whether the issue raised in the petition for review presents a purely legal question, in which case it is presumptively reviewable.").

Harrell's challenge here is "purely legal" because it raises only the question whether the state can demonstrate that the challenged rules are constitutional under the test set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, the court

must first determine whether the regulated speech is misleading or involves unlawful activity. *Id.* at 563-64. If not, the government must show the existence of three factors before it may impose restrictions: "(1) whether the state's interests in limiting the speech are substantial; (2) whether the challenged regulation advances these interests in a direct and material way; and (3) whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Mason v. Fla. Bar*, 208 F.3d 952, 955-56 (11th Cir. 2000). The test requires the state to put forward the evidence on which it relied when it enacted the challenged rules and does not require analysis of the effect of the rules on any particular advertisement. It is thus particularly well suited for review. Both this Court and the Supreme Court have entertained anticipatory challenges to commercial speech regulations under *Central Hudson*. *See, e.g.*, *Edenfield*, 507 U.S. 761; *Jacobs*, 50 F.3d 901.

Moreover, the parties have now completed discovery and have fully briefed and argued the constitutionality of the challenged rules on cross-motions for summary judgment. In the process, the Bar submitted the evidence on which it purported to rely in creating the rules and made its argument that this evidence is sufficient to support the rules' constitutionality. Requiring the process to be repeated would burden both the parties and the courts without serving any purpose.

See Payne Enters. v. United States, 837 F.2d 486, 492 (D.C. Cir. 1988) (holding that a case was ripe when "nothing would be gained by postponing its resolution").

Finally, this is not a case where plaintiffs are challenging a rule that has never been implemented by an agency. Most of the challenged rules have been in place since 1990 and have been regularly applied to lawyers in the state, including multiple times to Harrell himself. Moreover, the Florida Supreme Court has had several opportunities to review the rules and has upheld them against constitutional challenge. *See, e.g., Pape*, 918 So. 2d at 244. When, as here, there is no uncertainty about whether the agency is implementing the regulation as written, courts are particularly likely to conclude that a challenge is ripe for review. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006).

B. Hardship

The "hardship" inquiry seeks to identify circumstances that override the interests in postponing review. The analysis examines not only whether the plaintiff has shown injury imminent enough to create a case or controversy, but also whether postponing review would itself create hardship. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

The Supreme Court has noted that a "major" circumstance where hardship will render a challenge ripe is when "a substantive rule . . . as a practical matter requires the plaintiff to adjust his conduct immediately" or if it "forces the plaintiff

to choose between costly compliance with a regulation or risking punishment for noncompliance." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). That is precisely the situation here. Harrell depends on advertising for his livelihood, and regulations restricting his ability to advertise therefore have a "direct and immediate" effect on his "day-to-day business." *Abbott Labs.*, 387 U.S. at 152. Moreover, as Harrell explains in his declaration, complying with the Bar's restrictive rules forces him to make relatively bland, uninteresting advertisements that convey less information and make it more difficult for him to attract clients to the firm.

The Supreme Court has also held that requiring a plaintiff "to proceed without knowing whether [a regulatory scheme] is valid would impose a palpable and considerable hardship." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581 (1985). Here, the uncertainty of the rules' constitutionality require Harrell to suffer "the continuing uncertainty and expense" of complying with the Bar's regulatory scheme even though he contends that the rules are unconstitutional. Under these circumstances, the hardship inquiry supports immediate review. *Id.* at 582.

Challenges to agency rules are particularly likely to involve hardship justifying review when refusal to hear the challenge would frustrate a plaintiff's ability to bring a later challenge. *See Ohio Forestry*, 523 U.S. at 733, 734 (holding

that "delayed review would cause hardship to the plaintiffs" where plaintiffs lacked "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain"). Here, the district court's refusal to consider Harrell's challenge to the rules frustrates his ability to bring a future challenge in several ways. First, the district court's decision means that Harrell will have to suffer even more costly burdens before he can bring suit in federal court. Not only will Harrell have to pay a fee for filing each ad, but he will then be forced to submit to a Bar decisionmaking process that is arbitrary, unpredictable, and provides no opportunity for consideration of the speaker's First Amendment rights.

Moreover, although the rules require a single member of the Bar staff to issue an initial opinion on a submission within fifteen days, a filer whose advertisement is rejected by staff must ask for further review by the standing committee, which meets approximately once per month, and then the Board of Governors, which generally meets on a bi-monthly basis, neither of which faces a deadline for issuing a decision. (DN 29-1, Exh. 13 at 3, 5-6 (requiring only that the standing committee and Board of Governors schedule the matter for *consideration* at the next meeting)). In Harrell's past appeals to the Board of Governors, the entire process took up to nine months to complete, and even that depended on the relative promptness of Bar decisionmakers. (DN 29-1 ¶ 7).

Even if Harrell eventually receives a decision regarding an individual ad, it would not resolve his injury because he would still be forced to submit to the process again for each advertisement that he produces in the future, in each case being subjected to the random decisionmaking of Bar authorities. The provisions challenged by plaintiffs—including prohibitions on ads that are "manipulative," "misleading," or "likely to confuse"—are so broad and vague that an opinion as to whether any particular ad complies would shed little or no light on their overall meaning. Indeed, although this Court has already examined one of the rules at issue here—the prohibition on characterizations of the quality of a lawyer's services—and held it unconstitutional as applied to the lawyer in that case, *Mason*, 208 F.3d 952, the Bar continues to defend the rule's constitutionality as applied in other cases, including this one.

Thus, Harrell will never know for certain whether certain ads will be approved until he has already made the significant investment in developing the ad and paying the Bar's filing fee, and will continue to be forced into self-censorship, limiting his advertisements in an effort to maximize his chances for Bar approval. The end result of this process will be to force Harrell into litigating his First Amendment rights at his own expense, on a case-by-case basis, spending enormous amounts of money and time on each new advertisement that he wishes to air. Forcing Harrell to submit to this process would not only serve no purpose, it would

in itself add additional burdens to his First Amendment expression. *Cf. Zwickler v. Koota*, 389 U.S. 241, 252 (1967) ("[T]o force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.").

Finally, as the court noted, the Bar's disciplinary process is triggered only when the Bar receives a complaint about a particular advertisement. (DN 50 at 26). Because neither the Bar nor Harrell knows when a complaint will be filed, there will never be any warning before the process has actually begun. Once the process does begin, however, the Bar argues that the federal courts must abstain in deference to the ongoing state process. *See, e.g.*, *Mason v. Fla. Bar*, No. 6:05-CV-627-28JGG, 2005 WL 3747383, at *4 (M.D. Fla. Dec. 16, 2005). Thus, the district court's holding that Harrell may not bring a challenge until discipline has been threatened means that he will lack standing to bring suit in federal court until it is already too late. As a result, he and other plaintiffs will effectively be left without access to the federal district courts.

III. Harrell's Challenge to the Bar's Application of Its Rules to His Slogan Is Not Moot.

The basis for the district court's mootness determination was its conclusion that the Bar is bound by its mid-litigation approval of Harrell's slogan "Don't settle for less than you deserve." But even if the Bar is correct that it is bound by the Board of Governors' decision as to Harrell's slogan and the particular

advertisements that Harrell submitted for review, Harrell stated in his declaration that he uses his slogan in *all* his advertising and that future ads he plans to submit for review will also contain the slogan. (DN 29-1 ¶¶ 17, 19-20). There is no dispute that, as to these future ads, the Bar will not be bound by the Board of Governors' vote.

Given that the Bar is not bound, the chances that it will change its mind are significant. The Bar can and does reconsider the permissibility of particular advertising elements and warns lawyers of this fact when it approves ads. (DN 29-1, Exh. 2 at 2 ("The advertising rules and the Committee's interpretation of those rules may change over time, requiring revision and refiling of existing advertisements.")). Indeed, it was the Bar that originally suggested the slogan "don't settle for less than you deserve," and it was only after a subsequent change of position that the Bar decided that the slogan violated the rules. Because nothing prevents the Bar from changing its mind again in the future, the Bar cannot show that there is "no possibility" that the challenged conduct will not recur.[12]

[12] Indeed, typical anticipatory challenges, including *Jacobs*, do not involve any as-applied challenge to a specific decision. Harrell's inclusion of an additional as-applied claim, even if that claim is later made moot, makes the case more, not less, concrete. *See Thomas*, 473 U.S. at 581 (relying on a completed arbitration—any controversy over which was moot—as providing the necessary element of concreteness to make the challenge to the statutory arbitration requirement ripe"); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 581-83 (1980) (holding that a particular agency action, even if no longer at issue, helped show there was "nothing speculative" about the agency's position and "contribute[d] to the

These facts distinguish the case from *Graham*, 5 F.3d 496, on which the district court relied. In *Graham*, this Court held that a claim for injunctive relief was moot because the prosecutor had concluded that the plaintiff's proposed conduct did not violate the challenged statute. *Id.* at 500. The Court relied on the fact that the prosecutor's determination precluded him from bringing any prosecution against the plaintiff under the statute in any future election, and from "enforcing the statute against . . . other judicial candidates engaging in the same conduct." *Id.* Here, in contrast, the Bar's determination precludes it only from prosecuting Harrell based on the specific advertisement that Harrell submitted for review, leaving it free to prosecute Harrell and other lawyers for other advertisements containing identical content.

Moreover, whereas the prosecutor in *Graham* "repeatedly stated that the statute [did] not prohibit the plaintiff's proposed conduct," *id.*, the Board here conducted its vote in secret and claims that the session is privileged. (DN 23-1 at 4 ¶ 11; DN 23-2 at 7 ¶ 12). Indeed, other than a letter to Harrell from the Bar's ethics counsel, there is no record of the vote anywhere in the public record. Nor is

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concrete controversy" in a facial challenge); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122-25 (1974) (suit challenging labor regulations not moot despite settlement of strike that prompted suit); *see also Ukrainian- American Bar Ass'n v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990) (holding that mootness of as-applied challenge did not moot the case as a whole because "the complaint challenges the Government's policy, not merely [its application]"); *Capitol Tech. Servs. v. FAA*, 791 F.2d 964, 968-69 (D.C. Cir. 1986) (mootness of as-applied challenge did not moot ripe facial challenge).

there any explanation for the Board's decision or of how it could have concluded that "don't settle for less than you deserve" did not violate the rule against characterizing the quality of services, when previous decisions of the Standing Committee on Advertising had concluded that indistinguishable slogans *did* violate the rule, including "Do not settle for anything less," "Choosing a good lawyer shouldn't happen by accident," "Don't let your family settle for less," and "Why settle for less when you can have an entire team of attorneys, investigators, and legal assistants all on your side?" (DN 23-2 at 8-9 ¶ 15).

Even as to Harrell's specific challenge to the Bar's rejection of his slogan, the Board of Governors' decision does not moot the case. Neither the Bar nor the district court disputed that Harrell had standing to challenge that decision at the time the complaint was filed, and "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189 (internal quotations and citations omitted).

The district court held that, as a government actor, the Bar was entitled to a presumption that it would not again engage in wrongful conduct. Even in a case involving a government defendant, however, "voluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed

course simply to deprive the court of jurisdiction." *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (per curiam). The circumstances surrounding the Board of Governors' vote strongly suggest that the defendants here did exactly that. The Board took its vote in a closed meeting, attended by the Bar's counsel in this case, just three weeks after plaintiffs filed their complaint. (DN 23-1 at 4 ¶ 11; DN 23-2 at 7 ¶ 12). In making its decision, the Bar ignored its procedure for appeals of advertising decisions, instead taking the question up "on its own initiative." (DN 27 ¶ 8). Indeed, the Bar's counsel *admitted* at oral argument in the district court that he advised the Board of Governors to reverse the decision on Harrell's slogan after the lawsuit was filed. (Tr. of Jan. 6, 2009 Hrg. at 85).

For these reasons, the case bears no resemblance to *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288 (11th Cir. 2004), on which the district court relied. Not only did the state in Christian Coalition take the formal step of withdrawing the enforceable advisory opinion that was the subject of the lawsuit, but its sincerity in doing so was reinforced by a recent Supreme Court decision declaring a similar rule in another state unconstitutional. *Id.* at 1290. In contrast, the Bar here offers no justification for the Board's decision that would explain its action as anything other than a litigation tactic designed to deprive this Court of jurisdiction to decide the constitutionality of the Bar's rules. If the Bar could so easily escape jurisdiction, it could indefinitely avoid federal review simply by

relenting on any issues brought before the federal courts, only to reassert its position again later.

IV. The Bar's Preclearance Rule Is an Unconstitutional Restriction on Harrell's Speech.

The only claim for which the district court held Harrell had standing was his challenge to the Bar's preclearance requirement. Under Rule 4-7(a)(1)(A), a lawyer must submit an ad for review at least fifteen days before the ad's first planned air date. During the following fifteen day period, the rule requires the Bar to review the ad and notify the submitting lawyer whether it complies with the advertising rules. Rule 4-7(a)(1)(C). The lawyer may then "disseminate" the advertisement "upon receipt of notification by The Florida Bar that the advertisement complies with subchapter 4-7." Rule 4-7(a)(1)(E).

Although the rules, on their face, appear to require approval from the Bar *before* running an advertisement, the Bar contended, and the district court agreed, that no such approval is required. (DN 50 at 65). Thus, although the rules provide that a lawyer may disseminate an advertisement "upon receipt of notification . . . that the advertisement complies" with the rules, under the district court's reading of the rule a lawyer may also disseminate the advertisement upon receipt of notification that the advertisement does *not* comply. The district court's interpretation of the rule effectively transforms the rule from one requiring pre-

clearance to one requiring only pre-*filing*, in which the Bar's opinion on the ad's permissibility is purely advisory.

Even if the rule does not constitute a prior restraint, however, a requirement that Harrell file his advertising for review and wait fifteen days before airing it is indisputably a restriction on his commercial speech. Thus, at a minimum, the Bar would still have to satisfy its "heavy" burden of justifying the rule under the *Central Hudson* test. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Not only does the Bar's evidence fail to justify its rule, however, but its own task force, charged with judging the need for the rule, unanimously voted against it. (DN 29-1, Exh. 10 at 13-14, 36, 54-55).

In support of the rule, the Bar cited the results of a survey of 400 Florida residents, in which about twenty percent said they would have more confidence in the accuracy of information in lawyer advertising if it were precleared by the state. (DN 25-10). Even setting aside the fact that only one-fifth of respondents supported the Bar's position, the Bar's reliance on this survey is misplaced given that the preclearance rule specifically provides that review "does not extend to substantiation of factual claims or statements contained in the advertisements." Rule 4-7.7(a)(1)(D). If the respondents to the survey had known that the ads were being screened not for falsity but only to eliminate common advertising

techniques, there would be no basis for anyone to conclude that the accuracy of the advertisements would be improved.

In the district court, the Bar also alluded to the survey's conclusion that "[m]ost respondents believed that it is important that lawyers be required to submit their advertisements for review." (DN 25 at 22 n.15). The Bar, however, did not explain how public support for a restriction on speech is relevant to the First Amendment analysis. In a system of government that values and protects individual expression, a majority vote alone can never serve as a legitimate basis for restricting speech. *See Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("Access to a public forum . . . does not depend upon majoritarian consent."); *Amidon v. Student Assoc.*, 508 F.3d 94, 102-03 (2d Cir. 2007) (holding that "[u]se of the referendum . . . can place minority views at the mercy of the majority"). In any case, it is again unlikely that the respondents would have answered the same way had they known the system of prior review in question had nothing to do with the truth or falsity of the ads.[13]

[13] Moreover, respondents to the survey also stated that they would be more confident if the advertisements of other professionals, such as doctors, were subjected to pre-clearance. (DN 25-10). The survey thus establishes no reason to regulate lawyers more than other professions, and, at best, establishes that the rule adopted by the Bar is far too underinclusive. *See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 99-100 (2d Cir. 1998) (holding that a state does not materially advance its interests under *Central Hudson* if it "authorize[s] only one component of its regulatory machinery to attack a narrow manifestation of a perceived problem").

In addition to the survey, the Bar also relied in support of the preclearance requirement on a set of data assembled by Bar staff purporting to show that many television and radio ads submitted for review do not comply with the rules. The Bar argued that, without prior review, a noncomplying ad may remain on the air for several weeks before its noncompliance can be discovered. (DN 33 at 26). The flaw in the Bar's argument is that it has no evidence suggesting that the sorts of ads targeted by the prior restraint rule are likely to harm the public during the time it takes the Bar to review them. The examples of noncompliant ads on which the Bar relied contain no ads found to be false or likely to mislead consumers. (DN 29-1, Exh. 11). Rather, the bulk of supposed violations ran afoul of a former rule against ads that create "unjust expectations," a rule that the Florida Supreme Court has since revoked on the ground that the Bar was unable to interpret and apply it consistently. (DN 29-1, Exh. 10 at 7 (stating that the rule was "unclear and incapable of adequate definition to provide guidance to Bar members")). Almost all the remaining purported violations involved purportedly "manipulative" ads (such as an image of a fortune teller), ads that characterize the quality of the lawyer's services (such as the slogan "put your future in good hands"), or other purported violations that have nothing to do with whether the ad is false or whether consumers are likely to be misled. (DN 29-1, Exh. 11).[14]

[14] The very few ads found to be noncompliant on the ground that they were

As Harrell has explained, the reason that attorneys are frequently unsuccessful at complying with these rules is because, like the former rule against ads that create unjust expectations, it is impossible to predict how the Bar will interpret and apply them. It is not surprising, for example, that an attorney would fail to accurately deduce that the advertising rules prohibit the image of a fortune teller but permit the image of a wizard, and prohibit the slogan "put your future in good hands" but permit "don't take chances with your future." (DN 29-1, Exh. 11 at 9-10; Exh. 12 at 63). If the Bar really wanted to improve compliance with its rules, it should have created clear guidelines so that attorneys and Bar authorities would not be forced to guess which ads are likely to be found noncompliant.

CONCLUSION

The district court's decision should be reversed and remanded.

"misleading" or "unsubstantiated" were rejected based on either literal readings of statements that would confuse no reasonable consumer or because the statements could *never* be substantiated because they were statements of unprovable opinion. For example, the Bar determined that the statement "Lawsuits against defective products force big companies to create safer products" was misleading because, "while one of the goals of product liability suits is to force companies to make safer products[,] that is not always the result of such suits." (DN 29-1, Exh. 11 at 64). The ad, however, does not suggest otherwise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that my word processing program, Microsoft Word, counted 13,997 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2009, I caused two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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