IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANDREW WILLEY, Plaintiff, v. THE HARRIS COUNTY DISTRICT ATTORNEY, in her official capacity, Defendant.	Case No. 20-CV-1736

PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Texas's barratry statute completely bars *pro bono* attempts to solicit clients for the purpose of challenging the effectiveness of the appointed counsel to which they have a clear constitutional right. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."). The United States Supreme Court has never countenanced a complete bar on solicitation of clients for purposes other than pecuniary gain, and to undersigned counsel's knowledge no other court has either. To justify this complete and novel bar on admittedly non-commercial speech, Defendant offers state interests that are completely vindicated by existing, less-restrictive statutes or are otherwise inapposite to the speech regulated by Texas's barratry statute. That statute is, therefore, unconstitutional as applied to attorneys soliciting clients for non-pecuniary purposes.

I. BACKGROUND

This case challenges the application of Tex. Penal Code Ann. § 38.12(d)(2)(B) to any attorney attempting to solicit clients for purposes other than pecuniary gain. Because the only question before this Court is whether that statute may be constitutionally to applied to *anyone* who acts without a pecuniary purpose, and because (as explained below) Defendant challenges neither Willey's standing to sue[1] nor any of the preliminary-injunction factors other than likelihood of success on the merits, the specifics of Plaintiff Andrew Willey's speech are not strictly relevant to this Court's consideration. Nonetheless, because Defendant characterizes some of the events underlying this case inaccurately, Willey offers this factual background.

Willey's project seeks to vindicate the Sixth Amendment rights of criminal defendants in Harris County who are represented by overburdened attorneys. Complaint, Doc. 1 ¶¶ 23, 24. To

[1] As explained in Willey's Motion for Preliminary Injunction, the question of standing is clear in this case. If the Court has further questions regarding standing, Willey respectfully requests the opportunity to submit further briefing on those questions.

do this, Willey contacts criminal defendants who, according to publicly available data, are represented by attorneys who are appointed to far more cases than they could effectively handle. *Id.* ¶ 22. If Willey and the defendant conclude after consultation that the attorney is not meeting constitutional standards of adequacy, Willey offers to help the defendant try to get a different lawyer appointed by the court. Nonetheless, Defendant contends that "[u]nderrepresentation of indigent defendants is not the problem Willey is attempting to address . . . [because] [t]he indigent criminal defendants he wishes to contact are already represented by counsel." Def's Mot. to Dismiss, Doc. 17 at 8. Instead, Defendant contends, Willey is merely working to "expose and remedy what he believes to be the poor quality of appointed private counsel in Harris County." *Id.* This is not correct. Defendants who are represented by a constitutionally ineffective attorney are in every sense underrepresented—they receive less legal service than they are entitled to under the Sixth Amendment, and they have no attorney who will argue that issue on their behalf.

Jerome Godinich, the attorney representing the people Willey attempted to contact in this instance, handled more than *six hundred* felony appointments in one year, and routinely ignored his clients for months or years at a time. Doc. 1 ¶¶ 16, 18–20. Willey's attempts to vindicate the legal rights of people Godinich represents is, indeed, an attempt to remedy the problem of underrepresentation of indigent defendants and to vindicate their constitutional rights. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that defendants have a right to an *effective* attorney). The fact that these people technically have a lawyer is, indeed, the nub of the problem: If Section 38.12(d)(2)(B) is allowed to stand, it will be almost impossible for them to mount a counseled challenge to the effectiveness *of their current lawyer*.

Willey's project reasonably, competently, and safely attempts to vindicate the constitutional rights of people with overburdened court-appointed attorneys. Defendant contends

that Willey "impl[ies] to the represented defendant that his or her existing lawyer's failure to do one or more . . . 'basic defense tasks' is deficient conduct." Doc. 17 at 9 (quoting Doc. 1 ¶ 28). This, according to Defendant, is "as suggestive as it is investigative" because the questionnaire "appears to be a push poll." *Id.* Not so. Willey *asks* defendants whether their attorneys have done several basic things that any competent attorney must do; he does not tell them that their lawyers have failed to do these things. Doc. 1 ¶ 28. Failure to perform basic defense tasks *is* deficient conduct, so to the extent that Willey is suggesting that defendants should be dissatisfied if their attorneys have not done these things, Willey is right to. If someone asks a represented defendant "when is the last time your lawyer communicated with you about your case?" and that person answers "never," the person's faith may well be "shaken by these communications," as Defendant describes, Doc. 17 at 9; but that is because the person should not have faith in her attorney. By contrast, if the person answers "my lawyer visited last week to explain my case," there is no reason to believe that the mere question would do anything to shake the person's faith.[2]

Finally, Willey's project protects all privileged information. Defendant contends that Willey "essentially asks the represented defendant to make an uncounseled waiver of the attorney work-product doctrine." Doc. 17 at 9 n.8. Willey does not ask defendants to make any waiver whatever, and their communications with Willey or his agent do not effect a waiver: Those communications are themselves privileged because they are made for the purpose of getting legal advice regarding the constitutional sufficiency of currently appointed attorneys. Tex. R. Evid. 503(a)(1)(B) (protecting privilege of one who "consults a lawyer with a view to obtaining

[2] Defendant implies that one of the prospective client's inquiries to see if Godinich was still representing him is evidence that Willey's procedure interferes with the attorney-client relationship. Doc. 17 at 9 n.9. This is misleading. The client indeed reached out to see if Godinich was still his lawyer or if he had been appointed another one, but it is just as likely that this is because his lawyer was doing nothing on his case, and regardless Willey—at the client's written direction—was indeed planning to seek a new attorney for the client.

professional legal services from the lawyer"); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) ("[C]ommunications made in the course of preliminary discussions with a view to employing the lawyer are privileged . . . .") (quoting *McCormick on Evidence* § 88 (3d ed. 1984)). And Willey has accordingly treated all communications relevant to this case as privileged.

II. ARGUMENT

The parties agree on many of the issues in this case: Willey has standing to seek an injunction against applying Section 38.12(d)(2)(B) to him; if that section is unconstitutional as applied to him, he is entitled to a preliminary injunction against its enforcement; and, because it is a content-based restriction of non-commercial speech, that section is unconstitutional unless it survives strict scrutiny. The only disagreement before this Court is whether that statute indeed survives strict scrutiny.

Speech restrictions survive strict scrutiny "only if they are narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) (citing *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988)). "'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Id.* at 444 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). Although states have historically enjoyed greater latitude in regulating the legal profession—which, after all, is practiced exclusively through communication—the Supreme Court has never upheld a restriction on attorney solicitation other than for pecuniary gain. That is because the latitude that states enjoy when regulating the legal profession is applicable only to regulations that prevent abuses of the special powers that lawyers are granted by the state. *See In re Primus*, 436 U.S. 412, 426 (1978) (recognizing "the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers" but noting

that they "must not work a significant impairment of the value of associational freedoms" (internal quotation marks and citation omitted)); *NAACP v. Button*, 371 U.S. 415, 438–39 (1963) ("Thus it is no answer to the constitutional claims asserted by petitioner to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

A content-based regulation of speech is unconstitutional under strict scrutiny if it is not sufficiently narrowly tailored even if the putative motives underlying it are legitimate. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Thus "the Court [has] rightly rejected [a] State's claim that its interest in the 'regulation of professional conduct' rendered [a] statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'" *Reed*, 576 U.S. at 167 (quoting *Button*, 371 U.S. at 438–39 (omissions in *Reed*)). Whatever the state's motives, where, as here, it seeks to regulate speech on the basis of its content it must survive the most exacting constitutional scrutiny available. To do that, it must be narrowly tailored to forward compelling government interests, and the question whether alternatives exist by which speakers could express their chosen message is irrelevant. *See, e.g.*, *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541 n.10 (1980)

A. Section 38.12(d)(2)(B) is Not Narrowly Tailored to Protect Compelling Interests

Defendant offers four hypothetical state interests in support of Section 38.12(d)(2)(B): protecting existing attorney–client relationships, deterring conduct that interferes with court proceedings, regulating the legal profession, and protecting attorney–client privilege. Section 38.12(d)(2)(B) is not narrowly tailored to forward any of these interests, and it does not forward some of them at all.

1. Section 38.12(d)(2)(B) Is Not Narrowly Tailored to Protect Existing Attorney–Client Relationships

Defendant first argues that Willey's efforts could cause defendants harm by "planting seeds of doubt in the defendant's relationship with his or her existing counsel." Doc. 17 at 8. Even assuming the State has a compelling interest in preventing defendants from questioning the effectiveness of their court-appointed lawyers—a dubious proposition, given that lawyers should be agents of their clients and should welcome reasonable scrutiny—Section 38.12(d)(2)(B) does nothing to forward that interest. Because the State has other criminal laws and professional regulations that prevent lawyers from confusing a represented party or sabotaging their relationship with existing counsel, a complete prohibition on *any* communications seeking employment with represented parties does nothing to advance the State's interest; it penalizes only communications that would not cause the harms the State seeks to prevent.

The State comprehensively regulates the legal profession. *See* Tex. Disciplinary R. Prof. Conduct (1989); *see also generally* Tex. Occ. Code tit. 5, subtit. B, chaps. 951–953; Tex. Gov't Code tit. 2, subtit. G, chaps. 81–84. And the State criminalizes attorneys, acting with or without an interest in pecuniary gain, when they approach represented parties with information that involves "coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence." Tex. Penal Code § 38.12(d)(2)(E). The State also forbids lawyers to present "a false, fraudulent,

misleading, deceptive, or unfair statement or claim." *Id.* at (d)(2)(F). Those prohibitions are completely separate from the section challenged here, and they fully address the concerns Defendant offers in support of the section challenged here. If a represented defendant loses faith in his attorney's abilities because someone provided him information about his lawyer that is completely true, not misleading or unfair, and not coercive or unduly influential, the State's interest in preserving his *legitimate* faith in his attorney has already been fully vindicated.

The State already specifically regulates the category of contacts with represented parties that are, in Defendant's view, most likely to result in harm. An attorney may not communicate with a represented party about a matter when the attorney represents someone else in that matter. *See* Tex. R. Disciplinary Prof. Conduct 4.02. This is not, as Defendant contends, an "implicit rebuke to the conduct Willey intends to pursue," Doc. 17 at 10; it is an explicit limitation of conduct Willey does not intend to pursue, which shows all the more clearly that the state need not regulate the conduct he does intend to pursue.

Finally, Section 38.12(d)(2)(B) is not narrowly tailored to protect existing attorney–client relationships because it leaves significant attorney speech that would in fact threaten those relationships unregulated. A "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (quoting *The Florida Star v. B.J.F.*, 491 U.S. 524, 541–542 (1989) (Scalia, J., concurring in judgment)). Here, Section 38.12(d)(2)(B) forbids only attorney speech that seeks employment in the matter in which the contacted person is represented. Any other speech—no matter how deliberately or effectively it threatens an attorney–client relationship—is permitted. An attorney is free to approach represented defendants and explain to them the deficiencies of their current

lawyers if she does not seek to *become* their lawyer. Section 38.12(d)(2)(B) is, therefore, too underinclusive to be narrowly tailored. *See Reed*, 576 U.S. at 172 (noting "underinclusiveness" of ordinance as fatal to claim that it survives strict scrutiny).

2. Section 38.12(d)(2)(B) Is Not Narrowly Tailored to Deter Conduct Interfering With Court Proceedings

Defendant's second proposed justification for restricting Willey's political speech is that it could interfere with court proceedings, the integrity of which the State has an interest in protecting. Defendant's interest in protecting court proceedings is affirmatively hampered by a law that prevents represented people from hearing from other attorneys who may provide better service. Willey's specific speech exemplifies this.

Defendant's interest supports Willey's position because the integrity of court proceedings is threatened when defendants unwittingly rely on constitutionally inadequate defense counsel appointed to represent them. Willey seeks only to inform defendants of their rights and offer to represent them in obtaining replacement counsel if those rights are being violated. Criminalizing Willey's conduct results in defendants being more likely to have unconstitutionally ineffective counsel, a much more grave threat to the integrity of a prosecution than Defendant's concern that some indigent defendants might need reassuring that their ineffective court-appointed lawyer still represents them.

The State contends that "alternative remedies exist for addressing poor representation, including bringing such complaints to the attention of the trial court." Doc. 17 at 9. This is neither legally sufficient nor factually accurate. *First*, Willey does not bear the burden of proving that his preferred method of political expression is the only, or even the most effective, way of advancing his goals. Instead, the State must prove that their restriction on Willey's preferred method of speech is narrowly tailored to ensure that it does not unnecessarily infringe on his constitutional rights.

See Reed, 576 U.S. at 171 ("[I]t is the [defendant's] burden to demonstrate that [content-based regulation of speech] . . . furthers a compelling governmental interest and is narrowly tailored to that end."). Even if the State proffered some other way Willey could advance his civil-rights objectives, that would not justify barring him from the way he chose to do so.

Second, alternative remedies to poor court-appointed representation for indigent, jailed defendants are not available as a practical matter. The Texas barratry statute forbids attorneys from communicating with these defendants in an effort to offer them assistance in presenting their civil-rights claims to a judge. Without an attorney's direct involvement, a defendant may not know what his court-appointed lawyer is required to do. The only legal advice a defendant would be getting *is from his court-appointed lawyer*. If that lawyer is ineffective, the defendant cannot rely on him to say whether and how he is being ineffective.[3] Applying the Texas barratry statute to Willey's efforts would permanently insulate the defense bar from any legal challenge to their ineffectiveness pretrial. Judges routinely ignore *pro se* requests from defendants asking for replacement counsel due to the defendant's perception that their court-appointed lawyer is ineffective, including in cases where Willey has personally assisted the defendant in seeking replacement counsel after the defendant's *pro se* requests to the court had been ignored. *Robinson v. State*, 240 S.W.3d 919, 923 (Tex. Crim. App. 2007) ("Because the motion for new trial was presented pro se while the appellant was represented by counsel, the trial court was free to rule on it, or disregard it."). The fact that these indigent criminal defendants have been assigned a lawyer to represent them in their criminal case does not mean that they have a lawyer actively representing their interests in challenging *the effectiveness of that court-appointed lawyer*, which is the civil-rights issue with

[3] This assumes the appointed attorney communicates with them at all. One of the most frequent complaints Willey fields from indigent defendants in jail is that their court-appointed lawyer has never visited them in jail, has never answered their phone calls, and has never interviewed them about their case—often after months or even years of pretrial detention.

which Willey seeks to assist defendants. Claims that court-appointed counsel are ineffective do not disrupt the legal system; they forward it.

3. Section 38.12(d)(2)(B) Is Not Narrowly Tailored to Regulate the Legal Profession

Defendant's third proposed justification for Section 38.12(d)(2)(B) is that it is a permissible regulation of the legal profession. Doc. 17 at 10. For one thing, this is insufficiently specific. Mere invocations of professional regulation have specifically failed the Supreme Court's strict scrutiny analysis. *Reed*, 576 U.S. at 167 ("Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." (quoting *Button*, 371 U.S. at 438–39)). And in any event Defendant's only support for this interest is a citation to a *different* prohibition: disciplinary Rule 4.02. Doc. 17 at 10. That rule forbids attorneys to communicate with represented parties about a matter when the attorneys are representing other clients in the matter. *E.g.*, Tex. Disciplinary R. Prof. Conduct 4.02. Defendant concedes, as she must, that these prohibitions "do not directly apply to the conduct at issue here," Doc. 17 at 10, and contends that the "core function" of the rule is to "protect[] the attorney–client privilege," Doc. 17 at 11 (quoting Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 Hastings L.J. 797, 802 (2009)). As explained *infra*, Section 38.12(d)(2)(B) does not protect that interest. The rule, therefore, does not apply at all, and Section 38.12(d)(2)(B) is not a permissible regulation of the legal profession on this basis.

4. Section 38.12(d)(2)(B) Does Not Protect the Attorney–Client Privilege Because Attorney Communications with People Seeking Employment Are Privileged

Finally, Defendant contends that Section 38.12(d)(2)(B) is justified because it serves to protect the attorney–client privilege. This is, from the face of the statute itself, incorrect. The

attorney–client privilege applies to communications seeking legal advice even if an attorney–client relationship is never formed. Tex. R. Evid. 503(a)(1)(B) (protecting privilege of one who "consults a lawyer with a view to obtaining professional legal services from the lawyer"). "[C]ommunications made in the course of preliminary discussions with a view to employing the lawyer are privileged." *Auclair*, 961 F.2d at 69 (quoting *McCormick on Evidence* § 88 (3d ed. 1984)). And Section 38.12(d)(2)(B) forbids only communications that are seeking employment. A person could inadvertently waive attorney–client privilege in a communication that is covered by Section 38.12(d)(2)(B) only if she did not believe that the person with whom she was speaking would ever provide professional services to her. *See* Tex. R. Evid. 503(a)(1)(B). But if that were the person's belief, Section 38.12(d)(2)(B) would do nothing to protect the attorney–client privilege because the prospective client could just as well have revealed information to a non-lawyer, let alone to a lawyer not seeking professional employment. Defendant's rationale does not make sense, let alone narrowly forward a compelling interest.

B. Alternative Channels are Irrelevant and Unavailable

Defendant argues that "[s]ustaining the constitutionality of Section 38.12(d)(2)(B) as it relates to Willey would not leave Willey without recourse to pursue his goals of improving the criminal justice system." Doc. 17 at 11. This is irrelevant, and in any event false.

The question of alternative channels for speech is relevant only to *content-neutral* speech regulations, which must be "must be narrowly tailored to a significant state interest and must leave open ample alternative channels of communication." *Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open

ample alternative channels for communication of the information.'" (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Where, as here, a regulation targets speech on the basis of its content, it may not survive even if the speaker's message could be communicated through other means. *See Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541 n.10 (1980) ("Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." (citations omitted)). Accordingly, even if it were true that "reasonable alternatives exist" by which Willey could speak, Doc. 17 at 11 (capitalization altered), Section 38.12(d)(2)(B) would nonetheless fail.

Regardless, Defendant's proposed alternatives are inadequate. Defendant suggests that Willey could (a) "communicate the nature of his program through mass media"; (b) "send generalized written communications describing his program and offering to send a representative to evaluate a defendant's case upon the defendant's request"; or (c) "make his volunteer lawyers available for appointment through the court system." Doc. 17 at 12 (emphasis removed).

Defendant's first alternative fails because Willey's project begins by identifying *specific* people whom public data reveal to be represented by overburdened attorneys. These people almost certainly do not know that they are represented by overburdened attorneys or that they are entitled by law to be represented by attorneys who are not overburdened. For this reason, mass communications—which cannot identify specific people with specific problems—will not work.

Defendant's second alternative fails because either it cannot identify specific people with specific problems or, by virtue of identifying those people, *violates* Section 38.12(d)(2)(B). If Willey sent letters only to people he knew to be represented by overburdened attorneys inquiring

whether they would like their case evaluated in person, he would be sending a "written communication . . . [that] concerns a specific matter and relates to legal representation." *Id.* And he would of course be doing so "with the intent to obtain professional employment." *Id.* Defendant's proposed alternative violates the statute she seeks to defend.

Finally, Defendant's third proposed alternative is simply inapposite. Adding competent attorneys to the list of attorneys eligible for court appointments will do nothing to remedy the problem of judges appointing attorneys whom they know to be overburdened. Jerome Godinich, the attorney whose clients Willey sought to contact, has been publicly identified—including by this Court—as deficient. Doc. 1 ¶¶ 19, 20. He nonetheless maintains a financially thriving practice taking appointed cases in Harris County, notwithstanding the fact that many other attorneys—including Willey and many of his volunteer attorneys—are *also* available to take those appointed cases and handle them well.

III. CONCLUSION

Defendant concedes that Section 38.12(d)(2)(B) is a content-based restriction on non-commercial speech that is subject to strict scrutiny and that if it fails strict scrutiny Willey is entitled to a preliminary injunction against its enforcement. Because the section fails strict scrutiny, Defendant's motion to dismiss should be denied and Willey's motion for a preliminary injunction should be granted.

Respectfully submitted,

/s/ Charles Gerstein
Charles Gerstein
Attorney in Charge
(S.D. Tex. Bar No. 2998395)
Civil Rights Corps
1601 Connecticut Ave. NW, Suite 800
Washington, DC 20009

charlie@civilrightscorps.org
(202) 894-6128

/s/ Nathan Fennell
Nathan Fennell
(S.D. Tex. Bar No. 3547280)
Texas Fair Defense Project
314 E Highland Mall Blvd, Suite 204
Austin, TX 78752
nfennell@fairdefense.org
(512) 637-5220