

No. 01-

IN THE
Supreme Court of the United States

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,
Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Florida's prohibition of truthful and nonmisleading advertising by dentists regarding their professional credentials and membership in national dental organizations, save when the advertisement provides in state-scripted and "capital letters" that the organizations are "not" "bona fide," violates the First and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

All parties currently in the proceeding are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 284 F.3d 1204, and the opinion of the district court (Pet. App. 25a-45a) is reported at 152 F. Supp. 2d 1317. The district court decision in the initial proceeding (Pet. App. 46a-58a) is reported at 33 F. Supp. 2d 1327.

JURISDICTION

On March 6, 2002, the court of appeals issued its decision on the merits in this case. On April 30, 2002, the court of appeals denied petitioners' motion for rehearing and suggestion for rehearing en banc. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged Florida statutory provision, § 466.0282, is set out at Pet. App 59a-61a.

The First Amendment to the United States Constitution provides in part:

“Congress shall make no law . . . abridging the freedom of speech.”

The Fourteenth Amendment to the United States Constitution provides in part:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

STATEMENT

A. Background

Dr. Richard A. Borgner is licensed to practice dentistry in the State of Florida. He practices general dentistry in St. Petersburg with an emphasis on implant dentistry, and has been doing so for 28 years. Throughout his career, Dr. Borgner has been a member in good standing with the state-licensing board, the Florida Board of Dentistry.

Implant dentists have expertise in replacing defective teeth. They do so by inserting implant devices into the jaw that allow artificial teeth to attach to the bones that once connected the patient's natural teeth. Any dentist who has a general license to practice dentistry in Florida may practice implant dentistry in the State. Accordingly, no specific training or education beyond that required to obtain a general dentistry license is required. Pet. App. 26a.

The American Academy of Implant Dentistry (AAID) has supported the field of implant dentistry for over 50 years. AAID's "primary purpose . . . is the enhancement of its members' knowledge, skill, and expertise in the field of implant dentistry." Pet. App. 2a. To these ends, members of the organization may earn credentials in the field of implant dentistry—the "Associate Fellow" and "Fellow" designations—by completing numerous educational, training and practice requirements.

To become an Associate Fellow, the dentist must (1) complete 300 hours of continuing education in implant dentistry, including 150 hours of clinical implant education, (2) pass a written examination, and (3) successfully complete an oral/clinical treatment case examination. Pet. App. 26a. To become a Fellow, the dentist must (1) have five years of experience in implant dentistry, (2) complete 100 hours of continuing education in implant dentistry (above and beyond the 300 hours required for the Associate Fellow credential), (3) provide dental implant treatment in 50 cases, (4) pass an oral examination, and (5) satisfactorily present 10 cases to the AAID's Admissions and Credential Board. *Id.* at 26a-27a. All told, AAID has roughly 2200 members, about 550 of whom have earned Associate Fellow or Fellow status. *Id.* at 27a. Dr. Borgner is both an Associate Fellow and a Fellow of AAID.

AAID also sponsors a certifying board, the American Board of Oral Implantology/Implant Dentistry (ABOI/ID)

which issues the Diplomate or Board-Certified credential. Dentists may earn this credential by passing ABOI/ID's certification examination and by fulfilling certain educational and practice requirements. *Id.* ABOI/ID began issuing these credentials in 1989, and roughly 200 dentists (including Dr. Borgner) have received the designation since then. *Id.*

B. Florida's Regulation of Implant Dentistry Advertising.

Until recently, Florida law regulated dental advertising in this area by prohibiting false, deceptive, or misleading advertising. Fla. Stat. §§ 466.019, 466.028(1)(d) (1994). In applying that standard, the Florida Dental Board ("the Board") in 1994 specifically permitted dentists to advertise credentials issued by AAID. In doing so, they observed that the advertising was both truthful and non-misleading. Board of Dentistry Order 94-01DS, August 11, 1994 ("BOD 94-01DS"). "[A]lthough Implant Dentistry is not a specialty area recognized by the American Dental Association or the Board," the Board determined that "the AAID and the ABOI/ID are bona fide organizations that credential dentists in the area of implant dentistry." Pet. App. 48a (quoting BOD 94-01DS).

In 1996, the Florida legislature suddenly altered this policy. It enacted legislation prohibiting dentists from advertising membership in, or any expertise established by, organizations not recognized or accredited by the American Dental Association ("ADA") in the nine ADA-recognized "specialty" areas of dentistry. Fla. Stat. § 466.0282 (1996). In enacting this legislation, neither the legislature nor the Board made any findings or other determinations that the advertising of AAID credentials or the listing of implant dentistry amounted to anything less than truthful, non-deceptive advertising. Nor did the legislature or Board prepare any study showing that the prior general

standard—prohibiting false, deceptive or misleading advertising—had failed properly to regulate this area.

In 1997, Dr. Borgner and AAID challenged the new legislation on First Amendment grounds in the Northern District of Florida. The district court held that the statute violated plaintiffs’ free-speech rights because it prohibited dentists from providing truthful, non-misleading information to the public about membership in, and credentials from, the AAID, as well as certification by the ABOI/ID. *Borgner v. Cook*, 33 F. Supp. 2d 1327, 1333 (N.D. Fla. 1998) (“*Borgner I*”). See Pet. App. 46a. The State did not appeal.

In 1999, less than a year after the court’s decision, the Florida legislature attempted to modify the law. At the same time that it purported to lift the ban, however, the legislature imposed conditions on advertising that had the same effect. Borrowing a page from *Animal Farm*, the legislature allowed Dr. Borgner to advertise his membership in and credentials from AAID but only on the condition that the advertisement announce in “capital letters” or their equivalent that the association was not a “bona fide” accrediting organization according to the Florida Dental Board and that implant dentistry was not one of nine specialties that the Board officially recognizes.

More specifically, the new law, which is reprinted in full at Appendix A, works as follows. Under the law, Dr. Borgner may advertise a “practice emphasis” in implant dentistry, but not without including a proviso in any such advertisement, whether it be a business card, Yellow Pages insert or his letterhead. Fla. Stat. § 466.0282(3). The state-prescribed language says:

IMPLANT DENTISTRY IS NOT RECOGNIZED AS A
SPECIALTY AREA BY THE AMERICAN DENTAL
ASSOCIATION OR THE FLORIDA BOARD OF
DENTISTRY.

Id. In like manner, if Dr. Borgner wishes to “acknowledge or otherwise reference” his AAID credentials in the announcement, he must add a second disclaimer:

THE AMERICAN ACADEMY OF IMPLANT
DENTISTRY IS NOT RECOGNIZED AS A *BONA
FIDE* SPECIALTY ACCREDITING ORGANIZATION
BY THE AMERICAN DENTAL ASSOCIATION OR
THE FLORIDA BOARD OF DENTISTRY.

Id. (emphasis added). Both “statements” must appear “in capital letters or some other manner clearly distinguishable from the rest of the announcement, solicitation, or advertisement.” Fla. Stat. § 466.0282(3).

In enacting the new law, as in enacting the earlier one, the legislature did not make any findings that the advertising of AAID credentials or the listing of implant dentistry amounted to anything less than truthful advertising. The legislature did not explain why the general prohibition against false, deceptive or misleading advertising—which is still in existence, Fla. Stat. § 466.019 (2002)—did not suffice to address these issues. And it did not find that AAID or ABOI/ID were illegitimate organizations or ones that indiscriminately issued credentials. Despite this barren evidentiary record, the statute concludes with a statement that the legislature “finds that this process for the recognition of dental specialties and other bona fide areas of dental practice is the least restrictive means available to ensure that consumers are not misled about a dentist’s unique credentials.” Fla. Stat. § 466.0282(4).

Not surprisingly, since the passage of this speech code, Florida citizens have heard no more about implant dentistry in general or the AAID in particular than they did after the initial speech ban. Neither Dr. Borgner nor any other dentist in Florida (so far as the record shows) has chosen to advertise his or her expertise in this manner. And if Dr. Borgner ultimately loses this case, one can fairly ask whether anyone ever will

publicly promote an affiliation with these once-officially “bona fide” national dental organizations and now officially non-“bona fide” organizations.

C. Proceedings Below.

In the face of these conditions on his speech and with the recognition that the new law did indirectly what the initial law did directly, Dr. Borgner returned to court. Along with his co-plaintiff, AAID, Dr. Borgner claimed that the new legislation also violated his First (and Fourteenth) Amendment rights. In doing so, he named as defendants the Secretary of the Florida Department of Health, who is currently John O. Agwunobi, the Florida Board of Dentistry, and the members of the Board of Dentistry. While the Florida Attorney General represented the Board in the first action, he chose in the second action to “notif[y] Defendants that his office was declining to otherwise defend the case.” Pet. App. 26a n.1. The district court ultimately ruled the same way it had in *Borgner I* and granted plaintiffs’ motion for summary judgment.

The court started by setting forth the four-part commercial-speech test announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Pet. App. 32a (quoting *Central Hudson*). As an initial matter, the court concluded that Dr. Borgner’s speech was protected because it was truthful and not “‘inherently’ misleading.” Pet.

App. 32a. It therefore determined that the State “bear[s] the substantial burden of demonstrating that the restrictions placed on a dentist’s speech” satisfy the remaining elements of the *Central Hudson* test—which is to say that they “both target an identifiable harm and mitigate against such harm in a direct and effective manner.” *Id.* at 36a.

In concluding that the State had not met this burden, the court observed that it had produced little evidence to support the speech restriction. “Defendants have produced no evidence,” the court noted, “to suggest

[1] that implant dentistry is an illegitimate or unrecognized area of dental practice,

[2] that either the AAID or the ABOI/ID is a sham organization,

[3] that either organization awards credentials or certifications indiscriminately based upon something other than objectively verifiable criteria,

[4] that anyone has complained to the Board about being misled, deceived or confused by an advertisement that includes information regarding a dentist’s membership in and/or credentials from the AAID or the ABOI/ID, or

[5] that anyone has complained about a dentist who—like Dr. Borgner—has advertised his credentials in these organizations.”

Id. at 37a.

Instead of establishing any of these potential factual predicates for the regulation, the court added, the record showed just the opposite. Most notably, the record showed that the Dental Board determined in 1994 that AAID members could advertise their status as fellows of the AAID and diplomates of the ABOI/ID. And in that ruling, the Board determined “as a finding of fact that ‘the AAID and ABOI/ID are bona fide organizations’” that permissibly credential

dentists in this area. *Id.* (quoting Board’s order). “[N]othing in” that order, the court noted, said anything “to suggest that advertisement of a dentist’s credentials in the AAID and/or the ABOI/ID might be misleading to the public.” *Id.*

Having failed to provide any evidence that would support the legislation and having conceded that the membership of Dr. Borgner in these organizations, together with “the predicate requirements for” his credentials in these bodies, were “verifiable facts,” the State turned to two telephone surveys. The first was a two-week 1998 survey prepared in connection with the earlier (and unconstitutional) legislation, and the second was a similar 2002 survey “commissioned by the Board for purposes of this litigation” to show that the advertisement was potentially misleading. *Id.* at 38a. The trial court found, however, that “[n]either survey assessed what, if any, harm would result from permitting a dentist to advertise either a practice emphasis in implant dentistry or membership in and credentials received from the AAID or ABOI/ID.” *Id.* at 41a. Put another way, the court concluded that the surveys may “suggest that dentists who advertise ‘certification’ and/or ‘specialization’ may have a competitive edge over dentists who do not so advertise.” *Id.* at 43a. But, importantly, they do “not establish that any such competitive edge is unmerited.” *Id.* In the end, the court determined that the telephone surveys do not establish that the statute “targets a genuine threat of harm and/or furthers substantial state interests in a direct and effective manner.” *Id.* at 44a.

In a 2-1 decision, the Eleventh Circuit reversed. The majority agreed that the advertising was not in fact misleading or deceptive, and accordingly was eligible for First Amendment protection under the first prong of *Central Hudson*. *Id.* at 8a. As to the second prong, the majority concluded that Florida had a “substantial” governmental interest in the speech restriction due to the State’s interest in “protecting its citizens from unqualified and incompetent health care professionals.” *Id.* at 9a (citation omitted).

In addressing the third prong—whether the statute “advances the Government’s interest in a direct and material way,” *id.* (quotation omitted)—the majority relied on the two studies presented by the State. In its view, the studies “demonstrated the actual harm that could come from Borgner’s proposed advertisements that do not include disclaimers.” *Id.* at 13a. “Without a disclaimer,” the majority added, “consumers are led into thinking implant dentistry is a state-recognized specialty and that AAID and ABOI enjoy state approval, when in reality, they do not. The state has also shown that its disclaimer requirements will alleviate this harm because providing disclaimers will help consumers make better, more informed decisions about whom they select as their general or specialized dentist.” *Id.* at 13a-14a.

Lastly, the court concluded that the speech restriction was “no more extensive than necessary to serve the state’s interest.” *Id.* at 14a. Relying on *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the majority concluded that “[c]ourts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech.” Pet App. 14a. Nor did the majority believe that *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), altered this conclusion, even though that decision invalidated a disclaimer requirement because the State (there, too, Florida) failed to demonstrate the harm in advertising professional credentials and because the disclaimer required by the State was unduly burdensome. In the majority’s view, the surveys in this case made *Ibanez* “distinguishable,” as did the nature of the disclaimer requirements, which were not “especially long or burdensome” but were “simply an effective manner to convey necessary information to the public.” Pet. App. 17a.

Judge Hill dissented, concluding that the State had not satisfied the third or fourth prongs of *Central Hudson*. “It is

clearly not enough,” the dissent explained, “for the Board to identify some way—*any* way—in which Dr. Borgner’s advertisements might confuse.” *Id.* at 22a. Rather, there must be some “harm” in fact. And because the State conceded that Dr. Borgner’s certifying organizations were not sham operations, the only “harm” identified here was that the “potential consumer confusion of the AAID credential with state certification” might create a “competitive edge” for the advertising dentist. *Id.* at 23a. That did not suffice since the alleged purpose of the statute was not to protect one group of dentists over another, but to protect consumers. *Id.*

The dissent also concluded that the State failed to meet its burden of showing that the regulation is no more extensive than necessary. In its view, the requirement that Dr. Borgner recite in capital letters that AAID is not recognized as a “bona fide” specialty accrediting organization by the ADA or the Florida Board of Dentistry may well lead a consumer to “conclude that the AAID is a bogus organization or diploma mill.” *Id.* at 24a. Concluding that “this confusion” was “at least as likely as the confusion that AAID is a state-sponsored organization,” the dissent determined that the law could not meet the fourth prong of *Central Hudson*. *Id.*

REASONS FOR GRANTING THE WRIT

As is often the case when governments use speech restrictions to address a policy issue, the Florida statutory cure is worse than the disease. Ordinarily a challenge to the following type of law would pose the most basic of First Amendment questions:

General rule—individual may not publicly announce her association with, or credentials from, a national organization.

Exception to rule—individual may provide this information to the public but only if she simultaneously acknowledges in capital letters that the organization is “NOT RECOGNIZED AS A BONA FIDE” one by the State.

What converts this seemingly straightforward question into a potentially knotty one is the setting—that Dr. Borgner wishes to make a professional and commercial point rather than a political one. But even if truthful speech about legitimate organizations deserves less protection when it arises in connection with an individual’s efforts to earn a living, this kind of scripted disclaimer does not deserve the respect it received below.

The source of the lower court’s error was the view that the First Amendment presumptively permits disclaimer requirements in the context of commercial speech. Because this Court has stated in *dicta* on several occasions that commercial-speech disclaimers are preferable to speech bans and because the Court in one instance upheld a disclaimer requirement, a growing number of lower courts (including the Eleventh Circuit here) have given exceedingly relaxed scrutiny to commercial-speech disclaimers. That trend culminated in this case where the lower court upheld a disclaimer requirement based on the bookend explanations

that it is preferable to a speech ban and that it will prevent advertisements from being potentially misleading.

Not only does this result far exceed the limited authority that this Court has given States to impose speech disclaimers, but the very nature of these explanations proves the need for further guidance in this area. Even on their own terms, these explanations do not suffice to justify this law either as a matter of logic or common sense. The exceedingly high costs that this disclaimer imposes on the would-be speaker make it no different in effect from a categorical ban on speech. And the confessional tone of the disclaimer is far more likely to confuse consumers than to educate them.

The Court has not considered the appropriate boundaries of a disclaimer requirement since 1994 in its decision in *Ibanez*. And in each of the cases addressing the issue—*Ibanez*, *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer*—the Court has not been asked to explain the requisite findings necessary to impose such restrictions or to specify the correct means/end fit necessary to sustain state-scripted disclaimers. Because the resulting absence of guidance has generated confusion in the lower courts and because this issue sits at the sensitive crossroads between an individual’s right to choose what to say and when to say it and society’s right to compel an individual to speak in order to regulate misleading speech, the question deserves the Court’s time and attention. This case presents an ideal vehicle for doing so.

I. The Lower Court Erred.

A. The Decision Is Inconsistent With The Bedrock Presumption That Governments May Not Tell Individuals What To Say And When To Say It.

In initially prohibiting the National Government from restricting the speech of individuals, *see* U.S. Const. amend.

I (“Congress shall make no law . . . abridging the freedom of speech”) and in later prohibiting the States from doing the same, *see id.* U.S. Const. amend XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law”), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Constitution does not distinguish between government regulations that ban speech and government regulations that compel it. By its terms, the Constitution protects “freedom of speech,” a phrase “necessarily comprising the decision of both what to say and what not to say.” *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988).

Consistent with these words, the Court has long given equal, if not greater, First Amendment protection to government regulations that compel speech. “Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,” *id.* at 795, and “[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.” *Id.* at 790-91. The National Government and the States accordingly may not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” or do what comes to the same thing—“force citizens to confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, in *Barnette*, the Court said that “involuntary affirmation” and other forms of compelled speech “could be commanded only on *even more immediate and urgent grounds* than silence.” 319 U.S. at 633 (emphasis added). *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995) (“Disapproval of a private speaker’s statement does not legitimize use of the Commonwealth’s power to compel the speaker to alter the message by including one more acceptable to others.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995) (“The simple interest in providing voters with additional relevant information does not

justify a state requirement that a writer make statements or disclosures she would otherwise omit.”).

Under these free-speech first principles, there can be little doubt that a law scripting this kind of disclaimer—in conspicuous “capital letters” and with a “not” “bona fide” proviso—would fail to withstand any traditional form of First Amendment scrutiny. Plainly, such a government-imposed speech code could not be, and would not be, sustained.

B. The Court’s Commercial-Speech Cases Do Not Presumptively Permit Scripted Disclaimers.

While the Court has treated disclaimers differently in the commercial-speech setting, it has not forsaken these principles entirely. And, most importantly, the Court has never presumptively endorsed government-scripted and government-compelled disclaimers of this sort—as a brief review of the Court’s decisions illustrates.

From the earliest commercial-speech cases to the more recent, the Court has frequently mentioned informational disclaimers but has only specifically upheld them in one instance. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976), in initially marking the boundaries of commercial-speech protection and in striking a ban on the advertisement of prescription-drug prices, the Court acknowledged that commercial speech could be required to include “additional information, warnings, and disclaimers” but only to the extent they “are necessary to prevent its being deceptive.” One year later, *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977), invalidated restrictions on attorney advertising and said generally (and again in *dicta*) that “the preferred remedy” in the context of commercial-speech regulations “is more disclosure, rather than less.” In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), in striking restrictions on public utility

advertising, the Court stated that disclosure requirements may present an acceptable less-restrictive alternative to the suppression of speech. 447 U.S. at 565. And in *In re R.M.J.*, 455 U.S. 191 (1982), in preventing a state bar from prohibiting an attorney from advertising “Admitted to Practice Before THE UNITED STATES SUPREME COURT,” the Court noted that the State had not attempted a less restrictive regulation, such as “requir[ing] a statement explaining the nature of the Supreme Court Bar.” *Id.* at 206.

Not until *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), did the Court specifically uphold a disclosure requirement. At issue was a requirement that attorneys who advertise their willingness to work on a contingent-fee basis explain the nature of the fee.

In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

471 U.S. at 650. While the Ohio requirement upheld in *Zauderer* thus compelled attorneys to explain more fully how a contingency-fee arrangement works, the State did not script the disclaimer, did not require the attorney to put the disclaimer in capital letters and did not require the attorney to say that the fee arrangement was “not” “bona fide.”

Since *Zauderer* the Court has twice considered State efforts to restrict advertisements regarding professional credentials issued by private national organizations and in each instance has invalidated the law. In *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Court addressed an attorney advertisement providing that the lawyer was a “Certified Civil Trial

Specialist By the National Board of Trial Advocacy.” It held that the advertisement was neither actually nor inherently misleading, and accordingly could not be prohibited from being aired. *Id.* at 106, 110 (plurality); *id.* at 111 (Marshall, J., joined by Brennan, J., concurring in judgment). “We reject the paternalistic assumption that the recipients of petitioner’s letterhead are no more discriminating than the audience for children’s television.” *Id.* at 105 (plurality) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)). In its view, the “average consumer . . . can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information.” *Id.* at 105 n.13. Indeed, the disclosure of this designation “both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys.” *Id.* at 111. Because the case involved a complete ban, however, the Court concluded that it was not necessary “to consider when a State might impose some disclosure requirements, rather than a total prohibition, in order to minimize the possibility that a reader will misunderstand the significance of a statement of fact that is protected by the First Amendment.” *Id.* at 110 n.17.

Most recently, *Ibanez* addressed the use of a CFP (certified financial planner) designation by an attorney in her yellow pages listing, on her business card and on her office stationery. In Florida’s view, “the words used in the designation—particularly, the word ‘certified’—so closely resemble ‘the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists.’” 512 U.S. at 144 (citation omitted). The Court disagreed, holding that the State had “not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez’ constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public’s eyes.” *Id.* at 138-39.

In reaching this initial conclusion, the Court offered three rationales, all applicable here. One, “[g]iven the complete absence of any evidence of deception, the Board’s concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.” *Id.* at 145 (quotation omitted). Two, any risk of confusion or potential deception is removed by the consumer’s ability to “verify Ibanez’ CFP credential”—either by calling the CFP Board of Standards, just as the consumer in *Peel* could call the National Board of Trial Advocacy, or by asking Ibanez herself about the meaning of the certification. *Id.* at 145 n.9. Three, the State offered no evidence “that any member of the public has been misled by the use of the CFP designation.” *Id.* at 145 n.10.

Nor was the Court persuaded by the State’s alternative contention that the CFP designation was “potentially misleading,” thereby allowing it prophylactically to impose a disclaimer requirement that the “recognizing agency is not affiliated with or sanctioned by the state or federal government” and requiring the advertiser to set forth the recognizing agency’s requirements for recognition. *Id.* at 146. For one, the Court said, “we cannot allow rote invocation of the words ‘potentially misleading’ to supplant the Board’s burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’” *Id.* at 146 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). For another, the State had not “point[ed] to any harm that is potentially real, not purely hypothetical.” *Id.* For still another, the “detail required in the disclaimer . . . effectively rules out notation of the ‘specialist’ designation on a business card or letterhead, or in a yellow pages listing.” *Id.* at 146-47. Lastly, the case did not “fall within the caveat noted in *Peel* covering certifications” issued by sham organizations or those that “issued certificates indiscriminately for a price.” *Id.* at 148.

C. Florida’s Scripted Disclaimer Fails To Satisfy These Requirements.

Whether one measures the Florida disclaimer requirement by traditional free-speech principles or by *Central Hudson*, it is flatly unconstitutional. No satisfactory evidentiary explanation for this compelled speech has been established, and it is plainly more restrictive than necessary to further the State’s interest in protecting consumers.

Florida, to begin with, may not take advantage of two safe harbors in this area. Throughout this litigation, the State has conceded that Dr. Borgner’s proposed advertisements are truthful and non-misleading. He does have an expertise in implant dentistry; he is an Associate Fellow and Fellow of AAID; and he is a Diplomate of ABOI/ID.

Nor has the State ever argued that these are sham organizations that “fall within the caveat noted in *Peel* covering certifications” issued “indiscriminately for a price.” *Ibanez*, 512 U.S. at 148. Even though the Eleventh Circuit concluded that the State’s interest in this speech restriction stemmed from its desire to “protect[] its citizens from unqualified and incompetent health care professionals,” Pet. App.9a, no lower court has ever suggested and the State has never maintained that these organizations are anything less than legitimate. Indeed, one of the respondents, the Florida Board of Dentistry, has never altered its 1994 conclusions that these are “bona fide” organizations and that advertisements regarding them are not misleading. Confirming this conclusion, ABOI/ID has issued fewer than 200 “Diplomate” certificates since 1989 to dentists nationwide who have met its requirements. Pet. App. 27a. And the requirements for obtaining these credentials and the AAID credentials are anything but casual. They require extensive education, training, clinical experience, and oral and written examinations, all of which are objectively verifiable. Pet. App. 26a-27a.

In the face of these truths, the Eleventh Circuit fell back on the claim that Dr. Borgner's interest in explaining his credentials and expertise is "potentially misleading" or "potentially harmful." But as the Court has explained, "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 512 U.S. at 146 (quoting *Edenfield*, 507 U.S. at 771). That is exactly what happened here. The State failed to establish one shred of relevant evidence showing a risk of actual harm before enacting the law. There was no evidence of prior complaints about these credentials in general or about Dr. Borgner in particular. And there was no evidence of actual confusion about this expertise, about the dentists who have this expertise, or about these particular credentials. Indeed, the only State evidence of record cuts exactly in the opposite direction. The Florida Dental Board's 1994 finding on this precise issue said that the advertisement of these same credentials was not misleading. Pet. App. 37a.

In reaching a different conclusion, the Eleventh Circuit majority relied on the 1998 telephone survey prepared in connection with the first litigation (and concerning an unconstitutional law) and on the 2000 telephone survey prepared in connection with this litigation (and prepared after the law was enacted). In concluding that this "evidence" satisfied *Central Hudson's* third prong, the Eleventh Circuit has utterly diluted this requirement and in the process fueled criticism of the *Central Hudson* test itself. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in the judgment) (no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech'"); *id.* at 517 (Scalia, J., concurring in the judgment) ("shar[ing] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support

it”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) (“The Court’s continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is.”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 & n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves “false statements of fact” or “advocat[es] illegal activities”).

First, in relying on surveys prepared in connection with the litigation, the Eleventh Circuit relied on just one case from this Court—*Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Notably, however, that case involved a two-year study prepared *before* and *in connection with* the passage of a restriction on direct-mail attorney solicitations of individuals within 30 days of an accident. *Id.* at 620, 626. Reliance on the extensive evidence in that case—summarized in a 106-page study—to justify this permanent advertising restriction, where no “member of the public has been misled by the use of the [AAID] designation,” *Ibanez*, 512 U.S. at 145 n.10, gives analogy a bad name.

Second, Florida’s two surveys do not support the only legitimate end identified by the Eleventh Circuit below, namely to “protect[] [Florida’s] citizens from unqualified and incompetent health care professionals.” Pet. App. 9a. Because neither survey in any way suggests, let alone shows, that these organizations are illegitimate, neither one can plausibly support this objective of the restriction.

Third, the Florida study here in no way explains why this kind of scripted disclaimer is necessary. It is one thing to show that the mention of AAID credentials may lead the average dental consumer to assume that AAID is a state-sponsored organization, which presumably is a risk posed by every private state or national credentialing organization. But it is quite another to show that the only effective remedy for

this alleged harm is a scripted disclaimer that the organization is not “bona fide.” The two surveys do not even begin to support that kind of requirement, and never answer the more pedestrian question raised by this issue. Why not trust the consumer to call AAID, look at its web site, or call the ADA or Florida Dental Board to learn more about the significance of its credentials and those of ABOI/ID? That is what the Court has required in other cases. Any risk of confusion or potential deception along these lines, *Ibanez* teaches, is removed by the consumer’s ability to “verify Ibanez’ CFP credential”—either by calling the CFP Board of Standards, just as the consumer in *Peel* could call the National Board of Trial Advocacy, or by asking Ibanez herself about the meaning of the certification. *Ibanez*, 512 U.S. at 145 n.9. *See Peel*, 496 U.S. at 102-03 (plurality) (“there is no evidence that the consumers . . . are misled if they do not inform themselves of the precise standards under which claims of certification are allowed”). Because Florida thus has not “point[ed] to any harm that is potentially real, not purely hypothetical,” *Ibanez*, 512 U.S. at 146, it cannot satisfy *Central Hudson*’s third prong.

Matters do not improve when one considers the test’s fourth prong—whether the speech suppression is “more extensive than is necessary.” *Central Hudson*, 447 U.S. at 566. Not only do the two litigation-driven telephone surveys fail to explain why the capitalized not-bona-fide disclaimer is necessary, but no legitimate survey ever could justify such an exacting requirement. The capitalized nature of the disclaimer (or its conspicuous equivalent) does nothing to support Florida’s only proffered justification for this restriction—to protect the public from incompetent dentists. Likewise these requirements hardly advance the only other conceivable justification for the restriction—that the State wishes to ensure that credentialed members of AAID are not put in a misleadingly superior position relative to their counterparts in the dental profession. Of course, the required exclamation of

the non-state-accredited message does just the opposite. It serves to make the playing field exceedingly unequal.

In addition, the “detail required in the disclaimer . . . effectively rules out notation of the [AAID] designation on a business card or letterhead, or in a yellow pages listing.” *Ibanez*, 512 U.S. at 146-47. As a practical matter, no dentist could plausibly include the State-sponsored script in most customary advertisements. Nor was the State without alternatives. It could have established a mechanism for reviewing non-specialty credentials to distinguish sham accrediting organizations from legitimate ones. Or it could have simply required the advertiser to give the AAID’s address or phone number, or for that matter the ADA’s. As *Peel* observed, at any rate, the “average consumer . . . can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information.” 496 U.S. at 105 n.13 (plurality). This designation “both serves the public interest and encourages the development and utilization of meritorious certification programs for [professionals].” *Id.* at 111 (Marshall, J., joined by Brennan, J., concurring in the judgment).

Add to this the content of the scripted disclaimer—that AAID is “NOT” a “BONA FIDE” organization—and it becomes clear that the legislative policy behind this law does just what the First Amendment proscribes. It first prohibits the advertiser from communicating truthful information however he or she wishes; it then conditions any speech on the topic on the advertiser’s willingness to pay the price of embracing the State’s script for communication in this area; and it lastly involves a script confessing that the advertiser’s credential is not “bona fide” or literally not given by a “good faith” organization. If this is narrow tailoring, then the concept has lost all meaning. In both real terms and practical terms, this is a speech ban, pure and simple.

II. The Eleventh Circuit's Decision Is One Among Many Lower-Court Decisions Reflecting The Mistaken View That The First Amendment Presumptively Permits Disclaimer Requirements.

Nor is the Eleventh Circuit alone in reading this Court's cases to say that disclaimers are presumptively constitutional in commercial-speech cases. Court after court has embraced the view that disclaimers (even State-scripted disclaimers) represent a safe harbor in regulating the speech of professional and other commercial advertisers.

Numerous decisions, for example, stand for the general proposition that disclaimers will be upheld. *See, e.g., Walker v. Bd. of Prof'l Responsibility*, 38 S.W.3d 540, 548 (Tenn. 2001) (upholding disclaimer requirement for advertisement of specialization not recognized by the Tennessee Commission on Continuing Legal Education and Specialization); *Iowa Supreme Court v. Kirlin*, 570 N.W.2d 643, 644-46 (Iowa 1997) (upholding disclaimer requirement for advertisement of professional credentials in legal organizations); *Douglas v. State*, 921 S.W.2d 180, 186-87 (Tenn. 1996) (upholding disclaimer requirement for advertisement of specialty services provided by general dentists); *Miss. Bar v. Attorney R.*, 649 So. 2d 820, 824 (Miss. 1995) (upholding disclaimer requirement for advertisement of practice areas); *Moore v. Cal. State Bd. of Accountancy*, 831 P.2d 798, 813 (Cal. 1992) (upholding disclaimer requirement for advertisement that uses the term "accountant"); *Parmley v. Mo. Dental Bd.*, 719 S.W.2d 745, 752 (Mo. 1986) (upholding disclaimer requirement for advertisement of certification by organization not recognized by the American Dental Association).

District court decisions are to similar effect. *See, e.g., Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1355 (E.D. Tex. 1995) (upholding disclaimer requirement for advertisements of certifications not granted by the Texas Board of Legal Specialization), *aff'd*, 100 F.3d 953

(5th Cir. 1996) (unpublished table decision); *Simm v. La. State Bd. of Dentistry*, No. 01-2608, 2002 WL 63538, at *6 (E.D. La. Jan. 16, 2002) (concluding that *Zauderer* generally permits disclaimers but not speech bans).

Just as numerous decisions indicate that disclaimers are generally permitted, others hold that outright advertising bans generally are not permitted. *See, e.g., Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 332 (W. Va. 1996) (striking ban on advertising specialization); *Ardt v. Ill. Dep't of Prof'l Regulation*, 607 N.E.2d 1226, 1232 (1992) (striking ban on advertising "family dentistry"); *Tsatsos v. Zollar*, 943 F. Supp. 945, 951 (N.D. Ill. 1996) (striking ban on advertising of affiliation by podiatrists with a national certifying organization).

And several decisions combine these strands of analysis by striking a ban and maintaining in *dicta* that a disclaimer requirement would be permitted. *See, e.g., Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 510 (6th Cir. 1987) (striking ban on advertising of a dentist's authorization to perform a particular dental procedure because the dentist was in fact permitted to perform the procedure) ("It is equally evident that these terms and the information they convey can be presented in a way which does not mislead the public into believing that a general practicing dentist is a dentist with an orthodontia specialty license. A disclaimer to such an effect would adequately address the state's concern."); *Appeal of Sutfin*, 693 A.2d 73, 76 (N.H. 1997) (striking sanctions against dentist because speech ban restricted truthful speech, but suggesting that a disclaimer requirement would be valid) ("The Supreme Court's decisions in this area reflect a preference for regulations that impose lesser burdens on speech, such as disclosure requirements, as opposed to outright suppression"); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1240 (E.D. Cal. 2000) (striking dentistry ban on advertising credentials with AAID because "AAID is a bona fide organization, and it actually issues credentials according

to certain published standards,” but stating that disclaimer requirement would be constitutional).

Typical of the scrutiny of these disclaimer requirements is the Missouri Supreme Court’s analysis, which is exceedingly forgiving and which mistakenly concludes that *Zauderer* embraces this presumption in favor of all manner of disclaimers. “The disclaimer of section 332.321.2(14)(f),” that court concluded, “rather readily may be found constitutionally sufficient; appellant has only a minimal protected interest in ‘not providing . . . particular factual information.’” *Parmley v. Missouri Dental Board*, 719 S.W.2d 745, 752 (Mo. 1986) (quoting *Zauderer*, 105 S. Ct. at 2282).

III. The Lower Court Erred On A Matter Of Great Public Importance.

Against the backdrop of these lower-court decisions, it is well to remember that the developing lower-court perspective that compelled silence is generally barred while compelled speech (*e.g.*, a disclaimer) is generally permitted has no foundation in the holdings of this Court. No First Amendment decision of the Court, whether in the commercial-speech arena or any other, has endorsed the kind of far-reaching regulation of the freedom of speech that Florida has imposed.

Certainly the only holding of the Court permitting a disclaimer—*Zauderer*—does not do so. Recall that it merely established that lawyers advertising contingency fee arrangements needed to explain in their own words that the client would be responsible for some (if not all) of the costs of the litigation. But that was because the advertisement in that instance *was misleading* as written, not because it had the ineffable quality of possibly being misleading in some settings and with some people. For the same reason that the Court has never “reduce[d] the adult population . . . to reading only what is fit for children” in other (more difficult) commercial-speech

settings, *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quotation omitted) (striking law prohibiting the mailing of unsolicited advertisements for contraceptives), the Court has never upheld disclaimer requirements merely because someone—anyone—might be confused by the information. The presumption in favor of disclaimers, as *Zauderer* indicates, applies not to any compelled-speech requirement but only to settings in which the regulated speech *is* itself misleading. In that setting, however, the speech receives no First Amendment protection at all, *Central Hudson*, 447 U.S. at 566, and it is only the inclusion of the additional information that makes the advertisement not misleading and thereafter a form of protected speech. Here, of course, the advertisement was not misleading as written. In the words of *Zauderer* itself, such “broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.” 471 U.S. at 648-49.

Nor did the law in *Zauderer* have the added First Amendment indignity of scripting the disclaimer or, worse, of requiring the lawyer to indicate that contingency-fee arrangements were “not” “bona fide” according to the State Bar. To say that *Zauderer* permits and indeed respects such verbal goose-stepping necessarily slights the decision and the First Amendment as well.

In the eight years since the Court last reviewed the commercial-speech boundaries of disclaimer requirements in *Ibanez*, the lower courts have failed correctly to ascertain the line between permissible disclaimer requirements and impermissible restraints on truthful speech. Yet, throughout this period of time, the Court has been steadfast in making clear that commercial-speech restrictions represent a policy choice of “last resort,” not “first resort.” *Thompson v. W. States Med. Center*, 122 S. Ct. 1497, 1507 (2002). Yet no serious assessment of the history of this legislation could plausibly reach the conclusion that Florida chose this option

as a law of “last resort.” And in one case after another, the Court has invalidated similar efforts to restrict commercial speech as an option of “first resort.” *See, e.g., id.; Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Despite this drum beat of decisions reminding governments that they may not casually restrict the advertising of truthful, non-misleading information, the lower courts continue to treat the advertisement of professional credentials as a form of second-class speech. And this case well illustrates the trend. Not only were these disclaimer requirements treated as presumptively legitimate, but they were allowed even though their transparent effect was to ban protected speech. If two of the four Article III judges who reviewed this law could reach these conclusions and do so on the basis of Supreme Court precedent, it would seem that the time has come to provide additional guidance to the lower courts about the line between valid and invalid disclaimers as well as the requisite findings needed to sustain them.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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