IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HEATHER KOKESCH DEL CASTILLO,

Plaintiff,

v.

Civil Action No. 3:17-cv-00722

CELESTE PHILIP, MD, MPH, in her official capacity as Surgeon General and Secretary, Florida Department of Health,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

INTRODUCTION

The Department of Health's motion for summary judgment clarifies the central dispute between the parties. Plaintiff Heather Del Castillo is a certified health coach who wishes to give advice to Floridians on the age-old topic of diet, but may not do so without first becoming a fully licensed dietitian/nutritionist. Del Castillo contends that making it a crime to advise adults on what to buy at the grocery store is a restriction on speech that should be subject to First Amendment scrutiny. The Department, by contrast, argues that this is not a First Amendment case at all, and that Florida's law, at most, imposes an "incidental" burden on speech that should be reviewed under rational-basis scrutiny.

The Department is wrong. Speech about diet—whether general in nature or tailored to an individual—is fully protected by the First Amendment. The content-based burdens Florida's law imposes on speech about diet are direct, not incidental, and should be reviewed with strict scrutiny. Because the Department has not come close to satisfying strict scrutiny—or, indeed, any level of First Amendment scrutiny—this Court should deny the Department's motion for summary judgment and grant Plaintiff's cross-motion.

STATEMENT OF FACTS

The Department's statement of facts makes clear that there is no disagreement about the meaning or application of the Act at issue in this case. Simply stated, Del Castillo wishes to earn a living by speaking to other adults about what to buy at the grocery store, and the Act prohibits her from doing that.[1]

Although none of the material facts is seriously in dispute, Del Castillo believes that three aspects of the Department's statement of facts require additional clarity or emphasis. First, the Department's attempt to recast Del Castillo's dietary advice as "conduct" rather than speech is belied by the undisputed evidence of what Del Castillo actually did. Second, Florida's law operates to prohibit Del Castillo from offering dietary advice that is materially identical to advice that is widely available in books and on the Internet. Finally, the Department's statement of facts is most notable for what it does not contain: Any evidence that people in Florida are safer or healthier as a result of Florida's ban on dietary speech than they would be if Florida had no such ban.

[1] The Department devotes significant space to arguing that the Act applies to Del Castillo's speech and that she does not meet any of the exceptions to the Act. But Plaintiff does not dispute that the Act covers her speech—everyone agrees that it does. The question is whether the Department may, consistent with the First Amendment, prohibit Plaintiff from offering advice about food and nutrition to willing listeners for compensation.

I. Del Castillo's Holistic Health-Coaching Services Consisted Exclusively of Speech.

Heather Del Castillo's health-coaching services are fully described in Del Castillo's motion for summary judgment. Pl.'s Mot. Summ. J. at 2–4. For purposes of defeating the Department's cross-motion, however, really only one fact is relevant: The Department agrees that Del Castillo wishes to do only one thing—"talk to willing individuals about food for pay." Def.'s Mot. Summ. J. 16 (citing Del Castillo Dep. 78:8–10).

While the Department acknowledges that this sort of communication is unlawful in Florida, *see* Def.'s Mot. Summ. J. 16, it still argues that the Act's ban on this particular type of speech is, in fact, a regulation of "conduct." *See* Def.'s Mot. Summ. J. 21 (describing Del Castillo's speech as "incidental to the conduct of the profession") (citation omitted). But the record shows that all the "conduct" in which Del Castillo wishes to engage is communicative. For example, it is undisputed that Del Castillo does not (and has no desire to) perform any of the following services:

- Diagnose or treat any medical condition, Del Castillo Decl. ¶¶ 4, 7;
- Prescribe or administer medication, *id*. at ¶ 7;
- Draw blood or run lab work, *id*.; or

- Manipulate human tissue. *Id*.

Instead, Del Castillo simply wants to talk to other adults about diet and nutrition.

The Department asserts, incorrectly, that Del Castillo represented that she was "able to practice dietetics" or was a "health care professional." Def.'s Mot. Summ. J. 14. But those allegations are completely unsubstantiated. To the contrary, the record establishes that Del Castillo never described herself as someone who was licensed as a dietitian or nutritionist. Del Castillo Decl. ¶ 2. Indeed, Del Castillo was quick to correct anyone who accidentally misdescribed her as a dietitian or nutritionist. *Id*.

In defending its ban on dietary speech, the Department relies heavily on one instance in which Del Castillo worked with a client who had been previously diagnosed with a specific gene mutation. Def.'s Mot. Summ. J. 18–19. In working with that client, Del Castillo reviewed a list of prohibited foods provided by that client's doctor, and, based on that list, recommended foods that were not prohibited to the client. *See* Del Castillo Decl. ¶ 5. This real-world example shows the purely communicative nature of Del Castillo's services: Del Castillo ran no diagnostic tests, did not make the underlying diagnosis, made no recommendations for treatment, and did not create the list of prohibited foods. *Id*. Instead, she simply

used the information provided by the client's doctor to help her client select a healthy diet that avoided any prohibited foods. *Id*.

II. Department Confirms That a License Is Required to Share Information Available in Books and on the Internet.

Del Castillo has alleged that the Act does not apply to "dietary advice distributed through books, on television, or online"—mediums through which ideas and advice on diet (and other topical matters) are routinely exchanged and zealously debated. *See* Compl. ¶ 34. This means that while Del Castillo is still free to write a book or blog post, she must have a license if she wishes to individually recommend the recipes, philosophies, and habits advocated in those mediums. This restriction encompasses guidance on mainstream diets found on popular websites and in books that have sold millions of copies worldwide. *See* Pl.'s Mot. Summ. J. 7.

The Department admits that this is how the Act applies. *See* Defs.' Mot. Summ. J. 16 (stating that Del Castillo was "properly cited" for providing guidance on a popular dietary regimen). And while the Department has stopped short of contending that books and blogs about diet are *themselves* illegal under the Act, it has made it clear that it is unlawful to convey the information in those books or blogs in the context of providing individualized dietary advice. *See* Defs.' Mot.

Summ. J. 22–23 (stating that the Act "does not prohibit Plaintiff from writing books, articles, or a blog about nutrition"); *id*. at 16 (asserting that Del Castillo's guidance on the Whole30 Diet—a popular diet program advocated in the eponymously titled book—was illegal). Because Del Castillo often advised her clients to adopt already-popularized health and wellness philosophies, this prohibition rendered much of her business illegal. Del Castillo Decl. ¶¶ 3, 6.[2]

III. The State Has No Evidence That the Act Actually Prevents Harm.

The Department has presented no evidence that the Act furthers the state's interest in promoting health and safety. Instead, the Department relies only on the unsupported opinion of its expert, Dr. Gail Kauwell, who provided a series of anecdotes and instances of hypothetical harms to support the Department's theory that the Act keeps Floridians safe.

In particular, Dr. Kauwell seizes on Del Castillo's occasional promotion of the popular Whole30 Diet as posing a potential danger to the public. Dr. Kauwell

[2] Under the Act, therefore, popular programs like Nutrisystem and Jenny Craig are illegal in Florida unless each consumer has access to a licensed nutritionist. *See* Fla. Stat. § 468.505(j) (exempting "Any person who provides weight control services or related weight control products, *provided* . . .consultation is available from . . . a licensed dietitian/nutritionist, a dietitian or nutritionist licensed in another state that has licensure requirements considered by the council to be at least as stringent as the requirements for licensure under this part, or a registered dietitian" (emphasis added)).

describes a hypothetical scenario in which a health coach recommends the Whole30 Diet to an expectant mother (or potentially expectant mother) to her detriment, because the health coach is unaware that the Whole30 Diet's carbohydrate limitation restricts the intake of vitamin B9, an important prenatal vitamin. But the record lacks any indication that this risk is greater for women who learn of and are persuaded to adopt the Whole30 diet by Del Castillo's advice as opposed to those who learn of and are persuaded to adopt the Whole30 diet by the popular book. Nor has the Department provided any evidence that Del Castillo is unaware of the importance of vitamin B9 for women of childbearing age, or that she advocates the Whole30 Diet before or during pregnancy.

Ultimately, the Department has provided no evidence to support its assertion that the Act promotes health and safety in a narrowly tailored way. *See* Pl.'s Mot. Summ. J. 10–13. Instead of any such scientific data, the Department proffers anecdotal newspaper clippings from the 1980s, a 30-year old episode of the Oprah Winfrey show, and a series of potential (but nonexistent) harms suffered by hypothetical citizens. These anecdotes and speculation are analyzed in Plaintiff's motion for summary judgment. *See* Pl.s' Mot. Summ. J. 10–13. In short, although Plaintiff acknowledges that it is possible to imagine situations where a person may be harmed by unquestioningly following grossly negligent dietary advice—such as

the woman Dr. Kauwell cites who fasted for 47 days while at a "health farm" in California—the Department has proffered no evidence that Florida's total prohibition on unlicensed dietary advice is a narrowly tailored way to address such extreme and unusual situations. Indeed, the Department cannot point to even one such incident in the last 30 years. As described in greater detail below, that is insufficient for the Department to meet its burden under the First Amendment.

Argument

This is a First Amendment case. Plaintiff Heather Del Castillo wishes to speak with willing customers and whether she may do so depends on what she says. If she offers generalized advice about diet, such as one might give at a public lecture, her speech is legal; if she offers individualized advice about diet, her speech is illegal. That is a textbook example of a content-based restriction on speech that should be reviewed with strict scrutiny.

The Department tries to escape this conclusion, arguing that Florida's prohibition on individualized dietary advice does not regulate constitutionally protected speech at all, and thus should, at most, be judged under rational-basis review. But none of the Department's arguments is persuasive. The Department cannot meet the high standard for showing that speech about diet is—like obscenity or incitement—a historically recognized category of unprotected speech.

Equally unavailing is the Department's argument that Florida's prohibition on unlicensed dietary advice imposes merely an "incidental" burden on speech, an argument the U.S. Supreme Court has already rejected. Nor can the Department evade First Amendment scrutiny based on this Circuit's decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), or under Justice White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181 (1985), neither of which can support the weight the Department places on it.

Because Del Castillo's speech is fully protected, the Department was obligated to show that the burdens Florida law imposes on her speech are narrowly tailored to serve a compelling government interest. But the Department has made no effort to satisfy this demanding standard—or even the lesser standard of intermediate scrutiny. Thus, this Court should deny the Department's motion for summary judgment and grant Del Castillo's cross-motion.

I. The First Amendment Fully Protects Del Castillo's Speech.

This Court should analyze Florida's law as a regulation of fully protected speech for three reasons. First, the Department has failed to show that individualized advice about diet is a historically unprotected form of speech under *United States v. Stevens*, 559 U.S. 460 (2010). Second, Del Castillo's speech is not merely "incidental to" occupational conduct. Instead, the only "conduct" in which

she engages is speech. Thus, under binding Supreme Court precedent, the burdens Florida places on that speech are direct, not incidental. Finally, neither this Circuit's decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), nor Justice White's non-controlling concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), provides a basis for treating Del Castillo's speech as anything other than fully protected by the First Amendment.

A. There is no exception to the First Amendment for speech about diet.

The threshold question in this case is whether speech about diet falls within the scope of the First Amendment's protection. There can be no question that it does. As a general matter, "the government lacks the power to restrict expression because of its message, ideas, subject matter, or content." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011). The Supreme Court has recognized only "a few limited exceptions for historically unprotected speech, such as obscenity, incitement, and fighting words." *Id*. (collecting cases).

The Supreme Court has never suggested that dietary advice shares company with child pornography and true threats, and for good reason: The test for recognizing unprotected categories of speech is extremely demanding. As the Supreme Court recently clarified, federal courts may not recognize new

unprotected categories of speech based on an ad hoc balancing of social costs and benefits. Instead, the question is whether the category of speech has, "from 1791 to the present," been considered "historically unprotected." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (identifying well-established categories of historically unprotected speech).

The Department has offered no evidence of any kind to make this showing, nor could it. People have been offering advice on diet and nutrition—including individualized advice—since time immemorial, and no state in the country restricted who could offer this advice until the 1980s. And "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." *Brown*, 564 U.S. at 792 (citations and quotations omitted). Accordingly, this Court should review the burdens on Del Castillo's speech the same way it would review any other burdens on fully protected speech.

B. The Act imposes a direct—not incidental—burden on Del Castillo's speech.

Because it cannot show that Del Castillo's speech is categorically unprotected, the Department instead attempts to redefine her speech as professional "conduct" that Florida may regulate without implicating the First Amendment. Def.'s Mot. Summ. J. 21–23. This position, however, has already been flatly rejected by the U.S. Supreme Court in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In that case, the Court considered a federal statute that prohibited individuals and groups from providing "material assistance" to designated terrorist organizations—a prohibition which extended to providing direct, expert advice to those groups on diplomacy and other means of nonviolent conflict resolution. *Id*. at 8.

The government in *Holder* made the same argument the Department makes here: that the challenged law generally functioned as a restriction on conduct, with only an incidental burden on speech.[3] And the U.S. Supreme Court unanimously

[3] Unlike the Department here, the government in *Holder* did not argue that this eliminated *all* First Amendment scrutiny. Instead, the government merely contended that the Court should review the law with intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). *See Holder*, 561 U.S. at 26–27.

rejected that argument.[4] In doing so, the Court set forward a simple test for distinguishing regulations of speech from regulations of conduct: If, as applied to the plaintiff, the "conduct triggering coverage under the statute consists of communicating a message," then the law is properly analyzed as a content-based restriction on speech. *Id.* at 28. Thus, the plaintiffs in *Holder*—who were prohibited from communicating "advice derived from 'specialized knowledge'" but not from communicating "general or unspecialized knowledge," *id.* at 27—were entitled to the full protection of the First Amendment.

These principles apply with crystal clarity here. Del Castillo wants to give dietary advice. If she gives generalized advice, such as by publishing a book or giving a public lecture, her speech is legal. If she gives individualized advice, her speech is illegal. Under *Holder*, that is a content-based restriction on speech. This Court should thus reject the Department's invitation to engage in the "dubious constitutional enterprise" of "characterizing speech as conduct," *Wollschlaeger v. Gov. of Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc), and should

[4] Although the Court split 6-3 on whether the law challenged in *Holder* was constitutional, all nine Justices agreed that burdens on individualized expert advice are burdens on speech, not conduct.

instead analyze the Act just as it would any other content-based restriction on speech.

C. Neither the Eleventh Circuit's decision in *Locke* nor Justice White's concurrence in *Lowe* can save the Act.

In the face of this precedent, which the Department neither cites nor discusses, the Department relies almost exclusively on two opinions: the Eleventh Circuit's decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), and Justice White's concurring opinion from the U.S. Supreme Court's 1985 decision in *Lowe v. SEC*.[5] Neither of these can support the weight the Department places on it.

Locke involved a First Amendment challenge to Florida's licensing scheme for interior designers.[6] The plaintiffs alleged that this scheme unconstitutionally burdened speech, because it swept in large amounts of purely aesthetic advice. But the Eleventh Circuit rejected that argument, concluding in a brief discussion that "[t]here is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Id.* Direct, personalized speech, the court held, was merely

[5] The Department's citation to *Lowe* does not note that it is citing only to Justice White's concurring opinion, rather than to a holding of the Court. *See* Def.'s Mot. Summ. J. at 21–22.

[6] The Institute for Justice, which represents Del Castillo, represented the plaintiffs in *Locke*.

"occupational conduct," the restriction of which "does not implicate constitutionally protected activity under the First Amendment."

In support of this proposition, the Eleventh Circuit relied on Justice Byron White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181, 228–30 (1985) (White J., concurring). In that concurrence, Justice White argued that there was a constitutionally significant distinction between regulating speech to the public at large and regulating the speech of "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Id.* at 232 (White, J., concurring). In Justice White's view, the former was pure speech while the latter was the "practice of a profession" and not subject to First Amendment protection. *Id.*

Justice White's opinion did not control the outcome in *Lowe*; a majority of the Court decided the case on statutory grounds and completely avoided the constitutional question. And since it first appeared over three decades ago, Justice White's concurrence has never been cited or had its reasoning adopted by any other member of the Court. To the contrary, just three years after *Lowe*, the Supreme Court implicitly rejected Justice White's concurrence, noting that the Court had never held that occupational licensure was "devoid of all First

Amendment implication" or "subject only to rationality review." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988).

This Court should not feel bound either by *Locke* or Justice White's concurrence in *Lowe* because both are in fatal conflict with later Supreme Court and en banc Eleventh Circuit precedent. The central premise of *Locke*—that there is a constitutionally significant distinction between generalized advice and individualized advice—was expressly rejected by the Supreme Court in *Holder*. Indeed, *Holder* establishes that the very act of distinguishing between individualized and general advice is *itself* a content-based distinction that triggers strict scrutiny. This holding has since been reinforced by the Supreme Court's decision in *Reed v. Town of Gilbert*, which confirms that laws that "defin[e] regulated speech by particular subject matter" are "obvious[ly]" content-based and subject to strict scrutiny. 135 S. Ct. 2218, 2227 (2015).

The Department's reliance on *Locke* also ignores the en banc Eleventh Circuit's recent and clear signals that *Locke* is no longer good law (or, at most, should be limited to its facts). Specifically, in *Wollschlaeger v. Governor of Florida*, the en banc Eleventh Circuit invalidated a Florida law that prohibited doctors from routinely asking their patients questions about gun ownership, concluding that the law violated the First Amendment. There, as here, the

government argued that its prohibition regulated professional conduct, rather than speech. But the *en banc* Eleventh Circuit rejected that argument and refused to "subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review." *Wollschlaeger*, 848 F.3d at 1311.[7]

The en banc Eleventh Circuit went on to cast doubt not only on *Locke*, but on other circuit court rulings that had similarly embraced Justice White's concurrence in *Lowe*. For example, the court analogized *Locke* to the Ninth Circuit's ruling in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), before observing "[t]here are serious doubts about whether *Pickup* was correctly decided," and specifically criticizing the Ninth Circuit for engaging in the "dubious constitutional enterprise" of "characterizing speech as conduct." *Wollschlaeger*, 848 F.3d at 1309. This Court should, accordingly, decline the Department's invitation to engage in that same dubious constitutional enterprise here.

In short, in resolving this case, this Court should rely on the most recent and most authoritative precedent from this Circuit and from the U.S. Supreme Court.

[7] Because the Eleventh Circuit concluded that the challenged law could not survive even intermediate scrutiny, it did not resolve whether strict or intermediate scrutiny should apply. *Wollschlaeger*, 848 F.3d at 1301. Of course, under Supreme Court precedent, strict scrutiny is the default standard for all content-based burdens on speech. *Reed*, 35 S. Ct. at 2227.

That precedent confirms the commonsense intuition that a law that prohibits certain people from speaking about certain topics is a content-based restriction on speech, and must be reviewed with strict scrutiny.

II. The Department Has Made No Attempt to Carry Its Burden Under the First Amendment.

Establishing that the First Amendment protects speech about diet essentially ends the analysis, because the Department has made no effort to satisfy strict scrutiny or, indeed, any level of First Amendment scrutiny. Instead, the Department's entire constitutional argument is that Florida's law is subject only to rational-basis review. Def.'s Mot. Summ. J. at 22–23. For the reasons outlined above, the Department is wrong and its failure to even attempt to satisfy First Amendment scrutiny is dispositive. But even if the Department had tried to carry its burden, it could not have done so successfully, because the Act is not appropriately tailored to any sufficiently compelling state interest.

First, it is not at all clear that the objectives Florida's law seeks to promote are "compelling" for purposes of the First Amendment. Although the Department cites the Supreme Court's 40-year-old decision in *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975), for the proposition that "States have a compelling interest in the practice of professions within their boundaries," *see* Def.'s Mot. Summ. J. 23,

that decision is of little help to them. *Goldfarb* is not a First Amendment case at all—it is an antitrust case—and its passing reference to a state's "compelling" interest in regulating professions had nothing to do with strict-scrutiny analysis.

At most, the Department can rely on the state's general interest in promoting public health and safety. But while that interest is certainly legitimate, the Supreme Court has expressed extreme skepticism of laws that attempt to promote public health and safety by restricting the flow of information to protect people from making (what the government believes are) unhealthy decisions. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996) ("[A] state's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.") (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*, 425 U.S. 748, 770 (1976)); *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

Even if the government had a compelling interest in manipulating the information to which consumers have access to promote public health, the

Department has offered no evidence to establish that requiring a license to speak on matters of diet and nutrition is a narrowly tailored means for promoting that interest. *See Reed*, 135 S. Ct. at 2227. The Department's failure to supply this evidence is not surprising, because the law is massively underinclusive. Floridians have access to enormous amounts of dietary advice—in books, online, and on television—that is materially identical to the advice that Del Castillo offered. Yet the Department has offered no legitimate neutral justification for why it must silence Del Castillo while leaving this materially indistinguishable advice unregulated.

The Department has also offered no evidence (because none exists) and cites no studies (because none have been conducted) to suggest that the Act accomplishes *anything at all*. The Department's expert—a Ph.D. professor of dietetics with decades of experience and a vast familiarity with the dietetics literature—was unable to point to any evidence that the Act makes people in Florida safer than people in states that do not regulate dietary advice. In other words, the Department cannot even show that the Act is meaningfully better than

doing nothing at all; let alone that it is better than a more narrowly tailored, less burdensome alternative such as regulating the title "licensed dietitian."[8]

Rather than address these more narrowly tailored options, the Department simply asserts that "less restrictive means of regulation are not available," *see* Def.'s Mot. Summ. J. 7. But that is just not true. The Department's expert confirmed that numerous states regulate only who may use titles such as "licensed nutritionist" or "certified dietitian," without prohibiting anyone from giving individualized dietary advice. The Department has an obligation—even under intermediate scrutiny—to present evidence for why these less burdensome alternatives were insufficient. *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) ("The government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests."). Its failure to do so is fatal to the Act. *See Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("If the First Amendment means anything, it means that regulating

[8] The Department gestures at the risks associated with, for example, insufficient folic-acid intake by women of childbearing age, Def.'s Mot. Summ. J. at 18–19. But nowhere does the Department argue, much less prove, that these risks are greater for people who based their dietary choices on individualized advice rather than advice published in books or aired on television. Nor has the Department offered any evidence that women in states that do not regulate who may give dietary advice suffer greater incidence of these potential harms than women in states that do regulate this advice.

speech must be a last—not first—resort. Yet here it seems to have been the first strategy the government thought to try.") (quoting *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002)).

Conclusion

For these reasons, Plaintiff requests that this Court deny Department's Motion for Summary Judgment and grant Plaintiff's cross-motion.

Dated this 14th day of June 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief complies with Local Rule 7.1(F) and 56.1(E) because it contains 4,232 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2018, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT** was filed using the Court's CM/ECF system and served on the following counsel of record:

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