

No. 16-50157

In The United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

KELLY PARKER, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS STATE BOARD OF DENTAL EXAMINERS; TAMELA L. GOUGH, D.D.S, M.S., IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; STEVE AUSTIN, D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; TIM O'HARE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; KIRBY BUNEL, JR., D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; WILLIAM R. BIRDWELL, D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; EMILY A. CHRISTY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; JAMES W. CHANCELLOR, D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; RODOLFO G. RAMOS, JR., D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; LEWIS WHITE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; WHITNEY HYDE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; RENEE CORNETT, R.D.H., IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; D. BRADLEY DEAN, D.D.S., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; CHRISTIE LEEDY, D.D.S., IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; LOIS PALERMO, R.D.H., IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS; EVANGELIA MOTE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE TEXAS BOARD OF DENTAL EXAMINERS,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas,
Austin Division, No. 1:14-cv-191-SS

**AMICUS CURIAE BRIEF OF TEXAS ACADEMY OF PEDIATRIC DENTISTRY,
TEXAS ASSOCIATION OF ORTHODONTISTS, AND THE TEXAS SOCIETY OF
ORAL AND MAXILLOFACIAL SURGEONS IN SUPPORT OF
DEFENDANTS-APPELLANTS AND REVERSAL**

AMY L. RUDD
LINDSEY B. COHAN
DECHERT LLP
500 W. 6th Street, Suite 2010
Austin, Texas 78701

*Counsel for Amici Curiae Texas
Academy of Pediatric Dentistry,
Texas Association of
Orthodontists, and The Texas
Society of Oral & Maxillofacial
Surgeons*

Supplemental Statement of Interested Persons

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, amici curiae provide this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae	Counsel
Texas Academy of Pediatric Dentistry	Amy L. Rudd Lindsey B. Cohan Dechert LLP
Texas Association of Orthodontists	Amy L. Rudd Lindsey B. Cohan Dechert LLP
The Texas Society of Oral & Maxillofacial Surgeons	Amy L. Rudd Lindsey B. Cohan Dechert LLP

The undersigned certifies that amici curiae Texas Academy of Pediatric Dentistry, Texas Association of Orthodontists, and The Texas Society of Oral and Maxillofacial Surgeons are nonprofit organizations that have no parent corporations and are not owned in whole or in part by any publicly held corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED this 26th day of April 2016.

/s/ Lindsey B. Cohan
 Lindsey B. Cohan
*Counsel for Amici Curiae Texas
 Academy of Pediatric Dentistry,
 Texas Association of Orthodontists,
 and The Texas Society of Oral &
 Maxillofacial Surgeons*

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
IDENTITY AND INTEREST OF AMICI CURIAE.....	3
I. Identity of Amici Curiae	3
A. Texas Academy of Pediatric Dentistry	3
B. Texas Association of Orthodontists	4
C. The Texas Society of Oral and Maxillofacial Surgeons.....	5
II. Interest of Amici Curiae.....	6
ARGUMENT	9
I. The District Court Misapplied The Third Prong Of Central Hudson By Ignoring ADA Standards And National Consensus About Specialty Dental Advertising.....	9
A. Accreditation By The ADA’s CODA Is The Gold Standard In Determining Specialty Status.....	10
B. Other States’ Regulation Of Dental Specialty Advertising Supports The Constitutionality Of The Advertising Regulation.....	15
II. If Affirmed, The District Court’s Injunction Should Be Limited In Application To These Plaintiffs.....	17
CONCLUSION.....	23

TABLE OF AUTHORITIES

Page(s)

CASES

Ass’n of Nat’l Advertisers, Inc. v. Lungren,
44 F.3d 726 (9th Cir. 1994)..... 21

Borgner v. Brooks,
284 F.3d 1204 (11th Cir. 2002)..... 20

*Central Hudson Gas & Electric Corporation v. Public Service
Commission of New York*,
447 U.S. 557 (1980).....9, 17

Discount Tobacco City & Lottery, Inc. v. U.S.,
674 F.3d 509 (6th Cir. 2012) 19

Educ. Media Co. at Virginia Tech, Inc. v. Swecker,
602 F.3d 583 (4th Cir. 2010)9

Falanga v. State Bar of Ga.,
150 F.3d 1333 (11th Cir. 1998)15, 16

Fla. Bar v. Went For It, Inc.,
515 U.S. 618 (1995).....9

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001).....9

United States v. Stevens,
559 U.S. 460 (2010).....19

STATUTES

68 ILL. ADMIN. CODE § 1220.421(f) 17

234 MASS. CODE REGS. § 5.03 17

CONN. GEN. STAT. ANN. § 20-106a..... 16

IDAHO CODE ANN. § 54-903(6) 17

TABLE OF AUTHORITIES
(continued)

	Page(s)
IDAHO CODE ANN. § 54-924(12)	17
KAN. STAT. ANN. § 65-1427	17
KAN. STAT. ANN. § 65-1437(a)(2).....	17
KY. REV. STAT. ANN. § 313.035(3)	17
KY. REV. STAT. ANN. § 313.080(1)	17
MISS. CODE ANN. § 73-9-29	17
N.D. ADMIN. CODE § 20-02-01-01(3).....	17
TEXAS ADMIN. CODE § 108.54	<i>passim</i>
OTHER AUTHORITIES	
Federal Rule of Appellate Procedure 29.....	3

INTRODUCTION

Amici curiae—three professional organizations whose member dentists qualify to advertise as “specialists” under Texas law—urge this Court to reverse the District Court’s judgment finding Section 108.54 of the Texas Administrative Code (the “Advertising Regulation”) unconstitutional. Contrary to the District Court’s decision, the consensus among dental practitioners, including amici, their members, and even Plaintiffs-Appellees (“Plaintiffs”), is that uniformity in the communication of dental specialty status is both desirable and necessary to protect consumers who otherwise cannot easily discern among providers of dental services. The decision by Defendants-Appellants, members of the Texas State Board of Dental Examiners (“TSBDE”), to follow the national trend and to adopt the uniform standards promulgated by the American Dental Association (“ADA”) defining who truly is a dental “specialist” makes good sense and directly advances the State’s substantial interest in protecting consumers from misleading dental advertisements. The ADA, as the oldest and most renowned dental association in the country, has long been the gold standard among practitioners in determining who has achieved the

level of education, training, and experience worthy of the “specialist” designation.

At the very least, this Court should limit any injunction involving the Advertising Regulation solely to these Plaintiffs. A wholesale invalidation of the regulation would leave Texas—one of the largest states in the country—without any meaningful regulation of what uniform criteria a dentist must satisfy to advertise using the terms “specialty” or “specialist,” a result that even Plaintiffs agree is undesirable. Texas consumers of dental services deserve better, since they are the ones that would be harmed by such unregulated “specialty” advertising.

IDENTITY AND INTEREST OF AMICI CURIAE

I. Identity of Amici Curiae

Amici Curiae—the Texas Academy of Pediatric Dentistry (“TAPD”), the Texas Association of Orthodontists (“TAO”), and The Texas Society of Oral and Maxillofacial Surgeons (“TSOMS”)—are non-profit, non-partisan organizations in Texas whose members focus their practices on pediatric dentistry, orthodontics, and oral and maxillofacial surgery, respectively, and who serve thousands of patients in Texas.¹ Under the Advertising Regulation, these organizations’ members are permitted to advertise as specialists in their respective areas of dental specialty practice in Texas.

A. Texas Academy of Pediatric Dentistry

The Texas Academy of Pediatric Dentistry, the Texas-based affiliate of the American Academy of Pediatric Dentistry, is an organization with approximately 343 active members whose primary practice is pediatric dentistry. Pediatric dentistry is the specialty of

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici curiae state that no counsel for a party authored this brief in whole or in part, and no party or party’s counsel made any monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or entity other than amici curiae make any monetary contribution to the brief’s preparation or submission.

dentistry dedicated to the oral health of children from infancy through the teenage years. To qualify as a specialist in pediatric dentistry in Texas, a dentist must first complete either a Doctor of Dental Surgery (“D.D.S.”) or Doctor of Medicine in Dentistry (“D.M.D.”) degree.

Thereafter, the dentist must complete a two- to three-year pediatric dentistry residency accredited by the ADA’s Commission on Dental Accreditation (“CODA”). Acceptance to such a residency is highly competitive. In addition, TAPD encourages its members to become board certified in pediatric dentistry, which requires additional written and oral testing. The mission of TAPD is “to serve, advocate for, and protect the children of Texas through active involvement in specialty services and through legislative and regulatory affairs.” TAPD Website, <http://www.tapd.org>.

B. Texas Association of Orthodontists

The Texas Association of Orthodontists (“TAO”), the Texas-based affiliate of the American Association of Orthodontists, is an organization with approximately 873 active members whose primary practice is orthodontics. Orthodontics is a specialty area of dental practice focused on diagnosing, preventing, and treating facial

irregularities to correctly align the teeth and jaw. To qualify as a specialist in orthodontics in Texas, dentists must obtain a D.D.S. or D.M.D. degree and then complete a two- to three-year post-graduate residency in a CODA-accredited orthodontic residency program. TAO, like TAPD, encourages its members to become board certified in orthodontics. Among TAO's stated purposes are the advancement of "the art and science of orthodontics," the maintenance of the "highest standards of excellence in orthodontic education and practice," and the making of "significant contributions to the health of the public."

C. The Texas Society of Oral and Maxillofacial Surgeons

The Texas Society of Oral and Maxillofacial Surgeons ("TSOMS"), the Texas-based affiliate of the American Association of Oral and Maxillofacial Surgeons, is an organization with over 350 active members whose primary practice is oral and maxillofacial surgery. Oral and maxillofacial surgery is the specialty of dentistry that includes the diagnosis and surgical and adjunctive treatment of diseases, injuries, and defects involving both the functional and esthetic aspects of the hard and soft tissues of the oral and maxillofacial region. To achieve specialty recognition in Texas, TSOMS members train in a

CODA-accredited residency training program for a minimum of four years. They train alongside medical residents in internal medicine, general surgery, and anesthesiology, and also, depending on the specific program, spend time in otolaryngology (ear, nose and throat), plastic surgery, emergency medicine, neurosurgery, and other medical specialty areas. The mission of TSOMS is to “continually enhance the quality and value of health care” for patients seeking oral and maxillofacial services in Texas. ROA.265.

II. Interest of Amici Curiae

TAPD, TAO, and TSOMS each have a significant interest in the resolution of this appeal. All three organizations have active members practicing in one of the nine specialty areas recognized under the Advertising Regulation. Those specialty recognitions, and the years of education and extensive qualifications they require, distinguish the organizations’ members from other dental practitioners in Texas and makes them more equipped in their respective fields of practice to diagnose, treat, and ensure the safety of the patients they see. The organizations themselves also invest substantial resources into ensuring that their members abide by uniform standards to achieve

specialty status and have access to the latest training and tools to provide the best and safest possible care to consumers of their services in Texas.

If the Fifth Circuit were to affirm the District Court’s invalidation of the Advertising Regulation, such a ruling would impact TAPD, TAO, TSOMS, and their members. Among other things, affirmance of the District Court’s decision would dilute the dental “specialist” designation in Texas by permitting general dentists, who do not have years of supervised clinical and didactic training and/or who have not satisfied extensive criterion, to advertise on par with the organizations’ members, who by contrast have long-term and comprehensive education and training through programs accredited by CODA. Such dilution threatens the health and safety of patients served by amici and their members by obscuring important distinctions between dental professionals. Absent clear and uniform guidelines for which practitioners are indeed “specialists,” patients cannot be expected make reasoned decisions about dental services.

In addition, permitting non- or less-qualified dental practitioners to advertise as “specialists”—particularly as it concerns ADA-recognized

specialty areas—threatens the organizational missions of amici curiae. TAPD, TAO, and TSOMS each strive to ensure the highest possible educational and training standards in their specialty dental fields, to ensure uniformity in education and training, and to promote maximum public confidence in their membership and professions. Amici support the TSBDE’s adoption of specialty designations sanctioned by the ADA because the ADA shares these goals.

ARGUMENT

I. The District Court Misapplied The Third Prong Of *Central Hudson* By Ignoring ADA Standards And National Consensus About Specialty Dental Advertising

Although the District Court decision is wrong in several respects, amici curiae urge in particular that the Court erred in applying the third prong of the test articulated by the Supreme Court of the United States in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The third prong of *Central Hudson* requires proof that the regulation at issue “directly advances the governmental interest asserted.” 447 U.S. at 566. Nevertheless, the relationship between the regulation and the governmental policy goal “need not be proven by empirical evidence; rather, it may be supported by ‘history, consensus, and simple common sense.’” *Educ. Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583, 589 (4th Cir. 2010) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)); accord *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995).

Paying only lip service to these standards, see ROA.1908, the District Court faulted the TSBDE for failing to cite any “studies, surveys” or other “tangible evidence” that limiting use of the words

“specialty” or “specialist” to specialties recognized by the ADA would limit consumer confusion. ROA.1910-12. In particular, the Court insisted that there was “no evidence the ADA’s chosen list of specialties is accurate, based on standard and uniformly applied criteria, or will actually help the public properly distinguish between general practitioners and specialists by weeding out false, deceptive, or misleading claims.” ROA.1912-13. As explained below, this is wrong for two main reasons.

A. Accreditation By The ADA’s CODA Is The Gold Standard In Determining Specialty Status

First, the District Court wrongly disregarded evidence that (1) the ADA’s specialty recognition standards are based on uniformly applied criteria widely accepted by members of the dental profession; and (2) the ADA recognizes that regulation of dental specialty advertising is necessary to combat consumer confusion.

The ADA has long recognized the need to protect consumers of dental services by circumscribing “specialty” claims by dental practitioners. To that end, the ADA adopted a Code of Professional Conduct (the “ADA Code”), which the Association describes as “a written expression of the obligations arising from the implied contract

between the dental profession and society.” ADA, Description of Principles of Ethics and Code of Professional Conduct, <http://www.ada.org/en/about-the-ada/principles-of-ethics-code-of-professional-conduct>. ADA members, which include amici’s members and even some of the Plaintiffs, “voluntarily agree to abide by the ADA Code as a condition to membership in the Association.” *Id.*² Section 5 of the ADA Code, entitled “PRINCIPLE: VERACITY (truthfulness)” prohibits dentists from advertising as specialists unless certain criteria are met:

- (1) The special area(s) of dental practice and an appropriate certifying Board must be approved by the American Dental Association.
- (2) Dentists who announce as specialists must have successfully completed an educational program accredited by the Commission on Dental Accreditation, two or more years in length, as specified by the Council on Dental Education and Licensure, or be diplomates of an American Dental Association recognized certifying board. The scope of the individual specialist’s practice shall be governed by the educational standards for the specialty in which the specialist is announcing.
- (3) The practice carried on by dentists who announce as specialists shall be limited exclusively to the special area(s) of dental practice announced by the dentist.

² Plaintiffs Dr. Jay Elliott and Dr. Jarom Heaton both admitted membership in the ADA. ROA.1573, 1575.

ADA Code, § 5.H (General Standards). As the ADA previously has explained to this Court:

The Association’s specialty recognition system has been responsible for assuring the American public that an individual who truthfully holds himself or herself out as a member of an ADA-recognized specialty meets high standards of education and training. . . . The standards are the same for all the recognized specialties. Their foundation is the successful completion of an educational program accredited by the Commission on Dental Accreditation of two or more years in length. . . .

In contrast, there is no standardized, nationally accepted program for recognizing achievement in non-specialty interest practice areas. Such credentials have varying levels of attainment. Educational qualifications can range from basic weekend continuing education courses to two years of formal, advanced full-time education. Experience, training and examination may or may not be required.

Brief for Amicus Curiae in Support of Appellees on Behalf of the American Dental Association, *Simm v. Louisiana State Bd. of Dentistry*, No. 02-30304, 2002 WL 32156697, at *3 n.2 (5th Cir. filed July 17, 2002) (emphasis added).

Amici curiae and their members support ADA-promulgated specialty accreditation standards because the ADA is the only organization with a “standardized nationally accepted” program for recognizing specialty status across several fields of dentistry. Moreover, the ADA is the only organization identified by any party that is widely

known to consumers. To the extent that any patient wishes to ascertain the credentials of a particular dental specialist in Texas, he or she need only look to CODA standards available on the ADA website. That is a far cry from the type of research that would be required if any organization with a putative set of credentialing standards could certify “specialists” in dentistry. The morass of potentially competing organizational standards would be unwieldy for any patient to navigate. As TSOMS representative Dr. Mark Craig testified, without accreditation by ADA’s CODA, it is impossible for patients to compare one specialty program to another to discern differences in the training and experience of dental professionals. ROA.1625-27.

This is important: at issue is whether patients in Texas have access to accurate information to help them decide where to seek medical care. Consumers should be able to understand what they are getting in their dental specialists because the dangers of going to the wrong professional are great. The procedures being performed by Plaintiffs and the specialist dentists in amici’s organizations can be complicated, often risky, and require extensive training to ensure

maximum patient safety. Credentialing should not be left to any fly-by-night dental organization.

Notably, amici curiae and their members are affiliated with larger national organizations devoted to their specialty dental practices, which adhere to the same high standards for education and professional achievement promulgated by the ADA. *See* American Academy of Pediatric Dentistry, <http://www.aapd.org/about>; American Association of Orthodontists, <https://www.aaoinfo.org>; American Association of Oral and Maxillofacial Surgeons, <http://www.aaoms.org>. These national organizations collectively boast thousands of members and likewise support the type of standardized programming for credentialing specialists as set forth by the ADA. *See* AAPD Residency Programs, http://www.aapd.org/residency_program; AAO Accredited Orthodontic Programs, <http://www.aaoinfo.org/education/accredited-orthodontic-programs>; AAOMS Training Programs, <http://www.aaoms.org/education-research/education-training>. That is because national, standardized programming promotes predictability in the quality of dental care, ensures consistency in the care provided to patients (including those that move across state lines), and facilitates consumer

choice by empowering patients to understand the differences in dental professionals and dental care.

There most certainly is consensus among national and state dental organizations that ADA standards are the best standards for determining who are specialists. That consensus is sufficient to support the Advertising Regulation. *See, e.g., Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1341-42 (11th Cir. 1998) (upholding constitutionality of state regulation prohibiting attorneys from engaging in in-person uninvited solicitation of prospective clients).

B. Other States' Regulations Of Dental Specialty Advertising Supports The Constitutionality Of The Advertising Regulation

Second, the District Court's decision ignores a large swath of other state regulations circumscribing dental specialty advertising based on ADA-promulgated standards. In its capacity as Defendant-Intervenor, TSOMS cited the District Court to dozens of state statutes that limited who could advertise as specialists to those qualified in ADA-recognized specialty areas. *See* ROA.1804, 1847, 1912. Nevertheless, the District Court flatly rejected the argument that other states' regulations could demonstrate national "consensus" about the wisdom of following ADA

standards. *See* ROA.1913. The Court also criticized Defendants for not explaining “how any one of these statutes actually matches Rule 108.54 in terms of deference to the ADA.” *Id.* This was error.

As the Eleventh Circuit Court of Appeals recognized in *Falanga*, other states’ similar regulation of commercial speech can help establish the “consensus” necessary to support the third prong of *Central Hudson*. 150 F.3d at 1342-43. In upholding the constitutionality of a Georgia statute proscribing in-person solicitation of legal services, the Eleventh Circuit found persuasive that “[n]o less than 31 states proscribe in-person solicitation in the same or similar manner.” *Id.* at 1342. Notably, it made no difference that most of these states did not have rules “identical” to the Georgia rules. *Id.* Rather, it was sufficient that other states regulated in a similar way.

The same is overwhelmingly true here. The record before the District Court contained citations to at least 25 state laws that regulate dental specialty advertising “in the same or similar manner” as the State of Texas. ROA.1804, 1847.³ Research by amici curiae reveals at

³ In their opening brief on appeal, Defendants-Appellants identified 28 jurisdictions with similar regulation of dental specialty advertising. *See* Brief for Defendants-Appellants at 27.

least eight others. *See* CONN. GEN. STAT. ANN. § 20-106a; IDAHO CODE ANN. §§ 54-903(6), 54-924(12); 68 ILL. ADMIN. CODE § 1220.421(f); KAN. STAT. ANN. §§ 65-1427, 65-1437(a)(2); KY. REV. STAT. ANN. §§ 313.035(3), 313.080(1); MISS. CODE ANN. § 73-9-29; 20 MO. C.S.R. §§ 2110-2.090(1), 2110-2.110(5)(C); N.D. ADMIN. CODE § 20-02-01-01(3). Moreover, several states regulate dental specialty advertising in a manner that “actually matches” the Advertising Regulation promulgated the TSBDE, by permitting dentists to advertise as specialists only if they have completed CODA-accredited programs in specialties recognized by the ADA. *See, e.g.*, 234 MASS. CODE REGS. § 5.03; MISS. CODE ANN. § 73-9-29; N.D. ADMIN. CODE § 20-02-01-01(3).⁴ The District Court’s decision to ignore this overwhelming national consensus was wrong.

II. If Affirmed, The District Court’s Injunction Should Be Limited In Application To These Plaintiffs

At the very least, this Court should clearly limit the scope of any injunctive relief prohibiting enforcement of the Advertising Regulation to these Plaintiffs. While ruling the Advertising Regulation “*might* be

⁴ In addition, other states similarly permit non-ADA specialists to advertising their credentials from other organizations, but only if they include the term “general dentist.” *See, e.g.*, N.D. ADMIN. CODE § 20-02-01-01(3).

permissible in the abstract,” the District Court held that “it is not permissible on the record currently before the Court.” ROA.1916 (emphasis in original). The Court thus granted Plaintiffs’ motion for summary judgment “with respect to [their] First Amendment claims.” *Id.* However, in fashioning relief, the District Court ordered that: “Texas Administrative Code § 108.54 is an unconstitutional restriction on *Plaintiffs’* First Amendment right to free commercial speech,” and “Defendants are ENJOINED from enforcing Texas Administrative Code § 108.54 *to the extent it prohibits Plaintiffs from advertising as specialists* or using the terms ‘specialty’ or ‘specialist’ to describe an area of dentistry not recognized as a specialty by the American Dental Association.” ROA.1920-21 (emphases added); *see also* ROA.1922-23. Thus, the District Court only upheld Plaintiffs’ as-applied challenge to the constitutionality of the Advertising Regulation.

In evaluating Plaintiffs’ claims under *Central Hudson*, the District Court conspicuously focused on the merits of Plaintiffs’ specialty claims, which further supports that the Court only upheld Plaintiffs’ as-applied challenge. In particular, the District Court emphasized that the organizational Plaintiffs award credentials “to members who have

demonstrated measurable expertise in their respective disciplines,” and that “[t]he individual Plaintiffs have developed an expertise in and limit their practice to their given fields, none of which are recognized as dental specialties by the ADA.” ROA.1900. As a result, the Court concluded that “the public would hardly feel misled if a licensed AAID diplomate advertised as a ‘specialist’ in implant dentistry and then later discovered the AAID was not a ‘specialty’ under Texas law because it had not achieved specialty status according to the ADA.” ROA.1907. In other words, the District Court was keenly focused on how the Advertising Regulation might unconstitutionally constrain speech as applied to *these Plaintiffs*. Any broader interpretation of the Court’s judgment is wrong.

Nevertheless, several organizations appear to have interpreted the District Court’s judgment more broadly, which—if allowed—poses a substantial risk to Texas consumers. *See, e.g.*, ADA News, “Texas court ruling allows non-ADA-recognized specialty dentists to advertise as ‘specialists’” (Jan. 26, 2016), <http://www.ada.org/en/publications/ada-news/2016-archive/january/texas-court-ruling-allows-non-ada-recognized-specialty-dentists-to-advertise-as-specialists> (“Dentists who

don't practice one of the nine specialties recognized by the ADA may still advertise as 'specialists' in Texas. . . ."); American Academy of Physiological Medicine & Dentistry, "Dental Specialties Court Ruling" (Jan. 27, 2016), <https://www.aapmd.org/aapmd-blog/dental-specialties-court-ruling> ("The ruling will allow dentists, who have the appropriate training, to advertise as 'specialists,' in the area of implantology, anesthesia, and other non-American Dental Association (ADA) specialties.").

This Court should lay to rest any interpretation of the District Court's judgment that prohibits enforcement of the Advertising Regulation beyond Plaintiffs. To succeed on their facial challenge to the Advertising Regulation, Plaintiffs would have had "to establish that no set of circumstances exists under which [the law] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations and quotations omitted); *accord Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 522 (6th Cir. 2012). Facial challenges are "disfavored" by the Courts, *see Discount Tobacco City & Lottery*, 674 F.3d at 522, and Plaintiffs did not meet their burden to demonstrate that the

Advertising Regulation “lacks any plainly legitimate sweep” on this record.

Indeed, even the District Court agreed that the State’s interests in “ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading professional advertisements” have “widely been recognized as substantial.” ROA.1909 (citing *Borgner v. Brooks*, 284 F.3d 1204, 1216 (11th Cir. 2002)). And as explained above, there is broad consensus that limiting the word “specialist” to those dentists who have achieved the requisite education and training in an ADA-approved specialty practice serves to minimize patient confusion and protect patient health. *See supra* pp. 15-17. At a minimum, there is no doubt that the Advertising Regulation directly advances the State’s legitimate interest in prohibiting general dentists with zero or only minimal specialty education or training from advertising as “specialists” simply because they feel like doing so. The Advertising Regulation thus has a “plainly legitimate sweep” that would be thwarted by wholesale invalidation of the regulation.

Any broader injunction against enforcement of the Advertising Regulation poses a very real and immediate threat to consumers in Texas. As in *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, the regulation “acts as a surrogate for monitoring functions which consumers cannot easily or comprehensively perform.” 44 F.3d 726, 734 (9th Cir. 1994). It is highly relevant that typical consumers of dental services in Texas lack “the capacities and resources” to “discriminate between truthful and specious claims” of dental specialty. *Id.* For example, most consumers simply do not know the difference between a “specialist” accredited as a “fellow” through weekend coursework by the American Academy of Implant Dentistry (“AAID”)⁵ and a “specialist” trained in a four-year CODA-accredited residency training program for oral and maxillofacial surgery. Both individuals can perform dental implants, but they do not have the same education, training, and experience. Yet if the Advertising Regulation is invalidated, both can advertise that they are “specialists,” and consumers will not know which one has years

⁵ A dentist can achieve this title by doing 400 hours of continuing dental education over the course of many years—the equivalent of occasional continuing legal education from year to year—and without enrolling in a full-time residential training program. See AAID Credentialing, <http://www.aaid.com/credentialing/Fellow.html>.

of supervised clinical and didactic training. As such, the Advertising Regulation is a facially reasonable and constitutional limitation on commercial speech preventing that untenable result.

CONCLUSION

Amici curiae strongly urge the Court to uphold the constitutionality of the Advertising Regulation as a reasonable restriction on commercial speech that directly and materially advances the State's interest in prohibiting misleading advertisement of dental specialties. Limiting "specialty" advertisement to those dentists who qualify in an ADA-recognized specialty ensures both uniformity in specialist qualification and consistency in consumer advertising. The consuming public needs and deserves that protection. The District Court's decision should be reversed.

April 26, 2016

Respectfully submitted,

/s/ Amy L. Rudd

Amy L. Rudd

Lindsey B. Cohan

DECHERT LLP

500 W. 6th Street, Suite 2010

Austin, Texas 78701

*Counsel for Amici Curiae Texas
Academy of Pediatric Dentistry,
Texas Association of Orthodontists,
and The Texas Society of Oral &
Maxillofacial Surgeons*

Certificate of Service

I hereby certify that on this 26th day of April, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Amy L. Rudd

Amy L. Rudd

*Counsel for Amici Curiae Texas
Academy of Pediatric Dentistry,
Texas Association of Orthodontists,
and The Texas Society of Oral &
Maxillofacial Surgeons*

Certificate of Compliance

1. I certify that, on April 26, 2016, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.
2. I certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
3. I certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Century Schoolbook typeface.

Date: April 26, 2016

/s/ Lindsey B. Cohan
Lindsey B. Cohan
*Counsel for Amici Curiae Texas
Academy of Pediatric Dentistry,
Texas Association of Orthodontists,
and The Texas Society of Oral &
Maxillofacial Surgeons*