From:	samydmd@aol.com
To:	HHC Exhibits
Subject:	Fwd: Additional Information on SB 835
Date:	Monday, May 20, 2019 8:01:41 AM
Attachments:	AAID.Texas.Bunel.excerpts.pdf WhatMakeASpecialist.pdf Texas.jan2016.decision.pdf NC.21 NCAC 16P.0105.Feb1.2019.pdf aaid.cal.check.pdf FlaCheck.2010.pdf FIFTH.CIRCUIT.COURT.OF.APPEALS.AAID.TEXAS.pdf ABDS.Iowa.pdf

---

safest thing for Oregon to do is:

Repeal all specialty advertising regulations/statutory prohibitions;

Adopt 'or the American Board of Dental Specialties' in addition to the specialties recognized by the ADA's National Commission on Specialty Recognition;
ADA still controls all specialties;
Iowa is an example of a legal way to denote specialization; (ADA recognized dental specialties and/or those recognized by the ABDS/American Board of Dental Specialties' (attached and now law)
NC rule (eff. 2-1-2019) is another way to denote specialization
Fla paid about 700K after our victory in 2009;(attached)
Cal paid almost one million after our victory in 2010; (attached)
Testimony of Oral Surgeon on Texas Dental Board (Bunel, attached)

THIS IS ALL ABOUT ECONOMIC COMPETITION

Frank R. Recker, DDS
Attorney at Law
Frank R. Recker & Associates, Co, LPA

4th and Vine Tower
One W. 4th Street
Suite 2606
Cincinnati, Ohio 45202

Tel: 800-224-3529
Fax: 888-469-0151
Email: recker@ddslaw.com

DENTAL BOARD [650]

Notice of Intended Action

Pursuant to the authority of Iowa Code 153.33 and 153.34, the Dental Board hereby gives Notice of Intended Action to amend Chapter 26, "Advertising", and to rescind and reserve Chapter 28, "Designation of Specialty" Iowa Administrative Code.

The amendments clarify the requirements to advertise a specialty in the practice of dentistry to permit dentists to advertise as a specialist if they are a diplomate of, or board eligible for, a national certifying board of a specialty recognized by the American Dental Association or a diplomate of a board recognized by the American Board of Dental Specialties. In addition, the rules permit dentists a third option for advertising as a specialist if they are a diplomate of a national certifying board that meets established criteria. The American Dental Association has recently addressed the changing scope of specialization and recent court cases have highlighted the constitutional rights of licensees to advertise the services they provide. Chapter 28 currently sets forth in detail the specialties that may be advertised and the requirements for those specialties. Because the proposed amendments to chapter 26 set forth the criteria for advertising specialties, the Board is also seeking to rescind chapter 28 at this time.

Any interested person may make written comments on the proposed amendments on or before September 12, 2017. Such written materials should be directed to Phil McCollum, Associate Director, Iowa Dental Board, 400 S.W. Eighth Street, Suite D, Des Moines, Iowa 50309 or sent by email to phil.mccollum@iowa.gov.

There will be a public hearing on September 12, 2017 at 2:00 pm in the Board office, 400 S.W. Eighth Street, Suite D, Des Moines, Iowa, 50309 at which time persons may present their views orally or in writing.

The proposed amendments are subject to waiver or variance pursuant to 650-chapter 7.

After analysis and review of this rule making, there is no impact on jobs.

ITEM 1. Amend subrule **650—26.4** as follows:

650—26.4(153) Public representation. All advertisement and public representations shall contain the name and address or telephone number of the practitioner who placed the ad.

26.4(1) If one's practice is referred to in the advertisement, the ad may state either "general/family practice" or "specialist" ~~the American Dental Association recognized specialty that the practitioner practices~~.

26.4(2) ~~No dentist may state or imply that the dentist is certified as a specialist when that is not the case. Use of the terms "specialist," "specializing in" or other similar terms in connection with areas that are not recognized as specialties pursuant to 650—Chapter 28 is not permitted.~~

A dentist may advertise as a specialist if the dentist meets the standards set forth in this rule.

1. The indicated specialty(s) of dentistry must be those for which there are national certifying boards recognized by the American Dental Association or by the American Board of Dental Specialties.

2. The dentist wishing to advertise as a specialist must be a Diplomate of, or board eligible for, a national certifying board of a specialty recognized by the American Dental Association, or a Diplomate of a board recognized by the American Board of Dental Specialties.

3. A dentist who does not meet the requirements of (2) may advertise as a specialist if he/she can demonstrate that he/she has earned "Diplomate" status from a national certifying board that meets all of the following criteria:

    i. is an independent entity comprised of licensed dentists and is incorporated and governed solely by the licensed dentists/board members;

    ii. has a permanent headquarters and staff;

    iii. has issued Diplomate certificates to licensed dentists for at least five years;

    iv. requires passing an oral and written examination based on psychometric principles that tests the applicant's knowledge and skills in the specific area of dentistry;

    v. requires all dentists who seek certification to have successfully completed a specified, objectively verifiable amount of post DDS or DMD education through a formal postgraduate program and/or an organized continuing education program of comprehensive scope that is earned through continuing education providers approved by the Board; and

    vi. has its own website that provides an online resource for the consumer to verify its certification requirements and a listing of the names and addresses of the dentists who have been awarded its board certification.

26.4(3) The use of the terms "specialist", "specializes", "orthodontist", "oral and maxillofacial surgeon", "oral and maxillofacial radiologist", "periodontist", "pediatric dentist", "prosthodontist", "endodontist", "oral pathologist", "public health dentist," dental anesthesiologist, or other similar terms which imply that the dentist is a specialist may only be used by licensed dentists meeting the requirements of this rule. A dentist who advertises as a specialist must avoid any implication that other dentists associated with him or her in practice are specialists.

26.4(4) The term "diplomate" or "board certified" may only be used by a dentist who has successfully

completed the qualifying examination of the appropriate certifying board of one or more of the specialties recognized by the American dental association or the American Board of Dental Specialties, or otherwise permitted pursuant to these rules.

26.4(5) A dentist advertising as a specialist pursuant to these rules shall include the name of the national certifying board and the name of the entity which recognizes the board.

26.4(~~3~~6) ~~Dentists~~ A dentist may advertise the areas in which they practice, including, but not limited to, specialty services, using other descriptive terms such as "emphasis on _____" or other similar terms, as long as all other provisions of these rules regarding advertising are met.

ITEM 2. Rescind and reserve **650—Chapter 28.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2017
Lyle W. Cayce
Clerk

No. 16-50157

AMERICAN ACADEMY OF IMPLANT DENTISTRY; AMERICAN SOCIETY OF DENTIST ANESTHESIOLOGISTS; AMERICAN ACADEMY OF ORAL MEDICINE; AMERICAN ACADEMY OF OROFACIAL PAIN; JAY E. ELLIOTT, D. D. S.; MONTY BUCK, D. D. S.; JAROM C. HEATON, D. D. S.; MICHAEL A. HUBER, D. D. S.; EDWARD F. WRIGHT, D. D. S., M. S.,

Plaintiffs - Appellees

v.

KELLY PARKER, in her official capacity as Executive Director of the Texas State Board of Dental Examiners, TAMELA L. GOUGH, D. D. S., M. S., in her official capacity as a Member of the Texas Board of Dental Examiners; STEVE AUSTIN, D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; TIM O'HARE, in his official capacity as a Member of the Texas Board of Dental Examiners; KIRBY BUNEL, JR., D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; WILLIAM R. BIRDWELL, D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; EMILY A. CHRISTY, in her official capacity as a Member of the Texas Board of Dental Examiners; JAMES W. CHANCELLOR, D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; RODOLFO G. RAMOS, JR., D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; LEWIS WHITE, in his official capacity as a Member of the Texas Board of Dental Examiners; WHITNEY HYDE, in her official capacity as a Member of the Texas Board of Dental Examiners; RENEE CORNETT, R. D. H., in her official capacity as a Member of the Texas Board of Dental Examiners; D. BRADLEY DEAN, D. D. S., in his official capacity as a Member of the Texas Board of Dental Examiners; CHRISTIE LEEDY, D. D. S., in her official capacity as a Member of the Texas Board of Dental Examiners; LOIS PALERMO, R. D. H., in his official capacity as a Member of the Texas Board of Dental Examiners; EVANGELIA MOTE, in her official capacity as a Member of the Texas Board of Dental Examiners,

Defendants - Appellants

No. 16-50157

Appeals from the United States District Court
for the Western District of Texas

Before ELROD, SOUTHWICK, and GRAVES, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The plaintiffs challenge a provision in the Texas Administrative Code regulating advertising in the field of dentistry. The district court held that the provision violated the plaintiffs' First Amendment right to engage in commercial speech. It therefore enjoined enforcement of the provision as applied to the plaintiffs. The defendants appealed. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Texas law prohibits dentists from advertising as specialists in areas that the American Dental Association ("ADA") does not recognized as specialties. *See* TEX. ADMIN. CODE § 108.54. The plaintiffs seek to enjoin enforcement of Section 108.54, as they wish to advertise in areas recognized as specialties by other dental organizations but not by the ADA. They argue the First and Fourteenth Amendments give them the right to do so.

This appeal involves several plaintiffs. The organizational plaintiffs include the American Academy of Implant Dentistry, the American Society of Dental Anesthesiologists, the American Academy of Oral Medicine, and the American Academy of Orofacial Pain. These organizations are national organizations with member dentists. The purpose of each organization is to advance the interests of dentists practicing in the organization's respective practice area. Each organization sponsors a credentialing board and offers credentials to members who demonstrate expertise in their respective field.

The individual plaintiffs are five dentists, three of whom are in private practice and two of whom are professors at the University of Texas Health Science Center School of Dentistry. The individual plaintiffs limit their practice to one of the following practice areas: implant dentistry, dental anesthesiology, oral medicine, and orofacial pain. Each of the individual plaintiffs has been certified as a "diplomate" by one of the organizational plaintiffs' credentialing boards, indicating that the plaintiff has achieved that board's highest honor by meeting certain requirements set by the board "including training and experience beyond dental school."

The Texas Occupations Code provides that the Texas State Board of Dental Examiners may "adopt and enforce reasonable restrictions to regulate advertising relating to the practice of dentistry . . . ." *See* TEX. OCC. CODE § 254.002(b). The plaintiffs take issue with one of the Board's regulations, Texas Administrative Code Section 108.54. Section 108.54 provides:

> A dentist may advertise as a specialist or use the terms "specialty" or "specialist" to describe professional services in recognized specialty areas that are: (1) recognized by a board that certifies specialists in the area of specialty; and (2) accredited by the Commission on Dental Accreditation of the American Dental Association.

TEX. ADMIN. CODE § 108.54(a). Part (b) lists the ADA's nine recognized specialty areas as the ones that meet the requirements of part (a).[1] The Board does not itself certify specialties but instead relies exclusively on the ADA for that purpose. Section 108.54 also requires certain ADA-related education or board-certification qualifications in order to advertise as a specialist. *See* TEX. ADMIN. CODE § 108.54(c).

---

[1] Those recognized specialty areas are endodontics, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, prosthodontics, dental public health, oral and maxillofacial pathology, and oral and maxillofacial radiology. *See* TEX. ADMIN. CODE § 108.54(b).

Section 108.54 prohibits the individual plaintiffs from advertising as specialists or referring to their practice areas as specialties because their practice areas are not recognized as such by the ADA. The ADA has considered whether to grant specialty recognition to the plaintiffs' respective practice areas, but thus far it has denied that recognition. Nevertheless, the plaintiffs are not completely forbidden from advertising their practice areas. In 2012, two of the individual plaintiffs in this case and the American Academy of Implant Dentistry challenged a separate provision of the Texas Administrative Code that restricted the plaintiffs from advertising their credentials and holding themselves out as specialists in implant dentistry. The Board responded by revising an existing regulation and adding another. *See* TEX. ADMIN. CODE §§ 108.55, 108.56. Section 108.55 allows general dentists who do some work related to the specialty areas listed in Section 108.54(b) to advertise those services as long as they include a disclaimer that they are a general dentist and do not imply specialization. Section 108.56 provides that dentists may advertise "credentials earned in dentistry so long as they avoid any communications that express or imply specialization . . . ." *See also* TEX. ADMIN. CODE § 108.57 (prohibiting false, misleading, or deceptive advertising).

Under the current regulations, the plaintiffs may advertise credentials they have earned and the services they provide only if they clearly disclose that they are a "general dentist" and do not "imply specialization." *See* TEX. ADMIN. CODE §§ 108.55, 108.56. The plaintiffs complain that this regime prevents them from truthfully holding themselves out as "specialists" in their fields.

In March 2014, the plaintiffs brought this action against the executive director and members of the Board in their official capacities. The plaintiffs challenged Section 108.54 on First and Fourteenth Amendment grounds, and the parties eventually filed cross-motions for summary judgment. The district court granted summary judgment to the plaintiffs in part, concluding that

Section 108.54 "is an unconstitutional restriction on Plaintiffs' First Amendment right to free commercial speech." The court enjoined the defendants "from enforcing Texas Administrative Code § 108.54 to the extent it prohibits Plaintiffs from advertising as specialists or using the terms 'specialty' or 'specialist' to describe an area of dentistry not recognized as a specialty by the American Dental Association, or any other provision of Texas law inconsistent with [the district court's] opinion." The court determined the plaintiffs' "remaining Fourteenth Amendment claims are without merit" and granted summary judgment to the defendants on those claims. The defendants appealed.

DISCUSSION

We review a judgment on cross-motions for summary judgment *de novo* "with evidence and inferences taken in the light most favorable to the nonmoving party." *White Buffalo Ventures, LLC v. Univ. of Texas at Austin*, 420 F.3d 366, 370 (5th Cir. 2005). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

This case involves commercial speech, which is protected by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561–62 (1980).

Though commercial speech is protected by the First Amendment, courts give to it "lesser protection . . . than to other constitutionally guaranteed expression." *Id.* at 563. A four-part test applies:

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

Id. at 566. "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983). Within this framework, we consider the plaintiffs' challenge to Section 108.54. We conclude that the Board fails to justify Section 108.54 under the *Central Hudson* analysis. We do not reach the plaintiffs' Fourteenth Amendment argument.

Before we begin our analysis, we measure the reach of the district court's ruling. The parties dispute whether the district court enjoined Section 108.54 facially or as applied. We find that answer in the district court's own words: Section 108.54 "is an unconstitutional restriction on Plaintiffs' First Amendment right to free commercial speech." We interpret that language to mean that Section 108.54 is held to be unconstitutional only as applied to these plaintiffs. Neither the district court nor we address whether this language would also fail a facial challenge.

I. Lawful Activity, Not Misleading

In order for commercial speech to be protected under the First Amendment, "it at least must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566. "The first part of the test is really a threshold determination whether the speech is constitutionally protected . . . ." *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009).

The parties do not dispute that the relevant speech in this case concerns lawful activity. Texas law permits the individual plaintiffs to limit their practice to the fields of implant dentistry, dental anesthesiology, oral medicine, and orofacial pain. We agree, then, that advertising as a specialist in one of these practice areas concerns lawful activity.

The parties disagree as to whether the speech would be misleading or just potentially misleading. The distinction is important. "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982). "But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *Id.*

The Board argues that the relevant speech here is inherently misleading because the term "specialist," in the context of unregulated dental advertising, is devoid of intrinsic meaning. The Board urges us to categorize the term "specialist" in a completely unregulated context, reasoning "the State need only show that an unregulated, unadorned, and unexplained claim of 'specialist' status in a particular practice area is inherently misleading[.]" In support, the Board offers witness testimony from several dentists regarding what they perceive "specialist" to mean. Observing that the witnesses characterize "specialist" differently, the Board reasons the term "specialist" has no agreed-upon meaning, is devoid of intrinsic meaning, and is therefore inherently misleading.

It has been "suggested that commercial speech that is devoid of intrinsic meaning may be inherently misleading, especially if such speech historically has been used to deceive the public." *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 112 (1990) (Marshall, J. &

Brennan, J., concurring in the judgment). The Court noted, for example, that a trade name is "a form of commercial speech that has no intrinsic meaning." *Friedman v. Rogers*, 440 U.S. 1, 12 (1979). "A trade name conveys no information about the price and nature of the services offered . . . until it acquires meaning over a period of time . . . ." *Id.* The term "specialist," by contrast, is not devoid of intrinsic meaning. All of the testimony offered by the Board demonstrates that the term "specialist" conveys a degree of expertise or advanced ability. Although different consumers may understand the degree of expertise in different ways, that only shows the term has the potential to mislead. It does not mean the term is devoid of intrinsic meaning and, therefore, inherently misleading.

The Board nevertheless urges that the use of the term "specialist" is unprotected because, unlike in *Peel*, the "specialist" designation might be used without reference to any certifying organization. The Court in *Peel* considered a claim of "certification as a 'specialist' by an identified national organization[.]" *Peel*, 496 U.S. at 105. The problem here is the absence of any group imprimatur behind the label "specialist." Nonetheless, the term "specialist" is not rendered devoid of intrinsic meaning, and thereby inherently misleading, simply because the organization responsible for conferring specialist credentials on a particular dentist is not identified in the advertisement. *See Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 145 & n.9 (1994). Whether the absence of that information contributes to the potentially misleading character of the speech is a separate question.

Moreover, there is no evidence that the term "specialist" has been or will be used in a way that is distinct from its ordinary meaning. In one appeal, we held that the use of the term "invoice" in automobile advertising was inherently misleading because it was "calculated to confuse the consumer[.]"

Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n, 24 F.3d 754, 757 (5th Cir. 1994) (quotation marks omitted). It was misleading because an advertised price of "$49.00 over invoice" could mean a multitude of prices other than the dealer's true cost because "holdbacks, incentives, and rebates" were included in the dealer's cost. *Id.* The word "invoice" did "not mean what it appear[ed] to mean" and conveyed no useful information to the consumer. *Id.*

Here, the individual plaintiffs intend to use "specialist" in the same manner as dentists practicing in ADA-recognized specialties, namely, to convey useful, truthful information to the consumer. Unlike in *Joe Conte*, the relevant term — "specialist" as opposed to "invoice" — will be used in a way that is consistent with its ordinary meaning.

Finally, the Board suggests that the plaintiffs' proposed speech is inherently misleading simply because it does not comply with the regulatory requirements imposed by the Board. According to the Board, Section 108.54 "is what gives 'specialist' a standardized, reliable meaning in dental advertising in Texas." The Board's argument would grant it the ability to limit the use of the term "specialist" simply by virtue of having created a regime that defines recognized and non-recognized specialties. *See Byrum*, 566 F.3d at 447. Even if appropriate regulation is warranted because the "specialist" designation might be potentially misleading, it is not inherently misleading merely because it does not align with the Board's preferred definition of that term.

Our fundamental issue is whether the speech is subject to First Amendment protection. "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. at 203. The dentists' proposed speech "may be presented in a non-deceptive manner and [is] not 'inherently likely to deceive' the public." *See Pub. Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 219 (5th Cir. 2011)

(quoting *In re R.M.J.*, 455 U.S. at 202). "Given the complete absence of any evidence of deception, the Board's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Ibanez*, 512 U.S. at 145 (quotation marks and citations omitted). By completely prohibiting dentists from advertising as specialists simply because their practice area is one not recognized as a specialty by the ADA, "truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech[.]" *See Edenfield v. Fane*, 507 U.S. 761, 768–69 (1993).

The plaintiffs' proposed speech is not inherently misleading. Even so, the Board may regulate potentially misleading speech if the regulation satisfies the remaining elements of the *Central Hudson* test. *See id.* at 769. In order to meet its burden, the Board must "show[] that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez*, 512 U.S. at 142 (citing *Central Hudson*, 447 U.S. at 566). We now look at those issues.

II. Substantial Interests

The parties agree that the Board has asserted substantial interests. The plaintiffs dispute two of the interests articulated by the Board: "preventing the public from being misled to believe that qualification as a 'specialist' under non-ADA-approved criteria is equivalent to qualification as a 'specialist' under ADA-approved criteria," and "exercising its 'power to establish standards for licensing practitioners,' *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)[.]" The plaintiffs argue that these are not substantial interests.

These interests appear to be related to the state's interest in "ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading

professional advertisements." The Board considers the plaintiffs' objections to be "inconsequential" because the plaintiffs concede "the State has a substantial interest in protecting the public from misleading advertising[.]" As the plaintiffs point out, however, the Board may not assert a substantial interest in Section 108.54 itself simply because "States have a compelling interest in the practice of professions within their boundaries[.]" *See also Goldfarb*, 421 U.S. at 792.

Regardless of these questions, we agree with the district court that the Board has a substantial interest in "ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading professional advertisements." These interests satisfy this part of *Central Hudson.*

III. Directly Advances the Governmental Interest

Next, we turn to whether the regulation directly advances the substantial governmental interests asserted. *See Central Hudson*, 447 U.S. at 566. This step of the *Central Hudson* analysis "concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). The Board's burden on this point is significant: "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Ibanez*, 512 U.S. at 143 (quotation marks omitted). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770–71. The Board may satisfy its burden with

"empirical data, studies, and anecdotal evidence," or "'history, consensus, and simple common sense.'" *See Pub. Citizen*, 632 F.3d at 221 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

The Board says it is common sense that Section 108.54 advances the interest in establishing a uniform standard for specialization and allows consumers to distinguish between general dentists and specialists. The Board also submits that Section 108.54 protects consumers from potentially misleading speech. We note that the Board has not done much heavy lifting here. Indeed, it points to the fact that Section 108.54 provides a standard, but it offers no justification for the line that it draws other than its unsupported assertion that the ADA "should maintain the national gold standard . . . ." Its only suggestion as to why the plaintiffs' proposed speech would be misleading is that the speech does not comport with the ADA's list of designated specialties.

The Board attempts to support its position with the personal experiences of Board members and two surveys considered in another case. *See Borgner v. Brooks*, 284 F.3d 1204, 1211–13 (11th Cir. 2002). The personal experiences of the Board members add little to the Board's argument, and the *Borgner* surveys hardly bolster its position. The *Borgner* surveys are not in the record and the district court could not "mak[e] an independent evaluation of their applicability to the facts before it . . . ." Moreover, those surveys were provided in support of a different regulatory regime that permitted "advertisement of an implant dentistry specialty" and membership in a credentialing organization "so long as these statements are accompanied by the appropriate disclaimers." *Id.* at 1210. Doubt has also been raised as to the validity of the surveys. *See id.* at 1217 n.5 (Hill, J., dissenting); *see also Borgner v. Florida Bd. of Dentistry*, 123 S. Ct. 688, 689 (2002) (Thomas, J. & Ginsburg, J., dissenting from denial of certiorari).

The Board also discusses its long history of reliance on the ADA's recognition of specialties. Other states have taken a similar approach. In supplemental briefing, however, the parties identified a recent change in the ADA's own approach to dental-specialty advertising under the ADA Principles of Ethics and Code of Professional Conduct. The ADA now concludes it is ethical for dentists, within certain parameters, to "announce as a specialist to the public" in any of the nine practice areas recognized as specialties by the ADA and "in any other areas of dentistry for which specialty recognition has been granted under the standards required or recognized in the practitioner's jurisdiction . . . ." The ADA observed that "states have begun to recognize specialties beyond the nine dental specialties recognized by the ADA."

The Board has provided little support in its effort to show that Section 108.54 advances the asserted interests in a direct and material way. *See Went For It*, 515 U.S. at 625–26. Ultimately, though, the Board's position collapses for a more fundamental reason: it fails at the outset to "demonstrate that the harms it recites are real . . . ." *See Edenfield*, 507 U.S. at 771. The Board attempts to meet its burden on this point with testimony from several witnesses describing complications experienced when patients visited a general dentist for a procedure that should have been performed by a specialist. One of the Board's members, for example, described treating a patient who experienced complications after visiting a general dentist to have nine implants placed. The patient said, "if I had only known that there was a specialist[.]" Another Board member described a similar problem, testifying that "patients will come to [his specialty] practice after experiencing a complication in a general dentist's office." A third witness testified that the "overall failure rate and complication rate was higher for nonspecialists who were placing dental implants." Nevertheless, harm from a general dentist performing work within an ADA-recognized specialty at a lower quality than

would a specialist is not a harm that Section 108.54 remedies.[2] Section 108.54 regulates how a dentist may advertise his or her practice, not the kind of services a dentist can provide. The Board does not suggest that any of the complications described in the witness testimony were experienced by patients visiting dentists who held themselves out as specialists, but who were not qualified to do so.

In summary, we must examine "the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest." *Lorillard*, 533 U.S. at 555. The Board does not identify anything else to demonstrate real harms that Section 108.54 alleviates to a material degree. *See Edenfield*, 507 U.S. at 771. Absent that demonstration, and with little support behind its chosen means, we conclude that the Board has not met its burden at this step of the *Central Hudson* analysis.

IV. Not More Extensive than is Necessary

Even if the Board demonstrated that Section 108.54 directly advanced the interests asserted, it fails to demonstrate that it is "not more extensive than is necessary to serve" those interests. *See Central Hudson*, 447 U.S. at 566. This last step "complements" the third step of the analysis. *See Lorillard*, 533 U.S. at 556. Here, "the Constitution requires 'a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Byrum*, 566 F.3d at 448 (quoting *Bd. of Trs. of the State Univ. of New*

---

[2] In his deposition, one of the plaintiffs in this case stated he was "aware of . . . instances where general dentists, without any form of specialty, have advertised as implant experts and that [has] been a problem[.]" The "problem" was business competition, as the plaintiff wished to advertise that he — unlike those other dentists — was a specialist.

York v. Fox, 492 U.S. 469, 480 (1989)). "[T]he existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.'" *Went For It*, 515 U.S. at 632 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)). The cost of the restriction must be "carefully calculated," and the Board "must affirmatively establish the reasonable fit . . . require[d]." *Fox*, 492 U.S. at 480.

Section 108.54 completely prohibits the plaintiffs from advertising as specialists in their fields solely because the ADA has not recognized their practice areas as specialties. The Board has not justified Section 108.54 with argument or evidence. Without more in the record, we find an improper fit between the means and the objective.

The Board has not suggested it considered less-burdensome alternatives. To the extent that advertising as a specialist is potentially misleading, "a State might consider . . . requiring a disclaimer about the certifying organizations or the standards of a specialty." *See Peel*, 496 U.S. at 110 (plurality opinion). Sufficient disclaimers are a means to address consumer deception. *Pub. Citizen*, 632 F.3d at 223. Indeed, we held in *Public Citizen* that the State failed to meet its burden where it merely submitted a "conclusory statement that a disclaimer could not alleviate [the] concerns" it earlier identified. *Id.* A State might also consider "screening certifying organizations . . . ." *See Peel*, 496 U.S. at 110 (plurality opinion). The California legislature took precisely that approach when regulating the use of the term "board certified" among physicians and surgeons. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1107, 1111 (9th Cir. 2004). Similarly, the district court in our case noted that "[o]ne obvious less-burdensome alternative would be to peg the term 'specialty' or 'specialist' to a set of statutory or regulatory qualifications that signify the credentialing board has met some uniform standard of minimal

competence." This is not a novel approach. For example, one court believed California's regulatory scheme "appeared to rely upon the ADA in making recognition decisions," but in response to a predecessor lawsuit the dental board "developed its own recognition standards which [were] reduced to a proposed regulation." *See Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1235 (E.D. Cal. 2000). We express no opinion regarding the merits of these alternative approaches, but we note the existence of several less-burdensome alternatives. *See Went For It*, 515 U.S. at 632.

The Board submits that the individual plaintiffs can "engage in a substantial amount of commercial speech regarding their dental practices." The plaintiffs can advertise the credentials they have earned and the services that they provide, albeit within certain parameters. *See* TEX. ADMIN. CODE §§ 108.55, 108.56. Nonetheless, the existence of other forms of commercial speech does not eliminate the overbreadth of the regulation on specialty advertising that is truthful and has not been shown to be misleading commercial speech. The Board's position is especially troublesome because there is no indication whatsoever that it "carefully calculated" the costs associated with Section 108.54. *See Fox*, 492 U.S. at 480.

We do not suggest that the Board may not impose appropriate restrictions in the area of dental specialist advertising. The plaintiffs agree that advertising as a specialist is potentially misleading and that reasonable regulation is appropriate. We hold only that the Board has not met its burden on the record before us to demonstrate that Section 108.54, as applied to these plaintiffs, satisfies *Central Hudson*'s test for regulation of commercial speech. We reiterate a limitation noted by the district court: "While the challenged restriction *might* be permissible in the abstract, it is not permissible on the record currently before the Court."

Although the Board has not met its burden in this case, a "regulation that fails *Central Hudson* because of a lack of sufficient evidence may be enacted validly in the future on a record containing more or different evidence." *See Pub. Citizen*, 632 F.3d at 221. Our holding neither forbids nor approves the enactment of a similar regulation supported by better evidence.

* * *

The Texas Academy of Pediatric Dentistry, the Texas Society of Oral and Maxillofacial Surgeons, and the Texas Association of Orthodontists submitted an opposed motion to file an amicus brief. That motion was carried with the case. The motion is DENIED.

AFFIRMED.

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

I disagree with the majority that Rule 108.54[1] of the Texas Administrative Code is unconstitutional as applied to the plaintiffs (hereinafter collectively referred to as "Academy"). The advertising proposed by Academy is inherently misleading. Misleading commercial speech is not entitled to First Amendment protection. Because I would reverse the district court's grant of summary judgment on Academy's First Amendment claim and its enjoinment of the provision as applied to Academy, I respectfully dissent.

Academy wants to advertise as specialists in certain subsets of dentistry that are not recognized as specialties by the American Dental Association ("ADA") and are prohibited from doing so by the rules of the Texas State Dental Board of Dental Examiners (the "Board"). Academy brought a facial and as-applied constitutional challenge against the Board arguing that Rule 108.54, which regulates specialty advertising for dentists, unconstitutionally infringes on commercial speech protected by the First Amendment.

The district court partially granted both parties' cross-motions for summary judgment. Academy was granted summary judgment on its First Amendment claim, invalidating the ordinance as applied to Academy. The Board was granted summary judgment on Academy's equal protection and due process claims. The Board appeals the First Amendment claim. Academy failed to file a cross-appeal, but then attempts to revive a Fourteenth Amendment due process claim in the appellees' brief.

As the majority correctly states, we apply the four-part test from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980), as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come

---

[1] See Appendix, No. 1, herein for 22 Tex. Admin. Code § 108.54 in its entirety.

> within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

As a threshold determination, for commercial speech to be protected under the First Amendment, "it at least must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566. Advertising that is inherently misleading receives no protection, while advertising that is potentially misleading may receive some if it may be presented in a way that is not deceptive. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

This case is analogous to *American Board of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir. 2004), which involved a California statute that limits a physician from advertising as board certified in a medical specialty without meeting certain requirements. There, the Ninth Circuit said:

> The State of California has by statute given the term "board certified" a special and particular meaning. The use of that term in advertising by a board or individual physicians who do not meet the statutory requirements for doing so, is misleading. The advertisement represents to the physicians, hospitals, health care providers and the general public that the statutory standards have been met, when, in fact, they have not.
>
> Because the Plaintiffs' use of "board certified" is inherently misleading, it is not protected speech. But even if the Plaintiffs' use of "board certified" were merely potentially misleading, it would not change the result in this case, as consideration of the remaining three Hudson factors confirms that the State may restrict the use of the term "board certified" in advertising.

Joseph, 353 F.3d at 1108.

Such is the case here. Texas has by statute given the term specialist a particular meaning. *See* 22 Tex. Admin. Code § 108.54; *see also* 22 Tex. Admin. Code §§ 119.1-119.9 (setting out special areas of dental practice).

Additionally, it is only "in the context of unregulated dental advertising" that the Board contends the term "specialist" is devoid of intrinsic meaning and is inherently misleading. But with regard to the regulated dental advertising and the recognized specialty areas, the term has a special meaning and special requirements.

Further, the areas that Academy seeks to have designated as specialties are actually more like subsets, which are already encompassed within general dentistry and multiple of the existing recognized specialties. *See* 22 Tex. Admin. Code §§ 119.1-119.9; *see also* Tex. Occ. Code § 251.003 (setting out the provisions of the practice of dentistry). The majority opinion allows that, instead of a general dentist having to comply with the academic, educational or certification necessary to become, for example, a prosthodontist, a general dentist can simply get "certified" in one small aspect of the branch of prosthodontics, i.e., implants, and advertise at the same level as someone who actually completed an advanced degree in an accredited specialty.[2]

The majority relies on *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), to conclude that "specialist" is not devoid of intrinsic meaning. In *Peel*, the issue involved letterhead and a statement that the attorney was a "certified civil trial specialist by the National Board of Trial Advocacy." The Court concluded that this was not inherently misleading, saying that "it seems unlikely that petitioner's

---

[2] "Prosthodontics is that branch of dentistry pertaining to the restoration and maintenance of oral functions, comfort, appearance, and health of the patient by the restoration of natural teeth and/or the replacement of missing teeth and contiguous oral and maxillofacial tissues with artificial substitutes." 22 Tex. Admin. Code § 119.8.

statement about his certification as a 'specialist' by an identified national organization necessarily would be confused with formal state recognition." *Id.* at 104-05. The Court further reiterated that a "State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA" and pointed out that "[t]here is no dispute about the bona fides and the relevance of NBTA certification." *Id.* at 110. However, that is not the case here where, as the Board correctly asserts, the term "specialist" may be used without reference to any identified certifying organization and there is a dispute about the bona fides and relevance of the certifications.

Thus, despite what the majority says, the problem is not merely that "the organization responsible for conferring specialist credentials on a particular dentist is not identified in the advertisement." Nevertheless, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 145, n.9 (1994), is also distinguishable. *Ibanez* involved an attorney who advertised her credentials as CPA (Certified Public Accountant) and CFP (Certified Financial Planner). Again, there were no questions about the certifications. Further, footnote 9, which addressed only a point raised in a separate opinion, says that a consumer could easily verify Ibanez' credentials – as she was indeed a licensed CPA through the Florida Board of Accountancy and also a CFP. More importantly, Ibanez was not practicing accounting. Further, under 22 Tex. Admin. Code §§ 108.56 additional credentials or certifications are clearly allowed to be advertised in Texas.[3]

In *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Commission*, 24 F.3d 754 (5th Cir. 1994), this court relied on evidence in the record to support the district court's finding that the use of the term "invoice" in the automobile

[3] See Appendix, No. 3, herein for 22 Tex. Admin. Code § 108.56 in its entirety.

industry was inherently misleading. That evidence included testimony of various car dealers that "invoice" means different things. *Id.* at 757. Here, we have testimony that "specialist" in unregulated dental advertising means different things. The majority's statement that "[h]ere, the individual plaintiffs intend to use 'specialist' in the same manner as dentists practicing in ADA-recognized specialties" is erroneous. In fact, the plaintiffs intend to use "specialist" to encompass subsets of existing specialties that do not necessarily require the same academic, educational or certification required of the specialties recognized by both the ADA and Texas.

For these reasons, I would conclude that the term "specialist" in the context of unregulated dental advertising is inherently misleading and, thus, not protected by the First Amendment.

Moreover, even if Academy's proposed speech was only potentially misleading, the Board would still be able to regulate it under the remaining elements of the *Central Hudson* test quoted previously herein. As the Board asserts, the evidence provided, at the very least, creates a question of fact sufficient to survive summary judgment.

The Supreme Court said in *Ibanez*:

> Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *see also id.*, at 564, 100 S.Ct., at 2350 (regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose"); *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993) (regulation must advance substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served"); *In re R.M.J.*, 455 U.S., at 203, 102 S.Ct., at 937 (State can regulate commercial

> speech if it shows that it has "a substantial interest" and that the interference with speech is "in proportion to the interest served").

Ibanez, 512 U.S. at 142-43.

The majority acknowledges that the Board has a substantial interest. But, the majority then concludes that the Board has not demonstrated that Rule 108.54 directly advances the asserted interests. I disagree. The Board presented evidence demonstrating how Rule 108.54 would directly and materially advance the asserted interests. That evidence included "empirical data, studies, and anecdotal evidence" or "history, consensus, and simple common sense." *See Pub. Citizen Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

The majority dismisses the empirical data and studies referenced in *Borgner v.* Brooks, 284 F.3d 1204, 1211-13 (11th Cir. 2002), because the actual studies are not in the record. The absence of those studies in the record does not undermine the reliability or persuasiveness of the Eleventh Circuit's analysis and conclusions about those same studies including, but not limited to, the following:

> These two surveys, taken together, support two contentions: (1) that a substantial portion of the public is misled by AAID and implant dentistry advertisements that do not explain that AAID approval does not mean ADA or Board approval; and (2) that ADA certification is an important factor in choosing a dentist/specialist in a particular practice area for a large portion of the public.

Id. at 1213.

Additionally, the majority dismisses deposition testimony and evidence of complications saying, in part, that the harms would not be remedied by Rule 108.54 because it merely regulates how a dentist may advertise. I disagree. Rule 108.54 regulates what a dentist may hold himself out as being to the public, i.e., a general dentist with or without certain credentials or a specialist.

The majority further dismisses witness testimony because it does not necessarily pertain to general dentists who violated the existing rule by holding themselves out as specialists in advertisements. The point of the testimony was to offer support for the fact that an ADA-recognized specialist has a higher success rate and fewer complications than a general dentist who may perform a subset of those recognized specialties. Also, what the Board does clearly establish is that the harms Rule 108.54 seeks to prevent are very real. This was established by way of both anecdotal evidence and simple common sense. With regard to consensus, the Board introduced evidence that numerous other states limit dental-specialty advertising.

Rules 108.55-56 allow any pertinent information about individual plaintiffs' qualifications to be advertised to consumers. *See* 22 Tex. Admin. Code §§ 108.55-56.[4] Rules 108.55-56 also clearly establish that Rule 108.54 is not more extensive than necessary. Dentists are able to advertise any and all dental credentials and certifications so long as they do not hold themselves out as specialists in areas where they have not complied with the statutory requirements.

Thus, even if the speech was only potentially misleading, I would conclude that the Board can still regulate it under the *Central Hudson* test.

For these reasons, I would reverse the district court's grant of summary judgment on Academy's First Amendment claim and its enjoinment of the provision as applied to Academy. Therefore, I respectfully dissent.

---

[4] See Appendix, No. 2, herein for 22 Tex. Admin. Code § 108.55 in its entirety.

No. 16-50157

APPENDIX

1. Rule 108.54 states:

(a) Recognized Specialties. A dentist may advertise as a specialist or use the terms "specialty" or "specialist" to describe professional services in recognized specialty areas that are:

(1) recognized by a board that certifies specialists in the area of specialty; and

(2) accredited by the Commission on Dental Accreditation of the American Dental Association.

(b) The following are recognized specialty areas and meet the requirements of subsection (a)(1) and (2) of this section:

(1) Endodontics;
(2) Oral and Maxillofacial Surgery;
(3) Orthodontics and Dentofacial Orthopedics;
(4) Pediatric Dentistry;
(5) Periodontics;
(6) Prosthodontics;
(7) Dental Public Health;
(8) Oral and Maxillofacial Pathology; and
(9) Oral and Maxillofacial Radiology.

(c) A dentist who wishes to advertise as a specialist or a multiple-specialist in one or more recognized specialty areas under subsection (a)(1) and (2) and subsection (b)(1)-(9) of this section shall meet the criteria in one or more of the following categories:

(1) Educationally qualified is a dentist who has successfully completed an educational program of two or more years in a specialty area accredited by the Commission on Dental Accreditation of the American Dental Association, as specified by the Council on Dental Education of the American Dental Association.

(2) Board certified is a dentist who has met the requirements of a specialty board referenced in subsection (a)(1) and (2) of this section, and who has received a certificate from the specialty board, indicating the dentist has achieved diplomate status, or has complied with the provisions of § 108.56(a) and (b) of this subchapter (relating to Certifications, Degrees, Fellowships, Memberships and Other Credentials).

(3) A dentist is authorized to use the term 'board certified' in any advertising for his/her practice only if the specialty

> board that conferred the certification is referenced in subsection (a)(1) and (2) of this section, or the dentist complies with the provisions of § 108.56(a) and (b) of this subchapter.
>
> (d) Dentists who choose to communicate specialization in a recognized specialty area as set forth in subsection (b)(1)-(9) of this section should use "specialist in" or "practice limited to" and should limit their practice exclusively to the advertised specialty area(s) of dental practice. Dentists may also state that the specialization is an "ADA recognized specialty." At the time of the communication, such dentists must have met the current educational requirements and standards set forth by the American Dental Association for each approved specialty. A dentist shall not communicate or imply that he/she is a specialist when providing specialty services, whether in a general or specialty practice, if he or she has not received a certification from an accredited institution. The burden of responsibility is on the practice owner to avoid any inference that those in the practice who are general practitioners are specialists as identified in subsection (b)(1)-(9) of this section.

22 Tex. Admin. Code § 108.54.

2. Rule 108.55 states:

> (a) A dentist whose license is not limited to the practice of an ADA recognized specialty identified under § 108.54(b)(1)-(9) of this subchapter (relating to Advertising of Specialties), may advertise that the dentist performs dental services in those specialty areas of practice, but only if the advertisement also includes a clear disclosure that he/she is a general dentist.
>
> (b) Any advertisement of any specific dental service or services by a general dentist shall include the notation "General Dentist" or "General Dentistry" directly after the name of the dentist. The notation shall be in a font size no smaller than the largest font size used to identify the specific dental services being advertised. For example, a general dentist who advertises "ORTHODONTICS" and "DENTURES" and/or "IMPLANTS" shall include a disclosure of "GENERAL DENTIST" or "GENERAL DENTISTRY" in a font size no smaller than the largest font size used for terms 'orthodontics,' 'dentures' and/or 'implants.' Any form of broadcast

advertising by a general dentist (radio, television, promotional DVDs, etc) shall include either "General Dentist" or "General Dentistry" in a clearly audible manner.
(c) A general dentist is not prohibited from listing services provided, so long as the listing does not imply specialization. A listing of services provided shall be separate and clearly distinguishable from the dentist's designation as a general dentist.
(d) The provisions of this rule shall not be required for professional business cards or professional letterhead.

22 Tex. Admin. Code § 108.55.

3. Rule 108.56 states:

(a) Dentists may advertise credentials earned in dentistry so long as they avoid any communications that express or imply specialization in a recognized specialty, or specialization in an area of dentistry that is not recognized as a specialty, or attainment of an earned academic degree.

(b) A listing of credentials shall be separate and clearly distinguishable from the dentist's designation as a dentist. A listing of credentials may not occupy the same line as the dentist's name and designation as a dentist. Any use of abbreviations to designate credentials shall be accompanied by a definition of the acronym immediately following the credential.
[Image with examples]

(c) The provisions of subsection (b) of this section shall not be required in materials not intended for business promotion or public dissemination, such as peer-to-peer communications.

22 Tex. Admin. Code § 108.56.

4344137893

State of Florida

DIVISION OF RISK MANAGEMENT
TALLAHASSEE, FLORIDA

Wachovia
Wachovia Bank, N.A.
www.wachovia.com
63-1012/632

VOID AFTER 90 DAYS

Date Check	Number
6/29/2010	4344137893

VOID AFTER 90 DAYS

CHECK AMOUNT

Pay • *****SIX HUNDRED FORTY THOUSAND SEVEN HUNDRED TWENTY AND 75 / 100**********

$640,720.75

To AMERICAN ACADEMY OF IMPLANT DENTISTRY
211 EAST CHICAGO AVENUE STE 750
CHICAGO, IL 60611

MP

AUTHORIZED SIGNATURE MP

⑈4344137893⑈ ⑆063210125⑆ 2079900544433⑈

STATE OF CALIFORNIA

WARRANT NUMBER 06-951356

THE TREASURER OF THE STATE WILL PAY OUT OF THE

FUND NO. 0741 FUND NAME P&V- DENTISTRY FUND

IDENTIFICATION NO. 1110

MO. 06 DAY 02 YR. 2011

90-1342/1211

06951356

TO:

951356

AMERICAN ACADEMY OF
IMPLANT DENTISTRY

DOLLARS	CENTS
$**675000	00

JOHN CHIANG
CALIFORNIA STATE CONTROLLER

:121113423: 06951356 11"

ACCT

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - VIEW AT AN ANGLE

STATE OF CALIFORNIA

WARRANT NUMBER 08-908719

H THE TREASURER OF THE STATE WILL PAY OUT OF THE

FUND NO. 0741 FUND NAME P&V- DENTISTRY FUND

IDENTIFICATION NO. 1110

MO. 08 DAY 30 YR. 2005

90-1342/1211

08908719

001755

TO:

--- MICHAEL POTTS AND THE AMERICAN ACADEMY OF IMPLANT DENTISTRY

DOLLARS	CENTS
$**324252	91

Steve Westly

STEVE WESTLY
CALIFORNIA STATE CONTROLLER

19 ——— 4802

⑈121113423⑈ 08908719⑈

21 NCAC 16P .0105 is readopted with changes as published in 33:5 NCR 503-04 as follows:

21 NCAC 16P .0105 ADVERTISING AS A SPECIALIST

~~Only dentists who have successfully completed a postdoctoral course approved by the American Dental Association Commission on Accreditation in a specialty area recognized by the ADA or have been approved by one of the specialty examining Boards recognized by the ADA may announce a specialty practice and advertise as a specialist~~.

(a) A dentist shall not advertise or otherwise hold himself or herself out to the public as a specialist, or use any variation of the term, in an area of practice if the communication is false or misleading under Rule.0101 of this Section.

(b) It shall [~~not~~] be false or misleading for a dentist to hold himself or herself out to the public as a [~~specialist~~]specialist, or any variation of that term, in a practice area [~~provided~~] unless the [~~dentist~~] dentist:

(1) has completed a qualifying postdoctoral educational program in that [~~area.~~] area as set forth in Paragraph (c) of this Rule; or

(2) holds a current certification by a qualifying specialty board or organization as set forth in Paragraph (d) of this Rule.

(c) For purposes of this Rule, a [~~A qualifying~~] "qualifying postdoctoral educational program" [~~program~~] is a postdoctoral advanced dental educational program accredited by an agency recognized by the U.S. Department of Education (U.S. DOE).

[~~(c)~~](d) [~~A dentist who has not completed a qualifying postdoctoral educational program shall not advertise or otherwise hold himself or herself out to the public as a specialist, certified specialist, or board-certified specialist, or use any variation of those terms, unless she or he holds current certification by a qualifying specialty board or organization.~~] In determining whether an organization is a qualifying specialty board or organization, the [~~The~~] Board shall consider the following criteria: [~~criteria in determining a qualifying specialty board or organization:~~]

(1) whether the organization requires completion of [~~a~~] an educational [~~training~~] program with [~~training, documentation, and~~] didactic, [~~clinical~~] clinical, and experiential requirements appropriate for the specialty or subspecialty field of dentistry in which the dentist seeks certification, and the collective didactic, clinical and experiential requirements are similar in scope and complexity to a qualifying postdoctoral educational [~~program in the specialty or subspecialty field of dentistry in which the dentist seeks certification.~~] program. Programs that require solely experiential training, continuing education classes, on-the-job training, or payment to the specialty board shall not constitute [~~an equivalent~~] a qualifying specialty [~~board;~~] board or organization;

(2) whether the organization requires all dentists seeking certification to pass a written or oral examination, or both, that tests the applicant's knowledge and skill in the specialty or subspecialty area of dentistry and includes a psychometric evaluation for validation;

(3) whether the organization has written rules on maintenance of certification and requires periodic recertification;

(4) whether the organization has written by-laws and a code of ethics to guide the practice of its members;

(5) whether the organization has staff to respond to consumer and regulatory inquiries; and

(6) whether the organization is recognized by another entity whose primary purpose is to evaluate and assess dental specialty boards and organizations.

[~~(d)~~] (e) A dentist qualifying under [~~Subsection (c)~~] Paragraph (d) of this Rule and advertising or otherwise holding himself or herself out to the public as a specialist, or any variation of that term, [~~"specialist," "certified specialist," or "board-certified specialist"~~] shall disclose in the advertisement or communication the specialty board by which the dentist was certified and provide information about the certification criteria or where the certification criteria may be located.

[~~(e)~~] (f) A dentist shall maintain documentation of either completion of a qualifying postdoctoral educational program or of his or her current specialty certification and provide the documentation to the Board upon request. Dentists shall maintain documentation demonstrating that the certifying board qualifies under the criteria in Subparagraphs [~~(c)(1)~~] (d)(1) through (6) of this Rule and provide the documentation to the Board upon request.

[~~(f)~~](g) Nothing in this Section shall be construed to prohibit a dentist who does not qualify to hold himself or herself out to the public as a specialist [~~"specialist," "certified specialist" or "board-certified specialist"~~] under ~~the preceding paragraph~~ [~~Paragraphs~~] Paragraph (b) [~~or (c)~~] of this Rule from restricting his or her practice to one or more specific areas of dentistry or from advertising the availability of his or her ~~services.~~ services, provided that ~~Such~~ such advertisements ~~may~~ do ~~not,~~ not ~~however,~~ include the ~~terms~~ term "specialist," or any variation of that term, [~~"certified specialist," or "board-certified specialist," or any variation of those terms,~~] and must state that the services advertised are to be provided by a general dentist.

History Note: *Authority G.S. 90-41(a)(16),(17),(18); 90-48;*
Eff. March 1, 1985;
Amended Eff. April 1, 2003; May 1, 1989.
Readopted with substantive changes February 1, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN ACADEMY OF IMPLANT DENTISTRY *et al.*,
Plaintiffs,

-vs-

Case No. A-14-CA-191-SS

GLENN PARKER, Executive Director, Texas State Board of Dental Examiners, *et al.*,
Defendants,

-vs-

TEXAS SOCIETY OF ORAL AND MAXILLOFACIAL SURGEONS,
Intervenor Defendant.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendants' Motion For Summary Judgment [#46], Plaintiffs' Response [#54] thereto, Defendants' Reply [#59] in support; Plaintiffs' Motion for Summary Judgment [#47]; Defendants' Response [#55] thereto; Intervenor Defendant's Response [#56] thereto; Plaintiffs' Reply [#61] in support; Plaintiffs' Supplement [#64]; Defendants' Response [#65] thereto; Intervenor Defendant's Motion for Summary Judgment [#53]; Plaintiffs Response [#54] thereto; and Intervenor Defendant's Reply [#60] in support. Having considered the parties' arguments, and having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and orders GRANTING IN PART and DENYING IN PART each of the parties' motions for summary judgment.

Background

In 2012, Dr. Jay E. Elliot, Dr. Monty Buck and the American Academy of Implant Dentistry (AAID) sued the executive director and members of the Texas State Board of Dental Examiners (State Dental Board) challenging Texas Administrative Code § 108.55, which restricted the plaintiffs from advertising their respective credentials and holding themselves out to the public as "specialists" in the field of implant dentistry. *See Elliot v. Parker*, No. 12-CV-133-LY (W.D. Tex. May 3, 2013). The case was resolved when the State Dental Board revised Rule 108.55 and added a new Rule 108.56, which together allowed credential advertising so long as the advertisements avoided communications expressing or implying a specialization.

Dr. Elliot, Dr. Buck, and the AAID, joined now by three licensed dentists and three private trade organizations, bring this action against the executive director and members of the State Dental Board challenging Texas Administrative Code § 108.54, which prohibits a licensed dentist from advertising as a "specialist" in any area of dentistry not recognized as a "specialty" by the American Dental Association (ADA). Plaintiffs complain this Rule infringes on their First Amendment right to engage in truthful, non-misleading commercial speech and violates their Fourteenth Amendment due process and equal protection rights by impermissibly delegating power over who may advertise as a "specialist" to the ADA, a private organization comprised of members in competition with Plaintiffs and with a direct financial stake who may advertise as "specialists" to the public. The individual Plaintiffs have received training and certification in areas of dentistry represented by the organizational Plaintiffs, but the Rule restricts Plaintiffs from expressing or implying a specialization in these disciplines because they are not ADA-recognized specialties.

The Texas Society of Oral and Maxillofacial Surgeons (TSOMS), a private dentistry organization representing surgeons practicing in an ADA-recognized specialty area, intervened as a party defendant in this case on the grounds invalidating Rule 108.54 would harm the organization, its members, and its members' patients because it would permit less-qualified dentists to advertise as specialists in services traditionally provided by TSOMS members. The parties have filed cross-motions for summary judgment on each of Plaintiffs' constitutional claims.

I. The Challenged Rule in Context: Texas's Regulatory Scheme

The Texas Occupations Code prohibits any person from engaging in "false, misleading, or deceptive advertising in connection with the practice of dentistry" and bars any person regulated by the board from engaging in "advertising that does not comply with the reasonable restrictions adopted by the [State Dental] Board. *Id.* § 259.006(a). Consistent with this mandate, the Texas legislature empowered the State Dental Board to adopt and enforce reasonable restrictions prohibiting communications by dentists that are "are false, misleading, or deceptive." *Id.* § 295.005.

Pursuant to this authority, the State Dental Board enacted Rule 108.54, the object of Plaintiffs' constitutional challenge. Rule 108.54 provides that a "dentist may advertise as a specialist or use the terms 'specialty' or 'specialist' to describe professional services in recognized specialty areas that are: (1) recognized by a board that certifies specialists in the area of specialty; and (2) accredited by the Commission on Dental Accreditation of the American Dental Association [CODA]." TEX. ADMIN. CODE § 108.54(a). The Rule then lists the nine specialty areas recognized by the State Dental Board, which track those specialty areas recognized by the ADA.[1] *Id.* § 108.54(b).

[1] The nine specialties recognized by the ADA are dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics.

To advertise as a specialist in one of the areas recognized by the State Dental Board and the ADA, a dentist must either (a) successfully complete an educational program of two or more years in a specialty area accredited by CODA, or (b) become board certified by a specialty board in a State Dental Board and ADA-recognized specialty area and receive a certificate indicating the dentist has achieved diplomate status. *Id.* § 108.54(c)(1)–(2).

Dentists who do not otherwise qualify as specialists may advertise any service they provide, including those not recognized as specialties, provided the advertisement clearly discloses they are "general dentists" and "does not imply specialization." *Id.* § 108.55. In addition to listing the services provided, dentists "may advertise credentials earned in dentistry so long as they avoid any communications that express or imply specialization." *Id.* § 108.56. The State Dental Board is entitled to take disciplinary action against any dentist who violates the Code's or the State Dental Board's advertising restrictions, which include revocation of a person's dental license. TEX. OCC. CODE § 263.002(a).

It is undisputed Rule 108.54 relies on the ADA's list of specialty areas for purposes of determining what constitutes a bona fide dental specialty and has not independently adopted its own standards or criteria. The parties agree Rule 108.54 permits a dentist to advertise as a specialist or refer to his or her area of practice as a specialty *only if* the area of practice is recognized as a specialty area by the ADA.

II. The Parties

The Plaintiffs in this case are four private dental organizations—the American Academy of Implant Dentistry (AAID), the American Society of Dentist Anesthesiologists (ASDA), the American Academy of Oral Medicine (AAOM), and the American Academy of Orofacial Pain (AAOP)—and five licensed dentists—Dr. Jay Elliot, Dr. Monty Buck, Dr. Jarom Heaton, Dr.

Michael Huber, and Dr. Edward Wright. The mission of each of the organizational Plaintiffs is to advance knowledge, skill, and expertise in their respective fields. To further this goal, each of the organizational Plaintiffs sponsor credentialing boards and award Fellow or Diplomate credentials to members who have demonstrated a measurable expertise in their respective disciplines. Implant dentistry, dental anesthesiology, oral medicine, and orofacial pain are not "recognized specialty areas that are . . . recognized by a board that certifies specialists in the area of specialty[] and accredited by [CODA]." TEX. ADMIN. CODE § 108.54(a). Consequently, neither the ADA nor the State Dental Board recognize implant dentistry, dental anesthesiology, oral medicine, or orofacial pain as "specialties."[2] *Id.* § 108.54(b).

The individual Plaintiffs are licensed to practice dentistry in Texas and have all earned credentials from one of the organizational Plaintiffs' credentialing boards. Three of the individual Plaintiffs—Dr. Elliot, Dr. Buck, and Dr. Heaton—are in private practice, and two of the individual Plaintiffs—Dr. Huber and Dr. Wright—are Professors at the University of Texas Health Science Center School for Dentistry in San Antonio. Dr. Elliot and Dr. Buck concentrate their private practice in the field of implant dentistry and Dr. Heaton exclusively practices dental anesthesiology. Dr. Huber and Dr. Wright are Professors of oral medicine and orofacial pain, respectively. The individual Plaintiffs have developed an expertise in and limit their practice to their given fields, none of which are recognized as dental specialties by the ADA. Consequently, Plaintiffs are forbidden from advertising as specialists or representing their practice areas are dental specialties.

[2] The ADA has denied specialty recognition to dental anesthesiology four times, most recently in 2012. Since the 1990s, the ADA has twice denied specialty status to oral medicine and has once denied specialty recognition to implant dentistry and orofacial pain. *See* Pls.' Mot. Summ. J [#47] at 15–16 n.17.

Defendants are the executive director and members of the State Dental Board, all of whom are sued in their official capacities. Defendants promulgated the challenged Rule and are entrusted with its enforcement.

Intervenor Defendant TSOMS is a private dental organization whose members practice oral and maxillofacial surgery. Because oral and maxillofacial surgery is recognized as a dental specialty by the ADA, TSOMS members who otherwise satisfy Rule 108.54 may advertise in Texas as specialists in oral and maxillofacial surgery.

III. Procedural History

Plaintiffs filed their Complaint on March 5, 2014. *See* Compl. [#1]. The Complaint brought claims against Defendants for violations of their First Amendment commercial speech rights, violatoins their Fourteenth Amendment due process and equal protection rights, and for "standardless delegation." *Id.* On March 27, 2014, Defendants filed a Motion for Partial Dismissal under 12(b)(6), seeking dismissal of the due process and equal protection claims. *See* Mot. Partial Dismissal [#7]. On April 9, 2014, Defendants filed a Motion for Partial Judgment on the Pleadings, seeking dismissal of the "standardless delegation" claim. *See* Mot. Partial J. Pleadings [#12]. Concluding there was "significant overlap" amongst the constitutional claims, the Court found Plaintiffs' pleadings were adequate and denied Defendants motions as "premature." *See* June 20, 2014 Order [#23] at 9.

TSOMS filed its Motion to Intervene as Defendant on September 10, 2014, which the Court granted on September 30, 2014. *See* Sept. 30, 2014 Order [#30]. On April 10, 2015, the parties filed cross-motions for summary judgment as to all claims. *See* Defs.' Mot. Summ. J [#46]; Pls.' Mot. Summ. J. [#47]; TSOMS Mot. Summ. J. [#53]. The motions are now ripe for consideration.

Analysis

The individual Plaintiffs desire to advertise as specialists in their respective fields and use the terms "specialty" or "specialist" to describe the dental services they provide. Plaintiffs contend Rule 108.54 impermissibly restricts their ability to do so because no matter how true the statement, it is unlawful for any dentist to represent to the public he or she is a specialist in any area of dentistry the ADA has declined to recognize. Plaintiffs find this regime particularly offensive because the ADA is a private dental organization whose members who are in direct competition with Plaintiffs and, consequently, have an incentive not to recognize them as specialists. Plaintiffs mount facial and as-applied challenges to Rule 108.54, arguing it violates their First Amendment right to freedom of commercial speech and their Fourteenth Amendment rights to due process and equal protection. Plaintiffs seek a declaration Rule 108.54 is unconstitutional and an injunction against further enforcement of the rule.

Defendants agree Rule 108.54 prohibits Plaintiffs from publicly referring to their practices as "specialties" or to themselves as "specialists" in any advertisement and argue such a rule does not violate the Constitution because such speech would mislead rather than inform the public. The Court will address each claim in turn.

I. Summary Judgment—Legal Standard

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

II. First Amendment

A. Legal Standard

It is well-settled that First Amendment protections extend to commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). However, commercial speech "merits only 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, . . . allowing modes of regulation that might be impermissible in the realm of noncommercial expression. *Pub. Citizen Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (citing *Ohralik v. Ohio State Bar Assoc.*, 438 U.S. 447, 456 (1978)). Because Plaintiffs' desired advertisement constitutes commercial speech, Rule 108.54 should be analyzed under the framework set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980):

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

Central Hudson, 447 U.S. at 566. "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Ibanez* v. *Fl. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 n.7 (1994) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

B. Inherently or Potentially Misleading Speech

First, there can be no dispute Plaintiffs' proposed advertising concerns lawful activity. While Texas does distinguish between specialists and non-specialists for purposes of advertising, a dental license makes no such distinction. A licensed Texas dentist is entitled to limit his or her practice solely to implant dentistry, dental anesthesia, oral medicine, or orofacial pain. *See* Pls.' Resp. [#54]

at 2. Consequently, expressly advertising themselves as specialists or implying they specialize in any of these fields concerns the provision of lawful dental services. *Cf. Kiser v. Reitz*, No. 2:12-CV-574, 2015 WL 1286430, at *6–7 (S.D. Ohio Mar. 20, 2015) (rejecting a First Amendment challenge on the grounds that advertising as both a specialist and general dentist would constitute advertisement for an illegal activity where Ohio law bans a specialist from performing general dentistry).

Next, the Court must determine whether the banned speech is misleading, in which case it is not protected by the First Amendment. *See Fl. Bar v. Went for It, Inc.*, 515 U.S. 618, 623–24 (1995). In conducting this inquiry, the Supreme Court distinguishes between "inherently misleading" speech and "potentially misleading" speech. *See In re R.M.J.*, 455 U.S. 191, 202–03 (1982). Advertising that "is inherently likely to deceive [or] . . . has in fact been deceptive" is not shielded by the First Amendment. *Id.* Advertising is only potentially misleading, and therefore protected by the First Amendment, if the "information may also be presented in a way that is not deceptive." *Id.* at 203.

Defendants argue Plaintiffs' desired speech is "inherently misleading" and therefore is not subject to constitutional review. According to Defendants, use of the term "specialty" or "specialist" is inherently misleading and can be freely regulated because it has no "intrinsic meaning" and is "ill-defined," and thus has significant potential to deceive the public. Specifically, TSOMS argues that the terms at issue are inherently misleading because:

> [w]ere any general dentist able to advertise himself as a "specialist" in Texas based on some "ill-defined" and non-uniform standard, the public would have no way of knowing whether any particular dental "specialist" actually had the educational and training background to perform the particular dental services advertised.

TSOMS' Mot. Summ. J. [#53] at 10. However, TSOMS' argument is a red herring. The issue here is not whether the state is entitled to protect consumers from misleading information by conditioning specialty advertisements on meeting some uniform standards of competency; the issue is instead whether the standards chosen by the state are immunized from constitutional review. In this case, it is clear they are not.

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, the Supreme Court held an attorney's advertisement listing himself as a "Certified Civil Trial Specialist" after having received certification by the National Board of Trial Advocacy was not actually or inherently misleading. 496 U.S. 91, 110 (1990). The attorney had been censured based on a rule prohibiting lawyers from holding themselves out as "certified" or as a "specialist" in any field other than patent, trademark, or admiralty law. *Id.* In reaching their conclusion, a majority of the justices rejected the Illinois Supreme Court's holding that the attorney's advertisement "was tantamount to an implied claim of superiority of the quality of [his] legal services" or that "his certification as a 'specialist' by an identified national organization necessarily would be confused with formal state recognition." *Id.* at 99–101, 105. Because the letterhead was truthful speech, it was only potentially misleading and could not be categorically banned. *Id.* at 107. However, "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers," the Court held that "a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.* at 110.

Here, the State Dental Board places a categorical ban on any claim of specialty in a non-ADA-recognized field, arguing that such a claim would necessarily be misleading. This argument is not in line with the teachings of *Peel*. Defendants have produced no evidence of actual deception associated with advertising as specialists in non-ADA-recognized fields, there is no evidence to

suggest any of the Plaintiffs' fields are illegitimate or unrecognized, and there has been no accusation any of the Plaintiffs' organizations are shams. Other than being inconsistent with the state's definition of the word, there is no reason to believe Plaintiffs' proposed speech is deceptive, untruthful, false, or misleading. *Peel* flatly rejected the notion that the state, by its own rule, could bar non-ADA-recognized specialists who truthfully hold themselves out as specialists from doing so simply by defining the term "specialty" to include only ADA-recognized fields.

The Court acknowledges there might be cases where this type of speech could be characterized as inherently misleading—for example, if the words "specialty" or "specialist" were terms of art in the dental profession or had some commonly understood meaning among consumers. *See American Bd. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1104–05 (9th Cir. 2004) (finding a physician's use of the term "board certified" inherently misleading where California had adopted specific statutory criteria reflecting the common understanding of the term). That is not the case here. There is no indication that the public's recognition of dental specialties is coextensive with the ADA's; the public would hardly feel misled if a licensed AAID diplomate advertised as a "specialist" in implant dentistry and then later discovered the AAID was technically not a "specialty" under Texas law because it had not achieved specialty status according to the ADA.

The Court finds Plaintiffs' desired speech is not inherently misleading and the potential for Plaintiffs' speech to mislead the public is not an adequate justification for its outright ban. To the extent that some risk exists that the public could be misled if Plaintiffs are permitted to represent themselves as specialists, "the preferred remedy is more disclosure, not less." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977). Such a decree is consistent with the purpose of the First Amendment's protection of commercial speech:

> People will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than close them. Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Central Hudson, 447 U.S. at 561–62 (quotations and citations omitted). Consequently, the Court must decide whether Defendants have met their burden of justifying Rule 108.54 by: (1) articulating a substantial government interest; (2) demonstrating the Rule directly advances that interest; and (3) showing the regulations are not more extensive than necessary to advance that interest.

C. Whether the Rule Directly Advances the State's Asserted Interest

Combining the first and second prongs, the Court turns to whether Defendants have met their burden of showing that Rule 108.54 directly advances a substantial state interest in a manner no more extensive than necessary to serve that interest. *Ibanez*, 512 U.S. at 142. "Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Pub. Citizen*, 623 F.3d at 220 (quoting *Edenfield*, 507 U.S. at 768). To succeed, "the State must demonstrate the challenged regulations advance the Government's interest in a direct and material way." *Went For It*, 515 U.S. at 625. To show the Rule materially advances a substantial interest, Defendants must "demonstrate[] that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. This burden "is not satisfied by mere speculation or conjecture." *Id.* Instead, Defendants must meet their burden with empirical data, studies, and anecdotal evidence or with "history, consensus, and simple common sense." *Went For It*, 515 U.S. at 628. In any event, "[c]ourts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers before they will find that restrictions on such speech satisfy [this] prong." *Borgner*, 284 F.3d at 1211. However, the evidence on which the Defendants relies to show the harms Rule

108.54 protects against are real need not "exist pre-enactment," *Pruett v. Harris Cnty. Bail Bond Bd.*, 499 F.3d 403, 410 (5th Cir. 2007), and it may "pertain[] to different locales altogether," *Went For It*, 515 U.S. at 628.

Defendants argue the state has a substantial interest in ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading professional advertisements. These interests have widely been recognized as substantial. *See, e.g.*, *Borgner*, 284 F.3d at 1216 ("The state has a substantial interest in regulating the dental profession, establishing uniform standards for certification, and in ensuring that dentists' advertisements are not misleading to consumers"). Defendants shoulder the burden of establishing that Plaintiffs' proposed speech is inaccurate or misleading and Rule 108.54 will alleviate their potential harm in a material way. *See Edenfield*, 507 U.S. at 771. Considering the record in this case, and for the following reasons, the Court finds Defendants have failed to satisfy this burden.

Defendants first claim Rule 108.54 rectifies the risk consumers might mistakenly believe a dentist advertising as a specialist in non-ADA recognized specialty field is in fact certified as a specialist by the state or by the ADA, *see* Defs.' Mot. Summ. J. [#46] at 12–13, and would mislead consumers into thinking a certified specialist in a non-ADA recognized specialty area is more qualified than they actually are, *see* TSOMS Mot. Summ. J. [#53] at 12–13. Defendants do not offer any competent evidence to substantiate these fears and admit they did not review any studies, surveys or other evidence regarding the impact of specialty advertisements before promulgating the Rule.[3]

[3] Defendants offer a few snippets of deposition testimony stating that general dentists are not as competent as specialists. For example, Dr. Kirby Bunel, a State Dental Board member practicing oral and maxillofacial surgery, acknowledged being aware of instances where patients had come to his practice after experiencing complications from a specialty procedure performed in a general dentist's office. TSOMS' Mot. Summ. J. [#53-2] Ex. 2 at 67:22–68:12. However, this type of vague testimony has nothing to do with whether consumers have been, or will be, misled by non-ADA-recognized specialty advertisements. Indeed, Dr. Bunel later testified "I can't possibly know what a person reading

Instead, Defendants appeal to their own professional judgment and "vast experience dealing with customers of dental services." Defs.' Mot. Summ. J. [#46] at 13. The State Dental Board's collective common sense is not a substitute for the "tangible evidence" required to satisfy this prong of *Central Hudson*. *See Borgner*, 284 F.3d at 1211; *see also Pagan v. Fruchey*, 492 F.3d 766, 777 (6th Cir. 2007) ("[E]ven common sense decisions require some justification."). "[C]oncern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Peel*, 496 U.S. at 111.

Mindful of the need to camouflage a bare record, Defendants next argue two telephone surveys cited in *Borgner v. Brooks* are sufficient to discharge their burden. Defendants are incorrect. The surveys referenced in *Borger* were conducted "to demonstrate that the restriction on [specialty] advertising directly addresses an actual harm—specifically, that consumers would think [AAID credentials] were recognized by the state." *Borgner*, 284 F.3d at 1211. These surveys were commissioned by the state for the express purpose of defending a Florida advertising restriction requiring licensed dentists to include a disclaimer next to any advertising of a non-ADA recognized specialty credential, such as a credential from the AAID. Reversing the district court's finding that the surveys were too dubious to meet the evidentiary burden under *Central Hudson*, the Eleventh Circuit stated:

> These two surveys, taken together, support two contentions: (1) that a substantial portion of the public is misled by the AAID and implant dentistry advertisements that do not explain that AAID approval does not mean ADA or Board approval; and (2) that ADA certification is an important factor in choosing a dentist/specialist in a particular practice area for a large portion of the public. From these survey results, it is clear that many consumers find it difficult to make a distinction between AAID and ADA certification, and many consumers find ADA certification of a general or specialized dentist to be extremely important. They are thus misled by

---

an ad would mean, would think" and stated he did not "have any facts to support" what the public would believe when reading any given advertisement. Pls.' Reply [#54-3] Ex. 3 at 77:24–25, 80:5–8.

> advertisements like Borgner's, which suggest to them that implant dentistry is an ADA approved specialty or that the AAID is a bona fide accrediting organization. Furthermore, this confusion concerns an issue that is relevant and compelling to a large proportion of consumers.

Id. at 1213. The State Dental Board argues these surveys are sufficient evidence "on the question of whether there is a real harm that can be alleviated by restrictions on advertising of non-ADA-recognized "specialties," [because] Texas is not required . . . to reinvent the wheel." Defs.' Mot. Summ. J. [#46] at 13.

The problem for Defendants is that *Central Hudson* requires the submission of *evidence* tending to show that advertising as specialists in non-ADA-recognized specialties actually have the potential to mislead or confuse the public. The surveys presented in *Borgner* are not in the record and therefore are not evidence. Indeed, for the Court to rely on conclusions drawn from surveys not in evidence without making an independent evaluation of their applicability to the facts before it would be patent error.[4] The Court finds it especially inappropriate to do so where the district court found the surveys to be insufficient to satisfy constitutional standards—and, where Justices Thomas and Ginsberg dissented from the denial of certiorari on the grounds the plaintiff "raise[d] serious questions about the validity of the surveys on which the Eleventh Circuit relied." *See Borgner v Fl. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002). Further, as Plaintiffs point out, it is ironic to point to

[4] As an aside, the Court highlights the potential for the surveys in *Borgner* to hurt Defendants' case rather than to help it. Because they were conducted with the goal of legitimizing restrictions on the advertisement of non-ADA recognized credentials, the surveys apparently found that advertising AAID credentials in implant dentistry was misleading. *See Borgner*, 284 F.3d at 1212–13. Texas, however, permits dentists to advertise AAID credentials without requiring any disclaimer. Relying on such studies undermines Texas' current advertising regime because they suggest that the specialty advertising restrictions as written still have the potential to mislead consumers.

Borgner for support because the state dental board in that case commissioned an empirical study to substantiate the challenged rule, a tactic the State Dental Board and TSOMS have not taken here.[5]

Second, Defendants claim Rule 108.54 advances the state's substantial interest in creating a uniform standard of qualification for dental specialties and specialists. *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 510–11 ("[The state] has a substantial interest in enabling the public to distinguish between general practitioners and specialists."). Defendants argue that reliance on the ADA is a "reasonable solution that is neither ineffective in serving, nor remote from, the state's legitimate purpose." *See* Defs.' Mot. Summ. J. [#46] at 18. However, the state's prerogative to draw *a* line does not imply the right to draw *any* line; *Central Hudson* shifts the burden to the state to present more than a bald claim the chosen line is "reasonable." Defendants must present evidence establishing that the criterion chosen to demarcate between specialty dentists and general dentists—acceptance or recognition by the ADA—will actually help the public distinguish between dentists. *See Edenfield*, 507 U.S. at 771 (requiring the state to demonstrate "the ban imposed by th[e] rule advances its asserted interests in [a] direct and material way").

Attempting to meet this burden, Defendants argue the ADA's specialty recognition process, including accreditation by CODA, is a valid basis on which to distinguish general dentists and specialists because it is the industry standard for state dental advertising restrictions. Defendants cite a litany of state statutes purporting to limit dentist advertising to ADA-recognized specialty areas as well as to the American Association of Dental Board Guidelines on Advertising (AADB

[5] Neither party argues the factual situation *Borgner* is controlling here, nor could they. The Florida law at issue in *Borgner* permitted licensed dentists to advertise specialty practice or credentials by a non-ADA-recognized organization as long as they included a disclaimer that the particular practice was not recognized as a specialty by the ADA or the Florida Board of Dentistry. *Borgner*, 284 F.3d at 1207. Texas's specialty advertising restriction, by contrast, permits licensed dentists to advertise their non-ADA-recognized specialty credentials without any disclaimer but wholly restricts the right to advertise as a specialist in any specialty area not recognized by the ADA.

Guidelines). To the extent this is evidence of "consensus,"[6] it fails to establish that relying on the ADA to determine advertising specialty areas materially advances its substantial interest in helping distinguish between general practitioners and specialists. Defendants have presented no evidence the ADA's chosen list of specialties is accurate, based on standard and uniformly applied criteria, or will actually help the public properly distinguish between general practitioners and specialists by weeding out false, deceptive, or misleading claims.

In fact, the record suggests Rule 108.54 works in conjunction with Texas' dental licensing rules to increase confusion and perhaps even ban truthful claims. Licensed dentists may lawfully provide services to their patients in any area of dentistry, including dental implants, dental anesthesiology, oral medicine, and orofacial pain, and the State Dental Board has no authority to specify dental specializations; licensed dentists may exclusively practice in any of these four fields of dentistry. *See* Pls.' Mot. Summ. J. [#47-7] Ex. 8 at 6. Further, the State Dental Board has adopted the ADA's list of specialties without regard to whether the non-ADA-recognized fields are actually bona fide and meet standards of minimal competency. Taken together, this means Texas dentists may specialize in non-ADA-recognized fields, they are just prohibited from saying so. The incongruity between the rights of dental licensees to practice and the rights of dental licensees to advertise is confusing at best and perhaps even forces licensed dentists to misrepresent the nature of their practices.[7]

---

[6] The Court notes that Defendants have not demonstrated how any one of these statutes actually matches Rule 108.54 in terms of deference to the ADA, nor is there any suggestion the statutes are based on any empirical or anecdotal evidence. Similarly, the AADB Guidelines do not help Defendants because they would allow advertising non-ADA-recognized specialties with a disclaimer and are therefore less restrictive.

[7] This risk is exacerbated by 22 TEX. ADMIN. CODE § 108.55. Under this provision, a dentist who exclusively limits his or her practice to a non-ADA-recognized specialty area and wishes to advertise the services he or she provides must include the notation "General Dentist" in the advertisement. Such a notation risks misleading the public to believe a practitioner who only practices dental anesthesiology also provides general dentistry services.

D. Whether the Rule is More Extensive Than Necessary

Even if Defendants had met their evidentiary burden, Rule 108.54 would nonetheless fail *Central Hudson*'s final prong, which requires Defendants to show the Rule is "not more extensive than is necessary to serve that interest." *Pub. Citizen*, 632 F.3d at 221 (citations omitted). The "fit" between the legislature's interests and the chosen regulation need not be perfect, but must be reasonable. *See Went for It*, 515 U.S. at 632. "[T]he existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable.'" *Id* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)).

For two reasons, the Court finds Defendants have not shown Rule 108.54 is not more extensive than necessary to serve the state's interest in eliminating confusion in the marketplace and creating uniform standards. First, requiring non-ADA-recognized specialists to include a disclaimer that their specialty area is not certified by the state or by the ADA would be a less extensive means of mitigating any potential confusion than an outright ban. Courts, including those in the Fifth Circuit, have placed the burden on the state to show a disclaimer would not alleviate concerns about deception. *See, e.g.*, *Pub. Citizen*, 623 F.3d at 223, 224 (finding the Louisiana Attorney Disciplinary Board's "conclusory statement that a disclaimer would not alleviate its concerns . . . [a]n unsupported assertion [that was] insufficient to satisfy [its] burden" and citing cases). Defendants have not carried their burden of showing why a disclaimer would be inappropriate in this case. Again, if the state was interested in protecting dental consumers from misleading advertisements, such an interest would be furthered by more disclosure, not less. *See Central Hudson*, 447 U.S. at 562 ("[P]eople will perceive their own best interests if only they are well enough informed, and the best means to that end is to open channels of communication, rather than close them.").

Second, and perhaps more importantly, Defendants have failed to explain why blind reliance on the ADA is not more stifling of commercial speech than is reasonably necessary. Defendants' sole argument on this point is that because it considers the ADA the "standard bearer" in the profession, the State Dental Board has preferred to "use the work that's already been done by the ADA rather than by doing the work itself." *See* Defs.' Mot. Summ. J. [#46] at 18, 22. While it may be reasonable for the state to rely on the ADA for choosing uniform standards or qualifications for distinguishing between specialty areas, Defendants' argument does not explain why it is reasonable to blindly defer to the ADA's choice of specialty areas; notably, this framework does not account for the risk that a non-ADA-recognized specialty board or credentialing organization could meet the standards of integrity set by the ADA but still not be recognized as a specialty for political or economic reasons. Wholesale deference to the ADA risks suppressing the truthful speech of dentists who have achieved high levels of training, education, or experience but have not successfully petitioned ADA for specialty recognition.

One obvious less-burdensome alternative would be to peg the term "specialty" or "specialist" to a set of statutory or regulatory qualifications that signify the credentialing board has met some uniform standard of minimal competence. *See Pain Mgmt.*, 353 F.3d at 1102 ("These regulations . . . specify both the criteria that the Medical Board of California will use to determine whether a certifying organization possesses requirements equivalent to those of the ABMS and the procedures that govern applications for an equivalency determination by the Medical Board of California."). Defendants have failed to offer a justification for choosing not to devise some set of uniform criteria for distinguishing between bona fide credentialing organizations other than "we don't want to do the work ourselves." Absent a more convincing reason or evidence to the contrary, the Defendants have

not met their burden of establishing that Rule 108.54 is "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Went for It*, 515 U.S. at 632.

E. Conclusion

Central Hudson requires Defendants to establish Rule 108.54 directly advances its stated substantial interest in a manner no less extensive than necessary based on concrete evidence, not on mere speculation or conjecture. For whatever reason, Defendants have been content not to offer any competent evidence and have instead essentially asked the Court to "trust them" based their common sense and experience in the dental field. Such a meager showing cannot carry the day. *See Ibanez*, 512 U.S. at 146 ("If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to demonstrate the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

While the challenged restriction *might* be permissible in the abstract, it is not permissible on the record currently before the Court. *See Pub. Citizen*, 623 F.3d at 221 ("A regulation that fails *Central Hudson* because of a lack of sufficient evidence may be enacted validly in the future on a record containing more or different evidence."). Consequently, in light of the parties' cross-motions for summary judgment, and based upon the record and the briefing in this case, the Court must grant Plaintiffs' motion for summary judgment with respect to its First Amendment claims.

III. Fourteenth Amendment: Equal Protection

Plaintiffs contend Rule 108.54 creates discriminatory classifications between dentists who have obtained designations as ADA-recognized specialists and those who have obtained professional dental credentials in an area of dentistry not recognized as a specialty by the ADA. Plaintiffs attempt to place the burden on Defendants to disprove their allegation, arguing that since a "regulation of

commercial free speech is subject to intermediate scrutiny in a First Amendment challenge, it follows that equal protection claims involving commercial speech also are subject to the same level of review." *See* Pls.' Mot. Summ. J. [#47] at 29 (quoting *Chambers v. Stengel*, 256 F.2d 397, 401 (6th Cir. 2001)).

However, the quoted language from *Stengel* does not accurately characterize Supreme Court and Fifth Circuit precedent. For purposes of an equal protection claim in the Fifth Circuit, "[u]nlike under [a] First Amendment challenge, [the state] need not 'articulate . . . the purpose or rationale supporting its classification[,]' as long as there is a 'reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Gibson v. Tex. Dep't of Ins.*, 700 F.3d 227, 239 (5th Cir. 2012) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Indeed, as this Court noted in a recent First Amendment and equal protection challenge to the Texas Alcoholic Beverage Code:

> with respect to the burden of proof [Plaintiffs'] Equal Protection challenges are the mirror image of their First Amendment challenges. That is, while Defendants had the burden of justifying, with evidence and argument, the [Rule's] speech-based regulations, [Plaintiffs] bear[] the burden of demonstrating there is no reasonably conceivable basis which might support the classifications in the challenged sections of the [advertising restrictions].

Authentic Beverages Co. v. Tex. Alcoholic Beverages Comm'n, 835 F. Supp. 2d 227, 247 (W.D. Tex. 2011).

It is "reasonably conceivable" the classifications made by the advertising restriction at issue are rationally related to the state's interest in ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification, and protecting consumers from misleading professional advertisements. Because Plaintiffs have wholly neglected their obligation to negate the link between the challenged restriction and state's interests with any evidence, the Court finds summary judgment is due to be granted in favor of Defendants on Plaintiffs' Equal

Protection claims. *See Heller,* 509 U.S. at 320–21 ("A state . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. . . . A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has foundation in the record.").

IV. Fourteenth Amendment: Standardless Delegation

Finally, the Court turns to Plaintiffs' due process claim, which is limited to one issue: whether Rule 108.54 is an unconstitutional delegation of legislative authority to the ADA.[8] Pls.' Reply [#61] at 7. Plaintiffs argue Rule 108.54 delegates to the ADA the exclusive authority to determine the government's official position with regard to what dental fields may be advertised as "specialties," which in turn controls which dentists may advertise as "specialists." According to Plaintiffs, this framework is constitutionally deficient because it assigns legislative power to the ADA, a private dental organization in direct competition with plaintiffs, to determine what is non-misleading information in Texas dental advertisements without attaching any meaningful standards or state mechanism for review. Plaintiffs base this theory on a series of *Lochner*-era cases which "stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." *General Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1456 (2d Cir. 1990) (citing *Eubank v. City of Richmond*, 226 U.S. 143 (1912); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928)).

[8] Based on Plaintiffs' pleadings, Defendants initially moved to dismiss three types of due process claims: (1) procedural; (2) substantive; (3) standardless delegation. *See* June 20, 2015 Order [#23] at 7. While the Court refrained from limiting the scope of Plaintiffs' due process claims at the motion to dismiss stage, the parties now agree Plaintiffs' sole theory of recovery under the Due Process clause is for standardless delegation.

The facts before the Court are not on all fours with this general proposition—the State Dental Board has not delegated any legislative or rulemaking power to the ADA to determine the state's position vis-à-vis which dental advertisements are misleading. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring) (characterizing legislative delegation as the "handing off [of] regulatory power to a private entity"); *see also Biener v. Calio*, 361 F.3d 206, 216 (3rd Cir. 2004) ("The Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party acting as a state actor."). When the ADA votes to recognize a dental specialty, it is not exercising Texas' rule-making authority to limit the scope of a dental licensee's rights delegated to it by the State Dental Board.

Rather, the State Dental Board has made a voluntary legislative decision to rely on the ADA's professional judgment with regard to what disciplines should be recognized by specialties for purposes of professional advertising. *See Kiser*, 2015 WL 1286430, *5 ("The ADA merely publishes a list of specialties, and individual states have the opportunity to use that list for lawmaking purposes."); *see also Ponzio v. Anderson*, 499 F. Supp. 407, 409 (N.D. Ill. 1980) (rejecting an argument the state improperly delegated its legislative function to an independent entity by relying on a dentist license examination prepared by a private corporation to determine the qualifications and fitness of applicants for dental licenses). Plaintiffs have provided the Court with no authority suggesting this is a violation of federal due process. Accordingly, the Court finds summary judgment should be granted in Defendants favor on Plaintiffs standardless delegation claim.

V. Conclusion

The right to advertise as a specialist in Texas is undoubtedly a financial boon to dentists in the state. While ostensibly promulgated to protect consumers from misleading speech, it appears

from the dearth of evidence that Rule 108.54's true purpose is to protect the entrenched economic interests of organizations and dentists in ADA-recognized specialty areas. Indeed, Defendants have presented little more than industry bias in favor of the ADA to support the argument Plaintiffs' desired speech is deceptive, false, or misleading or that the State Dental Board can trust the ADA to carve out specialty areas without the need to make any substantive determination of whether the Plaintiffs' dental organizations are actually bona fide. The First Amendment demands more.

Consequently, considering the record in this case, the Court finds Plaintiffs First Amendment claim succeeds on its merits and grants Plaintiffs' motion for summary judgment on this claim. Consequently, the Court finds Texas Administrative Code § 108.54 is an unconstitutional restriction on free speech and enjoins its enforcement. Plaintiffs' remaining Fourteenth Amendment claims are without merit, and thus the Court grants summary judgment in favor of Defendants as to these claims.

Accordingly,

IT IS ORDERED that Defendants and Intervenor Defendants' Motions for Summary Judgment [#46, 53] are GRANTED IN PART and DENIED IN PART, as described in this opinion;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment [#47] is GRANTED IN PART and DENIED IN PART, as described above in this opinion;

IT IS FURTHER ORDERED that Texas Administrative Code § 108.54 is an unconstitutional restriction on Plaintiffs' First Amendment right to free commercial speech;

IT IS FINALLY ORDERED that Defendants are ENJOINED from enforcing Texas Administrative Code § 108.54 to the extent it prohibits Plaintiffs from advertising as

specialists or using the terms "specialty" or "specialist" to describe an area of dentistry not recognized as a specialty by the American Dental Association, or any other provision of Texas law inconsistent with this opinion.

SIGNED this the 21st day of January 2016.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

Frank R. Recker, DDS, JD
General Counsel, American Academy of Implant Dentistry

IMPLANT DENTISTRY: WHAT MAKES A SPECIALIST?

There has been a trend over the past 20 years at the American Dental Association's Commission on Dental Accreditation (CODA) to add implant dentistry requirements to the training standards of the existing ADA recognized specialties. At the request of the respective trade associations representing the fields of oral and maxillofacial surgery, periodontics, prosthodontics and even endodontics, CODA has added 'implant dentistry' requirements to their respective accreditation standards. While some may argue that these additions are to benefit the public, I believe those standards were added for protectionist or 'turf' reasons. The antitrust implications go far beyond safeguarding the quality of educational programs as stated in the CODA mission statement. It also provided CODA 'an out' in 2017 for denying the AAID application to CODA to develop educational standards for the discipline of implant dentistry, claiming that implant dentistry was already 'covered' in the postgraduate programs in prosthodontics, periodontics, oral surgery and endodontics.

For example, adding didactic and/or clinical requirements in laser dentistry to the existing standards for Oral Medicine would allow those in oral medicine to claim that they are specialists in laser dentistry simply because their CODA standards 'include' education in laser dentistry without regard to how detailed or in depth those standards actually are. The end result, as we have seen with the addition of implant standards to CODA accredited postgraduate programs, would be oral medicine specialists advertising themselves as also being specialists in laser dentistry. Such would also preclude CODA from ever developing standards for the discipline of laser dentistry, claiming the area was already addressed in oral medicine postgraduate programs.

A look at the current CODA standards for implant dentistry is illustrative of the implant dentistry 'illusion.' (See Pages 5-7) Comparisons are made relating to implant training in prosthodontics, oral and maxillofacial surgery, periodontics and endodontics.

From a review of the CODA Standards in each postgraduate program relative to implant dentistry, we can see that the common threads of all four postgraduate programs are:

1. No requirement for a specific number of implants placed
2. No requirement related to restoring implants
3. No requirement regarding the type of implants placed
4. No requirement regarding bone grafting, including location and specific procedures

5. No requirement regarding the number of didactic hours of education
6. No requirement regarding the number of clinical hours of training

Since there are no minimum stated requirements, one program may have 300 hours of actual didactic education in implant dentistry while another may have 100 hours, or even less, and still meet the CODA requirements. There are approximately 330 CODA accredited postgraduate programs that are permitted to interpret these vague requirements any way they wish. Most notably missing is any comprehensive education in implant dentistry from start to finish including diagnosis, treatment planning, surgical placement, provisional and final restorations, and most importantly long-term follow-up.

Relative to actual clinical training, the same scenario exists. Programs covered by any of these four CODA implant requirements discussed may actually devote more than 100 hours of clinical experience in implant dentistry, while another program may devote less than 10 hours to clinical training. There is simply no way for the public or the profession to know, one way or the other.

Taken as a whole, these CODA standards for education in implant dentistry are ambiguous, generic, nonspecific, and subjective, but most importantly, inadequate relating to didactic and clinical training in implant dentistry. The evidence of any single program's compliance with the implant standards (should CODA choose to look) is ostensibly found by reviewing 'implant-related didactic course materials' which could include a physiology text or a text in dental materials, and/or patient records indicating 'interaction with restorative dentists.'

Also noticeably absent are any uniformity standards, or any requirement of psychometrically based testing in implant dentistry, which would validate actual competency. In reality, as the CODA standards for implant dentistry are applied, each of the collective, multitude of postgraduate programs in and oral and maxillofacial surgery, periodontics, prosthodontics and endodontics are free to interpret these ambiguous 'standards' any way they choose. The ONLY common denominator resulting from these vague standards is that many graduates of these programs consider themselves specialists in implant dentistry and so advertise to the public. The illusion is perpetuated by competitive segments of the dental profession and conveyed to the public by competitive forces in the marketplace, through advertising. Were these implant standards added by CODA to benefit the public? Or are they more closely aligned with protecting turf and the respective economic interests of existing specialties, as recently opined by Judge Sam Sparks in the 2016 Texas District Court decision?

The American Board of Dental Specialties (ABDS) insures that any certifying board seeking recognition as a dental specialty reasonably demonstrates competency in a specific area of dentistry similar to the process in medicine. It doesn't require nor accept non descript, vague and generic statements of training or experience but instead requires objectively verifiable criteria and psychometric

testing upon which the ABDS can feel reasonably comfortable that those criteria demonstrate competency. There are no comparable assurances from the CODA standards. Nor could the public ever ascertain even minimal competency in implant dentistry by any graduate of a CODA approved program in Oral and Maxillofacial Surgery, Periodontics, Prosthodontics, or Endodontics. The above CODA standards related to implant dentistry insure nothing relative to competency in implant dentistry.

On the other hand the American Board of Oral Implantology/Implant Dentistry, the implant certifying board recognized by the American Board of Dental Specialties (ABDS), issues Diplomate/Board Certified certificates to those dentists who can demonstrate the following, all of which are objectively verifiable criteria:

1. All applicants must have a minimum of seven (7) or more years of clinical practice experience in implant dentistry; and,
2. have completed at least 75 implant cases and the implants have been fully functional for a minimum of 1 year; and,
3. have completed a minimum of 670 hours of Continuing Dental Education hours or Continuing Medical Education hours that are specific to implant dentistry; and,
4. 300 hours of the continuing education must be part of a continuum of training in implant dentistry. The 300-hour requirement may be met by combining hours from multiple continuums, each containing a minimum of 60 hours of instruction. The continuing education programs submitted must be recognized as a continuing education provider (in the US) by the AGD or ADA. The other 370 hours of continuing education must be implant related in nature including but not limited to: Implant Surgery, Conscious Sedation, Pharmacology, Periodontology, Occlusion, Medical Emergencies, Computer Diagnostics, Treatment Planning, Bone/Soft Tissue Grafting; and,
5. Applicants must successfully complete both the Part I and Part II examination (psychometrically based testing/oral and written) within four (4) years of application to become a **Diplomate of the American Board of Oral Implantology/Implant Dentistry**
6. Applicants are also required to submit ten (10) cases that have been restored and functional for a minimum of one year at the time of case submission.

Additionally the following must be documented by anyone seeking Board Certified status from the ABOI/ID:

1. Full arch removable implant overdenture with two (2) or more implants with a minimum diameter of 3.25mm.
2. Edentulous posterior maxilla with compromised vertical height (less than 5mm) requiring at least 3mm of sinus augmentation and two or more implants with a minimum diameter of 3.25mm.

3. Anterior maxilla with implant support that included one (1) or more root form implants with a minimum diameter of 3.0mm.
4. Extraction with immediate implant placement OR extraction with ridge preservation and delayed implant placement with a minimum diameter of 3.0mm.
5. Edentulous mandible with implant support that includes four (4) or more root form implants with a minimum diameter of 3.25mm.
6. A posterior quadrant in a partially edentulous mandible or maxilla with implant support that includes two (2) or more root form implants with a minimum diameter of 3.25mm.
7. Case showing the management of a width deficient boney ridge (less than 3mm) requiring augmentation or manipulation (excluding ridge reduction) and the placement of two (2) or more root form implants with a minimum diameter of 3.0mm.
8. Ten Cases to be determined by the candidate. No more than one of these cases can be a single tooth replacement.'

The real measure of competency in implant dentistry is demonstrated by those dentists who can successfully complete the comprehensive requirements of the ABOI/ID listed above, not a simply a graduate of a CODA approved program with vague, non-quantifiable and non-verifiable standards. As I visit state boards throughout the country, a frequent objection to accepting the ABDS (which recognizes the ABOI/ID as a specialty certifying board in implant dentistry) is the fact that the ABDS recognized specialty of implant dentistry does not have CODA approved programs. I would urge every dentist to review the above referenced CODA standards and decide to whom they would refer a consumer for implant dental services? Asked another way, how can you know what actual didactic and clinical implant training or experience ANY oral surgeon, periodontist, prosthodontist or endondontist has completed, assuming they graduated after implant 'standards' were added to their post graduate program? More to the point, can you conclude 'competency' in implant dentistry merely because that clinician graduated from a CODA approved postgraduate program? Any objective dentist would concede that it couldn't be done, at least on the basis of any empirical evidence.

It may be time for candor, looking at the facts, and admitting that the 'CODA approved' argument is illusory, especially as it relates to implant dentistry. There are simply too many competitive forces working against a specialty in implant dentistry. On this point I would again note that CODA recently rejected an application from the AAID to accredit postgraduate programs in implant dentistry. And that rejection is primarily based upon CODA's assertion of already 'existing standards' in postgraduate programs. It's time for the dental profession to take an objective look at CODA and the ABDS. Which entity really identifies competency in implant dentistry? One is based on empirical evidence and one is based upon subjective, generic, non-verifiable criteria.

Vague training standards in implant dentistry are really all about advertising

as a specialist in implants and gaining a competitive advantage, not about achieving competency. The 'real' implant specialist can easily be identified if one looks objectively at the credentials that have been verified.

Implant Dentistry Table 1: CODA STANDARDS

Definitions below common to all CODA Standards

Competent: Having the knowledge, skills and values required of the graduates to begin independent, unsupervised specialty practice.

In-depth: Characterized by thorough knowledge of concepts and theories for the purpose of critical analysis and synthesis.

Understanding: Knowledge and recognition of the principles and procedures involved in a particular concept or activity.

2017 CODA Standards for programs in Periodontics relative to dental implantology

4-10 The educational program must provide didactic instruction and clinical training in dental implants, as defined in each of the following areas:

4-10.1 In depth didactic instruction in dental implants must include the following:

1. The biological basis for dental implant therapy and principles of implant biomaterials and bioengineering;

The prosthetic aspects of dental implant therapy;

2. The examination, diagnosis and treatment planning for the use of dental implant therapy;
3. Implant site development;
4. The surgical placement of dental implants;
5. The evaluation and management of peri-implant tissues and the management of implant complications;
6. Management of peri-implant diseases; and
7. The maintenance of dental implants.

4-10.2 Clinical training in dental implant therapy to the level of competency must include:

1. Implant site development to include hard and soft tissue preservation and reconstruction, including ridge augmentation and sinus floor elevation;
2. Surgical placement of implants; and
3. Management of peri-implant tissues in health and disease.
4. Provisionalization of dental implants.

   Intent: To provide clinical training that incorporates a collaborative team approach to dental implant therapy, enhances soft tissue esthetics and facilitates immediate or early loading protocols. This treatment should be provided in consultation with the individuals who will assume responsibility for completion of the restorative therapy.

2017 CODA Prosthodontic standards relative to dental implantology

Didactic Program

4-11 Instruction at in-depth level…Implants and implant

therapy; Clinical Program:

4-22 Students/Residents must be competent in the placement and restoration of dental implants, including referral.

2017 CODA standards for Oral and Maxillofacial Surgery relative to dental implantology

4-8.1 Dental implant training must include didactic and clinical experience in comprehensive preoperative, intraoperative and post-operative management of the implant patient.

The preoperative aspects of the comprehensive management of the implant patient must include interdisciplinary consultation, diagnosis, treatment planning, biomechanics, biomaterials and biological basis.

The intraoperative aspects of training must include surgical preparation and surgical placement including hard and soft tissue grafts.

The post-operative aspects of training must include the evaluation and management of implant tissues and complications associated with the placement of implants.

Examples of evidence to demonstrate compliance may include:

- Implant-related didactic course materials
- Patient records, indicating interaction with restorative dentists

2017 CODA standards for Endodontics relative to dental implantology

4-10 The educational program must provide clinical and didactic instruction in:

a. Diagnosis and treatment of periodontal conditions and defects in conjunction with the treatment of the specific tooth undergoing endodontic therapy; treatment should be provided in consultation with the individuals who will assume the responsibility for the completion or supervision of any additional periodontal maintenance or treatment;

b. Placement of intraradicular restorations and cores in endodontically treated teeth; when the patient is referred, this treatment is accomplished in consultation with the restorative dentist;

c. Implant dentistry; and

d. Extrusion procedure

A. I don't remember that.
Q. Do you have an understanding what that relationship is?
A. Well, it's my understanding that CODA is a commission of the ADA. The ADA has several commissions.
Q. When you were present at a board meeting, of a board wanting to see the credentialing requirements for to obtain certification from the ABOI/ID?
A. I don't recall that. I think this issue has come up in a board meeting maybe once or twice since I've been on the board.
Q. When you looked at this revised rule, did you draft it?
A. No, I did not draft it.
Q. It was handed to you by staff?
A. I don't know who drafted it. It was presented in our packet to look at. I remember we made some changes in the meeting if I recall.
Q. So you don't recall whether or not there was a board subcommittee on the rule revision or anything like that?
A. That's correct.
Q. Did the board discuss any other, to your recollection, when you were discussing the pending revised rule, did the board discuss any other benchmark

or mechanism to recognize a specialty other than CODA?
A. Not that I recall, sir.
Q. Would you personally be curious to know what the requirements are to obtain a credential from cosmetic dentistry, implant dentistry, all these different areas of dentistry that aren't ADA-recognized specialties or don't have CODA-approved programs?
A. Would I be interested to know?
Q. Yes.
A. Not really, no.
Q. All right. Are you aware that, for example, a credential of MAGD, do you know what that is?
A. Is that Master of something.
Q. Master Academy of General Dentistry. Do you what it takes to get that credential?
A. No.
Q. Do you know whether or not there's a certifying board in general dentistry?
A. I do not know if there is one or not.
Q. Is it your understanding that only specialties recognized by the dental board can advertise "practice limited to" a certain area?
A. I think that's what the rule says.
Q. So if a dentist in Texas limited his practice to cosmetic dental procedures, he or she would not be

permitted to advertise their name and then, practice limited to cosmetic dentistry?
A. That has how I understand the rule.
Q. They would not be allowed to do that?
A. That's how I understand the rule, yes. There a lot of advertising issues that are handled by the board legal.
Q. The board doesn't see them?
A. Not really unless it's just really egregious.
Q. You've already indicated there's one dental license in Texas. Everybody can do everything.
If a dentist truthfully advertises he limits his practice to cosmetic dentistry, for example, and he has from a bona fide organization whatever that means, their highest credentialing award, diplomate whatever, why shouldn't that dentist be allowed to advertise practice limited to cosmetic dentistry?
MR. TODD: Objection. Argumentative.
Go ahead.
A. The dentist can advertise that he performs cosmetic dentistry and he can write an ad that only talks about cosmetic dentistry.
Why someone chose to phrase practice is limited to, I have no idea. That's what the rule says now. I don't know why that was chosen that way.

Q. You are one of rule makers, so I'm asking you. If a dentist wants to make a truthful statement that his practice is limited to cosmetic dentistry, why should any rule prohibit him from saying that?
A. Well, I think the, as I understand, the prevailing belief is that that implies something that may not be true. It implies a specialist.
Q. Do you know what that prevailing belief is based on?
A. No. We talked about what is a consumer -- how's he going to find -- who knows what they know, what they think.
So one has to be careful about speech which is allowed because you can't get in a person's head and wonder what they're thinking or going to presume or is implied and I believe the rationale has been to limit that speech, so that it's more clear and because not everybody may be as ethical as you and I because they play words wordplay and parse words to provide a message that's not exactly the truth.
You've probably seen that before. So I believe it's been a rationale to limit that because you can't write a rule that would encompass every possible innuendo one could imagine. Just like there's no way a state would tell me there's a circumstance under which I

can drive 100 miles down the interstate.
They just don't allow it.
Q. Aren't you guessing as to what the public would think or not think if they say "practice limited to"?
A. Who the heck knows what someone's going to think.
Q. You're restricting what a dentist can say without knowing what the effects would be on the public.
MR. TODD: Objection. Argumentative.
A. Well, you're parsing words in "I want to specialize in something" versus "I'm a specialist."
And you and I may know what a subtle nuance is between those two things, but the general public may not have the academic wherewithal to understand the difference between those two things.
Q. We don't know either way, do we, what the public would think?
A. I have a pretty good idea based on what people say and do and you've been a dentist. You understand what I'm telling you.
Q. But my point is, we don't have any facts upon which to conclude that the public would believe A, B or C --
A. Neither of us have any facts to support either point of view, that's correct.

Q. So Texas is restriking what a dentist can say without knowing what the effects would be on the public if he said it?
MR. TODD: Objection. Argumentative.
A. I don't know how you can answer that question. I don't know.
Q. (BY MR. RECKER) What do you mean, I don't know --
A. I can't know what they are saying so I can't say I'm doing it without knowing because I don't know what one would say.
Q. The plaintiff, Elliot and Buck, two plaintiffs they cannot say specialist in implant dentistry. They cannot say that, would you agree?
A. That's correct.
Q. Would you also agree that you have no idea what the public would perceive that to mean?
A. Well, they can say implant dentistry. We do implant dentistry. They can say that.
Q. I'm specifically saying they cannot say under current Texas law that they are specialists in implant dentistry.
A. That's correct.
Q. And you have no basis upon which to show me or a court if they said this, this is what would happen to

the public?
MR. TODD: Objection. Argumentative.
A. Well, I'm a board member. You can make an argument to the judge. I don't know.
Q. (BY MR. RECKER) That's my question. Do you have any basis to support the proposition that the public would be mislead or harmed by Elliot and Buck advertising specialist in implant dentistry?
MR. TODD: He started to give you an answer a while ago and you interrupted him about a good idea based on and then you interrupted him on talking to people and meeting people and things like that and you went on to your next question.
A. I think the state says if you're not a specialist, you can't say you're a specialist and getting around in a room with your pals and deciding to say you're a specialist doesn't make you a specialist.
Q. (BY MR. RECKER) My question was based upon evidence to support saying you're a specialist in implant dentistry would somehow be harmful to the public.
We don't have any such evidence, do we?
MR. TODD: I'm going to object. That's an argument to make in a brief to the Court.
He's already told you that he didn't

participate in adopting that rule.
MR. RECKER : Okay, Jim -- would you please read back the question because I'm going to get an answer.
A. And I want to answer your question, sir. I'm not trying to be obtuse. I'm just trying to explain that I can't possibly know what a person reading an ad would mean, would think.
What I know is what the prevailing thought has been what it would imply, okay. And that word imply is just what it means.
It would imply something that is not necessarily true and that's the basis of the rule as I understand it.
So just because someone wants to say I'm a specialist doesn't mean you're a specialist just because you really want it to be true.
There have, historically, been a standard bearer in our profession and that's standard bearer has been recognized for generations of dentists and that's what we have.
If the law wants to change it, throw all that out the window and come up with some other standard and not have a standard, that's not for me to decide. I'm entered into this system. I was trained up in it.