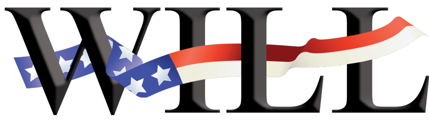

1241 N FRANKLIN PLACE
MILWAUKEE WI 53202
WILL-LAW.ORG
414.727.9455

May 6, 2026

State of Wisconsin Dentistry Examining Board
Wisconsin Department of Safety and Professional Services
PO Box 8366
Madison, WI 53708-8366

Re: Clearinghouse Rule 26-023—Relating to Unprofessional Advertising

Dear Members of the Wisconsin Dentistry Examining Board:

I. Introduction and Interest of Commenter

The Wisconsin Institute for Law & Liberty ("WILL") respectfully submits this comment in objection to the State of Wisconsin Dentistry Examining Board's ("the Examining Board") proposed rule, Clearing House Rule 26-023, "relating to unprofessional advertising."[1] As explained below, this proposed rule is constitutionally suspect and may violate the First Amendment of the United States Constitution as applied to dentists who specialize in areas of dentistry—like implantology—that are not recognized by the American Dental Association ("ADA"). Furthermore, WILL is concerned by the Examining Board's practice of delegating authority to a private entity to determine which Wisconsin dentists are deemed "specialists." If taken too far, the Examining Board risks unconstitutionally delegating governmental authority to an organization without lawful authority to exercise it.

WILL is a nonprofit law and policy center headquartered in Milwaukee, Wisconsin, dedicated to protecting First Amendment rights and reforming occupational licensing to remove unnecessary barriers so businesses can thrive. WILL advises that the Examining Board not finalize this rule, as currently proposed, or heavily amend it.

II. The Proposed Rule, CR 26-023, Further Restricts Dentists' Commercial Speech

Pursuant to Wis. Stat. § 447.07(3)(o), the Examining Board may "deny, limit, suspend, or revoke" the license of a dentist who "advertise[s] by using a statement that tends to deceive or mislead the public." Further, according to Wis. Admin. Code DE § 6.02(4)(c), "advertising as a specialist in a non-American Dental Association-recognized specialty is prohibited" and constitutes "unprofessional advertising." Therefore, if a dentist specializes in a specialty that is unrecognized by the ADA—which currently only recognizes 12 dental specialties[2]—he or she is prohibited from advertising their

[1] Proposed Order of the Wis. Dentistry Examining Bd. Adopting Rules, Clearinghouse Rule 26-023 (Unprofessional Advertising), in 843A4 Wis. Admin. Reg. (Mar. 23, 2026), available here.

[2] Nat'l Comm'n on Recognition of Dental Specialties & Certifying Bds., *Recognized Dental Specialties*, available here (last visited May 3, 2026).

specialty and may be punished by the Examining Board for doing so. As currently written, the rule may already impose unconstitutional restraints on commercial speech, *infra*. More concerning, CR 26-023 would amend the administrative code to expand those restraints and impose additional limits on speech.

Specifically, CR 26-023 proposes expanding the categories of speech that constitute unprofessional advertising to include communications that merely "**imply**" that a dentist is a specialist when the specialty is not recognized by the American Dental association.[3] Then, CR 26-023 specifies that if a dentist is not a specialist in an ADA-recognized specialty, the dentist is categorically barred from using any terms such as "'specialist', 'specialty', or 'limited specialty of', with the name of the branch of dentistry practiced as a specialty'" in "**any media**."[4] (emphasis added).

III. The Fifth Circuit Court of Appeals Has Found a Nearly Identical Rule to Be Unconstitutional Under the *Central Hudson* Test

Before finalizing this proposed rule, the Examining Board should be aware that similar restrictions on speech have been held unconstitutional as applied to dentists practicing non-ADA-recognized specialties. Final promulgation of this rule without any changes may expose the examining board to liability and future lawsuits.

In *American Academy of Implant Dentistry v. Parker*, the Fifth Circuit determined that a nearly identical Texas regulation prohibiting dentists from advertising as "specialists" in areas not recognized by the ADA violated the plaintiffs' First Amendment right to engage in commercial speech.[5] In this case, the plaintiffs practiced in specialties not recognized by the ADA and were each certified as a "diplomate," denoting a high level of competence in the field, by credentialing boards other than the ADA.[6] The plaintiffs argued that the regulation prevented them from truthfully holding themselves out as "specialists" in their fields—a violation of their commercial speech.[7]

Commercial speech is protected by the First Amendment, though to a lesser degree than other types of expression.[8] To determine whether commercial speech is protected, the U.S. Supreme Court has developed a four-part analysis, known as the *Central Hudson* test.[9] First, for commercial speech to be protected, the speech must concern lawful activity and not be misleading.[10] Then, courts turn their attention to the regulation and determine whether the asserted governmental interest is substantial.[11]

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[3] CR 26-023, *supra* note 1, at 8-9.
[4] *Id.* at 9.
[5] *Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 304 (5th Cir. 2017).
[6] *Id.*
[7] *Id.* at 305.
[8] *Id.*at 306.
[9] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).
[10] *Id.*
[11] *Id.*

If both of those conditions yield positive results, courts determine whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than is necessary to serve that interest.[12] The party seeking to uphold a restriction of commercial speech carries the burden of justifying it.[13]

In holding that the Texas regulation violated the plaintiffs' free speech rights, the Court determined that the rule did not pass the test. First, the Court determined that the Plaintiffs' proposed speech concerned lawful activity and was not misleading,[14] and "by completely prohibiting dentists from advertising as specialists simply because their practice area is one not recognized as a specialty by the ADA, 'truthful and misleading expression will be snared along with fraudulent or deceptive commercial speech.'"[15] Turning its attention to the regulation, the Court determined that the state board did have a substantial interest in "ensuring the accuracy of commercial information in the marketplace."[16] However, the state board did not carry its burden in proving that the regulation would *directly* advance the government's interest because the state board failed "at the outset" to establish the harms[17] the regulation sought to alleviate were real.[18] Finally, the Court determined that the regulation was more extensive than was necessary, as the state board had not considered less-burdensome alternatives.[19] For example, allowing non-ADA specialty dentists to advertise as specialists provided the advertisements are accompanied with disclaimers about the certifying organization *may* be a less-burdensome alternative.[20]

For the same reasons that the Texas regulation may violate the commercial speech rights of dentists practicing non-ADA-recognized specialties, CR 26-023 may as well. In fact, CR 26-023 is just as restrictive, if not more so. The Texas rule fell, as applied to the plaintiffs, because it failed the last two factors of the *Central Hudson* test: that the regulation must advance the stated governmental interest and it must not be more extensive than is necessary to serve that interest, *supra*. Here too, Wisconsin's rule may fall if challenged. The Examining Board bears the burden of building a record—based on empirical or historical evidence—and doing the "heavy lifting" to show the regulation meaningfully addresses the harms it claims.[21] As it currently stands, the Examining Board has not carried its burden. Finally, CR 26-023 is much more

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[12] *Id.*

[13] *Id.* (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)).

[14] *Id.* at 307 ("The parties do not dispute that the relevant speech in this case concerns lawful activity.").

[15] *Id.* at 308.

[16] *Id.* at 309.

[17] The "harms" that the Texas State Board of Dental Examiners claimed the regulation would alleviate were complications arising in a general dentist's office. *Id.* at 310.

[18] *Id.* at 310.

[19] *Id.* at 311.

[20] *Id.* at 310-11; *see also Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002).

[21] *Id.* at 310.

restrictive than is necessary. To name just one problem, the proposed rule bars non-ADA-recognized specialists from even *implying* a specialty while entirely barring the express use of certain words.[22] That is quite the restriction.

IV. The Examining Board Should Avoid Delegating Final Decision-making Authority to the ADA

Finally, the Examining Board should make every effort to **not** delegate regulatory authority to the ADA, which is a private entity. Article IV, Section 1 of the Wisconsin Constitution vests legislative power in the Senate and Assembly. When administrative agencies—like the Examining Board—promulgate rules, they are exercising delegated legislative powers.[23] However, placing that power in the hands of a private entity, like the ADA, may violate the Constitution.

The United States Supreme Court has created a test to determine whether a regulatory scheme impermissibly delegates legislative authority to a private entity.[24] A private entity may assist, advise, and make recommendations within a regulatory scheme, but the entity must function subordinately to the agency and the agency must retain final decision-making authority and supervisory control over the private entity.[25] Known as the "private nondelegation doctrine," the U.S. Supreme Court last year reaffirmed use of the doctrine, by clarifying that delegation is permissible when "the private party's recommendations . . . cannot go into effect without an agency's say-so."[26] In *Horsemen's I*, the Fifth Circuit explained that an "agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance."[27] Currently, the ADA creates a list of specialties, and the Examining Board broadly defers to that list without final approval. Such a practice may run afoul of the private nondelegation doctrine.

Wisconsin courts have similarly held that governmental functions "involving discretion" cannot be delegated to a private entity.[28] In *Dammann*, the Wisconsin Supreme Court explained that discretionary decisions on behalf of the government "cannot legally be delegated otherwise than to public officers, acting for and as a part of the government under such conditions and control that 'they can approach and determine questions impartially, unbiased and without adverse personal interest.'"[29] Therefore, the Examining Board should refrain from delegating final decision-making authority to the ADA—as this rule may do—and cease giving final authority to the ADA to determine which dental specialties the State of Wisconsin may recognize. The state,

[22] CR 26-023, *supra* note 1, at 8.
[23] *Koschkee v. Taylor*, 2019 WI 76, ¶ 12, 387 Wis. 2d 552, 563, 929 N.W.2d 600, 605.
[24] *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).
[25] *Id.* at 388-89, 399.
[26] *Fed. Commc'ns Comm'n v. Consumers' Rsch*., 606 U.S. 656, 695 (2025).
[27] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F4th 869, 872 (5th Cir. 2022).
[28] *State ex rel. Wisconsin Dev. Auth. v. Dammann*, 228 Wis. 147, 277 N.W. 278 (1938).
[29] *Id.* (quoting *Wagner v. Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922)).

not a private entity, is tasked with making such decisions—and must do so in a way that does not unconstitutionally inhibit speech.

V. Conclusion

The Examining Board should be aware that its current regulations on "unprofessional advertising" may already violate the First Amendment. CR 26-023 further crosses the line into unconstitutional territory and may violate the commercial speech rights of non-ADA-recognized dental specialists. Moreover, WILL advises that the Examining Board discontinue its practice of delegating decision-making authority to the ADA. The Legislature has delegated legislative power to the Examining Board—**not the ADA**—to use its best judgement in regulating dentistry. Therefore, the Examining Board should reconsider how it regulates speech, or else risk violating the Constitution.

WILL appreciates the opportunity to submit this comment and is available for further dialogue on these matters.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY
1241 N. Franklin Place
Milwaukee, Wisconsin 53202
(414) 727-9455

Erin Gamble
Erin E. Gamble
Associate Counsel