No. 26-1957

United States Court of Appeals
For the Eighth Circuit

OSTERIA SEGRETO, LLC
d/b/a THE BARBER SHOP BLACKSTONE,

Plaintiff–Appellant,

v.

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–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

As explained in the opening brief, it is not inherently misleading to call a barber-themed bar the "Barber Shop Blackstone" because ordinary people can understand that the name refers to the bar's theme rather than claiming that the bar is a place where you can get your hair cut. In response, the State makes three arguments. It claims that it is inherently misleading to use a word in a way outside the four corners of its dictionary definition. Appellees' Br. 10–12.[1] It offers a new interpretation of Nebraska law under which (contrary to its earlier assertions) the bar is not prohibited from calling itself a "barber shop" after all. *Id.* at 13–16. And it argues, in a single citationless sentence, that it can restrict commercial speech as "misleading" even if there is no danger that any consumer could be misled into a commercial transaction. *Id.* at 17.[2] Each argument fails.

[1] Pinpoint citations refer to the page numbers of the briefs themselves, not the pagination in the automatically generated ECF footers.

[2] The parties appear to agree that the remaining preliminary-injunction factors rise or fall along with this Court's resolution of the First Amendment arguments. If Osteria Segreto is likely to succeed on the merits, those factors cut in favor of it, and if not, not. *Compare* Opening Br. 39–40, *with* Appellees' Br. 20.

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I. Free-speech rights do not depend on strict compliance with dictionary definitions.

First, a word on burden. The State asserts that it doesn't have one here: "The burden is not on the State to show *actual* deception; the burden is on Osteria Segreto to show that its name is not inherently misleading." Appellees' Br. 16. That's wrong. "When a State restricts speech, it bears the burden of proving the constitutionality of its actions." *Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 763 (8th Cir. 2018) (cleaned up); *accord Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (noting state failed "to prove . . . that the speech at issue . . . is both inherently and actually misleading"). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007). The State's burden here is to prove that a reasonable consumer, viewing the Barber Shop Blackstone's advertising in context, would walk away with the idea that the business is a real-life barbershop instead of a bar.

It can't. As explained in Osteria Segreto's opening brief, the district court erred because it focused on the statutory definitions of "barber" and "barber shop" instead of asking whether ordinary people would be able to understand Osteria Segreto's speech as required by cases like *Peel v.*

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Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91 (1990). *See* Opening Br. 23–24 (citing *Peel*). In response, the State largely declines to defend the district court's approach and doesn't even cite *Peel*. Instead, it offers a different categorical rule, suggesting that, rather than being entirely controlled by statutory definitions, the analysis should be entirely controlled by dictionary definitions. Appellees' Br. 10–11. The dictionary definition of "barber shop" is "a barber's place of business," and the Barber Shop Blackstone isn't a barber's place of business. *Id.* That, the State says, ends the inquiry.

But that isn't the test. Courts don't hold that speech is "inherently misleading" whenever it doesn't match a dictionary definition. They hold that speech is "inherently misleading" when it cannot be communicated in a way the "consuming public understands." Opening Br. 23 (quoting *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 103 (1990)). And, as explained in the opening brief, ordinary Nebraskans are perfectly capable of understanding the words "barber" and "barber shop" outside the four corners of their dictionary definition. They can understand that the terms are sometimes used fancifully to refer to people who cut things other than hair (like the Turf Barber or the Barking

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Barbershop, Opening Br. 12) and sometimes used historically to refer to buildings that used to be active barber shops (like the Cahow Barber Shop or the Barber Shop Blackstone itself, Opening Br. 29 & n.7).

Simply put, entrepreneurs naming their businesses (and courts reviewing their free-speech claims) are not prisoners of the dictionary, and no case holds that they are. To be sure, courts sometimes *cite* dictionaries as one way to determine how consumers might understand a word. *See, e.g.*, *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1239 (11th Cir. 2017) (citing Webster's Third New International Dictionary (1986)). But they also make clear that the relevant question is what "consumers expect[ ] . . . when they read those words[,]" not just what the dictionary says. *Id.* at 1239. The State does not explain how an ordinary consumer would actually be misled here. Recall that the Barber Shop Blackstone has no signage and advertises solely online (Opening Br. 5–6), which means any consumer would have to (a) visit www.thebarbershop.bar[3] where she would (b) encounter a business described as "a lively high-

[3] Because the district court denied the preliminary injunction, the bar's website is offline, but the record establishes that this was its URL. App. 104; R. Doc. 18-3, at 3. And if our hypothetical consumer found that URL by searching on Google, Google would also have identified the business as a bar. *Id.*

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energy bar"[4] and (c) learn that the barbershop trappings are merely a "façade."[5] For the State to be right, we would have to expect that consumer to leap to the conclusion that this "high-energy bar" is in fact a barbershop simply because its name is "the Barber Shop Blackstone." But surely it's more likely that she will understand a business claiming to be a bar is in fact a bar, no matter what the dictionary says.

This context matters because, as explained in the opening brief, courts must evaluate speech in its full context rather than cherry-picking bits. Opening Br. 30 (citing, again, *Peel*, 496 U.S. at 96). But the State's brief simply repeats the cherry-picking: Sure, the bar's slogan on its website ("Where the Buzz Is Real") might suggest a haircut (Appellees' Br. 12)—but only if the visitor ignores the website's text that says it is a bar and the website's URL that says the same thing. Yes, the photograph of a vintage barber's chair might suggest a real barbershop (*id.*), except that the photograph appears on a website explaining that the barbering décor is "a façade." The State can ignore these things if it wishes, but there is no reason to assume a reasonable consumer would do the same.

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[4] App. 13, 30, 104; R. Doc. 1, at 7; R. Doc. 9-1, at 2; R. Doc. 18-3, at 3.

[5] *Id.*

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II. The State's re-interpretation of its laws is unpersuasive.

Arguing apparently in the alternative, the State then seems to abandon its position entirely. It claims, for the first time, that it "is not stopping Osteria Segreto from using the word 'barber' or 'barber shop' in the name of its business." Appellees' Br. 15. Instead, it says, it only forbids the Barber Shop Blackstone from "hold[ing] itself out" as a barber shop. *Id.* And fixing the "holding itself out" problem is easy because the bar could avoid all this legal trouble by keeping everything the same and calling itself the "Barber Shop Bar Blackstone" instead of the "Barber Shop Blackstone." *Id.*

None of that makes sense. To start, the Barber Board's initial threat letter to Osteria Segreto was clear: It claimed that it "violate[s] Nebraska law" for the bar to "market[] itself using the barber shop title, barber poles, and images of barber poles." App. 17; R. Doc. 1-1, at 1.

The Barber Board claimed that because that's what Nebraska law says. The statute forbids anyone from "us[ing] the title of barber or barber shop or indicat[ing] in any way that such a person or entity offers barbering services." Neb. Rev. Stat. Ann. § 71-201(5). The State claims the opening brief engaged in "selective statutory quotation" because it

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did not include the subsequent sentence, which forbids "hold[ing] itself out as a barber shop." Appellees' Br. 14–15 (quoting Neb. Rev. Stat. Ann. § 71-201(5)). But it is unclear what difference the State perceives between "indicat[ing]" that someone offers barbering services and "hold[ing]" oneself out as a barber shop. The point is that under Nebraska law "it is illegal to falsely indicate that one is providing barber services—but it is also separately illegal to use the terms 'barber' or 'barber shop' *without* that indication." Opening Br. 37. The State seems to suggest otherwise, but it does not explain why it reads the "or" in the statutory text to instead mean "and."[6]

And that provision is the one the district court's order upholds. Add. 29; App. 304; R. Doc. 33, at 29 (holding that "the Bar's name and use of the barber pole are misleading on their face"). The State seems to abandon that holding and instead asks this Court to uphold a restriction under which the name "Barber Shop Blackstone" is banned (because it is "holding itself out as a barber shop") but the name "Barking Barbershop" is not (because it, somehow, holds itself out otherwise). The restriction

[6] That's because in Nebraska, like other places, "or" means "or." *Mann v. Mann*, 7 N.W.3d 845, 859 (Neb. 2024) ("The word 'or,' when used properly, is disjunctive[.]").

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wrongly upheld by the district court was unconstitutional, but at least it was coherent: Osteria Segreto was prohibited from using certain words outside of their statutory definitions. The amorphous rule offered by the State as a replacement removes the coherence without changing the constitutional analysis. Even if the State's new reading of the law is right, it is still true that no reasonable person would look at the Barber Shop Blackstone's advertising in context and think it was anything other than what it says it is—a barber-themed speakeasy bar. *See supra* 2–6.

Indeed, not only does the State's new reading of the statute fail to improve the State's constitutional arguments, it inadvertently gives the whole game away. As part of its new legal interpretation, the State offers a solution to the problem: Everything would be fine, it says, if the bar's name were simply changed to the "Barber Shop Bar Blackstone." Appellees' Br. 15 (calling this an "obvious candidate" for a non-misleading name). Adding the word "bar" to the name, apparently, would dispel any confusion caused by the words "Barber Shop."

But if the name "Barber Shop Blackstone" could be saved by adding the word "bar" to it, then it is not "incapable of being presented in a way that is not deceptive." *Revo v. Disciplinary Bd. of N.M. Sup. Ct.*, 106 F.3d

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929, 933 (10th Cir. 1997). And if adding the word "Bar" to the name dispels the confusion, why does that word work its magic only if it is in the business's name? Again, the Barber Shop Blackstone's advertising consistently calls the business a bar, even a "lively high-energy bar." App. 13, 30, 104; R. Doc. 1, at 7; R. Doc. 9-1, at 2; R. Doc. 18-3, at 3. And it says these things on its website "thebarbershop.**bar**." App. 12–13, 30–31, 103; R. Doc. 1, at 6–7; R. Doc. 9-1, at 2–3; R. Doc. 18-3, at 2. The State's position seems to be that an ordinary consumer looks at a business's name in isolation and that *business names* can therefore be policed for their accuracy in the abstract. But it provides no case supporting that proposition.

And for good reason—that is not the law. On the State's view, the *Central Hudson*[7] doctrine authorizes the State to act as a sort of roving commission on truth in nomenclature. Once a business's name is not literally true, all bets are off. Victoria's Secret, on its face, suggests that the store was founded by a woman named Victoria (rather than a man named Roy Raymond).[8] That's unprotected and can be banned at will, even if

[7] *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

[8] *See* Roy Raymond, https://en.wikipedia.org/wiki/Roy_Raymond.

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consumers know exactly what they're buying. The Arizona Beverage Company, on its face, suggests it makes iced tea in Arizona instead of in New York,[9] so that too is wholly outside the First Amendment even if consumers understand the product itself. And the name "Cap'n Crunch's Crunch Berries" would be misleading because the cereal does not contain anything resembling the dictionary definition of a "berry."[10] All of those names are protected speech, though, because in all of those cases (just as with the Barber Shop Blackstone) it is reasonable to believe that the "consuming public understands" what the business actually sells. *Peel*, 496 U.S. at 103.

III. It matters that no consumer could be meaningfully misled.

The Barber Shop Blackstone's advertising consistently identifies the business as a bar because it is a bar. The point of the advertising is to induce people to come and buy drinks, which are the only things it sells. App. 30, 34; R. Doc. 9-1, at 2; R. Doc. 9-2, at 1. It does not want to

[9] *See* Arizona Beverage Company, https://en.wikipedia.org/wiki/Arizona_Beverage_Company.

[10] *See Werbel v. PepsiCo, Inc.*, No. C 09-04456, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (collecting cases, including challenges to the name "Froot Loops," and calling the Crunch Berries argument "[n]onsense").

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trick the public into thinking it sells haircuts because if someone walks into the bar looking for a haircut, the bar will not sell him one.

And that matters because (as explained in the opening brief) it means the State's censorship of the bar's name is not protecting consumers from anything. Opening Br. 33–34. In the workaday commercial-speech case, the government is concerned that false or misleading advertising will mislead someone about the nature of what they're buying. In *Peel*, Illinois was concerned that clients might hire lawyers based on a mistaken understanding of their qualifications. 496 U.S. at 101. In *Ocheesee Creamery*, Florida was worried that consumers would buy skim milk based on a misunderstanding of its vitamin content. 851 F.3d at 1239. In *1-800-411-Pain Referral Service, LLC v. Otto*, Minnesota was worried that vulnerable accident victims would think they were calling a doctor or lawyer who could provide help directly instead of a referral service. 744 F.3d 1045, 1062 (8th Cir. 2014).

Here, there are no similar dangers. Even if a consumer looks past the context of the Barber Shop Blackstone's advertising and decides, based on name alone, that it must be a working barbershop, that consumer can't buy anything based on that belief. The Barber Shop

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Blackstone doesn't sell haircuts or barbering services, and no reasonable person would purchase a cocktail believing it will make his hair shorter.

The State's only response is to say that this doesn't matter. This argument, says the State, "conflates the question [of] whether speech is inherently misleading with the completion of a fraudulent transaction." Appellees' Br. 17. "Only the former," it argues without citation, "matters under the *Central Hudson* framework." *Id.* In other words, the State's position is that *even if* everyone who ever sees the Barber Shop Blackstone's advertising understands it's a bar and *even if* prohibiting the Barber Shop Blackstone's name could never save a single consumer dollar, the name is still illegal because it is not literally true.

But of course not. To be sure, the State needn't always prove that a fraudulent transaction has in fact occurred, but it still matters whether one is possible. As the opening brief explains, the entire point of the commercial-speech doctrine is to protect consumers' ability to strike fair commercial bargains, and the State has no interest in restricting speech where no bargain can be struck. Opening Br. 33 (collecting cases). Inherently misleading commercial speech is not outside the scope of the First Amendment out of some abstract regard for Platonic truth. It is outside

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the scope of the First Amendment because "fraud"—along with "obscenity, defamation . . . incitement, and speech integral to criminal conduct"—is one of the "historic and traditional" categories of unprotected speech. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). But speech that cannot lead to a fraudulent transaction is not fraud, and *fraud*, not abstract misleadingness, is what would render the Barber Shop Blackstone's speech unprotected.

The State's contrary view—that *Central Hudson* gives it free rein to restrict speech that isn't literally true without regard for whether any consumer could even theoretically be harmed—is wrong. After all, even *outright lies* enjoy First Amendment protection where they do not "implicate fraud or speech integral to criminal conduct[.]" *United States v. Alvarez*, 567 U.S. 709, 721 (2012) (plurality opinion). Surely a fanciful bar name does as well. The State undeniably has an interest in protecting Nebraskans from fraud—but the State can have no conceivable interest in consumer protection where there is no fraudulent transaction to protect consumers from.

And the State doesn't dispute that no real fraudulent transaction is possible here. Indeed, the closest the State comes to identifying a real

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government interest here has nothing to do with consumers at all but rather with its power to "regulate trades" in the first place. Appellees' Br. 13–14. The response brief insists, at length, that Nebraska has the power to regulate who may practice an occupation. Of course it can.[11] But the power to regulate occupations does not carry with it the corresponding power to impose blanket restrictions on using the terminology related to those occupations. *See Peel*, 496 U.S. at 108 ("[T]he Commission relies heavily on the inherent authority of the Illinois Supreme Court to supervise its own bar.").

None of the State's cases say otherwise. It claims that "the State can prohibit non-lawyers from claiming to be lawyers" (Appellees' Br. 14), but it cites a case in which the speaker falsely held "himself out as a lawyer and counsel" while selling "presentations on filing evictions and common law l[ie]ns." *State ex rel. Comm'n on Unauthorized Prac. of L. v. Hansen*, 834 N.W.2d 793, 794 (Neb. 2013). It says the State "can also prohibit non-doctors from claiming to be doctors" (Appellees' Br. 13), but it cites a case in which the court held a man in contempt for violating an injunction

[11] Though that power, too, has limits. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

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that prohibited him from "professing to be a physician" while operating "a 'clinic' at which he diagnosed and treated ailments of individuals." *Neb. Dep't of Health v. Hinze*, 441 N.W.2d 593, 594 (Neb. 1989). Those cases, at most, support the uncontroversial proposition that the government can prevent businesses from defrauding consumers. Neither stands for the sweeping proposition that the State can stop people from calling themselves doctors or lawyers in any context whatsoever, let alone that it can stop them from operating doctor- or lawyer-themed bars.[12] No case stands for that proposition because that is not the law. The district court's ruling to the contrary should be reversed.

CONCLUSION

The district court's ruling should be reversed and this case remanded with instructions to grant the preliminary injunction.

[12] Which, yet again, people do. *See* Dr. Jack's Drinkery, https://www.visitomaha.com/listings/dr-jacks-drinkery/65341/. If Dr. Jack diagnosed people's ailments, his commercial speech would be misleading and could be prohibited. Since he provides "[l]ive music, drink specials, dart boards, outdoor patio and games[,]" it is not, and his bar's name harms no one. So too here.

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Respectfully submitted on September 9, 2026,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify the foregoing Reply Brief of Appellant complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,268 words, as calculated using the word-count function of Microsoft Word 365, including all text, headings, footnotes, and quotations.

I further certify the foregoing Reply Brief of Appellant complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6), because this document has been prepared in the proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Robert J. McNamara
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CERTIFICATE OF COMPLIANCE WITH 8TH CIR. R. 28A(h)(2)

I hereby certify the foregoing Reply Brief of Appellant has been scanned for viruses using Bitdefender Endpoint Security Tools (Product version 8.26.9.664; Security Content version 7.101492), and it is virus-free pursuant to Eighth Circuit Rule 28A(h)(2).

/s/ Robert J. McNamara
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2026, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, and all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert J. McNamara
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