No. 15-1873

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LESLIE RAE YOUNG,

Plaintiff - Appellant,

v.

PETE RICKETTS, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Nebraska
Honorable Joseph F. Bataillon, District Judge

PETITION FOR REHEARING EN BANC

ANASTASIA P. BODEN
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Plaintiff - Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26 and Eighth Cir. R. 26.1A, Plaintiff affirms that she is an individual and neither she nor her unincorporated business, e-List.me, have issued any stock.

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STATEMENT OF CONFLICT
PURSUANT TO FRAP 35(B)

Appellant Leslie Young seeks rehearing en banc of the Panel's decision, which upheld Neb. Rev. Stat. § 81-885.01(2). That law requires anyone who, like Ms. Young, advertises homes that are for sale by owner to obtain a real estate broker's license. The Panel held that the law regulated the conduct of real estate brokerage, not speech, and was therefore subject only to rational basis scrutiny.

The Panel's opinion conflicts with rulings from the Supreme Court and multiple circuit courts—including this Court—that require professional licensing laws that regulate speech based on its content to withstand strict First Amendment scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988) (fee and licensing requirement for professional fundraisers violated First Amendment); *Argello v. City of Lincoln*, 143 F.3d 1152, 1152 (8th Cir. 1998) (licensing requirement for palm readers was content-based restriction on speech); *see also Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016) (law that requires licensure of psychologists facially overbroad under First Amendment); *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014) (licensing requirement for tour guides was content-neutral restriction on speech). These court opinions affirm that the state cannot evade First Amendment scrutiny by labeling speech "professional conduct."

Moreover, the Panel held that Ms. Young's advertisements qualified as the

conduct of real estate brokerage, in part, because she calls herself an "advertising broker," or "advertising agent," or sometimes simply "broker" or "agent." *Young v. Ricketts*, No. 15-1873, slip op. at 11 (8th Cir. June 9, 2016). Any limitation on the terms that professionals call themselves is a restriction on commercial speech. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 106 (1990); *In re R. M. J.*, 455 U.S. 191, 204-07 (1982); *Serafine*, 810 F.3d at 359; *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009). The opinion therefore also conflicts with Supreme Court and Circuit Court opinions that require limitations on self-identifying terms to withstand First Amendment scrutiny.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Leslie Young is an advertising broker and the owner of Elist.me. She provides advertising services for people who want to sell their homes without a licensed real estate broker, that is, for sale by owner (FSBO). For a flat $95 fee, owners e-mail information about their homes to Ms. Young, which she inputs into a private database called a Multiple Listing Service (MLS). *Young v. Ricketts*, 88 F. Supp. 3d 1092, 1100-01 (D. Neb. 2015). Other websites take information from the database and publish it on their own websites in the form of advertisements. *Id.*

Ms. Young does not provide any services associated with real estate brokerage. She does not show homes, negotiate sales, handle client funds, or complete closing

paperwork. *Id.* She never interacts with potential buyers; her advertisements provide potential buyers with only the *sellers'* contact information. The ads contain her company's name and logo, and identify her as "Advertising Broker" or "Agent." *Id.*

The Nebraska Real Estate Commission (Commission) considers Ms. Young's business to be the practice of real estate brokerage, and requires her to obtain a license before creating or posting her advertisements. As detailed below, the Commission considers a vast array of speech to require a license. Ms. Young's Complaint alleged that the law, both on its face and as-applied to her, is an unconstitutional restriction on speech, and that it violates the Due Process Clause because the licensing requirements bear no relationship to FSBO advertising. The district court granted summary judgment to the Commission and the Panel affirmed.

Ms. Young seeks rehearing en banc pursuant to Federal Rule of Appellate Procedure 35 and Local Rule 35A because this case presents an issue of exceptional importance, and the Panel's opinion conflicts with cases from the Supreme Court, this Circuit, and other Circuits that demand that content-based restrictions on speech—regardless of whether they are styled as licensing requirements, or regulations of professional conduct—withstand strict First Amendment scrutiny. Moreover, the Panel's opinion conflicts with many opinions of other courts that require any limitations on self-descriptive terms to satisfy commercial speech scrutiny. Rehearing is therefore necessary to maintain uniformity with controlling decisions of

the Supreme Court, and within the Circuit.

REASONS FOR GRANTING THE PETITION

I

THE PANEL DECISION CONFLICTS WITH SUPREME COURT, EIGHTH CIRCUIT, AND OUT OF CIRCUIT PRECEDENT THAT REQUIRE LAWS THAT REGULATE PROFESSIONAL SPEECH TO WITHSTAND FIRST AMENDMENT SCRUTINY

A. Licensing Laws That Regulate Speech Are Subject to First Amendment Scrutiny

Laws that regulate speech based on the topic discussed are content-based restrictions on speech subject to strict First Amendment scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). A state cannot evade that scrutiny by calling the regulated speech "professional conduct." *See Riley*, 487 U.S. at 788; *Argello*, 143 F.3d at 1152; *see also Serafine*, 810 F.3d at 364; *Edwards*, 755 F.3d at 1001. A law that regulates a profession consisting entirely of speech, or a law that substantially burdens the speech of the person regulated, ceases to be a regulation of conduct, and is instead a regulation of communication.

In *Riley*, 487 U.S. at 801, the Supreme Court struck down a law that required professional fundraisers to obtain a license. Though aimed at a profession, the law "directly and substantially [] affect[ed] the speech" of those regulated, and was therefore subject to First Amendment scrutiny. *Id.* Likewise in *Argello*, 143 F.3d

at 1152, this Court analyzed a law requiring licensure of those engaged in the profession of "clairvoyancy, palmistry, phrenology, mind reading, [and] fortune telling" under the First Amendment, and held that speech does not cease being speech merely because a client pays a professional for it. Rather, the fact that a client pays for the speech is exactly what makes that speech fully protected. *Id.* at 1153 ("There is a distinct difference between the offer to tell a fortune," which is commercial speech, "and the actual telling of a fortune," which is fully protected.).

The Fifth and D.C. Circuit Courts of Appeal agree. The Fifth Circuit struck down a Texas law requiring a license for psychologists as facially overbroad because it prohibited individuals from being paid to give advice "about the common problems of life," or in other words, to speak. *Serafine*, 810 F.3d at 369; *see also Edwards*, 755 F.3d at 1001 (law regulating tour guides violated the First Amendment).

A statute does not regulate speech when it incidentally burdens speech. But a law ceases being the regulation of "conduct" when it turns on the words spoken. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (law declaring it "unprofessional conduct" for a licensed pharmacist to advertise the prices of prescription drugs violated First Amendment); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("the conduct triggering coverage under the statute consists of communicating a message"); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370 (2002) (striking down, on First Amendment grounds, provisions of a federal

law that only required FDA approval of compounded drugs if pharmacists advertised those drugs); *Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication."); *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1245 (11th Cir. 2015) (Law regulating surcharges invalid under First Amendment because "[l]iability . . . turns solely on the restauranteurs' choice of words.").

The panel decision, which refused to analyze Ms. Young's claims under the First Amendment, conflicts with these cases holding that laws that regulate a person based on the content of what he or she says are subject to First Amendment scrutiny, regardless of whether that person is paid to talk.

B. Nebraska Law Forces People Whose Profession Consists Solely of Speech To Obtain a Real Estate Broker License Before Speaking

Nebraska law defines "real estate brokerage" as being paid to "[1] negotiate the listing . . . for any real estate . . . or [2] assist[] in procuring prospects," or "[3] hold[ing] [oneself] out as engaged in any of the foregoing," and requires a license for it. Neb. Rev. Stat. § 81-885.01(2). The Commission has applied the licensing requirement to people who, like Ms. Young, are engaged only in advertising homes that are for sale, as well as a vast array of other speech.

Since 2005, the Commission has issued at least 14 Cease and Desist Orders to persons who advertised real estate for sale in Nebraska. The Commission ordered

Owners.com, Jack Keller, and John Fothergill, to cease advertising property on the grounds that this advertising constituted unlicensed real estate brokerage. 4 J.A. at 833, 872, 990. In 2007, when an attorney asked the Commission if he could advertise FSBO property and then draft purchase agreements in his capacity as an attorney, the Commission answered no, because "advertising . . . property for sale" requires a real estate broker license. *Id.* at 894. In 2009, it ordered the Real Estate Disposition Company to cease "advertising Nebraska real estate for auction" on the grounds that such advertisement constituted brokerage. *Id.* at 877. That same year, it issued Cease and Desist Orders to Carl Wuestehube for "advertising Nebraska real estate for sale . . . without . . . a Nebraska real estate license," and warned him to cease "advertising the Nebraska real estate for sale in any form or media." *Id.* at 897, 899, 909; *see also id.* at 885. The March 11, 2010, Cease and Desist Order the Commission sent to Ms. Young declared that she violated the statute by "advertising for sale, real property located in the State of Nebraska . . . without having first secured a Nebraska real estate broker license." 3 J.A. 742.

The Commission interprets the statute to encompass a vast amount of speech beyond real estate brokerage. Commission Director Greg Lemon testified that "procuring prospects" means: "Helping somebody find a potential purchaser or potential lessor of property, specifically assisting—you know, perhaps calling or—or talking to people, saying, 'I have this property for sale you may be interested in.'"

4 J.A. 806:20-25. He testified that a person would be "procuring prospects" if she accepted money in exchange for calling a friend or emailing her work colleagues to tell them that her neighbor's house is for sale. *Id.* at 810:23-811:7, 809:14-21. Director Lemon defined "procuring prospects" as "active[] one-on-one contact, you know, targeted individual mailings" of advertisements, *id.* at 812:3-6, and as "[h]elping somebody find a potential purchaser . . . perhaps calling or—or talking to people, saying, 'I have this property for sale you may be interested in.'" *Id.* at 808-11.

The licensing law also regulates speech as applied to Ms. Young. Her business consists entirely of advertising for people who want to sell their homes *without* employing a licensed real estate broker. Ms. Young helps these customers design advertisements and places them into a database for ultimate publication on websites. Ms. Young does not do any other activities normally associated with real estate brokerage. Based solely on her ads, the Commission issued Cease and Desist Orders demanding that she stop practicing real estate brokerage without a license. 3 J.A. 742, 759. This Court should grant en banc review to properly scrutinize this content-based restriction on speech.

C. The Panel Erred by Reviewing the Commission's Prohibition on Advertising Under the Rational Basis Standard

The Panel's decision, analyzing the licensing law under rational basis scrutiny, conflicts with the decisions of the Supreme Court, this Circuit, and other Circuits,

which require laws that directly burden speech to withstand heightened First Amendment scrutiny. The Panel did not apply First Amendment scrutiny because it concluded that Ms. Young's business qualifies as "brokerage" under the statute. *Young*, slip op. at 11. But First Amendment scrutiny applies *because* she qualifies as a "broker"—solely by virtue of communicating information.

The Panel held that the law did not regulate speech as applied[1] to Ms. Young because she:

> entered into Listing Agreements with FSBO customers; used her status as a licensed California broker to place their "listings" on MLS and REALTOR.com databases not otherwise available to for-sale-by-owner properties; and worded those listings in a manner that told potential Nebraska buyers and their agents that the property seller was represented by a broker.

Id. at 5-6. Each of these "activities" is simply speech, underscoring the argument that the statute should be subject to First Amendment scrutiny. A "Listing Agreement" is

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[1] The Panel stated that "Ms. Young failed to prove that the Nebraska License Act, on its face, was a regulation of speaking or publishing as such," because "Young did far more than publish advertisements." But even if correct, that finding should not have foreclosed her *facial* overbreadth claim and the Court should have addressed the evidence of how the Commission applies the law to others engaged in speech. Plaintiffs are entitled to bring a facial First Amendment claim regardless of whether the law can constitutionally be applied to them. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (overbreadth doctrine has "no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity") (citation omitted). The Panel's decision therefore throws the facial/as-applied distinction in First Amendment cases into jeopardy.

an agreement to advertise properties.[2] Placing listings on the MLS or Realtor.com is simply placing advertisements in a chosen medium.[3] And calling oneself an "advertising agent" or "broker" is self-titling, subject to First Amendment scrutiny. All of the professional "conduct" the Panel identifies is speech, and the law should therefore have been analyzed under the heightened scrutiny required by the First Amendment.

II

THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND CIRCUIT COURT DECISIONS THAT REQUIRE LAWS THAT REGULATE SELF-IDENTIFYING TERMS TO WITHSTAND FIRST AMENDMENT SCRUTINY

A. The Use of a Name, Logo, or Similar Self-Identifying Information Is Commercial Speech

The use of a truthful, descriptive term for a person's business practice is protected by the First Amendment. *Peel*, 496 U.S. at 106; *In re R. M. J.*, 455 U.S. 191,

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[2] Ms. Young's Listing Agreements state in bold, capital letters that she does not represent the seller in the sale of their home, and her participation is limited to advertising. 3 J.A. 735-39.

[3] Though Young "used her status as a licensed California broker" to access the MLS, that fact is irrelevant to whether she qualifies as a "broker" under Nebraska law. MLSes are private databases. The particular database in which Ms. Young posts her advertisements requires participants to have a California real estate broker license, but she is not required by California or Nebraska law to have a license to post in the MLS. Indeed Director Lemon explicitly disclaimed that posting in an MLS alone qualified as the practice of real estate brokerage. 3 J.A. 646:2-5.

204-07; *Serafine*, 810 F.3d at 359; *Byrum*, 566 F.3d at 449; *see also Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94-101 (2d Cir. 1998); *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987).

In *Peel*, 496 U.S. at 101, the Supreme Court held that the state could not prohibit an attorney from placing the term "Certified Civil Trial Specialist" on his letterhead, when he was, in fact, certified by a private organization. The state contended that it was potentially misleading because consumers might think the certification had been issued by the state, but the Court found no evidence that the term was inherently or actually misleading. *Id.* at 100-01. The context of the speech in question and the general level of understanding among consumers was enough to minimize confusion. *Id.* at 104-05. Therefore, even if the term were potentially misleading, the Court held that the state could not ban it entirely. *Id.* at 109. Where speech is only potentially misleading, the state should instead "'assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.'" *Id.* at 110 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977)). *Accord*, *In re R. M. J.*, 455 U.S. at 204 (attorney may truthfully state that he is admitted to the Supreme Court Bar even if this is potentially misleading).

Likewise in *Miller v. Stuart*, 117 F.3d 1376, 1379-81 (11th Cir. 1997), the plaintiff was a licensed CPA, but a state law forbade him from stating that fact on his business cards or letterhead because he worked for a firm owned by non-CPAs. The

state argued that his use of the term could potentially mislead consumers to think that "he is providing regulated public accounting services associated with CPAs when in fact he is providing services that any non-CPA can provide." *Id.* at 1383. Yet the state "failed to produce any empirical evidence showing consumers will be misled," and "relied solely on 'speculation and conjecture' to support its assertion." *Id.* at 1383. Nor did the state prove that its per se ban on the use of the term "CPA" was narrowly tailored. "[A] disclaimer or some other form of additional disclosure," would be "a narrower limitation that would allow [the] Plaintiff . . . to hold himself out as a CPA in a non-misleading manner." *Id.*; *see also Byrum*, 566 F.3d at 449 (state could not forbid unlicensed interior designers from calling themselves "interior designers," but could prohibit them from calling themselves "*licensed*" interior designers); *Serafine*, 810 F.3d at 359 (law prohibiting people from calling themselves "psychologists" unless they were licensed violated First Amendment). Any law that restricts the use of self-identifying terms is subject to this heightened scrutiny.

B. The Panel's Opinion Conflicts With This Precedent

The statute declares that anyone who "holds [her]self out" as a broker must get a license. Neb. Rev. Stat. § 81-885.01(2). The Commission interprets this as prohibiting Ms. Young from using such terms as "advertising broker" or "agent" to describe her business. Though any law that prohibits the use of self-identifying terms is subject to First Amendment scrutiny, the Panel *relied* on the fact that Ms. Young

called herself a "broker" to immunize the statute from such scrutiny.[4] *Young*, slip op. at 11. This was a fundamental error. The fact that Ms. Young's use of self-identifying terms subjects her to the licensing law at a minimum means the law was subject to First Amendment scrutiny.

Under *Peel*, 496 U.S. at 111, and *Miller*, 117 F.3d 1376, the Panel should have determined whether Young's speech was actually or potentially misleading, and even if it determined the speech was potentially misleading, it should have struck down the law if the Commission could have employed less restrictive means to prevent confusion. *Peel*, 496 U.S. at 110. For example, the Commission could impose a disclaimer requirement instead—in fact, Ms. Young's use of terms like "advertising broker" and "advertising services," and her link to the eList.me website with its many disclaimers, already are a form of additional disclosure. For that reason, the Panel contradicts those decisions requiring self-identification restrictions to be analyzed under the First Amendment.

III

THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The Panel's decision relegates laws that regulate the speech of people engaged in lawful occupations to rational basis scrutiny. Given the short shrift courts often give

[4] The Panel relied on *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988), but even that case requires commercial speech scrutiny.

to rational basis review, free speech for professionals is in grave danger. That danger is apparent from the result in this case. The Panel upheld the law under rational basis review, even though Young would be prohibited from advertising FSBO homes *even if she obtained the license*, because Nebraska regulations make it illegal for a person with a license to advertise FSBO property. 299 Neb. Admin. Code § 2-004.

Moreover, the Panel held that the law satisfied rational basis, even though the training and education requirements bear no relation to FSBO advertising. To get a license, applicants must (a) complete 18 credit hours in subjects related to real estate at an accredited college, or (b) complete 180 class hours in a Commission-approved real estate course, or (c) prove they have served as a licensed real estate sales person or broker for two years and complete 120 hours of Commission-approved class study. They are then required to pass an examination "covering generally the matters confronting real estate brokers." Neb. Rev. Stat. § 81-885.13(4). In other words, if Ms. Young were to obtain a license, she would have to spend time and money learning skills and information related almost exclusively to showing homes, negotiating sales and commissions, handling client funds, and other acts that she does not do. *Cf. Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (requirement that casket sellers obtain funeral director's license fails rational basis because licensing requirements were unrelated to selling caskets); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-27 (5th Cir. 2013) (same).

The Commission's contention that the law prevents fraud is undermined by the law's various exemptions. Unlicensed property owners may advertise their own property for sale, Neb. Rev. Stat. § 81-885.04(1), even though they have the strongest incentive to misrepresent their properties. A trustee for a property owner may, without a license, advertise property, *id.* § 81-885.04(3), and a property owner's "employee[s], parent[s], child[ren], brother[s], or sister[s]" are also exempt. *Id.* § 81-885.04(4). *Anyone at all* can advertise another person's property so long as they are not paid. *Id.* § 81-885.01(2). The result is to "undercut the principle of non-contradiction." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008). Under the Panel's decision, speakers in all industries will be subject to this lax review, merely because they are engaged in a "profession."

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

DATED: July 5, 2016.

Respectfully submitted,

s/ Anastasia P. Boden
ANASTASIA P. BODEN

Counsel for Plaintiff - Appellant

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s/ Anastasia P. Boden
ANASTASIA P. BODEN

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I hereby certify that on July 5, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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