SUPREME COURT OF THE UNITED STATES

No. 93–639

SILVIA S. IBANEZ, PETITIONER *v.* FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

[June 13, 1994]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

Once again, we are confronted with a First Amendment challenge to a state restriction on professional advertising. Petitioner, who has been licensed as an attorney and as a certified public accountant (CPA) by the State of Florida, and who also has been recognized as a "Certified Financial Planner" (CFP) by a private organization, identified herself in telephone listings under the "attorneys" heading as "IBANEZ SILVIA S CPA CFP." App. 4. Respondent, the Florida Board of Accountancy, determined that petitioner's use of both the CPA and the CFP designations was inherently misleading, and sanctioned her for false advertising. Fla. Stat. 473.323(1)(f) (1991) (accountants subject to disciplinary action if they "[a]dvertis[e] goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content").

Because petitioner's use of the CFP designation is both inherently and potentially misleading, I would uphold the Board's sanction of petitioner. I therefore respect-fully dissent from Parts II-A and II-C of the opinion of the Court.

States may prohibit inherently misleading speech entirely. *In re R. M. J.*, 455 U. S. 191, 203 (1982). In *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990), we considered an attorney advertisement that proclaimed the lawyer to be a "`Certified Civil Trial Specialist By the National Board of Trial Advocacy.'" See *id.*, at 96. A majority of the Court concluded that this statement was not inherently misleading, although the discussion of this issue was joined by only four Justices. See *id.*, at 100–106 (plurality opinion); *id.*, at 111 (Marshall, J., concurring in judgment). The plurality reasoned that the certification was a statement of verifiable fact; that the certification had been conferred by a reputable organization that had applied objectively clear standards to determining the attorney's qualifications; and that consumers would not confuse the attorney's claim of certification as a specialist with formal state recognition.

Although the Certified Financial Planner Board of Standards, Inc., appears to be a reputable organization that applies objectively clear standards before conferring the CFP designation on accountants, the other factors relied on by the *Peel* plurality are not present in this case. First, it was important in *Peel* that "[t]he facts stated on [the attorney's] letterhead are true *and verifiable*." *Id.*, at 100 (emphasis added); see also *id.*, at 101 ("A lawyer's certification by [the recognizing organization] is a verifiable fact, as are the predicate requirements for that certification"). Of course, petitioner's recognition as a CFP can be verified—but only if the consumer knows where to call or write. Unlike the advertisement in *Peel*, petitioner's advertisements did not identify the organization that had conferred the certification. The average consumer has no way to verify the accuracy or value of petitioner's use of the CFP designation.

Related to this point is the fact that, in the absence of an identified conferring organization, the consumer is likely to conclude that the CFP designation is conferred by the State. The *Peel* plurality stressed that "it seems unlikely that [the attorney's] statement about his certification as a `specialist' *by an identified national organization* necessarily would be confused with formal state recognition." 496 U. S., at 104–105 (emphasis added). Because here there is no such identification, the converse is true. It is common knowledge that "many States prescribe requirements for, and `certify' public accountants as, `Certified Public Accountants.'" *Id.*, at 113 (Marshall, J., concurring in judgment). Petitioner has of course been licensed as a CPA by the State of Florida. But her use of the CFP designation in close connection with the identification of herself as a CPA ("IBANEZ SILVIA S CPA CFP") would lead a reasonable consumer to conclude that the two "certifications" were conferred by the same entity—the State of Florida.

The Board of Accountancy has recognized this likelihood of consumer confusion: "[The term `certified'] in conjunction with the term `CPA' and the practice of public accounting, [is] so close to the terms protected by state licensure itself, that [its] use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists." App. 193–194. For this reason, the Board's regulations provide that an advertisement will be deemed misleading if it "[s]tates a form of recognition by any entity other than the Board that uses the ter[m] `certified.'" Fla. Admin. Code 61H1–24.001(1)(i) (1994). Petitioner's advertising is in clear violation of this prohibition. Because the First Amendment does not prevent a State from protecting consumers from such inherently misleading advertising, in my view the Board's blanket prohibition on the use of the term "certified" in CPA advertising is constitutional as applied to petitioner.

But even if petitioner's use of "certified" was not inherently misleading, it seems clear beyond cavil that *some* consumers would conclude that the State conferred the CFP designation, just as it does the CPA license, and thus that the advertisement is *potentially* misleading. Indeed, this conclusion follows *a fortiori* from *Peel*, where five Justices concluded that the attorney's specialty designation was at least potentially misleading. See 496 U. S., at 118 (White, J., dissenting). The advertisement in *Peel*, which identified the certifying organization, provided substantially more information to consumers than does petitioner's advertisement; if the one was potentially misleading (and we said that it was), so too is the other.

States may not completely ban potentially misleading commercial speech if narrower limitations can ensure that the information is presented in a nonmisleading manner. *In re R. M. J.*, *supra*, at 203. But if a professional's certification claim has the potential to mislead, the State may "requir[e] a disclaimer about the certifying organization or the standards of a specialty." *Peel*, *supra*, at 110 (plurality opinion); see also *id.*, at 116–117 (Marshall, J., concurring in judgment); *In re R. M. J.*, *supra*, at 203. The Board has done just that: An advertisement that "[s]tates or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting" will be deemed false or misleading, "unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government." Fla. Admin. Code 61H1–24.001(1)(j) (1994). "The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in

the immediate proximity of the statement that implies formal recognition as a specialist." *Ibid.* There is no question but that the CFP designation "implies that [petitioner] has received formal recognition as a specialist" in financial planning, an "aspect of the practice of public accounting," and her advertisements do not contain the required disclaimer. If the absolute prohibition on the use of the term "certified" cannot be applied to petitioner (as the Court today holds), then the disclaimer requirement applies to petitioner's advertising that she is a specialist in financial planning. Because petitioner failed to comply with it, the Board properly disciplined her.

Petitioner *is* a certified public accountant, and her use of the CPA designation in advertising conveyed this truthful information to the public. I agree with the Court that the State of Florida may not prohibit petitioner's use of the CPA designation under the circumstances in which this case is presented to us, and I therefore join Part II-B of the Court's opinion. I would only point out that it is open to the Board to proceed against petitioner for practicing public accounting in violation of statutory or regulatory standards applicable to Florida accountants. See Brief for Petitioner 28 ("Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy"). And if petitioner's public accounting license is revoked, the State may constitutionally prohibit her from advertising herself as a CPA.