IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

OSTERIA SEGRETO, LLC d/b/a THE BARBER SHOP BLACKSTONE, Plaintiff, vs. MICHAEL HILGERS, Attorney General of Nebraska, in his official capacity, and TARA J. STERNS, JOSEPH A. SCOVILLE, and COURTNEY A. DAUBENDIEK, in their official capacities as the members of the Nebraska Board of Barber Examiners, Defendants.	)	No. 8:26CV65 Omaha, Nebraska April 16, 2026

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BRIAN C. BUESCHER
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by certified stenograph, transcript produced with computer.

A-P-P-E-A-R-A-N-C-E-S

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(At 11:03 a.m. on April 16, 2026; with counsel present:)

THE COURT: You may be seated.

We are on the record for a hearing on Osteria Segreto, LLC versus Hilgers, et al., Case Number 8:22CV65 [*sic*]. We are here for arguments on Plaintiff's Motion For Preliminary Injunction. I am going to refer to all documents on the docket by their docket numbers and all pages in any documents by their docket page number at the top of the document. I do ask the parties to do the same.

Counsel, will you state your appearances for the record, starting with counsel for the plaintiff.

MR. GUTMAN: Good morning, Your Honor. Daniel Gutman and Sydney Hayes on behalf of the plaintiff. Also at counsel table with us are Senior Certified Law Students Ben Sobus and Cole Davis.

THE COURT: Thank you very much.

MR. GUTMAN: Thank you.

THE COURT: Okay. And then we will have for the defense.

MR. McKECHNIE: Good morning, Your Honor. Joe McKechnie on behalf of the defendant and my co-counsel here, Mr. Dethlefsen.

THE COURT: Okay. Thank you.

I know that the parties have exhibit -- exhibit lists at filing 29 and filing 30. All of the exhibits, as I requested,

are already filed on the docket.

Does any party object to any of the exhibits offered by the opposing party? I'll start with the plaintiff.

MR. GUTMAN: Thank you, Your Honor. Plaintiffs do not object to any of the exhibits for purposes of this hearing. The only objection that we have is filing number 13-6, which is the declaration of Lauren Garrison. Paragraphs 9 and 10 of that declaration in which Miss Garrison avers to comments made by her clients. We would object to those two paragraphs on hearsay but other than that we have no objection for purpose -- to any of the defendant's evidence for the purpose of this hearing.

THE COURT: Okay. And I will take that objection under advisement and decide whether to give that testimony any weight or handle it appropriately.

Thank you.

MR. GUTMAN: Thank you, Your Honor.

THE COURT: How about from the defense?

MR. McKECHNIE: Yes, Your Honor. We just have one objection to paragraph 28 of filing 9-1 on foundation grounds. The declaration of Mr. DiGiacomo. He lacks foundation to assert that no consumers have been confused about his business and the symbols that they advertise with.

THE COURT: Okay. I will take that objection under advisement as well and give it any weight, if any, that -- that

I decide to give it -- to it. I will admit the other -- well, I'm going to admit all of the exhibits that were submitted in this case subject to any further ruling I will put in my order with regard to those specific issues.

In my order setting this hearing on the plaintiff's Motion For Preliminary Injunction, I stated that each party would be allocated 20 minutes to present your argument on the plaintiff's motion. I will of course -- may allow additional time, if appropriate. I have read the parties' submissions for and against the Motion for Preliminary Injunction and so you can make reference to those or provide me further thoughts on those as you see.

So at this point in time, I will open it up for the plaintiff's argument and what I will allow is however you wanna split this up. Mr. Gutman, if you wanna do it, that's fine. If the students -- the senior certified students are gonna handle this, that's fine. If you wanna handle some issues with some and some with -- issues with others, that's fine too. And we'll be flexible in that regard just given the circumstances of this.

So, Mr. Gutman, why don't you just go ahead and tell me how you intend to proceed.

MR. GUTMAN: Thank you, Your Honor.

Yes- -- yesterday or maybe two days ago we filed a notice requesting just that a senior certified law student would be

arguing, and it sounds like with the Court's permission, we would request that Mr. Ben Sobus handle the argument in total for -- for the plaintiff.

THE COURT: Okay. All right, Mr. Sobus, you're on. So if you would stand right there and just make sure the microphone is up. I do like for you to stand when you argue. So you go ahead and proceed with your argument but you can expect that I'll have some -- some questions for you along the way as you proceed so go ahead.

MR. SOBUS: Of course, Your Honor. Thank you. May it please the Court. My name is Ben Sobus on behalf of the plaintiff and I'm a senior certified third-year law student at the University of Nebraska.

I'd like to first thank the Court for its time, the court staff for its time here in considering this motion. This case strikes at the heart of the First Amendment for the State of Nebraska has imposed a total ban on the use of the name barber shop and the use of a barber pole.

Now, as the Court is familiar with the briefing, I just wanted to use my time here today to really hit on three points that we think are the most important.

First, I wanna talk about inherent or misleading speech under *Central Hudson*; second, I wanna talk about the no more extensive than necessary requirement also from *Central Hudson*; and, finally, I'll briefly address the State's trademark

argument that it raised in briefing.

I'm gonna start with actual or inherently misleading speech. Now, as this Court is aware, this is a commercial speech case governed by *Central Hudson*; and the threshold question in *Central Hudson* is whether that speech is either actually or inherently misleading. Now we agree with the State that if the speech is either actually or inherently misleading, that it receives no First Amendment protections, but where we disagree with the State is whether this speech is either actually or inherently misleading.

I'll begin first with the inherently misleading prong. Speech is only inherently misleading when it is incapable of being presented in a way that is not deceptive. Now, instructive in this analysis we feel is the Fifth Circuit's decision in *Express Oil* referenced in our briefing.

Now, the Fifth Circuit there held that the name tire engineer was inherently misleading where the State of Mississippi banned the use of the word engineer unless you were a licensed engineer. The Court there reversed the district court's finding that the speech was inherently misleading because in that case, the use of the prohibited name was encountered on a website where it advertised automotive services or it was encountered at the Tire Engineers' storefront which looked like any other automotive shop except that the name was Tire Engineer.

Ultimately, the Fifth Circuit held that context controls the analysis on this inherently misleading prong and so too here. The attempted use of the word here based on the context paints the exact same picture that we have from the Tire Engineer case. If we go to the website which is found at the URL thebarbershop.bar, it advertises cocktails, not haircuts. And the physical experience is even more persuasive because as consumers arrive at the bar, they find an unmarked back -- black door in a back alley. They enter into this door, are meeted [*sic*] by a bouncer during business hours from 7 p.m. to 2 a.m. and then enter into the bar where they find a bar with a menu that has possible drink orders that are certainly barber themed but there's no haircuts offered. No reasonable person goes through that entire experience and is left deceived as to whether this is a barber shop or not.

Now --

THE COURT: No, but I -- here's where I wanna -- here's where I wanna start, okay? You've got the Supreme Court saying the test is whether it's inherently misleading and we're talking about that right now. Okay? So you're essentially arguing that The Barber Shop Blackstone, that name is not inherently misleading and it's not inherently misleading because -- because of the content on the -- the context.

MR. SOBUS: That's exactly right.

THE COURT: I think there's some distinguishing I can

do with the -- the Tire Engineers and the Fifth Circuit but also the Fifth Circuit doesn't control here either. Okay.

MR. SOBUS: And that's correct.

THE COURT: Everyone knows that. But I think there's some distinguishing that can be -- happen there. Is it your position that -- Well, let me just ask you this. Let's just say, for example -- and maybe there is such a law -- that in Nebraska they prohibited the use of word -- of the word "hospital" for anything but a hospital. You can only call yourself a hospital if you're a hospital. And what if someone decided to open a bar called The Hospital Blackstone.

Would that be inappropriate -- would that be allowed?

MR. SOBUS: Your Honor, looking at the context of The Hospital Blackstone, that would be the circumstances that control. So the context of where --

THE COURT: So you're saying there might be context where that would be allowed.

MR. SOBUS: Yes, Your Honor.

THE COURT: Okay.

MR. SOBUS: Based on --

THE COURT: I think that's a big stretch here. Don't you think it'd be a big problem if anyone called themselves a hospital that wasn't a hospital?

MR. SOBUS: And that certainly may be a big stretch, Your Honor, and perhaps it's limited by the differing interest

here between -- certainly hospital has a heightened interest versus, say, a barber shop.

THE COURT: Well, let's -- let's -- let's make it a little easier and take it a little more home to where we are, all right? What if the State of Nebraska passed a law saying that you can only call yourself a law office if you are a law office and someone opened up a bar called The Law Office Blackstone. Would that commercial speech be allowed to be -- would be allowed -- would that impediment on commercial speech be allowed under the U.S. Constitution?

MR. SOBUS: Yes, Your Honor. What I'll say is, of course, the context perhaps shows that it's, you know, a bar named The Law Office Blackstone but also the possibility of injury there is certainly less likely. If one goes into The Law Office Blackstone expecting legal services, they're gonna get a drink but not legal services.

THE COURT: Yeah. Well, you're right. The consequence there's a little different as the consequence here would be a little different too. It'd be probably similar to make the -- the consequence of making the mistake thinking you were going to a law office and end up being able to buy a drink is, say, less so than a hospital. All right?

Well, let's take it to another one. And this -- this is another -- I'm gonna ask you -- give you another example because I think it -- it shows the problems with -- with your

argument here. What if someone decided -- what if there was a law that said you couldn't call yourself the Department of Motor Vehicles unless you were the Department of Motor Vehicles and someone said I'm gonna open up a bar called The Department of Motor Vehicles Blackstone? There's no professionals there. There's just people who do -- you know, at the Department of Motor Vehicles, a real one, there's -- there's just people who do stuff for the -- for the State. What if -- Would that be allowed? Would -- Can the State say you can only call yourself the Department of Motor Vehicles if you're the Department of Motor Vehicles?

MR. SOBUS: Your Honor, that hypothetical would probably be actually misleading which is the second prong of *Central Hudson* where if speech is actually misleading, then it also receives no First Amendment protections. So that probably doesn't fall under the inherently misleading prong and could be dealt with on the actually misleading prong.

THE COURT: Well, but, I mean, then -- then maybe we can shift to that. I mean, the -- the point I wanna make is the name of this business is The Barber Shop Blackstone. That's what the name of it is. And it's not a barber shop. And your argument is the State of Nebraska is not allowed under the U.S. Constitution to require businesses that are not barber shops to not call themselves barber shops. This isn't like The Bar-Bar Shop or The Barber Shop Bar or something different.

This is actually calling yourself something that they're not.

And I wanna make sure I give you the chance to give the best argument you can as to why the State of Nebraska cannot demand that businesses don't call themselves something that they're not.

MR. SOBUS: Well, yes, Your Honor. So in sum, on the inherently misleading, we would say that context controls but on the actually misleading speech, which I think is probably the better answer to your hypotheticals, is that the State must put forward their proof of actual deception. Again, we think that Tire Engineer case is persuasive because there the Court looked at a survey where they surveyed 400 individuals, and 66 percent of respondents said, you know, we think this tire engineer place employs engineers but even that finding wasn't sufficient to find actually misleading speech.

THE COURT: Well, and I think I understand why you'd wanna shift it to actually misleading if you're -- if you're in your position. But, you know -- because then you have to -- to show that and, you know, we've got one affidavit of someone, you know, showing that, you know, that one barber saying I think it's misleading and, okay. Well, but ultimately I -- I -- I'm not sure I agree with you that it -- that -- that -- that you even get past the inherently misleading, you know.

So go ahead and go on to your other elements and I'll -- I'll hear from you on that.

MR. SOBUS: Your Honor's certainly correct that that is our argument on the actually misleading is a single affidavit here is not enough evidence to prove that but on -- going back to the inherently misleading speech, speech that can be presented in a non-misleading fashion. In doing so, this non- -- how do we present speech in a non-misleading fashion? We look at the overall context.

So I think that's the stronger argument on the inherent misleading speech is that it's capable of being presented in a way that's not misleading. And how do we do that? We look at the overall context.

Now, as Your Honor correctly points out the affidavit point. So moving to my second point on narrow tailoring, because the speech, as we argue, isn't either actually or inherently misleading so we move to the other factors of *Central Hudson*. And one really jumps off the page is that the State is required to have a narrowly tailored, no more extensive than necessary law.

Now, the State in its briefing make these conclusory arguments that the law is narrowly tailored. But there are less burdensome alternatives that the State could utilize here in preventing and achieving the State's interest which is preventing unlicensed haircuts ultimately. And we don't contest the fact that the State does have a legitimate interest here in preventing that.

For example, the State could allow licensed barbers to represent themselves as such. They could call themselves a licensed barber shop. And that's a solution the Fifth Circuit came to in *Byrum v. Landreth* cited in our brief or that the Eleventh Circuit came to in Abra- -- *Abramson v. Gonzalez*, also cited in our brief at Footnote 3. These were licensed interior designers in the Fifth Circuit and then licensed psychologists in the Eleventh Circuit.

By just putting a simple disclaimer that we are of -- a member of a licensed profession was narrow tailoring. Or in the *Express Oil* case, there, a point of sale disclaimer that, hey, even though we call ourselves tire engineers, we don't actually employ any licensed engineers as licensed by the State of Mississippi.

Now applied here the effect of that statute is a total ban on the use of the name "barber shop" and the display of a barber pole which goes far beyond the State's interest in preventing unlicensed barbers from cutting hair. A bar should -- I mean, a -- a bar cannot call themselves The Barber Shop Blackstone just like a lawn care service couldn't call themselves lawn barbers under this statute.

Thus we're likely to succeed on the merits of this actually or inherently misleading speech component and because it's not narrowly tailored, the State brings up this trademark argument in its briefing but --

THE COURT: Well, before we get to the trademark argument, here's the -- here's the deal. I -- the way -- I mean, I understand there might be other cases or other examples that may allow you to call into more question here but really I'm only dealing with this name. That's what I'm dealing with today. I'm deciding on this name only, The Barber Shop Blackstone. That's what I'm deciding on. And you know what, there might be another name that would illustrate a problem with being called a barber and I did when reading the barber shop statute found it interesting. My mother was a barber on the farm in the middle of nowhere Nebraska for 25 years and never had a barber pole so, apparently, she was in violation. No one cared. So I found that interesting.

And I also find it interesting the history of all this, all right? Why is this so regulated? It's because of history. It's because they used to do a lot more things than cutting hair, all right? And so that's where we're at, and we've got some legacy law here that's probably more regulatory than it would be if we thought about it today. That being said, it doesn't matter; right? So that -- that's where we're all...

So I know you were about to get into the trademark. Okay? Respectfully to the -- to the State I think that is by far their weakest argument, and I was surprised they lead with it because the trademark issues -- here in federal court we deal with the trademark issues on some frequency, and you don't got

one, it's not even close. All right? There's huge legal problems with what happened, even what was registered. That all being said, I don't think I have to get there and I don't plan to. All right?

So give me a little about your -- your trademark argument and -- but -- but understand that you don't really need to convince me much on that one because I think that one -- I think you called it -- what was it -- a red herring or something, and that's that -- that -- I'm not convinced on that one. So go ahead -- go ahead with your argument.

MR. SOBUS: Thank you, Your Honor. I'll certainly be brief. So the trademark law doesn't shield the state statute from a constitutional challenge, as Your Honor well knows. And even if the trademark law were relevant here, the State doesn't have the trademark it claims; and, finally, as the State helpfully provided us evidence here, when this trademark was initially enacted, the own Attorney General's Office wrote an opinion letter that said the ability to enforce this is a -- probably a dubious proposition, and we agree with the Attorney General's view of the enforceability of this service mark when it was enacted in 1987, I believe, Your Honor. So for those reasons, you know, we think the State's trademark arguments fail and are a total red herring.

So what on its face may appear like an innocuous dispute over the name of a bar and the display of a barber pole, at the

end of the day, the State is ultimately saying that if you're an unlicensed business, you cannot use these words, you cannot display this image which has been in the public domain for centuries, as the State cites, since the 5th century AD.

And for those reasons, we respectfully ask this Court to grant our preliminary injunction; and if the Court has any other questions, I'm happy to answer them.

THE COURT: Okay. I wanna ask you about this barber pole situation. I've already brought it up. I believe in your brief you're -- you're suggesting that the way the statute is written that a candy cane could be regulated is what you're arguing.

MR. SOBUS: Yes.

THE COURT: Okay. Let's go over the language of this 'cause I think you're -- I think you're off-base there and I need you to tell me why you think I'm wrong on this. So the statutory definition of barber pole is this. It says, "Barber pole shall mean a cylinder or pole with alternating stripes of red, white, and blue or any combination of them which run diagonally along the length of the cylinder or pole[.]" That's Nebraska Revised Statute 71-202.01(2). Okay? So let's look at the language of this.

"Or any combination of them." What is "them"? "Them" is red, white, and blue together. All right. So that means you could have a red, white, and blue alternating color pole, or

you could have a red, blue, and white alternating color pole, or you could have a blue, white, and red alternating color pole but you have to have all three just on the plain reading of this.

So the suggestion that a candy cane is in -- in there, I don't buy it at all. I don't think that -- that's not what it says. This is very clear language in my view and why is that not narrowly tailored? I mean -- and by the way, the -- the mark that is put on the -- on the Internet of your business is a black and white pole. Put that up, you got no problems; right?

MR. SOBUS: Yes, Your Honor.

THE COURT: So what I would like to know is why is my reading of this statute wrong because I -- I -- I mean, the candy cane is out in my view.

MR. SOBUS: Your Honor, in my view, however persuasive that may be, as I read the -- it's the any combination thereof. So it could be two of the colors and not all three. So that is how we get to the reading of, you know, we can -- this is regulating candy canes.

THE COURT: Yeah. Well, I -- I -- I -- I just don't -- I don't see it that way. Any combination thereof is combination as to the order of the colors on the pole, and so -- and "them" means all. It means them. Doesn't mean -- 'cause they -- they could have said and -- or any combination

of any of them. That could have been problem. That could have been fine. Then -- then it would have been or two of them -- two or more of them. They didn't say that. Any of them.

And so -- and I -- I -- I believe, based on the materials in front of me, that's the way it's been enforced for -- for a long time. So that's where I'm at on the -- on the barber pole bit so...

All right. Is there anything else you wish to offer before I give the State a chance to respond to your arguments?

MR. SOBUS: If I just have two responses to the -- your barber pole --

THE COURT: Yes.

MR. SOBUS: -- discussion here, Your Honor.

So the red, white, and blue in theory, okay, we have an American flag, color striping on a pole, and that would also be regulated under the statute.

THE COURT: If it's diagonal and it looks like a pole, probably, yes.

MR. SOBUS: Yes. Which probably goes to the no more narrowly tailored requirement that we're regulating things that don't actually affect what ultimately is the State's interest here. So we could have a more narrowly tailored law that gets to the same purpose.

And with that, Your Honor, we ask this Court grant our preliminary injunction.

Thank you.

THE COURT: Okay. Thank you very much.

I will now hear from the State of Nebraska. Please proceed however you wish.

MR. McKECHNIE: Thank you, Your Honor.

There are really two narrow restrictions that are at issue here. There's the use of the title "barber shop" unless you're licensed and there's use of the barber pole in your advertising unless you're licensed under the Act.

There are several government interests that are at stake. We have not only preventing the unlicensed practice of barbering but we have a valid exercise of the State's police power. The pole and the title are exclusively reserved for use by licensed barbers, they're required to be displayed under the barber board's registra- -- regulations, excuse me, and there's a long history of those, title and pole, being associated with licensed barbers in the state of Nebraska.

We also have preventing against dilution of those marks and generally just preventing against consumer confusion. So when you apply that against the plaintiff and their display of the title and the pole, it does not amount to a violation of their First Amendment rights. These are valid restrictions, and if they cannot carry their burden on a PI, this Court should deny that motion.

This is a law that is categorically different from *Central*

Hudson, *Virginia Pharmacy*, and *Bates*. This does not restrict truthful communication from being -- truthful information from being communicated to the public. It does not restrict the plaintiff from operating a barber shop-themed speakeasy. Like I mentioned, there's the two narrow restrictions that prevent people from holding themselves out as being a barber. It enforces the licensing scheme that the State adopted in 1927. It prevents dilution of these marks and it generally prevents consumer confusion.

The plaintiff is using the title and the pole in a manner that is causing confusion and will mislead the public about the type of services they offer. When the public sees the pole and the title, that's a seal of approval by the State. It's part of the licensing scheme. It means that that's a licensed barber and the services and the qualities that will be provided meet the standards that have been set by the barber board.

Since 1927 Nebraska has required barbers to be licensed within this state. And since that time, licensed barbers have used the title barber shop. And for over half a century, licensed barbers have displayed the barber pole.

This long and exclusive use of the title and the pole should not be supplanted because a business that opened last year wants to capitalize on the goodwill and the reputation that are exclusively associated with these marks to deceptively advertise under the guise of a regulated barber shop.

Now, I intended to address trademark but listening to your questions, I'm just gonna skip ahead to First Amendment, if that's all right with the Court.

THE COURT: That's probably a good idea.

MR. McKECHNIE: So there's -- I think it's good to start with the First Amendment permits the states to restrict deceptive and misleading speech. And preventing the unauthorized use of the barber pole enforces the licensing scheme, it prevents dilution, and it prevents consumer confusion.

So 71-201, subsection 5 and subsection 6, those are the two versions -- two subsections that are at issue today. So subsection 5 says you cannot use the title barber shop. The definition of title is a designation. So when you're using the title barber shop, you're designating your services. And the plaintiffs talked about context. The Barber Shop Blackstone is their business name. There's nothing to indicate they don't do anything other than offer barbering services.

Then when you look at subsection 6 --

THE COURT: And, first of all, let's just stop right there with the name.

MR. McKECHNIE: Yes.

THE COURT: Okay? The contention is, well, context matters and we don't advertise much but we do advertise and when we do, we make clear we're making drinks, not cutting

hair. Okay. Does that matter? Tell -- tell --

MR. McKECHNIE: That's --

THE COURT: -- me your argument against the argument that they have which is context matters and here the context it's clear that we're -- that we're not cutting hair.

MR. McKECHNIE: Well, that's not what's visible on their social media advertising. They have The Barber Shop Blackstone as their logo. It's juxtaposed against all the required furnishings of a regulated barber shop. They got the barber pole displayed. It's a cylindrical shape. Dome on the top, dome on the bottom, diagonal red, white, and blue stripes. They have a barber chair. They have a service mirror. They have a cape. They have a service station. And they say The Barber Shop Blackstone, come see our bar. We have special guest barbers. That is inherently misleading to anyone who's scrolling Facebook and sees that, especially considering that barber shops can hold a liquor license in the state of Nebraska. So there's no context there that would indicate they don't actually offer barbering services.

But then I think the pole is what's the most egregious example here. There is nothing that they communicate -- So the pole is the only signage they have out in front of their business. If you look at filing 13-4, any consumer that's walking down the street, the only context they have is a barber pole. There's a long history of that pole being used by

licensed barbers. In fact, the regulations require licensed barbers to display it.

So context in that sense tells a reasonable consumer of the public that there's a barber shop located there. And so they may not go in and get a dangerous straight razor shave but considering that the State can regulate the industry, they've actually declared that regulating the industry is in the public interest, they require this to be displayed by licensed barbers. So it encroaches on the -- that police power that the State exercises, it dilutes the association of the pole with the licensees in the mind of a consumer, and it generally prevents consumer confusion.

THE COURT: All right. I have a question about this pole. Do you buy the argument that the definition of a barber pole in the statute includes a candy cane?

MR. McKECHNIE: I do not, Your Honor. I think that's such a broad reading it borders on absurdity but if the Court deems that reasonable, this Court should apply the savings canon, read it narrowly and find it's constitutional as applied to the plaintiff.

THE COURT: Okay. So your position is my reading that I expressed to the plaintiff is the right reading?

MR. McKECHNIE: Yes, Your Honor. We agree with that.

THE COURT: Okay.

MR. McKECHNIE: The Barber Act and the two

restrictions, they're really most analogous to the law that was at issue in the *San Francisco Arts & Athletics* case. So in SFAA Congress granted the U.S. Olympic Committee exclusive right to use the title Olympic and all associated symbols. No one can use those without the permission of the Olympic Committee for promotional or commercial purposes.

So -- I believe Justice Thomas wrote that opinion. He went through a trademark analysis first. He found there were common law rights in that but then when he moved to the First Amendment analysis, he found that was an incidental restriction no broader than necessary to further the government's interest in encouraging amateur athletics as well as encouraging and promoting U.S. Olympic Committee activity within the United States, and so that really I think is persuasive for this Court's analysis.

We have a title and a pole that since 1927 has been associated with licensed barbers within the state of Nebraska. We have a licensing scheme that's been set up to regulate the industry, that requires those to be used by licensees, and when a licensee or, rather, an unlicensed business uses these without any context communicating they're anything other than a licensed barber shop, it dilutes the association of the barber pole in the mind of the public, and it generally confuses the public.

THE COURT: I know. Just tell me here your view of

the law. So you're saying any barber has to call themselves a barber; is that true?

MR. McKECHNIE: So the Act says that you can only use the title barber or barber shop unless you're licensed. And then when you look at the regulations, there's some required displays. While -- I don't know off the top of my head whether the title is a required display. I would imagine if you're licensed, you would wanna call yourself a barber to distinguish yourself from cosmetology which if you're a cosmetologist, you still have 800 hours of additional training to actually call yourself a barber. And this is a proud profession. They really take a lot of pride in the services and the history of this profession.

THE COURT: So here -- here's the -- here's what I'm just going to say, you know what, every -- at least the males in this room, looks like everyone has been to a barber because, obviously, their hair is cut or maybe their mother cut their hair or something or maybe some unlicensed barber did it.

But the reason I say that is, you know, the barber I went to for 25 years here in Omaha was called Downtown Metro Hairstyling and she was only a barber. That's it. That's what her license said on the wall, all right? So the issue that's -- that's kinda brought up in these -- in these documents is isn't this way outdated? I mean, you know, back in the day barbers would do surgery on you. Okay? And then

barbers -- it was -- it was a different ball game; right?

Today, isn't this an outdated -- even barbers aren't using the term. Now, my -- the barber in Omaha here did have a pole but she painted it herself. She said, "I thought it was a dumb requirement." All right? So she put it up. All right. And -- and -- and maybe my mother, who was -- who did a wonderful job of cutting hair for 25, 30 years on the farm, she was also a cosmetologist. She had both, all right? She went longer and got everything so maybe she didn't have to put up the barber pole.

But what I'm just saying is, you know, this isn't the Olympics. All right. This is a term that was a bigger deal in 1927 when this thing was first come about than it has been for many, many years in Nebraska, and there's certainly a few people out there who still worry about the term but there's a whole bunch of 'em that don't. Respond to that.

MR. McKECHNIE: Well, respectfully, Your Honor, I would say that the barbers are very passionate about the use of this title.

THE COURT: I think you've heard from some.

MR. McKECHNIE: I've learned quite a lot about barbering, I will say. But I would just point the Court to the two cases -- I know they're persuasive -- out of the Fifth Circuit and the Eleventh Circuit. I think those cases actually support why this is -- this restriction on the use of the title

is constitutional. So in *Byrum* out of the Fifth Circuit, you had unlicensed interior designers and they couldn't actually use the title unless they were licensed. So the Fifth Circuit looked at that and said so long as you can practice interior design without a license, you can't restrict those individuals from using the title. So it all goes into the police power to regulate and license these professions.

THE COURT: What about engineers, though; the tire engineers out of the Fifth Circuit? Don't you have to be -- have a license to be an engineer?

MR. McKECHNIE: Well, respectfully, sir, I would say there's a big difference between an engineer, which is -- could describe half a dozen to a dozen subsets of engineering. Barber and barber shop have one meaning and they've historically had one meaning. It's really -- you can go in, you can get a straight-edge shave, you know you're not gonna, you know, be from ear to ear. It -- it -- it's something that is regulated, the services and the standards that they are providing meet the licensing and the regulations that's been set by the barber board, and this really has one meaning.

This isn't a restriction on expressive speech. The plaintiffs draw the example of a barber shop quartet. Never mind the fact that's a music group that arose out of a barber shop, but that's -- that's not the type of speech this law reaches.

THE COURT: So tell me this. Do you think if someone called themselves The Barber Shop Quartet Blackstone, would that be allowed?

MR. McKECHNIE: Well, I think the context of that would show --

THE COURT: So you're saying context could matter some -- sometimes.

MR. McKECHNIE: In this case, we don't have context to distinguish that. Our facts --

THE COURT: Well, that's --

MR. McKECHNIE: -- before the Court --

THE COURT: -- that's the argument of the plaintiff, though.

MR. McKECHNIE: -- are Barber Shop Blackstone.

THE COURT: So you're saying -- so that means -- you know, bar- -- so barber shop quartet. So context could matter sometimes. So you're not -- you're not gonna go out there and say if someone calls themself The Barber Shop Quarter Blackstone and has no business front, nothing, and they just go around and sing four-part male harmony, that that could be potentially allowed?

MR. McKECHNIE: I would say, Your Honor, that would sweep in protected speech that's expressive just like if *Sweeney Todd* came to the Orpheum and they display a barber pole in the play --

THE COURT: Who's *Sweeney Todd*?

MR. McKECHNIE: *Sweeney Todd*, the play where they cut hair and stuff like that.

THE COURT: Oh, really? Okay. You can tell -- Remember I got white hair up here so...

MR. McKECHNIE: I -- I just learned about this myself.

THE COURT: Okay. All right. Go ahead.

MR. McKECHNIE: But, you know, that they could display a barber pole, and this -- this statute wouldn't reach that because it's very limited to the use of it in advertising, whereas that's not being used in advertising to designate the type of services that this play offers.

So I do think there's some clear line of demarcation between where this law reaches and the sort of speech that would be protected. And this is commercial speech. So this is not the strict scrutiny standard. We're in *Central Hudson* territory. The very first step of the inquiry, is it misleading and is it deceptive; and if either of those are true, we don't even reach whether the government interest is furthered by the law's restrictions; and it's our position that this is inherently misleading, it has caused confusion.

Although it was a barber who also operates in Blackstone, she does have a right to understand who her competitors are and whether or not she's going to have someone open up shop right

down the street, and that has been confusing, and she did learn from her clients that they were also confused. The effect that that had on her was she filed a complaint, and the barber board pursuant to their statutory duties investigated, determined this was a violation, engaged in a long negotiation with the plaintiff, they actually agreed, there's evidence in the record -- there wasn't a -- an initial agreement here so this lawsuit kinda came out of the blue. It doesn't seem like this would be too much of a burden on the plaintiff. He had already agreed to change the colors on the barber pole and I think hyphenate the name.

THE COURT: Yeah. Well, so before I finish off with your part of the argument here, why don't you give me the best argument you have as to why the State of Nebraska can demand that only a barber shop which cuts hair call themselves a barber shop.

MR. McKECHNIE: I would say the best argument for that is that it's pursuant to the licensing scheme that the legislature has determined is in the public health, and that barbering is a profession that needs to be regulated in the public interest, and so use of the title barber shop by itself is inherently misleading to the public.

THE COURT: Okay. Thank you very much.

I'm now gonna give the plaintiff a chance to respond to anything, and -- and at that point since you have the -- the

burden here -- and before I do that, I'd just ask does the State have anything else you wish to say -- you feel you need to say before I turn it over to the plaintiff for a rebuttal?

MR. McKECHNIE: Yes, we do. Thank you, Your Honor.

THE COURT: Okay.

MR. McKECHNIE: I just wanna clear up some possible confusion in the brief. So the Board holds a registered service mark but our position is that they have common law rights in the pole when used by licensees as a certification mark. I just wanna make that clear 'cause I think there was a -- two references as a registered certification mark. It's the registered service mark.

THE COURT: Registered service mark. Okay. I still think you have a problem on all of that but I don't think I need to go there, and I don't think I need to rule on that necessarily based on where this thing sits but I appreciate you clarifying that.

MR. McKECHNIE: Yes. You're welcome.

THE COURT: Okay. Let's hear from the plaintiff, your -- your last chance here to -- to tell me why you get an injunction here.

MR. SOBUS: Yes, Your Honor. Thank you.

I'd like to start with the statute here at issue which says no person, partnership, limited liability, or corporation shall use the title barber or barber shop or indicate in any

way that such person or entity offers barbering services. So to the State's point regarding the *Sweeney Todd* example, the use of the barber pole in advertising, how is it any different from what our client's doing here is that we are using the barber pole in advertising.

And so on the facts here, the -- we've provided the Court with ample evidence that on all the facts the context shows that this is done for theming purposes, for advertising so it's not inherently misleading.

And then on the law, it's important, I think, to take a step back and truly consider the breadth of the law here. Every barber shop quartet is unlawful based on this statute. Even though the barber shop quartet, if we look at our brief -- the *Merriam-Webster Dictionary* is, you know, a style of unaccompanied group singing which has no relation to hair cutting but under the statute that is unlawful.

And, quite frankly, I'm not even convinced the board itself is legal because the statute requires that you offer barbering services.

THE COURT: Whoa there. I think you're going a little too far there. I don't think you need to bite off that apple at this point so go ahead.

MR. SOBUS: And, finally, Your Honor, on the San Francisco case, the State cites it but ultimately that was a trademark case. So even their First Amendment argument is

imbued with this trademark-style argument because that was a statutory grant from Congress for the exclusive right to use that.

So for those reasons, we ask this Court to grant our preliminary injunction and I thank the Court for its time today.

THE COURT: Okay. Thank you very much.

I believe I have everything I need to issue an order in this matter. I will note that my original thought was to have an argument here and then head up and check out this barber shop -- barber shop bar personally but it's not open so -- we looked, and so I decided that that would be too much scheduling and trying to figure out how to make that happen so...

But, anyway, we do have photos of it in the record and certainly some interesting legal issues. I will note that the student advocates have done a great job on this case and it's a very interesting case and -- more interesting than many of the things I get to deal with.

I've got a billion dollar environmental disaster case that I'm dealing with that is less interesting than this one, I can assure you so I got that.

Then I also will note thanks to the State for their advocacy on this as well.

Like I said, I'll take it under advisement. I think I can -- I got a big huge pile of things to do but I think I can

get this out fairly soon but it'll be out in due course.

And so thank you all for your efforts today. And if both parties -- and I'll -- I'll offer this to the students. If you wanna come to chambers and I'll show you around a little bit and say hello to you. I'm gonna offer it to the State too 'cause technically this is an adversary position. You may show up and just do the same. So if you wanna come back, come on back and I'll just say hello to you really quickly before we -- you know, before you take off and head back to wherever you're going to head back.

Thank you very much.

We are in recess.

MR. McKECHNIE: Thank you, Judge.

MR. SOBUS: Thank you, Your Honor.

(Adjourned at 11:46 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Rogene S. Schroder — May 26, 2026

Rogene S. Schroder, RDR, CRR — Date