UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JULIE ALLEMAN, et al., PLAINTIFFS, v. SHANNAE N. HARNESS, et al., DEFENDANTS.	Civil Action No. 3:24-cv-877 Judge: JWD - SDJ

DEFENDANTS' JOINT MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Shannae Harness, Shavaun Sam, Michelle Moore, Matthew Holcomb, Shawanda Woods-Smith, Jamie Monic, Courtney Newton, and the District Attorney of East Baton Rouge Parish move for dismissal of Plaintiffs' claims (Counts I and II) in Plaintiffs' Complaint, ECF No. 1, for the reasons stated in their attached Memorandum of Law.

Dated: December 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 18th day of December, 2024.

/s/ Zachary Faircloth
Zachary Faircloth

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, two licensed counselors, seek wholesale exclusion from Louisiana's longstanding laws regulating the practice of psychology and those who represent themselves as psychologists. Not only do Plaintiffs lack standing to seek such broad relief, but also States have wide latitude to ensure that commercial speech does not deceive consumers. Dismissal is warranted due to (1) lack of subject matter jurisdiction and (2) Plaintiffs' failure to state a claim.

Jurisdiction can be both first and last here. That is principally because Plaintiffs lack standing for much of the relief they seek. Indeed, Plaintiffs do not themselves believe they engage in the practice of psychology, are licensed to practice psychology, or could truthfully market their therapeutic services as such. *See Neese v. Becerra*, No. 23-10078, 2024 WL 5116402, at *2 (5th Cir. Dec. 16, 2024) (per curiam). In fact, their only cognizable injury is voluntarily dropping "Psychological" from the trade name of their business that provides counseling and social work services—not psychological services—in response to a complaint brought to the Louisiana State Board of Examiners of Psychologists. But no matter their standing for *that* relief based on *that* provision of the law, the claims against the Board and its members and employees are barred by sovereign immunity. Without a concrete injury or a proper defendant, this case should be dismissed without prejudice for lack of jurisdiction.

Jurisdiction aside, Plaintiffs' only justiciable claim fails on the merits, too. Louisiana has long prohibited anyone without a license from "represent[ing] himself

as a psychologist," by "using any title … incorporating the words 'psychology,' 'psychological,' or 'psychologist.'" La. R.S. 37:2360(A)(1), 2352(10). That speech is quintessential commercial speech subject to reasonable state regulation. That proper categorization dooms Plaintiffs' as-applied and facial claims under the First Amendment. Even as-applied, Plaintiffs' use of the term "psychological" is deceptive as Plaintiffs readily admit they do not engage in the practice of psychology. The law is clear that deceptive trade names do not receive any First Amendment protection. Furthermore, even possibly misleading trade names in the practice of psychology are plainly subject to the State's regulation under the *Central Hudson* factors. And in no circumstances is such commercial speech subject to a facial overbreadth challenge.

Summed up: (I) The Court should dismiss Plaintiffs' claims for lack of subject matter jurisdiction. (II) If the Court reaches the merits, it should dismiss Plaintiffs' Complaint for failure to state a claim.

BACKGROUND

A. Louisiana protects its citizens by licensing and regulating the practice of psychology through its Louisiana State Board of Examiners of Psychologists ("the Board"). La. R.S. 37:2351 *et seq*. To that end, only those having earned a psychology license can "represent himself as a psychologist" to unknowing customers, La. R.S. 37:2360(A)(1), by either (1) "using any title … incorporating the words 'psychology,' 'psychological,' or 'psychologist,'" or like terms, "which imply that he is qualified to practice psychology or that he possesses expert qualification in any area of psychology," (the "Title Provision") or (2) "using … description of services incorporating th[ose] words," (the "Services Provision"). La. R.S. 37:2352(10). Neither

can one "engage in the practice of psychology" without a license. La. R.S. 37:2360(A)(2) (the "Practice Provision"); *see* La. R.S. 37:2352(8) (defining "practice of psychology").

Any unlicensed "representation" or "engage[ment]" is impermissible and punishable as a misdemeanor. La. R.S. 37:2360(A). Such misdemeanors "shall be prosecuted by the district attorney of the judicial district in which the offense was committed." La. R.S. 37:2360(B). Additionally, the Board "may investigate" unlicensed actors who "title" their business under the guise of "psychologist." La. R.S. 37:2361(A). When faced with such a violation, the Board may apply for an injunction in state court to enjoin the violation. *See* La. R.S. 37:2361(B)–(C); s*ee also* La. Att'y Gen. Op. No. 12-0142 (Oct. 11, 2012).

B. Plaintiffs, two Baton Rouge counselors, Julie Alleman and Juliet Catrett, own and operate the business formerly named Psychological Wellness Institute, LLC. Compl. ¶¶ 20–22, ECF No. 1. Neither Alleman nor Catrett is a licensed psychologist—but they are licensed as a professional counselor (Alleman) and as a social worker (Catrett). *Id.* ¶¶ 21–23. In January 2024, the Board, following receipt of a complaint submitted by a third-party, notified them that Louisiana law prohibits "represent[ing] [one]self as a psychologist" by using "Psychological" in their business's trade name without a license to practice psychology and requested voluntary corrective action. *Id.* ¶ 26. In response, Plaintiffs agreed and changed their business's name to "P. Wellness Institute, LLC"—another plaintiff in this matter. *Id.* ¶¶ 3, 25,

27. The Board subsequently dismissed the third-party complaint against Alleman and Catrett. *Id.* ¶ 28.

C. On October 22, 2024, Plaintiffs sued the Board's members and its executive director and counsel (collectively, "Board Defendants") along with District Attorney Hillar Moore, III—all in their official capacities.[1] Compl. ¶¶ 4–11. Plaintiffs allege that—though they are not licensed psychologists—they want to represent themselves as "Psychological Wellness Institute, LLC" by trade name. *Id.* ¶ 29. They also allege that—though they do not engage in the practice of psychology—they want to tell clients that they "have studied psychological principles, methods, and procedures, and apply them in their treatment to help clients modify their behavior and improve their lives." *Id.* ¶ 31.

In their Complaint, Plaintiffs say little about their counseling practice. Nowhere do Plaintiffs allege that the Board has ever taken action against them for the unlicensed engagement in the practice of psychology. *Id.* ¶¶ 1–48. Nor do Plaintiffs allege that they engage in the practice of psychology as Louisiana defines it. *Id.* ¶¶ 1–48. Rather, they aver, "Louisiana law permits [them] to treat their patients consistent with their professional training…." *Id.* ¶ 24. That makes sense: They themselves are licensed counselors, *id.* ¶¶ 21–23, who do not allege that they illegally engage in the practice of psychology without a psychology license.

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[1] Though Plaintiffs named as a defendant "The District Attorney for the East Baton Rouge Parish," Compl. ¶ 11, Louisiana law "requires that the claim be brought against the district attorney in his official capacity," *Hudson v. City of New Orleans*, 174 F.3d 677, 680 (5th Cir. 1999). Defendants construe it as such.

Nor do Plaintiffs say much about their services. Nowhere do Plaintiffs allege that the Board has ever taken action against them for the representation of their services as psychology. *Id.* ¶¶ 1–48. Nowhere do Plaintiffs allege that they have, do, or intend to describe their services as "'psychology,' 'psychological,' or 'psychologist.'" *Id.* ¶¶ 1–48. And nowhere do Plaintiffs allege that describing their services as "'psychology,' 'psychological,' or 'psychologist'" would not be false or misleading, *id.* ¶¶ 1–48, given that they do not engage in the practice of psychology at all. The closest approximation to an allegation about Plaintiffs' services in the Complaint is that Plaintiffs would like to represent themselves as offering "Psychological Wellness," but then "explain to their clients" that (1) "they are not licensed psychologists," (2) that "they have studied psychological principles, methods, and procedures," and (3) that they "apply [psychological principles, methods, and procedures] in their treatment to help clients modify their behavior and improve their lives." *Id.* ¶ 31. But it remains entirely ambiguous what psychological principles, methods, and procedures were studied, what those services actually are, and whether Plaintiffs actually apply those principles in their therapeutic treatments.[2]

Across two First Amendment counts—as-applied and facial overbreadth—Plaintiffs seek broad relief enjoining enforcement of and declaring unconstitutional the Title Provision, the Services Provision, and the Practice Provision. *Id.* ¶¶ 36–48,

[2] Neither the Louisiana Professional Counseling Board of Examiners nor the Louisiana Board of Social Workers Examiners—the boards through which Plaintiffs are presumably licensed—describe their respective practices as involving "psychology," "psychological," or "psychologist." *See* La. R.S. 37:1103, 2703(15) (nothing in the chapter authorizes a social worker "to administer or interpret psychological tests, or to engage in the practice of psychology"); *contra* Compl. ¶ 29 ("[Plaintiffs] believe ["psychological"] accurately describes the services they provide.").

A–C. Plaintiffs also seek attorney's fees and costs and any other relief that is appropriate. Compl. ¶¶ D, E. Defendants now move to dismiss Plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(6).

LEGAL STANDARDS

Dismissal for Lack of Jurisdiction. Rule 12(b)(1) permits a party to raise fatal jurisdictional defects early. *See* Fed. R. Civ. P. 12(b)(1); *e.g.*, *In re FEMA Trailer*, 668 F.3d 281, 286 (5th Cir. 2012) (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). When "a Rule 12(b)(1) motion is filed," "the court first considers its jurisdiction." *McLin v. Twenty-First Jud. Dist.*, 79 F.4th 411, 415 (5th Cir. 2023). Standing and sovereign immunity are jurisdictional questions to be considered first when raised in a Rule 12(b)(1) motion. *See Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) (standing); *Kling v. Hebert*, 60 F.4th 281, 284 (5th Cir. 2023) (sovereign immunity).

Plaintiffs, as "the part[ies] asserting jurisdiction," "constantly bear[] the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see, e.g.*, *United States ex rel. Johnson v. Raytheon Co.*, 93 F.4th 776, 783 (5th Cir. 2024). On a factual attack under Rule 12(b)(1), as here, "no presumptive truthfulness attaches to the [] allegations." *Williamson v. Tucker*, 645 F.2d 404, 412–13 (5th Cir. 1981).

Dismissal for Failure to State a Claim. Dismissal is also proper where a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Hamilton v. Dallas County*, 79 F.4th 494, 499 (5th Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs' "conclusory allegations, unwarranted factual inferences, or legal conclusions" are "not accept[ed] as true"—only "well-pleaded facts" receive that presumption. *In re Great Lakes Dredge & Dock Co. LLC*, 624 F.3d 201, 210 (5th Cir. 2010) (internal citations and quotations omitted). Once the complaint is stripped to its "well-pleaded facts," those alone "must make relief plausible, not merely possible." *Benfield v. Magee*, 945 F.3d 333, 337 (5th Cir. 2019).

ARGUMENT

I. The Court Should Dismiss Plaintiffs' Claims Under Rule 12(b)(1) For Lack of Jurisdiction.

Fifth Circuit precedent requires the dismissal of Plaintiffs' Complaint for lack of subject matter jurisdiction. The most straightforward basis to do so is Plaintiffs' lack of Article III standing for the bulk of the relief they seek, leaving just one claim traceable to the Board Defendants. Those Defendants, however, are entitled to sovereign immunity. The Court should thus dismiss without prejudice all of Plaintiffs' claims.

A. Plaintiffs Lack Article III Standing To Challenge the Practice Provision and the Services Provision.

Plaintiffs' allegations of a narrow injury-in-fact stemming from the Title Provision does not give them *carte blanche* standing to seek relief from all the State's regulations of the practice of psychology. Of course, "standing is not dispensed in gross" that way. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Instead, the "irreducible constitutional minimum of standing contains three elements"—injury-

in-fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must demonstrate those elements for "'*each* claim that they press' against *each* defendant 'and for *each* form of relief that they seek.'" *Murthy v. Missouri*, 144 S. Ct. 1972, 1988 (2024) (quoting *TransUnion*, 594 U.S. at 431) (emphases added); *see Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014) (First Amendment as-applied claim and facial claim require distinct standing inquiries). They fail to do so.

For standing, the parties likely agree on one score: Plaintiffs allege that they altered their preferred trade name in response to a Board complaint accusing them of violating La. R.S. 37:2360(A)(1). *See* Compl. ¶¶ 26, 27. That is because Louisiana law prohibits Plaintiffs—who are not licensed psychologists—from "representing" themselves as "psychologist," by "using any title" "incorporating the words 'psychology,' 'psychological,' or 'psychologist.'" La. R.S. 37:2360(A)(1), 2352(10). So at this stage of litigation, Plaintiffs have alleged an injury-in-fact traceable to the Board and the Title Provision, redressable by the Court.[3] But that is it.

Yet Plaintiffs' requested relief far exceeds the Title Provision—at root, that is a traceability problem. Traceability calls for, at minimum, causation in fact. *See Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019) ("Because Article III 'requires no more than *de facto* causality,' traceability is satisfied here."); *California v. Texas*, 593 U.S. 659, 675 (2021) ("[T]he States also have failed to show how this injury is directly

[3] That is true of all Board Defendants but its executive counsel Courtney Newton, Compl. ¶ 9, who was not even hired by the Board until June 11, 2024, well after the relevant factual allegations in Plaintiffs' Complaint. So Plaintiffs cannot sustain any claim against Newton.

traceable to any actual or possible unlawful Government conduct ...."); *TransUnion*, 594 U.S. at 423 ("[T]he injury was likely caused by the defendant."). In that way, traceability is the standing requirement that guards the maxim that "standing is not dispensed in gross." *TransUnion*, 594 U.S. at 431.

For that reason, traceability cabins a plaintiff's standing to the *specifically challenged* conduct—not *all* unlawful conduct. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). So, for example, "plaintiffs cannot seek penalties for a particular violation if they would lack standing to sue for that violation in a separate suit." *Env't Tex. Cit. Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 366 (5th Cir. 2020), *as revised* (Aug. 3, 2020). Nor can a plaintiff bootstrap an injury-in-fact traced from *one* provision of the law to challenge a *different* provision. *See California*, 593 U.S. at 679 ("the problem for the [] plaintiffs is that these other provisions [] operate independently of [the challenged provision]").

Plaintiffs' broad request for declaratory and injunctive relief here runs headlong into these traceability principles. The Complaint lacks any factual allegations of any cognizable injury-in-fact traceable to either the discrete Practice Provision or the Services Provision. *See id.* ¶¶ 1–48. At best, Plaintiffs press pre-enforcement challenges to those provisions.

But "[t]he right to pre-enforcement review is qualified and permitted only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Neese*, 2024 WL 5116402, at *2 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Those circumstances are present only when

Plaintiffs allege that "(1) [they] intend[] to engage in a course of conduct arguably affected with a constitutional interest; (2) that the course of action is arguably proscribed by [that provision]; and (3) that there exists a credible threat of prosecution under" it. *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 215–16 (5th Cir. 2023).

Plaintiffs do not make those allegations for either the Practice Provision or the Services Provision. That is principally because "Plaintiffs themselves do not view their conduct as" violating Louisiana law. *Neese*, 2024 WL 5116402, at *2. Nor do they allege that "their current practices have [] been chilled or otherwise affected." *Id.*

As for the Practice Provision, nowhere do Plaintiffs allege they engage in the practice of psychology or that they intend to do so. *See id.* ¶¶ 1–48. Nor do they claim the Board regulates them as such. *See id.* ¶¶ 1–48. To be sure, Plaintiffs allege they have "studied principles, methods, and procedures of psychology and use[] those principles in [their] work." *Id.* ¶¶ 21–22. But they contend Louisiana law does not proscribe them from doing so: They allege "Louisiana law permits [them] to treat their patients consistent with their professional training provided that they do not represent themselves as psychologists or their work as psychological." *Id.* ¶ 24. It is therefore entirely undisputed that "the course of action" Plaintiffs are taking and propose to take is not "arguably proscribed by" La. R.S. 37:2360(A)(2). *Turtle Island Foods*, 65 F.4th at 215–16. By their own admission, Plaintiffs do not "engag[e] in the practice of psychology" without a license, nor do they intend to. In other words,

Plaintiffs themselves do not view their conduct as violating the Practice Provision. *See Neese*, 2024 WL 5116402, at *2. That is insufficient for standing.

As for the Services Provision, Plaintiffs admit they "do not currently use the term 'psychological' in describing any of their services to clients or potential clients." Compl. ¶ 30. Their website confirms that as well. *See* P. Wellness Institute, https://pwibr.com/ (last visited Dec. 17, 2024). And their services have been described the exact same way there (sans "psychological") since the company launched as "Psychological Wellness Institute, LLC" in 2021. *See Psychological Wellness Institute*, https://tinyurl.com/y6zazacd (as captured in 2021) (last visited Dec. 17, 2024).

Plaintiffs claim now that they "would like to explain to their clients" that they "apply [psychological principles, methods, and procedures] in their treatment to help clients modify their behavior and improve their lives." Compl. ¶ 31. But Plaintiffs do not allege anywhere that they actually intend to apply those principles, methods, or procedures. *See id.* ¶ 1–48. Nor could they given that they only "treat their patients consistent with their professional training"—as a licensed counselor and as a social worker—as "Louisiana law permits." *Id.* ¶ 24. That is, Plaintiffs do not allege their services have been chilled or otherwise affected by the Services Provision. *See Neese*, 2024 WL 5116402, at *2. That, too, falls short for Article III standing.

"Plaintiffs have thus failed to show that they are actually violating [the Practice Provision and the Services Provision], much less that they face a credible threat of enforcement." *Id.* "They therefore do not have standing" to challenge those provisions. *Id.*

B. Sovereign Immunity Bars Plaintiffs' Claims Against the Board.

Plaintiffs' claims against the state agency Board Defendants are plainly foreclosed by sovereign immunity. *See* Compl. ¶ 5. That is because "the Louisiana State Board of Examiners of Psychologists is a state agency for purposes of Eleventh Amendment immunity." *Cerwonka v. Louisiana*, No. CV 6:17-1095, 2018 WL 1867195, at *5 (W.D. La. Mar. 26, 2018), *report and recommendation adopted sub nom. Cerwonka v. Louisiana*, 2018 WL 1867094 (W.D. La. Apr. 18, 2018)); *see, e.g.*, *Fairley v. Louisiana*, 254 F. App'x 275, 277 (5th Cir. 2007) (per curiam) (barring suit against the Louisiana State Board of Medical Examiners, including its Executive Director).

"Eleventh Amendment sovereign immunity bars private suits against nonconsenting states in federal court," including "suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019); *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) ("[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." (citations and quotations omitted)). So "unless the state has waived sovereign immunity or Congress has expressly abrogated it," *City of Austin*, 943 F.3d at 997, Plaintiffs' "claims against" the Board and its officers "are barred in federal court," *Cerwonka*, 2018 WL 1867195, at *5.

Ex parte Young cannot be the answer. For the exception to apply, the state official "must have some connection with the enforcement of the challenged act." *City of Austin*, 943 at 997 (cleaned up). Two problems there: *One*, at most, the Board has

discretion to investigate violations. *See* La. R.S. 37:2361(A) ("The board may investigate any evidence or allegation…."); La. R.S. 37:2353(C)(6) (describing the Board's authorization to "[c]ause the prosecution and enjoinder of all persons violating this Chapter"). But such "[d]iscretionary authority to act, on its own, is insufficient to give rise to a particular duty to act, *i.e.*, a 'sufficient connection [to] enforcement.'" *Mi Familia Vota v. Ogg*, 105 F.4th 313, 327 (5th Cir. 2024) (quoting *City of Austin*, 943 F.3d at 998).

Two, according to the challenged provision, misdemeanors "shall be prosecuted by the district attorney"—not the Board. As *City of Austin* teaches, "[w]here a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the Court's] *Young* analysis ends." 943 F.3d at 998; *see* Compl. ¶¶ 34–35 (acknowledging that enforcement is left to the District Attorney). Because *Ex parte Young* cannot save Plaintiffs' claims against the Board Defendants, sovereign immunity bars those claims.

II. The Court Should Dismiss Under Rule 12(b)(6) For Failure To State A Claim For Relief.

If the Court proceeds to the merits, dismissal remains warranted because Plaintiffs have failed to state a claim for relief under the First Amendment. That is principally because Louisiana's prohibition on "represent[ing] [one]self as a psychologist" without a license "by using any title … incorporating the words 'psychology', 'psychological', or 'psychologist'" is a permissible regulation of commercial speech. *See* La. R.S. 37:2360(A)(1), 2352(10). That dooms both Plaintiffs' as-applied and facial overbreadth challenges.

A. Plaintiffs' First Amendment As-Applied Claim Fails (Count I).

Plaintiffs' only cognizable as-applied challenge concerns the Title Provision and the trade name for their business—core commercial speech. *See* Compl. ¶ 29 (desiring to use the trade name "Psychological Wellness Institute," instead of "P. Wellness Institute"). Properly characterized as such, Plaintiffs' as-applied claim fails.

1. Trade names are commercial speech.

Plaintiffs' trade name is black-letter commercial speech and may be regulated as such. "Commercial speech is '[e]xpression related solely to the economic interests of the speaker and its audience'" or "speech which does 'no more than propose a commercial transaction.'" *Book People, Inc. v. Wong*, 91 F.4th 318, 339 (5th Cir. 2024); *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (establishing the four-part analysis for commercial speech); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983) (The "core notion of commercial speech" is "speech which does no more than propose a commercial transaction."). Though courts have not settled "the precise bounds of the category of expression that may be termed commercial speech," *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985), trade names fall well within its bounds, *Friedman v. Rogers*, 440 U.S. 1, 11 (1979).

As the Supreme Court explained, trade names "serve to identify [a] practice and also to convey information about the type, price, and quality of services offered for sale in that practice." *Friedman*, 440 U.S. at 11. In other words, "use[]" of "a trade name" "is strictly business." *Id.* So "use of trade names in connection with" Plaintiffs' therapy practice, "then, is a form of commercial speech and nothing more." *Id.*; *see,*

e.g., *Express Oil Change, L.L.C. v. Ms. Bd. of Licensure for Pro. Engineers & Surveyors*, 916 F.3d 483, 487 (5th Cir. 2019) (Mississippi law prohibiting unlicensed engineers from naming business "Tire Engineers" was regulation of "commercial speech.").

Because Plaintiffs' trade name is plainly commercial speech, they cannot piggyback on the Fifth Circuit's decision in *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016). That is a *political speech* case, in which the plaintiff was "seeking votes, not clients." *Id.* at 360–361. The Court concluded that "the inclusion of 'psychologist' on the website was not commercial speech" *because* the "state's legitimate power to restrict the use of titles in the commercial context [were] inapplicable." *Id.* at 361. Of course, as *Serafine* acknowledges, States are free to regulate use of "the word 'psychologist' on a promotional flyer seeking clients, or on official business letterhead, or in a phonebook advertisement." *Id.* at 360. Indeed, according to *Serafine*, "States' ability to limit the *use of titles and trade names* to protect the public from 'false, deceptive, and misleading' advertising is well-established." *Id.* (emphasis added) (collecting cases). Such is the case here.

2. Misleading trade names are not protected by the First Amendment.

The Title Provision prohibits false, deceptive, and misleading trade names. For "commercial speech to be protected under the First Amendment, 'it at least must concern lawful activity and not be misleading.'" *Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 306 (5th Cir. 2017) (quoting *Cent. Hudson*, 447 U.S. at 566); *see*

Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994) ("false, deceptive, or misleading commercial speech may be banned").

But a trade name escapes First Amendment protection when it is "inherently misleading"—*i.e.* "inherently likely to deceive." *Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n*, 24 F.3d 754, 756 (5th Cir. 1994). Courts have long measured inherent deception based on the "'particular method by which the information is imparted to consumers.'" *Id.* (quoting *Peel v. Att'y Disciplinary Comm'n*, 496 U.S. 91, 112 (1990) (Marshall, J. and Brennan, J., concurring)). And "when the possibility of deception is self-evident," the State may regulate that speech and "need not survey the public" to *prove* deception. *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 605–06 (4th Cir. 1988) (quoting *Zauderer*, 471 U.S. at 652–53).

Some methods of communication—like trade names—are "inherently conducive to deception and coercion." *See Joe Conte Toyota*, 24 F.3d at 756. Indeed, the possibility of deception from a trade name is self-evident and "well-established." *See Serafine*, 810 F.3d at 360 (collecting cases). That is why courts have long recognized that risk, especially within the medical professions. *See Maceluch v. Wysong*, 680 F.2d 1062, 1068–70 (5th Cir. 1982) (per curiam) (upholding Texas licensing law that prevented doctors of osteopathy from using "M.D." in connection with their medical practice); *Brandwein v. Cal. Bd. of Osteopathic Exam'rs*, 708 F.2d 1466, 1469–70 (9th Cir. 1983) (upholding restriction preventing doctor of osteopathy from holding himself out as an M.D. because of the danger of false or misleading commercial speech); *Gonzalez-Colon v. Estado Libre Asociado de Puerto Rico*,

No. CV 15-1560, 2018 WL 3339688, at *6 (D.P.R. May 16, 2018), *report and recommendation adopted*, No. CV 15-1560 (PAD), 2018 WL 3339682 (D.P.R. July 6, 2018) (upholding a statute regulating the use of psychologist as a title); *see also Bowman*, 860 F.2d at 605–06 (upholding statute that prohibited unlicensed accountants from using the title "public accountant" because of the danger of "misleading commercial speech"). Plaintiffs cannot explain why their case warrants special treatment.

More, Plaintiffs' own admission that they themselves do not even believe they are engaging in the practice of psychology belies their claims. *See supra* Section I.A; Compl. ¶ 24 ("Louisiana law permits [them] to treat their patients consistent with their professional training provided that they do not represent themselves as psychologists or their work as psychological."). On their own telling then, Plaintiffs' representing themselves as engaging in the practice is itself false (or at the very least deceptive) commercial speech—long the purview of State regulation. Accordingly, Plaintiffs have no First Amendment right to a deceptive trade name, so the Court can end its analysis there.

3. Even applying the *Central Hudson* factors, the State is free to regulate as applied to these Plaintiffs.

Nor could Plaintiffs overcome the *Central Hudson* factors even if their deceptive trade name were "safeguarded by the First Amendment." *Turtle Island Foods*, 65 F.4th at 220. Under those factors, "the restriction" must "directly and materially advance[] a substantial state interest in a manner no more extensive than necessary to serve that interest." *Am. Acad.*, 860 F.3d at 308–09 (cleaned up).

First, the States' interest is unquestionably compelling: "to safeguard life, health, property, and the public welfare of this state, and in order to protect the people of this state against unauthorized, unqualified, and improper application of psychology." La. R.S. 37:2351. Indeed, "ensuring the accuracy of commercial information in the marketplace" is alone sufficient under the *Central Hudson* factors. *Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 220 (5th Cir. 2011); *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (similar). The State plainly clears that bar.

Second, the Title Provision directly advances that interest. Louisiana makes a guarantee to its citizens: Anyone engaging in the practice of psychology is, in fact, a licensed psychologist. *See* La. R.S. 37:2360(A)(2); *see also* La. R.S. 37:2352(10) (representation as a psychologist "impl[ies] that" someone is "qualified to practice psychology or … possess expert qualification in any area of psychology"). As a necessary corollary to that guarantee, Louisiana law promises consumers that no one will "represent himself as a psychologist" without that license. La. R.S. 37:2360(A)(1). In that way, Louisiana's Title Provision goes directly to "protect[ing] the people of this state against unauthorized, unqualified, and improper application of psychology." La. R.S. 37:2351.

Finally, the regulation is no "more extensive than is necessary to serve that interest." *Pub. Citizen*, 632 F.3d at 219 (quotation omitted). To be clear, it need not be the "least restrictive means." *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989). Here, the Title Provision directly addresses the same inherent deception present in *Maceluch*,

Brandwein, and *Gonzalez-Colon*. And Louisiana law takes that deceptive commercial speech head on: Plaintiffs, for example, both "person[s] not licensed" as a psychologist, cannot "represent [them]sel[ves] as a psychologist." La. R.S. 37:2360(A)(1). No more, no less.

Plaintiffs may very well want to use the trade name "Psychological Wellness Institute," rather than "P. Wellness Institute." *See id.* ¶ 24. But the *Central Hudson* factors here plainly weigh in favor of the State's regulation of misleading trade names within the particular field of psychology to protect the public from unlicensed practice.

B. Plaintiffs' First Amendment Overbreadth Claim Fails (Count II).

Of course, "facial challenges are disfavored." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2408–09 (2024). For that reason, "facial challenges to state laws are difficult to successfully mount." *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 497 (5th Cir. 2024) (detailing plaintiffs' burden to mount an overbreadth challenge).

But Plaintiffs' facial challenge here does not even reach *Netchoice*: "The overbreadth doctrine does not apply to commercial speech." *Serafine*, 810 F.3d at 364 (citing *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 496–97 (1982)). Because the Title Provision regulates commercial speech, *supra* Section II.A, Plaintiffs' facial overbreadth claim fails from the jump and must be dismissed.

PRAYER FOR RELIEF

Defendants respectfully request that this Court grant Defendants' motion to dismiss and dismiss Counts I and II of Plaintiffs' Complaint. Because all counts are barred by the Boards' sovereign immunity, it should dismiss all counts against the

Board Defendants for lack of jurisdiction. It should additionally dismiss Plaintiffs' challenge to the Services Provision and Practice Provision for lack of jurisdiction, because Plaintiffs lack standing to challenge those provisions. And, if it decides to reach the merits, the Court should dismiss all counts for failure to state a claim.

Dated: December 18, 2024

Respectfully submitted,

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**pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 18th day of December, 2024.

/s/ Zachary Faircloth
Zachary Faircloth

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JULIE ALLEMAN, et al., PLAINTIFFS, v. SHANNAE N. HARNESS, et al., DEFENDANTS.	Civil Action No. 3:24-cv-877 Judge: JWD - SDJ

PROPOSED ORDER

The Court has considered Defendants' Motion to Dismiss. **IT IS ORDERED** that the Motion is **GRANTED**. Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court **DISMISSES without prejudice** Plaintiffs' claims (Counts I and II) for lack of jurisdiction and, **DISMISSES with prejudice** Plaintiffs' claims (Counts I and II) for failure to state a claim for relief.

Signed this ___ day of _____, 2024

_____

UNITED STATES DISTRICT JUDGE