**RECORD NOS. 12-2084(L), 12-2323**

In The
# United States Court of Appeals
For The Fourth Circuit

**STEVE COOKSEY,**

***Plaintiff – Appellant,***

**v.**

**MICHELLE FUTRELL; BRENDA BURGIN ROSS; KATHLEEN SODOMA; CHRISTIE NICHOLSON; PHYLLIS HILLIARD; CATHLEEN E. OSTROWSKI; RICHARD W. HOLDEN, SR.,**

***Defendants – Appellees.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE**

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## BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Steve Cooksey
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jeff Rowes Date: 09/20/2012

Counsel for: Steve Cooksey

## CERTIFICATE OF SERVICE

**********

I certify that on September 20, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeff Rowes (signature) September 20, 2012 (date)

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## STATEMENT OF JURISDICTION

This is an appeal from the district court's order and judgment granting Defendant-Appellees' motion to dismiss.

The district court had subject-matter jurisdiction over this First Amendment challenge under 42 U.S.C. § 1983.

This Court has jurisdiction on appeal under 28 U.S.C. § 1291 because the district court's judgment on Defendant-Appellees' motion to dismiss was a final judgment that disposed of all claims.

The district court granted Defendant-Appellees' motion to dismiss on October 5, 2012. Plaintiff-Appellant filed a timely notice of appeal on October 18, 2012.

Plaintiff-Appellant appeals only the final judgment. On September 5, 2012, Plaintiff-Appellant filed a timely notice of appeal from the district court's August 8, 2012, denial of his motion for a preliminary injunction. Though he maintains that the denial of his preliminary injunction was legally mistaken—and his appeal of the judgment of dismissal addresses some of the district court's erroneous reasoning in denying the preliminary injunction—Plaintiff-Appellant is no longer pursuing a preliminary injunction.

## STATEMENT OF THE ISSUES

The U.S. Supreme Court and this Circuit have held that the chilling of speech is an injury giving rise to Article III standing when that chilling is objectively reasonable. Thus, speakers need not wait until the government formally sanctions them for speaking before they may bring a First Amendment challenge. The issues on appeal are:

1. Did the district court err in failing to recognize that this is a First Amendment case?

2. Given that this is a First Amendment case, did the district court err in finding that Appellant Cooksey lacked standing despite a criminal prohibition on his speech and despite having been directly told by the North Carolina Board of Dietetics/Nutrition that his speech is illegal?

## STATEMENT OF THE CASE

On May 29, 2012, Plaintiff-Appellant Steve Cooksey filed a three-count Complaint in the District Court for the Western District of North Carolina seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, alleging violations of the Free Speech Clause of the First Amendment. Appellant Cooksey challenges the application of the North Carolina Dietetics Practice Act, N.C. Gen. Stat. §§ 90-350, *et seq.*, and its associated regulations, to dietary advice that he provides in various contexts—some online, some in person, some public, some private, some compensated, some uncompensated. Defendant-Appellees are the members of the

North Carolina Board of Dietetics/Nutrition (collectively, "the State Board") and are sued in their official capacities.

Appellant Cooksey filed a motion for preliminary injunction with his Complaint, seeking to enjoin the application of the North Carolina Dietetics Practice Act to his speech during the pendency of this litigation. Without holding oral argument, on August 8, 2012, the district court denied that motion. Appellant Cooksey timely appealed on September 5, 2012. As noted in the Statement of Jurisdiction, Appellant Cooksey is not, however, pursing a preliminary injunction on appeal.

While Appellant Cooksey's motion for a preliminary injunction was pending, the State Board filed a motion to dismiss on July 27, 2012, which was referred to the magistrate judge. On August 27, 2012, the magistrate recommended that Appellant Cooksey's case be dismissed for lack of standing. On September 12, 2012, Appellant Cooksey timely filed written objections to the magistrate's recommendation.

Without holding oral argument, the district court affirmed the magistrate on October 5, 2012, dismissing Appellant Cooksey's complaint for lack of standing and entering final judgment in favor of the State Board. Appellant Cooksey timely appealed that judgment on October 18, 2012.

## STATEMENT OF FACTS

### I. APPELLANT COOKSEY'S DIABETES AND THE PALEOLITHIC DIET.

On February 15, 2009, an obese Appellant Cooksey was rushed to intensive care in a near diabetic coma. J.A. 8, ¶¶ 7-9. He was diagnosed with Type II diabetes, which involves chronically elevated blood sugar and typically strikes obese and sedentary adults. J.A. 8, ¶ 10. Type II diabetes is associated with obesity, heart disease, kidney failure, high blood pressure, blindness, and lower-limb amputation. J.A. 8, ¶ 11. Appellant Cooksey was told that he would be drug and insulin dependent for life. J.A. 8, ¶ 12.

While hospitalized, a North Carolina-licensed dietitian told Appellant Cooksey to eat a diet low in fats, especially saturated fats, and consume mainly whole grains. J.A. 9, ¶ 13. Following his discharge, a different North Carolina-licensed dietitian gave him the same advice. J.A. 9, ¶ 13.

A high-carbohydrate/low-fat diet is standard for diabetics. J.A. 9, ¶ 14. Diabetics are also told that they can eat whatever they want as long as they use insulin and other medications to control their blood sugar. J.A. 9, ¶ 15. For example, the American Diabetes Association's 2011 book, "Type 2 Diabetes for Beginners," states that "[m]any people think that having diabetes means they can't eat their favorite foods. But that's just not true. You can still eat the foods you

love." Phyllis Barrier, Type 2 Diabetes for Beginners 13 (2d ed. 2011); J.A. 9, ¶ 15.

Appellant Cooksey wanted to learn as much as possible about obesity and diabetes. J.A. 9, ¶ 16. He read general books, self-help books, and websites. J.A. 9, ¶ 16. He also sought advice from diabetics and others whom he believed had valuable knowledge. J.A. 10, ¶ 18. Sometimes Appellant Cooksey sought advice in person and other times through Internet forums such as Facebook or blogs. J.A. 10, ¶ 18. He discovered a substantial range of opinion on what is best to eat. J.A. 10, ¶ 18.

Appellant Cooksey came to the unexpected conclusion that the advice he had been given by his doctors and dietitians—eat a high-carbohydrate/low-fat diet—may have been wrong. J.A. 10, ¶ 20. Because diabetes is a blood-sugar disorder, and because carbohydrates raise blood sugar much more than protein and fat, there is mounting scientific evidence that a high-fat/low-carbohydrate diet is actually best, and best for diabetics in particular. J.A. 10, ¶ 20. Appellant Cooksey adopted a high-fat/low-carbohydrate diet primarily of fresh vegetables, beef, pork, fish, and eggs. J.A. 11, ¶ 22. This is called a "Paleolithic diet" because it emulates what Stone Age humans ate before agriculture. J.A. 10-11, ¶ 21.

Within a month of adopting a low-carbohydrate diet, Appellant Cooksey's blood sugar normalized and he discontinued insulin and other prescription

medications. J.A. 11, ¶ 23. He also began to exercise. J.A. 11, ¶ 24. Plaintiff Cooksey eventually lost 78 pounds, needs neither drugs nor doctors, and now feels healthier than ever. J.A. 11, ¶ 25.

## II. APPELLANT COOKSEY SHARES SIMPLE ADVICE WITH WILLING LISTENERS.

Since January 2010, Appellant Cooksey has written a free blog—now called Diabetes Warrior (www.diabetes-warrior.net)—to chronicle his transformation through Paleolithic eating. J.A. 11, ¶ 26. He posted his personal meal plan and updates his blog with recipes. J.A. 12, ¶ 30. He also expresses his opinion that high-carbohydrate/low-fat eating is causing the nationwide obesity and diabetes epidemics. J.A. 12, ¶ 29. His blog has a disclaimer stating that he has no academic credentials or government-issued licenses, and he never uses terms such as "doctor" or "dietitian" to describe himself. J.A. 11-12, ¶ 27. Appellant Cooksey's blog has become a popular forum that thousands of people in the United States and around the world visit each month to discuss diabetes, obesity, and Paleolithic eating. J.A. 11, ¶ 26.

From the blog's inception, readers have asked Appellant Cooksey for dietary advice. J.A. 12-13, ¶ 32. He has always tried to help, knowing what it is like to struggle with obesity and diabetes. J.A. 12-13, ¶ 32. Ultimately, Appellant Cooksey's advice amounts to recommendations about what to buy at the grocery store—more steak and avocados and less pasta, for example. J.A. 12-13, ¶¶ 28, 36.

He does not advise people to use or discontinue prescription (or any other) drugs. Sometimes he provides one-time advice, and other times he becomes friends with a reader, sharing advice and mentorship on a regular basis. J.A. 13, ¶ 33.

One such friend is Indiana resident Karen Gale. Like Appellant Cooksey, she was once an obese and sedentary Type II diabetic. J.A. 15, ¶ 47. After discovering his blog, she adopted a Paleolithic diet and often asked Plaintiff Cooksey for dietary advice and emotional support. J.A. 15, ¶ 47. Sometimes they would correspond via email and sometimes they would speak on the phone. J.A. 16-17, ¶¶ 54-55. Ms. Gale attributes much of her success in normalizing her blood sugar and body weight to the free advice she received from Appellant Cooksey as part of their friendship.

As his popularity grew, Appellant Cooksey did two things in addition to providing free advice informally to readers who contacted him. First, he started a free Dear Abby-style advice column on his blog, selecting specific questions that he thought would be of interest to as many readers as possible. On December 2, 2011, he posted a question from someone seeking advice for a friend who was both diabetic and a vegetarian. J.A. 14, ¶ 40. Appellant Cooksey explained how a Paleolithic diet could help the questioner's friend. J.A. 14-15, ¶¶ 42-46. On December 4, 2011, he posted an account of emails and telephone conversations

with his friend Karen Gale about how to apply the Paleolithic diet to her life. J.A. 15-16, ¶ 48.

Second, Plaintiff Cooksey started a life-coaching service in which he would charge a modest fee to provide the same advice and moral support that he had been providing his friends and blog readers for free. J.A. 17, ¶ 58. He modeled his life-coaching service on athletic-coaching programs on the Internet. For example, for $197 per month—his most expensive package—Plaintiff Cooksey would do 20 15-minute phone conversations and eight emails each month. J.A. 17, ¶ 58; J.A. 49.

## III. THE STATE BOARD TELLS APPELLANT COOKSEY THAT HIS DIETARY ADVICE IS ILLEGAL.

On January 12, 2012, Appellant Cooksey attended a nutritional seminar for diabetics at a church near his home. J.A. 17, ¶ 60. The seminar leader, who was the director of diabetic services at a local hospital, expressed her view that a high-carbohydrate/low-fat diet is best for diabetics, but also emphasized that diabetics can eat whatever they want. J.A. 17, ¶ 61. During the question-and-answer portion of the seminar, Appellant Cooksey expressed his opinion that a Paleolithic diet is best for diabetics. J.A. 18, ¶ 62. Other attendees expressed different perspectives, such as the opinion that a vegetarian diet is best. J.A. 18, ¶ 62.

A few days later, the Executive Director of the North Carolina Board of Dietetics/Nutrition ("State Board") called Appellant Cooksey to inform him that he was under investigation. J.A. 18, ¶ 63. The State Board, whose members are the

Defendant-Appellees in this action, is the entity responsible for administering North Carolina's Dietetics Practice Act and attendant regulations. N.C. Gen. Stat. § 90-356. The Executive Director informed Appellant that someone from the church seminar had filed a complaint with the State Board alleging that he was engaged in the unlicensed practice of dietetics. J.A. 18, ¶ 63.

The Dietetics Practice Act prohibits anyone but a state-licensed dietitian from, among other things, providing dietary advice to someone that is tailored to that person's individual circumstances. *E.g.*, N.C. Gen. Stat. § 90-352(4)(c) (defining "nutrition care services," for which a license is required, as "providing nutrition counseling in health and disease"). The statute makes no distinction between paid versus unpaid advice, nor any distinction between advice between strangers and advice between friends and family.

On January 27, 2012, the Executive Director emailed Plaintiff Cooksey to notify him that the Complaints Committee of the State Board had reviewed his online writings. J.A. 19, ¶ 71. She attached a 19-page printout of his writings from his website, Diabetes-Warrior.net. J.A. 17, ¶ 72; J.A. 34-53. The State Board had gone through Appellant Cooksey's writings with a red pen, indicating on a line-by-line basis what it is illegal for him to say without a government-issued dietitian's license. J.A. 19, ¶ 72.

The gravamen of the red-pen review is that Appellant Cooksey may express general opinions about nutrition such as *a Paleolithic diet is best*, but may not say, *you, John Doe, should eat a Paleolithic diet to help with your diabetes and obesity because that worked for me*. J.A. 35 (stating, "If people are writing you with specific questions and you are responding, you are no longer just providing information—you are counseling—you need a license to provide this service."). The State Board told Appellant Cooksey that it is illegal to give free dietary advice to his friend Karen Gale in private telephone conversations. J.A. 39 (stating, "You are no longer just providing information when you do this, you are assessing and counseling, both of which require a license."). The State Board cited the website comment "Steve, you have played a huge role in making [my] dream possible" as evidence of an illegal communication between Appellant Cooksey and a reader. J.A. 48. The red-pen review went along in this vein for pages:

- "[Y]ou need a license to provide this service," J.A. 35;
- "Here you are giving this person advice based on what she has said to you. . . . Counseling/advising requires a license," J.A. 35;
- "Assessing and advising—requires a license," J.A. 36;
- "[Y]ou guided her (for her friend) to your meal plan—indirectly you conducted an assessment and provided advice/nutritional counseling," J.A. 36;
- "Advising," J.A. 37;

- "You should not be addressing diabetic's [*sic*] specific questions. You are no longer just providing information when you do this, you are assessing and counseling, both of which require a license," J.A. 39;

- "When helping her with this issue you were assessing and advising—these activities require a license," J.A. 40;

- "Again, what does this communicate to the public? Assessing," J.A. 41;

- "You are now providing diabetic counseling, which requires a license," J.A. 45;

- "[Y]ou cannot work one-on-one with individuals." J.A. 48.

The State Board also drew a large red "X" through Appellant Cooksey's various life-coaching services. J.A. 48-49.

Appellant Cooksey did not want to, but he changed his website and refrained from giving individual dietary advice because the State Board told him that his speech was illegal and he feared punishment if he continued to speak in defiance of the Board. J.A. 25-26, ¶¶ 101-04. On April 9, 2012, the State Board sent Appellant Cooksey a letter stating that it had concluded its investigation and, based on Appellant Cooksey's substantial compliance with the State Board's instructions, would not take any further action. J.A. 21, ¶ 105; J.A. 105. The State Board stated that it would continue to monitor Appellant Cooksey. J.A. 105.

## SUMMARY OF THE ARGUMENT

This is a First Amendment case. Appellant Steve Cooksey wants to communicate dietary advice—i.e. advice about what food to buy at the grocery store—in his free Dear Abby-style blog column, to his friends and family for free, and for compensation as part of a life-coaching business. This advice about diet, which consists entirely of information and opinion conveyed through the spoken and written word, is self-evidently speech. *Goulart v. Meadows*, 345 F.3d 239, 247 (4th Cir. 2003) (holding that the "activity" of "transmi[tting] . . . knowledge or ideas by way of the spoken or written word" is "speech" protected by the First Amendment).

But all of this speech is a crime in North Carolina. The North Carolina Dietetics Practice Act facially prohibits Appellant Cooksey from giving individualized dietary advice to anyone—whether for free or for compensation—unless he first becomes a licensed dietitian, a process that would take years and cost thousands of dollars. Fearing criminal and civil sanctions, Appellant Cooksey stopped speaking in the form of dietary advice after the State Board told him specifically that his speech is illegal.

Appellant Cooksey brought a First Amendment challenge, but the district court dismissed his Complaint for lack of standing on the ground that he never alleged a cognizable injury. This was error. As explained in Part I below, the

district court failed to recognize that Appellant Cooksey's individualized advice about diet is entitled to First Amendment protection. Then, as explained in Part II below, the district court's failure to acknowledge that this is a First Amendment case led the lower court to compound its error by failing to apply the Supreme Court's and this Circuit's well-established doctrine of "chilling effects," under which Appellant Cooksey plainly suffered an injury-in-fact when he ceased speaking due to an objectively reasonable fear of government sanctions. Therefore, the district court should be reversed and this case should be remanded with instructions to allow Appellant Cooksey to pursue his First Amendment claims.

## STANDARD OF REVIEW

This Court reviews a dismissal for lack of subject matter jurisdiction *de novo*. *Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 369 (4th Cir. 2001).

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY NOT RECOGNIZING THAT THIS IS A FIRST AMENDMENT CASE.

Standing and the merits are typically separate inquiries, but they merge in this appeal because the district court's mistaken ruling that Appellant Cooksey lacks standing is indivisible from the district court's erroneous view that this is not a First Amendment case. In its standing ruling, the district court cited none of the abundant First Amendment authority on the lenience of standing in the free-speech

context, and the lower court's earlier analysis of the merits in its preliminary-injunction decision rejected First Amendment scrutiny for Appellant Cooksey's claims. Thus, it would seem that the district court's primary error—dismissing this case for want of an injury-in-fact—is a direct result of the district court's failure to recognize that this is a First Amendment case.[1]

Because standing is more lenient in the First Amendment context, and because Appellant Cooksey's standing is virtually incontestable once it is clear that this is a First Amendment case, it is necessary to address the merits on a limited basis to establish that the First Amendment applies. As explained below: (1) it is well-established that individualized advice is speech within the protection of the First Amendment; (2) there is no historical basis for denying protection to such speech; and (3) this Court's decision in *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988), which concluded that the First Amendment may not apply to a narrow subset of expert advice that occurs in a fiduciary context, does not alter the First Amendment analysis.

[1] It is not uncommon for district courts to conflate standing and the merits in the free-speech context. The Seventh Circuit, for example, recently reversed a district court for doing what the district court did here: dismissing a First Amendment case for want of a cognizable injury after erroneously concluding that the allegations of the complaint did not implicate the First Amendment. *ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).

### A. The Supreme Court Has Explicitly Held That Advice—Including Even Expert Legal Advice—Is Speech Within the Meaning of the First Amendment.

As noted above, the district court did not cite any First Amendment authority in its standing opinion. This appears to be a direct result of the district court's view, as expressed in its ruling denying Appellant Cooksey's preliminary-injunction motion, that individualized advice is not speech, but something akin to occupational conduct like performing surgery or managing an investment client's funds. J.A. 113 (describing North Carolina's law as "regulation of a profession"). This conclusion that advice is conduct, and not speech, led the district court to the further conclusion that rational-basis review, and not First Amendment scrutiny, applies. J.A. 114. In other words, the district court treated Appellant Cooksey's Complaint, which brought only First Amendment claims, as a very different sort of complaint, one that brought only substantive-due-process claims. As a result, the district court refused to apply the First Amendment's "chilling effects" doctrine to the standing question, which led to the erroneous dismissal.[2]

It is important to note, as an initial matter, the range of activities that the district court apparently believes falls outside the scope of the First Amendment. Appellant Cooksey's Complaint challenged the Dietetics Practice Act as applied to

[2] To be sure, Appellant Cooksey would have had standing even if he had brought only substantive-due-process or equal-protection claims subject to rational-basis review, but it is not necessary for the Court to reach that question.

three different types of speech: uncompensated advice that takes place between Appellant Cooksey and his friends and acquaintances; uncompensated advice that takes place between Appellant Cooksey and those who write in to his Dear Abby-style advice column; and compensated advice that takes place between Appellant Cooksey and his life-coaching clients. The red-pen review specifically identified statements made in each of these three different contexts as violating the Dietetics Practice Act, and the State Board argued in its briefing below that all of this speech is actually conduct that is wholly outside the scope of the First Amendment, an argument that the district court apparently accepted.

The district court was wrong in treating Appellant Cooksey's individualized advice as conduct because the Supreme Court has made it clear that advice is speech, and has found that speech as diverse as "tutoring, legal advice, and medical consultation" are all within the First Amendment. *Bd. of Trustees v. Fox*, 492 U.S. 469, 482 (1989). The Supreme Court definitively rejected the advice-as-conduct paradigm in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which held that even expert legal advice was entitled to full First Amendment protection. In that case, the Court considered the constitutionality of a federal law that prohibited the provision of "material support" to certain designated terrorist groups. *Id.* at 2712. "Material support" was defined to include the provision of "expert advice," meaning "advice . . . derived from scientific, technical or other

specialized knowledge." *Id.* at 2715. The plaintiffs, who included public-interest lawyers who wished to render legal advice to terrorist groups brought an as-applied challenge to the statute.

The Attorney General argued that expert legal advice tailored to the individual circumstances of particular people was conduct, not speech. *Id.* at 2723. Not only did the Supreme Court reject this false distinction, it used this distinction to illustrate precisely why the First Amendment applied. Under the challenged statute, whether the plaintiffs were permitted to speak depended on what they said. *Id.* at 2723-24. "If plaintiffs' speech . . . communicate[d] advice derived from 'specialized knowledge' . . . then it [was] barred. On the other hand, plaintiffs' speech [was] not barred if it impart[ed] only general or unspecialized knowledge." *Id.* at 2724. The Supreme Court, which was unanimous on this point, held that the First Amendment was applicable to the advice that the lawyers wanted to convey to the terrorists because, "as applied to plaintiffs the conduct triggering coverage under the statute consist[ed] of communicating a message." *Id.* Thus, the government's very act of distinguishing between speech that is *speech* and speech that is supposedly *conduct* triggered First Amendment scrutiny.

If expert legal advice that is individually tailored to assist designated terrorist groups is "speech" within the meaning of the First Amendment, then so too must be a free blog post by Appellant Cooksey urging an ordinary American such as his friend Karen Gale to eat more steak and less bread. Indeed, Appellant Cooksey is in precisely the same position as the plaintiffs in *Humanitarian Law Project*. He wishes to provide dietary advice to others, but whether he may lawfully do so depends on what he says. If he provides generalized advice to the public at large, his speech is unregulated. But if he provides individualized advice—whether it is given for free to a friend or family member or given for pay to a life-coaching client—his speech is prohibited under the Dietetics Practice Act. Thus, for the same reasons articulated by the Supreme Court in *Humanitarian Law Project*, the prohibitions that Appellant Cooksey confronts should be analyzed as burdens on protected speech.

### B. The District Court Did Not Find, Nor Did the State Board Even Attempt to Demonstrate, That Advice About Diet Has Historically Been Considered an Unprotected Category of Speech.

The district court's failure to treat Appellant Cooksey's speech as *speech* was a fundamental error that conflicts not only with the Supreme Court's caselaw affirmatively recognizing individualized advice as protected speech, but also with the Supreme Court's caselaw on unprotected speech. As explained below, the Supreme Court has made clear that speech may be excluded from the First

Amendment only if the government satisfies the extraordinarily high burden of demonstrating that the speech at issue falls into a historically unprotected category. Here, the district court did not even acknowledge this caselaw, much less require the State Board to make the required showing.

As the Supreme Court has recently reiterated, federal courts are loath to identify new categories of speech that fall outside the protection of the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (rejecting government argument that false speech is categorically outside the First Amendment); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (rejecting government argument that violent speech aimed at minors is categorically outside the First Amendment); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (rejecting government argument that depictions of animal cruelty are categorically outside the First Amendment). Courts are forbidden from jettisoning speech from the First Amendment on the basis of "an ad hoc balancing of relative social costs and benefits." *Stevens*, 130 S. Ct. at 1585. Federal courts may declare that a category of speech falls outside the First Amendment only if the government adduces compelling historical evidence that the category has—like defamation, incitement, or obscenity—been traditionally considered unprotected. *Id.* at 1586.

The district court did not acknowledge the Supreme Court's doctrine on unprotected speech, much less require the State Board to carry its burden, when the

lower court treated Appellant Cooksey's speech as though it was outside the First Amendment. There is no remotely tenable argument that dietary advice has traditionally been considered a form of speech outside the First Amendment. Far from being regarded as outside the First Amendment and subject to routine suppression, dietary advice was not regulated anywhere in the United States until 1983 when Texas enacted the first licensing scheme for dietitians. Tx. Occ. Code §§ 701, *et seq.* (recodified in 1999). North Carolina did not follow suit until 1991. 1991 N.C. Adv. Legis. Serv. 668 (LexisNexis). Indeed, the very notion that individualized dietary advice might be unprotected by the First Amendment is at odds with the fact that such advice has historically been[3]—and, as common experience tells us, remains—ubiquitous in America.

Not only is there no historical basis for concluding that individualized dietary advice—including even uncompensated advice to friends and family—falls outside the First Amendment, such advice does not resemble any of the categories of speech that have been found to be unprotected. Although the Supreme Court's

[3] Benjamin Franklin, for example, recounts in his autobiography how he encouraged a friend to adopt a vegetarian diet. When his friend doubted his "constitution [could] bear that," Franklin "assur'd him it would, and that he would be the better for it." Benjamin Franklin, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 37 (1793) (P.F. Collier & Sons 1909). His friend "agreed to try the practice, if [Franklin] would keep him company. [Franklin] did so, and [they] held it for three months." *Id.* This type of uncompensated individualized advice would qualify as illegal "assessing and counseling" under the interpretation of the Dietetics Practice Act set forth in the red-pen review.

caselaw makes clear that speech does not become unprotected merely because it is of low social value, it is also undeniable that every category of speech deemed outside the First Amendment *is* of low social value. These unprotected categories—which include criminal incitement, fraud, defamation, obscenity, child pornography, fighting words, and true threats—have nothing in common with Appellant Cooksey's advice about what adults should buy at the grocery store, and there is no reason why Appellant Cooksey's advice should be lumped in with them.[4] Thus, the district court erred in treating Appellant Cooksey's speech as though it is outside the First Amendment without requiring the State Board to satisfy any burden, much less the onerous test elucidated by the Supreme Court.

### C. This Circuit's Ruling in *Accountant's Society of Virginia v. Bowman* Does Not Remove Appellant Cooksey's Case from the Scope of the First Amendment.

The district court appears to have relied principally on *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988), for the proposition that Appellant Cooksey's dietary advice is not protected by the First Amendment. The

[4] The Supreme Court has only once declared a valuable category of speech—commercial advertising—to be outside the First Amendment. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942). The Court subsequently reversed that ruling, specifically noting the value that commercial advertising has for listeners. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). Today there are no similarly valuable categories of speech that are considered outside the First Amendment.

district court did not cite *Bowman* in its standing ruling, but did cite it in denying Appellant Cooksey's motion for preliminary injunction. J.A. 113. *Bowman*, which held that certain representations by non-CPA accountants were outside the First Amendment, does not change the constitutional analysis because that 24-year-old decision irreconcilably conflicts with more recent Supreme Court precedent such as *Humanitarian Law Project*. Even if *Bowman* were not entirely bad law, it must be read so narrowly as not to apply here. Thus, to the extent the district court relied on *Bowman* in concluding that dietary advice is beyond the protection of the First Amendment, such reliance was error.

### 1. *Bowman*'s theory that expert advice is conduct is now bad law.

To understand why *Bowman* is bad law, and why it does not bind this Court, it is necessary to understand both *Bowman*'s facts and that it was premised on a three-Justice concurrence that never commanded a majority of the Supreme Court and now has been rejected. *Bowman* involved a Virginia law that restricted the representations that non-CPA accountants were permitted to make regarding the quality of their work. Non-CPAs were, for example, prohibited from declaring that their work was consistent with generally accepted accounting standards. Non-CPAs were also prohibited from describing their work with certain statutorily defined terms like "audit report," "attestation," or "examination." 860 F.2d at 603.

This Court upheld those restrictions, reasoning that "the restrictions imposed . . . on the use of certain terms in the work product of non-CPAs, amount to the permissible regulation of a profession, not an abridgment of speech protected by the first amendment." 860 F.2d at 605. In other words, *Bowman* purports to stand for the proposition that when the government is restricting speech to protect consumers through a scheme of occupational licensure, then at least some of the speech subject to licensure may be deemed conduct and hence outside the First Amendment. The now-indefensible principle implicit in *Bowman* is that the government's interest in regulating CPAs is so profound that the First Amendment must not be allowed to interfere.

In reaching this conclusion, this Court relied heavily on Justice Byron White's then-recent concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), in which Justice White had argued that certain types of individualized advice by fiduciaries were outside the scope of the First Amendment. In a nutshell, Justice White opined—in reasoning that is now in direct conflict with *Humanitarian Law Project*—that individually tailored advice rendered by an expert to a fiduciary as part of a formal client relationship is a form of professional conduct, not speech, and accordingly is outside the First Amendment. *Id.* at 232 (White, J., concurring). The majority in *Lowe* not only refused to adopt Justice White's concurrence as the

holding of the case, the majority did not even think it necessary to reach any constitutional question. *Id.* at 211.

*Bowman* should be treated as bad law.[5] *Bowman* represents a guess by this Court that the Supreme Court would eventually adopt Justice White's concurrence, and in particular adopt his view that protecting consumers from bad advice in the fiduciary context is a government interest of such overriding priority that it nullifies the First Amendment. That has turned out to be an incorrect guess for two reasons.

First, the notion in Justice White's concurrence that individualized advice is conduct, and not speech, was expressly rejected by *Humanitarian Law Project*. 130 S. Ct. at 2723-24. There is no way to reconcile the unanimous Supreme Court holding in the latter opinion with the three-Justice concurrence in *Lowe*.

Second, beyond the facial conflict in the opinions, in ejecting expert professional speech from the First Amendment, Justice White was engaging in exactly the sort of "ad-hoc balancing" of government-versus-citizen interests that the Supreme Court unanimously rejected in *Stevens*. 130 S. Ct. at 1585. Indeed,

[5] This Circuit has recognized that when intervening U.S. Supreme Court authority undermines a previous panel's ruling, a subsequent panel should follow the Supreme Court's guidance and disregard the earlier circuit precedent. *See Faust v. South Carolina State Highway Dep't*, 721 F.2d 934, 940 (4th Cir. 1983) (noting that when "later Supreme Court decisions have shown" circuit precedent to be "untenable," it follows that the circuit precedent "is not a viable authority and should no longer be followed").

Justice White expressly characterized his concurrence as an effort to balance the government power to regulate certain professions against the authority of the First Amendment to protect speech. 472 U.S. at 228 ("This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment."). Justice White ultimately concluded that, at least where there is a fiduciary relationship, the government interest in consumer protection is so weighty that the First Amendment ceases to apply. *Id.* at 233.

But courts do not eject speech from the First Amendment because that speech conflicts with a government interest, regardless of that interest's magnitude. Indeed, defining the magnitude of the government interest is part of First Amendment review, whether under intermediate or strict scrutiny. And it is particularly untenable to argue here that North Carolina's interest in protecting people from Appellant Cooksey's lay advice negates the First Amendment. If the U.S. government's interest in denying expert legal advice to enemy terrorists as part of the international War on Terror does not exclude that advice from the scope of the First Amendment, then it is difficult to see how North Carolina has a First Amendment-trumping interest in suppressing speech about what adults should buy at the grocery store. Thus, *Bowman* is bad law for the proposition that individualized advice is outside the First Amendment.

### 2. If *Bowman* has any lingering vitality, it must be read narrowly so as not to apply here.

Even if this Court were not to repudiate *Bowman*, the decision is distinguishable on its facts, and the Supreme Court precedent discussed above mandates a narrow reading of those facts and the case as a whole. First, as the district court recognized in its ruling denying Appellant Cooksey's motion for preliminary injunction, "the key" inquiry under *Bowman* is whether there exists "a personal nexus between *professional and client*." J.A. 113 (emphasis added). But Appellant Cooksey offers individualized advice in a number of contexts in which no reasonable person could believe that a professional-client relationship exists, just as no reasonable person believes that a professional-client relationship exists when someone writes to Dear Abby for advice that might, in other contexts, be subject to regulation as the practice of marriage and family therapy. *See* N.C. Gen. Stat. § 90-270.48 (banning unlicensed practice of marriage and family therapy). If this Court believes that even one of these contexts falls outside the scope of *Bowman*, this case must be remanded for a determination of whether the Dietetics Practice Act may constitutionally be applied to speech occurring in that context.

Even as pertains to Appellant Cooksey's paid life-coaching service, *Bowman* cannot be dispositive at the motion-to-dismiss stage. Determining which contexts give rise to a professional-client relationship is necessarily a fact-based inquiry. *Cf. Lumbermens Mut. Cas. Ins. Co. v. First Ins. Servs. Inc.*, 417 Fed. Appx. 247, 250

(4th Cir. 2011) (noting that the existence of a fiduciary relationship is generally a question of fact). This is evident from *Bowman* itself, which looked closely at the facts to determine, in that case, that professional-client relationships were all that was regulated. For example, this Court in *Bowman* found it highly relevant that the prohibition at issue applied only to those who were compensated for their speech. *See* 860 F.2d at 604 (concluding that non-CPAs were engaged in regulable "professional" conduct because accountants "exercise their professional judgment in making individualized assessments of each client's financial situation, *for which they are compensated by the client*" (emphasis added)); *id.* at 604-05 (noting that accountant's reports were "prepared and circulated for the pecuniary benefit of the client, who has paid the accountant to prepare it"). And even pay is surely not dispositive. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received . . . ."). Thus, at the motion-to-dismiss stage, there is nothing to support any argument that—under North Carolina law—a life coach is a fiduciary of a client in the same way that a doctor is the fiduciary of a patient.

Of equal relevance is the difference between the representations made by non-CPA accountants in *Bowman* and the representations made by Appellant Cooksey. *Bowman* involved restrictions on the representations that non-CPAs were permitted to make regarding the quality of their work. For example, non-CPAs

were prohibited from declaring that their work was consistent with generally accepted accounting standards. Non-CPAs were also prohibited from describing their work with certain statutorily defined terms like "audit report," "attestation," or "examination." Both of these restrictions were designed to ensure that the public was not misled into believing that the non-CPA's advice met certain standards of quality that were reasonably implied by the use of those terms. The Board seems to make a similar argument with regard to the North Carolina proscription on dietary "assessing" and "counseling." But there is a crucial distinction: Appellant Cooksey does not, and has not, held out his advice as "assessing" or "counseling." Moreover, Appellant Cooksey has alleged that there is "no actual evidence that the people with whom Appellant Cooksey corresponded in his advice column, or any other person, mistook Appellant Cooksey for a North Carolina-licensed dietitian or any other sort of licensed professional." J.A. 27, ¶ 111; J.A. 29, ¶ 121. Thus, even if *Bowman* represents an exceedingly narrow exception to the First Amendment for those who use occupational terms to describe their work for fiduciaries, Appellant Cooksey does not fall within it.

To be sure, this Court in *Bowman* stated that "[p]rofessional regulation is not invalid, nor is it subject to first amendment strict scrutiny, *merely* because it restricts some kinds of speech." 860 F.2d at 604 (emphasis added). But it does not follow from this statement that professional regulations that burden speech are

*never* subject to First Amendment scrutiny. Indeed, the one case this Court cited in support of that proposition, *Ohralik v. Ohio State Bar Association*, actually did apply First Amendment scrutiny to a prohibition on in-person solicitation by lawyers. 436 U.S. 447, 456-57 (1978). Rather, this statement must, at most, be taken as a recognition that the government may permissibly regulate speech that is an integral part of other non-speech *conduct*. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664-65 (2011) (noting that a ban on the conduct of race-based hiring may be facilitated by a prohibition on the posting of "White Applicants Only" signs). But as the Supreme Court recognized in *Sorrell*, this same rule does not extend to prohibitions "directed at certain content and . . . aimed at particular speakers." *Id.* at 2665. Such regulations impose a direct—not incidental—burden on speech, and must be subject to ordinary First Amendment scrutiny. *See Humanitarian Law Project*, 130 S. Ct. at 2724 (applying "more rigorous scrutiny" to a law that "*generally* function[ed] as a regulation of conduct" because, in the case before the Court, "the conduct triggering coverage under the statute consist[ed] of communicating a message"). Thus, to the extent that *Bowman*'s concern with regulating the speech of fiduciaries has any vitality after decisions such as *Humanitarian Law Project*, *Bowman* must be read narrowly so as not to apply here because a layperson such as Appellant Cooksey—especially when he is offering dietary advice for free—is not anyone's fiduciary.

* * *

Spoken and written advice about diet is speech within the scope of the First Amendment's protection. At a bare minimum, uncompensated dietary advice—the sort of advice that laypeople exchange every day—must be entitled to some measure of free-speech protection. The district court's failure to acknowledge that fact infected the whole of its standing analysis. As explained below, now that it is clear that this is a First Amendment case—and not a case about engaging in occupational conduct without a license—Appellant Cooksey plainly suffered an injury-in-fact when he self-censored in response to the threat of sanctions under the Dietetics Practice Act and in response to the actions of the State Board.

## II. BECAUSE THE DISTRICT COURT DID NOT RECOGNIZE THAT THIS IS A FIRST AMENDMENT CASE, IT FAILED TO APPLY THE SUPREME COURT'S AND THIS CIRCUIT'S "CHILLING EFFECTS" DOCTRINE, UNDER WHICH APPELLANT COOKSEY PLAINLY HAS STANDING.

The district court concluded that Appellant Cooksey lacked standing because the State Board had not yet taken any formal action against him. But as explained below, this conclusion is in irreconcilable conflict with the Supreme Court's and this Circuit's well-established caselaw holding that plaintiffs in First Amendment cases may bring pre-enforcement challenges in federal court if their speech has been "chilled." Appellant Cooksey properly established an injury based on chilling caused by: (1) a non-moribund criminal statute that forbids anyone but a state-

licensed dietitian from expressing an opinion in the form of personal dietary advice; and (2) the three-month investigation, including the red-pen review in which the State Board expressly told Appellant Cooksey that his speech was illegal. Under the liberal approach to standing in First Amendment cases, Appellant Cooksey not only has standing, his standing is not a close call.

### A. The Trial Court Erred in Failing to Recognize That Chilling Is an Injury, Holding Instead That an Injury Requires Formal Punishment.

As set forth in the Complaint and argued in the district court, Appellant Cooksey alleged that he suffered an injury giving rise to an Article III case or controversy because his speech was chilled by the civil and criminal sanctions enumerated in the Dietetics Practice Act as well as by the specific actions of the State Board. A "concrete and particularized" injury-in-fact is one of the three elements of standing that comprise the "irreducible constitutional minimum" necessary for the exercise of jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[6] Under well-settled precedent, the allegations of the Complaint and supplementary evidence establish an injury sufficient for standing.

[6] The other two elements of standing—causation and redressability—have never been in dispute in this case. Nor could they be. If this Court agrees that Appellant Cooksey was injured by the statute and investigation, then it is self-evident that the government is the cause of those injuries and that an injunction against enforcing the relevant statutes would redress his injury.

The district court, however, rejected Appellant Cooksey's justiciability argument because the court refused to acknowledge that the chilling doctrine even exists, much less acknowledge that chilling can constitute a cognizable injury. Instead, the trial court held that Appellant Cooksey lacked standing because the State Board had not formally punished him: "the record before the court is devoid of any evidence or even an allegation that the state board made a formal determination on whether plaintiff violated the Dietetics/Nutrition Practice Act . . . took or threatened any formal action in response to the complaint lodged against plaintiff, or ordered compliance in any way." J.A. 128-29. As to Appellant Cooksey's numerous allegations that the State Board's three-month investigation, including the red-pen review, caused him to cease speaking in the form of personal advice, the trial court waved this off as "voluntar[y]" compliance with no jurisdictional implications. J.A. 129. In the district court's view, standing exists only when government officials institute—or threaten to imminently institute—formal proceedings to punish a speaker for her speech. The trial court thus concluded that "[i]nasmuch as plaintiff was not subjected to any actual or imminent enforcement of the Act, he lacks standing." J.A. 129.

The district court was flat wrong. The Supreme Court, this Court, and other jurisdictions uniformly agree that a citizen need not risk, much less elicit, punishment to vindicate her rights in federal court under Section 1983,

"particularly . . . when the presence of a statute tends to chill the exercise of *First Amendment* rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("*NCRL*") (emphasis added).[7] "[S]elf-censorship, which occurs

[7] *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012) (warning letter from State Bar "implied a threat of future enforcement that elevated the injury from subjective chill to actual injury"); *ACLU v. Alvarez*, 679 F.3d 583, 592-93 (7th Cir. 2012) (plaintiff had standing to challenge eavesdropping statute because the statute had not fallen into disuse); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 48-49 (1st Cir. 2011) (nonprofit had standing due to self-censorship and its objectively reasonable fear that Maine's non-major-purpose PAC provision would be enforced); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000-01 (9th Cir. 2010) (advocacy group had standing because its intended communications were arguably covered by state disclosure law); *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254-55, 1260-61 (11th Cir. 2010) (attorney plaintiff had standing to challenge state advertising rules); *Act Now to Stop War & End Racism Coal. v. Dist. of Columbia*, 589 F.3d 433, 435-36 (D.C. Cir. 2009) (stating challenge involved "somewhat more than the conventional background expectation that the government will enforce the law") (internal quotation marks and citation omitted); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660-61 (5th Cir. 2006) (nonprofit group had reasonable fear of prosecution based on recent agency action); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485-86 (8th Cir. 2006) (a credible threat of prosecution existed due to one case of recent enforcement); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir. 2000) (advocacy organizations faced credible threat of prosecution despite state's litigation position that the groups would not be prosecuted under the Act); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) ("[T]he State's [litigation position—that it has no intent to prosecute—] cannot remove [plaintiff's] reasonable fear that it will be subjected to penalties for its planned expressive activities. If we held otherwise, we would be placing [plaintiff's] asserted First Amendment rights at the sufferance of Vermont's Attorney General."); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 28, 31 (1st Cir. 1999) (credible threat of prosecution due to warning by Department of Business Regulation, the plain language of the statute, and stating "when dealing with pre-enforcement challenges to . . . statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence"); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217 (8th Cir. 1998) (holding plaintiffs had standing even though none had been arrested or threatened with arrest under anti-handbilling ordinance because city had "vigorously defended the ordinance and . . . never suggested that it would refrain from enforcement").

when a claimant is chilled from exercising her right to free expression," is a long-recognized injury giving rise to standing. *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (internal quotation marks and citation omitted); *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[S]elf-censorship" is "a harm that can be realized even without an actual prosecution."); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[I]t is not necessary that a person expose herself to arrest or prosecution under a statute in order to challenge that statute in federal court."). Self-censorship constitutes an injury when it is objectively reasonable, meaning that the challenged government action would "deter a person of ordinary firmness from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (internal quotation marks and citation omitted).

This bedrock principle—that chilling is an injury—has particular force when the statute at issue, like the Dietetics Practice Act here, provides for criminal penalties. For example, in *Babbitt v. United Farm Workers National Union*, an agricultural union challenged an Arizona statute that made it a crime to include false statements in publicity materials designed to persuade consumers to boycott non-union agricultural products. 442 U.S. 289 (1979). The union attacked the publicity statute on the ground that it imposed criminal liability even on

inadvertent falsehoods. *Id.* at 301. Arizona contended that the union lacked standing because the statute had never been applied, much less to inadvertent falsehoods, and may never be applied at all. *Id.* at 302. The Supreme Court rejected Arizona's position, holding in oft-quoted words that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Thus, the district court committed a fundamental error in concluding that standing, especially in the First Amendment context, requires formal punishment or "evidence or allegation that the state board or its executive director referred the complaint to the district attorney for prosecution." J.A. 129.

### B. The Trial Court Erred in Failing to Recognize That Appellant Cooksey Alleged an Injury Based on Chilling.

Appellant Cooksey properly alleged an injury based on the chilling of his speech. As discussed below, Appellant Cooksey demonstrated that his speech falls within the scope of a non-moribund criminal statute, and that he was investigated, told his speech was illegal, and threatened with the future monitoring of his speech. These facts are more than sufficient to allege an injury for Article III standing, particularly when compared to the facts in other cases in which this Court has found standing based on the chilling of speech.

### 1. Appellant Cooksey has standing because the Dietetics Practice Act is a non-moribund criminal statute.

Following the Supreme Court in *Babbitt*, this Court has long acknowledged that the mere existence of a non-moribund criminal statute provides an objectively reasonable basis for self-censorship and thus inflicts an injury for standing purposes. The leading Fourth Circuit case explaining this principle is *NCRL*. In that case, the pro-life nonprofit corporation NCRL wanted to distribute a voter guide but was concerned that doing so would violate a North Carolina criminal statute forbidding corporations from influencing an election. 168 F.3d at 709. North Carolina argued that NCRL lacked standing because: (1) the State did not interpret the challenged statute to apply to the distribution of voter guides and similar speech; and (2) in the 25-year history of the statute, the State had never applied it to speech analogous to the voter guide. North Carolina characterized the threat of prosecution as "hypothetical." *Id.* at 710.

This Court squarely rejected North Carolina's argument, holding that a credible threat of prosecution sufficient "for standing to mount a pre-enforcement challenge" exists when a "non-moribund statute . . . 'facially restricts expressive activity by the class to which the plaintiff belongs . . . .'" *Id.* (quoting *New Hampshire Right to Life*, 99 F.3d at 15). *See also Preston v. Leake*, 660 F.3d 726, 735-36 (4th Cir. 2011) (holding that non-moribund statute was sufficient for standing even though desire to violate it was allegedly inchoate). This Court

emphasized that the "presumption" in favor of standing is "particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *Id.* (citing *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987)). In the case of NCRL, it wanted to distribute its voter guide, but refrained from doing so because the statute facially forbade corporations—the class to which NCRL belonged—from engaging in that speech. *Id.* at 709. This Court held that NCRL suffered an injury giving rise to standing because it is objectively reasonable to fear criminal prosecution under a non-moribund statute.

This Court was notably unmoved by North Carolina's assertion that it would not enforce the statute in a manner that would proscribe a nonprofit like NCRL from distributing a voter guide. *Id.* at 710-11. Such an assertion was an unenforceable promise—made merely to gain advantage in litigation—that did nothing to allay NCRL's objectively reasonable fear that the government might one day change its mind and punish the group for its voter guide. This Court observed that neither the state board nor the district attorney's office had promulgated any regulation or policy exempting voter guides from the statute. *Id.* Absent a formal policy or "compelling evidence" to the contrary, the presumption is that a non-moribund criminal statute carries a credible threat of enforcement that is sufficient for standing. *Id.* at 710.

Appellant Cooksey has standing because the allegations of his Complaint are materially analogous to the facts in *NCRL*. First, both the statute in *NCRL* and the Dietetics Practice Act are criminal statutes. *Id.* at 709; N.C. Gen. Stat. § 90-366 (stating that each violation of the Dietetics Practice Act is a misdemeanor). Second, both statutes are non-moribund, as evidenced in this case by the fact that the State Board spent three months investigating Appellant Cooksey for violations of the Dietetics Practice Act.[8]

Finally, both statutes facially forbid speech by the class to which the speakers belong. In *NCRL*, the statute "provide[d] that any entity 'the primary or incidental purpose of which is to . . . influence or attempt to influence the result of an election' must register and file certain reports with the State, or its officers risk criminal prosecution." 168 F.3d at 710 (quoting N.C. Gen. Stat. § 163-278.6(14)). This Court held that NCRL's voter guide fell within the facial prohibition on attempts by corporations as a class to influence an election. *Id.* Here, the Dietetics Practice Act makes it a crime for the class of people without a dietitian's license to "[e]stablish[] priorities, goals, and objectives that meet nutritional needs" and to

[8] Indeed, one recent investigative report, based on documents produced by the State Board, found that the Board "has investigated nearly 50 people or organizations over the past five years, including athletic trainers, a nurse, a pharmacist, a spa, and even Duke Integrative Medicine" for the unlicensed practice of dietetics. Sara Burrow, *Nutrition Board Casts Net Far Beyond Paleo-Diet Blogger*, Carolina Journal Online (Oct. 17, 2012), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9589.

"[p]rovide[] nutrition counseling in health and disease." N.C. Gen. Stat. §§ 90-352(4)(b) & (c); *id.* § 90-365 (requiring a license to provide dietary advice); *id.* § 90-366 (criminal penalties for violation). Appellant Cooksey's dietary advice, in which he helps specific individuals incorporate the principles of Paleolithic eating to help with diabetes and obesity, plainly falls within the facial sweep of the Dietetics Practice Act in the same way that the voter guide fell within the facial sweep of the electioneering statute in *NCRL*. Thus, Appellant Cooksey has standing under *NCRL* and the district court erred in concluding otherwise.[9]

**2. The investigation, red-pen review, and threat letter enhance Appellant Cooksey's standing.**

The preceding section demonstrated that Appellant Cooksey has standing under *NCRL* and any number of other cases because the Dietetics Practice Act is a non-moribund criminal statute that restricts the speech of a class to which Appellant Cooksey belongs. Thus, his standing does not depend on the investigation, red-pen review, or threat letter. All of these, however, enhance his

[9] Appellant Cooksey's standing is actually much stronger than NCRL's. In *NCRL*, the elections board stated that it had never enforced the statute against an issue-advocacy group such as NCRL. Here, on the other hand, the State Board never represented to the trial court that it does not enforce the Dietetics Practice Act against unlicensed people such as Appellant Cooksey who give dietary advice. In addition, NCRL had standing even though the elections board affirmatively stated that it would not interpret the statute to apply to NCRL's voter guide. Here, on the other hand, the State Board never asserted that it would interpret the Dietetics Practice Act not to apply to Appellant Cooksey. Thus, Appellant Cooksey's injury is more serious than NCRL's and his assertion of standing is correspondingly stronger.

standing because they increase the probability of a formal enforcement action and thereby make Appellant Cooksey's self-censorship even more objectively reasonable.

As a preliminary matter, it bears pausing to look at the facts as a whole. It is not true—indeed, it cannot be true—that no cognizable injury based on chilling occurs when the government singles a speaker out for investigation, goes through his published writings with a red pen to highlight illegal statements, and then threatens that speaker with continued monitoring after he self-censors in fear of punishment. As noted earlier, it is well-settled that the paramountcy of free speech compels a liberal approach to standing analysis in the First Amendment context. *NCRL*, 168 F.3d at 710; *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements.") (internal quotation marks and citation omitted). The liberality of standing must be at its maximum when citizens are faced with the combination of a speech-prohibiting statute and an active investigation. In *Berry v. Schmitt*, for example, the state bar, based on a complaint, investigated an attorney for his public statements critical of officials, told him that the speech in question violated the relevant ethical rule, and then sent him a warning notifying him that the complaint would be closed but that he was expected to conform his behavior to the law in the

future. 688 F.3d 290, 295 (6th Cir. 2012). The Sixth Circuit held that the totality of those facts established standing based on an objectively reasonable chilling of the plaintiff's speech. *Id.* at 296-98. Those are exactly the circumstances present in this case and thus, from a broad perspective, Appellant Cooksey must have standing for the same reason that the plaintiff in *Berry* had standing.

Turning from the broad view to the specifics, the investigation enhances Appellant Cooksey's standing because reasonable Americans are intimidated into silence when the government initiates unexpected investigations based on what they have said or written. Appellant Cooksey's standing is actually much stronger than that of the plaintiff nonprofit in *NCRL*, where there was no investigation. In *NCRL*, the plaintiff nonprofit initiated contact with the elections board by seeking an opinion. 168 F.3d at 709. Here, by contrast, the State Board went after Appellant Cooksey first. The State Board undertook its three-month investigation following a complaint lodged by someone who heard Appellant Cooksey express opinions at a public meeting in a church. At this juncture, the State Board could have ruled the complaint frivolous or looked at Appellant Cooksey's website and done nothing. Instead, the State Board used the complaint as a launch pad for a detailed inquiry into Appellant Cooksey's writings, private conversations, and business plans. It is objectively reasonable for Appellant Cooksey, when faced with a government investigation from out of the blue, to have engaged in self-

censorship for fear of inciting punishment by his investigators. Thus, the State Board's investigation enhances Appellant Cooksey's standing well beyond that which this Court found sufficient in *NCRL*, where there was no investigation at all, much less one initiated by the elections board.

The red-pen review similarly enhances Appellant Cooksey's standing. The Executive Director and the Complaints Committee of the State Board produced the red-pen review—a line-by-line analysis of the legality of Appellant Cooksey's published writings—as part of the Board's investigation. The red-pen review concluded that a great deal of his speech is statutorily proscribed. For example:

- "[Y]ou need a license to provide this service," J.A. 35;
- "Here you are giving this person advice based on what she has said to you. . . . Counseling/advising requires a license," J.A. 35;
- "Assessing and advising—requires a license," J.A. 36;
- "[Y]ou guided her (for her friend) to your meal plan—indirectly you conducted an assessment and provided advice/nutritional counseling," J.A. 36;
- "Advising," J.A. 37;
- "You should not be addressing diabetic's [*sic*] specific questions. You are no longer just providing information when you do this, you are assessing and counseling, both of which require a license," J.A. 39;
- "When helping her with this issue you were assessing and advising—these activities require a license," J.A. 40;

- "Again, what does this communicate to the public? Assessing," J.A. 41;
- "You are now providing diabetic counseling, which requires a license," J.A. 45;
- "[Y]ou cannot work one-on-one with individuals." J.A. 3548.

The district court declined to ascribe any significance to the red-pen review because, in the district court's view, the review merely expressed the opinion of the Executive Director, which Appellant Cooksey was ostensibly free to disregard. J.A. 128. Because the district court did not believe that the views of the Executive Director could be imputed to the State Board—and also did not believe that such views would amount to formal punishment by the State Board—the district court concluded that the red-pen review did not constitute an injury for standing purposes. J.A. 128-29.

The district court was in error. Even if this Court were to ignore (as the district court did) that Appellee members of the State Board on the Complaints Committee participated in producing the red-pen review, J.A. 19, ¶ 71; J.A. 66, there is no legal distinction between the Executive Director and the State Board for the purposes of standing. This Court has recognized that an adverse decision by a director-level official of a state board establishes a cognizable injury. In *NCRL*, the plaintiff nonprofit wrote to Yvonne Southerland, Chief Deputy Director of the North Carolina State Board of Elections, seeking an opinion on whether

distributing its voter guide would violate the law. Ms. Southerland told NCRL that its voter guide would violate the law. 168 F.3d at 709. NCRL brought suit after receiving this opinion from Chief Deputy Director Southerland. *Id.* In analyzing NCRL's standing, this Court referred to Ms. Southerland's opinion as "the State," meaning that for standing purposes—and contrary to the district court's conclusion in the instant case—the opinion of a director-level official that particular speech is illegal *is* the opinion of the state board. *See id.* at 710. This Court held that NCRL had standing because, after receiving Ms. Southerland's opinion, "NCRL refrained from disseminating its guide, and its speech was chilled." *Id.*

The facts here are once again much more supportive of standing than in *NCRL*. If the *solicited* opinion of a *deputy* director was sufficient to chill speech in *NCRL*, then the *unsolicited* opinion of a *director and board members* must be an even stronger basis for Appellant Cooksey to assert standing based on chilling here. Thus, the red-pen review substantially enhances Appellant Cooksey's already sufficient standing.

Finally, the threat letter from the State Board further augments Appellant Cooksey's standing. The substance of the April 9, 2012 threat letter is "we told you your speech was illegal, you stopped speaking, and so now we'll keep an eye on you." No reasonable person in Appellant Cooksey's position would feel free to resume speaking following a three-month investigation resulting in numerous

specific allegations that his speech had violated the law and concluding with a letter stating that the investigation was being closed only because the person had acquiesced and stopped speaking. Any reasonable person would have done what Appellant Cooksey did: assume that silence was the only prudent option when dealing with a government agency willing to sink resources into a three-month investigation of a blogger whose website receives only a few thousand visitors each month. J.A. 11, ¶ 26. Thus, the threat letter is evidence that the State Board intended to chill Appellant Cooksey's dietary advice and evidence that the plan to chill his speech succeeded. *See Berry*, 688 F.3d at 297 ("[T]he warning letter implied a threat of future enforcement that elevated the injury from subjective chill to actual injury.").

### 3. *Blankenship v. Manchin* illustrates just how lenient this Court's approach to standing is in the free-speech context.

Wherever the line between standing and no-standing may be, Appellant Cooksey is well beyond it because this Court has found standing in the First Amendment context where the facts were far less compelling than they are here. In *Blankenship v. Manchin*, for example, Governor Manchin of West Virginia gave a press conference to promote a bond amendment to the state constitution. 471 F.3d 523, 525-526 (4th Cir. 2006). When a reporter asked the Governor about criticism made by Don Blankenship, a multi-millionaire coal magnate, the Governor stated that, by injecting himself into the public debate, Blankenship had invited closer

scrutiny of his business. *Id.* at 525. Blankenship sued, alleging that the Governor had chilled his speech. The Governor argued that he merely meant that Blankenship would receive greater scrutiny from the media and public. This Court rejected the Governor's invitation to construe his remarks in the light most favorable to him, holding that the Governor's statement at the press conference "did threaten imminent adverse regulatory action . . . ." *Id.* at 529. If it is objectively reasonable to feel chilled by impromptu comments at a press conference, then it must also be objectively reasonable for Appellant Cooksey to have self-censored in the face of a statute providing for criminal sanctions and in the face of a three-month official investigation that concluded with the State Board unambiguously telling Appellant Cooksey that his dietary advice is illegal and that he will be monitored.

Significantly, this Court held that Blankenship's speech was chilled even though he was a powerful person and even though he did not actually cease speaking altogether. The Governor argued that Blankenship's allegation of chilling was not objectively reasonable because Blankenship was wealthy, sophisticated, and an influential participant in public debate. The Governor maintained, and Blankenship apparently did not dispute, that Blankenship continued to participate in West Virginia politics even after filing suit. This Court held that a "chilling effect need not result in a total freeze of the targeted party's speech," *id.* at 532,

and went on to address the merits. If a wealthy businessman with a long history of raucous political speech suffers an injury when his speech is only partially chilled by an offhand remark at a press conference, then it must also be true that an ordinary person like Appellant Cooksey, who lacks a multi-millionaire's resources and history of public influence, suffered a cognizable injury sufficient for standing when he stopped speaking entirely after the State Board told him that his speech was illegal unless he had a license.

## CONCLUSION

The district court's order dismissing Appellant Cooksey's case was an extraordinary departure from the Supreme Court's and this Circuit's precedent, all of which require only that Appellant Cooksey have shown that the State Board's actions would have chilled a person of ordinary firmness from speaking. Thus, if this Court believes that any of Appellant Cooksey's various forms of compensated and uncompensated dietary advice fall within the scope of the First Amendment, it should reverse the district court's ruling and remand this case so that it may proceed on the merits.

## REQUEST FOR ORAL ARGUMENT

Due to the novel and important constitutional issues in this case, Plaintiffs respectfully request oral argument.

Dated: November 15, 2012.

Respectfully submitted,

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Dated: November 15, 2012

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I hereby certify that on this 15th day of November, 2012, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 15th day of November, 2012, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

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