No. 14-51151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY LOUISE SERAFINE,

Plaintiff-Appellant,

v.

TIM F. BRANAMAN, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
1:11-cv-01018-LY

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF APPELLANT AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

In addition to those persons listed in Plaintiff-Appellant's Statement of Interested Persons, the following persons have an interest in this *amicus curiae* brief:

1) The Center for Individual Rights, *amicus curiae*; and

2) Attorneys for *amicus curiae*: Michael E. Rosman, Christopher J. Hajec, and Michelle Scott (Center for Individual Rights).

Dated: February 18, 2015

/s/ Michael E. Rosman
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CORPORATE DISCLOSURE STATEMENT

The Center for Individual Rights is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

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INTEREST OF *AMICUS CURIAE*

The Center for Individual Rights (CIR) is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, including *Morse v. Frederick*, 551 U.S. 393 (2007), *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002), *Vera v. O'Keefe,* 791 F. Supp. 2d 959 (2011), and *Doe v. Burke*, 91 A.3d 1031 (2014).

CIR believes that the Texas Psychologists' Licensing Act is overbroad and has a chilling effect on speech protected by the First Amendment. CIR submits this *amicus curiae* brief to help this Court understand how that Act is overbroad even in relation to a purported "professional speech exception" to the First Amendment that was relied on by the court below, but has never been endorsed by either this Court or the U.S. Supreme Court.[1]

[1] All parties have consented to the filing of this *amicus curiae* brief. No party or party's counsel authored any part of this brief. No party, party's counsel, or any other person contributed money intended to fund its preparation or submission.

INTRODUCTION: FACTUAL SUMMARY AND THE RULING OF THE COURT BELOW

A recitation of the principal facts of this case reveals the real chilling effect of this overbroad statute.

Mary Louise Serafine, who has a Ph.D. in Education, has served on the psychology faculties of both Vassar College and Yale University. Record on Appeal ("ROA") 748. Her publications in the field of psychology are many and well-regarded, and she has been listed as a psychologist in *Who's Who in America*. ROA 741; ROA 341 (stipulated facts) ¶ 1. Dr. Serafine is also a lawyer. ROA 343 ¶ 16. She is licensed as an attorney in Texas, but not as a psychologist. ROA 343 ¶¶ 13, 16.

In 2010, Dr. Serafine was the Republican nominee for the Texas Senate in Travis County, Texas. ROA 341 ¶ 2. On a form she had to fill out for the Texas Secretary of State to be on the ballot, she listed her occupation as "attorney and psychologist." On her own campaign website she described herself as an "Austin attorney and psychologist." ROA 341 ¶ 4.

Apparently considering these descriptions, however true they might be, as violating the Texas Psychologists' Licensing Act, Texas Occupations Code § 501.001 *et seq.*, Sherry L. Lee, the Executive Director of the Texas State Board of Examiners of Psychologists, made a formal complaint to the Board about them. ROA 342 ¶¶ 6, 7. The Board then sent Dr. Serafine a letter in which it

"**ORDERED**" Dr. Serafine "to immediately **CEASE AND DESIST** from using the title 'psychologist' or offering or providing psychological services in the State of Texas." (emphasis in original). ROA 342 ¶ 7. It followed this letter with another, similar one in which the first was enclosed, and in which Dr. Serafine was warned that **"[f]ailure to comply with this letter within thirty (30) days will result in legal action being taken against you."** (emphasis in original). ROA 342 ¶ 8.

Not content with these threats, the Board then wrote to two *newspapers* seeking "corrections" of stories identifying Dr. Serafine as a "psychologist," on the ground that, lacking the Texas psychology license, she was "not allowed to use the term 'psychologist.'" ROA 342-43 ¶¶ 9, 10.

The Board next referred the matter to the Texas Attorney General's office for prosecution, and that office sent Dr. Serafine a letter threatening to prosecute her for her use of the term "psychologist." ROA 343 ¶¶ 11, 12.

At trial, Serafine testified that she had been teaching seminars, for compensation, on singleness and healthy relationships before receiving defendants' cease and desist letter. ROA 767. She also testified that she wanted to go on teaching such seminars, and also counsel individuals about such issues, but was afraid to do so because of defendants' letter and the state's threat of prosecution. ROA 763-65.

Indeed, the imperial sweep of the definition of "the practice of psychology" found in Texas's Psychologists' Licensing Act ("the Act") more than justified her fears. As shown below, for anyone who, like Dr. Serafine, lacks a psychology license, the Act bans speech on a wide variety of topics ranging far beyond any realistic idea of the practice of psychology. On any plausible view of how the First Amendment bears on the regulation of professions, the Act is drastically overbroad.

Indeed, not only is the statute overbroad as drafted; as shown below, it is overbroad as construed at trial by defendants. Worse, as the state's treatment of Dr. Serafine and its continued opposition to her as-applied challenge to its restriction of her political speech show, the state evidently has every willingness to enforce this statute to its full, free speech-chilling extent, in defiance of Supreme Court precedent on the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (finding the Stolen Valor Act unconstitutional as applied to an officeholder's false claim that he had received the Medal of Honor). The aggressive way Texas has applied this sweeping regulation makes its glaring overbreadth no mere theoretical concern, but an urgent matter.

* * *

The Act is purported to be a "professional regulation," a mere licensing scheme. In the 1940's, another Texas licensing scheme was at issue. When a

union organizer from Detroit named R. J. Thomas came to Texas to make a speech to a crowd advocating that they join his union, Texas served him with an order restraining him from doing so because he did not have an organizer's license. *Thomas v. Collins,* 323 U.S. 516, 520-21 (1945). Thomas made the speech anyway, and also engaged in individual union solicitation. *Id.* at 522-23. For disobeying the restraining order, he was sentenced to three days in jail and a $100 fine. *Id.* at 523-24. When the case reached the U.S. Supreme Court, the Court found that the state's requirement that Thomas register before making his speech violated his right to freedom of speech under the First Amendment. *Id.* at 540-41.

Concurring in the result, Justice Jackson opined that, consistently with the First Amendment, the state may regulate professions, even if by so doing it regulates speech. *Id.* at 544-45. Even he, however, saw the grave First Amendment problems with state regulation of public speeches advocating a cause. *Id.* at 546-547. As for the Court, it made no reference to "professional speech" or the regulation of professions at all.

In another concurrence forty years later, Justice White took up the purported professional speech exception to the First Amendment that Justice Jackson had first broached. The Court having concluded, on statutory grounds, that the Investment Advisers Act of 1940 did not apply to the giving of impersonal financial advice, *Lowe v. SEC*, 472 U.S. 181, 211 (1985), Justice White argued that

the constitutional question of whether the Act *could*, consistently with the First Amendment, apply to such impersonal advice should have been explicitly reached. *Id.* at 226-28. Justice White answered this question in the negative, enunciating the standard he arrived at as follows:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . . abridging the freedom of speech, or of the press."

Id. at 232 (White, J. concurring).

And so has the "professional speech" exception remained, in the Supreme Court, until today. The Court has never endorsed Justice White's theory. Nor has this Court. And the Supreme Court has cautioned federal courts not to carve out new areas of speech to be deprived of First Amendment protection. *United States v. Stevens,* 559 U.S. 460, 470, 472 (2010) (abjuring "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment").

This last point, with others, was lost on the court below, in its brief treatment of appellant's overbreadth claim. First, the court below quoted approvingly Justice White's statement in his concurrence in *Lowe* that regulations limiting those who could practice a profession were not subject to *any* scrutiny under the First Amendment. Findings of Fact and Conclusions of Law, ROA 689. Then, after reciting the overbreadth standard, the court below simply stated: "Because the Act is a professional regulation with only an incidental effect on protected speech, this court concludes that any impermissible application is insubstantial relative to its plainly legitimate sweep." ROA 690.

Clearly, the court below took it upon itself to carve out a new exception to the First Amendment, one never endorsed by this Court or the Supreme Court. And the rest of its rationale is even more indefensible. As shown below, the Act goes far beyond any regulation of professional speech that might be permissible, and in doing so operates not incidentally, but by direct regulation of what words may be uttered, and what subjects addressed, by those lacking the state's license. Indeed, specific words in political speech were directly prohibited in this very case. The contention of the court below that fully-protected speech can be prohibited as an "incidental effect" of an otherwise legitimate regulation is simply incorrect. *E.g., Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50 (1988) (holding that the

First Amendment applied in full force to the tort of intentional infliction of emotional distress because the allegedly tortious action consisted of speech).

ARGUMENT

Even assuming that this Court should adopt Justice White's professional speech exception to the First Amendment, the Act would remain staggeringly overbroad, sweeping in far more protected speech than that in any clearly legitimate sweep it might have.

I. The Overbreadth Standard

The overbreadth doctrine is an exception to the usual rule that a litigant lacks standing to assert the constitutional rights of another; its purpose is to prevent the discouragement or "chilling" of speech and other activity protected by the First Amendment. *Bd. Of Airport Commissioners of the City of Los Angeles v. Jews For Jesus, Inc.*, 482 U.S. 569 (1987) (holding airport resolution forbidding "First Amendment activities" unconstitutional as overbroad; "Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'") (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)); *Conchatta, Inc. v.*

Miller, 458 F.3d 258, 263 (3d Cir. 2006) (holding that an operator of a semi-nude dancing club and two of its dancers could challenge state statute precluding any establishment with a liquor license from permitting any "lewd, immoral, or improper entertainment" and holding the law unconstitutional; "in making their overbreadth claim, [dance club] may assert the rights of any liquor licensees subject to the Challenged Provisions"). A law is "overbroad" in this sense if its impermissible applications – that is, those that would penalize protected activity – are substantial in relation to the law's plainly legitimate sweep. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Given the purpose of the doctrine, the *degree* of chill is important, and thus the severity of the penalties in the law is relevant to overbreadth. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (holding that because of harsh criminal penalties, a challenge to a federal law aimed at "virtual child pornography" "provides a textbook example of why we permit facial [overbreadth] challenges to statutes that burden expression.").

Also, where it is unclear whether a statute bans given instances of protected speech, the lack of clarity militates in favor of overbreadth. *See id.* ("[F]ew legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."); *United States v. Williams*, 553 U.S. 285, 304 (2008) ("Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot

complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.") (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 & nn. 6, 7 (1982)).

Finally, the overbreadth doctrine applies to statutes aimed at commercial speech if such statutes also reach non-commercial speech. *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 481-84 (1989). Speech performed to make a profit is still non-commercial, and, as *Fox* made clear, includes for-profit job counseling, or fee-based legal or medical advice. *Id.* at 482.

II. The Act Is Very Broadly Drafted

According to the Act, "'psychological services' means acts or behaviors that are included within the purview of the practice of psychology." Texas Occ. Code § 501.003(a). Subsection "b" states that "[a] person is engaged in the practice of psychology if the person: (1) represents the person to the public by a title or description of services that includes the word 'psychological,' 'psychologist,' or 'psychology' [or] (2) provides or offers to provide psychological services to individuals, groups, organizations, or the public." § 501.003(b). Thus, the "definitions" of "psychological services" and the "practice of psychology" are substantially circular. Subsection "a" states that "psychological services" means

"the practice of psychology" and subsection "b" states that "the practice of psychology" includes offering or providing "psychological services."

Otherwise, § 501.003(c) describes (but does *not* define) the "practice of psychology" by a series of broadly-worded examples. Thus, the "practice of psychology" "includes," "addresses," and "involves" a number of things. For example, the practice of psychology "includes providing or offering to provide services to an individual or group . . . . that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior." § 501.003(c)(1). It also "addresses normal behavior and involves evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals or groups . . . ." § 501.003(c)(2). It further "includes . . . . counseling [and] career counseling," as well as "projective techniques, neuropsychological testing . . . . hypnotherapy . . . . and evaluating and treating mental or emotional disorders and disabilities by psychological techniques and procedures." § 501.003(c)(3). Finally, the practice of psychology is said to be "based on" both "a systematic body of knowledge and principles acquired in an organized program of graduate study" and "the standards of ethics established by the profession." § 501.003(c)(4).

After the practice of psychology is set forth so broadly in the Act, the practice of psychology without a license is forbidden in it. "A person may not

engage in or represent that the person is engaged in the practice of psychology unless the person is licensed under this chapter or exempt under Section 501.004." § 501.251. Those who do either commit a crime. § 501.503.

At trial, defendants did not even attempt to minimize the Act's broad sweep. On the contrary, they rejected any limiting constructions that might be put on the statute. For example, defendant Branaman, Chairman of the Texas State Board of Examiners of Psychologists, testified that the list of acts in subsection "c" that are included within "the practice of psychology" is disjunctive; one need do only one of them to be practicing psychology. ROA 945-47. He also testified that one could practice psychology without having acquired "a systematic body of knowledge and principles" in graduate school or following the ethics of the profession. ROA 945-46. Darrell Spinks, Executive Director of the Texas State Board of Examiners of Psychologists, also testified that the exemption for attorneys in § 501.004 does not allow them to do anything constituting the practice of psychology as long as it is not forbidden by their law license; rather, the action must be something their law license permits them, as opposed to non-lawyers, to do, or at least a function ancillary to their role as lawyers. ROA 1013-16.

III. The Act Bans The Use Of Specific Words In A Wide Variety Of Contexts

According to the Act, an unlicensed person who "represents the person to the public by a title or description of services that includes the word

'psychological,' 'psychologist,' or 'psychology'" commits the crime of practicing psychology without a license. §§ 501.003(b), 501.503. Thus, people commit a crime in Texas by using the word "psychologist" to describe themselves, regardless of context, or the words "psychology" or "psychological" to describe their services, even if they have training in psychology. An author who called himself a "psychological novelist" would commit a crime, as would the makers of motion pictures who dared to publicize them as "psychological thrillers." An unlicensed, non-academic author of books about psychology itself would commit a crime if one of the forbidden words were used in the title (as, of course, it commonly would be).[2] The regulation is not limited to use of these words in commercial speech, or even to non-commercial speech that is compensated.[3]

[2] As indicated above, if it is unclear whether a book or a movie constitutes a "service" under the Act, that is no argument against overbreadth. *Village of Hoffman Estates,* 455 U.S. at 494-95 & nn. 6, 7 (holding that in determining whether an enactment reaches a substantial amount of constitutionally protected conduct, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment). *See also National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (internal citations omitted).

[3] The court below, moreover, recognized that use of the forbidden words in commercial speech need not be misleading. It nonetheless drew the wrong conclusion from that premise. *Compare* Order of the court below on defendants' motion to dismiss, ROA 261 ("Because Serafine may present her services to the public in a way that is not deceptive, for example by stating that she is a nonlicensed psychologist offering psychological services in the state of Texas, the

Indeed, here, in the state's view, even a political candidate with more-than-respectable credentials as an academic psychologist committed a crime by describing herself as a "psychologist" on her campaign website.

Such a blanket banning of words amounts to a content-based restriction. *E.g.*, *Cohen v. California*, 403 U.S. 15, 24 (1971) (overturning petitioner's conviction for disorderly conduct for expressing opposition to the draft by means of a vulgar expletive, because "governmental bodies may not prescribe the form or content of individual expression"). And defendants have done nothing to show, under any level of scrutiny that might be applied, that such applications of the ban of these words, which are certainly substantial compared with any "plainly legitimate sweep" it might have, serve any governmental interest whatsoever.

IV. The Act Transgresses The Boundaries Of Any Commonsense Idea Of "The Practice of Psychology"

Apart from its prohibition of particular words, the Act would *still* be grossly overbroad, even if Justice White's purported "professional speech" exception to

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court concludes that her commercial speech is not inherently, but only potentially, misleading.") (internal quotation marks omitted) *with* its Findings of Fact and Conclusions of Law, ROA 691-93 (holding that because Serafine's speech was potentially misleading, and "[b]ecause the Act specifically prohibits the use of only three distinct words, each of which have a generally understood and reasonably clear meaning to the public at large, ... the Act is reasonably tailored to protect consumers from unlicensed and unregulated practitioners of psychology."). *Cf. In re R.M.J.*, 455 U.S. 191, 203 (1982) ("States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive," and any regulation "may be no broader than reasonable necessary to prevent the deception").

the First Amendment were valid, because the Act covers broad kinds of speech that are not at all distinctive to psychology, but commonly engaged in by those in other professions, or no profession.

As Justice White recognized, the professional speech exception as explained by him must have its limits:

> But the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se* or of the press. At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment.

Lowe, 472 U.S. at 229-230 (White, J., concurring). For example, a state may not simply define extremely broad, or heterogeneous, categories of speech and action and, by labeling them a "profession," remove them from all First Amendment protection. Even on the Justice White view, some natural or realistic idea of the profession must be preserved. If not, Texas could simply define the profession of psychology as that profession in which people talk over other people's problems with them and try to help them, and ban such talk to the unlicensed. (Indeed, Texas defines "the practice of psychology" almost that broadly.) *See, e.g.*, *National Ass'n for Advancement of Colored People v. Button,* 371 U.S. 415, 428-29 (1963) (holding that solicitation by public interest attorneys could not be prohibited by Virginia under its power to regulate the legal profession; "a State cannot foreclose the exercise of constitutional rights by mere labels").

And, of course, some recognized professions cannot be licensed, consistently with the First Amendment, at all. Consistently with free speech in a free country, there could never be any such thing as a "licensed political consultant," a "licensed journalist," or a "licensed historian" – certainly not if speech by the unlicensed in these respective areas was thereby banned.

What might be termed the natural or realistic idea of the practice of *clinical* psychology (which is what the Act is purported to license; academic psychologists remain unlicensed in Texas) is very different from that found in the Act. For example, the Merriam-Webster Online Dictionary defines "clinical psychology" as follows:

> **clinical psychology**
>
> Branch of PSYCHOLOGY concerned with the diagnosis and treatment of MENTAL DISORDERS. Clinical psychologists evaluate patients through interviews, observation, and PSYCHOLOGICAL TESTS, and they apply current research findings and methodologies in making diagnoses and assigning treatments. Most clinical psychologists hold an academic degree (Ph.D. or Psy.D.) rather than a medical degree (M.D.); they may provide PSYCHOTHERAPY but cannot prescribe medications. Most practictioners work in hospitals or clinics or in private practice, often in tandem with psychiatrists and social workers, treating mentally or physically disabled patients, prison inmates, drug and alcohol abusers, and geriatric patients, among others. *See also* PSYCHIATRY; SOCIAL WORK

http://www.merriamwebster.com/concise/clinical+psychology?show=0&t=1422305381. This definition of "clinical psychology" can and should be narrowed still further, for First Amendment reasons, by applying Justice White's limitation that

only particularized advice given in a professional-client (or patient) relationship may be regulated.

The Act goes far beyond this commonsense, real-world definition. Instead, for example, the Act states that one is practicing psychology if one "provid[es] or offer[s] to provide services to an individual or group, including providing computerized procedures, that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior." § 501.003(c)(1).

This is a breathtakingly broad provision. After all, applying "established principles, methods, and procedures of describing, explaining, and ameliorating behavior" encompasses much of the work of the social sciences. For example, the law of supply and demand is an established principle of describing and explaining behavior; thus, for example, the Act makes it a crime for an economics adviser to a state official to invoke this principle in an effort to ameliorate market behavior by making it more efficient. (The Act conspicuously does *not* limit "the practice of psychology" to "explaining" the "behavior" of the client to whom one is offering "services.")

More mundane, though in some cases no less important, sorts of examples can be multiplied indefinitely. Presumably, there are "established principles, methods, and procedures" for "ameliorating" a person's golf swing, known to golf

pros and others, and one who used them in giving advice to improve another's swing would be "describing, explaining, and ameliorating behavior." So would the leader (and the participants in) an Alcoholics Anonymous meeting, when giving advice based on the established twelve-step method of identifying and overcoming alcoholism and other addictions. So would one neighbor when advising another on how to overcome marital difficulties through a combination of tact, patience, and forbearance, or one mother when giving well-grounded advice to another on child-rearing based on "established principles" of their common religion. Indeed, not only does the Act ban wide swaths of advice that are not the distinctive province of clinical psychology, it most clearly applies when the advice is *good* advice, based on "established" knowledge.

This portion of the Act also forbids the unlicensed to engage in myriad forms of counseling and coaching, from life coaching to tax advice. *See*, *e.g.*, Pat Borzi, *Coach's Ph. D. in Psychology, Applied on Court,* N.Y. Times, February 18, 2015, at B8 (reporting that the basketball coach at the University of St. Thomas uses "psychology," in particular the notion of intrinsic motivation, to improve his players' performance).

Implicitly confessing that many of these forms of advice lie well outside the realm of the distinctively psychological, the Act contains numerous exemptions for "licensed professionals" who may dispense them, if permitted under their license,

provided they do not call their advice "psychological" or themselves "psychologists." § 501.004(a)(3). These comprise physicians, attorneys, registered nurses, licensed vocational nurses, occupational therapists, licensed social workers, licensed professional counselors, career counselors, licensed marriage and family therapists, and licensed chemical dependency counselors. § 501.004(b).[4] Employees of charitable nonprofit organizations, insofar as their activity is voluntary, and clergy are also exempted, with the same limitation on their use of terms. § 501.004(a)(4), (5). Clearly, these exemptions are present precisely *because* the Act is so broad that it encompasses much of the work of these other professionals. But even under Justice White's theory, restrictions on speech not distinctively belonging to the profession licensed in a given case, but engaged in by *many* professions and by non-professionals alike, are subject to scrutiny under the First Amendment.

Whatever scrutiny is applied to the banning of advice that is not distinctively psychological, nothing in the record of this case or the opinion below establishes that it can be met. No findings or testimony show any legitimate governmental interest in protecting the public from golf coaching, marital advice from a neighbor, advice on economics, and so on. Indeed, as just noted, it is precisely

[4] Thus, a psychiatrist who has studied psychology but has not obtained a psychologist's license in Texas could offer "psychological services" to his patients provided he does not call those services "psychological."

good advice – or, at least, advice based on "established principles, methods, and procedures" – that the Act most clearly penalizes. If Texas has an interest in banning such frequently-occurring forms of communication as indicated in the above examples, it has neither identified nor given evidence for it, and has, in the Act, pursued it in a counterproductive way.

V. The Act Bans Speech To Groups And The Public

The justification of the Act by the court below as a "professional speech regulation" is particularly odd because the definition of the "practice of psychology" in the Act explicitly applies to speech to groups of people and outside of any professional-client relationship in which particularized advice is given. The explicit language of § 501.003(c)(1), just discussed, applies *equally* to "individual[s] or group[s]." Lectures designed to help audiences with their golf swings, overcome alcoholism or marital problems, or make better financial decisions are among the kinds of services that only licensed psychologists and the exempt may provide in Texas. And, of course, the unlicensed (with some exceptions, § 501.004(a)(1), (2)) may not provide lecture services designed to help people overcome difficulties, such as various neuroses, of a distinctively psychological nature. Along with lectures, books, newspaper articles, and radio talk shows on the same subjects apparently also are banned. *See* § 501.003(c)(1)(b)(2) (providing that one practices psychology if one "provides or

offers to provide psychological services to individuals, groups, organizations, or the public"). Indeed, an investment newsletter in which the principle of supply and demand was used to "ameliorate" the investment behavior of its readers would constitute the "practice of psychology" under the Act. As Justice White himself explained, such generalized, impersonal forms of advice may not be banned in a licensing statute. *See also, e.g., R&W Technical Services Ltd. v. Commodity Futures Trading Com'n,* 205 F.3d 165, 175 (5th Cir. 2000) ("Had impersonal advisors been included in the definition of an investment advisor [in *Lowe*], there would have been an unconstitutional prior restraint in regulating them, since the publication of impersonal advice about specific investments is fully protected speech under the First Amendment.")

It would appear that defendants are disposed, at least to some extent, to prosecute some such violations of the Act. Testimony of Defendant Branaman, ROA 503-509 (stating that he would have to look at the specific facts of instances of, for example, golf coaching, twelve-step programs, telephone help lines, and weight-loss and smoking cessation programs to determine whether violations of the Act had occurred). But even if promises of forbearance by the state had been made here, they would not defeat the overbreadth of the statute. *Stevens*, 559 U.S. at 480 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional

statute merely because the Government promised to use it responsibly."); *Conchatta Inc. v. Miller,* 458 F.3d 258, 265 (3d Cir. 2006) ("The Commissioner asserts that the Liquor Board does not intend to enforce the Challenged Provisions against 'legitimate' theatrical or concert performances. However, the mere fact that an agency does not currently intend to apply a statute in an unconstitutional manner cannot have the effect of an explicit limiting construction."); *Ways v. City of Lincoln, Neb.,* 274 F.3d 514, 519-20 (8th Cir. 2001) (rejecting city's assurances that a statute was "not intended to apply to artistic venues" in considering an overbreadth challenge). And one need look no further than the facts of this case, in which Texas took action against Dr. Serafine for her truthful, clearly-protected political speech, to see that forbearance is not even being practiced by the relevant state officials. *See Rosemond v. Conway,* No. 3:13-cv-00042-GFVT (E.D. Ky. Filed July 7, 2013) (challenging a letter to a nationally-syndicated advice columnist, licensed as a psychologist in North Carolina but not Kentucky, from the Kentucky Attorney General ordering him to cease and desist from violating Kentucky's broadly-worded psychologists' licensing statute by calling himself a "psychologist" and unlawfully practicing psychology in Kentucky by means of his column).

In short, the Texas Psychologists' Licensing Act is drastically, indeed, impudently overbroad, banning far more speech than possibly could be justified

even by Justice White's theorized professional speech exception to the First Amendment. It should be ruled unconstitutional for that reason.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Dated: February 18, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font with a 14-point type face.

3. The paper version of this brief will be an exact copy of the electronic version. There are no privacy redactions necessary under 5th Cir. Rule 25.2.13. The electronic version has been scanned and reported free of viruses by the most recent version of a commercial virus-scanning program.

Dated: February 18, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, the foregoing *Amicus Curiae* Brief of the Center for Individual Rights in Support of Appellant and Reversal has been filed with the Clerk of the Court and sent via the Court's ECF system to the following persons:

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