



## II. STATEMENT OF THE CASE

The American Academy of Implant Dentistry (“AAID”) stands as a Plaintiff in this matter, both in its own right and representing the claims of its members, who are threatened with an infringement of their First Amendment rights. These threats can only be redressed by this Court’s granting a Preliminary Injunction. The approximately one hundred seventy-two (172) Florida licensed dentists/members of the AAID are all affected by the statute at issue and each could rightfully assert these claims on his or her own. Accordingly, the AAID is a proper Plaintiff in this matter, either standing on its own behalf and/or representing the interests of all of its Florida members. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975). See also Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343-45 (1977); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Dr. Borgner and the other AAID members are licensed dentists who practice in the State of Florida. They have in the past, with the approval of this Court, and the State of Florida, advertised their membership in the AAID. Dr. Borgner and other dentists continue to advertise their membership in the AAID (Borgner Affidavit, Exhibit A). This Court has previously determined that advertising membership in the AAID is truthful, is not misleading and gives the public valuable information to help it make informed decisions when seeking dental treatment. See Borgner v. Cook, 33 F.2d 1327, 1998 U.S. Dist. LEXIS 15432 (N.D. Fl. 1998) (hereinafter referred to as Borgner I)

(copy attached as Exhibit B). The State of Florida and other states, such as Oklahoma and Tennessee, have also determined that advertising membership in the AAID is truthful, is not misleading and gives the public valuable information. (See Exhibit C). The recently amended Section 466.0282 will prohibit Dr. Borgner and other members of the AAID from truthfully advertising their credentials.

### III. ARGUMENT

To be entitled to injunctive relief, the moving party must establish that (1) there is a substantial likelihood that he ultimately will prevail on the merits of the claim; (2) he will suffer irreparable injury unless the injunction is issued; (3) the threat and injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the public interest will not be harmed if the injunction is issued. Henry v. First National Bank of Clarksdale, 595 F.2d 291, 301 (5<sup>th</sup> Cir. 1979); Compact Van Equipment, Inc. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5<sup>th</sup> Cir. 1978); Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974); Cunningham v. Adams, 808 F.2d 815, 819 (11<sup>th</sup> Cir. 1987); Johnson v. United States Department of Agriculture, 734 F.2d 774, 781 (11<sup>th</sup> Cir. 1984).

- A. **The Plaintiffs can establish a substantial likelihood that they will prevail on their claim that their First Amendment rights are being violated.**

A review of the case law, read in light of the Affidavits of Dr. Borgner and Mr. J. Vincent

Shuck (Affidavit of J. Vincent Shuck attached as Exhibit D), the Exhibits to those Affidavits and the Plaintiffs' Complaint, demonstrates that advertising membership in, and certification by, the AAID is commercial speech that is protected by the First Amendment. Most importantly, this Court itself held, only months ago, that advertising membership in, and certification by, the AAID is commercial speech that is protected by the First Amendment. (See Exhibit B, Borgner I.) This commercial speech is truthful, is not misleading and is informative to the public.

It has been less than a year since this Court's decision in Borgner I. Now, the Legislature, in response to the lobbying efforts of the Florida Dental Association ("FDA"), is again infringing on the Plaintiffs' First Amendment rights. (See articles discussing FDA lobbying efforts attached as Exhibit E.) The newly revised statute is an absolute bar to a professional's truthful advertising of membership in, or credentials obtained from, any accrediting organization, unless those credentials are obtained in a specialty area of dental practice recognized by the American Dental Association or unless the accrediting organization meets the very strict and onerous added requirements set forth in Section 466.0282 for recognition by the Florida Board of Dentistry ("the Board").

At first glance, the new Section 466.0282 may appear to allow dentists to advertise their credentials obtained in areas of dentistry not recognized by the American Dental Association ("ADA") as "specialty" areas. However, a close reading of the new law shows that this is not the case. If the dentist's credentials are from, or his membership is in, an accrediting organization *not* recognized as a specialty by the ADA, the accrediting organization must meet very strict, very specific conditions in order to seek recognition by the Board as a "bona fide accrediting organization." See Fla. Stat. § 466.0282 (amended 1999). These strict criteria include the following:

- (a) Successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is:
  - 1. Beyond the dental degree;
  - 2. At the graduate or postgraduate level; and
  - 3. Of at least 12 months in duration.
- (b) Prior didactic training and clinical experience in the specific area of dentistry which is greater than that of other dentists.
- (c) Successful completion of oral and written examinations based on psychometric principles.

Id. at (2). To achieve recognition by the Dental Board, an accrediting organization is entirely dependent on the existence of graduate or postgraduate programs offered at the university-based dental schools. In most areas of dental practice not recognized as ADA specialties, these criteria *cannot* be met. No “formal, full-time advanced education program” exists that is “affiliated with or sponsored by a university-based dental school and is . . . beyond the dental degree[,] at the graduate or postgraduate level[,] and of at least 12 months in duration.” (See Exhibit D, Affidavit of J. Vincent Shuck.)

Obviously recognizing the onerous burden placed on dentists to add additional years of full-time coursework to their education, in programs that may not even exist, the Legislature provides the following “band-aid” to those (virtually all general dentists who have credentials in any non-ADA specialty area of dentistry) who cannot meet this burden:

[A] dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the board may announce a practice emphasis in any other area of dental practice *if the dentist incorporate in capital letters or some other means clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement*. “. . . (NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) . . . IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD

OF DENTISTRY.” If such an area of dental practice is officially recognized by an organization that the dentist desires to acknowledge or otherwise reference in the dentist’s announcement, solicitation, or advertisement, the same announcement, solicitation, or advertisement shall *also* state prominently: “. . . (NAME OF REFERENCED ORGANIZATION) . . . IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.”

Id. at (3) (emphasis added).

Section 466.0282(4) specifically states that “[t]he Legislature also 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.” Id. at (4). However, in considering this very issue, this Court in Borgner I, stated as follows:

Like the defendants in *Peel*, *Ibanez*, and *Parker*, the defendants in this case bear a heavy burden to justify the complete ban placed on certain aspects of commercial speech, specifically on the advertisement of a dental practitioner’s membership in AAID and credentials awarded by AAID and ABOI/ID. In shouldering their burden, the defendants may not rely on speculation and conjecture but must produce specific evidence to demonstrate that the harms they recite are real and substantial and that the ban “directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.” *Ibanez*, 129 L. Ed. 2d at 126. Plaintiffs suggest—and the court agrees—that, given their burden, the defendants have not produced sufficient evidence to survive Plaintiffs’ motion for summary judgment.

Borgner I, 33 F. Supp. at 1331. In reviewing the “evidence” presented by the Defendants, this Court noted as follows:

The defendants next suggest that, unlike the state respondents in *Peel* and *Ibanez*, the state defendants in this case have produced “anecdotal” evidence to support their argument that members of the public would be confused if Borgner were permitted to advertise his membership in, and credentialing by, non-ADA-approved organizations. This “anecdotal” evidence consists of the affidavits of (1) Robert T. Ferris, D.D.S., a diplomate of the American Board of Periodontology, . . . and (2) H. Fred Varn, a past Executive Director of the Florida Board of Dentistry.

As a past Executive Director of the Florida Board of Dentistry, Mr. Varn states in his affidavit that “it is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe . . . .” The defendants admit, however, that they have no empirical evidence to support Mr. Varn’s opinion.

As a dental practitioner whose practice is limited to the ADA-approved specialty of periodontics, Dr. Ferris states in his affidavit that

“it is my opinion that confusion exists among dental consumers concerning the relation between legitimate dental specialties and other dental areas . . . . “ Again, the defendants have not come forward with any empirical evidence to support Dr. Ferris’s opinion. **They have produced not one bit of anecdotal evidence concerning Dr. Borgner’s patients or potential patients, not one report of a complaint or inquiry about his services or his advertisements, not one report of any person’s being deceived, misled, or confused by any dentist’s AAID or ABOI/ID certifications, and not one document or study to support the proposition that dental consumers have been misled by any credential issued by any dental accrediting organization in any area of dentistry not recognized by the ADA as a specialty area of dentistry.**

Id. at 1332 (emphasis added).

The defendants have fallen woefully short of convincing this court that dental consumers will be misled if Borgner is permitted to advertise both his membership in AAID as well as his credentialed status with AAID and ABOI/ID. While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, **they provide no specific evidence that suggests, much less demonstrates, that Borgner’s advertisement will create the danger of deception they claim to fear.**

Id. (emphasis added).

Both the Senate and the House of Representatives referenced this Court’s decision in Borgner

I. The Substantive Analysis report of the House of Representatives Committee on Health Care

Licensing and Regulation quotes the following excerpt directly from the Borgner I decision:

In [Borgner I], the past Executive Director of the Florida Board of Dentistry stated in his affidavit that:

It is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe that dentists who hold themselves out to the public as “specialists,” as being “board certified,” or as limiting their practice to a particular type of practice have in fact obtained specialty certification from the State of Florida or a specialty organization approved by the State of Florida.

The court stated that, “While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, they provide no specific evidence that suggests, much less demonstrates, that Borgner’s advertisement will create the danger of deception they claim to fear.” With that, the Senior United State District Judge ruled that “Section 466.0282 is DECLARED unconstitutional to the extent it prohibits Borgner from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID, and the defendants are ENJOINED from enforcing section 466.0282 against Borgner. . . .”

House of Representatives Committee on Health Care Licensing and Regulation Analysis, p. 2 (a copy is attached as Exhibit F).

The Senate reports the following:

In 1998, a Florida licensed dentist and the American Academy of Implant Dentistry asked the federal court to declare s. 466.0282, F.S., unconstitutional and to enjoin the Agency for Health Care Administration and the Florida Board of Dentistry from enforcing the section. On July 16, 1998, the United States District Court for the Northern District of Florida, in an action for declaratory and injunctive relief, granted the plaintiff-dentist’s motion for summary judgment and declared s. 466.0282, F.S., unconstitutional as a violation of the commercial speech rights, protected under the First Amendment to the United States Constitutional, of Florida dentists who wish to advertise membership in, or specialty recognition by, an accrediting organization that is not recognized or accredited by the American Dental Association. [cite omitted]

Senate Staff Analysis and Economic Impact Statement, p. 2 (a copy is attached as Exhibit G).

Yet, in spite of this Court’s finding that the Board presented **no** evidence to justify the complete ban placed on certain aspects of commercial speech, specifically on the advertisement of

a dental practitioner's membership in AAID and credentials awarded by AAID and ABOI/ID, and in spite of this Court's finding that the Board presented only speculation and conjecture in support of its restriction on dental advertising, the Legislature has amended 466.0282 to prohibit the Plaintiffs and similarly-situated dentists from truthfully advertising their membership in, and credentials obtained from, the AAID and ABOI/ID, without the onerous, lengthy and "chilling" disclaimers.

Florida's absolute ban on a dental professional advertising various memberships and/or credentials earned in organizations other than the eight specialty areas of dental practice recognized by the ADA constitutes an absolute ban on protected free speech, is inconsistent with the free speech guarantees of the First Amendment of the United States Constitution and is contrary to decisions of the United States Supreme Court and this Court. The statute at issue blocks the general public's access to truthful and accurate commercial information that the First Amendment is designed to protect.

Unquestionably, dental advertising is commercial speech entitled to First Amendment protection. See Borgner I, 33 F.2d 1327 (1998); Parker v. Kentucky, 818 F.2d 504 (6<sup>th</sup> Cir. 1987). The Supreme Court in Virginia State Board of Pharmacy stated that advertising which is potentially misleading, particularly with respect to the rendering of professional services such as law and medicine, could possibly be subject to some form of regulation. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 773, n.25 (1976). However, the Supreme Court later noted that with regard to advertising, which is potentially misleading, the preferred remedy is more disclosure rather than less. See Bates v. State Bar of Arizona, 433 U.S. 350,

375 (1977). Favoring disclosure to the public of more information rather than an outright ban on the particular advertising, the Court stated that in doing so the general public=s interest in receiving information was better protected, as was the advertiser=s right to communicate. Id. at 375. More particularly, truthful information regarding a dentist=s certification and particular areas of expertise facilitate the public=s access to dental services. Jacobs v. Board of Governors of Registered Dentists of the State of Oklahoma, attached as Exhibit H.

Accordingly, a state can only restrict commercial speech if its asserted interest in doing so is substantial, the restrictions directly advance that asserted interest, and the restrictions are no more extensive than necessary to meet that interest. In re R.M.J., 455 U.S. 191, 203 (1982) (holding “rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible”). See also Central Hudson Gas & Electric v. Public Service Comm’n of New York, 477 U.S. 557, 564-66 (1980) (holding that a complete ban on promotional advertising by electric utility is unconstitutional); Abramson v. Gonzalez, 949 F.2d 1567, 1574 (11<sup>th</sup> Cir. 1992) (to restrict commercial speech, government “must demonstrate that there is a reasonable fit between the legislature’s ends and the narrowly tailored means chosen to accomplish those ends”). Thus, each restriction must be scrutinized to be sure it is no more broad than reasonably necessary to protect consumers from false and deceptive advertising.

Admittedly, the Supreme Court has been more tolerant of regulations mandating disclosure or "disclaimer" requirements than it has been on regulations that impose a total ban on speech. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985). However, state-imposed disclaimer requirements on commercial speech are *not immune* from

constitutional constraints. Disclaimers that are “unjustified” or “unduly burdensome” may violate the First Amendment. Id. at 651.

For example, the United States Supreme Court, in Ibanez v. Florida Dep’t of Business and Professional Regulation, Board of Accountancy, held the state’s disclaimer requirement unconstitutional. Ibanez v. Florida Dep’t of Business and Professional Regulation, Board of Accountancy, 114 S. Ct. 2084, 2090 (1994). The plaintiff, who held a currently active license as a Certified Public Accountant, also wanted to place the initials “C.F.P.” (Certified Financial Planner) after her name. The department’s regulation required a disclaimer listing the “recognizing agency’s” educational, experience and testing requirements for certification and stating that “the recognizing agency is not affiliated with or sanctioned by the state or federal government.” Id. at 2090-91 [footnote omitted]. Based on the state’s failure to present any evidence showing that the C.F.P. designation was even potentially misleading and also based on the fact that the disclaimer “effectively rules out notation of the ‘specialist’ designation on a business card or letterhead, or in a yellow pages listing,” the Court held the regulation unconstitutional. Id.

The new statutory provision at issue herein is nearly on point with the Court's decision above. The disclaimer required by Section 466.0282 is “unduly burdensome” and cannot meet constitutional scrutiny. See Id. Under 466.0282, if Plaintiff Borgner wishes to advertise that his practice is limited to an area of dentistry that has not been named a specialty area by the ADA (implant dentistry), or is an area of dentistry (such as the Plaintiffs') which is not represented by an "bona fide accrediting organization" **approved by the Board**, he must include in his announcement, solicitation or advertisement, "*in capital letters and clearly distinguishable from the rest of the*

*announcement,"* the following sentence:

(NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) . . . IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

In addition to this lengthy and inherently confusing statement, if the dentist wishes to include in his advertisement or announcement that he is a member in the AAID or that he has obtained credentials from the AAID or the ABOI/ID, for instance, he must *also* include in his announcement, *in capital letters and clearly distinguishable from the rest of the announcement*, the following sentence:

(NAME OF REFERENCED ORGANIZATION) . . . IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

Furthermore, under Section 466.0282(4), a dentist cannot even include the area of dentistry in his announcement or advertisement *without the above disclaimer*.

In other words, Dr. Borgner, who limits his practice to implant dentistry and desires to truthfully inform the public of that fact, and who is a member in the AAID, a “Fellow” of the AAID and a “Diplomate” of the ABOI/ID and desires to truthfully inform the public of these objectively verifiable facts, must print the following information on his business card, on his letterhead, and in his yellow pages listing:

<p>RICHARD A. BORGNER, D.D.S. 2299 9<sup>TH</sup> AVENUE NORTH, #1-E ST. PETERSBURG, FLORIDA 33713 Telephone: (727) 321-4484 Practice Limited to Implant Dentistry Fellow, American Academy of Implant Dentistry</p>
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Diplomate, American Board of Oral Implantology/Implant Dentistry

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

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

THE AMERICAN BOARD OF ORAL IMPLANTOLOGY/IMPLANT DENTISTRY (ABOI/ID) IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

Obviously, the disclaimers will not fit on a business card, on a dentist's letterhead or anything other than large, and expensive, yellow pages or newspaper advertisement. They are first and foremost "unjustified" and, secondly, "unduly burdensome." See Ibanez, 114 S. Ct. at 2090. Not only are the disclaimers "unjustified" and "unduly burdensome," but they are inherently misleading and will likely cause confusion for the dental consumers.

The rule is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (1983). See also Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). The state must prove not only that the harms it seeks to protect against are real, but also that the proposed restrictions will actually materially alleviate those harms. Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 1803 (1993). See also Zauderer, 471 U.S. at 648-49; Bolger, 463 U.S. at 73; In re R.M.J., 55 U.S. 191, 205-206 (1982); Central Hudson, 447 U.S. at 569. Mere speculation,

under the guise of “potentially misleading,” will not suffice. Edenfield, 113 S. Ct. at 1803; Ibanez, 114 S. Ct. at 2088. This Court in Borgner I has already found that the State cannot meet this burden. See pages 5-7 supra. Even the House of Representatives Committee has admitted that the Defendants evidence of the “harms” the statute was enacted to protect was merely speculation and conjecture. See House of Representatives Committee on Health Care Licensing and Regulation Analysis, p. 2, quoted on page 7 supra.

In the absence of evidence showing that the public will likely be misled by the advertising of the Plaintiffs’ membership in, and credentials from, the AAID and ABOI/ID, the state cannot ban, or even restrict, the Plaintiffs’ First Amendment rights.

The Legislature’s purpose in amending Section 466.0282 is merely pretextual. It passed the legislation as a result of the lobbying efforts of the Florida Dental Association. The FDA’s real concern, and hence the Legislature’s purpose, is protecting ADA specialty areas of practice and the “turf” of dentists who are specialists in those ADA-recognized specialty areas. Pretextual governmental interests cannot justify the amended statute. Cf. Edenfield, 113 S. Ct. at 1798. The Defendants have presented no evidence of false or misleading advertising, no evidence supporting their claim that the public would be misled by advertising membership in, or credentials from, the AAID or ABOI/ID, and, thus, no evidence to justify the amended rule. See Borgner I, 33 F.2d at 1333.

If the purpose were not pretextual, the state must still demonstrate that the rule “directly advances the stated governmental interest, and is no broader than reasonably necessary to serve that interest.” Edenfield, 113 S. Ct. at 1800. The Defendants have already failed to meet that burden.

Without any evidence of actual harm to the public and the showing that the restriction on commercial speech will alleviate that harm to a material degree, a state cannot ban, or even restrict, a professional's use of the designation of a certification obtained from a bona fide organization without violating his constitutional right to freedom of speech. The Florida Legislature has admitted that the Board has no evidence of actual harm to the public and, thus, certainly cannot show that the restriction on commercial speech will alleviate that harm to a material degree. Therefore, the Legislature cannot ban, or even restrict, a dentist's use of the designation of a certification obtained from a bona fide organization. Furthermore, even if it could restrict such advertising, it cannot do so by requiring the dentist to include in his announcement or advertisement the unjustified and unduly burdensome disclaimers found in Section 466.0282(3), without violating the dentist's constitutional right to freedom of speech.

**B. The Plaintiff will suffer irreparable injury unless the injunction is issued and the threat and injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause the Defendants.**

The Eleventh Circuit has held that violation of an individual's constitutional rights, especially his or her First Amendment rights, constitutes irreparable injury. *See, e.g., Cate v. Oldham*, 707 F.2d 1176 (11<sup>th</sup> Cir. 1983) (citing *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5<sup>th</sup> Cir. 1981) (“[t]he loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction”); *Daniel v. City of Tampa*, 818 F. Supp. 1491, 1493 (M.D. Fla. 1993) (“[a]n alleged constitutional infringement will often alone constitute irreparable harm sufficient to warrant granting of a preliminary injunction”).

The Defendants have the burden of proving that Florida=s restrictions on a dentist=s commercial speech are justified, that the harms that they seek to protect are real and substantial and that the restrictions will actually, directly and materially alleviate those harms. The Defendants cannot meet this burden. Indeed, the Defendant Board of Dentistry itself, comprised of experts empowered to regulate the practice of dentistry in the State of Florida, has previously held that the Plaintiff AAID and the certifying Board it sponsors, ABOI/ID, are Abona fide organizations that credential dentists in the area of implant dentistry,≡ and that the credentials at issue could lawfully be advertised to the public. See the State of Florida, Board of Dentistry Final Order, Exhibit D of Plaintiffs= Complaint for Declaratory Judgment and Preliminary Injunction. More importantly, this Court has held that the Defendant has not met its burden of proving that Florida=s restrictions on a dentist=s commercial speech are justified, that the harms that they seek to protect are real and substantial and that the restrictions will actually, directly and materially alleviate those harms.

As in Ibanez, the Defendants cannot demonstrate that the public would infer state-sanctioned credentials. The designation, ADiplomate, American Board of Oral Implantology/Implant Dentistry,≡ clearly indicates the organization from which the credential is bestowed. Likewise, AFellow,≡ AAssociate Fellow,≡ and/or AMember≡ of the American Academy of Implant Dentistry also expressly indicate the organization from which the credentials emanate.

When the regulation of professional advertising is challenged, the courts use a four-part analysis developed by the United States Supreme Court to determine whether the regulation violates the First Amendment=s commercial speech protections: (1) is the expression protected by the First Amendment, i.e. the expression, at a minimum, must concern a lawful activity and not be misleading;

(2) is the asserted governmental interest substantial; (3) does it directly advance the governmental interest asserted; and (4) is it not more extensive than is necessary to serve that interest? Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 566 (1980); See also Shapero v. Kentucky Bar Association, 486 U.S. 466, 472 (1987).

The Defendants bear the burden of justifying the restrictions the state has placed on commercial speech. Edenfield v. Fane, 507 U.S. 761 (1993). For the Defendants to prevail, they must demonstrate that the link between this statute and its asserted governmental interest is an immediate connection or a direct link. Central Hudson, 447 U.S. at 569. A tenuous or speculative link is insufficient to meet this burden. Id. In short, the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Id. at 574. The Defendants have already failed to meet this burden in Borgner I.

Furthermore, in Borgner I, the Board agreed to refrain from enforcing the provisions of Section 466.0282 during the pendency of that case. (See Agreed Order attached as Exhibit I.) Certainly, the present situation is no less likely to cause the Plaintiffs irreparable injury than the situation in Borgner I and the potential damage to the Defendants is no less than it was in Borgner I. Even if the Defendants could establish, which they cannot, that the statute directly advances governmental interests, the statute is clearly not narrowly tailored to serve those state interests. The Defendants cannot show that a more limited speech regulation would be ineffective. Central Hudson, 447 U.S. at 571. See also Babkes v. Satz, 944 F. Supp. 909 (S.D. Fla. 1996).

**C. The granting of a preliminary injunction will serve the public interest.**

“The First Amendment protects the public’s interest in receiving information.” Pacific Gas & Elec. Co. v. Public Utilities Comm’n of California, 475 U.S. 1, 106 S. Ct. 903, reh’g denied. 475 U.S. 1133, 106 S. Ct. 1667 (1986) (citing Saxbe v. Washington Post Co., 417 U.S. 843, 863-64 (1974); Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). See also First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (constitutional protection of freedom of speech “serves significant societal interests” wholly distinct from the speaker’s interest in self-expression). The Eleventh Circuit Court of Appeals, in Abramson v. Gonzalez, quoting the United States Supreme Court, stated, “People will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication, rather than to close them. . . . The First Amendment presumes that some accurate information is better than no information at all.” Abramson, 949 F.2d at 1578 (quoting Central Hudson, 447 U.S. at 562, 100 S. Ct. at 2349).

Consequently, the public’s interest will best be served by allowing access to useful, truthful, non-misleading information which Dr. Borgner and other similarly situated dentists wish to continue to advertise. By advertising their membership in, and credentials from, the AAID, a bona fide professional organization, these dentists can provide the public with useful, truthful, non-misleading information which may assist consumers in selecting a dentist who has the training and experience in a particular area they need.

Based upon the foregoing and Plaintiffs’ Complaint with Attachments filed simultaneously, and having met their burden of proof both factually and as required by the relevant case law, the Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the Defendants

from implementing and enforcing Section 466.0282 of the Florida Statutes, as amended, or in any other way prohibiting the advertising of--without the specified onerous disclaimers--:

1. Member, American Academy of Implant Dentistry, and/or
2. Associate Fellow, American Academy of Implant Dentistry, and/or
3. Fellow, American Academy of Implant Dentistry, and/or
4. Diplomate, American Board of Oral Implantology/Implant Dentistry, and/or
5. Board Certified, American Board of Oral Implantology/Implant Dentistry, and/or
6. Practice limited to (or emphasis on) implant dentistry.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served upon the Attorney General of the State of Florida, by certified mail, return receipt requested, this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

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Marilyn J. Marshall (0991805)