UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JULIE ALLEMAN, JULIET CATRETT, and P. WELLNESS INSTITUTE, LLC	
Plaintiffs,	Case No. 3:24-cv-00877
v.	Judge John deGravelles
SHANNAE N. HARNESS, *et al.*	Magistrate Judge Scott D. Johnson
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Introduction

Title 37 of the Louisiana Revised Statutes sets forth rules governing professions, and Chapter 28 of that title covers the practice of psychology. Part of Chapter 28, Section 37:2360, entitled "Violations and Penalties," states that it "shall be a misdemeanor [f]or any person not licensed in accordance with the provisions of this Chapter . . . to represent himself as a psychologist." La. R.S. § 37:2360 (the "Representation Law").

What constitutes "represent[ing] [one]self as a psychologist" is, curiously enough, in a different section (Section 37:2352(9)) that defines "psychologist." It states:

> "Psychologist" means any person licensed as a psychologist in accordance with the provisions of this Chapter. A person represents himself to be a psychologist by using any title or description of services incorporating the words "psychology," "psychological," or "psychologist," or by using any other terms which imply that he is qualified to practice psychology or that he possesses expert qualification in any area of psychology, or if that person offers to the public or renders to individuals or to groups of individuals services defined as the practice of psychology in this Chapter.

La. R.S. § 37:2352(9).[1] The scope of this definition, and thus the prohibition in the Representation Law is breathtaking. The first thing to note is that the prohibition on using the three forbidden words ("psychology," "psychological," and "psychologist") is absolute for any title or description of services. It is only "other terms" that must imply a qualification or expertise before they are

[1] Defendants refer to this provision as Section 37:2352(10). *E.g.*, Doc. 22-1, Memorandum of Law in Support of Defendants' Joint Motion To Dismiss ("Dfs' Memo.") at 2, 8, 13. Similarly, they refer to the provision defining the "practice of psychology" as Section 37:2352(8). *Id.* at 3. Every online source that plaintiffs have consulted, including Lexis, Casetext, Justia, and the Louisiana legislature's own website (https://www.legis.la.gov/legis/Laws_Toc. aspx?folder=111&title=37) uses subsections "(9)" and "(7)" for these two provisions. That is what the complaint used, and defendants never explicitly state that the references in the complaint are wrong. Accordingly, this memorandum will continue to use the subsections that were used in the complaint.

prohibited. Thus, those who tutor high school or college students in psychology cannot call themselves "Psychology Tutors" or even describe what they do ("tutor students in psychology") without committing a misdemeanor under Louisiana law. So, too, editors, layout artists, or ad salesmen for *Psychology Today* or *Psychology Now* magazine risk charges by describing what they do or using the name of the magazine in a job title. It prohibits sports coaches from telling prospective employers that they use psychology to motivate their players. Most relevant here, it prohibits *licensed* practitioners other than licensed psychologists, like plaintiffs here, who use psychology principles to help their patients from accurately describing what they do. Indeed, remarkably enough, plaintiffs cannot even tell their patients that their services include recommending psychologists for them if needed without running afoul of the law.

The law also prohibits any terms which imply an expertise in any *area* of psychology, regardless of what words are used or whether it is in a "title" or "description of services." So the individual without a Louisiana license who claims that she has studied Freudian methods for ten years, and describes her expertise at a lecture, also has violated the Representation Law.

But that's not the worst of it. Because "offer[ing] to the public or render[ing] . . . services defined as the practice of psychology in this Chapter" *also* constitutes a prohibited representation, the Representation Law incorporates the equally broad definition of the "practice of psychology" in Section 37:2352(7). That section defines "practice of psychology" as:

> the observation, description, evaluation, interpretation, and modification of human behavior, by the application of psychological principles, methods, and procedures, for the purpose of eliminating symptomatic, maladaptive, or undesired behavior, and of improving interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health.

La. RS § 37:2352(7). Persons engaged in such activity are engaged in the practice of psychology

regardless of whether payment is made for services rendered. *Id.*

Thus, as the complaint notes (¶¶ 40-44), anyone who has studied psychology and applies its principles to aid others in behavior modification (whether or not for money) – life coaches, sports coaches, 12-step program counselors, or even parents – have "represented" themselves as licensed psychologists even if they *never* used any of the prohibited words or implied any expertise in psychology. *Cf. Serafine v. Branaman*, 810 F.3d 354, 365-70 (5th Cir. 2016) (holding that Texas's definition of "practice of psychology" was overbroad and violated the First Amendment).

Defendants dispute little of this. Instead, their efforts to circumvent the unconstitutionality of the Representation Law consists of (1) slicing and dicing the provisions of Section 37:2352(9), (2) ignoring (or misrepresenting) the allegations of the complaint, and (3) misstating the relevant authorities. Their motion should be denied.

Factual Background

The complaint in this action alleges that plaintiffs Julie Alleman and Juliet Catrett are the owners of plaintiff P. Wellness Institute, LLC, a Louisiana limited liability corporation in the City of Baton Rouge. Doc. No. 1 ("Compl.") ¶ 3. Alleman is a Licensed Professional Counselor, a Licensed Marriage and Family Therapist, and a Licensed Addiction Counselor under the laws of Louisiana. Compl. ¶ 21. Catrett is a Licensed Clinical Social Worker. Compl. ¶ 22.

Both Alleman and Catrett have studied principles, methods, and procedures of psychology and use those principles in their work at P. Wellness Institute to improve their clients' lives by supporting and encouraging them to modify their behavior. Compl. ¶¶ 21-22. Both clearly identify the licenses that they possess. They have never represented to the public or told their clients that they are licensed psychologists. Compl. ¶ 23. Louisiana law permits Alleman and Catrett to treat their

patients consistent with their professional training, including using the principles, methods, and procedures of psychology. Compl. ¶ 24.

All but one of the defendants (the "Board Defendants") are members or senior staff of the Louisiana State Board of Examiners of Psychologists (the "Board"). Compl. ¶¶ 4-9. The District Attorney for East Baton Rouge Parish (the "District Attorney"), currently Hillar Moore, III, is also a defendant. Compl. ¶ 11. All the defendants are sued in their official capacities.

P. Wellness Institute was formerly known as Psychological Wellness Institute, LLC. In January 2024, a representative of the Board apprised Alleman and Catrett that a complaint had been filed alleging that they were in violation of Louisiana law by using the word "psychological" in the name of their business. The representative further stated that a preliminary investigation had substantiated the allegations of the complaint and supported multiple violations of Louisiana law. Compl. ¶¶ 25-26. To comply with Louisiana law, Alleman and Catrett changed the name of their company to P. Wellness Institute. The Board then dismissed the complaint. Compl. ¶¶ 27-28.

Alleman and Catrett would like to change the name of their company back to Psychological Wellness Institute because the word "psychological" *accurately* describes the services they provide. Alleman and Catrett also would like to explain to their clients, when appropriate, that, although they are not licensed psychologists, they have studied psychology, psychological principles, methods, and procedures, and apply them in their treatment to help clients modify their behavior and improve their lives. Compl. ¶¶ 29, 31.

Defendants lack any reasonable basis for believing that Alleman and Catrett's use of the words psychological or psychology would mislead any potential or actual consumers or clients. Compl. ¶ 32. Despite that, in the absence of relief from this Court, the Board Defendants will charge

Alleman and Catrett with violations of Louisiana law if Alleman and Catrett change the name of their company back to Psychological Wellness Insitute or use the terms "psychological" or "psychology" in accurately describing their services to their clients and will refer Alleman and Catrett's violations of Louisiana law to defendant the District Attorney. The District Attorney, in turn, will prosecute Alleman and Catrett for those violations. Compl. ¶¶ 33-35.

Argument

The Representation Law covers both commercial and non-commercial speech, including plaintiffs' commercial and non-commercial speech. Defendants make no effort at all to justify its restriction of non-commercial speech and, accordingly, their motion should be denied on that ground alone. Moreover, their failure to acknowledge the breadth of the Representation Law's prohibitions, and their refusal to accept the truth of the allegations of the complaint, undermines both their jurisdictional and substantive arguments.

I. THE REPRESENTATION LAW RESTRICTS BOTH COMMERCIAL AND NON-COMMERCIAL SPEECH

As defendants acknowledge, commercial speech is a fairly narrow category of speech that relates *solely* to a person's economic interests or does no more than propose a commercial transaction. Dfs' Memo. 14. *Bd. of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989) (whether speech "'propose[s] a commercial transaction' . . . is the test for identifying commercial speech."); *Ocheesee Creamery LLC v. Putman*, 851 F.3d 1228, 1234 n.6 (11th Cir. 2018) ("narrow category"). The Representation Law prohibits speech outside that narrow category.

Even with respect to titles, it is hardly clear that *only* commercial speech is at issue. Titles can be expressive and convey information unrelated to the economic interests of the speaker. Defendants rely heavily on *Friedman v. Rogers*, 440 U.S. 1 (1979) for the proposition that "trade

names" are *always* commercial speech. But there, the Supreme Court concluded that a registered trade name has no inherent meaning. *Id.* at 12 ("A trade name conveys no information about the price and nature of the services offered by an optometrist . . ."). The Fifth Circuit has repeatedly distinguished *Friedman*, and limited it to its context. *E.g.*, *American Academy of Implant Dentistry v. Parker*, 860 F.3d 300, 307 (5th Cir. 2017) (citing *Friedman*, contrasting trade names with terms like "specialist" because, unlike trade names that convey no information, "[t]he term 'specialist' . . . is not devoid of intrinsic meaning"); *Gibson v. Texas Dept. of Insurance – Division of Workers' Compensation*, 700 F.3d 227, 235-36 (5th Cir. 2012) (declining to decide whether a domain name that used words prohibited under Texas law is commercial speech; "Cases involving trademark infringement involve inherently deceptive speech because they contain a significant risk that an infringing party will freeload on the goodwill that has been created by the original trademark . . . Accordingly, the case law cited by [the government agencies] is inapposite") (citing *Friedman*).[2]

Here, even as to titles, the law proscribes commercial and non-commercial speech. Plaintiffs here might be using their title to sell their services to potential clients, but they might also be using it in speaking with other mental health professionals. Or filling out a form that seeks the name of their business at their dentists' office. Similarly, the ad salesman for *Psychology Today* is not proposing a commercial transaction every time he communicates his title to someone. He might be

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[2] Similarly, in *Matal v. Tam*, 582 U.S. 218 (2017), the Supreme Court declined to decide whether the use of *The Slants* as the name of a rock band, which the lead singer claimed expressed views on social issues, was commercial speech. *Id.* at 245. (The Federal Circuit had concluded that it was not commercial speech. *Id.* at 229.) In cases like *Matal* and *Gibson*, the courts declined to decide whether the titles were commercial speech because the laws violated the First Amendment even if they were. Since, as shown below, the complaint's allegations demonstrate that Louisiana's law is similarly unconstitutional, even as to commercial speech, the court can deny defendants' motion without resolving that question here as well.

speaking to co-workers or at a convention of magazine ad sales representatives.

But the prohibition in the Representation Law on using "psychology," "psychological," and "psychologist" is not limited to titles. The law prohibits their use even in a description of services. Of course, a description of services *might* be commercial speech. One could describe one's services to potential clients in an advertisement in an effort to attract more business. But that is hardly the only situation where such descriptions can be made. One can also describe services to *existing* clients to describe what is being done (as plaintiffs here allege they would like to do). The psychology tutor who uses the words "psychological" or "psychology" to describe what she is teaching is not engaged in commercial speech even though she may be getting paid. *E.g.*, *Bd. of Trustees v. Fox*, 492 U.S. at 482 (while "tutoring, legal advice, and medical consultation provided (for a fee) . . . consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction which is what defines commercial speech.") (emphasis in original).

Moreover, the "practice of psychology" is not commercial speech *at all*, as the Fifth Circuit explained in *Serafine*, even when it is paid speech (which is *not* a requirement under Section 37:2352(7)). *Serafine*, 810 F.3d at 365 ("providing psychological services . . . is not commercial speech. Commercial speech is speech 'that *proposes* a commercial transaction, not 'speech for profit.'"). Indeed, the Representation Law's coverage of non-commercial speech is even clearer than the Texas law at issue in *Serafine*; the Texas law (unlike Louisiana's) included offers to provide psychological services in its definition of the "practice of psychology." *Id.* The scope of non-commercial speech under the Texas law was also *narrower* since it only applied to speech based on knowledge and principles "acquired in an organized program of graduate study" and "the standards of ethics established by the profession." *Id.* at 366. Neither of those limitations appear in Louisiana's

definition of the practice of psychology or, accordingly, the Representation Law.

II. DEFENDANTS' JURISDICTIONAL ARGUMENTS ARE MERITLESS

Defendants move to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1). They argue that (1) plaintiffs only have standing to challenge the part of the Representation Law that limits the use of titles (Dfs' Memo. 7-11) and (2) the Board Defendants have sovereign immunity (Dfs' Memo. 12-13). These arguments are meritless.

Before demonstrating this, though, two curious aspects of the argument deserve mention. First, defendants argue that the jurisdictional argument is dispositive of the entire complaint. *E.g.*, Dfs' Memo. 1 ("Jurisdiction can be both first and last here"). *Id.* at 2, 7. But defendants concede that plaintiffs are being harmed by what they call the "Title Provision." And they never explain why plaintiffs cannot seek relief against the District Attorney for that ongoing harm. To the contrary, they concede that the District Attorney has authority to prosecute the misdemeanor crimes that they would be committing if they were to use the prohibited words in their title, *id.* at 3, 13, and they do not dispute his willingness to prosecute future violations (Compl. ¶¶ 34-35). *See also* Dfs' Memo. 19 ("all counts are barred by the Boards' [sic] sovereign immunity"). Thus, they have not even *argued* a basis for dismissing the entire complaint for a lack of subject matter jurisdiction.

Second, defendants claim that their Rule 12(b)(1) motion is a "factual" attack on jurisdiction. Dfs' Memo. 6. But they have submitted no evidence with their motion and it is altogether unclear what "facts" they are relying upon (other than the hiring date of one of the defendants, Dfs' Memo. 8 n.3, a fact both irrelevant and unsupported) to make this "factual" attack. Accordingly, defendants' "Rule 12(b)(1) motion should be granted only if it appears certain that plaintiff[s] cannot prove a plausible set of facts that establish subject-matter jurisdiction." *Davis v. United States*, 597 F.3d 646,

649 (5th Cir. 2009) (cleaned up). *See Mi Familia Vota v. Ogg*, 105 F.4th 313, 319 (5th Cir. 2024).

A. Plaintiffs Have Standing

Article III standing has three elements: (1) an injury-in-fact, (2) a sufficient causal connection between defendants' actions (or likely future actions) and the injury, and (3) the likelihood that the injury will be redressed by a favorable decision. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). While the injury must be concrete and particularized, future injuries are sufficient for Article III standing if there is a substantial risk that they will occur. *Id.* at 158. Plaintiff bears the burden on standing, but the elements of it are demonstrated with the manner and degree appropriate for the relevant stage of the litigation. *Id.* Thus, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plurality op.) (cleaned up).

A plaintiff may challenge the enforcement of a law without actually violating it. *Susan B. Anthony List*, 573 U.S. at 158-59. It is sufficient for a plaintiff to express an intention to engage in a course of conduct prohibited by the law where there is a credible threat of prosecution. *Id.* at 159; *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (Dfs' Memo. 8) ("once a plaintiff has shown more than a 'subjective chill'—that is, that he 'is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure'—the case presents a viable 'case or controversy' under Article III").

Plaintiffs meet these standards here. They allege that they would like to change the title of P. Wellness Institute back to Psychological Wellness Institute, and that they would like to explain

to their clients their familiarity with, and use of, psychology in describing the services they are providing. Compl. ¶¶ 29, 31. The complaint also alleges facts suggesting a credible threat of prosecution because it alleges that plaintiffs *already* have been threatened with prosecution and were forced to change the name of their company as a consequence. Compl. ¶¶ 26-27. In short, they allege both past and ongoing injuries from the Representation Law that defendants enforce and that an injunction precluding enforcement will remedy.

Defendants' argument to the contrary goes as follows: (1) there is no general prohibition on "representing" oneself as a psychologist, but rather three different prohibitions on using titles, describing services, and engaging in the practice of psychology, (2) plaintiffs are only harmed by the prohibition on using titles, and therefore (3) plaintiffs lack Article III standing to challenge the provisions on describing services and engaging in the practice of psychology. Each of these arguments is wrong.

1. Defendants Cannot Slice And Dice The Representation Law. – The Representation Law (Section 37:2360) prohibits a person not licensed to represent himself as a psychologist. Section 37:2352(9) then gives additional details on that prohibition by describing the words that one can use to so represent oneself. According to defendants, this actually amounts to three separate prohibitions: words 25-28 in Section 37:2352(9) constitute a "Title Provision"; words 30-32, a "Services Provision"; and words 67-92, a "Practices Provision." Dfs' Memo. 2-3.

Defendants offer no citation for this proposition that the Representation Law is actually three separate provisions, and plaintiffs are unaware of any Louisiana law to this effect. Defendants cite cases like *Murthy v. Missouri*, 603 U.S. 43 (2024) for the proposition that plaintiffs must have standing for each form of relief they seek against each defendants. Dfs' Memo. 8. In *Murthy*,

plaintiffs claimed that various government officials had pressured social media platforms to censor their speech; in reviewing a preliminary injunction issued after extensive discovery (*id.* at 54), the Court cited the "standing for each form" proposition to support its holding that it was plaintiffs' burden to show "that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff 's speech on that topic." *Id.* at 61. Here, plaintiffs have alleged what the role of the Board (and the District Attorney) is in enforcing the law against "representation"; they want a judgment preventing defendants from doing so. *Murthy* has nothing to do with slicing up parts of a statute.[3]

Defendants' division of the Representation Law is particularly inappropriate here, where plaintiffs are making a facial challenge because of the statute's overbreadth. Such challenges rely on the statute's unconstitutional application to other people. Defendants claim that plaintiffs cannot make an "overbreadth" challenge here, but, as shown below, they are simply wrong.

2. Defendants Misstate Plaintiffs' Interests And Standing. – Paragraphs 30 and 31 of the complaint allege that, although they do not currently use forms of the word "psychology" in describing their services to their clients, they "would like to explain to their clients, when appropriate, that, although they are not licensed psychologists, they have studied psychological principles, methods, and procedures, and apply them in their treatment to help clients modify their behavior and improve their lives." In paragraphs 33-35, plaintiffs allege that the defendants will take

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[3] Defendants' other authorities are no more helpful. In *California v. Texas*, 593 U.S. 659 (2021), the state plaintiffs claimed an injury from provisions they were not challenging as illegal. *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014), has nothing to do with standing at all, much less the proposition for which defendants cite it. There, the Fifth Circuit held that plaintiffs *had* standing to challenge Mississippi's election disclosure laws, but the record was not sufficiently complete for them to succeed on their as-applied challenge. *Id.* at 291-92. The court also rejected their facial challenge, but, again, not on standing grounds. *Id.* at 301.

various adverse actions against them if they "use the term 'psychological' in accurately describing their services to their clients."

These paragraphs plainly allege that plaintiffs have standing to challenge what defendants call the "Services Provision." Plaintiffs are "seriously interested" in disobeying the prohibition in the Representation Law against using certain words in describing their services, and defendants are "seriously intent on" enforcing it. *Justice*, 771 F.3d at 291. Defendants' arguments to the contrary on standing are meritless.

Defendants first point to the complaint's allegations that they do not *currently* use the term "psychological" in describing their services. Dfs' Memo. 11. But that is because Louisiana law forbids them from doing so. Plaintiffs are not obligated to violate the law to have standing. Plainly, they have alleged that the Representation Law has chilled their *speech about* their services. *Compare* Dfs' Memo. 11 ("Plaintiffs do not allege their *services* have been chilled . . .") (emphasis added).

They also argue that "Plaintiffs do not allege anywhere that they actually intend to apply [psychological] principles, methods, or procedures." *Id.* (As with many of their misreadings of the complaint, defendants cite "¶¶ 1-48" to support this baseless proposition.) This ignores that, in paragraphs 21 and 22 of the complaint, each of the plaintiffs alleges that she has "studied principles, methods, and procedures of psychology and *uses those principles in her work at P. Wellness Institute to improve her clients' lives*" (emphasis added). Not only does the complaint allege that they *intend* to apply the principles, it alleges that they are doing so. Similarly, defendants' contention that it is "entirely ambiguous . . . whether Plaintiffs actually apply those principles in their therapeutic treatments" (Dfs' Memo. 5) is just a stubborn refusal to read the complaint.

3. Plaintiffs Have Standing To Make A Facial Challenge. – Even if defendants

were correct in their other arguments, plaintiffs have standing to make a facial overbreadth challenge and thus can challenge the Representation Law as a whole (and all of its applications). *Bd. of Trustees v. Fox*, 492 U.S. at 484 ("The First Amendment doctrine of overbreadth is designed as a 'departure from traditional rules of standing'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). It "enable[s] persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" *Id.* (quoting *Broadrick*).

Defendants argue that the overbreadth doctrine does not apply to commercial speech (Dfs' Memo. 19). That is irrelevant because the overbreadth doctrine *does* apply to statutes that regulate both commercial and non-commercial speech.

Fox was just such a case. There, the Court considered a challenge to a university regulation that prohibited the operation of private commercial enterprises in university facilities, including student dormitories. Although the Court held that the principle type of speech that was at issue – Tupperware parties – was commercial speech (492 U.S. at 474-75), it held that the overbreadth doctrine was still applicable. "Although it is true that overbreadth analysis does not normally apply to commercial speech . . . that means only that a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground . . ." *Id.* at 481. Since the regulation also reached non-commercial (even if "for profit") speech, overbreadth analysis could still be applied. *Id.* at 483.

Thus, even if defendants' other arguments were correct, plaintiffs have standing to challenge the overbreadth of the entire Representation Law because it proscribes non-commercial as well as commercial speech. *See also Serafine*, 810 F.3d at 365 (addressing the overbreadth challenge

because prohibition on providing psychological services applied to both commercial and non-commercial speech).

B. Defendants' Sovereign Immunity Argument Is Wrong

Defendants also argue that the Board Defendants have sovereign immunity. Defendants err because they fail to meet their burden to show that the Board is an arm of the state and because the *Ex Parte Young* exception is applicable here.

1. Defendants Fail To Meet Their Burden Of Showing That The Board Is An Arm of the State. – Eleventh Amendment immunity precludes nonconsenting states from being sued in federal court under most circumstances. It also extends to those state agencies that are "arms of the state." An entity claiming that it is an arm of the state bears the burden. *Bonin v. Sabine River Authority, State of Louisiana*, 65 F.4th 249, 253 (5th Cir. 2023). There is no bright-line test in the Fifth Circuit. *Id.* at 254. Rather, courts exercise their reasoned judgment, applying the six factors from *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). *Bonin*, 65 F.4th at 254. Those factors include (*inter alia*) how state statutes and state case law characterize the agency, its source of funds, and its degree of local autonomy. *Id.*

Defendants very brief argument (Dfs' Memo. 12) mentions none of the *Clark* factors. Dfs' Memo. 13. Indeed, as noted previously, although they call their jurisdictional challenge a "factual" one, they have submitted no evidence in support of it. *Cf. Farmer v. Mouton*, 2017 U.S. Dist. LEXIS 69707, at *18 (E.D. La. May 8, 2017) (holding that the Louisiana State Board of Medical Examiners is an arm of the state with Eleventh Amendment immunity after going through all six *Clark* factors, although concluding that it is a "close question"). Accordingly, they simply fail to meet their burden

that the Board is an "arm of the state" entitled to Eleventh Amendment immunity.[4]

2. *Ex Parte Young* Is Applicable. – Even if the Board itself has Eleventh Amendment immunity, plaintiffs have sued the Board members and staff in their official capacities, for prospective injunctive relief, a well-known exception to the Eleventh Amendment based on *Ex Parte Young*, 209 U.S. 123 (1908).

To invoke this exception, plaintiffs must sue an individual with "some connection with the enforcement" of the statute, a standard that the Fifth Circuit has struggled to define. *Jackson v. Wright*, 82 F.4th 362, 367 (5th Cir. 2023). It has identified some guideposts, though. First, "[a]ll that is required is a mere scintilla of enforcement by the relevant state official with respect to the challenged law." *Id.* (cleaned up); *Roake v. Brumley*, 2024 U.S. Dist. LEXIS 205050, at *81 (M.D. La. Nov. 12, 2024) (deGravelles, J.). Second, an official must have more than the general duty to see that the laws of the state are implemented. *Jackson*, 82 F.4th at 367.

Here, the Board Defendants meet these requirements. They are specifically authorized to investigate and seek injunctive relief for any violations of Chapter 28 in a court. La. R.S. § 37:2361. That is both more than a scintilla of enforcement authority and more than a general duty to enforce Louisiana law in general.

Defendants nonetheless contend that the Board Defendants are not suable under the *Ex Parte*

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[4] Defendants do cite *Cerwonka v. Louisiana*, 2018 U.S. Dist. LEXIS 65827 (W.D. La. March 26, 2018), *report adopted*, 2018 U.S. Dist. LEXIS 65651 (W.D. La. Apr. 18, 2018), which held that the Board was entitled to Eleventh Amendment immunity in 2018. The Court in *Cerwonka* made no mention of most of the *Clark* factors, including the degree of local autonomy or the authority to sue or be sued in its own name, or its right to hold and use property. Accordingly, plaintiffs respectfully submit that it should not be followed. *Farmer*, 2017 U.S. Dist. LEXIS 69707, at *8-*9 (finding earlier cases with respect to the Board of Medical Examiners unpersuasive because they failed to evaluate the *Clark* factors).

Young exception because they have discretion to investigate and seek relief, and because the District Attorney also has authority to prosecute offenders. Dfs' Memo. 12-13. The first argument is strikingly counterintuitive. First, if the mere existence of discretion were sufficient to override the *Ex Parte Young* exception, there would be little of it left. Most government officials have *some* discretion. Prosecutors, for example, usually have discretion to prosecute offenses (often called "prosecutorial discretion"). Second, the Board Defendants have *already* exercised their discretion to enforce the Representation Law against *these plaintiffs*. Third, virtually every case challenging licensing schemes is brought against the board that enforces the scheme. *E.g.*, *Express Oil Change, L.L.C. v. Mississippi Bd. Of Licensure for Professional Engineers & Surveyors*, 916 F.3d 483 (5th Cir. 2019); *Parker*, 860 F.3d at 305 (suing various officials of the Texas State Board of Dental Examiners); *Serafine*, 810 F.3d at 357-58 (suing various officials of the Texas State Board of Examiners of Psychologists); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (suing various officials of the Texas Board of Architectural Examiners).

Defendants cite two authorities to support their argument, *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019) and *Mi Familia Vota*, 105 F.4th at 313. Neither helps them. *City of Austin* involved a state law that preempted a city law that precluded landlords from refusing tenants who want to pay rent with federal housing vouchers. Attorney General Paxton could only "enforce" the law by defending it through intervention in a private lawsuit seeking to enforce the city's prohibition. *City of Austin*, 943 F.3d at 1000 & n.1. The Fifth Circuit held that past examples of Paxton intervening to defend the supremacy of *other* state laws over contrary municipal laws was insufficient to show he would do so with the law in question, and, that the City would face no threat of prosecution or any adverse action even if he did. *Id.* at 1002. Similarly, in *Mi Familia Vota*, the

court concluded that the general duty of local prosecuting attorneys "to see that justice is done" was not sufficiently specific and imposed only a general duty. *Mi Familia Vota*, 104 F.4th at 328.

Moreover, *Mi Familia Vota* did not hold that the specific (as opposed to general) duty was a prerequisite, but only one of three "guideposts" to determine the propriety of an *Ex Parte Young* lawsuit. The other two were the state official's demonstrated willingness to exercise that duty and whether the state official constrains a person to obey the challenged law. *Id.* at 325. The court went on to examine the application of those factors, *id.* at 329-33, which would have been pointless if the first guidepost were dispositive. Here these factors militate in favor of a suit against the Board Defendants. They *already* have told plaintiffs that they were in violation of the law, threatened adverse consequences, and essentially forced plaintiffs to change the name of their company. *Cf. id.* at 332 ("We focus our attention on [defendant local district attorney's] actions."); *City of Austin*, 943 F.3d at 1001 (distinguishing a case where Paxton had sent threatening letters that plaintiff was in violation of a specific Texas law).

Finally, the argument that the Board Defendants cannot be proper *Ex Parte Young* defendants because the District Attorney has authority to bring criminal charges is meritless. In the part of *City of Austin* they rely upon, the court was discussing *Morris v. Livingston*, 739 F.3d 740 (5th Cir. 2014), where plaintiffs had sued the Governor of Texas challenging the constitutionality of a statute that had specifically given enforcement authority to the Texas Department of Criminal Justice. Nothing in *Morris* or *City of Austin* suggests that state law cannot give specific civil enforcement authority to one set of officials (here, the Board Defendants) and criminal enforcement to a different

state official (the District Attorney).[5]

III. THE COMPLAINT ADEQUATELY ALLEGES CLAIMS FOR FREE SPEECH VIOLATIONS

The complaint alleges that Louisiana law prohibits plaintiffs from saying things that are true about what they do: they provide services based in psychology. Defendants' Rule 12(b)(6) motion simply ignores the allegations of the complaint *and* Louisiana law.

On a Rule 12(b)(6) motion, while the court need not accept conclusory or legal conclusions, it nonetheless must "accept all well-pled facts as true" and construe "all reasonable inferences in the complaint in the light most favorable to the plaintiff." *Tesla, Inc. v. Louisiana Automobile Dealers Ass'n*, 113 F.4th 511, 522 (5th Cir. 2024) (cleaned up).

A. The As-Applied Claim

The complaint alleges that plaintiffs have studied psychological principles and use those

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[5] Defendants also make two frivolous footnote arguments. Citing *Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999), defendants suggest that the complaint misnames the District Attorney for East Baton Rouge Parish as a defendant. Dfs' Memo. 4 n.1. *Hudson* stands only for the proposition that Louisiana law requires suit to be brought against an officer, and not an office. It says nothing about *how* to name the officer. That is covered by Fed. R. Civ. P. 17(d) ("may be designated by official title"), which would trump Louisiana law even if it were to the contrary. *Hanna v. Plumer*, 380 U.S. 460 (1965).

Second, and relatedly, defendants assert that the Board's executive counsel "was not even hired by the Board until June 11, 2024" and thus is not an appropriate defendant. Dfs' Memo. 8 n.3. Aside from the fact that the hiring is not mentioned in the complaint and not supported by any submission of evidence, the argument ignores that this is a lawsuit for prospective injunctive relief, which can only be obtained against the current occupant of an office. *Waid v. Earley*, 960 F.3d 303, 334 (6th Cir. 2020) (Governor Whitmer was proper *Ex Parte Young* defendant for ongoing harms caused by unconstitutional conduct prior to her taking office; "it does not matter what Whitmer *personally* did or did not do in the past, or even in the present"). That is why Fed. R. Civ. P. 25(d) requires a successor officer be "automatically substituted" when a public officer sued in an official capacity ceases to hold office. *See also* 1961 Advisory Committee Notes to Rule 25 (amended rule requiring substitution will apply to suits "to prevent officers . . . from enforcing unconstitutional enactments") (citing *Ex Parte Young*).

principles in their practice to help their clients, and that Louisiana law permits this. Compl. ¶¶ 21-22, 24. They would like to state this truth to their clients; moreover, referring to their services as psychological would be "accurate," and, accordingly, defendants have no reasonable basis for believing that describing their services in this way would mislead anyone. Compl. ¶¶ 29, 31-32. These allegations state a claim that the Representation Law violates the First Amendment as applied *even if* all of the speech in question were commercial speech.

1. Commercial Speech. – The First Amendment protects commercial speech. Under the test first set down in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980), that speech must concern lawful activity and not be misleading. If it is, then courts must ask whether the regulation of it directly serves a substantial interest and is not more extensive than is necessary to serve that interest. *Id.* at 566. The government bears the burden of justifying any regulation. *Parker*, 860 F.3d at 306.

Here, the complaint alleges that the speech plaintiffs would like to engage in concerns their lawful activity and is not misleading. It alleges that they use psychological principles in their practice to help their clients, and thus it is perfectly true that their services are "psychological." They do not represent themselves as licensed psychologists.

Instead of accepting these allegations as true, defendants simply ignore them and make up their own. Dfs' Memo. 1 (plaintiffs' business does "not [provide] psychological services"), 2 ("Plaintiffs readily admit they do not engage in the practice of psychology"), 4 ("They also allege that . . . they do not engage in the practice of psychology"). Indeed, they ignore their own standing argument. Dfs' Memo. 10 (arguing that plaintiffs have no standing to challenge the so-called "Practices Provision" because Louisiana law permits them to use principles of psychology).

Whether plaintiffs may engage in the *practice* of psychology, as defined in La. R.S. § 37:2352(7), is not really relevant, but an appropriate reading of the complaint (and Louisiana law) suggests that they come pretty close. The complaint alleges that plaintiffs use "principles, methods, and procedures" of psychology to help clients modify their undesired behavior. That certainly sounds a great deal like the definition in Section 37:2352(7).

Moreover, Louisiana law certainly suggests that licensed professional counselors and licensed clinical social workers can engage in treatment that fits the definition of the practice of psychology. Licensed professional counselors can treat "mental, emotional, behavioral, and addiction disorders." La. R.S. § 37:1103(5), (7) (definitions of "licensed professional counselors" and "mental health counseling services"). Licensed clinical social workers may treat people "to restore or enhance social, psychosocial, or biopsychosocial functioning." La. R.S. § 37:2708(B). Each of the statutes authorizes those professionals to use "psychotherapy," *id.*, which is a technique specifically included in the "practice of psychology." *See also* La. AG Op. 11-0276, 2012 La. AG LEXIS 208, at *7 (Oct. 12, 2012) (noting that "psychotherapy" is defined in a medical dictionary as the "[t]reatment of emotional, behavioral, personality, and psychiatric disorders based primarily upon verbal or nonverbal communication and interventions with the patient").

Perhaps most tellingly, La. R.S. § 37:2365 states that other licensed professionals "shall be permitted to render services consistent with their professional training and code of ethics. . ." Plainly, there would be no *point* to this section if there were not at least some question as to whether the practice of other professionals constituted the practice of psychology. One does not need an exemption from a rule if it is not applicable in the first place. *See also* La. AG Op. 11-0276, 2012 La. AG LEXIS 208, at *14 (rejecting objection by the Board of Examiners of Psychologists to new

rules promulgated by the Professional Counselors Board of Examiners that specified coursework for Licensed Marriage and Family Therapists in psychotherapeutic services and psychopathology; the Psychologists Board claimed that the rules violated the statute governing the practice of psychology, but the opinion notes that Section 37:2365 precludes any such argument).[6]

But, again, whether plaintiffs engage in the *practice* of psychology is irrelevant. It is enough that they offer psychological services, and the complaint alleges that they do because they apply psychological principles, methods, and procedures in working with their patients. Again, Louisiana law strongly suggests that licensed professionals like plaintiffs can provide psychological services. *Compare* La. R.S. § 37:2356.4(C) ("psychological services. . . includ[e] diagnosis for the purpose of offering mental health counseling and psychotherapy services for treatment and prevention of mental, emotional, behavioral, and addiction disorders") *with* La. R.S. § 37:1103(7) (mental health counseling performed by licensed professional counselors involves diagnosis and treatment of "mental, emotional, behavioral, and addiction disorders" and can include psychotherapy).

Courts, including the Fifth Circuit, have held that the First Amendment generally precludes states from prohibiting the use of specified words. *E.g.*, *Express Oil Change*, 916 F.3d at 493 (holding that ban on using the term "engineers" for those not licensed as engineers by the state violated the First Amendment rights of a business that used the name "Tire Engineers"); *Parker*, 860 F.3d at 312 (holding that law prohibiting dentists from using the words "specialty" or "specialist"

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[6] Defendants point out that each of the licensing chapters for professional counselors (Chapter 13) and social workers (Chapter 35) has a provision stating that "nothing in *this* chapter" (emphasis added) authorizes anyone to engage in the practice of psychology. Dfs' Memo. 5 n.2. (No such provision appears in Chapter 50-A, governing addiction counselors.) That authorization – permission to engage in certain conduct even if it otherwise would constitute engaging in the practice of psychology – comes from Section 37:2365, which is in Chapter 28.

unless they were certified in a specialty by a board accredited by the American Dental Association violated the First Amendment); *Gibson*, 700 F.3d at 237 (holding that attorney that used "Texas" and "Workers' Comp." in a domain name in violation of a state law prohibiting use of those words stated a claim under the First Amendment); *Byrum*, 566 F.3d at 448 (holding that law prohibiting unlicensed interior decorators from advertising their services using the phrases "interior designer" or "interior design" likely violated First Amendment); *Abramson v. Gonzales*, 949 F.2d 1567, 1578 (11th Cir. 1992) (holding that law that precluded unlicensed psychologists, clinical social workers, and therapists from holding themselves out by any title or description incorporating (*inter alia*) the words "psychologist," "psychology," and "psychological" violated First Amendment); *Eckles v. Kulongoski*, 1994 U.S. Dist. LEXIS 22111, at *31 (D. Oregon Apr. 26, 1994) (holding that statute prohibiting unlicensed individuals from using various terms associated with psychology violated the First Amendment). And although defendants are correct that the "as applied" challenge in *Serafine* involved political speech, the Fifth Circuit also found that the plaintiff there (who was *not* a licensed psychologist but had published in psychological journals) had "a 'strong argument' that calling herself a psychologist on her campaign website was not misleading." *Serafine*, 810 F.3d at 362.

In many ways, these are *a fortiori* cases. Several only prohibited people from "holding themselves out" by using prohibited words, which is narrower (and more focused on commercial speech) than the Representation Law. The law in *Express Oil* only prohibited the use of a *job title* ("Engineers") and not other related words, as the Representation Law does. *Abramson* involved *unlicensed* clinical social workers, and the Eleventh Circuit held that precluding them from using the word "psycholog*ist*" violated the First Amendment. Plaintiffs here are licensed, and do *not* refer to themselves as psychologists.

Defendants claim that use of *any* form of the word psychology is "inherently" misleading, but the few binding cases they cite (Dfs' Memo. 16-17) do not support their argument. *Joe Conte Toyota v. La. Motor Vehicle Comm'n*, 24 F.3d 754 (5th Cir. 1994) involved the use of the word "invoice"; the district court had concluded that the term was misleading *after a trial*, *Joe Conte Toyota v. Benson*, 1993 U.S. Dist. LEXIS 4709, at *1 (E.D. La. Apr. 6, 1993), *aff'd*, 24 F.3d 754 (5th Cir. 1994), and the Fifth Circuit relied heavily on the "[a]mple evidence in the record" (24 F.3d at 756) to affirm that judgment. *See also Express Oil*, 916 F.3d at 491 ("based on . . . our own precedent, the Board was required to present evidence of deception") (citing *Joe Conte Toyota*); *Gibson*, 700 F.3d at 237 (holding that domain name was neither inherently nor actually misleading because "there is no history" and "no factual findings") (citing *Joe Conte Toyota*). *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982) similarly involved the affirmance of a decision made *after* discovery, in which the district court had concluded that it would be misleading for doctors without a Doctor of Medicine degree to use "M.D." Again, plaintiffs do not call themselves psychologists.

Defendants purport to go through the other *Central Hudson* factors, Dfs' Memo. 17-19, but their analysis all pretends that the Representation Law only prohibits unlicensed individuals from calling themselves psychologists, when it plainly prohibits far more. Assuming that defendants have a substantial interest in preventing misleading advertising, they present no plausible argument why prohibiting the words "psychology" or "psychological" directly advances that interest, much less why any potential consumer misunderstanding could not be mitigated with a disclaimer. *E.g.*, *Express Oil*, 916 F.3d at 493; *Parker*, 860 F.3d at 311.

2. Non-Commercial Speech. – The Representation Law also restricts plaintiffs' non-commercial speech, *e.g.*, they cannot describe their services to their clients (*i.e.*, their treatment)

using the prohibited words. Accordingly, the Representation Law is content-based. *E.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws [are] those that target speech based on its communicative content"); *Otto v. City of Boca Raton*, 981 F.3d 854, 863 (11th Cir. 2020) (local ordinance prohibiting certain kinds of therapy was content-based because whether "therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it."). Content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly-tailored to serve compelling state interests. *Reed*, 576 U.S. at 163. No lower standard is applied to speech within a professional relationship. *Hines v. Pardue*, 117 F.4th 769, 775 (5th Cir. 2024).

Defendants make no effort to defend the Representation Law under strict scrutiny, and little wonder why. A law that prohibits *any* use of the prohibited words in describing a service, regardless of whether it is even remotely misleading – "Before we meet again, I'm going to speak to a psychologist colleague about your case" – is not narrowly-tailored to protect consumers.

B. Facial Challenge

Again, because defendants do not acknowledge that the Representation Law restricts both commercial and non-commercial speech, they make no effort to dispute the law's overbreadth. It would be hard for them to do so since *Serafine* already has held that a *narrower* law was overbroad and violated the First Amendment. *Serafine*, 810 F.3d at 369-70 ("By limiting the ability of individuals to dispense personal advice about mental or emotional problems . . . [the practice of psychology law] chills and prohibits protected speech. But that is precisely what the overbreadth doctrine is meant to prevent.").

IV. EVEN IF A CLAIM FAILS TO STATE A CLAIM FOR RELIEF, PLAINTIFFS SHOULD BE GIVEN THE OPPORTUNITY TO REPLEAD

Defendants' motion also asserts that the complaint does not provide enough detail. *E.g.*, Dfs' Mot. 4 ("Plaintiffs say little about their counseling practice"), 5 ("Nor do Plaintiffs say much about their services"), 5 ("[I]t remains entirely ambiguous what psychological principles, methods, and procedures were studied [and] what those services actual are"). Defendants are wrong in suggesting that a complaint must offer evidentiary details. Rule 8(a) requires only a short, plain statement of facts. *Wolcott v. Sebelius*, 635 F.3d 757, 770 (5th Cir. 2011) ("[Plaintiff] has no duty to present evidence upon filing a complaint; it must merely plead a short and plain statement of the grounds for jurisdiction, the claim that entitles it to relief, and a demand for relief sought.").

Even if defendants were correct, the appropriate action would be to allow plaintiffs to replead their claims. *E.g.*, *Garig v. Travis*, 2021 U.S. Dist. LEXIS 122430, *77 (M.D. La. June 30, 2021) (deGravelles, J.) (granting leave to amend in accordance with the "wise judicial practice" and general rule); *Fetty v. La. State Bd. of Private Sec. Examiners*, 611 F. Supp. 3d 230, 249 (M.D. La. 2020) (deGravelles, J.) ("'[A] court ordinarily should not dismiss the complaint except after affording every opportunity to the plaintiff to state a claim upon which relief might be granted.'") (quoting *Byrd v. Bates*, 220 F.2d 480, 482 (5th Cir. 1955)).

Conclusion

For the foregoing reasons, defendants' motion to dismiss should be denied.

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