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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The Department rests its entire defense of Florida's Dietetics Practice Act on the so-called "professional speech doctrine." Under that doctrine, laws regulating speech by state-identified "professionals" fall wholly outside the scope of the First Amendment. Unfortunately for the Department—but fortunately for Plaintiff and for speakers throughout the country—the U.S. Supreme Court on Tuesday of this week definitively rejected that doctrine. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Family & Life Advocs. v. Becerra*, No. 16-1140, 2018 WL 3116336, at *7 (S. Ct. June 26, 2018) (*NIFLA*).[1] Instead, with only two narrow exceptions that do not apply here, a content-based regulation of speech by "professionals" is subject to strict scrutiny, just like any other content-based regulation.

The *NIFLA* ruling makes this an easy case. As applied to Ms. Del Castillo, Florida's Dietetics Practice Act regulates speech based on its content. Content-based regulations of speech are subject to strict scrutiny. The Department has made no effort to satisfy strict scrutiny or, indeed, any level of First Amendment

[1] A copy of the Supreme Court's ruling is attached to this brief as Exhibit 1.

scrutiny. Nor has the Department identified any material facts that are in dispute. Thus, Plaintiff is entitled to summary judgment.

I. *NIFLA* Rejected the Professional Speech Doctrine and Confirmed That This Case Is Governed by Ordinary First Amendment Principles.

As the parties' earlier briefing has made clear, the central legal dispute between Ms. Del Castillo and the Department is whether this is a First Amendment case. To Ms. Del Castillo, the answer seems obvious: She wants to give people dietary advice, and the government is preventing her from doing that. But in the Department's view, Florida's law cannot be a content-based regulation of speech, cannot impose direct burdens on speech, and, indeed, cannot implicate the First Amendment at all. This is because, the Department argues, "any restriction the Act may impose upon speech is merely incidental to its regulation of the profession of dietetics and nutritional counseling." Def.'s Mem. Opp'n. Pl.'s Mot. Summ. J. at 9. To support its claim, the Department relies on the Eleventh Circuit's ruling in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), and other lower-court rulings that have adopted this so-called "professional speech doctrine."

Plaintiff explained in her opening and response briefs why the professional speech doctrine was inconsistent with decades of Supreme Court precedent, and why the en banc Eleventh Circuit's ruling in *Wollschlaeger v. Governor of*

Florida, 848 F.3d 1293 (11th Cir. 2017), had fatally undermined *Locke*. Pl.'s MSJ at 20–23; Pl.'s Resp. to Def.'s MSJ at 14–18. But now the U.S. Supreme Court has removed all doubt: In *NIFLA v. Becerra*, decided two days ago, the Court expressly rejected the professional speech doctrine.

The plaintiffs in *NIFLA* were "crisis pregnancy centers"—"pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." *NIFLA*, 2018 WL 3116336, at *4. In 2015, California enacted a law that required these centers to disclosure information to their clients about the availability of state-funded abortions. The centers sued, arguing that this compelled speech violated their First Amendment rights. But the Ninth Circuit upheld the law, invoking the same "professional speech doctrine" that the Eleventh Circuit adopted in *Locke* and that the Department urges here.

The Supreme Court reversed and struck down the disclosure requirements, holding that "neither California nor the Ninth Circuit ha[d] identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id*. at *12. Treating "professional" speech that way, the Court reasoned, would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id*.

at *11. But "[s]tates cannot choose the protection that speech receives under the First Amendment…." *Id*.

Instead, there are only two situations in which states enjoy more flexibility to regulate professional speech, neither of which applies here.

First, the Supreme Court has applied lower scrutiny "to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id*. at *8 (citations omitted). This does not apply here because the Act is not a disclosure law—it prohibits speech—and because Ms. Del Castillo's dietary advice is not commercial speech.[2]

Second, "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id*. (citation omitted). To be sure, the Department describes Ms. Del Castillo's dietary advice as "the profession of dietetics and nutritional counseling" and the burden imposed on her advice as merely

[2] Although Ms. Del Castillo is engaged in commerce, her speech is not "commercial speech" as the Supreme Court has defined that term. "[T]he core notion of commercial speech [is] speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quotation marks and citation omitted). Even where courts have extended the doctrine beyond this basic core, they have done so only to include things like "material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009).

"incidental" to the regulation of those professional services. *See, e.g.*, Def.'s Mem. Opp'n. Pl.'s Mot. Summ. J. at 9. But the Court in *NIFLA* and other recent decisions have made clear that this exception does not apply when the "professional conduct" being regulated is itself speech. *See, e.g.*, *Holder v. Humanitarian Law Project*, 562 U.S. 1, 27–28 (2011). Instead, this exception allows the government to regulate *non-expressive conduct* even though speech may be involved in facilitating that conduct. For example, the Court has held that the government can require doctors who perform abortions (a type of non-expressive professional conduct) to make certain factual disclosures to their patients. *See NIFLA*, 2018 WL 3116336, at *9–10 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). Here, however, the Act "is not tied to a procedure at all," *id.* at *10; Ms. Del Castillo wants to do—and was fined for doing—only one thing: talking to people about their diet. Thus, because the only "conduct triggering coverage under the statute consists of communicating a message," *Holder*, 561 U.S. at 28, the Department cannot take advantage of this narrow exception.

In short, *NIFLA* confirms Ms. Del Castillo's commonsense intuition that a law that prohibits her from speaking to people about diet is a regulation of speech.

Like *NIFLA*, this is an ordinary First Amendment case, and this Court should decide it using ordinary First Amendment principles.[3]

II. Under Ordinary First Amendment Principles, the Act Is a Content-Based Regulation of Speech and Is Subject to Strict Scrutiny.

As Plaintiff explained in her Motion for Summary Judgment, laws that are triggered by speech of a particular content are content-based. Pl.'s Mot. Summ. J. at 17 (citing *Holder*). Florida's regulation of dietary speech is content-based in at least two ways. First, it is subject-matter based: It prohibits Ms. Del Castillo from being paid for speech about diet, rather than speech about any other subject. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (holding that "[g]overnment regulation of speech is content based if . . . [it] defin[es] regulated speech by particular subject matter"). Second, Florida's law makes distinctions between different types of speech about diet: It applies to individualized advice, but not to general advice. *See Holder*, 561 U.S. at 27 (holding that a law is content-based where speech that "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' . . . is barred," but speech that "imparts only general or

[3] The Department spends much of its response brief arguing that Florida's regulation of speech about diet survives rational-basis review under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because *NIFLA* confirms that this is a First Amendment case—and so cannot be subject to rational-basis review—this Court need not consider those arguments.

unspecialized knowledge" is not).[4] As a result, Florida's law is content-based and subject to strict scrutiny.

The Department makes two counterarguments. First the Department argues that any burden Florida's law imposes on Ms. Del Castillo's speech is "merely incidental to the regulation of dietetics and nutritional counseling," and so "is not subject to *any* degree of First Amendment scrutiny." Def.'s Mem. Opp'n. Pl.'s Mot. Summ. J. at 11 (emphasis in original). This is the argument that the Supreme Court rejected in *NIFLA*, and so needs no further discussion.

Second, the Department argues that Florida's prohibition on Ms. Del Castillo's speech is not content-based because "[s]he can communicate about dietetics and nutrition to anyone she wants . . . provided she does not do so for pay." *Id*. at 5. Under the Department's theory, it is the fact of *payment*, rather than the content of Ms. Del Castillo's speech, that triggers regulation, and so Florida's law does not implicate the First Amendment at all.

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[4] Florida's law is also speaker-based because it prohibits speech only by people whom the Department has not licensed. The Supreme Court has separately held that speaker-based restrictions—like content-based restrictions—receive strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565–66 (2011); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.")

This second argument adds nothing to the first. After all, most professionals get paid for their work and that made no difference to the Court in *NIFLA*. And it's not as if the Act regulates all paid speech regardless of its content—the Act allows Ms. Del Castillo to give paid advice about anything under the sun, except diet.

In any event, the U.S. Supreme Court expressly rejected this second argument decades ago in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). That case concerned the constitutionality of New York's "Son of Sam" law, which forbade criminals from profiting from books written about their crimes. Just as the law here applies only to compensated speech on the subject of diet, New York's law applied only to compensated speech on the subject of one's crimes. New York's law imposed no limit on speakers receiving income from other sources, including for speech on topics other than their crimes.

The Supreme Court unanimously agreed that New York's law was content-based, holding that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115.[5] Indeed, the Court believed this conclusion was "so

[5] Justices Blackmun and Kennedy concurred separately, but agreed that the law was content-based. Justice Thomas took no part in the consideration of the case.

'obvious' as to not require explanation." *Id.* (*citing Leathers v. Medlock*, 499 U.S. 438, 447 (1991)). Even so, the Court provided a commonsense explanation: The Son of Sam law was content-based because it "singles out income derived from expressive activity for a burden the state places on no other income, and it is directed only at works with a specified content." *Id.* Thus, the Court reviewed the law with strict scrutiny, which it could not survive.

Simon & Schuster was consistent with the rule—"well settled" both then and now—that "a speaker's rights are not lost merely because compensation is received." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Nor could the rule be otherwise, because any other rule would grant the government vast power to suppress speech.

The Department implicitly concedes as much. Responding to Plaintiff's argument that Florida's law is unconstitutionally underinclusive because it excludes a large amount of speech materially identical to Plaintiff's, the Department argues that "[i]f . . . the Act were extended to apply to newspapers, books, [or] television shows . . . it would constitute a content-based restriction on speech subject to strict scrutiny." Def.'s Mem. Opp'n. Pl.'s Mot. Summ. J. at 11. That's correct—the government cannot prohibit the journalists, authors, and television personalities who produce that speech from being paid for their efforts

unless it can satisfy the high bar of strict scrutiny. But, as *NIFLA* confirms, that same rule applies to individualized advice like Ms. Del Castillo's.

Applying these principles here, Florida's law, as applied to Ms. Del Castillo, is a content-based restriction on speech. Ms. Del Castillo wants to talk with paying clients, and whether she may do so depends on what she says. If she wants to give individualized advice about diet, she must do so for free. If she does so for pay, the government can fine her or throw her in jail. That is all that the First Amendment requires to trigger strict scrutiny.[6]

III. The Department Has Not Carried Its Burden Under Any Level of First Amendment Scrutiny.

Because binding precedent confirms that this is a First Amendment case, this case is also easy to resolve. As explained in Plaintiff's earlier briefing, under strict scrutiny—or, indeed, any level of First Amendment scrutiny—the Department had an affirmative burden of showing that Florida's prohibition on dietary advice by

[6] The Department argues in passing that Florida's law is not content-based—despite facially singling out speech about diet for regulation—because the government did not enact the law "because of agreement or disagreement with the message [dietary advice] conveys." Def.'s Mem. Opp'n. Pl.'s Mot. Summ. J. at 4 (quoting *Crawford v. Lungren,* 96 F.3d 380, 384 (9th Cir. 1996)) (additional citation omitted). But the Supreme Court rejected that argument in *Reed*. 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.") (citation omitted).

unlicensed speakers addressed a real problem, in a meaningful way, while burdening no more speech than necessary. *See* Pl.'s Mot. Summ. J. at 23–27; Pl's Resp. Def.'s Mot. Summ. J. at 18–22.

The Department has made no effort to carry this burden. Indeed, the Department's response brief does not contain even a single citation to record evidence. Nor has the Department alleged that there are any material facts in dispute that would preclude summary judgment. That is dispositive. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.")

CONCLUSION

For the reasons explained above, Plaintiff requests that this Court grant Plaintiff's motion for summary judgment, deny the Department's cross-motion, and hold that Florida's Dietetics/Nutrition Practice Act is unconstitutional as applied to Heather Del Castillo and other similarly situated speakers.

Dated: June 28, 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 2,099 words.

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CERTIFICATE OF SERVICE

I certify that on June 28, 2018, a copy of **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was filed using the Court's CM/ECF system and served on the following counsel of record:

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