Case No. 14-51151

In the
United States Court of Appeals
for the Fifth Circuit

DR. MARY LOUISE SERAFINE,

Plaintiff - Appellant

v.

TIM F. BRANAMAN, Chairman, Texas State Board of Examiners of Psychologists, in his official capacity; DARREL D. SPINKS, Executive Director, Texas State Board of Examiners of Psychologists, in his official capacity,

Defendants - Appellees

On Appeal from the United States District Court
for the Western District of Texas
No. A-11-cv-01018, the Honorable Lee Yeakel

BRIEF OF APPELLANT

Mary Louise Serafine, Ph.D., J.D., *Pro Se*
P.O. Box 4342
Austin, Texas 78765
512-220-5452
mlserafine@gmail.com

Certificate of Interested Persons

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The undersigned certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification.

1. Plaintiff-Appellant Mary Louise Serafine, Ph.D., J.D., is not represented in the Fifth Circuit and acts *pro se*.

2. Plaintiff-Appellant Serafine, before or during trial, was represented by Mr. Joel M. Spector and Mr. James M. Manley of the Mountain States Legal Foundation, 2596 South Lewis Way, Lakewood, Colorado 80227; by Mr. John R. Hays, Jr., Hays & Owens LLP, 807 Brazos Street, Suite

500, Austin, Texas 78701; and by Mr. Roger B. Borgelt, Borgelt Law, 614 S Capital of Texas Hwy, Austin, Texas 78746.

3. Defendants-Appellees Texas State Board of Examiners of Psychologists et al. ("Board") are represented in the Fifth Circuit by Mr. Alex Potapov, Assistant Solicitor General of the State of Texas, General Litigation Division-019, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

4. Defendants-Appellees Board et al. were represented in the trial court by Mr. James C. Todd and Ms. Amy Penn, Assistant Attorneys General of the State of Texas, General Litigation Division-019, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

Mary Louise Serafine, Ph.D., J.D. *pro se*

Statement Regarding Oral Argument

This is a freedom of speech case in which the facts of the State's enforcement action were stipulated, and the First Amendment analysis urged by Appellant Serafine is a well-worn path. At the same time, the Circuits are split on an aspect of psychological licensing—the issue here—and this case is the first to include the extensive social science evidence on point to the State's claimed justifications—harm to the public—for its restriction on speech. Plaintiff-Appellant respectfully leaves oral argument in the Court's discretion.

Table of Contents

Table of Authorities

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Magazine, Sept.2, 2010 52

Floyd, M., Scogin, F., McKendree-Smith, N.L. et al., Cognitive therapy for depression: A comparison of individual psychotherapy and bibliotherapy for depressed older adults, *Behavior Modification*, 2004, 27: 2: 297-318 37

Goode, E., William Kessen, 74, a Professor And Expert on Child Psychology, *New York Times*, February 18, 1999 11

Gould, R.A. and Clum, G.A., A meta-analysis of self-help treatment approaches, *Clinical Psychology Review*, 1993, 13: 169-186 36

Norcross, J.C., Koocher, G. P., & Garofalo, A., Discredited psychological treatments and tests: A Delphi poll, *Professional Psychology Research and Practice*, 2006, 37:5:515-522 38

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Time Magazine, Mar. 29, 1999 11

Stice, E., Burton, E., Bearman, S.K., and Rohde, P., Randomized trial of a brief depression prevention program: An elusive search for a psychosocial placebo control condition,
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Statement of Jurisdiction

This case was brought under the First and Fourteenth Amendments to the U.S. Constitution. The district court had jurisdiction under 28 U.S.C. §1331and 28 U.S.C. §1343(a)(3), as well as 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291.

The district court dismissed certain claims pursuant to Fed. R. Civ. P. 12(b)(6). On September 24, 2014, the court entered a final take-nothing judgment, disposing of all claims by all parties, and entered its Findings of Fact and Conclusions of Law on the same day. Serafine timely paid costs and filed notice of appeal.

Issue Presented

Chapter 501 of the Texas Occupations Code criminalizes the unlicensed practice of psychology. The Texas State Board of Examiners of Psychologists issued a cease and desist order against Appellant Serafine, and the Attorney General threatened prosecution, because she called herself a "psychologist" on her political campaign website.

> Did the trial court err in determining that Texas Occupations Code §501.003(b) satisfies the First and Fourteenth Amendments, both facially and as applied to Serafine?

Introduction

Chapter 501 of the Texas Occupations Code—the Texas Psychologists' Licensing Act ("Chapter 501")—prohibits the unlicensed practice of psychology. The practice of psychology is defined as using the word "psychological, psychologist, or psychology" to describe oneself. In a separate part of the subsection, practicing psychology consists of providing free or paid services described in the Chapter. Chapter 501 is enforced by the Texas State Board of Examiners of Psychologists ("State" or "Board").

In 2010, Appellant Serafine was the Republican nominee in her district for Texas Senate. Her campaign website, www.serafineforsenate.com, contained the traditional "bio." The bio opened: "Mary Lou Serafine is an Austin attorney and psychologist."

During the campaign, the Texas Psychological Association ("TPA") emailed Serafine that in their opinion the sentence violated Chapter 501. She changed "psychologist" to "educator." Thereafter the TPA and the Board signed formal complaints against Serafine over the use of the word and filed them with the Board. The Board issued a cease and desist order

against Serafine, followed by a letter from the Attorney General threatening prosecution for Serafine's use of the word in "public records."

The TPA's lobbyist and the Board then contacted local newspapers, informing them of the cease and desist order and demanding corrections stating that Serafine was not a psychologist. The TPA's lobbyist phoned the same information to the office of Serafine's opponent.

Chapter 501 violates the First and Fourteenth Amendments and should be struck down. Its purpose is to suppress protected speech, and it is supported by no legitimate government interest. It is vague as both a civil and criminal statute and overbroad, extending its reach even to political websites and many other occupations.

There is extensive social science research, over several decades, on the outcomes of one-to-one conversation known as "talk therapy." That research demonstrates that, while beneficial, no greater benefits are obtained by highly trained conversationalists than by those with little or no training, or, in some research, by self-help activities. To the extent the State has a legitimate interest, it could be met with more limited means.

Statement of the Case

I. Factual Background

A. Initial Events

The events giving rise to this case were stipulated and found by the district court. ROA.741-744. In 2010, Serafine was the Republican nominee in her district for Texas Senate. Her campaign website, serafineforsenate.com, contained the traditional "bio." It opened with this sentence: "Mary Lou Serafine is an Austin attorney and psychologist." A few months before the election, the Texas Psychological Association ("TPA") emailed Serafine that, in their opinion, the sentence could not contain the word "psychologist." ROA.758-759. Serafine immediately changed "psychologist" to "educator." ROA.758-759. The advisors on her campaign staff were experienced, ROA.886-887, ROA. 869-870, and both they and Serafine thought the new word "not deliberately deceptive," but vague and less effective. ROA.884. Serafine has never claimed to be a licensed psychologist and no one has ever approached her believing that she was, despite long being known as a psychologist. ROA.426, ROA.748, ROA.775,

ROA.861-862, (Complaint, ROA.12, ROA.746). She does not claim to be entitled to a Chapter 501 license. *Id.*

During the Board's investigation of Serafine's use of the word, it found that Serafine had also written the words "attorney, psychologist" in the slot marked "Occupation," on the ballot form required by the Texas Secretary of State. The Board found that on Google and Yahoo many others had for years described Serafine with the word "psychologist" or "psychology." The Board's executive director believed that Chapter 501 required Serafine to have those web-speakers remove "psychologist" from their descriptions of Serafine. ROA.920-922.

The Board sent Serafine a cease and desist letter, ROA.741-744, enclosing sections 501.001, 501.002, and 501.003 of the Occupations Code, and ordering her not to practice psychology or use the term psychologist. ROA.741-744. Ex. P-2.

Both the Board and the lobbyist for the TPA, ROA.901, ROA.908, contacted local newspapers to inform them of the cease and desist order and that Serafine was not a psychologist. The Board demanded "corrections."

ROA.741-744. The lobbyist for the TPA also notified the office of Serafine's political opponent. ROA.908. Later the Texas Attorney General threatened prosecution. ROA.741-744, Ex. P-6.

Serafine has complied by having the word psychologist removed from her listing in *Who's Who in America* and by not re-starting her seminars and offering one-on-one life-coaching or counseling as she had planned.[1]

Like most psychologists, *see infra*, Serafine is not eligible to sit for the examination. ROA.765. The Board maintains a database for the public that identifies its licensees. ROA.940.

B. Serafine Is a Psychologist

Serafine's research in psychology was considered "groundbreaking" and "truly significant" by internationally recognized psychologists. ROA.752-753, Ex. P-12. Her Ph.D. dissertation was independently reviewed and recommended for publication in Genetic Psychology Monographs by J. McVicker Hunt, one of the most influential psychologists of the 20th Century

[1] The district court appeared to believe erroneously that the Attorney General would not to enforce §501.003 against Serafine.

and a former president of the APA (the American Psychological Association). ROA.751.

Serafine trained in psychology as a post-doctoral fellow in Yale's Department of Psychology.[2] She served on the psychology faculties at Yale and Vassar and lectured at the freshman level in virtually all of psychology's sub-fields—developmental and cognitive psychology, psychobiology, learning, memory, perception, language, motivation, social psychology, intelligence, personality, mental illness, psychotherapy, and early childhood education—with several of these at the advanced level, including research and statistics. ROA 748-749. ROA.748-750.

Serafine was recommended for tenure at Vassar in the Department of Psychology one year early. She has worked with, published with, and/or been mentored by leading psychologists, including Robert Crowder (a leading cognitive psychologist), William Kessen (a former president of the APA's Developmental Psychology division), Irvin Child (chairman of Yale's

[2] *See* Serafine's curriculum vitae, Ex. P-11, verified and admitted at ROA.747-748.

Department of Psychology), and in graduate school, William Ware (a leading applied statistician). She has published in a collection of works edited by Robert Sternberg, also among the most influential psychologists of the last century and a former president of the APA. ROA.740, ROA.1053.

Before her campaign and the events in this suit, Serafine taught seminars and offered one-on-one life-coaching or counseling services on personal growth issues, as do many such people in every state.[3] ROA.12-13. Serafine's seminar methods and one-on-one services arise in part out of her graduate training in a program designed by a student of Carl Rogers. *Ibid.*, ROA.14. Columbia University Press continues to publish her book on the psychology of music, which the psychologist reviewing the book independently for the Press described as being "in the best traditions of developmental psychology." ROA.752. Trial Exhibit P-13 (reviewer's report). The editors of *Who's Who* chose the word psychologist to describe Serafine and continued to do so until Serafine, under the cease and desist

[3] Serafine's Complaint at ROA.11 et seq. was verified as true and correct at ROA.746.

letter, requested removal of "psychologist." ROA.767-768, Ex.P-10.

Serafine is an attorney and also has been known as a psychologist for 30 years. ROA.769. She is proud of it and does not want to be ousted from the psychological tradition of which she feels a part. ROA.770-772. She greatly wants her biography in *Who's Who in America* restored to its original. ROA.767-768, Ex. P-10 (letters to *Who's Who).*

C. The Meaning of "Psychology" Words

Appellant Serafine testified as her own expert[4] and was properly qualified under Fed. R. Evid. 702.[5] ROA.781-782. She relied on her training and experience in psychology and the material included but not limited to

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[4] Dr. Serafine's compilation of material includes no studies that have been withdrawn or de-published, so far as can be determined, and all materials can be verified in their respective publications. Most of them are available at the PsycINFO database, which contains some three to four million published articles in psychology. *See* http://psycnet.apa.org/index.cfm?fa=search.advancedSearchForm (accessed 1/7/2015). Dr. Serafine's expert opinion was based on her independent analysis of the published results and data, not necessarily on the conclusions of the cited authors, which may be different**.**

[5] Dr. Serafine's role is not unlike that of a corporation's designation of its employee, or defendant physician's designation of himself in a malpractice action.

the sources listed in Ex. P-19. (Ex. P-19 is shown at ROA.515-527 and was admitted as material she reviewed at ROA.779). Her expert testimony included the following facts:

Virtually all psychology textbooks and dictionaries define psychology as *the science or study of behavior*, and "psychologist" as "one who studies the mind or behavior." ROA.784-785.

Most psychologists are unlicensed. ROA.772. All of them are referred to as "psychologists" by the established media,[6] ROA.1052, (for example, Serafine's mentors, who were unlicensed)[7] and by all psychological organizations and journals. "Psychology" and "psychologist" are generic words analogous to sociology/sociologist, physiology/physiologist.

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[6] Time Magazine article on Jean Piaget
Papert, S., *Child psychologist Jean Piaget*, Time Magazine, Mar. 29, 1999 (a pioneering "psychologist") Available at: http://content.time.com/time/magazine/article/0,9171,990617,00.html (accessed 1/28/2015).

[7] New York Times Obituary of William Kessen
Goode, E., *William Kessen, 74, a Professor And Expert on Child Psychology*, New York Times, February 18, 1999 (a "developmental psychologist" who "helped shape the thinking of a generation of child psychologists") Available at: http://www.nytimes.com/1999/02/18/us/william-kessen-74-a-professor-and-expert-on-child-psychology.html (accessed 1/28/2015)

ROA.783-785 (history of etymology of the terms).

The majority of psychological organizations in the U.S. comprise psychologists of whom the majority are unlicensed.[8] ROA.790-791. Almost half (about 40 percent) of the members of the American Psychological Association—the largest of the North American organizations—are not licensed psychologists, ROA.791, and some 80 percent of the University of Texas psychology faculty are not licensed. ROA.774. The American Psychological Association properly refers to all its members as psychologists. ROA.783-784, ROA.1052. Serafine was a member of the APA for several

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[8] The majority of members of these American associations work in the unlicensed areas of psychology: Association for Psychological Science (http://www.psychologicalscience.org/), Association for Research in Personality (http://www.personality-arp.org/), the Psychonomic Society (http://www.psychonomic.org/), the Society for Research in Child Development (http://www.srcd.org/), The Society for Industrial and Organizational Psychology (http://www.siop.org/), Society for Judgment and Decision-Making (http://wviw.sjdm.org!) .ROA.790-791.

Many of the American psychologists who belong to these international organizations work in the unlicensed areas of psychology: International Association for Cross-Cultural Psychology (http://www.iaccp.orgfdrupall), International Association for Relationship Research (http://www.iarr.org/), International Society for Research on Aggression (http://www.israsociety.com/), International Society for Self and Identity (http://www.issiweb.org!). ROA.790-791.

years. ROA.769.

Within the American Psychological Association, there are some 54 subject-matter divisions. Forty-nine of them comprise psychologists of whom the majority are unlicensed (e.g., experimental psychology, developmental psychology, psychology of the arts, etc.) Many past presidents of the APA are or were unlicensed, as are many considered the most influential psychologists of the past century. ROA.773-774. The Board's chairman agreed at deposition that "there certainly are many branches of psychology." ROA.499. These psychologists are known as just that: psychologists. Even assuming that the aim of Chapter 501 is to regulate talk therapy ("psychotherapy")—which it is not, as the statute is far broader—the field of talk therapy is a small part of psychology. Survey textbooks that are 700 or more pages in length devote as few as only 20 pages to talk-therapy or psychotherapy. ROA.784.

D. The Text of Chapter 501.

Section 501.003 defines the "Practice of Psychology" as follows:[9]

> (a) In this section, "psychological services" means acts or behaviors that are included within the purview of the practice of psychology.
>
> (b) A person is engaged in the practice of psychology within the meaning of this chapter if the person:
>
> > (1) represent the person to the public by a title or description of services that includes the word "psychological," "psychologist," or "psychology";
> >
> > (2) provides or offers to provide psychological services to individuals, groups, organizations, or the public;
> >
> > (3) is a psychologist or psychological associate employed as...[ ]; or
> >
> > (4) is employed as a psychologist...[ ].
>
> (c) The practice of psychology:
>
> > (1) includes providing or offering to provide services to an individual or group, including

[9] The complete text of Chapter 501 of the Texas Occupations Code is available at http://www.statutes.legis.state.tx.us/?link=PR. (accessed January 27, 2014).

providing computerized procedures, that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior;

(2) addresses normal behavior and involves evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals or groups, as well as the psychological disorders that accompany medical problems, organizational structures, stress, and health;

(3) includes:
(A) using projective techniques, neuropsychological testing, counseling, career counseling, psychotherapy, hypnosis for health care purposes, hypnotherapy, and biofeedback; and
(B) evaluating and treating mental or emotional disorders and disabilities by psychological techniques and procedures; and

(4) is based on:
(A) a systematic body of knowledge and principles acquired in an organized program of graduate study; and
(B) the standards of ethics established by the profession.

Under regulations at 22 Tex. Admin. Code §§ 461.1 - 473.8,[10] obtaining a Chapter 501 license is prohibitively burdensome. Among other reasons, two years of supervised practice—usually unpaid—are required, plus written and oral examinations. 22 Tex. Admin. Code §§ 463.10, 463.11.[11]

Serafine is not eligible to sit for the examination. ROA.765, ROA.783-785, ROA.1052. A doctoral degree is required from only an accredited program, and those programs exclude experimental, cognitive, social, and developmental psychology programs and most programs in education. ROA.765, ROA.783-785, ROA.1052.

Chapter 501 imposes a fine of $1,000 a day and punishes as a Class A misdemeanor, any person who "engages in the practice of psychology or represents that the person is a psychologist," without a license. §501.002, 501.251, 501.004, 501.502, and 501.503.

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[10] *See* Texas Administrative Code, Title 22 (Examining Boards), Part 21 (Texas State Board of Examiners of Psychologists), available at http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=2&ti=22 (accessed on Jan. 27, 2015).

[11] Sections 463.10 and 463.11 of the Texas Administrative Code are contained in the Appendix attached hereto.

E. How the Board Interprets Unlicensed Practice

The relevant subsections are (b)(1) and (b)(2), each considered in turn.

1. Under § 501.003(b)(1)

In construing this subsection,[12] the State's counsel and witnesses agreed that it banned one's "**calling themselves**" a psychologist, anywhere, at any time, without a license. *See* State's counsel: ROA.213, ROA.215, ROA.221, ROA.223, ROA.287, ROA.739-740 ("allowing just anybody to say 'I'm a psychologist...'" must be prevented), and ROA.783; the Board's chairman: ROA.503, ROA.504, ROA.508, ROA.509; the Board's executive director: ROA.917.

The subsection everywhere bans not only a title but the *word* or *term*, except by license. ROA.941.

[12] This subsection provides that one engages in practice of psychology by representing oneself by a title or description of services that includes the word "psychological," "psychologist," or "psychology."

2. Under § 501.003(b)(2)

In construing this subsection[13] it is necessary to note that "psychological services" means "the practice of psychology" pursuant to subsection (a) and defined in subsection (c). At trial, the Board's chairman had a copy of §501.003 with him on the stand. He acknowledged that it defined what *speech* constitutes the practice of psychology, ROA941, and that, individually, the *conversations* listed in subsection (c) would still be prohibited as the practice of psychology, even if one avoided the prohibited words psychological, psychologist, or psychology. ROA.942. Thus, under §501.003(c)(1), he testified, if a person applied *"established principles, methods, or procedures of describing, explaining, or ameliorating behavior"* as a service, that would be prohibited as the unlicensed practice of psychology. ROA.942. In fact, "[a]ny of those [the first three under §501.003(c)] constitutes the practice of psychology," even if unpaid. ROA.943-944.

And subsection (c)(4)—requiring training—is not a safe harbor: "The

[13] This subsection provides that one engages in practice of psychology by offering or providing psychological services to individuals, groups, organizations, or the public.

failure to not [sic] have had a systematic body of knowledge based on a training program certainly does not exempt them from the Act," the Board's chairman testified. ROA.946.

The Board's chairman testified that speech that is lawful in one context could be unlawful in another. ROA.948-949. Words unlawful on private property would be lawful on a university campus. "[I]t has to do with the intent and the purpose of the speech." *Id.* The intent of both the speaker and listener are what matter, and although not visible, it is "inherent in the way the Act is written." *Id.*

The Board's chairman also testified:

> A. If a person -- if the person were having a conversation at a cocktail party and talking about psychology, I don't believe that would constitute the practice of psychology. If they were offering -- conducting an interview, talking to a person about what their problems were, if they were *applying a systematic body of knowledge* to the understanding and description of behavior of a particular individual or a group of individuals and talking about how to ameliorate and resolve those problems, then, yes, I think that would be the practice of psychology. (emphasis added)

ROA.949-950.

At deposition[14] the Board's chairman testified that services offered by management consultants, sports coaches, and golf pros might constitute the practice of psychology and therefore violate Chapter 501. But there was no way to know in advance. The Board would have to investigate the context in which the speech occurred, in order to determine whether there was a violation. ROA.503-507. It was the same with common weight-loss, twelve-step, and other programs, as well as telephone help-lines. *Id.*

> **Q. [Plaintiff's counsel Mr. Manley]: Well, what I'm trying to understand is when does advice about life's challenges cross the line from -- into the practice of psychology, because I can't figure that out based on what we've discussed.**
>
> A. When it -- when the individual represents themselves as a psychologist or as practicing psychology, then it crosses the line.
>
> **Q. So if a person doesn't use the term psychologist or psychological or psychology, then they don' t come within the coverage of the act?**
>
> A. My -- I would need to know the situation in order to

[14] Branaman deposition, of 6/4/2013, trial exhibit P-18, shown at ROA.497-509. [Trial Exhibits P-16, P-17, P-18, excerpts from the depositions of Ms. Lee, Mr. White, and Dr. Branaman respectively, were admitted at ROA.988-989.]

determine that specifically. The -- I'd have to know the situation.

ROA.505.

Q. What about smoking cessation programs?

A. I would respond in the same way. It depends on the context in which those are delivered.

Q. But I guess I can't imagine a program where someone offers advice to someone about how to stop smoking that wouldn't involve the application of established principles to ameliorate behavior.

A. A person might go to a physician for a prescription that would facilitate smoking cessation as opposed to going to a psychologist and seeking hypnotherapy to facilitate smoking cessation.

ROA.507.

Q. But golf coaches, for instance, give advice about the psychology of the game and how to control your thoughts in order to improve your -- your behavior on the golf course?

A. They might.

Q. And assuming they're not calling themselves psychologists, wouldn't that nevertheless come under the purview of the act?

A. I think I'd have to know the context of the specific case.

Q. Well, how -- how would one read the statute and then determine if what they' re going to do violates the act? I mean, if they're -- if they're engaged in what I just described, golf coaching, talking to players about the psychological aspects of the game.

A. To the best of my knowledge, we've never had a complaint filed in that regard, so I don't know.

Q. But in looking at the statute, can you tell me right now if that -- if that would be covered?

A. I would need to know the facts of the case.

Q. Well, they're as I've represented them to you.

A. Well, I would I would be looking for more collateral data if you came to me with a case based on that representation. I would be saying to you, just as I am now, I don' t know. I need to know more about this.

ROA.508-509.

Serafine testified at trial describing the services she wanted to offer to normal people. ROA.763-764. She would be engaged in describing and explaining behavior, and ameliorating the behavior of clients if they wish to. She wanted to make such offerings available to "individuals [and] groups,

and businesses, relying on my background in psychology and, additionally, my views about life." *Id.*

She noted that her field of developmental psychology is a *point of view* about changes over the life-span. She gave two examples of differences from mainstream opinion. ROA.766.

The Board's Chairman reviewed at trial the description of Serafine's background in connection with her seminars that was once posted on the internet (Ex. P-5):

> Dr. Serafine began her career leading seminars, workshops, and personal development groups in the field of teacher training. She also taught and did research in psychology and served on the faculties of UT, Yale University, and Vassar College, before undertaking a new venture at mid-life and going to law school. She has frequently served as a small-group facilitator in the seminar When Your Relationship Ends, and now teaches the Successfully Single seminar, as well as the Building A Healthy Relationship seminar.

Ex. P-5 at 17.

The Board's chairman testified that Serafine likely could not teach such

seminars under §501.003(b)(2). The most she was allowed to do was "lecture." The seminars constitute unlawful practice of psychology because of what the seminars *talk about*:

- it's unclear whether this was purely...a lecture";
- the term "'small group facilitator' suggests it is the practice of psychology";
- "it appears to be facilitating some process";
- the term "'small group' suggests that those individuals have come there for a particular reason and suggests that there was some kind of intent on the part of whoever is offering the group to solicit or invite those individuals to participate or those persons came to participate because of what they believed about the group";
- "...it talks about a setting in which persons have problems";
- "It talks about recovery";
- "It talks about family resources, which is in a center and it's a professional corporation."
- "Some type of service is being held out for the purposes of money, perhaps."
- "It's a service of some type....I can't tell what the links are on the left-hand side but that would certainly suggest that it was the practice of psychology."

ROA.947-951.

F. The TPA's and the State's Justifications for Chapter 501

According to the executive director/lobbyist for Texas Psychological Association,[15] the purpose of enforcing Chapter 501 is "[p]rotecting the title of psychologist," and "[i]t didn't matter where [Serafine] was portraying herself." "[A]nytime someone uses that term, that should be regulated and controlled by the statute."[16]

The Board's chairman was asked at trial specifically, "from [his] perspective as the head of the body charged by law with implementing this statute," what purpose was served by allowing only people who hold the license to use the word "psychologist." He answered:

"I suppose that the concept that comes to mind is brand name."

ROA.968.

He clarified that this meant, speaking metaphorically, a trademark.

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[15] Trial Exhibit P-17 (Deposition of White at 35).

[16] *Id.* at 45.

ROA.978.

The State's expert, licensed as both an attorney and psychologist, ROA.1025, was asked at trial if he had conducted or reviewed any surveys showing that the public relied on "psychologist" to signify licensure. He testified:

> **Q. [Plaintiff's counsel Mr. Manley] Did you review any such surveys?**
>
> A. Yes, I did. Actually, not with regard to psychology. What I reviewed were some textbooks in marketing and the effects of branding and the effects on the general public of trying to introduce a name or a title to increase public perception or awareness of the presence of that, including how much corporations pay to have their products appear in movies -- not advertising the product, but because it increases the likelihood that people will purchase their product merely because they see the name present. And I argue that it's analogous to use the word "psychologist" because that implies to the public how it raises the likelihood there would be expectations of provision of services.
>
> **Q. And where do those citations appear in your report?**
>
> A. [ ] I did not cite them. Principles of Marketing by Kotler would be one.

ROA.1041.

The Board's former executive director, explained why she sent to the Attorney General the list of 130 Google and Yahoo "hits" where others, over years, described Serafine as a psychologist. She testified, "you can't call yourself a psychologist in Texas unless you're licensed by the Board. It's a protected title." ROA.920-922. She believed Chapter 501 required Serafine to

> "take steps to correct the fact that she was being called a psychologist, using that title, somebody was calling her a psychologist...."[17] [The hits were] "proof that -- that Dr. Serafine was violating the Act."[18]

ROA.921-922.

As to Serafine's seminars, she testified at deposition that "[t]he services she's providing sound similar to psychology."[19]

At opening statements, State's counsel urged that

> allowing just anybody to say "I'm a psychologist..." would invite unlawful activity and be inherently misleading.

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[17] Trial Exhibit P-16 (Deposition of Lee at 52).

[18] Trial Exhibit P-16 (Deposition of Lee at 52).

[19] *Ibid.*

ROA.739-740.

> Chapter 501 also "gives the public a certain assurance";
>
> **and this is very important**—[it] provides to the recipients of psychological services a place they can go to complain if they feel they have been mis-served in the delivery of psychological services.

ROA.739. (emphasis added)

The State's further justification was to prevent "risks to public health and safety." ROA.396, ROA.457, ROA.739. Based on the Board chairman's testimony of what was prohibited, the risk is from unlicensed speech that "talks about recovery," or occurs "in a setting where persons have problems," ROA.947-951, or, in deposition testimony, was unlicensed speech that "facilitate[s] personal growth." ROA.503-507 (deposition admitted at trial).

Finally, the State urged a purpose that it said at opening statements it would prove at trial:

> We think the evidence will actually show that there is such a thing as the field of psychology. There's a fair amount of consensus on what's effective and

what isn't.

ROA.739.

G. Evidence for the Justifications

1. The State's Evidence

At trial, as follows:

- when asked whether they personally relied on a group of "established principles, methods, and procedures of describing, explaining, and ameliorating behavior," the State's expert and the Board's chairman answered in the affirmative; ROA.1052, ROA.964-965.

- when asked if the written exam was widely accepted, they said it was. ROA.970-971.

- when asked about inter-rater agreement on the oral exam, they said it was high. ROA.971-972; *see also* ROA.468.

The State's expert's report was not put into evidence. He acknowledged he cited no studies or research, and no papers, except for citing "a communication from a senior research officer with APA." He could not say whether any "scientific principles or procedures" appeared in his report. ROA.1040-1042. As an anecdotal example, he opined that in one case his diagnosis was superior to an opinion by an educational counselor.

ROA.1034-1035.

The State argued that all states have purportedly similar licenses for psychologists, but there was no evidence of the extent of similarities and differences. *See also People v. R. R.*, 807 N.Y.S.2d 516 (N.Y. Sup. Ct. 2005)(noting that New York did not prohibit practice of psychology or define its nature and scope until 2003; court discerns there is no difference between psychology and social work). The State made no claim that enforcement across the states is similar to that of Texas. In Exhibit P-19, Serafine had cited to the APA's Model Act for licensing psychologists,[20] but the district court sustained objection to further testimony concerning its trade protection implications. ROA.1048.)

In briefing, the State pointed to its witnesses' testimony to the effect that in "the vast majority of complaints against psychologists, the Board staff

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[20] *See* Ex. P-19 at p.3:
American Psychological Association Model Act for State Licensure of Psychologists
Adopted by Council as APA Policy 2/20/2010
https://www.apa.org/about/policy/model-act-2010.pdf (link re-accessed 1/29/2015)

and the accused practitioner agree as to the appropriateness of the practice at issue." ROA.468.

The Board's current executive director testified about complaints the Board receives: Medicaid fraud, sexual impropriety, ROA.997, ROA.1001, ROA.1003, child custody opinion disputes. ROA. 997.

None were complaints that the advice, opinion, ideas, or speech delivered was erroneous or harmful in content, or omitted to include content that would have prevented a harm or conferred a benefit.

None complained of misrepresentation or fraudulent inducement from misuse of the word psychologist.

At trial, the State did not identify any topic tested by its examinations, ROA.980-981,[21] or identify course work required across its accredited training programs. The State did not cite any studies.

The State did not identify any established principle, method, or procedure of describing, explaining, and ameliorating behavior that was

[21] Deposition excerpts were admitted into evidence as Exhibits P-16, P-17, P-18 at ROA.988-989.

required to be known by its licensees.

2. Appellant's Evidence

In 2012, a year before trial, some 4,000 peer-reviewed experimental studies and review articles had been published on the known factors affecting the efficacy or effectiveness of talk therapy methods in only the previous five years. ROA.1048. Dr. Serafine used standard research techniques, ROA.755-756, ROA.776, to review a sub-set of publications of which a partial list was entered at trial. Ex. P-19, ROA.515-527. Previously Dr. Serafine had taught some of the same material at the college level, ROA 748-749, as it is included in freshmen textbooks. ROA.794-796. It is universally available.[22] Dr. Serafine testified it was necessary "to look at what are the outcomes of the research that has been done." ROA.777. ROA.786-805. ROA.783-804. Some studies are summarized in this record at Doc. #

[22] All studies are still available in their respective publications and none have been withdrawn or de-published, so far as can be determined. Most are available in the PsycINFO database of about three to four million publications, *see* http://psycnet.apa.org/index.cfm?fa=search.advancedSearchForm, (accessed 1/7/2015), with a few in the PubMed database. Dr. Serafine's expert opinions are based on the results, not necessarily the same as the conclusions of the cited authors.

93. ROA.478-589.

In summary, her testimony concluded that (1) the speech prohibitions defined as "the practice of psychology" could not protect the public from any cognizable harm; and (2) no body of knowledge exists, based on fact or consensus, that identifies Chapter 501's "established principles, methods, and procedures for describing, explaining, and ameliorating behavior." Those conclusions are drawn from research showing the following results.

Trained psychotherapists or talk therapists do not get better results than people with less training, or people with little or no training. ROA.792 et seq. (cross-examination at ROA.843 et seq.). Dr. Serafine testified that peer-reviewed studies reaching this conclusion were published as early as the 1970s, for example work by Strupp and Hadley,[23] and have continued. ROA.788 et seq. Considerable trial time focused on a peer-reviewed

[23] Strupp, H.H. and Hadley, S.W., Specific versus nonspecific factors in psychotherapy, Archives of General Psychiatry, 1979, 36:10: 1125-1136 ("[p]atients treated by untrained, non-psychology professors showed...as much improvement as patients treated by ['highly experienced'] professional therapists").

summary of multiple studies[24] and meta-analyses on the issue of trained, little-trained, or untrained therapists, and a review of meta-analyses all reaching the same conclusion published by Christensen and Jacobson.[25] ROA.786-789. ROA.786-792, ROA.843 et seq., article shown at ROA.541. Across 108 studies of therapies with minors, the same result is confirmed.[26]

Dr. Serafine was critical of "one-shot" studies, and relied on meta-analysis. ROA.861-862.

She further explained that, while more recent, some research demonstrates that trained therapists do not get better results than self-help books (*see* "Bibliotherapy" at Ex. P-19 at pp. 8-9, ROA.522-523), ROA.540,

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[24] Christensen, A. and Jacobson, N.S., "Who"or What" can do psychotherapy: The status and challenge of nonprofessional therapies." Psychological Science, 1994, 5:1: 8-14 (also citing Durlak, J., Comparative effectiveness of paraprofessional and professional helpers, Psychological Bulletin, 1979, 86: 80-92, finding "clients who seek help from paraprofessionals are more likely to achieve resolution of their problem than those who consult professionals").

[25] Christensen and Jacobson, *Ibid.* (concluding that paraprofesstionals without advanced training produce effects comparable to those for professional treatment).

[26] Christensen and Jacobson, *Id.* (reporting "meta-analysis of 108 well-designed psychotherapy studies with children and adolescents [] found no overall difference in effectiveness between professional therapists, graduate-student therapists, and paraprofessional therapists").

ROA.543, ROA.791-792, ROA.1047, or self-help groups such as AA, or even fake treatments intended to be placebos. Finding placebos that do *not* work as well as standard treatments has been difficult.[27] Populations studied usually do not include hospitalized patients, but include unhospitalized populations considered to have mental problems. ROA.1047.

Professionals with more experience do not get better results than those with less experience. Dr. Serafine explained a meta-analysis of 475 studies that attempted find a correlation between years of clinical experience and client improvement. When meta-analyzed the data yield zero correlation, a finding confirmed in a separate meta-analysis of another 143 studies.[28] ROA. 786-789.

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[27] Stice, E., Burton, E., Bearman, S.K., and Rohde, P., Randomized trial of a brief depression prevention program: An elusive search for a psychosocial placebo control condition, Behaviour Research & Therapy, 2007, 45: 5: 863–876.(cognitive-behavioral therapy superior to control group, but so were intended placebos: (1) a non-therapy supportive-expressive group, (2) reading the book *Feeling Good* by Burns, (3) journaling at home, and (4) expressive writing at the researchers' lab).

[28] Christensen, A. and Jacobson, N.S., "Who (or What) can do psychotherapy: The status and challenge of nonprofessional therapies." Psychological Science, 1994, 5:1: 8-14.

When different "principles, methods, and procedures" are tested against each other—including principles based on opposite assumptions about how to ameliorate behavior—no method or procedure gets better results than any other. ROA.786 et seq., ROA.795 (*see* "Common Factors" at Ex. P-19 at pp. 11-12, ROA.525-526). Dr. Serafine explained there are different assumptions (e.g., Freudian as opposed to Skinnerian, etc.). ROA.803-804. She explained why placebo effects account for many of the beneficial outcomes, ROA.795-796, including that a beneficial sense of alliance may be created by a helping person. ROA.795-796. She testified that some have concluded only 15 percent of any benefit is attributable to the actual method—which are the "principles, methods, and procedures" in the statute. The remainder is due to family and other factors. ROA.795-796.

For the Court's convenience, some of the studies from trial testimony or briefing are set forth in the margin, including by Gould and Clum,[29] *see*

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[29] Gould, R.A. and Clum, G.A., A meta-analysis of self-help treatment approaches, Clinical Psychology Review, 1993, 13: 169-186 (meta-analysis of 40 self-help studies examining 61 treatments, finding large treatment effect sizes for self-help interventions and no differences between unassisted self-help and therapist-assisted self-help).

ROA.788 et seq., ROA.1047; Floyd and Scogin et al., *see* ROA.1047, study at ROA.550 et seq.;[30] Ahn and Wampold,[31] noted at Ex. P-19, p.11.

There is a lack of consensus about preferable methods and what constitutes mental health. Dr. Serafine testified at length to the absence of consensus among experts in psychology. Recognizing the lack of consensus about what is effective, Norcross and his research team attempted to measure consensus at least on what constitutes quackery in psychological treatments and tests. Selecting some 50 treatments and tests that the researchers deemed "discredited," they were unable to demonstrate consensus that the treatments and tests were in fact "discredited," except for a few methods ("angel therapy"). When shown their colleagues'

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[30] Floyd, M., Scogin, F., McKendree-Smith, N.L. et al., Cognitive therapy for depression: A comparison of individual psychotherapy and bibliotherapy for depressed older adults, Behavior Modification, 2004, 27: 2: 297-318 (no differences in improvement between those who received individual cognitive psychotherapy and reading the book Feeling Good by Burns, among depressed older adults).

[31] *See* Ahn, H., and Wampold, B. E., Where oh where are the specific ingredients? A meta-analysis of component studies in counseling and psychotherapy, Journal of Counseling Psychology, 48: 3: 251-257 (bonafide treatments do not work better than those with an important feature missing or those to which an irrelevant feature is added).

answers, in an attempt to boost consensus, there was no significant change in the spread of views. Repeated on a different set of experts, the result was the same. But the spread of views about what constituted quackery was significantly correlated with gender and the expert's school of thought.[32] ROA.797-800, *see* article at ROA.573 et seq.

Dr. Serafine testified there is little consensus, also, on what constitutes "mental health," explaining the current DSM-5 controversy. ROA.801-802.

The State's expert and Board's chairman, who was not qualified as an expert, ROA.943, made counter-arguments that Dr. Serafine addressed on rebuttal. ROA.1046-1053.

Dr. Serafine explained at trial why analogies between psychology and medicine are inapt, due to measurement problems. ROA.794-795.

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[32] Norcross, J.C., Koocher, G. P., & Garofalo, A., Discredited psychological treatments and tests: A Delphi poll, Professional Psychology Research and Practice, 2006, 37:5:515-522 (successive surveys find "large" variation in experts' ratings of quackery, significantly correlated only with gender and theoretical orientation).

Accord Norcross, J.C. and Koocher, G.P. Psychoquackery: Discredited Treatments in Mental Health and the Addictions . Online article available at: http://e-psychologist.org/printer_friendly.iml?Material_ID=105&Exam_ID= (accessed Feb. 7, 2015).

II. Course of Proceedings Below

Serafine filed her original complaint on November 29, 2011. The State filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), which the district court granted in part and denied in part. After a three-day bench trial, with closing arguments held on March 7, 2014, the court took briefing on *Eckles v. Oregon State Board of Psychologist Examiners et al*., Civil Case No. 92-945, U.S. District Court (D.Oregon 1994), *see infra,* which upheld an *unlicensed* plaintiff's First Amendment right to use "psychological, psychologist, or psychology" in commercial advertising under intermediate scrutiny. Serafine later alerted the district court to the release of *Kagan v. City of New Orleans*. On September 24, 2014, the district court entered findings of fact and conclusions of law and a take-nothing judgment. On October 20, 2014, Serafine filed notice of appeal.

Standard of Review

This is a First Amendment freedom of speech challenge to a content-based and speaker-based prohibition enforced by a criminal penalty. "Whether...free speech rights have been infringed is a mixed question of law and fact [and t]he appropriate standard of review is *de novo*." (internal quotations omitted) (alteration in original). *Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex.*, 295 F.3d 471, 479 (5th Cir. 2002).

The Government bears the burden of showing the constitutionality of the prohibitions. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (citing *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000)).

Summary of Argument

The task of the First Amendment is nowhere greater than where the state's police powers are forcibly used to suppress speech. Here, where the power to license professions extends to trades and callings that so closely concern the freedom of speech and thought, the Constitution requires the courts to act.

Subsection 501.003(b), prohibiting "the practice of psychology," violates the First and Fourteenth Amendments to the U.S. Constitution, violating the right to freedom of speech applicable to the states through the Fourteenth Amendment and also violating due process under the latter.

Specifically, the subsection fails under any level of scrutiny, especially in prohibiting political speech. It is also vague and overbroad, and is a prior restraint. Even under the doctrine of commercial speech, it cannot be upheld.

The problem with the statute is that it is impossible to determine what is permitted or prohibited. It is left to the Board's discretion what *practicing psychology* unlawfully would be, but even the Board cannot identify it.

Before considering these grounds, however, on which the statute should be declared unconstitutional, we first consider three fundamental, if implicit, errors in the district court's analysis. The court implicitly did not treat subsection 501.003(b) as speech. It appeared to rely on Ninth Circuit dicta that the speech at issue is conduct. Alternatively, the trial court appeared to treat the statute as speech, but speech exempt from First Amendment scrutiny. Finally, the district court applied inapposite dicta from unrelated cases, such as those in medicine and law, purporting to establish an all-purpose licensing law that this Court should resist.

The challenged statute reduces to a license to speak—to use two nouns or an adjective, or to express one's ideas and opinions about behavior—effectively the whole of life. More fundamentally, the purpose of the statute is improper: to confer a brand or mark on an organized lobby.

The trial court erred in not holding that Chapter 501 is unconstitutional.

Argument

I. Preliminary Issues

The district court erred in not analyzing subsection 501.003(b) as speech. Alternatively, the court exempted the subsection from the First Amendment. The Court also applied case law in other fields inapplicable to psychology. We treat each of these in turn.

A. Subsection 501.003(b) prohibits speech.

The unlicensed practice of psychology, under §501.003(b)(1), consists of uttering a word. It seems plain that words are speech. Unlicensed practice also, under subsection (b)(2), consists of providing services that describe, explain, and improve behavior, or address normal behavior, or treat purported "disorders" of a long list of mental processes through talking. Describing, explaining, addressing, and "treating" with talk—nothing else is stated or implied—are speech. Notably, the criminalized services are not limited to services provided to individuals but also to **"groups, organizations, or the public." This license is not restricted to one-on-one speech. It prohibits all speech about behavior.** On this

ground alone—restricting speech in the marketplace of ideas about behavior—it should be struck down.

There are only two ways in which §501.003(b) could be construed, albeit erroneously, to prohibit something other than speech: it might be construed as prohibiting only conduct, or it might be construed to prohibit some "practice" other than just talking. Both fail.

Speech as Conduct. Only the Ninth Circuit has re-defined one-on-one talk therapy as conduct, over a trenchant three-judge dissent. *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). r*eh'g den'd*, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013)(O'Scannlain, dissenting)("[t]he panel, contrary to common sense and without legal authority, simply asserts that some spoken words...are not speech).

The Third Circuit recently rejected this re-labeling and noted: "That the counselor is speaking...does not transmogrify her words into 'conduct.'" *King v. Governor of New Jersey*, 767 F.3d 216, 229-30 (3rd Cir. 2014), *petition for cert. filed* Dec. 5, 2014.

The district court in the instant case did not explicitly re-define speech

as conduct, but it relied on *National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000), the doctrinal basis for *Pickup*, where psychoanalysis was held to be "treatment," thus conduct.[33] This Court should not re-define speech as conduct.

Speech as "practice." Alternatively the activities listed in 501.003(c) might be considered to be a *practice*—for example, applying "established principles" or "addressing" normal behavior. But if, as here, it is the communication of a message that triggers the statute's operation of prohibiting the supposedly unlawful practice, then review is still required under the standard of strict scrutiny, not the lower, intermediate standard for conduct. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

B. Subsection 501.003(b) is not exempt from First Amendment

The Supreme Court has repeatedly warned that the lower courts do not enjoy "a freewheeling authority to declare new categories of speech outside

[33] However, the dissent in *Pickup* appeared to construe *NAAP* as limited to the holding that psychoanalysis, as a technique, was afforded no *special* First Amendment protection. *Pickup*, 740 F.3d at 1218-19.

the scope of the First Amendment." *U.S. v. Stevens*, 559 U.S. 460, 472 (2010). It also rejected as "startling and dangerous" the idea that government "could create new categories of unprotected speech" and employ "a simple balancing test" to weigh the pros and cons. *Brown v. Entertainment Merchants Assoc. et al.*, ___ U.S.___, 131 S. Ct. 2729, 2734 (2011).

Based on these cases, the Third Circuit recently held that talk therapy is not exempt from First Amendment protection. *King v. Governor of New Jersey*, 767 F.3d 216 (2014).

But even before these cases, this Court in *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) had subjected an occupational license to First Amendment scrutiny, holding that in creating such a license, the State may not "license speech and reduce its constitutional protection by means of the licensing alone."

Here, the district court erred in assuming that *because* the speech prohibitions were framed as a "professional regulation," *therefore* the prohibitions were merely "incidental" to protected speech." ROA.690. This reasoning inverts the doctrine—which is, correctly, that *if* the speech is only

incidental, *then* a professional regulation might stand. The district court's opinion amounts to an unpermitted carve-out from First Amendment protection for occupational licenses. The Supreme Court has not hesitated to strike down licensing schemes that cannot pass constitutional scrutiny, *Thomas v. Collins*, 323 U.S. 516, 530 (1945)(Jackson, J. concurring) (labor organizer); *Riley v. National Federation of the Blind of N.C.*, ___U.S.___, 108 S.Ct. 2667, 2680 (1988) (professional fundraisers). A Texas court similarly has struck down a license, which was never re-instituted. *Wilson v. State Bd. of Naturopathic Examiners*, 298 S.W.2d 946 (Tex.Civ.App. —Austin 1957) (striking naturopath license).

The Professional Speech Doctrine. It remains to consider what has been called "the professional speech doctrine." With or without that label, it amounts to an exemption from traditional First Amendment scrutiny when applied, as here, to prohibit the speech of the *unlicensed* citizen. It is attributed to this passage in Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985):

> One who takes the affairs of a client personally in

> hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. **If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.** Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." (footnotes omitted) (emphasis added)

472 U.S. at 232.

The part in bold font above was relied on by the district court. While a Supreme Court concurrence should not lightly be disregarded, the opinion has created confusion because it appears to support both freedom and

restriction of a professional's speech, and freedom and restriction of a non-professional's speech. Only the Fourth, Ninth, and Eleventh Circuits have relied on the opinion, and it has never been approvingly mentioned by the Supreme Court in the 30 years since its issuance.

The most recent circuit case to employ Justice White's opinion is *Moore-King v. County of Chesterfield, Virginia*, 708 F.3d 560 (4th Cir. 2013). There, the Fourth Circuit interpreted the passage about "personal nexus" to be the converse of what was actually stated. Where the passage said that in the *absence* of personal nexus, the government may *not* regulate, the Fourth Circuit held that *if* a personal nexus exists, *then* the government may freely regulate. [34] These are not the same thing. The latter formulation is broader and leads to government regulation wherever "personal nexus" can be hypothesized. While it is not precisely clear what Justice White meant, there is nothing in the opinion to suggest that giving advice and opinion creates

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[34] *See Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir.1988)(interpreting *Lowe*, "[p]rofessional speech analysis applies...where a speaker 'takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances'").

a "personal nexus" so binding that the client's "judgment" is suspended and transferred to the professional, who exercises the decision-making himself, on behalf of the client. More likely the concurring opinion contemplates a genuine representation, personification, or acting *for* or *instead of*—it says *on behalf of—a* client. Certainly the concurring justices had in mind the facts before them—that the securities newsletter-publisher, Mr. Lowe, had been convicted of misappropriating client funds and tampering with evidence.

But the Fourth Circuit in *Moore-King* found that when even a fortune-teller sits down with a client, she "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." 708 F.3d at 569. Thus, the court upheld a license for "the occupation of...fortune-teller, palmist, astrologist, numerologist, [and] clairvoyant...." 708 F.3d at 563.

This is a dangerous doctrine, because it admits to no limit on the one-to-one speech the state may license and prohibit.[35] Even so, the license at

[35] The Fourth Circuit, recently rejecting as unconstitutional a North Carolina abortion/unltrasound requirement appears to have distinguished *Moore-King*. *See Stuart v. Camnitz*, U.S. Court of Appeals, 4th Cir., No. 14-1150,

issue here prohibits speech far beyond one-to-one speech, reaching services about "behavior" provided to "groups, organizations, and the public." And the circuits are split on this issue, with the Eighth eloquently holding that

> "[i]f the citizens of Lincoln wish to have their fortunes told, or to believe in palm-reading ..., they are free to do so under our system of government [which is] not free to declare certain beliefs...forbidden"; [c]itizens are at liberty to believe that the earth is flat...."

Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998).

If the *Moore-King* decision upholding a fortune-telling license is justified at all, it is because the license requirements (fees, zoning, but no knowledge test) were not entirely prohibitive of fortune-telling speech—in contrast to the prohibitive requirements imposed by the statute at issue in this case.

This Court should avoid clearing a path for a new form of restricting

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Dec. 22, 2014.

speech that goes so far as to reach a license for seers. [36]

C. Case Law In Other Fields Is Inapposite

The district court erred in relying on licensing case law from fields too far away from psychotherapy or psychology. The license at issue here regulates speech about mental life and behavior. But psychology lacks the precise measurement tools that the physical sciences have achieved over centuries. ROA.783-785, ROA.794-795. Those sciences comprise physical facts, including about the body, that underlie the specialized knowledge licensed in medicine, engineering, architecture, etc. Yes, there can be Cartesian debate about the line between the mental and the physical world,

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[36] *See*

Baker, Billy, Police-psychic controversy brewing in Salem, *Boston Globe,* Oct. 31, 2013,
("city ordinance clearly states that psychics can only forecast the future and read the past" but not lift curses).
http://www.bostonglobe.com/metro/2013/10/30/police-cry-deceit-salem-psychics-see-trouble/mUFd6sMPGSftRCKWy5AjuI/story.html, accessed 1/8/2015.

Dias, Elizabeth, In the Crystal Ball: More Regulation for Psychics, *Time Magazine*, Sept.2, 2010 (complaint that "so many people [are] practicing out there, doing it under false pretenses," whereas, "I have a college degree, I have a background in religion and philosophy and English, and I have experience doing this").
http://content.time.com/time/nation/article/0,8599,2015676,00.html, accessed 12/30/2014

but for now, licensing in the mental arena should not be treated the same as licenses based on physical facts. Even lawyers and CPAs, who belong to speaking professions, have articulable, specialized knowledge and the feature—not true of talk therapists—that they actually personify and represent their clients, standing in their clients' shoes before the government and other third parties.

Great mischief, therefore, is made in the law when courts are asked to articulate a general licensing doctrine usable across the swath of professional licenses, both mental and physical.

Here, the State argued for merging all licensing into a single police power doctrine. ROA.407-409. This should be resisted, especially when a trade or calling closely concerns the freedom of speech and thought.

The hours and days of testimony in this case failed to reveal the specialized knowledge that the statute purports to license. There is no consensus at all on better or worse ways to change or ameliorate, or even describe and explain, behavior and mental processes. The State did not show any exam content that tested any specialized knowledge, or name any

topic included on the test. Nor do the words of the statute—such as "disorders" or "treating" refer to any specialized knowledge. The statute does not specify the disorders in the DSM-5 diagnosis manual, but even if it had, the controversy over the new manual would have undone the guidance expected. ROA.801. As discussed above, there is a lack of consensus even on what constitutes quackery.

It is significant that no adjudicated malpractice case has yet appeared in any American jurisdiction brought by a client for failure to correctly apply any specialized knowledge,[37] while there are tens of thousands of malpractice cases among the other fields.

This is not to say that the State may not regulate at all in this area—which Serafine well conceded on the stand. ROA.857-858.[38] The issue is the nature of the statute and whether licensing case law from different

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[37] The sole case of *Osheroff v. Chestnut Lodge, Inc.*, 490 A.2d 720, 62 Md.App. 519 (1985)(patient alleging psychodynamic (Freudian) therapy was wrong treatment) was never adjudicated.

[38] N.B.: In the transcript, "imprimatur" and "argument" appear phonetically as "perimeter" and "article."

fields can be applied as a matter of course. The district court erred in applying and failing to distinguish dicta that arose from cases addressing medicine, law, and other fields.

II. Subsection 501.003(b) Does Not Pass Any Level of Scrutiny.

By banning speech-services between willing parties on an entire subject—behavior—the statute is facially unconstitutional. To the extent it admits of some level of scrutiny, strict scrutiny applies, and the statute fails. But even intermediate scrutiny or rational basis analysis, if they applied, could not rescue it.

A. Strict and Intermediate Scrutiny

This Court has held that if a statute "is intended to suppress expressions...then it is subject to strict scrutiny." If the purpose is otherwise, it is subject to intermediate scrutiny. *Illusions--Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 308-309, (5th Cir. 2007). *See also Asgeirsson v. Abbott*, 696 F.3d 454, 460 (5th Cir. 2012).

A valid purpose is one **that is *not* due** to "a concern over the message's direct effect on those who are exposed to it." (citation omitted) (emphasis

added) *Illusions--Dallas* at 308. That is, the claimed "secondary effects" sought to be prevented by some (allowable) speech restrictions cannot save an unconstitutional restriction where the only secondary effects claimed by the government are the direct effect on listeners of the speech itself:

> "[l]isteners' reactions to speech are not the type of `secondary effects' we referred to [in the earlier case]. "The emotive impact of speech on its audience is not a `secondary effect.'"

R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992).

The purposes of the statute. The purpose of §§501.003(b)(1) and (b)(2) is to suppress speech—three words and speech-services about behavior. A prohibition "solely on the basis of the subjects the speech addresses" is facially unconstitutional. *R.A.V. v. St. Paul*, at 382. *See also Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)(content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people"). The subsections' prohibitions are also speaker-based and viewpoint-based. Serafine's area of developmental psychology holds some different views than licensed clinical psychologists.

Here, the State's concern is over the message's direct effect on

recipients—they will, as the State's expert implied, go elsewhere than to licensed psychologists for services they want, or they may be harmed somehow by unlicensed speech about behavior that the recipients themselves have elected to hear. If strict scrutiny or intermediate scrutiny applies, the prohibition must first be within the government's power, and its interest, respectively, must be compelling or at least substantial.

Improper purpose. But the State lacks power to do what is, at best, wholly improper. Subsection 501.003(b)(1) criminalizes "psychological, psychologist, and psychology" in order to confer a brand or service mark on a private group—a purpose that, if it were not already pre-empted by federal law, unlawfully commandeers generic words. Across all witnesses for the State and the TPA, this was by far the most forceful, specific, and unanimous testimony. The only research that the State's expert did in preparation for his testimony was to review a book on marketing. His explanation of the subsections' purpose, ROA.1041, tracked closely the classical definition of

trademark or service mark.[39]

The TPA and the Board acted as private mark-holders would when learning of an infringement: they clambered to call the papers and threatened prosecution. These actions find no purpose in public protection. It cannot be imagined that any member of the public was seeking psychological services at the website of a politician. The Board's and the TPA's actions are consistent only with protecting a mark, not the public.

The district court erred in holding subsection (b)(1) constitutional, because nothing in First Amendment doctrine permits *de minimus* infringements of only "three distinct words." Such a slope is slippery. The court further erred by implying Serafine was required to produce a voter who would have voted differently if the website had not been changed, because that conclusion improperly shifts the burden to the plaintiff. *See*

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[39] Such a mark is "a distinctive mark of authenticity, through which the products of particular manufacturers...may be distinguished from those of others...[and]...it follows that no sign or form of words can be appropriated as a valid trademark which...others may employ with equal truth and with equal right for the same purpose." *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.*, 220 U.S. 446, 453 (1911).

Ashcroft, supra, 542 U.S. at 666. It was equally error to conclude Serafine could find some other, different words to describe herself. The State had urged this without a hint of what those words might be.

The State's interest. Other than its improper purpose, the State demonstrated clearly no compelling or substantial interest. In *Brown v. Entertainment Merchants Association*, ___ U.S. ___, 131 S.Ct. 2729 (2011), the Supreme Court rejected under strict scrutiny the flawed, inconclusive studies on the effect of violent video games on aggressive behavior of minors. In *King, supra,* the Third Circuit did accept under intermediate scrutiny the legislature's reliance on the opinions of two national and one international organization—controversial though it is—that talk therapy aimed at changing same-sex attractions in minors is harmful.

But here the State presented no studies, no legislative investigation, and not even anecdotes—only conclusory allegations—concerning the harms allegedly prevented by prohibiting speech to voluntary listeners. The district court found that the public was potentially misled by "psychologist," but there was no evidence of this. To the contrary was evidence of the words'

dictionary meanings, and as used by the press and psychologists themselves. The State claimed to know "what's effective and what isn't," but again there was no evidence. Remarkably the State's witnesses could not state what content the statute covered.

This is inadequate under strict and even intermediate scrutiny. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 379 (2000) (rejecting "mere conjecture" as adequate to carry a First Amendment burden"); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985) ("unsupported assertions" insufficient to justify "broad prophylactic rules"). The First Amendment will be eroded if speech prohibitions require no evidence at all.

Means of achieving the purpose. Even assuming the State's claimed interests were compelling or substantial, the tests of strict and intermediate scrutiny require that the means employed to achieve those interests are the least restrictive or are narrowly tailored, respectively. Here, the means were neither narrowly tailored nor the least restrictive, and no alternative means of communication are left open, except for unlawful conduct or, according

to the Board's chairman, restricting oneself to giving a lecture.

There are narrower means that could meet the State's asserted interests, such as regulating speech only to vulnerable audiences (children, the mentally disabled, etc.) or to captive audiences (e.g., those hospitalized or imprisoned); instituting a certification and complaint board; restricting the use of terms such as "Licensed" or "Applied" or "Clinical" Psychologist; and maintaining the database that is already available, so that the public can easily identify those with the State's imprimatur. Restricting terms such as "Licensed Psychologist" would comport with the majority of other licensed fields.[40]

B. Political Speech

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest

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[40] E.g., *Licensed* Counselor at Tex. Occ. Code sec. 503.452(a); *Certified Public* Accountant, *Certified* Accountant at (Tex Occ. Code secs. 901.451-901.453); *Registered* Nurse at Tex Occ. Code sec. 301.251; *Professional* Engineer at Tex Occ. Code sec. 1001.301.

protection to such political expression...." *Buckley v. Valeo,* 424 U.S. 1, 14 (1976).

The State's sole complaint about Serafine is that she engaged in core political speech. Her motive was entirely political (to describe how she thinks, easily allow investigation into her past). ROA.770. Even if false, her statement would still be protected speech. *U.S. v. Alvarez*, 567 U.S.___, 132 S. Ct. 2537 (2012). Serafine was communicating to the entire public, not communicating with a client. The Board accused her of "advertising" as a psychologist, Ex.P-3 (cease and desist letter), but it was advertising solely to get votes.

C. Rational Basis

That the Act contains so many exemptions—for members of the clergy, government employees, non-profit volunteers, university campuses, and professionals trained outside psychology—"diminishes the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do

more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quotation omitted).

The evidence at trial demonstrating that therapists trained on opposite assumptions do not produce clinically different results, and that trained therapists do not get better results than untrained ones or self-help, was based on *Daubert*-level[41] "gold standard" research. *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 181 (2012) (Sotomayor, dissenting) (describing "gold standard" as "[e]xperimental methods and findings [that] have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.") (citations omitted). *See also U.S. v. Simmons*, 470 F.3d 1115, 1122 (5th Cir. 2006).

That evidence was not contradicted.

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[41] *Daubert v. Dow Pharmaceuticals*, 509 U.S. 579 (1993).

It is irrational, in light of that evidence, to create a high barrier to entry when the State cannot articulate any specialized knowledge to which entry is to be had.

The statute fails under any level of scrutiny.

III. Subsection 501.003(b) is Vague and Overbroad

Void for vagueness. The Board's chairman testified that violating §501.003(b)(2) would depend on the "context": the same words might be lawful in one place but unlawful in another. He testified that violation also depends on the speaker's and listener's "intent." But which contexts and intentions are unlawful? Must the speaker disavow that he is helping very much?

After four years of litigation, it is unknown whether Serafine's now-canceled seminars are lawful or not. The cease and desist order is in effect, and the Board's chairman explained why the seminars likely constitute the practice of psychology, but the district court's opinion refers to "her services" in the future, as though they were permitted.

The Board's chairman could not determine whether common services

were prohibited or not (golf lessons, management consulting, weight-loss centers) unless the Board first conducted an investigation. There was no hint what such investigation might entail, whether one could seek pre-enforcement rulings, or do anything except hope to stay under the Board's radar.

The due process clause requires invalidating a law where "men of common intelligence must necessarily guess at its meaning." (citation omitted) *Hynes v. Mayor of Oradell*, 425 U.S. 610, 610 (1976). The Board's testimony that it would have to investigate shows that the statute vests in State officials "the undefined power to determine what [the public] will hear." *Ibid.* Chapter 501 is unconstitutionally vague.

Overbreadth. Subsections (b)(1) and (b)(2) are also overbroad because their unconstitutional applications substantially outnumber their plainly legitimate ones.

The word-ban on psychology-words reaches far beyond commercial speech and prohibits every use of the words—even truthful use—on political websites, book jackets, and social conversations in every setting. Banned

entirely is useful commercial speech such as, "Hire me, and I'll help you with the voters' psychology"; "I'll get you ready for the psychological challenge of being on stage"; "Half the game is psychological, so hire me."

The ban on speech-services about behavior also criminalizes speech far beyond the statute's plainly legitimate sweep.

The legitimate sweep, as Justice White opined in *Lowe, supra,* is when the client's affairs are *personally* assumed or taken in hand by another. This is plainly the case for clients who cannot consent or cannot handle their own affairs—for example, those addicted, suicidal, mentally disabled, very young or old—or where the client is a captive audience and cannot escape the speech, for example if hospitalized, imprisoned, or in public school. These fall within the plainly legitimate sweep of a psychological licensing statute.

There may or may not be other legitimate applications, but the test for overbreadth is to compare the protected speech, wrongly prohibited by the statute, against only the *plainly* legitimate applications.

Here, the statute prohibits or chills a vast domain of protected speech, while the legitimate sweep that is plainly obvious is much smaller, certainly

including schools, hospitals, courts, prisons, and, as a group, individuals with mental impairments, and only uncertainly going beyond that. But if management and business consultants who give seminars and one-to-one sessions—to executives and sales forces, for example—and political consultants, life-coaches, golf pros, 12-step programs, Weight-Watchers, ® after-school programs to improve social skills or self-image, and common grief, divorce, and self-help groups must wonder whether what they are doing constitutes the unlawful practice of psychology, then the statute is overbroad. This is so especially here, where the statute reaches beyond individual services and prohibits services to "groups, organizations, and the public." The statute equally criminalizes Zen leaders, yoga teachers, curanderas, and folk healers.[42]

These are the ordinary goings-on of a free people. It is constitutionally protected speech, proscribed by a statute reaching too far beyond what is plainly legitimate. Even under "professional speech doctrine" this statute

[42] *See* at Ex.P-19, page 13, reference to at least one medical school to employ folk-healing.

falls, because the one-to-one nexus that is the basis of that theory (for government licensing) is absent in the many services prohibited by the statute—namely, speech-services about behavior to "groups, organizations, and the public."

"In the First Amendment context...this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *U.S. v Stevens*, 559 U.S. 473 (2010)(distinguishing *Salerno* doctrine)(citations omitted).

IV. Subsection 501.003(b) is a Prior Restraint on Speech

The Supreme Court has long recognized that "prior restraints on speech...are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Here, the license at hand is a license to speak—a license is necessary before using a word or discoursing on behavior. The burden of obtaining the license, and the Board's discretion in awarding it, result in a prior restraint that can be saved "only if the government can establish that the activity

restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest." *U.S. v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000) (internal quotation omitted). No such threat or interest was proved or even suggested.

V. Subsection 501.003(b) Infringes Commercial Speech.

The Court does not reach this doctrine because Chapter 501, on its face and as enforced, is unconstitutional under the foregoing doctrine. The initial facts concerned no speech proposing a commercial transaction but was advertising to get votes.

Should the Court reach this issue, the four-part test of *Central Hudson* is well known, *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), and the prohibition on these three generic psychology-words cannot stand. Two courts have well-applied the doctrine to protect truthful use of these words. This Court in *Byrum v. Landreth*, 566 F.3d 442, 448 (5th Cir. 2009) found an analogous rule

> "prohibits significant truthful speech. Appellants do not propose to claim training, certification, or licenses they do not possess; they merely wish to use the words 'interior designer' or 'interior

design' to accurately describe what they do").

In a well-reasoned opinion on the same ground, the District Court of Oregon reached the same decision on the words "psychological, psychologist, and psychology" in *Eckles v. Oregon State Board of Psychologist Examiners et al*., Civil Case No. 92-945, U.S. District Court (D. Oregon 1994). The *Eckles* decision is unpublished but contained in the record at ROA.591-660 et seq. (Doc. 96), and was briefed by Appellant, ROA.666-677 (Doc. 99) and the State, ROA.662-665 (Doc 97). Compared to Serafine, the plaintiff in *Eckles* was identically situated (unlicensed, ineligible, not seeking a license); brought suit similarly under the speech clause; and sought to enjoin prohibition of the identical words—psychology, psychologist, and psychological—embodied in an occupational license for psychologists. The Oregon act was similarly defended by the state on grounds involving the police power and public protection. The Court made an as-applied ruling allowing all three of the words and their variants to be used in advertising and awarded attorneys fees.

Subsection 501.003(b)(1) fails all four of the *Central Hudson* factors[43] for the reasons described above, but two issues are important.

First, concerning whether the government's interest is substantial, the district court erred in finding that "Serafine's use of the word "psychological"...or the term physiologist [sic]...could potentially induce the belief that she is licensed by the state to perform psychological services" because all three words "have a generally understood and reasonably clear meaning to the public at large." Opinion at 10. There was no evidence to this effect, and in the 30 years that Serafine has been nationally recognized as a psychologist, no one has ever made that assumption. ROA.838.

Second, the State argued that allowing anyone to say "I'm a psychologist" would be advertising for unlawful activity. The argument is that the statute itself prohibits unlicensed psychological services.

This reasoning makes an end-run around *Central Hudson* on the first prong by boot-strapping the element of illegality into the statute itself. No

[43] The factors are whether (1) the speech concerns unlawful activity or is misleading; (2) the governmental interest is substantial; (3) the regulation directly advances the interest; and (4) it is no more extensive than necessary.

doctrine suggests that *Central Hudson's* rejection of advertising unlawful conduct concerns anything other than conduct that was *already, independently* unlawful. Thus, typical arguments to support bans against soliciting unlawful activity concern advertisements to sell counterfeit goods, *Levi Strauss & Co. v. Shilon,* 121 F.3d 1309 (9th Cir. 1997), to promote tobacco to minors, *Lorillard Tobacco Co. v. Reilly,* 533 U.S.525 (2001), to promote alcohol to minors, *Educational Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2010), or to propose gender discrimination in employment, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

But *Central Hudson* likely does not stand for the proposition that an unconstitutional regulation can be rescued from being stricken by the First Amendment because the regulation contains within itself a provision that renders the item for sale unlawful. Such reasoning too conveniently would allow a law intended to forbid the sale of a bottle of water to become constitutional if the statute also makes bottled water unlawful.

Conclusion

For all of the above reasons, the Court should reverse the judgment of the district court and should render judgment for Serafine that Chapter 501 is unconstitutional on its face and as applied to Serafine. Appellant respectfully asks the Court to remand for an award of attorneys' fees, costs, and expenses in accordance with 42 U.S.C. §1988.

Respectfully submitted,

Mary Louise Serafine, Ph.D., J.D. *pro se*

Certificate of Compliance

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), and pursuant to 5th Cir. Rule 25.2, I certify that:

1. This brief complies with Rule 32(a)(7)(B) because it contains 12,651 words, including footnotes, and excluding the portions exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect in 14-point Palatino Linotype font.

3. The paper version of this brief will be an exact copy of the electronic version. There are no privacy redactions necessary under 5th Cir. Rule 25.2.13. The electronic version has been scanned and reported free of viruses by the most recent version of a commercial virus-scanning program.

Date: February 8, 2015

M. L. Serafine

Mary Louise Serafine, Ph.D., J.D. *pro se*

Certificate of Service

On February 8, 2015, I filed electronically the foregoing, with attached Appendix , which caused the same to be served on the counsel below. Later the same brief and Appendix were separately filed and served.

Alex Potapov, Esq.
James C. Todd, Esq.
Office of the Attorney General
General Litigation Division-019
P.O. Box 12548, Capitol Station
Austin, Texas 78711-25
(512) 475-4263

M. L. Serafine

Mary Louise Serafine, Ph.D., J.D. *pro se*