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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Board argues that speech is speech only when the government says so. According to the Board, the government may forbid unlicensed people from saying certain words—even words unrelated to actual conduct—by declaring those words the practice of a profession. Rather than disavow its position that Appellant Cooksey's personal advice about diet is illegal, the Board reaffirms it, stating that "the Act, Regulations, and [red-pen review]" are all "[c]onsistent" with the proposition that Appellant Cooksey may "express his opinions about dietary matters but [may] not assess specific individuals' circumstances and offer personal counseling." Br. of Appellees at 10. Because the Board does not believe that speech is at issue, it does not believe that any speech was chilled, and hence there is no justiciable claim.

But this is a First Amendment case: the Board investigated Appellant Cooksey for what he said and wrote about diet, telling him that writing and saying those words are illegal. In response, he stopped speaking. The Board made, and continues to make, no distinction between free dietary advice offered in his online Dear Abby-style column, free dietary advice offered in private, and private dietary advice for a fee as part of a life-coaching service. The prohibition on unlicensed dietary advice applies to Appellant Cooksey even though his advice is pure speech unrelated to any conduct. Because this is a case about chilling pure speech, the

allegations of the Complaint set forth a justiciable claim and the district court should be reversed.

ARGUMENT IN REPLY

I. THIS IS A FIRST AMENDMENT CASE.

As Appellant Cooksey explained in his opening brief, the Board's argument that advice is not speech contradicts the most basic principles of the First Amendment. In response, the Board argues that speech covered by occupational licensing is a *sui generis* category of communication outside the First Amendment or, in the alternative, that only licensed professionals have free-speech rights. As the following demonstrates, neither argument is persuasive.

A. The Board's Position Contradicts the Entirety of First Amendment Jurisprudence.

The Board's argument that personal advice is not speech contradicts virtually every tenet of First Amendment jurisprudence. Here is that argument in a nutshell: Personal advice about diet, even for free, is professional conduct outside the First Amendment and may be regulated subject only to rational-basis review to protect ignorant listeners.

This position is inconsistent with at least seven free-speech doctrines in that it: (1) ejects an entire category of speech from the First Amendment; (2) treats advice as conduct, not speech; (3) restricts speech to certain speakers; (4) restricts speech based on subject matter; (5) endorses a prior restraint; (6) allows a

substantial burden on speech; and (7) censoriously suppresses ideas based on a fear that the listener will heed them. The Supreme Court has reaffirmed every one of these doctrines in the 25 years since the primary First Amendment authority upon which the Board relies, *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (1988), was decided:

1) Even "animal-crush" videos are a form of protected speech because only historically unprotected categories of speech such as defamation are outside the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584-85 (2010).

2) Individualized legal and technical advice to designated enemy terrorists is speech, and prohibiting speakers from "communicat[ing] advice derived from 'specialized knowledge'" is a content-based restriction on speech subject to heightened scrutiny. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010).

3) Government cannot forbid corporations and unions from engaging in speech because the First Amendment "[p]rohibit[s] . . . restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310 (2010).

4) Government cannot restrict the sale of violent video games to children because, "as a general matter, . . . government has no power to restrict expression because of . . . its subject matter." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *see also id.* at 2739 n.8 (noting that studies offered to support the law "fail to show, with the degree of certitude that strict scrutiny requires, that this *subject-matter restriction* on speech is justified." (emphasis added)).

5) Government cannot require a license to work as a door-to-door charitable solicitor because "generally, speakers need not obtain a license to speak." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988).

6) Government restrictions on the ability of pharmacies to communicate "prescriber-identifying information" are subject to strict scrutiny, despite the fact that they do not outlaw all communication of that information, because "[g]overnment's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

7) Accurate liquor advertising is protected because the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996).

Thus, every aspect of the Board's position violates a basic principle of modern First Amendment law.

B. Occupational Licensing Is Not Immune to the First Amendment.

The Board has two responses to the Supreme Court authority indicating that dietary advice is protected by the First Amendment: (1) under *Bowman*, speech regulated by occupational licensing is outside the First Amendment because occupational licensing is a *sui generis* category of speech that should be considered conduct, even when there is no actual conduct; and (2) if the First Amendment applies in the occupational-licensing context, then it applies only to those with licenses and not to laypeople. As explained below, neither of these arguments is persuasive.

1. The dietitian statutes at issue regulate speech, not conduct, and thus the First Amendment applies.

The Board argues that all occupational licensure is outside the First Amendment because licensure regulates the practice of a profession, not speech. The Board rests its First Amendment argument on *Accountants' Society of Virginia v. Bowman*, a 1988 decision of this Court about non-CPA accountants that the Board reads as categorically expelling speech within the purview of occupational licensing from the First Amendment. Br. of Appellees at 31-44. For the reasons explained in detail in Appellant's opening brief, *Bowman* is of dubious validity (and factually distinguishable). Br. of Appellant at 21-30.

In any case, Appellant Cooksey agrees that *actual* conduct does not become subject to First Amendment scrutiny simply because there is speech incidental to that conduct. For example, there is no First Amendment dimension to the criminalization of theft even though speech may be an incidental component of that conduct (such as when a mugger verbally demands his victim's wallet). Similarly, with licensed occupations, government may regulate the conduct of a dentist even though a dentist may use speech to facilitate dentistry (e.g., instructing patients to open their mouths). Appellant Cooksey agrees that there is no First Amendment right to perform dentistry without a license.

Even for core medical professionals such as doctors, professional advice without conduct is protected speech. The Board suggests that Appellant Cooksey's (correct) reading of the First Amendment is unworkable because it would mean that surgery, for example, would not be protected speech, but advising someone to undergo surgery would be protected. Br. of Appellees at 40. But this is exactly the distinction that the Ninth Circuit rejected in *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). In *Conant*, the federal government sought to revoke a doctor's license to prescribe controlled substances because the doctor recommended medical marijuana, which was legal under state, but not federal, law. The government asserted that the First Amendment did not apply because the recommendation was conduct akin to issuing a prescription and also that it contemplated the illegal conduct of the patient. The Court of Appeals rejected the speech-as-conduct theory as well as the proposition that speech becomes conduct if the speech urges illegal conduct. *Id.* at 637-39. If the First Amendment protects the right of doctors, who are fiduciaries of their patients, to advise illegal conduct, then it must be true the First Amendment protects the right of a non-fiduciary such as Appellant Cooksey to advise conduct that is legal such as eschewing carbs and eating more protein and fats.

In any event, the fact that many licensed occupations include actual conduct—often dangerous conduct—and much incidental speech is not germane to the constitutional analysis of an occupational-licensing scheme that regulates only speech and no conduct. As the Board's brief makes clear, dietetics consists of one person talking to another about what to eat. Br. of Appellees at 6. Dietitians are not doctors, nurses, dentists, phlebotomists, x-ray technicians, sonogram technicians, or any other healthcare worker who engages in actual conduct with patients or dispenses medication. Dietitians learn things about their clients and make recommendations about what to eat. That is all Appellant Cooksey did. Neither the use of portentous statutory terms such as "assessing" and "counseling" nor the promulgation of confidentiality or other standards for dietitians alters the reality that dietetics is an occupation that consists of nothing but speech and speech was all that transpired between Appellant Cooksey and his willing listeners.

Courts apply the First Amendment to occupational-licensing statutes when the licensing scheme regulates only speech, even to the classic speaking occupation—law. For example, in *Legal Services Corp. v. Velasquez*, the Supreme Court held that the First Amendment forbade the government from dictating what legal theories a lawyer may advance in representing indigent clients even when the government is paying for the representation. 531 U.S. 533, 548 (2001). *Velasquez* cannot be squared with the Board's view that advice is categorically outside the

First Amendment (indeed, it seems never to have occurred to anyone in that case that advice is not speech).

Similarly, in *Ohralik v. Ohio State Bar Association*, the Supreme Court considered whether in-person legal solicitation was the equivalent of general advertising (and hence protected by the First Amendment) or merely part of a business transaction. 436 U.S. 447, 455-57 (1978). The Supreme Court did not declare that the speech at issue was unprotected simply because it was speech on a topic covered by law licensing. Rather, after concluding that the speech was primarily a business transaction, the Court expressly noted that this fact "does not remove the speech from the protection of the First Amendment," but merely "lowers the level of appropriate judicial scrutiny." *Id.* at 457. The Court then carefully reviewed the history of restrictions on legal solicitation and evidence of the dangers of direct selling before holding that in-person legal solicitation could permissibly be banned. *Id.* at 460-67. The Court later refused to extend its *Ohralik* holding to solicitation by accountants when the factual record did not support doing so. *See Edenfield v. Fane*, 507 U.S. 761, 771-73 (1993).

Velasquez, *Ohralik*, and *Edenfield* stand for two propositions that undermine the Board's argument. First, the First Amendment can apply even to speech regulated by law licensing. Second, the fact that the regulation of certain lawyer speech might be upheld does not mean that every speech regulation in every

occupational context is valid, or that no one has standing to bring a First Amendment challenge to such regulations. Instead, determining how the First Amendment applies is a fact-specific inquiry that occurs during discovery and trial.

The applicability of the First Amendment to speech covered by occupational licensing is true of health-related occupations that consist solely of speech. Consider, for example, psychology, in which a therapist, who cannot prescribe medication or engage in any conduct, talks to a patient. The leading case is *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("NAAP"). In *NAAP*, psychoanalysts brought a First Amendment challenge to their regulation under California's psychologists-licensing scheme. The Ninth Circuit reached the merits of the psychoanalysts' First Amendment claims. That court upheld the licensing scheme for psychologists as applied to psychoanalysts under "First Amendment scrutiny."[1] *Id.* at 1054-56. *See also Conant*, 309 F.3d at 637-38. Thus, where an occupational-licensing scheme regulates only communication, and not conduct, the First Amendment applies.

This Court need not—indeed, should not—decide the merits here. The Board is trying to persuade this Court to dismiss Appellant Cooksey on standing

[1] Although the court was not specific about the level of First Amendment scrutiny it was applying, the Supreme Court has never recognized any level of First Amendment scrutiny that is equivalent to the rational-basis test that the Board advocates.

grounds in part by raising the specter of successful First Amendment challenges to other licensing schemes and how inconvenient this would be for the government. Br. of Appellees at 39-41. But recognizing that the First Amendment applies does not mean that Appellant Cooksey will prevail on the merits. The speakers in *Ohralik* and *NAAP* lost. Nor does acknowledging the applicability of the First Amendment mean that strict scrutiny applies. Indeed, *how* the First Amendment applies to the facts is not before this Court, only the question of *whether* it applies. Whatever the appropriate First Amendment standard, that question is best addressed in the first instance by the trial court in the context of argument on the merits over a well-developed record. It is enough for this Court to recognize that the First Amendment applies—and conduct its standing analysis accordingly—because there is no basis for believing that occupational licensure is categorically outside the First Amendment, much less for believing that the application of dietitian-licensing statutes to Appellant Cooksey is outside the First Amendment.

2. There is no basis for suggesting that under Humanitarian Law Project *the First Amendment applies only to those with government-issued occupational licenses.*

The Board's primary strategy for dealing with the Supreme Court's modern speech jurisprudence is to ignore it. The one case the Board does not ignore, because it cannot, is *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). As Appellant Cooksey explained in his opening brief, *Humanitarian Law Project*

is fatal to the Board's position because it held that individually tailored legal advice derived from specialized knowledge is speech protected by the First Amendment. Br. of Appellant at 16-18. This holding—that advice unrelated to any conduct is protected speech—cannot be reconciled with the Board's position that dietary advice unrelated to conduct is outside the First Amendment.

To avoid the fatal implications of *Humanitarian Law Project*, the Board devises a novel reading of that case. It suggests that *Humanitarian Law Project* stands for the proposition that First Amendment protection for advice derived from specialized knowledge applies only to licensed professionals who have demonstrated their mastery of specialized knowledge to state licensing boards. Br. of Appellees at 36-37. In the Board's view, *Humanitarian Law Project* could not apply to Appellant Cooksey because he has not demonstrated his mastery of dietetic knowledge. This reading of *Humanitarian Law Project* gets the First Amendment backwards, is wrong on the face of the decision, and ignores the absence of any support for this theory in the caselaw.

With respect to the First Amendment, it is self-evident that state licensing boards do not confer free-speech rights. Free-speech rights are memorialized in the First Amendment, not bestowed by state legislative fiat. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (observing that the First Amendment "codified a *pre-existing* right").

The Board's reading of *Humanitarian Law Project* is also inconsistent with the facts of that case. There was only one lawyer in that case, a retired administrative judge and no mention of where, or if, he was still licensed. The other individual plaintiff was a Sri Lanka-born doctor. None of the six nonprofits were law firms. But the plaintiffs did provide specialized legal and technical advice tailored to the circumstances of Kurdish and Sri Lankan terrorists. *Humanitarian Law Project* applies to advice offered by anyone, regardless of licensure, precisely because occupational licensure played no role in the decision.

The Board also tries to create a false distinction between the advice at issue in *Humanitarian Law Project* and the advice on diet that Appellant Cooksey wants to offer. The Board suggests that *Humanitarian Law Project* applied First Amendment scrutiny, and strict scrutiny at that, because the State Department tried to restrict the content of the legal and technical advice to the foreign terrorists, whereas here there are no specific content restrictions on what a licensed dietitian may say to someone about what to eat. Br. of Appellees at 36. But that is not what the case says at all. The lawyers in *Humanitarian Law Project*, like everyone else in America, were forbidden from providing advice to the Kurdish and Sri Lankan terrorists. This prohibition did not make distinctions between advice on various topics and it did not make distinctions between lawyers and laypeople. Indeed, the proscription in *Humanitarian Law Project* was actually less content-based than the

proscription in this case, which applies exclusively to advice on the subject of diet.[2]

Finally, nothing in the caselaw suggests that when speech conflicts with occupational licensing, only licensed professionals have First Amendment rights. The Supreme Court never suggested in *Velasquez* or *Ohralik* that the lawyers were entitled to some modicum of First Amendment protection *because* they were licensed lawyers. And the fact that the psychoanalysts in *NAAP* were not state-licensed psychologists did not prevent the Ninth Circuit from applying the First Amendment there. Nor indeed did this Court in *Bowman* suggest that non-CPA accountants lacked First Amendment rights but that state-licensed CPAs do have such rights.[3]

The Board's mistaken interpretation of *Humanitarian Law Project* causes it, in turn, to adopt a reading of this Circuit's ruling in *Bowman* that cannot be squared with modern First Amendment jurisprudence. Appellant Cooksey explained why *Bowman* has either been effectively overruled or substantially

[2] It bears noting that the U.S. government tried and failed in *Humanitarian Law Project* to do what the Board is doing here: seeking dismissal on standing and ripeness grounds. 130 S. Ct. at 2715.

[3] The Board's failure to grasp *Humanitarian Law Project* also leads it to repeat the same trope over and over: that Appellant Cooksey can express general opinion on diet, but may not counsel anyone in his or her particular diet. Br. of Appellees at 10, 28, 37. But offering general opinions as a consolation prize for taking away the right to give advice is unconstitutional. The whole point of *Humanitarian Law Project* was that advice is protected speech and simply allowing people to express general opinions while banning advice is not constitutional.

narrowed in his opening brief, Br. of Appellants at 21-30, and will not recapitulate those reasons here. Appellant Cooksey will note, however, that the Board is incorrect to claim that this Circuit recently "reaffirmed the principle articulated in *Bowman*" in *Greater Baltimore Center for Pregnancy Concerns v. Mayor & City Council*, which cited *Bowman* in a single footnote. *Compare* Br. of Appellees at 38 *with* 683 F.3d 539, 555 n.3 (4th Cir. 2012). The panel in *Greater Baltimore* cited *Bowman* to explain why licensed doctors may be required to make certain disclosures while laypeople may not be so compelled. Because the plaintiffs in that case were laypeople, not licensed doctors, the citation to *Bowman* was pure dicta. Further, the proposition that government has a freer hand to regulate the speech of licensed professionals[4] than it does to regulate the speech of laypeople does not imply, as the Board seems to believe, that the government has unfettered discretion to declare that anyone who gives individualized advice is a professional who may be subject to licensure.[5]

[4] The Board's reading of *Greater Baltimore* conflicts with the Board's reading of *Humanitarian Law Project*, which the Board reads to say that only licensed professionals have free-speech rights.

[5] This panel should not put stock in the 11th Circuit's ruling in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), upon which the Board relies. To the extent that the perfunctory ruling conflicts with the Supreme Court's First Amendment jurisprudence, it is bad law. *Locke* is also factually distinguishable. *Locke* concerned licensure for commercial interior designers, whose work may hypothetically present safety concerns for non-consenting third parties. No such concerns are present in this case.

Because the caselaw does not support the Board's argument that occupational-licensing exists in a *sui generis* First-Amendment-free zone, the Board falls back on suggesting that extending First Amendment protection to occupational speech is undesirable because it would require courts to engage in "task-by-task dissection of professional licensing laws." Br. of Appellees at 41. But the Supreme Court has stated "simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. It would always be easier for government to regulate if it did not have to comply with constitutional strictures, but that fact alone is not a reason for ignoring those strictures. In any event, this concern has little salience here, in which all or virtually all of the purported "conduct" covered by the licensing law consists of rendering advice. Moreover, it is possible that certain restrictions on advice in some occupations are so venerable that they constitute historically recognized exceptions to the First Amendment, though that is surely not the case with dietary advice, which has been regulated in North Carolina since only 1991. *Cf. Stevens*, 130 S. Ct. at 1586 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them.").

In sum, the Board has failed to articulate any compelling reason why this Circuit should read *Bowman* as foreclosing Appellant Cooksey's First Amendment challenge. Appellant Cooksey wishes to convey opinions through the spoken and written word. North Carolina prohibits him from doing so. Whatever the standard of First Amendment review, it is clearly more than none and the justiciability of Appellant Cooksey's claims should be evaluated accordingly.

II. APPELLANT COOKSEY HAS STANDING BECAUSE HE HAS ALLEGED OBJECTIVELY REASONABLE CHILLING.

Despite an objectively reasonable basis for chilling—a statute forbidding advice about diet, an investigation, the red-pen review, and the warning letter—the Board continues to insist that Appellant Cooksey has no First Amendment injury. The Board's position is: Even though the Board investigated Appellant Cooksey for three months, and even though the Executive Director and Complaints Committee told him in detail that his advice was illegal, and even though the Board said it would monitor him, he lacks standing because he failed to exhaust administrative remedies by seeking the opinion of the Board as a whole. This position is so inconsistent with First Amendment standing law that the Board has no choice but to essentially ignore the vast caselaw that Appellant Cooksey cited in his opening brief and instead base its entire standing argument on an inapposite district court case, *Kemler v. Poston*, 108 F. Supp. 2d 529 (E.D. Va. 2000). The Board's standing argument is untenable.

A. The Board Erroneously Thinks That Its Arbitrary, Confusing, and Bureaucratic Interference in Appellant Cooksey's Life Means That Appellant Cooksey Had to Exhaust Administrative Remedies Before Bringing Suit.

Before explaining why *Kemler* is inapposite, it bears emphasizing just how out of step the Board's bureaucratic perspective is with the experiences of ordinary Americans. The Board contends in effect that standing is defeated by the fact that its treatment of Appellant Cooksey was so arbitrary, confusing, and bureaucratic that he misunderstood the Board. The Board faults Appellant Cooksey for taking the law seriously and for taking the Board's investigation seriously. The Board waves off its investigation as, at worst, an innocuous civics lesson for Appellant Cooksey. His chilling based on the laboriously detailed red-pen review? That was just the Executive Director and various Board members brainstorming, not real Board action. The threat letter warning him of continued monitoring to ensure compliant silence? The Board ignores that in its brief, but presumably the threat letter is supposed to illustrate the Board's magnanimity in not punishing Appellant Cooksey.

The Board argues that Appellant Cooksey, if he were aggrieved by the Board's actions, should have taken further steps to ascertain the opinion of the Board as a whole. Br. of Appellees at 18, 24-26. In its ripeness section, for example, the Board argues that his claims are not ripe because he failed to exhaust his administrative remedies by initiating an administrative procedure under state

law to obtain the Board's opinion. Br. of Appellees at 18. But it is blackletter law that there is no exhaustion requirement under § 1983. *See Patsy v. Bd. of Regents*, 457 U.S. 496 (1982); *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 218 (4th Cir. 1997) (citing *Patsy* for the rule that "a plaintiff bringing a suit pursuant to 42 U.S.C. § 1983 does not have to exhaust state administrative remedies before filing suit in federal court" as the general rule). In any case, the Board never explains why an ordinary citizen would think that he had not received the official opinion of the Board when he is investigated by the Board, told that his speech is illegal by the Executive Director and other Board members, and sent a threat letter from the Board on its letterhead. Nor does the Board explain how an ordinary citizen is supposed to fathom all of the purported nuances and subtexts that the Board—as its litigation position—now claims to see in its investigation of Appellant Cooksey.[6]

Furthermore, it is disingenuous for the Board to assert that it *might* have disavowed the red-pen review if Appellant Cooksey had pursued the state

[6] There are also potential abstention problems. First, the Board seems to suggest that federal courts need to dismiss federal constitutional claims to allow such challenges to state regulatory decisions to be made in state forums. This is called *Burford* abstention and it is highly disfavored. *Martin v. Stewart*, 499 F.3d 360, 365-66 (4th Cir. 2007); *Neufeld v. Baltimore*, 964 F.2d 347, 350-51 (4th Cir. 1992). Federal courts should only dismiss properly pled claims in favor of state-level resolution when there is a compelling state-level interest and no comparable federal interest. Here, the state law is not complex and there is a federal interest in free speech. Second, if Appellant filed an administrative action, he may be obligated to remain in state forums under *Younger* abstention. *See, e.g., Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165-67 (4th Cir. 2008).

administrative procedure. At no point in this litigation has the Board even hinted that the red-pen review was a misinterpretation of the Dietetics Practice Act. To the contrary, it reaffirms in its brief that the red-pen review's application of the Act to Appellant Cooksey was a correct interpretation of the law. Br. of Appellees at 10. The Board was perfectly happy with the red-pen review until it got sued, and now it is conveniently advancing ambiguity (maybe we would find his speech illegal and maybe we wouldn't) to create a moving target at the motion-to-dismiss stage in order to prevent Appellant Cooksey from taking the discovery he needs to pin the Board down and enable the courts to reach the merits of his claims.

The First Amendment does not care about the purported subtexts and nuances that the Board now sees in its treatment of Appellant Cooksey. Nor does the First Amendment care about the Board's moving-target strategy. But the First Amendment—as reflected in the decisions of this Court and the Supreme Court—cares a great deal about whether speech is chilled. *See* Br. of Appellant at 30-47. Under those decisions, the conduct of the Board is not even relevant because it is sufficient for standing that a non-moribund criminal statute proscribes speech. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999) ("*NCRL*"); *see also* Br. of Appellant at 36-39. The Dietetics Practice Act is just such a statute. To this, the Board has no response.

It is also sufficient for standing that an executive-level board official inform a citizen that his or her speech is illegal. *NCRL*, 168 F.3d at 709-710. The Board argues that *NCRL* is distinguishable on this point because in that case the plaintiff sought an opinion from the deputy director. Br. of Appellees at 22-23. The Board suggests that the deputy director's opinion in *NCRL* could be imputed to the Board as a whole because it was solicited. But how could that bureaucratic distinction matter to Appellant Cooksey? He was under investigation. The Executive Director and Complaints Committee of the Board told him in exhaustive detail that his speech was illegal. It would be arbitrary and contrary to the speech-protecting purpose of First Amendment standing doctrine for this Court to announce a perverse rule that the solicited opinions of executive-level officials objectively chill speech but unsolicited opinions rendered as part of an unsolicited investigation do not. Unsolicited opinions that are the result of an unwanted government intrusion into one's life are the most objectively chilling because people are justifiably fearful of zealous government investigators who act without provocation.

It is also sufficient for standing that the Board told Appellant Cooksey that it would continue to monitor him. The proposition that the government cannot subject someone to monitoring to control their speech is so well established that a much more ambiguous threat resulted in the reversal of a dismissal in *Blankenship*

v. Manchin, 471 F.3d 523 (4th Cir. 2006), in which this Court held that the government official involved was not even entitled to qualified immunity. In *Blankenship*, the governor of West Virginia had taken a position that a prominent businessman opposed. *Id.* at 525. In response to media questions at a press conference, the Governor made off-the-cuff remarks that the businessman, by injecting himself into the debate, perhaps made himself the subject of closer scrutiny. *Id.* at 525-26. The businessman sued on the ground that his speech had been chilled by the threat of investigation. *Id.* at 526-27. The Governor moved to dismiss on the ground that an inchoate statement about investigating the businessman did not constitute a threat that would deter a reasonable person from speaking. *Id.* at 527. This Court disagreed, holding not only that the press-conference remarks alone created a chilling effect, *id.* at 528-29, but also that subsequent scrutiny chilled too, *id.* at 529-30. Thus, this Court found chilling on two grounds: a threat of scrutiny and scrutiny itself.

Here, although the order of events is reversed, the same two elements are present: Appellant Cooksey was scrutinized and threatened with monitoring. This threat is highly credible because the Board already investigated Appellant Cooksey

and it is easy to monitor his online activity, as the Board's brief demonstrates.[7] If it is objectively reasonable for a prominent businessman with enormous resources to feel chilled by an official's off-the-cuff statement, it must also be objectively reasonable for Appellant Cooksey, an ordinary person with no particular resources, to feel chilled by a three-month investigation, an extensive red-line markup of his writings, and a formal threat of continued monitoring. *Blankenship*, 471 F.3d at 530.[8] Thus, Appellant Cooksey has standing.

B. *Kemler* Is Inapposite.

Unable to distinguish the numerous Supreme Court, Fourth Circuit, and other appellate decisions cited by Appellant Cooksey, the Board takes refuge in the easily distinguishable district court decision, *Kemler v. Poston*. In *Kemler*, two Virginia judges requested an advisory opinion from the Judicial Ethics Advisory Committee on the propriety of voting in a political primary. 108 F. Supp. 2d at 531.[9] The Committee opined that such a vote would constitute partisan political activity and hence violate judicial ethics. *Id.* at 533. The plaintiff judges then sued

[7] The Board identifies a single example of Appellant Cooksey pointing someone towards his meal plan following the Board's investigation. Br. of Appellees at 25. This is plainly insufficient at the motion-to-dismiss stage to demonstrate that his speech has not been chilled. *See Blankenship*, 471 F.3d at 532-33 (rejecting motion to dismiss even though plaintiff had continued speaking because "[a] chilling effect need not result in a total freeze of the targeted party's speech").

[8] *See* full page string cite. Br. of Appellant at 33.

[9] It bears noting that, unlike this case, the judges in *Kemler* initiated the entire controversy by seeking the advisory opinion in the first place.

the Committee members on the ground that the advisory opinion chilled them from primary voting. *Id.* The plaintiff judges also sued members of the Judicial Inquiry Review Commission, which investigates judicial-ethics violations. *Id.*

The court ruled that the plaintiff judges lacked an injury-in-fact because none of the defendants—whether members of the Committee or the Review Commission—had the authority to enforce judicial ethics. *Id.* at 538. At most, the Committee could render advisory opinions and the Review Commission could investigate public complaints and refer meritorious ones to the Virginia Supreme Court. *Id.* at 532. Furthermore, it was pure speculation that a complaint would ever find its way to the Virginia Supreme Court because: (1) the judges would have to vote in a primary; (2) someone in the general public would have to find out; (3) someone would have to complain; (4) the Review Commission would have to agree with the Committee's advisory opinion that voting is unethical; and (5) the Review Commission would have to investigate the complaint and, if it were meritorious, refer it to the Supreme Court. *Id.* at 538.

Appellant Cooksey's circumstances could not be more different. First, unlike the Committee and Review Commission in *Kemler*, the State Board has the authority to conduct disciplinary proceedings against Appellant Cooksey. N.C. Gen. Stat. §§ 90-365(5), -367; 21 N.C. Admin. Code § 17.0116. Second, unlike the contingencies that had to occur in *Kemler* for a complaint to be lodged, a complaint

has already been lodged in this case, and the public nature of Appellant Cooksey's online activity makes it unlikely to escape continued attention. Third, whereas no entity with enforcement authority took a position in *Kemler* about primary voting, the Board unequivocally told Appellant Cooksey that his speech was illegal. Fourth, unlike the defendants in *Kemler*, which never investigated the plaintiff judges, the Board did investigate Appellant Cooksey and closed its investigation only because it had been effective at silencing him.[10] Finally, unlike the defendants in *Kemler*, the Board has threatened Appellant Cooksey with future monitoring—and the implicit threat of sanctions—if he resumes speaking in a manner that the Board deems illegal. Thus, *Kemler* is easily distinguishable, and Appellant Cooksey's self-censorship is more than sufficient for standing.

III. APPELLANT COOKSEY'S CLAIMS ARE RIPE.

Appellant Cooksey satisfies the two-part ripeness test, and the primary precedent upon which the Board relies, *International Academy of Oral Medicine and Toxicology v. North Carolina State Board of Dental Examiners*, 451 F. Supp. 2d 746 (E.D.N.C. 2006), is readily distinguished.

[10] The Board's claim that it was statutorily required to investigate the complaint against Appellant Cooksey is irrelevant; the Board did not merely investigate Appellant Cooksey, it instructed him on what he legally may not say.

A. Appellant Cooksey Satisfies the Two-Part Test for Ripeness.

Ripeness is a practical, not formalistic, inquiry ensuring that federal courts do not exercise jurisdiction over speculative controversies. *See, e.g.*, *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (describing ripeness inquiry as turning on "practical common sense" rather than "nice legal distinctions"). But neither the courts nor aggrieved citizens are required to tolerate strategic behavior by the government in which it forces citizen compliance in the real world but then pleads in court that the controversy is unripe because of some yet-unexhausted bureaucratic procedure. *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (concluding that describing government compliance order as merely "a step in the deliberative process" did not exempt action from judicial review). Instead, the ripeness inquiry asks two questions: (1) is the controversy sufficiently mature that it is fit for judicial determination; and (2) would the parties suffer hardship were the court to delay adjudication? *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Appellant Cooksey satisfies both prongs.

Regarding maturity, the Board argues that providing personal advice about diet is categorically illegal for all but state-licensed dietitians. The Board does not distinguish between paid and unpaid advice, between advice among friends or strangers, or between advice offered in a free Dear Abby-style column and advice rendered in a professional, private context where the listener might reasonably

expect to be surrendering personal judgment to the speaker. Because there is apparently no factual context in which the Board believes that Appellant Cooksey's individualized advice would be legal, there are no uncertainties about the Board's position and there is a mature legal controversy. *S.C. Citizens for Life, Inc. v. Krawcheck*, 301 F. App'x 218, 221 (4th Cir. 2008); *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties."); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 390 (9th Cir. 2001).

Appellant Cooksey just as easily satisfies the hardship prong. His loss of First Amendment rights is an irreparable harm. *Newsom v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

B. *International Academy* Is Inapposite.

The Board's belief that a claim is not ripe unless there is a formal administrative determination is also rooted in the Board's failure to understand the ripeness case on which it heavily relies, *International Academy*.[11]

In *International Academy*, the court found no injury because the government literally had not done anything to the plaintiffs. A low-level employee wrote a

[11] As a practical matter, this Court recognizes that there is often little difference between standing and ripeness. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("Analyzing ripeness is similar to determining whether a party has standing.").

"Do's and Don'ts" article for the dental board's newsletter, which described advertising metal-free dentistry as a "Don't." 451 F. Supp. 2d at 749. The dental plaintiffs sued on the ground that this "Don't" purportedly chilled their desire to advertise metal-free dentistry. *Id.* at 748. The court dismissed the suit on ripeness grounds, ruling that there was no indication that the "Don't" described in the newsletter could be imputed to the dental board. *Id.* at 750. Given the uncertainty over the dental board's position, the court suggested that the plaintiff dentists could have initiated a state administrative proceeding for securing a formal declaratory ruling from the dental board. *Id.* at 753.

The Board mistakenly concludes that a declaratory ruling is a *necessary* condition for ripeness, when all *International Academy* suggested was that such a ruling may be *sufficient*.[12] Further, such a ruling would have little relevance to this case because Appellant Cooksey's claims are ripe for all of the reasons that the claims in *International Academy* were not. There, the plaintiffs had not yet engaged in any of the allegedly prohibited advertising; here, Appellant Cooksey has published extensively. There, the plaintiffs were not investigated for advertising; here, Appellant Cooksey was investigated for his speech. There, the

[12] The Supreme Court has expressed serious concern about requiring speakers to seek declaratory rulings from government agencies even when the government has not taken direct action against them. *See Citizens United v. FEC*, 130 S. Ct. 876, 895-96 (2010) (comparing the advisory-opinion process to "licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit").

"Do's and Don'ts" list was written by a low-level employee for a general audience; here, the red-pen review was written by Defendants and the Executive Director in direct response to Appellant Cooksey's speech. There, the dental board never found that the plaintiffs did not comply with the statute; here, the Board found that Appellant Cooksey brought himself into compliance only after the red-pen review. There, the plaintiffs were not subject to monitoring and the dental board actually disavowed any interest in taking action against the plaintiffs for truthfully advertising metal-free dentistry, *id.* at 750-51; here, the State Board has said that it will monitor Appellant Cooksey.

Far more analogous to Appellant Cooksey's allegations is *Arch Mineral Corp. v. Babbit*, in which the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") told Arch Mineral Corporation via correspondence that it was presumed statutorily responsible for remediation at a mine that it had purchased. 104 F.3d 660, 663 (4th Cir. 1997). After Arch filed suit, the OSM asserted that the claims were not ripe because the OSM might reach a different conclusion in official administrative proceedings. *Id.* at 666. The Fourth Circuit recognized that "[f]or all practical purposes . . . the decision has been made," *id*, and found the controversy ripe, *id.* at 669. Similarly, the Board has for all practical purposes concluded after its three-month investigation that Appellant

Cooksey's personal advice on diet is illegal (a position it presses before this Court). Thus, his claims are ripe.

CONCLUSION

For the foregoing reasons, the district court's ruling granting the Board's motion to dismiss should be reversed, and this case should be remanded to proceed on the merits.

Respectfully submitted,

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Dated: January 2, 2013

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I hereby certify that on this 2nd day of January, 2013, I caused this Reply Brief of Appellant 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 2nd day of January, 2013, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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