

No. 14-51151

**In the United States Court of Appeals
for the Fifth Circuit**

DR. MARY LOUISE SERAFINE,

Plaintiff – Appellant,

v.

TIM F. BRANAMAN, Chairman, Texas State Board of Examiners of Psychologists, in his official capacity; DARREL D. SPINKS, EXECUTIVE DIRECTOR, Texas State Board of Examiners of Psychologists, in his official capacity,

Defendants – Appellees.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 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.

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FEDERAL RULE 35(b)(1) STATEMENT REGARDING EN BANC REVIEW

The panel opinion facially invalidated a Texas statutory provision regulating the practice of psychology. This holding contradicted two settled principles of overbreadth analysis, both of which follow from the proposition that facial invalidation should be used only as a “last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

First, statutes must be read narrowly to avoid overbreadth problems. *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989). Here, the panel suggested that constitutional avoidance was *not* applicable in the overbreadth context. Panel Opinion (Op.) 21. Indeed, it took the opposite course and invalidated the statute based on expansive readings that were “possible” or “conceivable.” Op. 19. Under a narrow or even an ordinary interpretation, the statute is limited to the professional practice of psychology and presents no overbreadth problem. Not even the appellant advanced the overbreadth theory adopted by the panel.

Second, a statute can be held facially invalid only if its illegitimate applications are substantial relative to its legitimate sweep. *United States v. Williams*, 553 U.S. 285, 292 (2008); *Hersh v. U.S. ex rel Mukasey*, 553 F.3d 7433, 762 (5th Cir. 2008). The panel did not perform this comparison. A proper analysis reveals that much of the supposed overbreadth actually constitutes permissible regulation. Any illegitimate applications are purely hypothetical, and insubstantial relative to the statute’s legitimate scope.

Finally, the case presents an issue of exceptional importance. The panel opinion disrupts an important regulatory scheme, and threatens to do the same to other States’ laws concerning psychology, as well as to occupational regulation more generally.

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STATEMENT OF THE ISSUES

1. Whether courts must read statutes narrowly to avoid overbreadth problems, where a limiting construction is available.
2. Whether facial invalidation on overbreadth grounds requires a showing that a statute's impermissible applications are substantial relative to its legitimate scope.

STATEMENT OF THE COURSE OF PROCEEDINGS

Serafine brought several challenges to the Texas statute regulating the practice of psychology. The district court rejected her claims. ROA.256-58, 262-65, 689-93. A panel of this Court reversed as to two claims: an as-applied challenge to Texas Occupations Code section 501.003(b)(1), and a facial overbreadth challenge to Texas Occupations Code section 501.003(b)(2). Op. 23. This petition focuses on the facial overbreadth claim.

STATEMENT OF FACTS

Section 501.003(b)(2) defines the practice of psychology—which generally cannot be performed without a license under section 501.251—as “provid[ing] or offer[ing] to provide psychological services.” In turn, section 501.003(a) defines “psychological services” as those “included within the purview of the practice of psychology.” Finally, section 501.003(c) describes “the practice of psychology.” Thus, the scope of (b)(2) is set by (c). Op. 14-15.

Section 501.003(c) contains four subsections, each of which imposes limitations on what constitutes the practice of psychology. Under (c)(1), psychology is limited to “services” that involve “describing, explaining, and ameliorating behavior.” Subsection (c)(2) specifies that psychology “involves evaluating, preventing, and remediating ...

disorders.” (emphasis added). Under (c)(3), psychology “includes ... evaluating and treating mental or emotional disorders and disabilities *by psychological techniques and procedures.*” (emphasis added). Finally, (c)(4) states that psychology “is based on ... a systematic body of knowledge and principles acquired in an organized program of graduate study” as well as “the standards of ethics established by the profession.”

Serafine’s briefing to this Court devoted three pages to overbreadth. Serafine Br. 65-68. Her argument was based on the view that (c) is *disjunctive*—in other words, that one could practice psychology by satisfying any one of the four subsections. *Id.* at 18-19. Appellees responded that, as they had argued throughout the litigation, (c) must be read *conjunctively*. Appellees Br. 49 (citing ROA.403). The panel agreed with the appellees, primarily because (c)(3) and (c)(4) are separated by the word “and.” (By contrast, the adjacent section 501.003(b) prefaces the last subsection with “or.”) Op. 15-16.

Serafine never argued that the statute would be overbroad if read conjunctively. Indeed, her counsel suggested that the conjunctive reading of the statute was not reasonable because it would make subsection (c) too *narrow* to fulfill the legislature’s purposes. Oral Argument at 00:36:05-00:36:20. In short, neither party suggested that the conjunctive reading was overbroad—but that is what the panel held. Op. 22.

In reaching this conclusion, the panel declined to adopt a limiting construction of the statutory text, stating that it was “mindful of the Supreme Court’s decision not to ‘rely upon’ the canon of constitutional avoidance in the overbreadth context.” Op. 21 (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). Instead, the panel hypothesized broad readings that were “conceivable” or “possible.” Op. 19. The panel suggested that the statute could encompass, for example, Weight Watchers instructors or

advice bloggers. Op. 19. It even suggested that the statute could restrict “guidance about the common problems of life” offered “at the feet of grandparents, or in a circle of friends.” Op. 22. Without explicitly defining the statute’s legitimate sweep, or the scope of its impermissible applications, the court struck down (c) and (b)(2) as facially overbroad. Op. 22.

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH FIRST AMENDMENT OVERBREADTH PRECEDENTS FROM THIS COURT AND THE SUPREME COURT

A. The Panel Did Not Read the Statute Narrowly to Avoid Overbreadth

1. Facial invalidation of a statute on overbreadth grounds is “strong medicine,” *Williams*, 553 U.S. at 293, because it threatens “total judicial abrogation of an otherwise valid and rational legislative scheme.” *CISPES v. FBI*, 770 F.2d 468, 472 (5th Cir. 1985). “Invalidating a law that is perfectly constitutional in some applications has obvious harmful effects,” *Hersh*, 553 F.3d at 763 (internal quotation marks omitted), and “threaten[s] to short circuit the democratic process.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Accordingly, overbreadth must be “employed ... sparingly and only as a last resort.” *Broadrick*, 413 U.S. at 613 (quoted in *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 761 (5th Cir. 2010)).¹

One “important corollary” of the doctrine’s potential for harm is that “statute[s] should be construed narrowly to avoid overbreadth, if ... fairly subject to such a limiting construction.” *Wallington*, 889 F.2d at 576. This principle has been articulated by the

¹ Mindful of the doctrine’s limitations, courts of appeals have repeatedly rejected overbreadth challenges to occupational regulations. See *Wollschlaeger v. Governor of Fla.*, 2015 WL 8639875, at *31 (11th Cir. 2015); *Pickup v. Brown*, 740 F.3d 1208, 1234-35 (9th Cir. 2013); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 570 n.3 (4th Cir. 2013); *Locke v. Shore*, 634 F.3d 1186, 1191-92 (11th Cir. 2011); *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1386 (7th Cir. 1992).

Supreme Court, this Court, and other courts of appeals on many occasions. *E.g.*, *Broadrick*, 413 U.S. at 613 (“Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.”); *Ferber*, 458 U.S. at 769 n.24 (federal courts “should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction”); *Fairchild*, 597 F.3d at 757 (“Responsive to the ‘well-established principle that statutes will be interpreted to avoid constitutional difficulties,’ we decline to read the text expansively.” (quoting *Frisby v. Schultz*, 487 U.S. 474, 483 (1988))); *CISPES*, 770 F.2d at 473; *Locke*, 634 F.3d at 1191; *Wollschlaeger*, 2015 WL 8639875, at *10.

This Court has repeatedly applied this principle. *Fairchild*, 597 F.3d at 756 (finding text “amenable to a proffered limiting construction”); *Wallington*, 889 F.2d at 576-77 (declining to adopt “a literal reading of the text” which would have “the bizarre effect of criminalizing ... almost every communication by government employees of information they obtain in the scope of their employment”); *CISPES*, 770 F.2d at 473 (adopting narrow interpretation suggested by government); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1029-30 (5th Cir. Unit A June 1981) (declining to adopt “literal” reading which would “forbid[] the most sensitive and intimate conversations”).

The panel opinion conflicts with these cases. The panel declined to adopt any limiting construction, stating that it was “mindful of the Supreme Court’s decision not to ‘rely upon’ the canon of constitutional avoidance in the overbreadth context.” Op. 21 (quoting *Stevens*, 559 U.S. at 481). But as noted above, the Supreme Court and other

courts routinely rely on that canon in this context.² And the panel further contradicted those decisions by relying on broad constructions of the statute that were “possible” or “conceivable.” Op. 19 (stating that it is “possible that *any* classes taken after the completion of an undergraduate degree ... could be within the definition of an ‘organized program of graduate study’” and that “it is conceivable” that simply “attending a meditation seminar” would suffice); *see also* Op. 19 (stating that “a marriage-advice column or parenting blog could conceivably be within the ambit of subsection (c)”). This approach of hypothesizing the *broadest* available reading of the statute is directly at odds with the requirements of overbreadth analysis. *See, e.g., Ferber*, 458 U.S. at 773 (“Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving [it] an expansive construction.”); *Lawline*, 956 F.2d at 1386 (“[T]his Court will not strike down the ... rule as facially invalid on the assumption that the Illinois Supreme Court and the Northern District will construe [the rule] so broadly as to infringe upon ... First Amendment rights.”)

2. Under a narrow—or even an ordinary—reading of the statute, any possible overbreadth problem disappears. The “practice of psychology” is limited to “services” (subsection (c)(1)), which are aimed at addressing “disorders” (subsection (c)(2)), through the use of “psychological techniques and procedures” (subsection (c)(3)). Subsection (c)(4) further tightens the definition by making clear that the services comprising the practice of psychology are “based on” both “a systematic body of knowledge and

² In *Stevens*, the Supreme Court declined to apply a limiting construction only because doing so would have required “rewriting” the statute. 559 U.S. at 481.

principles acquired in an organized program of graduate study”³ and “the standards of ethics established by the profession.” Taken together, these requirements make clear that section (c) is restricted to the professional practice of psychology—which is regulated in all fifty States. ROA.688, 470-73; *see Kagan v. City of New Orleans*, 753 F.3d 560, 651 (5th Cir. 2014) (“Reviewing the law facially, we see its purpose to be clear.”).

Not even Serafine suggested that subsection (c) is overbroad if it is read conjunctively. To the contrary, her counsel argued that the conjunctive reading should be rejected because it is *too narrow*. Oral Argument at 00:36:05-00:36:20. Accordingly, once the panel adopted the conjunctive reading, Op. 15-16, it should have rejected Serafine’s claim for lack of disagreement between the parties—instead of turning to the “last resort” of overbreadth doctrine. *Broadrick*, 413 U.S. at 613.

3. In any event, none of the assertedly overbroad applications identified by the panel fall within the scope of the statute. The panel seemed concerned primarily about employees of Weight Watchers, Alcoholics Anonymous, tobacco-cessation programs, and other counseling services. Op. 17-20.⁴ Under a properly cabined reading of the statute, most or all such individuals would be excluded on the ground that they do not

³ The panel was concerned that this requirement would create a “seeming absurdity” because it implies that any practitioner who does not have a doctoral degree can operate without a license. Op. 16. This concern can be alleviated by reading (c)(4) to mean that the practice of psychology encompasses services that *properly* should be based on graduate studies. By analogy, a regulation stating that lifeguarding is based on a proper understanding of accident prevention should not be read to imply that anyone who lacks such an understanding is free to work as a lifeguard.

⁴ The other hypothetical applications mentioned by the panel can be excluded because they would not ordinarily be described as “services” under (c)(1). *See* Op. 19, 22 (discussing advice provided by friends and grandparents, or blogs and newspaper columns, on subjects such as parenting and marriage). They are also excluded by some or all of the other limitations discussed in this section (such as the professional ethics requirement).

treat “disorders” under (c)(2) or deploy “psychological techniques” under (c)(3). In addition, they are excluded by the two limitations contained in subsection (c)(4).

First, it is doubtful that leading a weight loss program would require “a systematic body of knowledge and principles acquired in an organized program of graduate study,” especially in light of the straightforward inference that only the graduate study *of psychology* would qualify. The notion that the requisite knowledge can be acquired through the graduate study of any subject whatsoever is not a plausible—let alone a required—interpretation of the statute. *See* TEX. OCC. CODE § 501.255 (requiring “a doctoral degree in psychology” to obtain even a provisional license to practice psychology). The panel nevertheless concluded that Weight Watchers instructors were under threat because “[i]t is ... possible that *any* classes taken after the completion of an undergraduate degree” could qualify. Op. 19. The use of “possible” demonstrates that, even according to the panel, a narrower reading is available. Under overbreadth principles, that narrower reading must be adopted.

The opinion further dilutes the “graduate study” requirement by suggesting that no program need actually be *completed*. Instead, “it is conceivable” that attending one “meditation seminar or AA training conference” would suffice. Op. 19. Again, the use of “conceivable” indicates that this reading is not mandatory. To the contrary, a single seminar could hardly constitute an “organized program of graduate study” or convey “a systematic body of knowledge.” Indeed, elsewhere in the opinion, the panel itself interprets the provision to require a “qualifying doctoral degree[.]” Op. 16.

The second portion of (c)(4) alleviates the panel’s concerns even more clearly. It provides that the practice of psychology is based on “the standards of ethics established

by the profession.” The profession in question is certainly psychology; it is hard to imagine why the practice of psychology would be defined by reference to ethical guidelines established by some other profession. See TEX. OCC. CODE § 501.151 (instructing the Texas State Board of Examiners of Psychologists (“the Board”) to adopt a code of ethics). The panel held, however, that it would be enough to follow *any* “professional standard of ethics”—for instance, one that Alcoholics Anonymous might develop. Op. 19. But the statute says “*the* profession,” not “*a* profession” or “*any* profession.” The panel’s interpretation is not persuasive, let alone inescapable. And if “the profession” means “psychology,” the panel’s concerns dissipate: after all, there is no suggestion that Weight Watchers instructors are bound by the ethical standards *of psychology*.

This Court has construed statutes narrowly to avoid overbreadth problems even when the most natural reading of the statute was to the contrary. See, e.g., *Wallington*, 889 F.2d at 576-77. Here, it is not necessary to go that far: the panel’s overbreadth concerns disappear even under ordinary interpretive principles.

B. The Panel Did Not Ensure That the Impermissible Applications Were Substantial Relative to the Statute’s Legitimate Scope

Assuming *arguendo* that some of the disputed applications *must* be read into the statute, the panel’s analysis still violated core overbreadth principles. The Supreme Court has “made clear that facial challenges of this sort can succeed only if there is a significant imbalance between the protected speech the statute should not punish and the unprotected speech it ultimately reaches.” *Shackelford v. Shirley*, 948 F.2d 935, 940 (5th Cir. 1991). Accordingly, overbreadth requires that the number of unconstitutional applications of the statute be “substantial ... judged *in relation* to the statute’s plainly legitimate

sweep.” *Stevens*, 559 U.S. at 473 (emphasis added and internal quotation marks omitted). Thus the two basic steps of overbreadth analysis are (1) establishing that the statute has unconstitutional applications and (2) demonstrating an imbalance between those applications and the statute’s legitimate scope.

1. At the first step, the panel never explained why the applications it identified would be unconstitutional. As noted above, the panel was primarily concerned about professional counselors in areas such as weight loss. To fall within the terms of the statute, these counselors would have to treat mental or emotional disorders using psychological techniques, and be subject to a professional code of ethics. Op. 21-22. Without explanation, the panel assumed that such counselors are beyond the State’s regulatory authority. This assumption directly conflicts with the venerable line of cases holding that “States have ‘broad power to establish standards for licensing practitioners and regulating the practice of professions.’” *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015) (quoting *Gade v. Nat’l Solid Wastes Mgm’t Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975))).⁵ The panel adduced no authority, and we are aware of none, suggesting that a State is powerless to regulate professional counselors who treat disorders using psychological techniques.

2. Any remaining overbreadth would not be “substantial.” *See, e.g., Fairchild*, 597 F.3d at 761 (rejecting an overbreadth challenge because it did not reach a substantial

⁵ *See also Watson v. Maryland*, 218 U.S. 173, 176 (1910) (“It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.”); *Kagan*, 753 F.3d at 562 (upholding the licensing of tour guides); *Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) (“It is properly within the state’s police power to regulate and license professions, especially when public health concerns are affected.”).

amount of speech). In any event, merely *hypothetical* unconstitutional applications do not suffice. Because overbreadth is “designed to prevent the chilling of protected expression,” *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989), the threat posed by an overbroad statute must be *realistic*. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) (requiring “a realistic danger” and noting that “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient”).⁶ Overbreadth challenges must therefore be rooted in “actual fact.” *N.Y. State Club Ass’n Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988); *see also Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

Serafine cannot demonstrate a realistic threat rooted in actual fact. She has not alleged that Texas has ever used the statute, or threatened to use it, in *any* of the scenarios hypothesized by the panel. *See Lawline*, 956 F.2d at 1386 n.6 (rejecting overbreadth challenge where “plaintiffs do not refer to any Illinois or Northern District cases which adopt an overbroad interpretation of the ... rules”).⁷ This is especially notable because subsection (c) has existed in its current form for over fifteen years. Psychologists’ Licensing Act, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 1431, 1857;⁸ *see United*

⁶ *See also Hersb*, 553 F.3d at 762 (it is not enough that “a court can hypothesize” impermissible applications); *Shackelford*, 948 F.2d at 940-41 (although one could imagine illegitimate prosecutions, “we have difficulty believing” the question “could go to the jury”).

⁷ The opinion notes that a Kentucky agency ordered a newspaper columnist to stop offering parenting advice. Op. 19-20. But the Kentucky statute is much broader: it does not limit psychology to the treatment of disorders or tie psychology to graduate study or professional ethics. KY. REV. STAT. § 319.010. Second, a single case in Kentucky does not establish a chilling effect in Texas. Third, the columnist prevailed in district court, demonstrating the viability of as-applied challenges in this context. *Rosemond v. Markham*, 2015 WL 5769091, at *1 (E.D. Ky. Sept. 30, 2015).

⁸ The definition was, if anything, broader in earlier versions of the statute. *See, e.g.*, Act of May 30, 1975, 64th Leg., R.S., ch. 362, § 1, sec. 2(c), 1975 Tex. Gen. Laws 956, 956.

States v. Scruggs, 714 F.3d 258, 268 (5th Cir. 2013) (“We also note that the honest-services statute has been on the books for a quarter of a century ... with no sign of the chilled political endorsements or the overreaching prosecutions prophesied by Scruggs.”); *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (rejecting overbreadth challenge where Texas had consistently applied the rule narrowly).⁹

But even assuming *arguendo* that there is a set of applications that are (1) mandated by the statute, (2) unconstitutional, (3) significant in number and (4) sufficiently realistic, the overbreadth would still have to be substantial *relative* to the statute’s legitimate scope. *See, e.g., Williams*, 553 U.S. at 292 (this requirement is “vigorously enforced”); *Hersh*, 553 F.3d at 762. The opinion never performs this comparison, which is fatal to Serafine’s claim. The legitimate sweep of the statute is vast—at a minimum, it includes the entire scope of the professional practice of psychology. *Hines*, 783 F.3d at 202 (explaining that “content-neutral regulation of the professional-client relationship does not violate the First Amendment”); *Nat’l Ass’n for Advancement of Psychoanalysis*, 228 F.3d at 1053-55 (upholding similar psychology statute); *supra* at 9 & n.5 (collecting cases confirming State’s broad power to regulate the professions).¹⁰

Any plausible overbreadth pales in comparison to the statute’s legitimate sweep. *See Ferber*, 458 U.S. at 773 (no overbreadth where statute’s “legitimate reach dwarfs its arguably impermissible applications”); *Hicks*, 539 U.S. at 123 (no overbreadth where persons who could be regulated “far outnumber First Amendment speakers”); *Scruggs*, 714

⁹ Moreover, because “numerous states” have similar laws, the thrust of the statute is “clear enough” that any improper applications cause “little concern.” *Shackelford*, 948 F.2d at 940-41.

¹⁰ The statute’s broad legitimate scope, by itself, is enough to reject Serafine’s claim. *See Wallington*, 889 F.2d at 576 (“[W]here there are a substantial number of situations to which a statute may validly be applied, we eschew reliance on the overbreadth doctrine.”); *Howell*, 843 F.2d at 208 (similar).

F.3d at 268. Under such circumstances, overbroad applications of the statute—if they ever arise—should be addressed via as-applied challenges. *See, e.g., Hicks*, 539 U.S. at 124 (unlawful applications “can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the ‘strong medicine’ of overbreadth to invalidate the entire policy”); *Williams*, 553 U.S. at 302 (if the statute covers documentary footage, such footage “could of course be the subject of an as-applied challenge”); *Broadrick*, 413 U.S. at 615-16 (stating that “whatever overbreadth may exist should be cured through case-by-case analysis”); *Shackelford*, 948 F.2d at 941 n.5.

II. THE OPINION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE BECAUSE IT WILL HAVE SWEEPING CONSEQUENCES FOR OCCUPATIONAL REGULATION

The panel opinion would present an issue of exceptional importance simply by virtue of its impact on psychology regulation in Texas. “[T]he state has a profound interest in the licensure of health-care professionals (such as psychologists) and the maintenance of appropriate standards of practice for such professionals.” *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 664-65 (1st Cir. 2010).¹¹ The Psychologists’ Licensing Act, in particular, was enacted to protect the public from “exploitation and injury at the hands of the unqualified and unscrupulous.” Act of May 23, 1969, 61st Leg., R.S., ch. 713, § 28, 1969 Tex. Gen. Laws 2059, 2066.

More recently, the Texas Sunset Advisory Commission observed that the “vulnerable client base” of psychologists—which includes “children, the elderly, and individuals with mental illness or emotional distress”—is subject to a heightened “risk of emotional, financial, or sexual exploitation.” TEX. SUNSET ADVISORY COMM’N: REPORT TO

¹¹ *See also Nat’l Ass’n for Advancement of Psychoanalysis*, 228 F.3d at 1054; *Pickup*, 740 F.3d at 1226; *King v. Governor of N.J.*, 767 F.3d 216, 232 (3rd Cir. 2014).

THE 79TH LEGISLATURE 152 (Feb. 2005). The Commission concluded that public safety mandated the “continued licensing and regulation of psychological practitioners in Texas.” *Ibid.* The Legislature agreed, unanimously renewing the Act. S.J. of Tex., 79th Leg., R.S. 2056 (2005); H.J. of Tex., 79th Leg., R.S. 1856 (2005).

Under the Act, the Board is charged with protecting the public from the dangers of improper psychological practice, which include sexual impropriety, fraud, and the use of outdated techniques. ROA.997; TEX. OCC. CODE §§ 501.401, .451. But the Board’s ability to fulfill its mission depends on the Act’s licensing requirements. The panel opinion effectively disarms the Board by allowing anyone—no matter how incompetent or dishonest—to provide psychological services *without a license*. The consequences for some of Texas’s most vulnerable residents are likely to be significant and dire.

And the consequences do not stop with Texas. The Mississippi and Louisiana statutes governing the practice of psychology are, if anything, broader. They are now under direct threat. *See* LA. STAT. ANN. 37:2352(7); MISS. CODE ANN. § 73-31-3(d).¹² Nor do the consequences stop with psychology; many licensing statutes are written at a similar level of generality. To take one example, the statute that was upheld in *Hines* defines veterinary medicine as “the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition.” TEX. OCC. CODE § 801.002(5)(A). The panel’s ruling raises a concern that future courts will conceive of overbroad applications of this statute, and any number of similar

¹² *See also, e.g.*, CAL. BUS. & PROF. CODE § 2903(a); FLA. STAT. § 490.003(4); GA. CODE ANN. § 43-39-7; N.Y. EDUC. LAW § 7601-a; OHIO REV. CODE ANN. § 4732.01(B).

statutes. By putting such a wide swath of the established regulatory framework in question, the panel opinion again conflicts with the cases recognizing a “broad power” to regulate the professions. *Hines*, 783 F.3d at 201 (internal quotation marks omitted).

The Supreme Court has warned that “without a substantial overbreadth limitation, review for overbreadth would be draconian indeed”—after all, “[i]t is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.” *Ferber*, 458 U.S. at 772 n.27 (internal quotation marks and alterations omitted). By focusing on the broadest “conceivable” applications of the statute, the panel has invited precisely such draconian consequences.

III. IN THE ALTERNATIVE, THIS COURT MAY WISH TO CONSIDER CERTIFICATION

Appellees believe that the district court’s judgment should be affirmed. In the alternative, however, this Court may wish to consider certifying the question of the statute’s proper meaning to the Texas Supreme Court. The panel adopted a reading which was not advocated by either party, and which threatens to impose substantial negative consequences in Texas and elsewhere. In recent years, this Court has repeatedly chosen to certify questions in cases, like this one, where certification was first requested at the rehearing stage.¹³ The same procedure may be appropriate here.

CONCLUSION

The petition for rehearing en banc should be granted.

¹³ See *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015); *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 278 (5th Cir. 2015); *Austin v. Kroger Texas L.P.*, 746 F.3d 191, 204 (5th Cir. 2014).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on Tuesday, January 26, 2016, the foregoing document was served, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>, upon counsel for appellant and amici.

I further certify that on Tuesday, January 26, 2016, the foregoing document was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>.

/s/ Alex Potapov
ALEX POTAPOV

CERTIFICATE OF COMPLIANCE

I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

I further certify that this brief complies with the length limitation of Rule 35(b)(2) and 5th Cir. R. 35.5 because it does not exceed 15 pages, excluding material not counted under Rule 32, and complies with the typeface and style requirements of Rule 32(a) and (c)(2) because it was prepared in Microsoft Word using 14-point Garamond typeface.

/s/ Alex Potapov
ALEX POTAPOV

APPENDIX: PANEL OPINION

REVISED January 12, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51151

United States Court of Appeals
Fifth Circuit

FILED

January 12, 2016

Lyle W. Cayce
Clerk

DR. MARY LOUISE SERAFINE,

Plaintiff–Appellant,

versus

TIM F. BRANAMAN, Chairman,

Texas State Board of Examiners of Psychologists, in His Official Capacity;

DARREL D. SPINKS, Executive Director,

Texas State Board of Examiners of Psychologists, in His Official Capacity,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before JONES, SMITH, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Mary Serafine ran for office and described herself as a “psychologist” on her campaign website. After the Texas State Board of Examiners of Psychologists ordered her to stop using the title of “psychologist” and to desist from offering or providing psychological services, Serafine sued, alleging that the Psychologists’ Licensing Act (the “Act”), Sections 501.001 through 501.505 of the Texas Occupational Code, violates the First and Fourteenth Amendments.

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The district court denied her claims. We affirm in part and reverse in part and remand.

I.

Serafine ran for the Texas Senate in 2010. On her campaign website, she described herself as an “Austin attorney and psychologist.” To appear on the ballot, she also filed a form with the Secretary of State in which she listed her profession as an “attorney and psychologist.” Although she does not have a degree in psychology, she completed a four-year post-doctoral fellowship in psychology at Yale, and the dissertation for her Ph.D. in education was published in *Genetic Psychology Monographs*. Serafine was a professor in the psychology departments at Yale University and Vassar College, where she taught a variety of psychology courses. She has studied under leading psychologists and was a member of the American Psychological Association for several years. She is not licensed to practice as a psychologist in Texas, nor could she be, because she does not hold a doctorate from a qualifying program. Before running for office, Serafine taught seminars and provided one-on-one counseling sessions on personal growth and relationships in Austin. She is a lawyer with a degree from Yale Law School.

In September 2010, the Texas State Board of Examiners of Psychologists (the “Board”) sent Serafine a letter informing her that she was violating the Act and ordered her to cease using the title “psychologist” on her campaign website (or in any other context) and to refrain from offering or providing “psychological services” in Texas. Two weeks later, the Board sent a follow-up letter telling Serafine she had thirty days to comply or face legal action from the Texas Attorney General. The Board also sought a correction from two Texas newspapers that had identified Serafine as a psychologist. In January 2011,

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Serafine received a letter from the Attorney General’s office threatening prosecution and referencing the Board’s complaint and Serafine’s use of the title “psychologist” in public records.

Serafine removed the word “psychologist” from her campaign website and requested that the title be deleted from her listing in *Who’s Who in America*. She then sued, claiming that the Act infringed her political speech, commercial speech, equal protection rights, and right to earn a living. She also challenged the Act as vague, overbroad, and a prior restraint.

The district court dismissed the equal protection, right-to-earn-a-living, vagueness, and prior-restraint claims and held a bench trial on the remaining claims. After trial, the court rejected the political speech and overbreadth claims, holding that the Act is a legitimate use of the state’s police power, which imposed only an incidental effect on Serafine’s speech, and that any impermissible applications of the Act are insubstantial in relation to its overall sweep. The court also rejected the commercial-speech claim, reasoning that the Act is reasonably tailored to further the state’s interest in protecting the public from the unauthorized practice of psychology. Serafine appeals.

II.

Serafine contends that Section 501.003(b)(1) (“(b)(1)”), under which “[a] person is engaged in the practice of psychology” if she represents herself “to the public by a title or description of services that includes the word ‘psychological,’ ‘psychologist,’ or ‘psychology,’” is unconstitutional as applied to speech on her political campaign website. We agree.

A.

The Board urges that the power to restrict the use of “psychological,” “psychologist,” or “psychology,” is incidental to its ability to license and is

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permissible under the “professional speech doctrine.” “[T]he States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”¹ Nevertheless, the extent to which a state can use its licensing power to restrict speech is unsettled.

The Supreme Court has never formally endorsed the professional speech doctrine, though some circuits have embraced it based on Justice White’s concurrence in *Lowe v. SEC*, 472 U.S. 181, 230–33 (1985).² Recently, we also observed that “state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution.”³

Assuming that the professional speech doctrine is valid, its application should be limited. “There is a difference, for First Amendment purposes, between . . . professionals’ speech to the public at large versus their direct, personalized speech with clients.”⁴ “While a professional may speak on a variety of topics in a variety of contexts, only some of this speech falls under the

¹ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)).

² See *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 568–70 (4th Cir. 2013) (applying professional speech doctrine); *Pickup v. Brown*, 740 F.3d 1208, 1228–29 (9th Cir.) (same), *cert. denied*, 134 S. Ct. 2871, and *cert. denied*, 134 S. Ct. 2881 (2014); *Locke v. Shore*, 634 F.3d 1185, 1191–92 (11th Cir. 2011) (same).

³ *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015), *cert. denied*, 2015 U.S. LEXIS 7664 (U.S. Nov. 30, 2015) (No. 14-1543). See also *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015) (upholding licensing law for tour guides against First Amendment challenge).

⁴ *Wollschlaeger v. Governor of Fla.*, No. 12-14009, 2015 U.S. App. LEXIS 21573, at *69 (11th Cir. Dec. 14, 2015) (alteration in original) (quoting *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)).

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category of “professional speech.”⁵ Indeed, in his concurrence in *Lowe*, Justice White first suggested this distinction between speech by a professional to a client (which may be restricted) and speech by a professional to the general public, which is subject to full First Amendment protection:

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.”

Lowe, 472 U.S. at 232 (White, J., concurring). Thus, assuming *arguendo* that the speech of professionals can be regulated incidentally to a valid licensing scheme, Justice White’s concurrence suggests that such restrictions—to avoid running afoul of the First Amendment—are properly confined to occupational-related speech made to individual clients.

Any interest the government can claim in protecting clients from manipulation or exploitation by a psychotherapist fails when the psychotherapist is no longer speaking to the client in her capacity as such.⁶ In other words, the professional speech doctrine is properly limited to the actual practice of the profession. “[T]he state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.”⁷ Outside the fiduciary relationship between client and therapist,

⁵ *Id.*

⁶ See *Rosemond v. Markham*, No. CV 13-42-GFVT, 2015 WL 5769091, at *6 (E.D. Ky. Sept. 30, 2015) (explaining that without the “professional-client relationship,” the “vices” of the professional speech doctrine “outweigh its virtues”).

⁷ *Lowe*, 472 U.S. at 231 (White, J., concurring) (quoting *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring)).

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speech is granted ordinary First Amendment protection. Indeed, “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*.”⁸

Serafine’s speech on her campaign website was far removed from the context of professional speech. She was not providing advice to any particular client but communicating with the voters at large, so the professional speech doctrine is inapplicable. Serafine’s campaign statements are entitled to full First Amendment protection.

B.

The Board also cites cases upholding restrictions on the use of professional titles. States’ ability to limit the use of titles and trade names to protect the public from “false, deceptive, and misleading” advertising is well-established.⁹ Nevertheless, *Maceluch* and other cases cited by the Board arose in the context of commercial speech where a party was trying to use a professional title or trade name for business purposes.¹⁰

The Board did not order Serafine to cease and desist because she used the word “psychologist” on a promotional flyer seeking clients, or on official business letterhead, or in a phonebook advertisement. Instead the Board

⁸ *Id.* at 229–30.

⁹ *Maceluch v. Wysong*, 680 F.2d 1062, 1069 (5th Cir. 1982) (per curiam) (affirming on basis of appended district court opinion); *see also Friedman v. Rogers*, 440 U.S. 1, 15 (1979).

¹⁰ *See Maceluch*, 680 F.2d at 1064, 1068–70 (upholding Texas licensing law that prevented doctors of osteopathy from using “M.D.” in connection with their medical practice); *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602, 605–06 (4th Cir. 1988) (upholding statute that prohibited unlicensed accountants from using the title “public accountant” because of the danger of “misleading commercial speech”); *Brandwein v. Cal. Bd. of Osteopathic Exam’rs*, 708 F.2d 1466, 1469–70 (9th Cir. 1983) (upholding restriction preventing doctor of osteopathy from holding himself out as an M.D. because of the danger of false or misleading commercial speech).

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directed her to cease describing herself as a psychologist on her political campaign website. Yet Seraphine was seeking votes, not clients. Thus, the inclusion of “psychologist” on the website was not commercial speech, and therefore the decisions involving a state’s legitimate power to restrict the use of titles in the commercial context are inapplicable.

C.

Serafine’s speech on her campaign website was not professional or commercial speech; it was political speech of the highest form—a candidate seeking election to public office. Indeed, “it can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”¹¹ Section 501.003(b)(1) is a content-based restriction on speech—proscribing one’s ability to claim to be a psychologist. As applied to Serafine’s political speech, (b)(1) is subject to “exacting scrutiny” and must be “narrowly tailored to serve an overriding state interest.”¹²

The state claims that its interest in health and safety extends to mental health and thus to psychology. Though protecting mental health may be a compelling interest, the state has not narrowly tailored its laws to further that interest where it regulates outside the context of the actual practice of psychology. Serafine was not practicing psychology by speaking on her political website or filing forms for political office. Although it is not clear whether the Board was aware of Serafine’s activities before her candidacy, she had taught

¹¹ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam)).

¹² *Id.* See also *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812–13 (2000) (explaining that content-based restrictions must survive strict scrutiny).

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personal-growth seminars and offered one-on-one sessions to seminar participants for many years, yet the Board did not complain until she decided to run for office. Perhaps the Board is concerned that by hearing Serafine's claim that she is a psychologist, voters will somehow be converted from political supporters to clients. Yet, if that is so, the way to protect the state's interest in mental health is for the Board to bring an enforcement action against Serafine for engaging in the practice of psychology (once she is actually treating such clients), not to suppress her political speech. Thus, when the Board applied (b)(1) to a statement made on Serafine's campaign website, it stepped far beyond the bounds of narrow tailoring.

Similarly, any interest the Board might claim in preventing the misleading belief that Serafine was licensed by the state as a psychologist is neither compelling nor narrowly tailored. As the district court recognized, such an interest is strongest in the context of commercial speech,¹³ but as discussed above, Serafine was not engaged in that. In the political context, the remedy for misleading speech is "more speech, not enforced silence."¹⁴ Indeed, in the midst of "a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent."¹⁵

Likewise, in *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (plurality opinion), the Court explained that "[t]ruth needs neither handcuffs nor a badge for its vindication." The Court held that false statements about receiving the Congressional Medal of Honor made by a water-district board

¹³ See *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (discussing why commercial speech needs a lesser degree of protection).

¹⁴ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹⁵ *Id.*

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member at a public meeting were entitled to First Amendment protection; it struck down the Stolen Valor Act, which criminalized such statements. *Id.* at 2542–43. The plurality specifically noted the public ridicule and swift refutation that immediately followed the false claim. *Id.* at 2549–50.

Indeed, the Court has long held that “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Thus, the “First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

Unlike the plaintiff in *Alvarez*, Serafine did not engage in a bald-faced lie. This case is much closer to *Byrum v. Landreth*, 566 F.3d 442, 447–48 (5th Cir. 2009), in which we noted the “strong argument” that calling oneself an interior designer in contravention of a state law which required a license in order to do so was “neither actually nor potentially misleading.” Serafine has taught psychology at the collegiate level and was published in psychological journals. Thus there is again a “strong argument” that calling herself a psychologist on her campaign website was not misleading. Although she may not be able to practice as a psychologist under Texas law, that does not bear on whether she is a psychologist by reputation or training.¹⁶ Therefore, because the state’s interest in proscribing misleading speech is limited in the political context, and because the Board’s goal of preventing deception can be served by other means—the vigorous public debate and scrutiny that accompany political

¹⁶ For example, a lawyer who is not barred in a particular state does not cease to be a lawyer because he is merely prohibited from practicing in that state.

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campaigns—(b)(1) is unconstitutional as applied to Serafine.¹⁷

III.

Serafine contends that Section 501.003(b)(1) and (2) are overbroad. We decline to address her overbreadth argument in regard to (b)(1), because that subsection is invalid as applied to her, but we agree with her that Section 501.003(b)(2) (“(b)(2)”) is overbroad.

A.

Although litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, “the lawfulness of the particular application of the law should ordinarily be decided first.”¹⁸ Generally, we “proceed to an overbreadth issue” only if “it is determined that the statute would be valid as applied.”¹⁹ Applying the overbreadth doctrine is “strong medicine”²⁰

¹⁷ Because we determine that (b)(1) is invalid as applied, we need not further address Serafine’s commercial-speech claim. As discussed above, and as Serafine acknowledges, the facts giving rise to this case concern political rather than commercial speech.

¹⁸ *Bd. of Trs. v. Fox*, 492 U.S. 469, 485 (1989). See also *Gibson v. Tex. Dep’t of Ins.*, 700 F.3d 227, 238 (5th Cir. 2012) (explaining that as-applied challenges should be considered before facial challenges).

¹⁹ *Fox*, 492 U.S. at 484–85. See also *United States v. Stevens*, 559 U.S. 460, 484 (2010) (Alito, J., dissenting) (explaining that “overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court”); *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989) (“There was no need for any comment on the overbreadth challenge, as the defendant’s conviction could have been—and indeed was—reversed on a narrower and alternative ground, *i.e.*, that the statute was unconstitutional as applied.”); *Spence v. Washington*, 418 U.S. 405, 414 n.9 (1974) (“Because we agree with appellant’s as-applied argument, we do not reach the more comprehensive overbreadth contention he also advances.”); *Street v. New York*, 394 U.S. 576, 580–81 (1969) (finding no need to consider overbreadth arguments because statute was unconstitutional as applied to defendant’s speech); *Netherland v. Eubanks*, 302 F. App’x 244, 247 (5th Cir. 2008) (quoting *Fox*, 492 U.S. at 485); *Moore v. City of Kilgore*, 877 F.2d 364, 390 (5th Cir. 1989) (explaining that because we held a fire department rule unconstitutional as applied to plaintiff’s speech, there was no need to consider his additional overbreadth argument).

²⁰ *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

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and is also “more difficult to resolve than the as-applied [challenge], since it . . . requires consideration of many more applications than those immediately before the court.” *Fox*, 492 U.S. at 485. Though “the occasional case requires us to entertain a facial challenge in order to vindicate a party’s right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.”²¹

Indeed, the few cases in which the Supreme Court found statutes unconstitutional facially and as applied to defendants’ conduct were decided under a different strand of facial invalidity that requires “that the statute could never be applied in a valid manner.”²² The more recent expression of the overbreadth doctrine, which we apply here, allows a party to challenge a statute if “a substantial number of its applications are unconstitutional.”²³ Under modern overbreadth doctrine, where a statute is invalid as applied, we should “resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires.” *Street*, 394 U.S. at 581. Indeed, “[g]oing beyond our ‘case or controversy’ limits spawns advisory opinions that are likely to be ill-informed. *In re Cao*, 619 F.3d 410, 440 (5th Cir. 2010) (Jones, C.J., concurring in part and dissenting in part). Because (b)(1) is invalid as applied to Serafine’s political speech, we need not address her claim that it is overbroad.

²¹ *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995) (internal citations omitted).

²² *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796–98 (1984) (discussing *Stromberg v. California*, 283 U.S. 359 (1931), and *Lovell v. Griffin*, 303 U.S. 444 (1938)).

²³ *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); see also *Taxpayers for Vincent*, 466 U.S. at 798–99 (explaining the development of modern overbreadth doctrine); *Moore*, 877 F.2d at 381 (Goldberg, J., dissenting) (discussing various strands of the overbreadth doctrine).

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B.

Serafine also brings an overbreadth challenge to (b)(2), which prohibits providing “psychological services to individuals, groups, organizations, or the public.” Although Serafine appears to have standing to challenge both (b)(1) and (b)(2) as applied to her (the Board ordered her to cease using the title of psychologist and to refrain from providing psychological services), she does not press an as-applied challenge under (b)(2) in this court.²⁴ Normally, “the principal advantage of the overbreadth doctrine . . . is that it enables [a litigant] to benefit from the statute’s unlawful application *to someone else*.” *Fox*, 492 U.S. at 483. Yet, *Fox* held that even in the “unusual situation” in which a “plaintiff has *standing* to challenge *all* the applications of the statute he contends are unlawful,” the plaintiff may still bring an overbreadth challenge where an as-applied challenge “will fail.” *Id.* at 484. By electing not to press an as-applied challenge to (b)(2), Serafine clears the way for us to consider her overbreadth challenge. Not bringing the as-applied challenge before us is similar to the situation in which the as-applied challenge fails or in which there was no possibility for an as-applied challenge at all.

Our conclusion that the Act is unconstitutional as applied to Serafine’s speech pertains only to (b)(1), not (b)(2). Thus, the rule that overbreadth challenges should not be addressed if the statute is invalid as applied does not govern our determination of (b)(2). Therefore, notwithstanding our conclusion in regard to (b)(1), we must also consider Serafine’s overbreadth challenge to (b)(2) to vindicate her “right not to be bound by an unconstitutional statute.” *Nat’l Treasury Employees Union*, 513 U.S. at 477–78.

²⁴ Although, based on the briefing, it was uncertain whether Serafine was bringing an as-applied challenge to (b)(2), at oral argument her lawyer explicitly stated that she is pressing the as-applied challenge only to (b)(1), not (b)(2).

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C.

Under the First Amendment, “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”²⁵ Indeed, “[t]he constitutional defect of an overbroad restraint on speech lies in the risk that the wide sweep of the restraint may chill protected expression.”²⁶ Even though the state may have the power to regulate the professional speech of psychologists incidental to a valid licensing scheme, if that scheme affects the speech of people beyond the purview of the state’s interests or power, it is overbroad.

1.

The overbreadth doctrine does not apply to commercial speech. *See Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 496–97 (1982). Thus, before proceeding with the overbreadth analysis, we must clarify that providing psychological services under (b)(2) is not commercial speech. Commercial speech is speech “that *proposes* a commercial transaction,” not “speech for profit.” *Fox*, 492 U.S. at 482. Therefore, merely receiving compensation for psychological services cannot be commercial speech. Indeed, “[s]ome of our most valued forms of fully protected speech are uttered for a profit.” *Id.*

Nevertheless, (b)(2) does not govern just the providing of “psychological services but also “*offers to provide psychological services*” (emphasis added). If such offers are made for pecuniary gain, they properly could be classified as

²⁵ *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6). *See also Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 755 (5th Cir. 2010) (explaining that the critical question is “whether the enactment reaches a substantial amount of constitutionally protected conduct”).

²⁶ *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989). *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (“The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”).

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commercial speech, and an overbreadth analysis might appear in error. Yet, in *Fox, id.* at 481–82, the Court explained that where a statute applies to both commercial and non-commercial speech, an overbreadth challenge still may be considered with respect to non-commercial speech. Likewise, because (b)(2) covers both commercial and non-commercial speech, we address the overbreadth challenge, but we properly confine our analysis to the providing of psychological services under that subsection or to offers to provide such services made without a commercial purpose (not for pecuniary gain).

2.

“The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”²⁷ “Facial challenges to the constitutionality of statutes should be granted ‘sparingly and only as a last resort.’”²⁸

Under (b)(2), “[a] person is engaged in the practice of psychology” if she “provides or offers to provide psychological services to individuals, groups, organizations, or the public.” Serafine contends that the statute must be construed by looking to Section 501.003(a), which defines “psychological services” as “acts or behaviors that are included within the purview of the *practice of psychology.*” (Emphasis added.) In turn, Section 501.003(a) must be construed by reference to Section 501.003(c) (“subsection (c)”), according to which “[t]he practice of psychology”

(1) includes providing or offering 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;

²⁷ *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 763 (5th Cir. 2008) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

²⁸ *Id.* at 762 (quoting *Broadrick*, 413 U.S. at 613).

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(2) addresses normal behavior and involves evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals or groups, as well as the psychological disorders that accompany medical problems, organizational structures, stress, and health;

(3) includes:

(A) using projective techniques, neuropsychological testing, counseling, career counseling, psychotherapy, hypnosis for health care purposes, hypnotherapy, and biofeedback; and

(B) evaluating and treating mental or emotional disorders and disabilities by psychological techniques and procedures; and

(4) is based on:

(A) a systematic body of knowledge and principles acquired in an organized program of graduate study; and

(B) the standards of ethics established by the profession.

TEX. OCC. CODE ANN. § 501.003(c) (West 2015). Serafine urges that subsection (c) is overbroad because it covers a significant amount of advice that is given outside the traditional context of the psychotherapist. Thus, by implication, (b)(2) is also overbroad.

3.

The first inquiry is whether the subsections should be read conjunctively as the Board urges or disjunctively as Serafine contends. Thus, for something to be the “practice of psychology,” must it meet the requirements of all four subsections or only one? A textual reading supports the Board’s position that subsection (c) is conjunctive. Each of the subparts (1) through (4) begins with a verb (“includes,” “addresses,” or “is”), and subpart (3) ends with “and” that appears before subpart (4). The presence of “and” (as opposed to “or”) indicates that subsection (c) should be read as an inclusive list—the practice of psychology requires something from each of the four subparts.²⁹

²⁹ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF*

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That conclusion is undermined, however, by the seeming absurdity that would result if subsection (c) were read conjunctively. A person who has not conducted graduate coursework, as required by Section 501.003(c)(4) (“(c)(4)”), but engaged in the other conduct listed in subsection (c)—counseling clients on psychological disorders, offering psychotherapy, or remediating behavioral problems—could not be said to be providing “psychological services” under (b)(2). If that practitioner did not advertise as a “psychologist” or fall within the other subparts of Section 501.003(b) (such as working for an organization that sells psychological services), she would not be engaged in the “practice of psychology” as defined by the Act. Thus, the Board would be powerless to prevent the very individuals the Act appears most concerned about—those without qualifying doctoral degrees—from providing psychological counseling.

Perhaps to avoid that problem, it appears that the Board heretofore has also read subsection (c) disjunctively. At trial, the chairman of the Board, Branaman, testified that it is disjunctive—so if someone were not applying a “body of knowledge” learned in “an organized program of graduate study” under (c)(4), she still could be engaged in the “practice of psychology” if the other requirements of subsection (c) were met.

Nevertheless, regardless of any enforcement problems that the conjunctive reading occasions, we are bound by the statute as the legislature fashioned it. The grammatical structure of subsection (c) is plain, and notably it contrasts with the disjunctive structure of Section 501.003(b), which uses a similar format (beginning each subsection with a verb) but employs “or” rather than “and” before the last subsection. Thus, while in practice the Board might prefer that subsection (c) be read disjunctively, we agree with the Board’s position

LEGAL TEXTS 116–119 (2012) (explaining the conjunctive/disjunctive canon).

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here on appeal—the straightforward textual reading of subsection (c) is conjunctive. This reading may limit the Board’s ability to bring actions against psychologists it considers illegitimate—those who do not base their practice on principles acquired in a graduate program—but it also will constrain the Board’s power, as Serafine is seeking.

4.

Serafine’s primary basis for an overbreadth challenge is the sweeping language of Section 501.003(c)(1) and (2) (“(c)(1)” and “(c)(2)”). Serafine correctly contends that providing “services to an individual or group . . . that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior” could apply to a number of activities, such as Alcoholics Anonymous (AA), Weight-Watchers, various self-help groups, life-coaches, yoga teachers, political consultants, and golf professionals. *See* Section 501.003(c)(1).

Similarly, (c)(2) also contains sweeping language requiring that the practice of psychology “address[] normal behavior and involve[] evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders.” Yet (c)(2) is somewhat narrower than (c)(1), and given that subsection (c) is conjunctive, we do not read the Act as broadly as does Serafine. Political consultants may describe, explain, and ameliorate behavior (under (c)(1)), but they rarely, if ever, evaluate, prevent, or remediate “psychological, emotional, mental, interpersonal, learning, and behavioral disorders” under (c)(2). Nevertheless, (c)(2) could still apply to Alcoholics Anonymous (AA), Weight-Watchers, golf coaches, yoga teachers, life-coaches, and various self-help groups, which do remediate various “psychological, emotional, mental, interpersonal, learning and behavioral disorders.”

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The Board reasons that (c)(3) and (c)(4) limit the scope of subsection (c) to exclude such groups. Under subsection (3), the practice of psychology “includes: (A) using . . . counseling . . . and (B) evaluating and treating mental or emotional disorders and disabilities by psychological techniques and procedures.” By requiring the evaluation and treatment of “mental or emotional disorders,” Section 501.003(c)(3)(B) is in many ways a repeat of (c)(2), except that it requires the use of “psychological techniques and procedures,” which appear to be listed in (c)(3)(A). By narrowing the range of disorders from “psychological, emotional, mental, interpersonal, learning and behavioral disorders” to “mental or emotional disorders and disabilities,” (3)(B) does further constrain the “practice of psychology,” so that a golf coach no longer appears to fall within its ambit. Nevertheless, Weight Watchers, AA, and other self-help groups that provide counseling to participants on emotional problems would still be included in subsection (c).

Section 501.003(c)(4)(A) provides the most significant limitation, given that it requires services based on “a systematic body of knowledge and principles acquired in an organized program of graduate study” as well as a professional code of ethics. But there is no indication that a practitioner needs to have completed a graduate degree if she has taken graduate-level classes. “Graduate” is defined as “of, relating to, or engaged in studies beyond the first or bachelor’s degree.” *Graduate*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/graduate> (last visited Oct. 26, 2015). Thus, anyone who has taken graduate-level psychology, counseling, or fitness classes after completing a bachelor’s degree and applied this knowledge to lead an AA group or work at a Weight-Watcher program would be included in the definition in (c)(4).

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It is also possible that *any* classes taken after the completion of an undergraduate degree, regardless of whether at a traditional university, could be within the definition of an “organized program of graduate study.” So, by attending a meditation seminar or AA training conference, it is conceivable that someone could be participating in “an organized program of graduate study.” As long as an individual who has taken graduate classes also applies a professional standard of ethics (which it is not unusual for organizations such as AA to have), she would be engaging in the practice of psychology under Section 501.003(c). Thus, although (c)(4) does narrow the scope of subsection (c), and by implication (b)(2), the provision still covers a substantial amount of speech that occurs outside the realm of professional psychologists.

Indeed, though subsection (c) certainly includes professional psychologists, it also applies to other professionals and citizens. Besides leaders for AA, Weight-Watchers, or other self-help groups, someone who has taken graduate classes in psychology, fitness, or counseling and has written a marriage-advice column or parenting blog could conceivably be within the ambit of subsection (c). Prosecution in such a circumstance might sound absurd, but in other jurisdictions it has not been merely hypothetical.

Recently, relying on a similar statute,³⁰ the Kentucky Board of Examiners of Psychology ordered a syndicated newspaper columnist to stop offering

³⁰ The statute in question was Kentucky Revised Statutes Section 319.010, which defined the “practice of psychology” as

rendering to individuals, groups, organizations, or the public any psychological service involving the application of principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, thinking, emotions, and interpersonal relationships; the methods and procedures of interviewing, counseling, and psychotherapy; and psychological testing in constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotion, and motivation. The application of said principles in testing, evaluation, treatment, use

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parenting advice in response to readers' questions. *See Rosemond v. Markham*, No. CV 13-42-GFVT, 2015 WL 5769091, at *1–2 (E.D. Ky. Sept. 30, 2015). The columnist, who held a master's degree in psychology but was not a licensed psychologist, had recommended that the parents of a “highly spoiled under-achiev[ing]” teenager suspend his privileges until he improved his grades. *Id.* at *1. According to the state, such public advice constituted the “practice of psychology.” *Id.* at *2.

Similarly, at Serafine's trial, the chairman of the Board testified that he could not tell, without more information or looking at a specific case, whether golf coaches, weight-loss services, or smoking-cessation programs would be within the “practice of psychology” as defined in subsection (c). The “opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.”³¹

Like the airport officials in *Jews for Jesus*, who “alone [had] the power to decide in the first instance whether a given activity [wa]s airport related,”³² here the Board would get to decide in the first instance what advice constitutes the “practice of psychology,” then enforce the law as it sees fit. Such unfettered discretion is untenable. Even if the Board had promised to limit the scope of its enforcement, the Supreme Court has held that this is insufficient, and the First Amendment “does not leave us at the mercy of *noblesse oblige*.” *United States v. Stevens*, 559 U.S. 460, 480 (2010). Like the Court, we “would not

of psychotherapeutic techniques, and other methods includes, but is not limited to: diagnosis, prevention, and amelioration of adjustment problems and emotional, mental, nervous, and addictive disorders and mental health conditions of individuals and groups; educational and vocational counseling; the evaluation and planning for effective work and learning situations; and the resolution of interpersonal and social conflicts.

³¹ *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Powell, J., concurring)).

³² *Id.*

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uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Id.*

The Board urges that because Section 501.004 of the Texas Occupation Code contains limited exemptions from the Act for clergy members, certain non-profit employees, and various licensed professionals (including physicians, attorneys, registered nurses, licensed social workers, licensed counselors, and licensed therapists), its scope is appropriately narrowed to professional psychologists. Yet if anything, under the canon of *expressio unius*, the presence of those exemptions suggests that anyone not granted an exemption in Section 501.004 is affirmatively covered by the Act.³³ Life coaches, weight loss counselors, and AA sponsors could all fall under the Act as discussed above.

Although the Board maintains that, under *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989), we should construe the statute narrowly to avoid overbreadth problems, we are mindful of the Supreme Court’s decision not to “rely upon” the canon of constitutional avoidance in the overbreadth context.³⁴ Courts should “impose a limiting construction on a statute only if it is readily susceptible to such a construction.” *Stevens*, 559 U.S. at 481 (quoting *Reno v. ACLU*, 521 U.S. 844, 884 (1997)). Nor should we “rewrite a . . . law to conform it to constitutional requirements.” *Id.* (alteration in original) (quoting *ACLU*, 521 U.S. at 884–85). The plain text properly limits the sweep of Section 501.003(c) to the evaluation and treatment of mental or emotional disorders, using psychological techniques such as counseling, by someone who relies on

³³ See SCALIA & GARNER, *supra*, at 108 (explaining that the “more specific the enumeration, the greater the force of the [*expressio unius*] canon”).

³⁴ *Stevens*, 559 U.S. at 481; see also *Hersh*, 553 F.3d at 756–57 (5th Cir. 2008) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)) (recognizing “that the doctrine of constitutional avoidance ‘is not a license for the judiciary to rewrite language enacted by the legislature’”).

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post-undergraduate classes or training and follows a professional code of ethics. We decline to give it an additional extra-textual limiting construction in a frantic attempt to rescue it.

The ability to provide guidance about the common problems of life—marriage, children, alcohol, health—is a foundation of human interaction and society, whether this advice be found in an almanac, at the feet of grandparents, or in a circle of friends. There is no doubt that such speech is protected by the First Amendment.³⁵ By limiting the ability of individuals to dispense personal advice about mental or emotional problems based on knowledge gleaned in a graduate class in practically any context, subsection (c) chills and prohibits protected speech. But that is precisely what the overbreadth doctrine is meant to prevent. *See Free Speech Coal.*, 535 U.S. at 255. Section 501.003(c), and by implication, Section 501.003(b)(2), are overbroad and contravene the First Amendment.

IV.

Serafine’s prior-restraint challenge fails. There is a “clear distinction, ‘solidly grounded in our cases, between prior restraints and subsequent punishments.’” *Gibson v. Tex. Dep’t of Ins.*, 700 F.3d 227, 235 (5th Cir. 2012) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Prior restraints “involve ‘administrative and judicial orders [such as temporary restraining orders and permanent injunctions] *forbidding* certain communications when issued in advance of the time that such communications are to occur.” *Id.* (alteration in original) (quoting *Alexander*, 509 U.S. at 550). Thus, by “penalizing past speech,” the Act is not a prior restraint on speech. *Alexander*, 509 U.S.

³⁵ *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)) (stating that government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

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at 553. The district court was correct in rejecting this claim.

In summary, the judgment is AFFIRMED in regard to the prior-restraint claim and REVERSED in respect to the constitutionality of Section 501.003(b)(1) as applied to Serafine's campaign speech and in regard to the overbreadth of Section 501.003(b)(2). This matter is REMANDED for entry of appropriate orders and judgment and other proceedings as needed.