STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

CASE TYPE: Other Civil

Christopher Johnson,

Plaintiff,

vs.

Minnesota Board of Veterinary Medicine, Jeremy Geske, Meg Glattly, John Lawrence Frederick Mehr, Michael Murphy, Susan Osman, Joanne Schulman, in their official capacities as members of the aforementioned Board and John King, in his capacity as the executive director of the aforementioned Board,

Defendants.

Court File No. 27-CV-06-16914

The Honorable Tony N. Leung

PLAINTIFF'S POST-TRIAL BRIEF

INTRODUCTION

Unlike some states, Minnesota has an established public policy against unreasonable occupational licensing restrictions. As demonstrated below, that policy is expressed not only in constitutional case law but also in statutory law, which provides that "no regulation shall be imposed upon any occupation unless ***required*** for the safety and well being of the citizens of the state." Minn. Stat. 214.001, subd. 2 (emphasis added).

This case presents two straightforward questions about that policy: first, is it judicially enforceable, and second, does Minnesota's regulation of horse teeth floaters violate it? The answer to both questions is plainly yes.

Chris Johnson would like to float horses' teeth for a living. He is well-trained, experienced, and highly skilled. Yet the State of Minnesota says he may not perform that work

unless he spends four years and $130,000 on a mostly irrelevant veterinary education that devotes a grand total of forty minutes to the subject of horse teeth floating. Alternatively, Chris may attempt to navigate a nearly impossible set of hurdles to become the first IAED-certified equine dentist in the entire State of Minnesota, after which he will have the privilege of working as the glorified apprentice to a state-licensed veterinarian (if he can find one willing to "supervise" him) for the rest of his life.

By contrast, if Chris wanted to earn a living filing down horses' hooves instead of their teeth, or sawing the horns off of cattle, or castrating sheep and chopping off their tails, or even cutting down pigs' teeth and trimming their tusks—he could do all of those things with no training, no experience, and, most importantly, no license of any kind. That is the very definition of arbitrary, and it cannot be reconciled with Minnesota's longstanding policy against unreasonable government regulation of the right to earn an honest living.

TABLE OF CONTENTS

Page

INTRODUCTION 1

PROPOSED FINDINGS OF FACT. 5

A. Horse Teeth Floating. 5

B. Christopher Johnson's Training from Jim Johnson. 5

C. Minnesota Requires a License to Float Horses' Teeth But Not to Perform Other Similar Animal Husbandry Practices 6

D. There Is No Licensing Requirement for Farriers Even Though Their Work Presents Greater Risks and Requires More Knowledge Than Teeth Floating. 6

1. Farriers Maintain Horses' Basic Health. 7

2. Farriers Perform Therapeutic Treatments. 7

3. Trimming and Shoeing Horses' Hooves is an Invasive Procedure That Presents Potential Risks to the Horse and the Farrier. 8

E. Only Three Classes of People May Float Horses' Teeth for Pay in Minnesota. 9

1. Veterinarians Receive Little if any Training in Floating Horses' Teeth. 10

2. Minnesota Requires Horse Teeth Floaters to be Both IAED-Certified Equine Dentists, Even Though Floating Involves Only a Small Part of Dentistry, and Forever Supervised by a Large Animal Veterinarian. 12

3. Minnesota Allows Regular Employees of a Horse Owner to Float Teeth with No Regulation or Oversight of Any Kind, But Not Independent Contractors Like Chris Johnson. 15

PROPOSED FINDINGS OF LAW 16

I. EQUAL PROTECTION. 16

A. The Minnesota Constitution's Heightened Equal Protection Test. 16

1. Imposing Onerous Licensing Requirements on Horse Teeth Floating While Not Licensing Similar Animal Husbandry Practices at All Violates Minnesota's Equal Protection Clause. 17

2. Defendants' Attempt to Distinguish Horse Teeth Floating from Other Husbandry Practitioners Is Unpersuasive. 23

3. Imposing Onerous Licensing Requirements on Independent Contractors Who Float Horses' Teeth While Allowing Regular Employees of Horse Owners to Float with No State Regulation or Oversight Violates Minnesota's Equal Protection Clause. 25

B. Right to Equal Protection Under the U.S. Constitution. 28

II. RIGHT TO DUE PROCESS UNDER THE MINNESOTA AND U.S. CONSTITUTIONS. 30

A. Requiring Horse Teeth Floaters to Be Licensed Veterinarians Violates Due Process Because Veterinarians Receive Little if Any Training in Horse Teeth Floating and Are no More Qualified to Perform that Service Than Non-Veterinarian Practitioners Like Jim and Chris Johnson. 34

1. Veterinarians Receive Little if Any Training in Horse Teeth Floating. 34

2. The Licensing Exam for Veterinarians Does Not Significantly Test Horse Teeth Floating. 36

B. The Alternative Licensing Route of Becoming IAED-Certified and Working Under the Supervision of a State-Licensed Veterinarian Violates Due Process Because IAED Certification is Nearly Impossible to Obtain and Must Be Supplemented with What Amounts to a Permanent Apprenticeship 36

1. The IAED's Sponsorship Requirement is Unreasonable. 37

2. The IAED's Requirement of Performing and Documenting 250 Cases of Equine Dentistry is Nearly Impossible to Fulfill and Is Mostly Irrelevant to a Floater's Training. 38

3. The IAED's Written Examination Is Vastly Overinclusive. 41

4. Requiring IAED-Certified Floaters to Work under a State-Licensed Veterinarian Amounts to a Permanent Apprenticeship. 43

5. Defendants' "Partial Deprivation" Argument is Unsupported By Case Law. 44

III. PUBLIC POLICY AGAINST UNREASONABLE OCCUPATIONAL REGULATION. 45

A. Requiring Floaters to Be Licensed Violates Minnesota's Declared Public Policy on Occupational Regulations. 46

B. Occupational Regulations Must Have a Substantial Relationship to the Public Good and Not Serve Primarily Private Interests, as the Challenged Restrictions on Horse Teeth Floating Plainly Do. 47

CONCLUSION 50

PROPOSED FINDINGS OF FACT

A. Horse Teeth Floating.

Horses' teeth grow throughout their lifetimes and need to be filed down or "floated" from time to time to ensure proper length and alignment. Trial tr. 102:17-20; 428:10-13. Floating is a painless procedure that removes naturally occurring extensions on a horse's teeth called "points." Stipulations of Fact, ¶¶ 2.t and 2.u; Trial tr. 35:6-9, 155:9, 487:8-10.

Floating is a relatively simple animal husbandry procedure that presents minimal risks to the animal and practitioner. Indeed, Chris Johnson's father, Jim has had only one accident floating the teeth of nearly 20,000 horses in 14 years. Trial tr. 73:16-24. Notably, neither the Defendants nor any of their witnesses offered any scientific evidence that horse teeth floating presents any serious health, safety or welfare concerns for animals or humans. E.g., Trial tr. 88:23-89:5; 149.21-150:16.

B. Christopher Johnson's Training from Jim Johnson.

Chris Johnson began training with his father in March of 2004. Trial tr. 19:23-24.

- For the first month, Chris felt the horse's teeth before each float to identify the teeth that needed floating and, after Jim's floating was complete, Chris touched the same teeth to learn the feel of properly floated teeth. Trial tr. 21:15-22; 26:22-27:3.

- Chris also learned the anatomy of a horse's mouth from a deceased horse's skull. Trial tr. 27:7-13. Using the skull, Jim taught Chris the horse's dental structure and how to practice strokes to achieve the right angle and muscle memory needed for a good float. Trial tr. 27:14-24.

- Jim also gave Chris a copy of *Sound Mouth-Sound Horse, The Gager Method of Equine Dental Care*, to use as a reference and training manual. Trial tr. 32:6-8.

- Finally, Chris learned horsemanship and how to control horses by approaching them carefully, rubbing their faces, and waiting for them to display submission by lowering their heads. Trial tr. 16:24-17:13. Good horsemanship enables floaters to avoid sedating horses, something most veterinarians do but lay floaters like Chris do not. Trial tr. 74:6 75:10; 92:21-23.

After training with his father for four months, Chris began floating horses' teeth full time but stopped upon learning that Defendants mailed a cease-and-desist letter to his father on October 6, 2004. Pl.'s Trial Ex. 1; Trial tr. 31:20-23; 44:11- 45:14.

C. Minnesota Requires a License to Float Horses' Teeth but Not to Perform Other Similar Animal Husbandry Practices.

Taking care of animals on a farm involves a wide array of animal husbandry practices, from castration, to birthing, to filing down and leveling a horse's hooves and teeth. Minnesota allows *all* animal husbandry practices—no matter how invasive, bloody, or potentially painful for the animal—to be performed by unlicensed, unregulated laypersons: all except horse teeth floating. Trial tr. 289:9-15; 337:18-24: Minn. Stat. § 156.001 *et seq.*

Even Defendants recognize a genuine and substantial distinction between the practice of animal husbandry and veterinary medicine. Pl.'s Trial Ex. 28A at 84-99. (Selections from Dr. Mehr's admitted deposition testimony distinguishing a series of animal husbandry procedures from veterinary medicine). Procedures such as farriery, castration, dehorning, tail docking and teeth floating are all animal husbandry procedures that are intended to maintain animals' basic health. Trial tr. 265:17-20; 313:16-22; 314:14-25. Under Minnesota law, *anyone* may perform *any* of those procedures for pay—including ***dental procedures*** such as removing piglets' eyeteeth or trimming boars' tusks—except for horse teeth floating, which the state has inexplicably singled out for onerous licensing requirements. Trial tr. 289:9-15; 337:18-24: Minn. Stat. § 156.001 *et seq.*

D. There Is No Licensing Requirement for Farriers Even Though Their Work Presents Greater Risks and Requires More Knowledge than Teeth Floating.

Of particular relevance to this case because of its many similarities to horse teeth floating is farriery—the care, maintenance and treatment of horses' hooves and feet. Although it is an

animal husbandry procedure performed on horses, and although it requires the same or even more knowledge and ability as floating, Minnesota does not regulate farriers in any way.

1. Farriers Maintain Horses' Basic Health.

Like their teeth, horses' hooves continue to grow throughout their lives. Trial tr. 267:11-13. They need to be trimmed and shod every six to eight weeks. Trial tr. 289:5. Like its teeth, if a horse's hoof grows too long without being trimmed, that presents a problem for the horse. Trial tr. 483.3-7. Specifically, a domesticated horse's hooves can grow to such a length that their feet will grow out of balance, if left untreated. Trial tr. 448:23-449:2. Such unevenness can cause soreness in other parts of the horse's body and, in the worse case, arthritis. Trial tr. 269:1-13.

2. Farriers Perform Therapeutic Treatments.

The farrier's responsibilities are numerous. Specifically, farriers address lameness and soundness problems in horses' feet and legs that cause pain elsewhere in their bodies. Trial tr. 267:14-268:1. Pain can be caused by improper trimming and shoeing that fail to correct the natural imbalance in a horse's foot that can in turn cause soreness and, possibly, arthritis in other parts of the horse's body. Trial tr. 269:1-13. Farriers are also responsible for detecting and treating various defects and abnormalities including founder, laminitis, navicular disease, arthritis, seedy toe, white line disease, abscesses, stone bruises, corns, and cracks in horses' hooves. Trial tr. 269:16-270:1-11. Laminitis is an inflammation of the lamina of the horse's foot that can be excruciatingly painful and can even cause death, as in the recent case of Kentucky Derby winner Barbaro. Trial tr. 500:4-15.

To competently trim and shoe horses' feet requires significant training. A farrier must have a thorough knowledge and understanding of the anatomy and physiology of the overall

horse, also known as the horse's "conformation," with special knowledge of the anatomy of the horse's lower legs, hoof capsule and feet. Trial tr. 268:13-19; 269:16-20; 497:23-498:2. And the farrier must know the mechanics of trimming, as well as the selecting, shaping and nailing on of the correct type of shoe given the individual horse's foot and use. Trial tr. 269:14-270:3. A farrier must even be able to read and understand radiographs and be able to communicate the analysis with veterinarians. Trial tr. 498:3-7.

3. Trimming and Shoeing Horses' Hooves Is an Invasive Procedure that Presents Potential Risks to the Horse and the Farrier.

Trimming a horse's hooves requires judgment, skill and significant knowledge of the normal contours of the specific horse's foot. Specifically, a farrier first examines the hoof to determine its normal angle. Trial tr. 271:20-23. She then uses a hoof knife to pare away any dead sole in the horse's foot. Trial tr. 271:23-24. Using a hoof nipper, the farrier then cuts off the excess hoof wall, the outer edge of the foot, before rasping off the rough edges on the hoof. Trial tr. 272:3-10.

A farrier must have significant knowledge and skill to properly shoe a horse as well. Specifically, she must know about horses' general anatomy and the specific horse's conformation including how the horse moves and how the horse is being used, i.e. what type of work or activities the horse will be performing. Trial tr. 277:2-18. Moreover, in consultation with the trainer, the farrier is responsible for recommending and selecting the appropriate type of shoe for the horse, Trial tr. 278:5-18, which may even include recommending therapeutic shoes and making changes in the horse's foot to treat diseases and deformities. Trial tr. 501:13-18. Finally, the farrier is responsible for nailing the shoe onto the horse's foot, a delicate procedure where the margin of error between sensitive and insensitive—living and nonliving—tissue is a matter of millimeters. Trial tr. 279:25 – 281:5. Accidentally driving a nail into the living tissue

of the horse's foot—a so-called "hot nail"—can cause pain, bleeding, and even infection. Trial tr. 281.6-23.

Risks exist for the farrier herself, as well. Common injuries include cuts, bruises, burns, and mashed fingers or being jerked down, stepped on, bitten or kicked by the horse. Trial tr. 498:8-13.

E. Only Three Classes of People May Float Horses' Teeth for Pay in Minnesota.

Relevant to this case, there are three classes of people who may legally float horses' teeth for compensation in Minnesota.[1]

The first class is licensed veterinarians. Under Minnesota law, initial licensing as a veterinarian requires that the applicant graduate from veterinary college, pass a standardized national examination, and pass the Minnesota Veterinary Jurisprudence Examination. There are no requirements that the applicant complete any specific electives in veterinary college in floating or later complete any continuing education classes in floating to be allowed to float horses' teeth for compensation. Minn. Stat. §§ 156.02 and 156.03.

The second class is non-veterinarians who are IAED-certified and have a written statement from a supervising large animal veterinarian. For a non-veterinarian to become licensed to work for multiple horse owners, Minnesota requires the applicant to submit to the Defendant Board (1) proof of current certification from the International Association of Equine Dentistry or other professional equine dentistry association as determined by the board; and (2) a written statement signed by a supervising veterinarian experienced in large animal medicine that the applicant will be under direct or indirect supervision of the veterinarian when floating equine

[1] There is one additional class of grandfathered practitioners in the law Minn. Stat. § 156.075 subd. 2(b) but it is irrelevant to this case because neither Chris nor any new entrant in the field can meet the experience and income requirements. Jim Johnson is the sole member of the grandfathered class. Stipulations of Fact, ¶ 3.e.

teeth. There is no requirement that the supervising veterinarian have any training, knowledge or skills in floating. § 156.075 Subd. 2(a)(1).

The third class is regular employees of either horse owners or licensed veterinarians. Minnesota law allows such employees to perform floating without completing any training or demonstrating any skills in floating. The law also does not require that the employing horse owner or the veterinarian to have any training or skill in floating. Minn. Stat. § 156.12 Subd.2 (d) and (h).

Each of the three classes is explained in further detail below.

1. Veterinarians Receive Little, if any, Training in Floating Horses' Teeth.

Becoming a veterinarian in Minnesota is a rigorous, long and expensive process. The State of Minnesota requires candidates to graduate from a veterinary college, pass a Minnesota-specific exam about veterinary laws, and pass a national licensing examination. Unlike the hands-on training and continuous evaluations that Chris received from his father, however, none of these three requires the applicant to learn to float or to demonstrate the manual skills necessary to safely and proficiently float horses' teeth.

The absence of any real connection between veterinary education and the protection of horses is made plain in Dr. Julia Wilson's testimony. As the Defendants' expert on veterinary curriculum, Dr. Wilson, testified that students at the University of Minnesota's College of Veterinary Medicine receive limited mandatory education in horse teeth floating. Despite incurring debt in excess of $130,000 from tuition and other costs over four years (Exhibit 23), veterinary students will take:

- Only one required class that specifically teaches how to float horses' teeth in a 10-minute lecture. Trial tr. 135:4-20.

- Following the lecture, students float teeth for 30 minutes. Trial tr. 135:19. During that time, there is no requirement that the student float the teeth of a live horse. Trial tr. 136:17-25. Students can float the teeth of a cadaver, at their discretion. Trial tr. 136:19-137:1.

- Students are not evaluated or graded on their competency in floating. Trial tr. 137:8-15.

Not surprisingly, students are not proficient at floating following this very brief education. Trial tr. 138:12-21. And students may graduate, and in fact 75 percent did graduate in 2006, without establishing any basic proficiency in floating. Trial tr. 137:24-138:21.

Perhaps more surprising is that the University of Minnesota's required offering of 40 minutes of lecture and hands-on training floating is a "relatively unique offering," according to Dr. Wilson, among the 28 accredited veterinary colleges. Trial tr. 139:17-22. In this regard, Dr. Michael Lowder admits that students at the University of Georgia do not do floating in any core classes and must wait to take an elective before initially learning the procedure. Trial tr. 528:1-8.

It is clear from Dr. Wilson's own words that not only are the majority of graduates from the University of Minnesota unprepared to proficiently float horses' teeth but those owners who hire graduates from any of the 28 veterinary colleges in America should not rely on the veterinarian's required education as a source of training in horse teeth floating.

In addition to graduating from veterinary college, Minnesota requires candidates to pass two examinations. Minn. Stat. § 156.03. The first, the Minnesota Veterinary Jurisprudence Examination, deals with Minnesota's veterinary statues. Minn. Rule 9100.0400. Subp.3A. The second is more comprehensive but here, as in the core curriculum at the University of Minnesota, there is no testing of basic hands-on floating. Minn. Rule 9100.0400. Subp.3B.

Specifically, the North American Veterinary Licensing Examination (NAVLE) is a standardized examination used by state and provincial licensing boards throughout North

America as part of their licensure of veterinarians. Stipulations of Fact, ¶¶ 6.a and 6.b. Minnesota requires passage of the NAVLE exam to become licensed in Minnesota. Stipulations of Fact, ¶ 6.c. The exam fails completely at testing the candidate's hands-on proficiency in horse teeth floating because it is administered on computers. Additional Stipulations, ¶ 1. Moreover, a person who is competent in horse teeth floating, as defined by Minnesota law, but has no additional skills or knowledge in veterinary medicine probably could not pass the NAVLE examination. Additional Stipulations, ¶ 2.

2. Minnesota Requires Horse Teeth Floaters to be Both IAED Certified, Even Though Floating Involves Only a Small Part of Equine Dentistry, and to be Forever Supervised by a Large Animal Veterinarian.

An alternative licensing route for horse teeth floaters in Minnesota is to become certified by the International Association of Equine Dentistry and submit to the Board a letter from a supervisory veterinarian—if the floater can find one. Minn. Stat. § 156.075 subd. 2(a) (1).[2]

While this alternative licensing path may initially appear reasonable, in the real world it is virtually impossible for a horse teeth floater living in Minnesota to fulfill all of the requirements. Specifically, Minnesota's alternative licensing scheme requires:

- The candidate must be a member for at least nine months before she is eligible to take the trade association's certification examination. Stipulations of Fact, ¶ 5.d. This includes paying the IAED's annual membership fee of $200. Trial tr. 176:18.

- The candidate must then find an existing IAED member willing to sponsor her. Stipulations of Fact, ¶ 5.e. This requires looking outside of Minnesota because the IAED has no members living in Minnesota. Stipulations of Fact, ¶ 5.g.

- The sponsor must periodically monitor the candidate's actual floating prior to her taking the IAED's examination. Stipulations of Fact, ¶ 5.f. To do so, the

[2] Defendants may also accept certifications from another "professional equine dentistry association," Minn. Stat. § 156.075 subd. 2(a)1 but the Board has not designated another other association and has not published or promulgated any standards, criteria or administrative rules by which to evaluate any other credentialing body. (Defendants' Response to Plaintiff's Third Request for Admissions, Nos. 47-50, Jan. 26, 2007).

candidate in Minnesota must endure the time and expense to travel to another state or pay the costs for the sponsor to travel to Minnesota to have the sponsor periodically monitor and review the floater's work. Trial tr. 585:23-586:1.

- The candidate must perform and chart 250 floats. Trial tr. 578:10-12. This requires, for all practical purposes, a candidate for IAED certification to ***become an employee of a licensed veterinarian***. Trial tr. 583:5-17.

- The candidate must then pay a $600 fee to take the IAED's examination and submit an application describing his experience and education. Trial tr. 176:19-20; 578:12-19.

- The candidate must then pass the IAED's written examinations by answering correctly 40 out of 50 questions about equine dentistry. Trial tr. 579:10-13. A significant part of this examination includes material unrelated to horse teeth floating.

- The candidate must then pass the IAED's practical examination that requires the candidate perform equine dentistry on sedated horses. Trial tr. 579:12-13; 586:15-17. Horsemanship, as discussed above, is an integral part of floating and the IAED's use of sedated horses makes its test not "viable" for floaters; it amounts to nothing more, according to Dr. Tom Allen, than "a ridiculous barrier." Trial tr. 175:6-16.

- Upon becoming IAED-certified, the candidate then must find a an experienced large animal veterinarian willing to sign and have submitted to the Defendant Board a letter committing the veterinarian to supervise, directly or indirectly, the candidate while he is floating teeth. § 156.075 Subd. 2(a)(1). This requirement, again, puts the floater's career in the hands of a member of a profession against which all those involved recognize that the floater wishes to eventually compete.

Two of these requirements warrant further discussion.

Meeting the IAED's fourth requirement of performing and documenting 250 cases ***requires that the candidate become an employee of a licensed veterinarian***. This is because Minn. Stat. § 156.012 subd. 2(h) provides the only means for a floater to legally perform the 250 cases because it allows her to work as an employee "under the direction and supervision of the veterinarian, who shall be responsible for the performance of the employee." Veterinary employment is the only option for a floater because there are no horse owners in Minnesota who

own a sufficient number of horses for a candidate to perform, document and have monitored by an IAED-recognized sponsor 250 cases in a reasonable period of time. Trial tr. 62:17-19. In essence, a requisite step for any floater who aspires to eventually offer her clients an alternative to buying dentistry from a veterinarian is to find a veterinarian willing to assume the expense and liability of her doing 250 cases in the veterinarian's clinic. Moreover, the reality of working for a veterinarian has an additional shortcoming—the floater will get little benefit from performing 250 dentistry cases. This is because power tools are the standard of veterinary dentistry but floaters, by law, exclusively use manual tools. Trial tr. 75:8-10. Thus, not only are the 250 cases difficult to achieve because they require employment at a veterinary clinic, the experience of performing 250 floats with power tools on sedated horses has little value to a floater wanting to eventually follow the law's requirement of only using manual rasps.

Second, passing the IAED's written examination, the trade association's sixth requirement, is a nearly insurmountable hurdle because it requires the candidate to master knowledge related to equine dentistry—a subject that is significantly beyond what a floater is legally allowed to eventually do under Minnesota law. Trial tr. 160:2-5. In fact, this test is so astonishingly unrelated to floating and, instead focused on the work of member dentists, that only 8% of the questions, in a survey of six recent examinations, require knowledge that is useful for a horse teeth floater and only 43% of the questions address subject matter that a proficient horse teeth floater would likely know. (Exhibit 9).

Even the IAED's president freely admits that 16% of the test covers illegal procedures in Minnesota. Trial tr. 614:8-10. In essence, the IAED's examination suffers from the same problem as described above in veterinary education—just too little of it is related to the daily work of horse teeth floaters, allowed by Minnesota law, to be valuable.

The fact that there are no IAED members in Minnesota underscores the illusory nature of that alternative to being a licensed veterinarian in Minnesota. Specifically, the burdensome and costly process of obtaining IAED certification and obtaining a letter from a supervisory veterinarian are nearly insurmountable obstacles that are unreasonable, unnecessary and unrelated to demonstrating the competence in horse teeth floating necessary to protecting horses' health and safety.

3. Minnesota Allows Regular Employees of a Horse Owner to Float Teeth with No Regulation or Oversight of Any Kind, But Not Independent Contractors Like Chris Johnson.

The State of Minnesota does not require a horse teeth floater to be licensed if the floater is a regular employee of the horse owner but requires licensing if he is an independent contractor. Minn. Stat. § 156.12 subd. 2 (d). Despite this different treatment of the same profession performing the same services to the same horse owner, Chris Johnson does not want to work as an employee of a horse owner because there is no one in Minnesota, to the best of his knowledge, who has enough horses that would keep him "busy year round floating teeth." Trial tr. 62:17-19.

Beyond Chris' sensibilities, the exception for horse owners' employees further establishes the absence of any genuine health and safety rationale in the statute. How can the quality of Chris' work be different when he is working as an employee versus working as an independent contractor? How can there be any difference in the safety to the horses based on whether Chris will receive a W-2 or a 1099 at the end of the year? These are the obvious questions raised by the requirement that Chris be licensed when working as an independent contractor but free from licensing requirements when doing the same work as an employee.

PROPOSED FINDINGS OF LAW

1. Minnesota's regulation of horse teeth floaters, Minn. Stat. 156.001, *et seq.* violates the Equal Protection Clause in Article 1 Section 2 of the Minnesota Constitution because it arbitrarily imposes occupational licensing requirements on one occupation that are not imposed on other similarly-situated occupations. [Part I.A]

2. Minnesota's regulation of horse teeth floaters, Minn. Stat. 156.001, *et seq.* violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution because it arbitrarily and irrationally imposes occupational licensing requirements on one occupation that are not imposed on other similarly-situated occupations. [Part I.B]

3. Minnesota's regulation of horse teeth floaters, Minn. Stat. 156.0001, *et seq.* violates the Due Process Clause of Article 1, Section 7 of the Minnesota Constitution because it imposes arbitrary and unreasonable occupational licensing requirements on the occupation of horse teeth floating that are not rationally related to the achievement of a legitimate government purpose. [Part II.A & B]

4. Minnesota's regulation of horse teeth floaters, Minn. Stat. 156.001, *et seq.* violates the Due Process Clause of the 14th Amendment to the U.S. Constitution because it imposes arbitrarily and unreasonable occupational licensing requirements on the occupation of horse teeth floating that are not rationally related to the achievement of a legitimate government purpose. [Part II.A & B]

5. Minnesota's regulation of horse teeth floaters, Minn. Stat. 156.001, *et seq.* violates Minnesota's public policy against imposing unnecessary or unreasonable restrictions on the right to earn a living. [Part III]

I. EQUAL PROTECTION

A. The Minnesota Constitution's Heightened Equal Protection Test.

The Court should apply heightened rational basis review to Chris Johnson's equal protection challenges under the Minnesota Constitution. Under that test, the state's regulation of horse teeth floating plainly violates Chris' right to equal protection by arbitrarily singling him out for uniquely—and unreasonably—onerous licensing requirements among similarly situated animal husbandry practitioners.

For a legislative classification challenged under the equal protection guarantee of the Minnesota Constitution to survive scrutiny under the State's heightened rational basis standard, each of the following three elements must be shown:

1. The distinctions creating the classification cannot be arbitrary but must be ***genuine and substantial***, providing a ***natural and reasonable*** basis to justify legislation adapted to peculiar conditions and needs;

2. The classifications must be ***genuine and relevant*** to the purpose of the law (that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy); and

3. The purpose of the statute must be one that the state can legitimately attempt to achieve.

Wegan v. Village of Lexington, 309 N.W.2d 273, 280 (Minn.1981) (quoting *Guilliams v. Comm'r of Revenue,* 299 N.W.2d 138, 142 (1980)).

Furthermore, Minnesota's heightened rational basis test requires "more than anecdotal support" for the claim that a challenged classification advances the goal the law was meant to achieve. *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991). In this regard, the "key distinction between the federal and Minnesota tests is that under the Minnesota test 'we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.'" *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quoting *State v. Russell,* 477 N.W.2d 886, 888 (Minn.1991)).

1. Imposing Onerous Licensing Requirements on Horse Teeth Floating While Not Licensing Similar Animal Husbandry Practices at All Violates Minnesota's Equal Protection Clause.

As the testimony of numerous witnesses at trial made abundantly clear, there is no "genuine and substantial" distinction between horse teeth floating and other animal husbandry

procedures that would justify the radically different treatment they receive with respect to occupational licensing.

Under the State's regime no license is required to, for example, cut open the membrane of a piglet's scrotal area and scrap off its testicles, scoop the horns out of a cow's skull and cauterized the worn with a red-hot electric probe, or slice off the bony part of a sheep's tail with a knife. Trial tr. 324:1-10; 328:21-32; 494:19-495:8. But Minnesota does require a license to do nothing more than file down horses' molars with a rasp. Minn. Stat. §156.001 *et seq.*

A comparison of horse teeth floating and farriery illustrates the inconsistency and utter irrationality of the State's approach to licensing of animal husbandry practices. The testimony of Defendants' expert witness, Dr. Tracy Turner, shows that there is no genuine and substantial basis to differentiate farriers and floaters that reasonably justifies the licensing of the later but not the former:

	Farriery	Floating
Instrument used	Rasp	Rasp
Anatomical structure	Soft, living tissue surrounded by hard, nonliving tissue.	Soft, living tissue surrounded by hard, nonliving tissue.
Continued growth throughout the horses' lives	Yes, hooves continue to grow.	Yes, teeth continue to grow.
Problem if growth is excessive.	Yes	Yes
Procedure involves the removal of non-living material	Yes, removal of outer hoof.	Yes, removal of points.
Risk of infection	Yes	Yes
Risk of pain to the horse	Yes	Yes
Risk of procedure causing the horse to bleed	Yes	Yes
Worse case scenario if infection is untreated	Death	Death
Risks decreased by horsemanship	Yes	Yes

Trial Tr. 481:14-485:21

Like farriery, no license is required to perform various other invasive, potentially risky, animal husbandry procedures for pay in Minnesota:

- **Dehorning**. Dehorning is the removal of a calf's horns using scoops, saws and/or cauterizing irons, which involves "burning the skin around the horn buds, effectively killing the horn," or cutting into the animal's horn and scooping the horn out of its skull. Dehorning is a bloody, invasive procedure that presents a significantly greater risk of disease transmission than floating. *See*, Trial Tr. 128:8-10; 129:20-21; 130:6-9; 130:1-5; 132:23 -133:2.

- **Castration**. Castration is the removal of an animal's testes, typically without anesthetic. Like dehorning, castration presents significant risks to the animal and the possibility of disease transmission. Among the risk of castration in an animal with an undetected hernia is the animal's intestines spilling out, and they "are awful hard to get back in." *See*, Trial tr. 129:5-11; 129:5-14; 326:1-10.

- **Tail Docking**. Tail docking involves slicing off a sheep's tail in order to prevent disease transmission by parasites that nest in the feces that collect around the animal's tail, if it is not removed. *See*, Trial tr.494:20-21; 494:22-495-8.

- **Eyeteeth Cutting**. Eyeteeth cutter is similar to horse teeth floating in that involves shortening of an animal teeth to aid proper nutrition. *See*, Trial tr.333:5-23; 336:7-13.

- **Tusk Trimming**. Tusk trimming involves the shortening of nearly full grown boars' tusks and, like horse teeth floating, must be perform once or twice a year throughout the animals' lives. *See*, Trial tr. 337:5-16. 336:23-337-2.

Although there is certainly room for play in the joints, Minnesota's equal protection law generally requires occupations that involve ***similar functions, skills and training*** to be regulated similarly, and occupations that do not, to be regulated differently. *Grassman v. Minnesota Bd. of Barber Examiners,* 304 N.W.2d 909, 911 (Minn. 1981) (emphasis added).[3]

In *Grassman,* the Minnesota Supreme Court was asked to rule on the constitutionality of a statute that (1) prohibits barbers from cutting hair after the closing hours established by the

[3] *See also, Nelson v. Peterson*, 313 N.W.2d 580, 582-83 (Minn. 1981) (striking down requirements to become a workers' compensation judge because the classifications that treated state attorney who represented employees differently from state attorneys who represented their employer or private attorneys were not genuine or relevant to the asserted statutory purposes and the distinctions which separate those within the statute from those excluded were manifestly arbitrary and fanciful.).

Defendant Board but not a similar restriction on cosmetologists and (2) established "trade areas" that included setting rates of compensation for barbers. *Grassman,* 304 N.W.2d *at* 910. Using Minnesota's heightened three-part Equal Protection test, the Court struck down both statutory provisions. Specifically, the Court rejected the State's argument that "substantial economic differences historically have attended the barbering profession" and that the "imposition of more stringent operational requirements upon the smaller and more sophisticated profession (of barbering) is justified. *Id.* at 911. Instead, the Court ruled that the State's distinctions were "not genuine and substantial and they fail[ed] to account for the similarities of training, experience and commitment practiced by hair stylists, however, formally classified or licensed." *Id.* at 911. Moreover, the Court even put the business/compensation regulation under the scrutiny of equal protection and concluded that "the establishment of a trade area *is merely a mechanism to accomplish an invalid regulation of but one of two closely allied professions* and therefore, the trade area concept is invalid." *Id.* at 912 (emphasis added).

Here, as in *Grassman,* the distinctions between floaters versus farriers and other husbandry practitioners are not genuine and substantial. Just as barbers and cosmetologists are performing similar functions and they require similar skills and training, floaters and farriers are providing the similar function of health maintenance and require similar manual skills and training in anatomy and the use of tools.

Specifically, both horse teeth floating and farriery are animal husbandry procedures that share the same function of maintaining the horse's basic health. Trial tr. 313:7-22; 288:22-289:2. Both are needed to ensure the "overall well being of [the] horse." Trial tr. 313:17-22. Moreover, the skills needed for floating and farriery are also similar. This is made plain in the eight similarities identified by Dr. Turner's testimony. *Supra.* More specifically, whereas a

floater must be able to identify points before rasping them down, a farrier must examine the hoof to determine the normal angle before paring away dead sole. Trial tr. 25:3-13; 268:20-22; 271:20-24.

The training needed to become competent in floating and farriery is also similar. Chris received four months of hands-on training that included learning the anatomy of the horse's mouth, identifying points and rasping them away. Trial tr. 20:21-40:11. Chris then apprenticed with his father and improved his skills while meeting customers' needs. Trial tr. 43:2. Lori Neises received similar training to become a competent farrier. Specifically, she attended a three-month course at the Minnesota School of Horse Shoeing and Blacksmithing where she learned about horses' complete anatomy, especially the bones of the horse's lower leg and hoof capsule; trimming; and shoeing. Trial tr. 266:17-19; 269:16-270:3. Neises then apprenticed for ten months with an established farrier before beginning to work for herself. Trial tr. 266:17-20. These experiences show that the similarities in training for both floaters and farriers both in terms of time, four versus three months, and in terms of curriculum, including learning about horses' anatomy, learning to evaluate the need for treatment, and learning how to use manual tools to meet the horses' needs for health maintenance.[4]

Likewise, the difference between floaters and other animal husbandry practitioners is not so genuine and substantial, in terms of function, skills and training, as to require floaters to spend thousands of dollars and multiple months and years to meet the numerous requirements of Minnesota's licensing alternatives but place no similar requirements on castrators, dehorners, tail dockers, eyeteeth cutters and tusk trimmers.

[4] Similarly, Dr. Turner did not need formal education to sell his farriery services to clients as he worked as a farrier both before and while attending undergraduate school and veterinary college. Trial tr. 477:17-22.

Floaters, dehorners, castrators, tail dockers, eyeteeth cutters and tusk trimmers are all involved in the same function of providing husbandry practices in order to maintain animals' basic health. Moreover, the requisite skills and training required are not genuinely or substantially different. Specifically, the skills and training required for all include an understanding of animal anatomy and dexterity in using manual tools to cut away or trim a specific body part. The only difference in these procedures is that they treat different body parts and that difference is irrelevant to an Equal Protection analysis of occupational classifications. That is because, following *Grassman v. Minnesota Bd. of Barber Examiners*, the relevant analysis focuses on the similarities and differences of the procedures' ***functions*** and the practitioner's ***skills and training*** and not on which part of the animal's body is being treated.

Finally, the practitioners all need an appreciation of the risks of accidents to the animal and themselves. In regard to risks, however, floaters have fewer concerns. Specifically, floating presents far fewer health and safety concerns than other husbandry procedures. As Millard Johnson testified, the riskiest procedures are (1) farriery, (2) castration and dehorning, and (3) tail docking. Floating is the lowest risk because it does not include "opening any wounds, [or] ... cutting away any tissue while you're doing it." Trial tr. 340:8-21; 341:24-342:4.

Whereas the similarities between the practitioners' function, skills and training are genuine and substantial, the licensing requirements on floaters but on no other practitioners are as different as night and day.

Accordingly, the State's requirement that horse teeth floaters be licensed while farriers and other husbandry practitioners are free to practice without meeting any licensing requirements at all manifestly violates equal protection because floating, farriery and the other practices all

involve the similar function of maintaining the animals' basic health and require similar skills and training that are not substantially or genuinely different.

2. Defendants' Attempt to Distinguish Horse Teeth Floating from Other Husbandry Practitioners Is Unpersuasive.

Defendants offer three bases for distinguishing between horse teeth floating and other animal husbandry practices, like farriery, dehorning, and castration. Specifically, Defendants argue (1) horses are different because they are not production animals; (2) floating is different because it is done regularly throughout a horse's life and (3) licensing for floaters is justified to prevent disease transmission.

None of Defendants' explanations for Minnesota's wildly different regulation of horse teeth floaters as compared to practitioners of other, equally challenging and in many cases far more invasive animal husbandry practices, is persuasive.

First, Defendants claim that requiring floaters, but not other practitioners, to be licensed is justified because horses are different from other animals such as cows, pigs, sheep and other so-called "production animals" that produce food or fiber. Trial tr. 431:24-25. This argument is unpersuasive because it does not explain why the State licenses floaters but not farriers. Moreover, the nature or use of the animal is irrelevant to the issues of protecting the animals' health and safety and insuring that the practitioners of similar functions are required to have similar skills and training.

Second, Defendants argue that requiring floaters, but not other practitioners, to be licensed is justified because horses have their teeth floated throughout their lives. Trial Tr. 112:1-12. This argument is similarly unpersuasive because it does not explain why floaters are licensed but not farriers and tusk trimmers. All three practitioners perform their service throughout the animals' lives. In fact, farriers provide the service every six to eight weeks. Trial

Tr. 447:22-23. That frequency is significantly greater than the one time a year that a floater will work on a horse's teeth. Trial Tr. 317:7-8; 444:10-11. Moreover, the frequency of the procedure done on a given animal is irrelevant to the core issues of an equal protection classification of an occupation—whether the practitioners do similar functions and are required to have similar skills and training.

Finally, Defendants argue that requiring floaters, but not other animal husbandry practitioners, to be licensed is justified because horse teeth floating presents the risk of disease transmission. Trial tr. 89:8-93:17. But that argument cannot be reconciled with the common sense reality that disease is everywhere on a farm and there are numerous ways for it to spread, as Defendants' own disease expert, Dr. Julia Wilson, admitted in the following:

Q. Obviously we have animal manure on the farm. The pathogens can reside in manure correct?

A. That is correct.

Q. How about water that is shared by different animals, can there be pathogens in that water?

A. Yes, there can be.

Q. You can even have pathogens on the soles of your shoes if you've been walking around on the farm, can't you?

A. Yes, and that's a proven route of transmission, particularly in the food industry.

Q. And at least some of the pathogens that we've been talking about can be spread in a variety of different ways, true?

A. That is correct.

Q. Including what you described before as aerosol spray or a little more colloquially as being inside the sneeze zone of the animal, correct?

A. That's correct.

Q. And it's not just horses that can spread those kinds of pathogens, it's other animals such as pigs, goats and sheep?

A. Yes.

Trial tr. 123:23-124:20.

Further undermining Defendants' claim, Dr. Wilson also acknowledged that reducing the risk of disease transmission is as simple as the practitioner washing his hands and disinfecting his instruments. Trial tr. 91:8-25; 126:15-19.

Because diseases are common and can be transmitted multiple ways on a farm, it is arbitrary to require horse teeth floaters to be licensed but not those engaged in other daily operations or procedures on a farm.

Not surprisingly, Dr. Wilson failed to identify one study that supports the notion that horse teeth floating presents higher risks of disease transmission than other husbandry procedures. Trial tr. 149:21-150:16. In conclusion, there is no genuine and substantial distinction between the work of horse teeth floaters and other animal husbandry practitioners that justifies the State's radically different regulation of them under Minnesota's heightened judiciary standard for equal protection claims.

3. Imposing Onerous Licensing Requirements on Independent Contractors Who Float Horses' Teeth While Allowing Regular Employees of Horse Owners to Float Teeth with No State Regulation or Oversight Violates Minnesota's Equal Protection Clause.

Under Minnesota's arbitrary licensing law, it would be perfectly legal for Chris Johnson—or indeed the undersigned counsel or even this Court—to float the teeth of a horse belonging to any person of whom he is the full-time employee. Minn. Stat. § 156.12 subd. 2(d) (stopping the State from prohibiting "the owner of an animal and the owner's regular employee

from caring for and administering to the animal belonging to the owner, except where the ownership of the animal was transferred for purposes of circumventing this chapter.")

Thus, for example, if a horse owner had a live-in nanny who was his full-time employee, it would be perfectly legal under Minnesota law for the owner to have the nanny go out to the barn and float his horses' teeth. By contrast, an "independent contractor"—even a perfectly well qualified one like Chris Johnson, who has far more training and experience in horse teeth floating than both the hypothetical nanny and even most state-licensed veterinarians—may not float a horse's teeth without jumping over the various regulatory hurdles outlined on pages 11-16 above.

This irrational regulation is quite similar to the licensing regulation overturned in *State v. Stewart*, 529 N.W.2d 493 (Minn. App.1995). In that case, Kelly Stewart worked as an unlicensed skilled laborer for General Sprinkler Corporation and his responsibilities included on-site fabrication of pipe segments and, among others, assembling the floor hanger components that supported fire suppression systems. *Stewart*, 529 N.W.2d at 495. At trial, the City of Minneapolis admitted that it intentionally does not apply or enforce its ordinance to the cutting and threading of pipe *off* the job site but it did do *on-site* enforcement because, according to the City's expert, on-site fabrication of pipe "was more likely to be inaccurate" than pipe fabricated elsewhere. *Id.* at 495.

Faced with these facts, the Minnesota Court of Appeals overturned the licensing regulation because the court could not find a genuine and substantial distinction between "a skilled laborer legally fabricat(ing) a pipe just across the street from a job site using portable equipment, while the same person doing the same activity on the job site a few feet away violates the ordinance." *Stewart*, 529 N.W.2d at 497.

Whereas the *Stewart* Court held unconstitutional a statute that treated the same person differently based on his working in different locations, here the statute treats differently the same person working under different employment/contractual relationships. For the same reason as in *Stewart*, this Court should find the instant statute unconstitutional because, as applied to Chris and other horse teeth floaters, the statute unreasonably treats the identically-situated persons, in all relevant respects, differently.

This is because the Equal Protection provision of the Minnesota constitution imposes two requirements that Minn. Stat. § 156.12 subd. 2(d) fails to meet. Specifically, the first prong requires that the classification not be "arbitrary but must be genuine and substantial, providing a natural and reasonable basis to justify the legislation to the peculiar conditions and needs." *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn.1981) It is self-evident that the regulation is arbitrary and an unreasonable basis to justify the legislation because the employment/contractual relationship that the floater has with the owner is irrelevant to issues of the health and safety of the horse.

Additionally, the second prong is a means-end test that requires that the "classification must be genuine or relevant to the purpose of the law, that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy." *Wegan,* 309 N.W.2d at 280. The treatments fail the second prong as well because it is the training and skills of the practitioner that are relevant to the goal of protecting the health and safety of the horse—and they are identical whether the floater is an employee or an independent contractor.

Finally and most clearly, the function, skills and training needed to float horses' teeth as an employee are identical to the function, skills and training needed to float horses' as an independent contractor.

As such, the requirement that horse teeth floaters be licensed must be struck down as violating the equal protection clause of the Minnesota Constitution because it requires the same floater to obtain licensure when he performs floating as an independent contractor but makes no such requirement when, for no relevant reason related to health, safety, function skill or training, he performs the same service as an employee.

B. Right to Equal Protection Under the U.S. Constitution.

Minnesota's onerous licensing of horse teeth floating, but not other functionally identical animal husbandry practices, is so unreasonable that it even violates the less rigorous federal rational basis test applicable to equal protection challenges under the U.S. Constitution. The 14th Amendment's Equal Protection Clause prohibits states from enforcing laws that unreasonably treat similar things differently or that regulate different things as if they were the same. Thus, the federal Equal Protection Clause ensures citizens that the state will treat them equally compared to similarly situated individuals. *E.g., State v. Richmond,* 730 N.W.2d 62 (Minn.App.,2007) (quoting from *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn.2000) in which the Minnesota Supreme Court observed that "[t]he equal protection clauses of both the United States and Minnesota Constitutions mandate that all similarly situated individuals shall be treated alike.")

While the Equal Protection Clause certainly does not forbid the government from making classifications, it does prohibit classifications that are arbitrary or unreasonable—it forbids the government from treating differently persons who are in "all relevant respects alike." *Nordlinger*

v. Hahn, 505 U.S. 1, 10 (1992). As demonstrated above, horse teeth floaters are similar in "all relevant respects" to other husbandry practitioners but are nevertheless the only ones who have to be licensed in Minnesota.

This principle is illustrated in *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C.,1989), which involved a self-styled "shoeshine entrepreneur" named Ego Brown. Brown employed homeless men as independent contractors providing them with showers, shoeshine kits, and training to shine shoes on the streets of the District of Columbia. For many years prior to 1985, Brown's contractors operated outdoor shoeshine businesses at various locations in the District. In 1985, however, the District suddenly withdrew Brown's permit and closed his sidewalk shoeshine business as an alleged violation of another municipal regulation specifically targeted at bootblacks. Among his other claims, Brown alleged that the regulation that allowed other vendors to sell their wares on the street but stripped bootblacks of their rights was constitutionally impermissible. *Brown,* 710 F. Supp at 352-53.

In striking down the law, the D.C. District Court had "no difficulty finding that the bootblack prohibition failed to pass the rational basis test." Moreover, the *Brown* court noted, that "[t]he inability of the District to articulate any rational basis for distinguishing bootblacks from other types of vendors combined with the regulation's elusive purpose compel us to declare this regulation unconstitutional." *Brown,* 710 F. Supp at 355.

Here, as in *Brown*, Defendants cannot articulate any rational basis for why horse teeth floaters must be licensed but not practitioners of other animal husbandry services like farriery, castration, dehorning, tail docking, and cutting of pigs' teeth. As in *Brown*, Defendants' explanations for singling out floaters for licensing—because horses are different from

pigs and cows, that floating is different because it is done periodically to the same horse, and horses can transmit disease—are factually inaccurate and logically unpersuasive.

II. THE RIGHT TO DUE PROCESS UNDER THE MINNESOTA AND U.S. CONSTITUTIONS.

The Minnesota and U.S. Constitutions both protect the right of citizens to earn an honest living free from arbitrary or unreasonable government interference. Minn. Const. art. I, § 7; U.S. Const. amend. XIV. Under both the state and federal due process clauses, government regulations must be rationally related to a legitimate government interest and must not be arbitrary or capricious. *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn.App.1996). With respect to occupational licensing, the challenged regulation must have a rational connection with the citizen's fitness or capacity to work in the particular vocation. *See, e.g., Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957) (holding that prohibiting applicant from practicing law because of his past political affiliation, prior arrest record and use of aliases constituted a denial of due process).

The State's regulation of horse teeth floaters violates the due process clause of both the Minnesota and U.S. Constitutions because it excessively burdens entry into a lawful occupation with unrelated regulatory requirements to the occupation. *Johnson v. Ervin*, 285 N.W. 77, 89 (Minn. 1939) (rejecting licensing requirements of Barber's Act under both state and federal due process provisions).

At issue in *Johnson v. Ervin* was the constitutionality of the state Barber's Act, which required beauty culturists, now known as cosmetologists, to enroll in barber school and to work as an apprentice cutting men's hairs and trimming their whiskers. The Act was challenged under both the state and federal due process provisions because it required culturists to be trained as barbers when what they wanted to do was to "cut or bob" women's hair. *Ervin*, 285 N.W. at 86.

The Minnesota Supreme Court struck down the law, finding that some of the licensing requirements, were "entirely foreign to the trade for which they desire to qualify, and having no relation to the health or safety of their patrons in their proposed occupation as beauty culturists or to the welfare of society." *Id* at 80.

Moreover, the Supreme Court found it was altogether unreasonable to require individuals wanting to become "beauty culturists" to spend 1,248 hours in a school or college of barbering and two-and-a-half years as an apprentice in a barber shop learning and mastering skills, for the most part, unrelated to their desired profession. *Ervin* remains good law. In fact, courts considering similar challenges to cosmetology licensing statutes continue to cite to it. *See, Grassman v. Minnesota Bd. of Barber Examiners,* 304 N.W.2d 909, 911 (Minn., 1981), *Minnesota Bd. of Barber Examiners v. Laurance,* 218 N.W.2d 692, 694 (Minn. 1974) (noting that *Ervin* is a case "upon which we must heavily rely"); *New York State Hairdressers & Cosmetologists Ass'n, Inc. v. Cuomo,* 369 N.Y.S.2d 965, 968 (N.Y.Sup. 1975) (observing that all but one similar licensing law for cosmetologists have been held to violate the constitution.)

Federal courts have likewise struck down unreasonable occupational licensing laws on due process grounds under the federal rational basis test. For example, in *Craigmiles v. Giles,* 312 F.3d 220, 225-26 (6th Cir. 2002), the Sixth Circuit struck down a law that allowed only state-licensed funeral directors to sell caskets because it was not rationally related to any legitimate state interest. *See also Casket Royale, Inc. v. Mississippi,* 124 F. Supp.2d 434, 440-441 (S.D. Miss. 2000) (same); *Brown v. Barry,* 710 F. Supp. 352, 355-56 (D.D.C. 1989) (no rational basis for prohibiting shoe shine stands—but not other businesses—from operating in public); *Santos v. City of Houston,* 852 F. Supp. 601, 608-09 (S.D. Tex. 1989) (stating that

"economic protectionism" is not a legitimate public purpose and striking down anti-jitney ordinance for which government failed to identify any valid justification).

The facts of *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999), are highly analogous to this case. *Cornwell* involved a challenge to California's requirement that African hairbraiders become fully licensed cosmetologists in order to ply their trade. As with Minnesota's licensing of horse teeth floater, the path to licensure for African hairbraiders required them to master a substantial body of knowledge and skills with little relevance to the work they actually performed. Specifically, California's licensing statute required that cosmetology schools offer 1,600 hours of instruction in a "full cosmetology course" that included seventeen mandatory subjects such as manicures, pedicures, eyebrow arching and removal, facials, makeup, hair coloring, bleaching, permanent waving, straightening, chemicals, press and curl, haircutting, scalp and hair treatments, wet hair styling as well as the theory of electricity in cosmetology. *Cornwell,* 80 F. Supp.2d at 1103.

Upon completing the course of study, California required candidates to pass an examination that was divided into two sections: a written part and a practical part. *Id* at 1115. The written part was worth 100 points out of the total 400 total examination points. Notably, only 11 points out of 100 was related to natural hair care and similar subjects that would be relevant to the plaintiff and other hairbraiders. *Cornwell,* 80 F. Supp.2d at 1103. In contrast, unrelated subjects constituted a significantly greater portion of the test. For example, "chemical hair care" constituted 48 points out of 100 and permanent waving, by itself, was worth 11 points, or equal to the relevant categories. *Id.* at 1103. Moreover, the court noted that the combined weight of the additional irrelevant categories of skin and nail care-16 points-is greater than

relevant categories by approximately 50 percent. In fact, the irrelevant portions of the exam comprise 89% percent of the written test. *Id.* at 1103.

The court then analyzed the practical part that was worth 300 of the total 400 available points. *Cornwell,* 80 F. Supp.2d at 1116. Here again the practical exam was highly unrelated to hairbraiding because it mostly covered how to give a patron a plain facial, apply makeup, arch eyebrows, wrap and saturate hair for a cold wave, straighten hair chemically and thermally, tint and bleach hair, give scalp manipulation, brush hair scientifically, cut and shape hair, construct wet curls, fingerwave hair, set and style hair and comb out the finished coiffure, thermally style the hair using a hand dryer and curling iron, manicure nails, apply acrylic nails, tips and wraps. *Id.* at 1116-1117. In fact, the court found that only 18% of the practical examination was weighted to "safety and sanitation"—subject that might be beneficial for a hairbraider to know—but even in those subjects the practical examination's focus related solely to the procedures that braiders do not offer –chemical hairstyling or relaxing. *Id.* at 1117.

In overturning California's cosmetology statute as applied to hairbraiders, the court importantly observed that

> "***Plaintiffs do not seek a special 'out' or preferential treatment; they seek rationality when trying to pursue a livelihood.*** Simply put, it is irrational to require Cornwell to comply with the regulatory framework. ***Even given due deference***, the Act and regulations as applied to Cornwell fail to pass constitutional muster as they rest on grounds wholly ***irrelevant to the achievement of the State's objectives.***" *Cornwell,* 80 F. Supp.2d at 1118 (emphasis added) (internal quotes omitted).

The same is true for Chris Johnson and Minnesota's regulation of horse teeth floaters.

A. Requiring Horse Teeth Floaters to Be Licensed Veterinarians Violates Due Process Because Veterinarians Receive Little if Any Training in Horse Teeth Floating and Are no More Qualified to Perform that Service Than Non-Veterinarian Practitioners Like Jim and Chris Johnson.

The requirements in Minn. Stat. § 156.001 *et seq.* that Chris Johnson and other floaters graduate from veterinary college and pass the national veterinary examination are not only a violation of the due process clauses of the Minnesota and U.S. Constitutions, they are revealing as to how disingenuous the asserted interest is in protecting horses and horse owners from incompetent floaters. That is because the State allows any licensed veterinarian—even one with no training whatsoever in horse teeth floating—to float horses' teeth while it denies well-trained highly and competent floaters, like Chris Johnson from doing the same. Trial tr. 140:6-17.

As the Sixth Circuit quipped when presented with similar facts in *Craigmiles*, the weakness of the state's proffered justifications for the casket sales monopoly "comes close to striking us with 'the force of a five-week-old unrefrigerated dead fish.'" 312 F.3d at 225. Thus, "[f]inding no rational relationship to any of the articulated purposes of the state"—including public health and welfare—"we are left with the more obvious illegitimate purpose to which [the] licensure provision is very well tailored," namely, economic protectionism. *Craigmiles,* 312 F.3d at 228. Those observations aptly describe Minnesota's regulation of horse teeth floaters as well.

1. Veterinarians Receive Little if Any Training in Horse Teeth Floating.

The requirement to graduate from veterinary college does not have any relationship to the ends of protecting horses. This is because the American Veterinary Medical Association (AVMA) does not require the 28 veterinary colleges in America to include horse teeth floating in the curriculum of any of their required or elective courses. Additional Stipulations, ¶ 5.

It is also not necessary for any veterinary student to demonstrate proficiency in horse teeth floating to graduate from the DVM program of any AVMA-accredited veterinary school including the University of Minnesota's College of Veterinary Medicine. Additional Stipulations, ¶ 6. Specifically, the required curriculum at the University of Minnesota's College of Veterinary Medicine for all DVM students involves only 10 minutes of instruction and 30 minutes of hands-on experience in equine teeth floating. Trial tr. 135:4-136:2. This minimal time is made even less applicable to the reality of treating horses by the fact that the school neither requires students to do the hands-on floating on a live horse nor does it even grade their competency. Trial tr. 136:16-137:15.

Defendants' expert, Dr. Julia Wilson, admits that this limited hands-on training in the required curriculum is insufficient for a student to become proficient in horse teeth floating; students can only become proficient by taking an additional one-week elective class. Trial tr. 138:7-21. However, because less than one quarter of students take the additional elective class, 75 percent of students graduate from the University of Minnesota's College of Veterinary Medicine without proficiency in basic horse teeth floating—but they are nevertheless allowed. Trial tr. 137:24-138:21.

It is also noteworthy that the University of Minnesota's required class that covers horse teeth floating is a "relatively unique offering" among the 27 other veterinary colleges in America, most of which do not have any mandatory instruction in horse teeth floating. Trial tr. 139:10-22. From this, it is clear that no veterinary college in Minnesota or elsewhere requires training in horse teeth floating that even approaches the 4 months of training that Jim Johnson gave to Chris Johnson.

Moreover, the cost of attending the University of Minnesota's College of Veterinary Medicine is enormous and unreasonable for floaters given the almost completely irrelevant curriculum. For a resident of Minnesota, the cost of tuition, fees and books exceeds $22,000 per year for four years. And students graduate with an average debt in excess of $130,000. (Exhibit 23). The high cost of veterinary education, in both time and money, is one reason that makes this requirement fundamentally unfair and why Chris does not want to attend veterinary college. Trial tr. 46:16-47:3.

2. The Licensing Exam for Veterinarians Does Not Significantly Test Horse Teeth Floating.

Like the veterinary school curriculum, the national licensing exam for veterinarians contains little if any material on horse teeth floating, requires no demonstration of proficiency in floating, and contains an extraordinary volume of subject matter that is totally irrelevant to the knowledge and skills necessary to properly float horses' teeth.

Specifically, the NAVLE is a comprehensive veterinary examination that does not and cannot test any candidate's hands-on proficiency in horse teeth floating. This is because it is administered on computers. Additional Stipulations, ¶ 1. As such, it is even less relevant to horse teeth floating than the written examinations in *Cornwell*, where 11% of the questions at least had some connection to natural hair care and hairbraiding. *Cornwell v. Hamilton*, 80 F. Supp.2d 1101, 1115 (S.D. Cal. 1999).

B. The Alternative Licensing Route of Becoming IAED-Certified and Working Under the Supervision of a State-Licensed Veterinarian Violates Due Process Because IAED Certification is Nearly Impossible to Obtain and Must Be Supplemented with What Amounts to a Permanent Apprenticeship.

While Minnesota's alternative licensing path involving certification by the International Association of Equine Dentistry may initially appear reasonable, the evidence shows that it is

anything but. Instead, the IAED certification path is essentially illusory, involving hurdles that are virtually impossible to surmount and resulting in what amounts to a lifetime apprenticeship under a profession whose members are largely hostile to the entire concept of horse teeth floating by laypersons.

The alternative licensing process is fundamentally unfair for three reasons. First, in order to sit for the IAED's examination, applicants must meet the IAED's unreasonable prerequisites that include working as *an employee to a veterinarian* in order to perform 250 documented floats. Second, the applicant must pass a grossly overinclusive test designed for equine *dentists*, not floaters. Third, it requires her to locate a veterinarian who will agree to supervise her—if one can be found—and without whose blessing she cannot work in Minnesota. *See* Minn. Stat. §156.075 subd. 2(a)(2).

Thus, it is not without reason that there is not a *single* IAED-certified horse teeth floater in Minnesota, Stipulations of Fact, ¶ 5.g; nor, for the reasons stated below, does it seem likely there ever will be one.

1. The IAED's Sponsorship Requirement Is Unreasonable.

There are two prerequisites to taking the IAED's certification examination.[5] First, the candidate must find an existing IAED member to sponsor him, and the sponsor must monitor the candidate's work. Stipulations of Fact, ¶¶ 5.e and 5.f. This requires an applicant from Minnesota to either incur the expense of traveling out of state to wherever he can find an IAED-certified sponsor or else pay for his sponsor to come to Minnesota periodically to monitor his work. Stipulations of Fact, ¶ 5.g; Trial tr. 598:1. In essence, the sponsor is a gatekeeper whose approval is required before a floater can take the next step. However, meeting this prerequisite

[5] As of the date of trial, Defendants did not recognize any association other than the IAED from which floaters can obtain certification to meet Minn. Stat. 156.075 subd. 2(a)1. Trial tr. 49:4-13.

assumes that Chris and other floaters can actually do floating in Minnesota for the sponsor to monitor. That is not necessarily the case, as shown below.

2. The IAED's Requirement of Performing and Documenting 250 Cases of Equine Dentistry is Nearly Impossible to Fulfill and Is Mostly Irrelevant to a Floater's Training.

It is nearly impossible and mostly irrelevant to his training as a floater for Chris to meet the second prerequisite of performing and documenting 250 cases of equine *dentistry*.

First, it is nearly impossible for Chris to meet this requirement because it is illegal for Chris to perform the required 250 cases working with his father as an independent contractor to horse owners. Minn. Stat. §156.001 *et seq*. Moreover there is no horse owner in Minnesota who has a sufficient number of horses for Chris to work as an employee to achieve this goal in a reasonable period of time. Trial tr. 62:17-19. The only remaining alternative for Chris to meet the IAED's prerequisite of documenting 250 cases of equine dentistry is for Chris to work *as an employee to a veterinarian* whose practice includes horse teeth floating. But that requirement is fraught with peril for would-be floaters and underscored by the following testimony from Defendants' expert witness, Dr. Tracy Turner:

Q. You work at Anoka Equine Veterinary Medicine, correct?

A. Equine Veterinary Service.

Q. I apologize. Service. That's one of the largest equine specialized vet clinics or facilities in the state, is that true?

A. That's correct.

Q. And you doubt any veterinarian at Anoka Equine would ever be willing to supervise a non-veterinarian equine teeth floater, isn't that true?

A. ***I think I've said that***, but I haven't asked every one of my colleagues.

Q. Well, you personally would never be willing to do that, would you?

A. No.

Q. In fact, you were very emphatic when you were asked this earlier. You said absolutely not.

A. That's correct. You want to ask me why? ***I have better things to do.*** I have a very busy practice and I'm not going to... and teeth floating is not part of my practice.

Trial tr. 491:3-23 (emphases added).

Dr. Julia Wilson and Dr. Michael Lowder shared Dr. Turner's low opinion of floaters. Specifically, despite being unable to identify a single study that demonstrates the dangers of floating, Dr. Wilson maintained her conviction that "lay teeth floating are suboptimal for the welfare of the horse." Trial tr. 120:22-25; 150:6-16. Dr. Lowder displayed an equally irrational prejudice towards floaters:

Q. I asked you whether you would consider one injury in 20,000 floats an acceptable track record?

A. No.

Q. You think that's too many injuries in 20,000 floats?

A. I think you should shoot for none.

Q. Do you know anybody who's ever achieved that track record?

A. No.

Trial Tr. 561:10-18.

The testimony of Drs. Turner, Wilson, and Lowder reflects a wholly unfounded prejudice among many veterinarians towards floaters like Jim and Chris Johnson. To be held by Turner and Wilson, two of most well known leaders in academia and the practice of veterinary medicine in Minnesota and across the country, makes that prejudice a serious obstacle for floaters in

Minnesota who are plainly being perceived by many veterinarians as trying to intrude upon their exclusive purview.

Secondly and more importantly, the requirement that the applicant to the IAED document 250 cases of equine dentistry is irrelevant and unrelated to his occupation as a horse teeth floater. The mismatch occurs because veterinarians use power tools, sedation and speculums and they provide a scope of service far greater than that of floaters including: (1) incisor adjustments, reductions and alignments, (2) treatment of canine teeth, (3) treatment and extraction of wolf teeth, (4) extraction of deciduous (baby) teeth, (5) extraction of permanent teeth that are infected or expires, (6) filings, (7) treatment of periodontal diseases, (8) root canals, (9) trephinations, (10) crown replacements and (11) orthodontia. Trial tr. 74:17-75:25; 156:4-157:16; 343:13-23.

The practical effect of doing equine dentistry while working for a veterinarian is to make any training Chris would get from performing and documenting 250 cases mostly irrelevant to his future work as a floater because performing equine dentistry in a veterinary office is well beyond the scope of work that Chris would be allowed to perform should he somehow manage to navigate Minnesota's alternative IAED licensing path. In other words, the requirement of performing and documenting 250 cases of equine dentistry has little benefit or relevancy to Chris' ultimate work and has the same problem of irrelevant content in the rejected apprenticeship in *Ervin*.

The foregoing merely represents the hurdles Chris and other applicants must clear in order to be eligible to take the IAED's certification examination. As explained below, the IAED's examination itself is overbroad, unreasonable, and largely irrelevant to the work Chris actually intends to perform.

3. The IAED's Written Examination Is Vastly Overinclusive.

The IAED's written examination is overinclusive because it tests ***equine dentistry***, as the trade association's name suggests, and not ***floating*** as defined in Minnesota statute. Trial tr. 159:20-24. The IAED requires a successful candidate to answer correctly 40 of the 50 questions on its written examination in order to proceed to the second part of the practical examination in which the candidate's skill at equine dentistry is tested on a sedated horse. Trial tr. 586:5-17; 602:24-603:10.

The testimony of Dr. Tom Allen and IAED president Douglas Smith are complementary and show that IAED's written exam is overinclusive because, in addition to covering only a few questions relevant to horse teeth floating, the exam has a significant number of questions that go far beyond what a horse teeth floater does and reasonably needs to know to work in Minnesota.

Specifically, Mr. Smith freely admitted that at least eight questions, or 16% of the IAED written examination in 2006, dealt with procedures that are illegal for a floater to perform in Minnesota. Trial tr. 614:8-10. And Mr. Smith admitted that the IAED requires the candidate to answer correctly 40 of the remaining 42 questions (or 95%) in order to pass the written examination. Trial tr. 616:7-13.

Consistent with Mr. Smith's statements that the IAED's written test is overinclusive is the testimony of Dr. Tom Allen, who is an advisor to the IAED's board on certification testing and a more neutral observer when it comes to the use of the IAED's certification process. Trial tr. 159:13-18.

According to Dr. Allen, the IAED's examination tests for procedures and nomenclature involving incisors, wolf teeth, canine teeth, and tooth extractions, ***all of which*** are well beyond the scope of horse teeth floating as defined under Minnesota law. Trial tr. 172:13-25; Minn. Stat.

§156.075 Subd. 1(a). Specifically, Dr. Allen testified that in six of the IAED's recent examinations, only 8% of the questions, on average, required knowledge that is useful for a horse teeth floater to know. This is low rate of relevancy is even less than the 11% mark that caused the *Cornwell* Court to declare California's cosmetology statue unconstitutional as it was applied to hairbraiders. 80 F. Supp.2d at 1115. Moreover, Dr. Allen's research showed that on average only 43% of IAED exam questions addressed subject matter that a proficient horse teeth floater in Minnesota would likely know. (Exhibit 9).

Based on Dr. Allen's research, it is extremely unlikely that a proficient horse teeth floater could answer the required 80 percent of the questions on the IAED's examination score to pass because the test's materials go well beyond horse teeth floating and what a floater needs to know to work completely and safely. Trial tr. 170:17-71:2.

Even Defendants admit the IAED's written exam is overinclusive. Specifically, Defendants admit that the IAED's examination tests for (a) maintenance of incisors, (b) removal of deciduous teeth, (c) removal of wolf teeth, (d) reducing canines, and (e) proficiency in using power tools; and none of these are part of horse teeth floating as defined by Minn. Stat. 156.075 subd. (1)(a) (2005). Stipulations of Fact, ¶¶ 5.k and 5.o.

Together with the Defendants' Admissions, the testimony of Mr. Smith and Dr. Allen reveal an extraordinary mismatch between the content of the IAED exam and the actual knowledge and skills needed to float horses' teeth. And as in *Cornwell*, where a low percentage of relevant questions was fatal to California's application of its cosmetology exam to hairbraiders, the low percentages of the IAED's questions that are relevant to horse teeth floaters clearly demonstrates that Minnesota's alternative licensing regime is purely an illusion.

4. Requiring IAED-Certified Floaters to Work under a State-Licensed Veterinarian Amounts to a Permanent Apprenticeship.

Finally, Minn. Stat. § 156.075 subd. 2a(2) requires Chris to submit to the Board a written statement signed by a supervising veterinarian experienced in large animal medicine that the applicant will be under direct or indirect supervision of the veterinarian when floating equine teeth. This requirement is unreasonable for both Chris and the supervising veterinarian.

It is unreasonable for Chris because it requires him to become a permanent apprentice for as long as he practices, subjecting him to the whims and demands of a large animal veterinarian. In *Ervin*, the Minnesota Supreme Court stuck down a requirement that beauticians complete a two-and-one-half year apprenticeship in an unrelated field as unreasonable. *Johnson v. Ervin*, 285 N.W. at 90. Here the apprenticeship is forever. Chris can never conduct his business truly freely and always must be under some sort of veterinarian supervision. Minn. Stat. § 156.075 Subd. 2(a)2. As such, the requirement is unreasonable as it subjects Chris to a perpetual apprenticeship.

It is also unreasonable to the veterinarian because it requires him to expose himself to potential liability for injuries caused by Chris. As noted at trial, Jim Johnson was able to obtain a written statement signed by Dr. Janice Peterson. Trial tr. 639:17. Whereas Dr. Peterson was willing to sign a letter for an experienced floater such as Jim Johnson who has a nearly perfect record of injury-free practice for more than 14 years, there is no evidence in the record that she or any other large animal veterinarian is willing to sign a letter for a far less experienced, but competent, floater such as Chris Johnson.

Finally, this requirement's unreasonableness is made even plainer when one considers how little training in floating veterinarians receive at the University of Minnesota and other veterinary colleges. As Dr. Wilson concedes, most students graduate from the University of

Minnesota's College of Veterinary Medicine lacking any proficiency in horse teeth floating. Trial tr. 137:24 –138:21. The vast majority of veterinarians graduate veterinary college without any skill that would help them meet the State's requirement that they supervise Chris. In fact, their lack of training undermines any genuine health and safety justification the State could possibly have for requiring Chris and other floaters to work as apprentices under their perpetual supervision.

The requirements that Chris Johnson and other floaters (1) meet the IAED's impossible prerequisites, (2) pass an unrelated test, and (3) work in a permanent state of apprenticeship are arbitrary, unreasonable, and fundamentally unfair. As a result, the alternative licensing path through IAED certification does not save Minnesota's unconstitutional licensing requirements for horse teeth floaters. And, as in *Cornwell*, Chris does not seek a special out or preferential treatment; he seeks rationality when trying to pursue his livelihood. As the evidence shows, there is no rationality in requiring him to meet the State's alternative licensing regime; thus it violates his right to due process under both the Minnesota and U.S. constitutions.

5. Defendants' "Partial Deprivation" Argument Is Unsupported By Case Law.

According to the Defendants, some courts have found that statutes that merely restrain, but do not completely foreclose, a person's ability to pursue a given vocation do not violate substantive due process, especially when the restriction is based on a public safety rationale. Citing *Conn v. Gabbert*, 526 U.S. 286 (1999), Defendants claim that the possible availability of full-time employment with a horse owner or veterinarian–which would effectively sidestep the need for licensure—renders the statute constitutional.

But Defendants' reliance on *Conn* is seriously misplaced. *Conn* involved the alleged deprivation of the right to pursue an occupation for a "period of less than 20 minutes" while Mr.

Conn was being searched and was thus unable to represent his client in a grand jury proceeding. *Conn v. Gabbert,* 1999 WL 118342, Pg. 17, U.S. Supreme Court Transcript. Moreover, there is no evidence in the record that Conn's income, reputation or professional qualifications were adversely affected by the interruption or that his client was substantially prejudiced by what occurred. *Conn,* 526 U.S. at 292 (Stevens concurring in judgment).

Here, Chris' deprivation is significantly longer than 20 minutes and has a significant effect on his ability to earn a livelihood and possibly inherit his father's customers. Unlike in *Conn* where the government required an attorney temporarily to endure a search, Chris is required to complete one of two burdensome governmental processes that are both unreasonable and unrelated to floating. Accordingly, Defendants' "partial deprivation" argument is not applicable to the instant case and should be rejected.

III. PUBLIC POLICY AGAINST UNREASONABLE OCCUPATIONAL REGULATION.

It is undisputed by the parties that the Minnesota Legislature has declared, as a matter of public policy, that ". . . no regulation shall be imposed upon any occupation unless required for the safety and well being of the citizens of the state." Pl.'s Compl. ¶ 122, Defs.' Answer ¶ 50; Minn. Stat. § 214.001, subd.2) Moreover, in evaluating whether an occupation will be regulated, the following factors will be considered:

> (1) whether the unregulated practice of an occupation may harm or endanger the health, safety and welfare of citizens of the state and whether the potential for harm is recognizable and not remote;
>
> (2) whether the practice of an occupation requires specialized skill or training and whether the public needs and will benefit by assurances of initial and continuing occupational ability;
>
> (3) whether the citizens of this state are or may be effectively protected by other means; and

(4) whether the overall cost effectiveness and economic impact would be positive for citizens of the state.

Minn. Stat. § 214.001, subd.2.

Legislative declarations of public policy are not binding in the context of constitutional judicial review. Nonetheless, the above statute, known as the Sunrise Act, establishes the criteria the legislature uses for new and presumably constitutional occupational regulation.[6] As such, the criteria are instructive in interpreting the rationality of existing occupational licensing regimes.

A. Requiring Floaters to Be Licensed Violates Minnesota's Declared Public Policy on Occupational Regulations.

When applying the criteria above to a comparison between floating and farriery, the irrationality of the State's licensing of horse teeth floaters becomes evident. Specifically, it is clear from both Lori Neises and Tracy Turner's testimony, *supra*, that (1) the potential for harm in floating is no greater than the potential for harm in farriery and (2) the skills and training needed to become competent in floating are substantially the same as farriery.

Moreover, testimony at trial showed that consumers of farriery services are amply protected from incompetent and unscrupulous farriers through a competitive market and access to civil litigation. Trial tr. 290:7-16. There is no reason to believe that the same horse owners would be worse off in an equally free market for horse teeth floaters. Specifically, Florida, which has the 3rd largest population of horses in the country, recently amended its law to specifically authorize floating by non-veterinarians and Defendants have no evidence that that the state's removal of the barriers to entry has caused a problem. Trial Tr. 145:1-10.

[6] The legislative record does not include any indication that the Legislature considered the Sunrise Act's criteria when it enacted of Minn. Stat. § 156.075 in 2005. *1Sp2005 c 1 art 1 s 80.*

Finally, just as it is for the unregulated practice of farriery, the net economic impact on consumers from a less-regulated or free market for floaters would be positive. Trial tr. 409:5-410:9.

B. Occupational Regulations Must Have a Substantial Relationship to the Public Good and Not Serve Primarily Private Interests, as the Challenged Restrictions on Horse Teeth Floating Plainly Do.

It is well established in Minnesota that social and economic legislation is unconstitutional where it primarily serves private interests rather than the public interest. *Lee v. Delmont*, 36 N.W.2d 530, 536 (Minn. 1949) (observing in context of rejecting a challenge to barber licensing law under the U.S. Constitution that "the judicial function" involves determining "if the ostensible protective purpose of a purported police regulation relates to the public welfare and not merely to a private interest").[7]

Professor Morris Kleiner's testimony establishes that Minn. Stat. § 156.001 *et seq.* primarily serves private interests rather than the public interest by requiring only horse teeth floaters to become licensed. While Plaintiff does not challenge the motivations of the Legislature in enacting the statute, he does contend that the licensing requirement, as written in statute, for floaters but no other practitioners of animal husbandry procedures can only be reasonably explained as protecting veterinarians from competition. This is because, as demonstrated throughout the trial, all other explanations fail at reasonably explaining why the

[7] *See also, State v. International Harvester Co.*, 63 N.W.2d 547, 552 (Minn. 1954) (observing in context of rejecting a challenge to economic regulation under the U.S. Constitution that "[t]he judicial function is to determine whether the ostensible protective purpose of the purported police regulation relates to the public welfare and not merely to a private interest and whether the remedy is designed to accomplish that purpose without going beyond the reasonable demands of the occasion so as to arbitrarily and unnecessarily interfere with personal and property rights"); cf. *Metro 500, Inc. v. City of Brooklyn Park*, 211 N.W.2d 358, 363-64 (Minn. 1973) (holding "[t]he control of uses authorized within a zone must have a substantial relationship to the public good and not result from a desire to resist the operation of economic laws . . . To conclude otherwise would lead to government by the whims of men rather than by law . . . . [t]his court recognizes that cities must have a measure of flexibility, but that some guidelines and standards must be required to the end that all our citizens have equal opportunities and do not have to entirely rely on the whim and caprice of those in power"); *Application of Paulson*, 81 N.W.2d 875 (Minn. 1957) (observing in context of dispute over whether granting carrier permit was "contrary to public interest" that "[t]he term 'public interest' has application to the interests of the public as a whole and not the private interests of competitors").

regulation is needed to protect the health and safety of horses or floaters vis-à-vis other husbandry procedures.

More specifically, Dr. Kleiner's testimony establishes that licensing schemes generally do not advance the asserted public purpose of occupational regulation—ensuring fitness to practice the regulated occupation. From the 50 occupations he has studied and the 40 studies done by his academic peers that he has reviewed, there is no evidence that licensing benefits consumers in terms of a reduction in unscrupulous or incompetent service. Trial tr. 371:21-372:3; 374:18-21. At the same time, licensing regimes indisputably increase the income and working conditions of members of the regulated occupation by reducing competition. Trial tr. 371:21-372:21. Moreover, Kleiner testified that the consumer protection that allegedly comes from monitoring the profession by boards is "fairly small" because there are very few professionals who ever lose their licenses. Trial tr. 399:18-20; 406:19-21. Additionally, the possible financial costs to a license holder of defending a potential disciplinary action does not have a significant impact on the quality of service to consumers because there are so few disciplinary actions resulting in the licensee not being allowed to practice. Trial tr. 405:18-406:21.

Thus, as a general rule, Dr. Kleiner and his peers have concluded that occupational regulations benefit primarily private interests and not public ones. This universal condemnation, however, does not undermine its relevancy to horse teeth floating where the barriers to entry from licensing are unusually and uniquely high when compared to the complete absence of any entry requirements for all other husbandry practitioners.

Applying this finding, Dr. Kleiner testified that Minnesota's regulation of horse teeth floaters evidences "red flags" that suggest regulatory capture and rent seeking which result in

benefits primarily to private interests. Specifically, Kleiner testified that the (1) extraordinary educational requirements for horse teeth floaters, (2) the State's adoption of occupational standards from the trade association, the American Association of Equine Practitioners, (3) the lack of health and safety issues; and (4) the fact that veterinarians dominate the Minnesota Board of Veterinary Medicine all suggest both regulatory capture that very closely fit with the other 50 other occupations Kleiner has studied. Trial tr. 383:3-11; 386;7-15; 399:21- 401:5. In essence, Minnesota's regulatory regime possesses features that cause licensing regimes to primarily serve private interests and not the public interest. No testimony or evidence in the record refutes these findings. Thus, in other words, Kleiner establishes that Minnesota's regulation requiring horse teeth floaters to be licensed shares characteristics of a licensing regime that primarily advances private interests and not the public interest, and does so where no other husbandry procedure is required to be licensed.

Outside of Minnesota, federal courts have recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose. *Craigmiles v. Giles*, 312 F.3d 220, 224 (C.A.6.2002) (holding as violating the 14th Amendment an occupational licensing law that stopped non-licensed discount casket retailers from selling caskets where the law protected the private interest of licensed funeral home operators who generally mark up the price of caskets 250 to 600 percent.); *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1321-22 (4th Cir. 1994) (rejecting simple favoritism as a valid basis for economic regulations). In fact, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (noting the clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders).

Minnesota's occupational regulation of horse teeth floating is contrary to the State's declared public policy because there is overwhelming evidence that establishes that no legitimate public interest can be served by requiring horse teeth floaters to be licensed while imposing no similar requirement on any other practitioner of animal husbandry procedures.

CONCLUSION

For the foregoing reasons, Chris Johnson respectfully asks that this Honorable Court:

A. Enter a judgment declaring that the regulation of horse teeth floaters as licensed veterinarians under Minn. Stat. §§ 156.001 *et seq*., as applied to him and on its face, is an unconstitutional violation of Sections 2 and 7 of Article 1 of the Minnesota Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States;

B. Enter a judgment declaring that the alternative to veterinary licensure in Minn. Stat. § 156.075 subd. 2 (a) (1), that includes IAED certification and the requirement of a letter from a large animal veterinarian willing to supervise the floating done by Chris Johnson and other horse teeth floaters is an unconstitutional violation of Sections 2 and 7 of Article 1 of the Minnesota Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States;

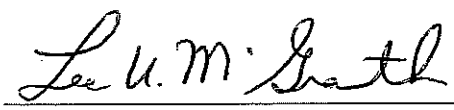
C. Permanently enjoin Defendants, their successors, agents, servants, employees and representatives, from enforcing Minn. Stat. §§ 156.001 *et seq*. as amended or supplemented from time to time, in a manner that restricts Chris Johnson and those similarly situated horse teeth floaters, from imposing or seeking to impose fines or criminal penalties directly or indirectly against them, and from subjecting them to legal action or harassment for being unlicensed under Minn. Stat. §§ 156.001 *et seq*. as amended or supplemented from time to time.

D. Award nominal damages of $1.00;

E. Award attorneys' fees and costs in this action (see 42 U.S.C. § 1988); and

F. Award such other further relief as the Court deems just, equitable and proper.

RESPECTFULLY SUBMITTED this 11th day of April, 2008.

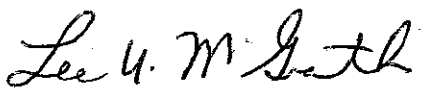


Lee U. McGrath (Minn. Reg. No. 0341502)
Clark Neily (admitted *pro hac vice)*
INSTITUTE FOR JUSTICE MINNESOTA CHAPTER
527 Marquette Avenue, Suite 1600
Minneapolis, Minnesota 55402-1330
Telephone: (612) 435-3451
Facsimile: (612) 435-5875
Email: lmcgrath@ij.org; cneily@ij.org

Attorneys for Plaintiff

ACKNOWLEDGEMENT

The undersigned acknowledges that: I am familiar with the terms of Minn. Stat. § 549.211, and that costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party pursuant to subd. 2 thereof, in the event a party or an attorney acts in bad faith; asserts a claim or defense that is frivolous and that is costly to another party; asserts an unfounded position solely to delay the order and course of the proceedings or to harass; or commits a fraud upon the Court.



Lee U. McGrath (Minn. Reg. No. 341502)
Executive Director
INSTITUTE FOR JUSTICE MINNESOTA CHAPTER
527 Marquette Avenue
Suite 1600
Minneapolis, Minnesota 55402-1330
Telephone: (612) 435-3451
Facsimile: (612) 435-5875
Email: lmcgrath@ij.org