No. 10-203

IN THE

NOV 23 2010

Supreme Court of the United States

THOMAS J. CAHILL,
in his official capacity as Chief Counsel for the
Departmental Disciplinary Committee for the
Appellate Division of the New York Court of Appeals,
First Department, *et al.*,

Petitioners,

v.

JAMES L. ALEXANDER, ALEXANDER & CATALANO LLC, AND PUBLIC CITIZEN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents describe the question in this case as "fact-bound" (*see e.g.* Opp. at 1), contend that there is no relevant split of authority (Opp. at 5-9), and argue that the issue presented by this case has no implications for other states (Opp. at 13-15). They are mistaken on each point. To the contrary, respondents' brief in opposition confirms that the split of authority identified in the Petition is real and that the varying and unpredictable results of state and lower federal courts considering similar advertising rules and similar advertisements demonstrate the need for intervention and guidance by this Court.

The Petition shows that there is a deepening split of authority on the legal question—expressly left open by this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)—of whether the States may, consistent with the First Amendment, restrict certain types of attorney advertising that incorporates unverifiable claims or marketing techniques that imply superior legal ability. The Petition also shows that the Court's involvement is warranted because many States have attorney advertising rules that, like New York's, prohibit unverifiable statements regarding the quality of legal services. Respondents' efforts to dispute these points are unsupported by either the facts or the law.

1. As a preliminary matter, respondents fail in their effort to dispute that this Court has expressly left open the question presented by this petition: whether unverifiable attorney advertising claims that imply superior quality of legal services are subject to any First Amendment protection. Respondents acknowledge, as they must, that in *Bates*, this Court said that

"advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. Respondents attempt to deflate this point, however, by noting that the Court's key commercial-speech case, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), was decided after *Bates* and that *Central Hudson* therefore controls. Opp. at 10. But this argument overlooks that at least three times after *Central Hudson* this Court has reiterated that the question remains open. *See In re R.M.J.*, 455 U.S. 191 at 201 (1982) (citing *Bates*, 433 U.S. at 383-84) (stating that "claims as to quality...might be so likely to mislead as to warrant restriction"); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 640 n. 9 (1985) (citing *Bates* and acknowledging that "our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services"); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (plurality opinion) (quoting *Bates* dictum that "[a]dvertising claims as to the quality of legal services . . . may be so likely to be misleading as to warrant restriction").

2. Nor do respondents support their claim that there is no split of authority on the issue of whether the First Amendment is implicated by attorney advertising rules that prohibit (a) unverifiable claims implicating the quality of legal services and (b) marketing techniques that do not assist the public in the intelligent selection of counsel and that imply the ability of attorneys to obtain superior results. This is a pure legal question, not a factual one.

As discussed in the Petition, the Second Circuit decision below—which struck the New York rules as facially unconstitutional—is directly at odds with the following cases that have concluded that there is no First Amendment protection for (a) unverifiable claims implicating the quality of legal service and (b) marketing techniques that unverifiably imply quality of legal service:

(a) **Cases concerning unverifiable claims implicating the quality of legal services**: *Florida Bar v. Pape*, 30 Fla. L. Weekly S807, 918 So. 2d 240 (Fla. 2005), *cert. denied*, 547 U.S. 1041 (2006) (upholding sanctions against an advertisement containing a "pit-bull" image and slogan because "[l]awyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified"); *In re PRB Docket No. 2002.093*, 177 Vt. 629, 630, 868 A.2d 709, 709-11 (Vt. 2005) (rejecting a First Amendment challenge to a penalty imposed against an attorney who described his law firm in an advertisement as "INJURY EXPERTS"); *In re Keller*, 792 N.E.2d 865 (Ind. 2003) (rejecting a challenge to an advertisement rule that prohibited representations or implications regarding the quality of legal services; the advertisement in question stated "Keller and Keller? Let's settle this one"); *Medina Cnty. Bar Ass'n v. Grieselhuber*, 78 Ohio St. 3d 373, 374-75, 678 N.E.2d 535, 536-37 (Oh. 1997) (rejecting commercial-speech challenge to discipline imposed for attorney's use of advertisement containing the slogan, "We Do It Well," which "contain[ed] unverifiable as well as misleading statements").

Furthermore, multiple state supreme courts have implicitly reached the same conclusion, upholding disciplinary actions based on publication of advertisements containing similar unverifiable claims. *See, e.g., Iowa Sup. Ct. Attorney Disciplinary Bd. v. Bjorklund*, 725 N.W.2d 1, 6 (Iowa 2006) (attorney disciplined for online publication of claim that his firm's "scholarly achievements [were] unmatched by any other law firm"); *Office of Disciplinary Counsel v. Furth*, 93 Ohio St. 3d 173, 177, 186, 754 N.E.2d 219, 225, 232 (Oh. 2001) (attorney violated rule against "unverifiable and self-laudatory" statements when he published online claims that, *inter alia*, he was "[a] passionate and aggressive advocate on behalf of his clients," and provided "[t]op notch legal services with a guarantee of satisfaction") (emphasis omitted); *In re Wamsley,* 725 N.E.2d 75, 77 (Ind. 2000) (attorney whose advertisement stated that he could obtain the "best possible settlement" in the "least amount of time" violated rule against misleading and self-laudatory statements); *Fla. Bar v. Lange*, 23 Fla. L. Weekly S263, 711 So. 2d 518, 521 (Fla. 1998) (advertisement that stated "When the Best is Simply Essential" violated rules of professional conduct because it was "self-laudatory and purport[ed] to describe the quality of [the lawyer's] services"); *In re Anonymous*, 689 N.E.2d 442, 444 (Ind. 1997) (attorney's slogan, "the track record and resources you need to win a settlement," was a self-laudatory and unverifiable claim likely to create an unjustified expectation as to results).

Also in tension with the decision below are several decisions of the lower federal courts. *See Farrin v. Thigpen*, 173 F. Supp.2d 427, 440, 447 (M.D.N.C. 2001);

Spencer v. Honorable Justices of the Sup. Ct. of Pa., 579 F. Supp. 880, 887-88 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (3d Cir. 1985) (unpublished); *Bishop v. Comm. on Prof'l Ethics and Conduct*, 521 F. Supp. 1219, 1225 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

(b) **Cases concerning marketing techniques that unverifiably imply quality of legal service**: *Pape*, 918 So. 2d 240, *supra*; *In re Felmeister & Isaacs*, 104 N.J. 515, 516-17, 528, 531, 518 A.2d 188, 189, 194, 196 (N.J. 1986); *In re Zang*, 154 Ariz. 134, 145-46, 741 P.2d 267, 278-79 (Ariz. 1987) (*en banc*) (noting in dicta that "dramatic, nonfactual advertisements are more likely to misrepresent or omit material facts, or to create unjustified expectations about the results a lawyer can achieve than are advertisements that primarily convey factual information that will help consumers make rational decisions about whether to seek legal services."), *cert. denied sub nom.*, *Whitmer v. State Bar of Ariz.*, 484 U.S. 1067 (1988).[1]

Tellingly, respondents fail to discuss nearly all of these cases. For example, the Respondents make no effort to distinguish cases such as *In re PRB Docket No. 2002.093*, 868 A.2d at 709-10 (2005), in which the Supreme Court of Vermont rejected a First Amendment challenge to a penalty imposed against an attorney who

1. On the other side of the split of authority, the Petition identified the following cases as more consistent with the decision below. *See Mason v. Fla. Bar*, 208 F.3d 952, 954, 957-58 (11th Cir. 2000); *Allen, Allen, Allen & Allen v. Williams*, 254 F. Supp. 2d 614 (E.D. Va. 2003); *see also Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 554, 557-58 (E.D. La. 2009).

described his law firm in an advertisement as "INJURY EXPERTS." In direct conflict with the decision below, which engaged in a *Central Hudson* analysis for this kind of advertisement, the Vermont Supreme Court held that the advertisement "f[ell] squarely within th[e] category of qualitative advertising claims that are not susceptible of measurement or verification," and therefore could be prohibited. 868 A.2d at 712.

Likewise respondents ignore *In re Felmeister & Isaacs*, 104 N.J. 515, 516-17, 528, 531, 518 A.2d 188, 189, 195, 196 (1986). In that case, the New Jersey Supreme Court affirmed the constitutionality of a rule that required attorney advertising to be "predominantly informational"—i.e., advertising in which, "in both quantity and quality, the communication of factual information rationally related to the need for and selection of an attorney predominates." *Id.* at 528, 518 A.2d at 194. Like New York's Rule 7.1(c)(5), which prohibits techniques lacking relevance to the selection of counsel, the New Jersey rule targets marketing gimmicks and other attention-grabbing techniques that do not contain relevant and objective information about the legal services offered. Thus the New Jersey Supreme Court has allowed the prohibition of advertisements that "rely[] in any way on the shock or amusement value of absurd portrayals wholly irrelevant to the selection of counsel," 104 N.J. at 517, 518 A.2d at 189, in square conflict with the decision of the Second Circuit in this case striking down New York's similar regulatory efforts as unconstitutional.

These decisions, like many others noted above and discussed in the Petition, create a split of authority with the Second Circuit's decision below. Respondents make

no effort to distinguish these cases or explain why, in light of the split, this Court's intervention is not warranted.

3. Respondents discuss a few contrary opinions, attempting to show that these opinions are not in conflict with the decision below, but their efforts to reconcile the cases are both half-hearted and flawed. For example, respondents concede that the *Pape* decision, 918 So. 2d 240, "comes closest to adopting the rule advanced by New York," because the Florida Supreme Court upheld disciplinary sanctions that used the slogan and image of a "pit bull" in its advertising. Opp. at 7. Respondents then argue that there is no true conflict here, because the advertisements prohibited in *Pape,* presumably unlike those at issue here, "constituted a promise to violate the rules [of Professional Conduct], and thus fell outside the protection of the First Amendment." Opp. at 7-8 (quoting *Pape* 918 So. 2d at 246). But that distinction cannot stand. First, like the "pit-bull" advertisement, the "heavy-hitter" advertisement at issue in this case does its work by implying superior legal ability by metaphor, rather than by a direct, and therefore falsifiable, assertion. As such, a "heavy hitter," just like a "pit bull," can be (but need not be) construed as a promise to engage in unethical conduct. But as the Florida Supreme Court concluded in *Pape*, "an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment." 918 So. 2d at 249.

Second, the Florida court did not base its decision on the First Amendment question on its conclusion about the particular meaning of the pit-bull image and

slogan; its observation about that came *not* in the First Amendment section of the opinion (*see Pape*, 918 So.2d at 248-49), but rather in its determination that the pit-bull image and slogan were in fact prohibited by the rules (*see id.* at 244-48). When it came to its First Amendment holding, however, the Florida Supreme Court surveyed this Court's relevant jurisprudence and held that "[l]awyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified." *Id.* at 247. That is the legal rule pressed by the State below and rejected by the Second Circuit, in square conflict with the Florida Court.

4. Respondents devote considerable effort (Opp. at 11-12) to showing that the petition can find no support in *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated and remanded*, 472 U.S. 1004 (1985), *after remand*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed for want of substantial federal question*, 475 U.S. 1114 (1986). But here too, the Respondents' argument is unavailing.

Respondents claim that the State improperly invoked language from the first decision of the Iowa Supreme Court in *Humphrey*, and argue that the language was deprived of all force by the order of this Court summarily vacating and remanding the case for reconsideration in light of *Zauderer*. But the Petition said explicitly that this Court initially granted, vacated, and remanded the original Iowa Supreme Court's decision in light of *Zauderer*. Pet. at 25. The point the State in fact made in the Petition is that following the GVR, the Iowa Supreme Court adhered to its original

decision upholding advertising rules similar to but even more restrictive than New York's. The Iowa court stated that "[w]e find nothing in the *Zauderer* holding at variance with our prior decision." 377 N.W.2d at 644. Thus, the Iowa Supreme Court's additional discussion in its opinion following remand of the special issues posed by electronic media merely added to, but did not supplant, its general pronouncement in its initial decision that it may regulate attorney advertising material that "makes no contribution to informed decision making." 355 N.W.2d at 570. *Zauderer* did not change the Iowa Supreme Court's conclusions on these issues, rather those conclusions were "borne out" by *Zauderer*, leading the Iowa court to "ratify [its] prior order." 377 N.W.2d at 645, 647. And it was this later decision that the Petition rightly notes was upheld by this Court's summary dismissal.

5. Finally, the Petition argues that the Court's intervention is also warranted because the Second Circuit's decision has ramifications for similar attorney advertising rules in many other States. Pet. at 31-33. The respondents' counter-argument is essentially that other States have not adopted precisely the same rules as New York. Opp. at 13-15. But this misses the point. The clean legal question presented—the one left open by this Court in *Bates* and the one that forms the split of authority described above—implicates the continuing vitality of many States' advertising rules, even ones that differ in some ways from New York's. As the Petition details, no fewer than thirty States have rules that prohibit unverifiable or unsubstantiated statements regarding the quality of legal services (primarily focusing on comparisons with other attorneys); twelve States restrict or entirely prohibit the use of trade

names or fictitious names to identify an attorney or law firm; seven States prohibit dramatizations in attorney advertising or potentially confusing or non-informational visual and verbal illustrations; and three States require that attorney advertisements primarily emphasize information that is useful and relevant to the public's search for competent and appropriate counsel. *See* Pet. at 32-33. With so many States regulating in this area, this Court's guidance is imperative.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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November 2010

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