No. 14-51151

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

MARY LOUISE SERAFINE,

Plaintiff-Appellant,

v.

TIM F. BRANAMAN, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For The Western District of Texas,
USDC No. 1:11-CV-1018
The Honorable Lee Yeakel Presiding

# *AMICUS CURIAE* BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY

Paul M. Sherman
Robert J. McNamara
Dana Berliner
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

*Counsel for Amicus Curiae*

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## CORPORATE DISCLOSURE STATEMENT

The Institute for Justice is a 501(c)(3) nonprofit corporation. It has no parent corporation and issues no stock.

## INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute has challenged laws across the country that regulate a wide array of occupational speech, including psychological advice, dietary advice, and historical tours. *Amicus* is also counsel of record in a case raising similar First Amendment issues with respect to veterinary advice, which is currently pending before this Court. *See Hines v. Alldredge*, No. 1:13-CV-56 (S.D. Tex. Feb. 11, 2014), *appeal docketed*, No. 14-40403 (5th Cir. Apr. 22, 2014) (argued and submitted for decision on Jan. 6, 2015).

This case raises important First Amendment questions, and the district court's opinion below repeatedly misapplies the relevant law. Although this does not necessarily mean that Appellant is entitled to judgment in her favor on all of her claims, the district court's legal reasoning, if adopted by this Court, will exacerbate a split among the circuits while imperiling the First Amendment

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that Appellant Mary Louise Serafine, *pro se*, and counsel for Appellees have consented to the filing of this brief.

protection afforded to occupational, political, and commercial speech throughout the Fifth Circuit.

## SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Plaintiff-Appellant Mary Louise Serafine has set forth the interested parties in this case at pages ii–iii of her opening brief. Pursuant to Fifth Circuit Rule 29.2, which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief," undersigned counsel of record certifies that, in addition to those persons listed in Plaintiff-Appellant's statement, the following persons have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) The Institute for Justice, *amicus curiae* in this case; and
2) Attorneys for *amicus curiae*: Paul M. Sherman, Robert J. McNamara, and Dana Berliner (Institute for Justice).

Dated: February 17, 2015

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*

## SUMMARY OF ARGUMENT

This case raises one of the most important unresolved questions in First Amendment law: Whether—and under what circumstances—the government's power to regulate occupations trumps the First Amendment's protection for free speech. The district court's answer to that question seems to have been: Always. But the district court's approach is impossible to square with binding precedent from the U.S. Supreme Court, which makes clear that Plaintiff-Appellant Serafine's occupational, political, and commercial speech is entitled to robust First Amendment protection. Thus, *amicus* offers this brief in the hopes that it will assist the Court in identifying and applying the correct standard of review to Serafine's various claims.

With regard to Serafine's challenge to the prohibition on her offering psychological services, including talk therapy, the district court erred because it treated this restriction as a prohibition on professional conduct, rather than a prohibition on speech. This conclusion has been expressly rejected by the U.S. Supreme Court, which has held that even expert legal advice is speech within the protection of the First Amendment. If this Court adopts the district court's reasoning, it will exacerbate a split of authority among the circuits on the constitutional status of occupational speech, such as talk therapy, and deprive speakers within the Fifth Circuit of important constitutional protections. While

rejecting the district court's reasoning does not necessarily mean that this Court must rule for Serafine on the merits of her facial challenge to Texas's psychology licensing law, it does mean that this Court should subject that claim to meaningful review and also that it should make clear that any ruling against Serafine's facial claim does not foreclose as-applied challenges to Texas's law.

With regard to Serafine's use of the title "psychologist" in her political advertising, the district court erred by failing to subject Texas's restrictions on that speech to strict scrutiny. Simply put, outside the narrow context of classic commercial speech—that is, speech that proposes a commercial transaction—the titles that a speaker uses to describe herself are fully protected by the First Amendment.

Finally, with regard to Serafine's use of the title "psychologist" in commercial settings, the district court erred by misapplying the Supreme Court's *Central Hudson* test, which imposes an affirmative burden on governments to support all restrictions on commercial speech with meaningful evidence. The district court did not conduct this inquiry, and therefore improperly relieved the government of this burden.

## ARGUMENT

The district court failed to apply binding Supreme Court precedent to the resolution of Plaintiff-Appellant Serafine's First Amendment claims and, as a result, it improperly relieved the government of its burden to justify its restrictions on Serafine's speech. Regardless of whether this Court ultimately agrees with the district court regarding the constitutionality of Texas's law, it should not endorse the district court's flawed reasoning, which poses a threat to speakers throughout the Fifth Circuit.

In Part I, *amicus* will explain why, under recent Supreme Court precedent, strict scrutiny is the appropriate standard for reviewing restrictions on occupational speech, including psychological advice and talk therapy. In Part II, *amicus* will explain why strict scrutiny also applies to the use of academic or professional titles in non-commercial settings, such as political advertising. Finally, in Part III, *amicus* will explain why the district court's application of the *Central Hudson* test to Serafine's commercial speech did not comply with the evidentiary standards that the Supreme Court has established for that test.

## I. Restrictions on Occupational Speech—Including Talk Therapy—Should Be Reviewed Under Ordinary First Amendment Principles, Which the District Court Failed to Apply.

The central question with regard to Texas's restriction on the "practice of psychology" is whether—as applied to Serafine's proposed activities—the restrictions are properly viewed as content-based restrictions on speech, or whether they are instead properly viewed as content-neutral restrictions on conduct that impose only an incidental burden on speech. The district court held these restrictions to be the latter and, accordingly, subjected them to no meaningful First Amendment scrutiny. But this was error. As explained in Section A, the U.S. Supreme Court has held that the First Amendment requires strict scrutiny whenever the government restricts a person's ability to speak on a particular subject, even if that speech takes the form of expert advice. As explained in Section B, the district court's contrary ruling, that Texas's psychology law is a restriction on conduct subject only to rational-basis review, exacerbates a split of authority among the federal courts of appeals as to how these principles apply to occupational-licensing laws, specifically including laws governing the practice of psychology. Finally, as explained in Section C, however this Court ultimately resolves Serafine's facial challenge to Texas's psychology law, it should make clear that it is not foreclosing future as-applied challenges to that law.

### A. The First Amendment requires strict scrutiny when the government restricts a person's ability to speak on a particular subject.[2]

Serafine proposes to engage in a variety of communications with paying clients, all of which the State of Texas defines as the unlawful "practice of psychology." The question, then, is whether these prohibitions should be viewed as restrictions on speech, subject to heightened scrutiny, or restrictions on conduct, subject to some lower form of scrutiny.

The answer to that question is supplied by *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which is the U.S. Supreme Court's most recent and most authoritative discussion of the speech/conduct distinction. In that case, the Supreme Court considered the constitutionality of a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorists. *Id.* at 7–10. The plaintiffs in that case included two U.S. citizens and six domestic organizations that wished, among other things, to train members of the Kurdistan Workers' Party (PKK) "on how to use humanitarian and international law to peacefully resolve disputes" and to "teach PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 10, 21–

[2] The arguments in this section, along with responses to the most common objections, are set forth in greater detail in Paul M. Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. __ (forthcoming Mar. 2015), *available at* http://ssrn.com/abstract=2563880 (last visited Feb. 17, 2015).

22. They wanted, in other words, to give individualized advice solely through the spoken word.

They were prevented from doing so, however, because speech in the form of advice was illegal. Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources," a term that was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* at 12–13. The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 25–39.

The government defended the law by arguing that the material-support prohibition was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 26–27.[3] But the U.S. Supreme Court emphatically and *unanimously* rejected that argument, holding that that the material-support

[3] Notably, the government in *Holder* did not argue that this fact eliminated *all* First Amendment scrutiny, as the district court in this case seemed to conclude. Instead, the government argued only that the material-support statute was subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). *Holder*, 561 U.S. at 26.

prohibition was a content-based regulation of speech subject to heightened scrutiny. *Id.* at 27.[4]

Most importantly, and in sharp conflict with the district court's opinion in this case, the Supreme Court did not base its ruling on some metaphysical distinction between "speech" and "conduct." Instead, the Court took a commonsense approach to determining whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs were allowed to communicate some things to designated terrorist groups but not other things:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

*Id.* (citations omitted).

The Court also rejected the notion that the material-support prohibition could escape strict scrutiny because it "*generally* function[ed] as a regulation of conduct." *Id.* at 27–28. As the Court observed, even when a law "may be described

[4] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 27; *id.* at 45 (Breyer, J., dissenting).

as directed at conduct," strict scrutiny is still appropriate when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28.

This analysis is directly applicable to the claims in this case. Serafine wishes to communicate psychological advice to clients, and "whether [she] may do so . . . depends on what [she] say[s]." *Id.* at 27. If Serafine's speech takes the form of "lecture services," Tex. Occ. Code § 501.003(b)(4), her speech is permitted. If, on the other hand, Serafine communicates psychological advice based on "a systematic body of knowledge and principles acquired in an organized program of graduate study," *id.* at § 501.003(c)(4)(A), her speech is prohibited. Further, just as in *Humanitarian Law Project*, even if there may be some situations in which Texas's prohibition is aimed at physical conduct—though one struggles to imagine what those might be—the "conduct" triggering application of the statute to Serafine consists entirely of speech.

Simply put, to the extent talk therapy works at all, it works by advising, encouraging, or persuading listeners to change their thought or behavior patterns. Thus, the sole object of the government's regulation is to prevent the *communicative* impact that talk therapy about a specific subject has on its

listeners.[5] And, as the Supreme Court has recognized, when the government regulates speech "out of concern for its likely communicative impact," such regulations "must be subjected to the most exacting scrutiny." *United States v. Eichman*, 496 U.S. 310, 317–18 (1990) (internal quotation marks omitted).[6]

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[5] *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1346 (2005) (footnotes omitted):

> When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct. And it's restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message. The restriction is not a "legitimate regulation of professional practice with only incidental impact on speech"; the impact on the speech is the purpose of the restriction, not just an incidental matter.

*See also* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 893 (2000) ("When a professional does no more than render advice to a client, the government's interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional's practice rather than the nonexpressive component (if such a component even exists).").

[6] To understand the distinction between laws aimed at the communicative impact of speech, and laws aimed at some non-communicative element of speech, it is useful to consider the counterexample of a doctor's prescription. Even though a doctor writing a prescription engages in speech, the government regulates that speech not because of its communicative impact, but rather because the prescription creates a legal entitlement to access a controlled substance. By contrast, if the government regulates a doctor's mere recommendation that a patient take a drug, that regulation is aimed at the communicative effect of that speech (namely, that the patient may be persuaded). *See Conant v. Walters*, 309 F.3d 629, 635–36 (9th Cir. 2002) (distinguishing between a doctor's recommendation that a patient try medical marijuana, which is fully protected speech, and a doctor's prescription for marijuana, which is not).

In short, there is no reason under the Supreme Court's case law to depart from ordinary First Amendment principles in resolving Serafine's challenge to Texas Occupations Code Section 501.003(b)(2)–(4). Under *Holder v. Humanitarian Law Project*, that means that restrictions on who may provide psychological advice and counseling are subject to strict scrutiny. 561 U.S. at 27–28.[7] This does not mean that all regulations of psychological advice and counsel are per se unconstitutional—indeed, the Supreme Court ultimately upheld the challenged prohibition in *Humanitarian Law Project*, 561 U.S. at 39—but it does mean they must be subject to more searching review than that applied by the district court.[8]

[7] Although the Supreme Court did not use the phrase "strict scrutiny" to describe its analysis, referring instead to "a more demanding standard," 561 U.S. at 28, the Court has, in a subsequent decision, clarified that the analysis applied in *Humanitarian Law Project* was strict scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

[8] The fact that Texas has chosen to license this speech, rather than ban it outright, does not change this conclusion. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (holding that content-based burdens on speech are subject to the same scrutiny as content-based bans); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000) (holding that content-based regulations of speech are subject to strict scrutiny).

### B. The district court's opinion exacerbates a split of authority regarding how these principles apply to occupational licensing (specifically including psychology) and poses a grave danger to speakers in countless occupations.

Despite the clear parallels between this case and *Humanitarian Law Project*, and the fact that Serafine discussed *Humanitarian Law Project* in both her response to the government's motion to dismiss and in her post-trial brief, R. 150, 433, the district court failed to even cite that binding decision, let alone distinguish its holding. Instead, the district court simply concluded that Texas's law "does no more than impose an incidental effect on Serafine's potentially protected speech." R. 689. In so ruling, the district court took sides in a growing dispute among federal appellate courts about how the First Amendment applies to occupational-licensing laws in the wake of *Humanitarian Law Project*, although the district court seems not to have been aware of this dispute.[9]

The Ninth Circuit was the first court to consider *Humanitarian Law Project* in the context of occupational licensing in the consolidated cases *Welch v. Brown*

[9] The district court based its ruling on the Ninth Circuit's 15-year-old ruling in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), which upheld California's licensing scheme for psychology without any serious First Amendment review. To the extent *NAAP* conflicts with the U.S. Supreme Court's ruling in *Humanitarian Law Project*, it is superseded by that ruling, and the same is true of the Eleventh Circuit's ruling in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011) (upholding the licensing of interior designers), and of Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (arguing that certain forms of individualized advice are properly viewed as conduct), both of which the district court also cited.

and *Pickup v. Brown*. 740 F.3d 1208 (9th Cir. 2013). Those cases involved a First Amendment challenge to a California law that made it a crime for state-licensed mental-health practitioners to subject minor patients to "sexual orientation change efforts," that is, therapy designed to change a minor's sexual orientation. *See id.* at 1222–23.

Although the district court in *Welch* had cited *Humanitarian Law Project* in a ruling preliminarily enjoining that law, 907 F. Supp. 2d 1102, 1113 (E.D. Cal. 2012), the Ninth Circuit's initial decision made no mention of *Humanitarian Law Project*. 728 F.3d 1042 (9th Cir. 2013). Instead, the panel concluded that talk therapy is not speech at all, but rather a form of medical treatment—legally indistinguishable from brain surgery—that raises no First Amendment issues. *Id.* at 1055.

Following a motion for rehearing en banc, however, the panel amended its opinion to address *Humanitarian Law Project*. The court, per Judge Graber, purported to distinguish that case on the grounds that it involved "ordinary citizens" who were engaged in political speech. 740 F.3d at 1230. But this argument drew a sharp dissent from Judge O'Scannlain, who, writing for himself and two other judges, pointed out that the plaintiffs in *Humanitarian Law Project*, who included lawyers and judges, "certainly purported to be offering professional services." *Id.* at 1217. Moreover, Judge O'Scannlain noted that the Supreme Court

itself had rejected the argument that the speech at issue in *Humanitarian Law Project* was purely political. *Id.* (citing *Humanitarian Law Project*, 561 U.S. at 25). As Judge O'Scannlain saw it, the application of *Humanitarian Law Project* could not have been more clear:

> [L]egislatures cannot nullify the First Amendment's protections for speech by playing this labeling game. [California's ban on sexual orientation change efforts] prohibits certain "practices," just as the statute in *Humanitarian Law Project* prohibited "material support"; but with regard to those plaintiffs as well as the plaintiffs here, those laws targeted speech. Thus, the First Amendment still applies.

*Id.* at 1218.

Although Judge O'Scannlain's dissent did not carry the day in *Pickup*, it formed a significant basis for the Third Circuit's later decision in *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). *King* involved a virtually identical ban on sexual orientation change efforts aimed at minors. *Id.* at 221. But unlike the Ninth Circuit, the Third Circuit acknowledged that *Humanitarian Law Project* was not distinguishable. *Id.* at 224–26. The court also criticized "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct'" as "unprincipled and susceptible to manipulation." *Id.* at 228. Nevertheless, the court went on to conclude that occupational speech—while protected by the First Amendment—should be protected at the same level as commercial speech. *Id.* at 235. Thus, applying the intermediate scrutiny set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), the court held

that New Jersey's ban on sexual orientation change efforts was constitutional. 767 F.3d at 237–40.

The Third Circuit's application of intermediate scrutiny, rather than strict scrutiny, is questionable; the Supreme Court has recently cautioned against lower federal courts singling out new categories of speech for reduced constitutional protection. *See United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."). Nevertheless, the Third Circuit's opinion in *King* is unquestionably more consistent with *Humanitarian Law Project* than is the Ninth Circuit's in *Pickup*, because the Third Circuit recognized that speech cannot be cast outside the First Amendment merely by relabeling it as "professional conduct."

The same cannot be said for the district court, which sides squarely—if unknowingly—with the Ninth Circuit. As a result, the district court's reasoning poses a grave danger to speakers in countless occupations. If the government can denude speech of First Amendment protection simply by labeling it the "conduct" of "practicing a profession," then there are no limits to what can be cast out from the scope of the First Amendment, because almost all speech can be characterized, in some sense, as conduct. University professors engage in the conduct of "instructing." Political consultants engage in the conduct of "strategizing." Stand-

up comedians engage in the conduct of "inducing amusement." Nobody, however, could conclude that such a sweeping and dangerous result is consistent with the Supreme Court's precedent, and this Court should reject that argument.

### C. However the Court resolves Serafine's facial challenge, it should make clear that as-applied challenges to Texas's psychologist licensing statute remain available.

The conclusion that Serafine's occupational speech is fully protected by the First Amendment does not necessarily mean that she succeeds on her facial overbreadth challenge. It simply means that this Court should resolve that claim the same way it would in any other First Amendment case, by asking whether the unconstitutional applications of Texas Occupations Code Section 501.003(b)(2)–(4) are substantial in relation to the statute's legitimate sweep. *See Stevens*, 559 U.S. at 485.

*Amicus* takes no position on whether Texas's law is facially overbroad. But if this Court should decide that it is not, this Court should make clear that it is not foreclosing future as-applied challenges to that law, because broadly worded licensing laws like Texas's are subject to abuse by regulatory boards.

This is well illustrated by a case that *amicus* Institute for Justice is currently litigating against the Kentucky Board of Examiners of Psychology. In 2013, that agency sent a cease-and-desist letter to syndicated newspaper columnist John Rosemond, ordering him to cease providing parenting advice in response to reader-

submitted questions, because such advice constitutes a "psychological service" offered to the public. Complaint & Ex. A, *Rosemond v. Conway*, No. 3:13-cv-00042-GFVT (E.D. Ky. filed July 16, 2013), *available at* http://www.ij.org/images/pdf_folder/first_amendment/ky_psych/ky-psych-complaint.pdf (last visited Feb. 17, 2015). Mr. Rosemond's specific advice was simply that the parents of an underachieving 17-year-old get tough with their son and suspend his privileges until he started performing better in school.

This sort of parenting advice is ubiquitous in America, as anyone with children can attest. But under the district court's reasoning, Mr. Rosemond's speech (and many other people's speech) would be entitled to no constitutional protection. This Court should reject such a sweeping and dangerous proposition. However this Court resolves the facial claims in this case, it should take care not to set precedent that would deprive speakers like Mr. Rosemond—or Appellant Serafine—of a First Amendment remedy when licensing boards prove incapable of justifying specific applications of general occupational-licensing laws.[10]

[10] Notably, the Supreme Court in *Humanitarian Law Project* expressly held that it was not foreclosing future as-applied challenges to the material-support prohibition. 561 U.S. at 39.

## II. Restrictions on the Use of Occupational Titles in Non-Commercial Settings Should Be Reviewed with Strict Scrutiny, Which the District Court Failed to Apply.

In addition to challenging the restrictions that Texas imposes on the offering of psychological services, *see* Tex. Occ. Code § 501.003(b)(2)–(4), Serafine has also challenged Texas's restriction on the use of the title "psychologist" and the terms "psychological" or "psychology" in communications related to her political campaign. *See id.* at § 501.003(b)(1). The district court rejected this claim out of hand, suggesting that there was "no evidence that the Act's effect on Serafine's ability to describe herself to voters rises to the level justifying the invocation of First Amendment protection." R. 690. The district court cited no case law for this proposition, and it is inconsistent with Supreme Court precedent, which establishes that even false statements about one's credentials—when made in the context of political speech—are fully protected by the First Amendment.

The Supreme Court has long recognized that statements or omissions regarding a political speaker's identity are entitled to the highest level of First Amendment protection, and that editorial decisions about which facts about a speaker's identity are relevant and which are irrelevant lie squarely with the speaker, not the government. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("[W]e think the identity of the speaker is no different from other components of the document's content that the author is free to include or

exclude."). Moreover, the Supreme Court has recently clarified that even brazenly false statements are fully protected by the First Amendment when they occur in a political setting. *See United States v. Alvarez*, 132 S. Ct. 2537 (2012) (holding that false statements about having received the Medal of Honor, made at a public meeting by a member of a water-district board, were fully protected by the First Amendment).

Thus, although the specific issue of the constitutional protection afforded to the use of professional titles in non-commercial settings appears to have rarely been litigated, it is not surprising that at least one court has concluded that such speech is fully protected by the First Amendment. In *State ex rel. State Board of Healing Arts v. Thomas*, the Court of Appeals of Kansas held that the state constitutionally could prohibit a man who had completed an eight-week course at an unaccredited university in Antigua from using the title M.D. on his business cards and in the corporate name of his business—both clearly forms of commercial speech—but that it would be unconstitutional for the state to prohibit him from using that title in "academic or social settings." 97 P.3d 512, 520, 523–24 (Kan. App. 2004).

Simply put, outside the narrow context of commercial speech, disputes about the appropriateness of using particular professional titles are typically resolved through public debate. In this case, Serafine wishes to describe herself as a

psychologist in the context of political advocacy. As the district court itself recognized, that description is not inherently misleading. R. 691. The media or the public may disagree with Serafine's description of her credentials, and she may suffer political consequences if her claim to be a psychologist is viewed as a misrepresentation. The government, however, cannot censor that claim unless it meets the demanding requirements of strict scrutiny. The district court did not hold the government to those demanding requirements, and in failing to do so committed reversible error.

## III. Restrictions on the Use of Occupational Titles in Commercial Settings Are Reviewed Using the *Central Hudson* Test, but the District Court Misapplied That Test.

Serafine has also challenged the application of Texas Occupations Code Section 501.003(b)(1) to her use of the terms "psychologist," "psychological," and "psychology" in a commercial setting. As the district court recognized, Serafine's description of herself in a commercial setting as a "psychologist" and her description of her services as "psychological" are not inherently misleading and are, at most, potentially misleading. R. 691. Accordingly, the district court correctly concluded that Texas's restrictions on Serafine's use of these terms are subject to intermediate scrutiny under the Supreme Court's *Central Hudson* test. *Id.* But while the district court identified the proper test, it misapplied that test, and in doing so relieved the government of its affirmative evidentiary obligations.

The Supreme Court has been unambiguously clear that the government cannot carry its affirmative burden under the *Central Hudson* test without real evidence. The controlling case is *Edenfield v. Fane*, 507 U.S. 761 (1993), in which the Supreme Court struck down a Florida law that prohibited certified public accountants from engaging in in-person solicitation of clients. In doing so, the Court held that restrictions on commercial speech cannot be supported by mere supposition or conjecture; they must, in every case, be supported by genuine evidence that the law targets a real harm and is reasonably calculated to address that harm. *Id.* at 770–72.

Other federal circuit courts have stringently applied this evidentiary requirement. For example, in *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007) (en banc), the en banc Sixth Circuit considered the constitutionality of a municipal ordinance that outlawed the placing of "for sale" signs in the windows of cars parked on the street. The municipality attempted to sidestep its evidentiary burden by asking the court to "adopt a standard of 'obviousness' or 'common sense,' under which [courts] uphold a speech regulation in the absence of evidence of concrete harm so long as common sense clearly indicates that a particular speech regulation will directly advance the government's asserted interest." *Id.* at 774. But the en banc Sixth Circuit expressly rejected that argument, holding that it "simply [could not] uphold the ordinance without *any* evidence at all to support the need

for its enactment and simultaneously follow what [the Sixth Circuit] view[s] to be the clear command of the Supreme Court." *Id.* at 778.

In this case, however, we have no idea whether or not the government satisfied this standard because the district court failed to make any relevant factual findings. Instead, it simply concluded, without any citation to evidence, that the harms presented by Serafine's speech were real and that Texas's efforts to address those harms were reasonably tailored. The district court also failed to consider whether obvious less-restrictive alternatives—such as a disclaimer that Serafine is not licensed as a psychologist in Texas—would serve the government's interest equally well. *Cf. McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (holding that, under intermediate scrutiny, the government is required to show "that it seriously undertook to address the problem with less intrusive tools readily available to it"). This was error, and this Court should remand Serafine's First Amendment claims so that the district court can weigh the evidence in the first instance.

## Conclusion

Regardless of how this Court believes that Serafine's various claims should be resolved on their merits, it is apparent that the district court below either failed to apply or misapplied the appropriate standard of review to each of those claims. As a result, the district court's reasoning, if allowed to stand, poses a threat to speakers throughout the Fifth Circuit. This Court should not allow that to happen.

Whether this Court chooses to resolve Serafine's claims itself or instead chooses to remand them to the district court for reconsideration under the appropriate standard of review, *amicus* respectfully requests that this Court clarify that 1) restrictions on occupational speech must be reviewed with strict scrutiny; 2) restrictions on the use of occupational titles in the context of political speech must be reviewed with strict scrutiny; and 3) the *Central Hudson* test for commercial speech requires a genuine evidentiary showing on the part of the government.

Dated: February 17, 2015

Respectfully submitted,

/s/ Paul M. Sherman
Paul M. Sherman
Robert J. McNamara
Dana Berliner
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font for the primary text and 14-point Times New Roman font for the footnotes.

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that this *Amicus Curiae* Brief of the Institute for Justice in Support of Neither Party has been filed with the Clerk of the Court and sent via the Court's ECF system to the following counsel of record:

Mary Louise Serafine
P.O. Box 4342
Austin, Texas 78765
Email: mlserafine@gmail.com

*Plaintiff-Appellant, Pro Se*

Alex Potapov
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Email: alex.potapov@texasattorneygeneral.gov

James Carlton Todd
Assistant Attorney General
Office of the Attorney General
General Litigation Division
300 W. 15th Street
William P. Clements Building
Austin, Texas 78707-0000
Email: jim.todd@texasattorneygeneral.gov

*Counsel for Defendants-Appellees*

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*