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The Truth Behind “Truth in Advertising” Laws: A Constitutional Analysis of Louisiana’s Restrictions on Physician Advertising

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I. INTRODUCTION

When Amy Sanders decided to undergo laser hair removal, she chose a medical spa owned by a physician who described himself as a “skin-care specialist.”¹ It was only after she received second and third-degree burns from this procedure that she discovered that the owner of the medical spa, and thus the doctor who trained the technician who performed the laser treatment, was actually an emergency room doctor.² Unfortunately, Amy is not the only patient with such a story. Kristen Cortland’s gynecologist administered injections to correct Kristen’s under-eye bags that resulted in a noticeable indentation under her eye that she would need to have surgically removed.³

It seems obvious that given the choice, Amy and Kristen, along with most patients, would have chosen to have these procedures performed by a board-certified cosmetic surgeon with hundreds of hours of specialty training in cosmetic procedures instead of a doctor with no similar specialty training.⁴ However, the current laws in Louisiana do not allow all board-certified doctors to advertise as being board-certified.⁵ Thus, for example, a board-certified cosmetic surgeon cannot advertise his or her credentials, leading the public to view that doctor no differently from the emergency room doctor or gynecologist also performing cosmetic procedures. These examples illustrate how patients in Louisiana are prevented from making fully informed decisions regarding their health care and choice of physicians because of the inability of physicians to advertise truthfully the full extent of their medical training.

Current law in Louisiana effectively allows physicians to advertise as being board-certified only if they are certified by one of two boards.⁶ While there are many other certifying boards that doctors choose for certification, Louisiana law does not allow these doctors to

1. Lisa Lombardi, *Cosmetic Surgery Boom Revamps Doctors’ Offices*, CNN HEALTH, (Dec. 2, 2009), <http://www.cnn.com/2009/HEALTH/12/02/plastic.surgery.cosmetic.risks/index.html>. This Comment uses the changed patient names as provided by Lombardi and CNN.

2. *Id.*

3. *Id.*

4. One requirement to achieve board certification by the American Board of Cosmetic Surgery is to perform at least 300 individual cosmetic surgery procedures during a period of one year. For a complete list of the requirements, see *8 Facts About ABCS Surgeons*, AM. BD. COSMETIC SURGERY, <https://www.americanboardcosmeticsurgery.org/patient-resources/choose-abc-surgeon/> (last visited Mar. 24, 2020).

5. See LA. R.S. 37:1285(A)(32) (effective July 1, 2015).

6. See *id.*

advertise themselves as being board-certified, thus restricting their free speech rights and harming patients in the process.⁷ As new jurisprudence emerges regarding commercial speech and as new medical specialties arise, it becomes increasingly important to reevaluate the current state of Louisiana laws to ensure that restrictions on physician advertising evolve consistently with developing case law and medical specialties.

This Comment analyzes Louisiana’s current restrictions on physician advertising and explains how these restrictions violate physicians’ commercial speech rights. Part II discusses the importance of board certification and explains the current law in Louisiana regarding physician advertising. Part III explains the parameters of the commercial speech doctrine and how it has been applied in cases of professional advertising. Part IV applies the commercial speech doctrine to Louisiana’s law and explores the ways in which these restrictions harm both the public and Louisiana’s physicians. Part V discusses additional benefits in allowing more expansive advertising. Finally, Part VI proposes possible legislative solutions that will allow more expansive commercial speech and will still protect the public.

II. ADVERTISING AS A BOARD-CERTIFIED PHYSICIAN IN LOUISIANA

A. *Importance of Board Certification*

In order to recognize the significance of allowing physicians to advertise themselves as board-certified, it is important to understand what exactly board certification is. In order to practice medicine in the United States, a physician needs to have completed medical school, met the applicable residency requirements, and be licensed in the state that they intend to practice based on approval from the state medical board.⁸ Board certification is not required.⁹ Even so, approximately 90% of physicians in the United States are board-certified¹⁰ and

7. The free speech rights discussed in this Comment are commercial speech rights protected under the First Amendment.

8. *8 Facts About ABCS Surgeons*, *supra* note 4.

9. *Not All Physicians Are Board Certified in the Specialties They Practice*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/physician-board-certified-specialties> (last visited Mar. 24, 2020).

10. Trisha Torrey, *What Is Medical Board Certification?*, VERY WELL HEALTH, <https://www.verywellhealth.com/what-is-medical-board-certification-2615005> (last updated Feb. 22, 2020).

many of those physicians hold more than one certification.¹¹ “[B]oard certification implies that physicians have gone above and beyond these demands to be considered qualified leaders in their specialties.”¹²

Boards or groups of boards typically establish the requirements that physicians must meet for board certification.¹³ Each board has its own requirements, which typically include a minimum hours requirement of practical experience as well as an exam.¹⁴ One of the largest, most widely recognized boards is the American Board of Medical Specialties (ABMS), which is composed of twenty-four member boards.¹⁵ However, a doctor may choose numerous other boards for certification.¹⁶ The Executive Director of the American Board of Physician Specialties (ABPS) explained that the definition of board certification “doesn’t mean only being certified by the American Board of Medical Specialties (ABMS).”¹⁷ For example, the United States Department of Labor lists ABPS as a certifying board in its discussion of board certification in the *Occupational Outlook Handbook*.¹⁸ The ABPS, similar to the ABMS, is a multidisciplinary certifying body encompassing twelve member boards that in turn include seventeen specialties.¹⁹ Some of these ABPS member boards are “direct competitor[s]” to ABMS boards, such as the ABPS Board of Certification in Emergency Medicine and the ABMS American Board of Emergency Medicine.²⁰ Other boards like the American

11. *ABPS Strives for Unique Board Certification Options*, CREDENTIALING RES. CTR.: MED. STAFF BRIEFING (Sept. 25, 2017), <https://credentialingresourcecenter.com/articles/abps-strives-unique-board-certification-options>.

12. *Why Does It Matter if Physicians Are Board Certified?*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/why-physician-board-certification-matters> (last visited Mar. 24, 2020).

13. *See id.*

14. *See, e.g., Board of Certification in Family Medicine Obstetrics*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/family-medicine-obstetrics> (last visited Mar. 24, 2020); *Board of Certification in Internal Medicine (BCIM)*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/internal-medicine> (last visited Mar. 24, 2020).

15. *ABMS Member Boards*, AM. BD. MED. SPECIALTIES, <https://www.abms.org/about-abms/member-boards/> (last visited Mar. 24, 2020).

16. *See Why Does It Matter if Physicians Are Board Certified?*, *supra* note 12.

17. *ABPS Strives for Unique Board Certification Options*, *supra* note 11.

18. *How to Become a Physician or Surgeon*, BUREAU LAB. STATISTICS: OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm#tab-4> (last updated Sept. 10, 2019).

19. *The Benefits of ABPS Board Certification*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/board-certification-benefits> (last visited Mar. 24, 2020).

20. Leigh Avera, Aureore Richard & Nathan Deal, *Controversies in Board Certification*, in EMERGENCY MEDICINE ADVOCACY HANDBOOK 89, 92 (Nathaniel R. Schlicher & Alison Haddock eds., 4th ed. 2016).

Board of Pediatric Neurological Surgery,²¹ American Board of Cosmetic Surgery,²² and the American Board of Spine Surgery²³ focus on one area of medicine, and these more specialized boards also often compete with the various ABMS boards, leading to “turf wars” and divisions in the medical community.²⁴

There are many benefits to becoming a board-certified physician, no matter which board may be providing the certification. “[B]oard certified physicians are widely viewed as leaders in their fields. This distinction is a boon for career advancement, but more importantly, it benefits patients.”²⁵ Additionally, by becoming board-certified, physicians often have more job opportunities, as some employers, like hospitals, sometimes require physicians to be board-certified in order to obtain staff privileges.²⁶ Board certifications also provide benefits to patients, such as aiding patients in choosing which physician to visit. “[P]hysician board certification sends the right message to patients, whose decisions about where to go for healing or health maintenance often depend on the credentials of a hospital or clinic’s physicians.”²⁷

B. Louisiana Law Governing Physician Advertising

Current Louisiana law states that a physician can only advertise as “board-certified” if the certifying board is a member of ABMS or an American Osteopathic Association (AOA) board, “[t]he board has been approved by the Louisiana State Board of Medical Examiners,” or the certifying board “requires an Accreditation Council for Graduate Medical Education or [AOA] approved postgraduate training program

21. *About Us*, AM. BD. PEDIATRIC NEUROLOGICAL SURGERY, <https://abpns.org/about.html> (last visited Mar. 24, 2020).

22. AM. BD. COSMETIC SURGERY, <https://www.americanboardcosmeticsurgery.org> (last visited Mar. 24, 2020).

23. *ABSS Mission and History*, AM. BD. SPINE SURGERY, <http://www.americanboardofspinesurgery.org/mission.aspx> (last visited Mar. 24, 2020).

24. See Amy Nordrum, *Medical Turf Wars: Plastic Surgeons Clash with Other Doctors About Who Can Perform Liposuction and Tummy Tucks*, CAL. ACAD. COSMETIC SURGERY (Oct. 16, 2015), <https://www.calcosmeticsurgery.org/medical-turf-wars-plastic-surgeons-clash-with-other-doctors-about-who-can-perform-liposuction-and-tummy-tucks/>.

25. *Why Does It Matter if Physicians are Board Certified?*, *supra* note 12.

26. *What Is ABMS Board Certification?*, AM. BD. MED. SPECIALTIES, <https://www.abms.org/board-certification/> (last visited Mar. 24, 2020).

27. *What Does It Mean for a Physician to Earn Board Certification?*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/meaning-physician-board-certification> (last visited Mar. 24, 2020).

that provides complete training in that specialty.”²⁸ Although the law grants the Louisiana State Board of Medical Examiners (LSBME) the authority to approve boards other than ABMS or AOA for physicians to advertise as board-certified, the LSBME has chosen not to do so.²⁹ As a result, only physicians who are board-certified by ABMS or AOA boards can advertise as board-certified in Louisiana. Notably, this law is not a scope of practice issue, as it does not restrict which physicians can perform certain procedures.³⁰ Instead, it prevents certain groups of physicians from truthfully advertising as board-certified.

Louisiana, along with several other states, enacted this law following the American Medical Association’s “Truth in Advertising” campaign in 2011.³¹ The American Medical Association (AMA) launched this campaign as an effort to provide patients with more transparency as to which health-care providers are medical doctors and to help patients better understand the qualifications of their health-care providers and physicians.³² As part of this campaign, the AMA conducted a survey that asked participants whether they thought that dentists, psychologists, and the like were medical doctors, whether or not it was easy to identify who was a licensed medical doctor, and other similar questions.³³ Results showed that “patients mistake physicians with non-physician providers, and they do not know that certain medical specialists are physicians.”³⁴ Additionally, 79% of survey participants voiced their support for legislation that would “require all health care advertising materials to . . . designate the level of education,

28. LA. R.S. 37:1285(A)(32) (effective July 1, 2015). Other requirements, including that the physician include the name of the certifying board and the name of the specialty in the advertisement, are not the subject of this Comment.

29. See LA. ST. BD. MED. EXAMINERS, MINUTES OF MEETING 5 (May 14, 2018), <https://www.lsbme.la.gov/sites/default/files/documents/Meetings/Minutes/2018/5%20May%202018%20MinutesREV.pdf> [hereinafter LSBME, MINUTES]. Although not addressed in this Comment, the state medical board’s failure to act could also lead to a due process claim under the Fourteenth Amendment. The state medical board is of the opinion that only boards with a complete Accreditation Counsel for Graduate Medical Education postgraduate training program should be able to advertise, as the state medical board is not the best entity to decide which boards should be approved and which ones should not. See *Senate Broadcast Archived Videos*, LA. ST. SENATE 4:00:00, http://senate.la.gov/video/videoarchive.asp?v=senate/2017/04/042617H~W_0 (last visited Mar. 24, 2020).

30. See LA. R.S. 37:1285(A)(32).

31. See AMA, “TRUTH IN ADVERTISING” CAMPAIGN 1 (2018), <https://www.ama-assn.org/system/files/2018-10/truth-in-advertising-campaign-booklet.pdf>.

32. *Id.* at 2.

33. *Id.* The survey was conducted online and included 802 adults as participants. *Id.* at 9.

34. *Id.* at 2.

skills and training of all health care professionals promising their services.”³⁵

In order to promote more transparency and truth in advertising, the AMA released a model “Health Care Professional Transparency Act.”³⁶ The model bill includes three primary requirements: (1) the “practitioner must wear a name tag during all patient encounters that clearly identifies the type of license held by the health care practitioner,” (2) the practitioner must clearly display identification as to her license in her office, and (3) the practitioner must include her license in “all advertisements for [her] health care services.”³⁷ The AMA then went further and included model legislation regarding board certification advertisements, stating that a physician may only advertise as board-certified if, among other things, the board was a member of the ABMS or AOA.³⁸ The Louisiana Legislature adopted this language, leading to the issue here today. Markedly, there seems to be a disconnect between the original intent of the survey to promote transparency and the resulting model legislation that restricted certain groups of physicians from truthfully advertising all of their credentials. Consequently, instead of providing information in order to allow patients to make informed decisions regarding their health-care providers, the AMA-sponsored law actually limits information available to patients, only allowing the public to learn that two groups of board-certified physicians possess this status when there are many physicians who have been certified by other boards.

In order to remedy this problem, the AMA recently adopted a new resolution to study boards that compete with ABMS in order to determine which boards should be considered “approved certifying entities in states where they are not currently approved.”³⁹ This resolution was adopted in an effort to stop the discriminatory effect of the legislation and “encourage competition among qualified certifying bodies.”⁴⁰ In other words, this new resolution shows a commitment by the AMA to ensure fairness to all certifying boards and to provide an

35. *Id.* at 6.

36. *Id.* at 10.

37. *Id.*

38. *Id.* at 13.

39. PETER C. AMADIO, CHAIR, AM. MED. ASS’N HOUSE OF DELEGATES, REPORT OF REFERENCE COMMITTEE C 17 (2018), <https://www.ama-assn.org/system/files/2018-11/i18-refcomm-c-annotated.pdf>.

40. *Id.*

equal opportunity to all physicians, not just those approved by the ABMS.

The AMA is not the only entity working to protect the free speech rights of physicians. States such as Texas and Oklahoma have actively allowed multiple specialty boards other than ABMS and AOA the right to advertise.⁴¹ Thus, these states went beyond the AMA approach of merely studying the boards and have affirmatively named the boards whose certifications will be honored for advertising purposes. Moreover, there are currently no restrictions regarding advertising as board-certified in the majority of states, leaving Louisiana in the small minority of states with such restrictive advertising regulations.⁴²

C. *Past Challenges to Louisiana's Truth in Advertising Law*

In 2017, the Louisiana Legislative Regular Session saw a challenge to Louisiana's law governing physician advertising on the grounds that it violated the free speech rights of physicians.⁴³ The bill sought to repeal the aspects of the law that restricted which physicians were able to advertise as board-certified.⁴⁴ The new law would have allowed physicians to advertise as board-certified, as long as "[t]he board can be verified as existing and the physician's standing with the board can be verified by the Louisiana State Board of Medical Examiners," giving the authority to the state medical board to verify that the requirements were met.⁴⁵ During the hearing, the bill was amended to require the repeal of the law to return the law to the pre-2011 status quo. The prior law essentially stated that physicians were subject to disciplinary actions if they advertised in any misleading, false, deceptive, or fraudulent way.⁴⁶

Though ultimately not enacted in 2017, the bill did receive support from some senators during the hearing. As one senator stated, although he personally disliked all forms of professional advertising,

41. *Board Certification Equivalency Criteria*, OKLA. ST. BD. MED. LICENSURE & SUPERVISION (June 29, 2012), http://www.okmedicalboard.org/download/660/Board_Certification_Equivalency_Criteria_Policy_312.pdf; *Certifying Boards Recognized for Purposes of Advertisement Only*, TEX. MED. BD., <http://www.tmb.state.tx.us/idl/EE25FD33-7051-867C-0B91-D8657910CBD1> (last visited Mar. 24, 2020).

42. *See What State Legislators Need to Know About Physician Board Certification Advertising*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/physician-board-certification-advertising> (last visited Mar. 24, 2020).

43. *See Senate Broadcast Archived Videos*, *supra* note 29, at 2:45:00.

44. S.B. 194, 2017 Leg., Reg. Sess. (La. 2017).

45. *Id.*

46. *See Senate Broadcast Archived Videos*, *supra* note 29, at 4:52:00.

he did not see how a law that did not allow a physician to advertise truthfully could pass “constitutional muster.”⁴⁷

Much of the discussion from those who opposed the proposed change involved stories of patients who had negative outcomes from seeing physicians that the opponents did not believe were qualified to be doing those procedures.⁴⁸ One opponent even brought autopsy photos that were available to the committee members if they wished to see them.⁴⁹ However, this was a misplaced focus on clinical competency. While the stories of these harmed patients are indeed tragic and very compelling, these stories essentially amount to doctors practicing bad medicine and are not germane to the issue of advertising. It is through scope of practice laws, rather than advertising laws, that such cases of malpractice or bad medicine should be resolved.

III. COMMERCIAL SPEECH AND PROFESSIONAL ADVERTISING

Louisiana’s current law is, simply put, unconstitutional. It violates physicians’ First Amendment rights to commercial speech by preventing them from truthfully advertising their qualifications, which is something that courts have continuously held to be in violation of commercial speech rights.⁵⁰

Commercial speech has not always been afforded the First Amendment protections that it has today.⁵¹ It was not until 1976 when the United States Supreme Court considered *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.* that the Court first recognized commercial speech as a protected form of speech.⁵² The Court emphasized that “the free flow of commercial information is indispensable” and encouraged open channels of communication between consumers and those advertising their services.⁵³

The Supreme Court expanded on the idea of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*

47. *Id.* at 3:23:00-3:29:00. The bill failed to move forward by a vote of 2-5. *Id.* at 5:17:00.

48. *See id.* at 4:11:00-4:12:00, 4:40:00-4:44:00.

49. *Id.* at 4:41:00.

50. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976).

51. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (denying that the plaintiff involved had a right to commercial speech and stating that the court is “equally clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising”).

52. 425 U.S. at 761-62.

53. *Id.* at 765.

of *New York*, noting that “[c]ommercial 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.”⁵⁴ The Court then established a four-part test to determine the constitutionality of restrictions on commercial speech:

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.⁵⁵

Today, the judicial approach to reviewing restrictions of commercial speech is “well settled.”⁵⁶ Although such speech may be afforded a lesser protection than other forms of protected speech,⁵⁷ generally only commercial speech deemed false, misleading, deceptive, or otherwise involves an illegal transaction may be banned.⁵⁸ The party advocating for the restrictions on commercial speech has the burden of justifying those restrictions.⁵⁹ “[M]ere speculation or conjecture” that the advertisement in question will mislead the public is not enough; “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.”⁶⁰

In recent years, courts have applied this framework to various restrictions on professional advertising. For example, in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, the Supreme Court rejected the government’s claim that advertising as a “specialist” certified by the National Board of Trial Advocacy was misleading, holding that the law in question was broader than necessary to prevent the alleged harm.⁶¹ The Court concluded that even if the advertisement was potentially misleading, this hypothetical harm “is

54. 447 U.S. 557, 561-62 (1980).

55. *Id.* at 566.

56. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985).

57. *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

58. *Zauderer*, 471 U.S. at 638.

59. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

60. *Id.* at 770-71.

61. 496 U.S. 91, 107-09 (1990) (plurality opinion).

not sufficient to rebut the constitutional presumption favoring disclosure over concealment.”⁶²

Similarly, in *Ibanez v. Florida Department of Business & Professional Regulation Board of Accountancy*, the Florida Board of Accounting reprimanded the petitioner after advertising that, in addition to being an attorney, she was also a Certified Public Accountant (CPA) and a Certified Financial Planner (CFP), which violated Florida law.⁶³ The Court held that the law violated the petitioner’s First Amendment right to commercial speech, as the government did not meet its burden of proving any real harm.⁶⁴

Perhaps the most germane case to the issue at hand is *American Academy of Implant Dentistry v. Parker*.⁶⁵ This case, heard by the United States Court of Appeals for the Fifth Circuit, involved a Texas law that barred “dentists from advertising as specialists in areas that the American Dental Association (“ADA”) does not recognize[] as specialties.”⁶⁶ Like the Louisiana law governing physician advertising, this law “regulate[d] how a dentist may advertise his or her practice, not the kind of services a dentist can provide.”⁶⁷ The Fifth Circuit ultimately held that the restrictions violated the dentists’ rights to commercial speech, as the board did not meet its burden of proving real harm or show that these restrictions directly advanced their interests.⁶⁸

IV. APPLYING THE CENTRAL HUDSON ANALYSIS TO LOUISIANA’S LAW

A. *Lawful Activity That Is Not Misleading*

The first step in a constitutional analysis of a restriction on commercial speech is to determine whether the First Amendment protects the speech in question.⁶⁹ The commercial speech “must concern lawful activity and not be misleading” in order to receive this First

62. *Id.* at 111.

63. 512 U.S. 136, 138 (1994).

64. *Id.* at 146. *But see* *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099 (9th Cir. 2004) (finding that a California law restricting advertising rights to physicians did not violate the plaintiff’s right to commercial speech).

65. *See* 860 F.3d 300 (5th Cir. 2017).

66. *Id.* at 304.

67. *Id.* at 311.

68. *Id.* at 309-10.

69. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

Amendment protection.⁷⁰ As physicians in Louisiana are lawfully able to practice medicine and obtain board certification in the areas recognized by boards other than ABMS, advertising as board-certified in those specialties concerns lawful activity.⁷¹

Moreover, advertising as “board-certified” by a board other than an ABMS or AOA board is not misleading. There is no evidence to suggest that physicians certified by boards other than those currently approved by the state medical board do not “intend to use [‘board-certified’] in the same manner” as physicians who are currently allowed to advertise as such, “namely, to convey useful, truthful information to the consumer.”⁷² Simply because a board may not be approved by the state medical board at this time does not automatically lead to the assumption that advertising as certified by that board is misleading or false. “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.”⁷³ As Louisiana already requires that the name of the certifying board be included in an advertisement claiming board certification, the information would be presented in a nondeceptive way. But by denying physicians from advertising as board-certified merely because the state medical board does not recognize the board, “truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech.”⁷⁴ However, if the use of the phrase board-certified was found to be potentially misleading, the board could regulate its use, assuming it meets its burden for the remaining elements of the *Central Hudson* analysis.⁷⁵

B. Regulations That Directly Advance a Substantial Government Interest

During the hearing regarding the 2017 proposed bill, the Louisiana State Board of Medical Examiners stated that its main

70. *Id.*

71. *See id.*; *Am. Acad. of Implant Dentistry*, 860 F.3d at 307 (finding that because “Texas law permits the individual plaintiffs to limit their practice to the fields of implant dentistry, dental anesthesiology, oral medicine, and orofacial pain . . . advertising as a specialist in one of these practice areas concerns lawful activity”).

72. *Id.* at 308.

73. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

74. *Am. Acad. of Implant Dentistry*, 860 F.3d at 308 (quoting *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993)).

75. *See id.*; *Cent. Hudson*, 447 U.S. at 566.

interest in regulating this aspect of physician advertising is patient safety.⁷⁶ This Comment recognizes that protecting the public through patient safety is a substantial government interest.⁷⁷ Thus, the ultimate question is whether the harm cited is in fact real and whether the regulations directly advance the government’s interest in protecting against that harm.

For this step in the *Central Hudson* analysis, the burden is placed on the State to prove that the harms it cites are not merely hypothetical, but real, and that the “restriction will in fact alleviate them to a material degree.”⁷⁸ “The . . . 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.’”⁷⁹ The Louisiana State Board of Medical Examiners announced in its 2007 newsletter that the board believed that the term board-certified is often “confusing” to the public and thus the board planned to promulgate a rule restricting which physicians could advertise as such.⁸⁰ According to the board, if physicians other than those with ABMS or AOA certification were to advertise as board-certified, “the public may be misled and deceived as to the true qualifications of a practitioner.”⁸¹ Opponents of the proposed bill in the 2017 hearing further defended its position and offered an example of “real harm,” wanting to show that the harm was indeed not hypothetical.⁸² One opponent spoke of a patient who underwent breast augmentation surgery by her gynecologist who also advertised as a leading specialist in cosmetic surgery.⁸³ This patient had a mass that was overlooked during the original surgery that was later confirmed to be breast cancer.⁸⁴ It appeared to be the opponent’s position that if the patient had chosen a board-certified plastic surgeon, this medical error would not have occurred.⁸⁵ However, the surgeon in question was not board-certified in cosmetic surgery and did not advertise as such.

76. See *Senate Broadcast Archived Videos*, *supra* note 29, at 4:07:00.

77. See *Am. Acad. of Implant Dentistry*, 860 F.3d at 309.

78. *Edenfield*, 507 U.S. at 770-71.

79. *Am. Acad. of Implant Dentistry*, 860 F.3d at 309 (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation Bd. of Accountancy*, 512 U.S. 136, 143 (1994)).

80. *Newsletter*, L.A. ST. BD. MED. EXAMINERS, Oct. 2007, at 1, 2.

81. *Id.* at 2.

82. See *Senate Broadcast Archived Videos*, *supra* note 29, at 4:42:00-4:45:00.

83. *Id.*

84. *Id.*

85. *Id.*

Instead, the surgeon advertised as a member of an educational organization in the cosmetic field, which under the current law, which is purportedly in place to protect against this exact harm, is not a prohibited advertisement.⁸⁶ Moreover, in the same hearing, a representative of the state medical board acknowledged that he was unaware of an increase in false advertising in the years leading up to the 2011 change in the law and that, as far as he knew, the board “certainly never took anyone’s license for false advertising.”⁸⁷

While the board undoubtedly has an interest in protecting patient safety, the mere possibility of patient confusion from advertising is not enough to sustain such strict regulations on physicians’ rights to commercial speech. As the Supreme Court indicated, “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”⁸⁸ If the board indeed believes that the public would be confused by such advertisements, it should be the board’s responsibility to educate the public on the meaning of board certification and publicize the qualifications that they believe patients should look for in physicians.⁸⁹

Just as “[a] claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer’s work or a promise of success,” a claim of board certification is “simply a fact . . . from which a consumer may or may not draw an inference of the likely quality” of that physician.⁹⁰ Patients have the ability to research their potential physician and that physician’s credentials online. According to a 2013 study, 80% of Internet users used the Internet to search for health-related topics, including researching particular doctors or hospitals.⁹¹ As the law already requires those advertising as board-certified to include the name of the certifying board, patients have the information that they need to then research the certifying board’s requirements, as most of

86. See LA. R.S. 37:1285(A)(32) (effective July 1, 2015); *Senate Broadcast Archived Videos*, *supra* note 29, at 4:42:00-4:45:00.

87. *Senate Broadcast Archived Videos*, *supra* note 29, at 4:10:00.

88. Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L. J. 497, 512 (2015) (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 358-59 (2002)).

89. See *Bates v. State Bar*, 433 U.S. 350, 375 (1977) (“If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar’s role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.”).

90. *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 101 (1990) (plurality opinion).

91. Jane Weaver, *More People Search for Health Online*, NBC NEWS (July 16, 2013), <http://www.nbcnews.com/id/3077086/t/more-people-search-health-online/#.XG9NnC-KCQ>.

the board’s websites include such information.⁹² Patients would then have all of the information necessary to decide for themselves if that physician is the right fit for their needs. “[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 the channels of communication rather than to close them.”⁹³

C. Not More Extensive Than Necessary

It is well established that the law challenged on commercial speech grounds may not be more extensive than necessary to serve the asserted government interests.⁹⁴ With no system in place to consider the validity of ABMS-competing boards, the state medical board has in effect issued a blanket ban on advertising as board-certified for all boards other than ABMS and AOA.

The state medical board has stated that they are interested in protecting patient safety.⁹⁵ The board wants to ensure that the public is not being misled, worrying that patients may not be able to tell the difference between “sham” boards, who do not have stringent requirements, but instead merely require that a physician write a check or take a weekend course to be certified, and respected boards that have much more stringent requirements.⁹⁶ However, the system currently in place is not only preventing physicians who are certified by these “sham” boards from advertising, but also physicians who are certified by bona fide boards.⁹⁷

Moreover, there are already safeguards in place to protect against physicians who mislead or endanger the safety of patients.⁹⁸ If physicians are acting carelessly and performing procedures that they are in fact not qualified or licensed to perform, the state medical board

92. LA. R.S. 37:1285(A)(32) (effective July 1, 2015); *see, e.g., Emergency Medicine Eligibility*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/emergency-medicine-eligibility> (last updated April 2018).

93. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). For a more in-depth discussion of the importance of increasing the information available to patients, *see infra* Part V.

94. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980).

95. *See Senate Broadcast Archived Videos*, *supra* note 29, at 4:07:00.

96. *See* Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1109 (9th Cir. 2004).

97. It is not the intent of this Comment to evaluate which boards are better than others, but merely to say that all boards should not be lumped together and barred from advertising because of the fear that a few boards may not have appropriate requirements.

98. *See* LA. R.S. 37:1285(A)(7), (10) (effective July 1, 2015).

has the authority to discipline that physician in the way that they see fit.⁹⁹ Additionally, according to Louisiana malpractice law, if a physician advertises as board-certified, the physician is holding him or herself to a higher level of duty, and if that duty is violated, the physician will again be subject to disciplinary actions by the state medical board.¹⁰⁰ Courts repeatedly find a presumption in favor of more information over less, strengthened “by the separate presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients.”¹⁰¹

While it is not required that the restrictions be “the single best disposition,”¹⁰² courts have agreed that “the 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.’”¹⁰³ There are various other approaches that the state medical board could take in order to accomplish their interests of protecting patient safety that do not involve infringing on physicians’ commercial speech rights. These alternative approaches are discussed in detail in Part VI.

V. BENEFITS TO MORE EXPANSIVE ADVERTISING

The benefits of expanding the physician advertising law go beyond ensuring that the right to commercial speech is protected. The current law “limit[s] competition by discriminating against physicians certified by other certification boards,”¹⁰⁴ and a change in the law will prevent anticompetitive behavior and work to end “turf-wars” occurring between different specialties.

Perhaps one of the largest battles is between cosmetic surgeons and plastic surgeons. While these two specialties encompass many of the same procedures, they are different specialties and have their own

99. *Id.*

100. *See Senate Broadcast Archived Videos, supra* note 29, at 3:19:00.

101. *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 109 (1990) (plurality opinion).

102. *Byrum v. Landreth*, 566 F.3d 442, 448 (5th Cir. 2009) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)); *see Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 311 (5th Cir. 2017).

103. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)).

104. *Physician Certification Advertising Rules*, AM. BD. PHYSICIAN SPECIALTIES, <https://www.abpsus.org/physician-certification-advertising-rules> (last visited Mar. 24, 2020).

certifying boards.¹⁰⁵ The major difference between the two specialties is that “[p]lastic surgery is intended to correct dysfunctional areas of the body and is reconstructive in nature,” while cosmetic surgery is “focused on enhancing appearance.”¹⁰⁶

The clash between the two specialties is best illustrated by the ABMS American Society of Plastic Surgeons’ “Do Your Homework” campaign.¹⁰⁷ This campaign, launched in 2011, urged patients who were seeking plastic or cosmetic surgery to ask their doctor if he or she was board-certified in plastic surgery by the American Board of Plastic Surgery.¹⁰⁸ Plastic surgeons were utilizing the knowledge that cosmetic surgeons, a direct competitor to plastic surgeons who operate in the aesthetic field, could not advertise as board-certified regardless of their certification because ABMS does not have a cosmetic surgery board. Thus, they sought to influence patients by creating the presumption that only board-certified plastic surgeons were qualified to do the elective procedures that the patient sought.

As the Department of Justice noted, “vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.”¹⁰⁹ The ABPS warns legislators to be aware of the monopolistic reasons that ABMS is pushing for stricter legislation, explaining that more competition will lead “to innovation and advancements, all for the betterment of patient care.”¹¹⁰

Another benefit is that allowing for more expansive commercial speech rights will increase the information available to the public and allow patients to have all of the information necessary to make fully informed decisions. “The commercial speech doctrine is fundamentally based on the premises that advertising (1) communicates information

105. See *About Cosmetic Surgery*, AM. ACAD. COSMETIC SURGERY, <https://www.cosmeticsurgery.org/page/CosmeticSurgery> (last visited Mar. 24, 2020).

106. *Id.*

107. See Malcolm Roth, *Do Your Plastic Surgery Homework, It Could Save Your Life*, AM. SOC’Y PLASTIC SURGEONS (Feb. 5, 2013), <https://www.plasticsurgery.org/news/blog/do-your-plastic-surgery-homework-it-could-save-your-life>.

108. *Id.*

109. Letter from Robert Potter, Chief, Competition Policy & Advocacy Section of Antitrust Div., U.S. Dep’t of Justice, to the Honorable Dan K. Morhaim, M.D., Md. House of Delegates 3 (Sept. 10, 2018), https://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/moc/DOJ_Letter.pdf.

110. *What State Legislators Need to Know About Physician Board Certification Advertising*, *supra* note 42.

to customers, and (2) such information allows consumers to make autonomous and more informed choices.”¹¹¹ Patients are being caught in the cross fire of professional turf wars under the false premise that the law is for their protection.¹¹² As illustrated in Supreme Court jurisprudence on the issue, “laws that seek to deprive people of information for ‘their own good’ constitute unwarranted—indeed ‘offensive’—governmental paternalism and presumptively violate the First Amendment.”¹¹³

As the law stands, patients are only able to access a portion of physicians’ qualifications. This limits their choices if they are looking for a board-certified physician to only those certified by ABMS or AOA. “[I]f [patients] require the services of a specialist, [they] deserve to know that the physician is a leader in that specialty.”¹¹⁴ Patients should be afforded the opportunity to decide for themselves which physician to visit based on what type of training they look for in a doctor.

Additionally, allowing all physicians to advertise truthfully will encourage physicians to stay in Louisiana. Some hospitals, especially in emergency rooms, require as part of their employment contracts that doctors be able to advertise as board-certified.¹¹⁵ Doctors who are board-certified in emergency medicine by a board other than ABMS, such as ABPS, are at risk of losing their contracts with hospitals because of their inability to advertise their credentials in Louisiana.¹¹⁶ This could lead to physicians leaving Louisiana for work and create a problem of emergency rooms being understaffed.

111. Berman, *supra* note 88, at 500.

112. See Nordrum, *supra* note 24.

113. Berman, *supra* note 88, at 500 (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)); see, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375 (2002); *Fla. Bar v. Went For It*, 515 U.S. 618, 630-31 (1995); *Ibanez v. Fla. Dep’t of Bus. and Prof’l Regulation Bd. of Accountancy*, 512 U.S. 136, 142 (1994); *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 105 (1990) (plurality opinion); *Bates v. State Bar*, 433 U.S. 350, 365 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

114. *Not All Physicians Are Board Certified in the Specialties They Practice*, *supra* note 9.

115. *Senate Broadcast Archived Videos*, *supra* note 29, at 3:33:00-3:35:00.

116. *Id.*

VI. PROPOSED LEGISLATIVE SOLUTION

While efforts have previously been made in an attempt to change Louisiana law regarding physician advertising,¹¹⁷ there has been no forward momentum in moving Louisiana law out of unconstitutional territory. The debate as to who is the best entity to evaluate the validity of certifying boards has contributed to the current stalemate. In 2018, a bill was introduced in the Louisiana Legislative Session that sought to remove the power to determine which boards should be able to advertise from the Louisiana State Board of Medical Examiners and give the Louisiana Legislature the power to do so.¹¹⁸ The bill failed, as the state legislature has previously said that they believe that physicians should govern their own profession, and no further action has been taken to repeal or amend the current law.¹¹⁹

While there may be alternative resolutions, a legislative solution is the most appropriate. Physicians do have the option to sue the state medical board claiming that the law violates their commercial speech rights, but they are perhaps hesitant to do so. Filing such a suit would cause physicians to sue other members of their profession, something that could inadvertently harm the physicians' careers and cause strife in the profession. Thus, it is imperative that the legislature revisits this law and ensures that Louisiana law protects the commercial speech rights of its physicians.

It is not contested that protecting the public is an extremely important government interest. Accordingly, this Comment does not propose a “no restrictions” approach to regulating how physicians advertise as board-certified if the Louisiana State Board of Medical Examiners were able to prove that some certifying boards were in fact “sham” boards. Instead, it seeks to offer possible solutions to allow for more expansive commercial speech and still protect the public.

Many alternatives to the current law still provide protection to potential patients without sacrificing physicians' rights to commercial speech. One possible solution would be to return the law to its pre-2011 form, as the state board recognized that there did not seem to be a major issue with false advertising before this change in the law.¹²⁰ This would

117. See *supra* Part II.C for a discussion of the 2017 proposed bill.

118. See LSBME, MINUTES, *supra* note 29.

119. See S.B. 186, 2018 Leg., Reg. Sess. (La. 2018); *Senate Broadcast Archived Videos*, *supra* note 29, at 4:12:00 (noting some legislators' preference to not make such decisions).

120. *Senate Broadcast Archived Videos*, *supra* note 29, at 4:52:00.

still allow the state medical board to discipline physicians who advertise in a false, deceptive, misleading, or fraudulent manner.¹²¹

A second possible solution would be to emulate other states that maintain stricter regulations regarding board-certified advertising than those states that are simply silent on the matter. Many states have successfully amended their truth in advertising laws to allow for more expansive free speech without taking a complete “no restrictions” viewpoint. For example, Texas law allows physicians who are certified by boards other than ABMS or AOA to advertise as such by providing explicit guidelines outlining an approval process.¹²² Boards who seek to be recognized by the state medical board may petition the board and must demonstrate certain requirements, including that the organization has at least 100 duly licensed members, certified members have passed a written or oral examination, and that the certified physicians have completed a program accredited by the Accreditation Council for Graduate Medical Education or the AOA that “provides substantial and identifiable supervised training of comprehensive scope in the specialty . . . certified.”¹²³ This has led to the Texas State Medical Board’s approval of seven boards, other than ABMS or AOA boards, who can now lawfully advertise their board certifications.¹²⁴

Similarly, the Oklahoma State Medical Board recognizes boards other than ABMS or AOA for advertising purposes.¹²⁵ The Oklahoma State Medical Board has developed criteria in order to determine which boards are valid and should be granted advertising rights.¹²⁶ In determining which boards should be allowed to advertise, the state medical board considers whether the certifying board has a “psychometrically validated exam” and whether “periodic re-certification” is required.¹²⁷

121. *Id.*

122. *Advertisement of Board Certification*, TEX. MED. BD., <http://www.tmb.state.tx.us/page/resources-advertisement-board-certification> (last visited Mar. 24, 2020).

123. *Id.* For a full list of the requirements, see *id.*

124. *Certifying Boards Recognized for Purposes of Advertisement Only*, *supra* note 41.

125. See *Certification Boards & Subspecialties*, OKLA. ST. BD. MED. LICENSURE & SUPERVISION, <http://www.okmedicalboard.org/download/892/Oklahoma+Medical+Board+approved+Certification+Boards+%26+SubSpecialties.pdf> (last visited Mar. 24, 2020).

126. *Board Certification Equivalency Criteria*, *supra* note 41.

127. *Id.*

VII. CONCLUSION

Truthful advertising is the exact type of commercial speech that has continuously been afforded protection under the First Amendment. However, physicians in Louisiana are still being denied the right to advertise truthfully an important qualification. As most physicians are board-certified by at least one board, these advertising restrictions affect a vast majority of physicians in Louisiana. This law is also affecting patients in Louisiana, as they are unable to access all relevant and truthful information when making decisions regarding their health care. There are many possible solutions to this problem, but at the heart of the matter is ensuring that physicians’ rights are protected by Louisiana’s lawmakers. The Louisiana Legislature and Louisiana State Board of Medical Examiners must work together to revise the current law and ensure that the rights of the state’s physicians and patients are being protected.