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

HEATHER KOKESCH DEL CASTILLO,

Plaintiff,

v.

Civil Action No. 3:17-cv-00722

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

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND MEMORANDUM IN SUPPORT

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INTRODUCTION

Plaintiff Heather Del Castillo is a privately certified health coach who wants to share dietary advice with willing listeners. If her advice were published in a book or on a blog, there is no question that it would be fully protected by the First Amendment. But because Heather instead renders her advice directly to customers, Defendant Florida Department of Public Health cited and fined her for the unlicensed practice of dietetics/nutrition.

Florida's regulation of Heather's speech about diet violates the First Amendment. Under the U.S. Supreme Court's decisions in *Holder v. Humanitarian Law Project* and *Reed v. Town of Gilbert*, licensing speech on particular topics is a content-based regulation of speech subject to strict scrutiny. On the undisputed record, the Department cannot come close to carrying its First Amendment burden of establishing a compelling interest in preventing adults from sharing advice about diet. Nor can the Department establish that Florida's burdensome licensure regime is narrowly tailored to whatever interests the Board asserts. Thus, this Court should enter judgment in Plaintiff's favor.

STATEMENT OF FACTS

Plaintiff Heather Del Castillo is a Florida resident who previously operated a health-coaching business, Constitution Nutrition, in the state of Florida. *See* Declaration of Plaintiff Heather Kokesch Del Castillo ("Del Castillo Decl.") ¶ 2.

She was forced to shut down the business because it is illegal in Florida for Heather to engage in Constitution Nutrition's core practice—providing individualized dietary advice in exchange for compensation—without a license.

The evidence in this case consists of written discovery, as well as the depositions of the plaintiff; the Defendant's 30(b)(6) designee, Sidronio Casas; and the Defendant's expert, Dr. Gail Kauwell. As discussed below, the evidence and testimony here establishes that the dietary advice provided by Heather is within the realm of mainstream dietary advice widely available in books, on television, and on the Internet. The testimony also confirms that there is no evidence that the state's censorship of such dietary advice advances or otherwise promotes health or safety.

A. Heather Del Castillo's Business.

The idea for Constitution Nutrition began around 2013, when Heather left an unfulfilling job in college administration to pursue a career in human health and wellness. Del Castillo Decl. ¶¶ 3–5. To that end, she earned a certification to be a holistic health coach from the Institute for Integrative Nutrition, an online school that educates health coaches on how to help others make positive changes to their diet and lifestyle. *Id*. ¶¶ 6–8. Heather never described or represented herself as a "dietician" or "nutritionist." *Id*. ¶ 8. In fact, if anyone ever made the mistake of

describing her as a dietician or nutritionist, she would immediately correct them. Del Castillo Decl. *Id*.

Then living in California, Heather opened Constitution Nutrition, a holistic health-coaching business. Del Castillo Decl. ¶¶ 2, 9. Typically, Heather conducted in-person meetings with those who sought her coaching services. *Id*. ¶ 9. Other times, however, Heather would "meet" with her customers through online media like Skype or Google Hangouts. *Id*. ¶ 11. This technology enabled Heather to reach and engage with clients from across the country. *Id*. Heather had a long list of happy customers, and her business received uniformly positive reviews on sites like Yelp. *Id*.

Heather's featured service—and the one ultimately leading to this litigation—was a six-month program in which she advised individual clients on what to eat (and not eat) and provided recommendations to help them improve their overall health and wellness. Del Castillo Decl. ¶ 9. For example, Heather would typically help clients adopt and incorporate healthy habits related to diet and exercise. *Id*. The cost for this service was $1,170 and included twelve 50-minute coaching sessions over the course of six months, email support, recipes, a monthly newsletter, and handouts on nutrition, fitness, and overall wellness. *Id*. It is undisputed that neither Heather's six-month program nor any of her other services involved any diagnostic testing or physical examination. *Id*. ¶ 10; Declaration of

Paul Sherman in Supp. of Pl.'s Mot. Summ. J. ("Sherman Decl.") Ex. 1 (Casas Dep. 25:15–26:3). Rather, Heather's services consisted entirely of written or spoken advice. *Id*. ¶¶ 10, 12; *see also* Casas Dep. 22:6–14 (testifying that the "sole basis for th[e] complaint is that Ms. Del Castillo was not licensed to provide dietary advice," and "not that anyone was harmed by her advice."); *id*. 26:23 (testifying that Heather's crime was that "[s]he offered nutritional counseling.").

Heather planned to continue operating Constitution Nutrition in California, where her business was perfectly legal. Del Castillo Decl. ¶¶ 12–14. But Heather had to temporarily cease operations when her husband, an airman in the U.S. Air Force, was relocated to Hulburt Field Air Force Base in Ft. Walton Beach, Florida. *Id*. ¶ 12. Once they relocated and got settled, Heather resumed her operation of Constitution Nutrition and began offering services. *Id*. ¶ 13. To help generate business in her new location, Heather took out some small advertisements in local publications. *Id*. ¶¶ 13–14. In one such advertisement, Heather offered to "review[] your health history, set goals . . . and achieve them through a customized holistic program that can include diet, exercise, motivation, and detoxing your home." *Id*. ¶ 14. Unbeknownst to Heather, the services offered in that advertisement—the very same services she provided in California—are illegal in Florida without a license. *Id*.

B. The Florida Dietetics and Nutrition Practices Act Makes It Illegal to Communicate Individualized Dietary Advice in Exchange for Compensation, Even Though That Same Information Is Widely Available in Books, on Television, and on the Internet.

Florida law forbids unlicensed individuals, like Heather, from speaking about nutrition with other willing adults in exchange for compensation. And the state—often at the behest of licensed nutritionists and dieticians—actively investigates and enforces against those who are alleged to have violated the Act.

1. Under the Act, it is illegal to provide basic dietary advice to another person, in exchange for compensation, without a government-issued license.

The practice of "dietetics" in Florida is subject to regulation by the Florida Department of Health ("the Department"). Under the state's Dietetics and Nutrition Practices Act ("the Act") the state defines "dietetics" as "the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, and management and from the behavioral and social sciences to achieve and maintain a person's health throughout the person's life." Fla. Stat. § 468.503(4). And it is illegal under the Act to "engage for remuneration in dietetics and nutrition practice or nutrition counseling" without a license. *Id*. § 468.504. Specifically, "dietetics" includes "recommending appropriate dietary regimens, nutrition support, and nutrient intake," *id*. § 468.503(5), while "nutrition counseling" refers, in relevant part, to "advising and assisting individuals or groups

on appropriate nutrition intake by integrating information from [a] nutrition assessment." *Id*. § 468.503(10).

To obtain a license authorizing an individual to provide any of these services, a person must: (1) Earn a bachelor's degree or postbaccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management; (2) complete 900 hours of supervised practice; (3) pass a licensure examination that costs $200; and (4) pay fees of $165. Fla. Stat. § 468.509; Fla. Admin. Code r. 64B8-41.001.[1] Heather is a college graduate with a post-graduate degree; but because her degrees are in unrelated fields, she cannot satisfy the Act's education requirements. Del Castillo Decl. ¶ 20. And because military spouses often relocate (often to other states), there is little incentive for Heather to start anew and undergo the burdens of obtaining a license in Florida. *Id*. ¶ 21.

While Heather lacks the formal education the state requires, she is not ignorant on matters of health and wellness. Heather is certified by the Institute of Integrative Nutrition as a health coach, and she stays abreast of the developments in her field. Del Castillo Decl. ¶ 8; Sherman Decl. Ex. 2 (Del Castillo Dep. 79:14–80:15). But without a license, it remains illegal in Florida for her to dispense basic dietary advice to an individual in exchange for compensation. Fla. Stat.

[1] The parties do not dispute that Heather has not satisfied these requirements.

§§ 468.503(5), 468.517(1)(a)-(b). This is true even though Heather's advice is materially identical to advice easily found in books and on the Internet. Del Castillo Decl. at ¶ 10. For example, while it is illegal for Heather to receive compensation for coaching someone who is attempting the Whole30 Diet—something she did previously—that same person can easily purchase books, read blogs, and listen to podcasts about the Whole30 Diet and attempt the diet herself.[2] The Act also exempts many licensed professionals, such as acupuncturists, who lack the specific training in diet otherwise required by the Department. *See* Fla. Stat. § 468.505. But the Department acknowledged that it does not have "any evidence that dietary advice offered by acupuncturists is safer than dietary advice offered by unlicensed people." Casas Dep. 43:3–45:7.

2. The State of Florida has enforced the Act against Heather and others purely for offering advice.

The State of Florida enforces the Act aggressively. As the Department's 30(b)(6) witness testified, the Department often receives complaints from licensed dieticians and nutritionists, alerting the Department of allegedly unlicensed practice.[3] Casas Dep. at 8:24–9:2. The state's agents pursue every complaint submitted to the Department. *Id*. 10:2–4. And when an investigator has reason to

[2] Similarly, Florida law permits Heather to trumpet the benefits of her personal experiences with the Whole30 Diet, but prohibits her from suggesting, for money, that a client should try it if she wants to enjoy similar results.

[3] Investigators sometimes open investigations on their own. Casas Dep. 8:24–9:2.

suspect that an individual has violated the Act, it is standard practice for that investigative agent to assume a false identity and begin an undercover investigation of the complaint. *Id*. 34:17–22.

That is exactly what happened to Heather. A licensed dietician saw Heather's advertisement in Natural Awakenings, a locally circulated magazine, under the heading "Nutrition Counseling," and contacted the Department. Casas Dep. 21:8–13; Sherman Decl. Ex. 3 (Defs.' Resp. to Pl.'s Requests for Prod. 005–11); Del Castillo Decl. ¶ 17. The informant then alerted the Department that Heather was allegedly "offering nutrition counseling services inclusive of a customized program to include diet and . . . in [sic] not a licensed dietician." Casas Dep. 22:23–24:21; Sherman Decl. Ex. 3 (Defs.' Resp. to Pl.'s Requests for Prod. 006). This complaint triggered an automatic investigation into Heather and her business, Constitution Nutrition. *See* Casas Dep. 10:2–4.

A sting operation ensued. On March 14, 2017, an investigator for the Department contacted Heather and, using the fake name "Pat Smith," asked about Heather's services. Casas Dep. 33:25–34:15; Sherman Decl. Ex. 3 (Defs.' Resp. to Pl.'s Requests for Prod. 002–03, 21–22); Del Castillo Decl. ¶¶ 15–17. Heather responded with a brief explanation of her services and asked Smith to provide

some additional background information on a form that she provided.[4] Del Castillo Decl. ¶ 15; Sherman Decl. Ex. 3 (Defs.' Resp. to Pl.'s Requests for Prod. 21–25). Smith never responded. *Id*. Instead, based on that one email, Smith concluded that Heather had violated the Act. Del Castillo Decl. ¶¶ 16-18; Casas Dep. 40:16–41:9.

On May 2, 2017, Smith (whose real name is Ben Lanier) arrived at Heather's home. Del Castillo Decl. ¶¶ 16-17. He delivered a letter from the Department, which informed Heather that the Department had probable cause to believe she was illegally practicing as a dietician or nutritionist. Defs.' Resp. to Pl.'s Requests for Prod. 012–14; Del Castillo Decl. ¶ 16. The letter included an order to cease and desist and assessed Heather a total fine of $754.09 ($500 in fines, plus $254.09 in investigatory fees). *Id*. This was the Department's standard practice. *See* Casas Dep. 14:18–20, 16:15–19. Feeling as though she had no other option, Heather paid the fines and costs and agreed to stop providing individualized dietary advice in exchange for compensation in Florida. Del Castillo Decl. ¶ 22.

[4] The form Heather provided is a standardized health-history form that was created by the Institute for Integrative Nutrition. Not all of the information on the form is relevant to the services Heather offered, but Heather nonetheless used it because of its ease and comprehensiveness. Del Castillo Decl. ¶ 15; *see also* Del Castillo Dep. 51:24–52:21.

C. The State of Florida Possesses No Evidence That the Act Makes Floridians Any More Safe or Healthy and Relies Solely on Speculative and Anecdotal Harm.

The State of Florida possesses no evidence whatsoever that the Act promotes or protects public health or safety. The State's own expert, Dr. Kauwell admitted that there is "no empirical evidence that [she] can point to" which indicates that licensure helps protect the public. Sherman Decl. Ex. 4 (Kauwell Dep. 60:8–15). Indeed, the only support Dr. Kauwell could muster for her belief that licensure "helps to protect the patients and clients," *id*. 60:5–7, is her own belief that this claim is true:

> Q: You seem to be telling me that you think there are benefits to public safety from having licensure as opposed to not having licensure, and what I'm trying to figure out is, how do we know?
>
> Dr. Kauwell: *How do you not know?*

Id. 60:11-15 (emphasis added).

Dr. Kauwell did acknowledge that there is no evidence to confirm her assumptions. *See* Kauwell Dep. 57:24–58:8 (testifying that she is unaware of any "studies that had compared health outcomes in Florida versus other states that might not license diet in the same way . . . or . . . any sort of pre/post studies."). The Department's 30(b)(6) representative was similarly unaware of any data tending to show the effectiveness of licensure. Casas Dep. 9:17–21; 10:18–22;

12:3–14; 12:24–13:15; 40:1–4. Indeed, between the testimony of Mr. Casas and Dr. Kauwell, it is unrebutted that:

- There is no evidence that, as a general matter, the Act makes Floridians safer. Kauwell Dep. 56:21–57:9, 57:24–58:8; Casas Dep. 9:17–21, 10:18–22, 12:3–14, 12:24–13:15, 40:1–4.

- There is no evidence that the passage of the Act resulted in a decrease in the amount of incidents or complaints of harm. Kauwell Dep. 56:22–57:9.

- There is no evidence that Floridians, because of licensure, are comparatively safer than residents of any of the states that do not require a license to dispense dietary advice. Kauwell Dep. 54:10–23, 57:10–13.

- There is no evidence that even a single complaint was ever "initiated . . . based on evidence that a member of the public was harmed by the unlicensed practice of dietetics." Casas Dep. 13:11–15.

Without evidence, the Department relies only on speculation and anecdote as its justification for the law. Specifically, Dr. Kauwell provided three hypothetical examples of "potential harm" that might be ameliorated by Florida's law. *See* Sherman Decl. Ex. 5 (Expert Report of Gail P.A. Kauwell, PhD, RDN, LDN, RAND ("Kauwell Rep.")). The first was a hypothetical scenario in which a young woman might harm her pregnancy by going on a low-carbohydrate diet. Kauwell Rep. at 7. The second was a hypothetical situation in which an elderly woman, who is suffering from an undiagnosed kidney disease, might detrimentally affect her health by increasing her protein intake. *Id*. at 8-9. And the third involved a

hypothetical scenario in which a man might risk liver-transplant rejection if he unknowingly consumes too much sodium. *Id*. at 9. Dr. Kauwell provided no evidence that these hypotheticals have actually happened anywhere, that the risk of these hypotheticals occurring was greater for individuals who receive advice directly from a speaker (as opposed to receiving it from a book or the Internet), or that full-blown licensure of dietary advice is a narrowly tailored way of addressing these hypothetical risks. *See* Kauwell Dep. 48:8–17; *see also id.* 54:10–22.

When Dr. Kauwell did cite instances of actual harm, she did so by reference to decades-old anecdotes that do not even remotely resemble the facts here. For example, Dr. Kauwell cites several articles from the late 1980s in which Floridians were swindled by individuals—many of whom were either doctors or claimed to be doctors—who were selling large amounts of nutritional supplements. Kauwell Rep. 5–7, Exs. 2.A–2.E. The Department admitted that it has no evidence that the Act would have prevented these occurrences, *see* Kauwell Dep. 56:22–57:9, and many were seemingly already illegal when they occurred. *See* Casas Dep. 51:9–52:11. Moreover, Florida law actually exempts sellers of nutritional supplements from the dietetics licensure regime. Fla. Stat. §§ 468.505(g)–(h).

Finally, Dr. Kauwell's report relied heavily on a March 1988 episode of the Oprah Winfrey Show entitled "Unorthodox Medical Treatments," as evidence for why licensure is supposedly necessary. Kauwell Rep. Exs. 2.F & 2.G. The episode

discussed such topics as a cult of dentists who instructed a woman to store her husband's corpse in her basement for eight years because "there was one dentist who claim[ed] he can heal," a medical doctor who duped a family into believing he could cure leukemia with high doses of German Vitamin A, and a woman who nearly perished at a "health farm" after taking a phony doctor's advice to fast for 47 days. *Id*.[5] According to Dr. Kauwell, although each of these instances "did not occur in Florida, they could have." *Id*. Ex. 2.F. But Heather has never—and would never—instruct any of her clients to do any of these things. *See* Del Castillo Dep. 78:8–10 ("I want to do what I was able to do in California, which is talk to willing individuals about food for pay.")

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

SUMMARY OF ARGUMENT

The central question in this case is straightforward: Is a government prohibition on advice about one of the most common topics in life—diet—a restriction on speech within the scope of the First Amendment? Under binding

[5] The health farm and the phony doctor who ran it were later found to have engaged in the unlicensed practice of medicine and subject to a permanent injunction. *See Bd. of Med. Quality Assurance v. Andrews*, 211 Cal. App. 3d 1346 (Cal. Ct. App. 1989).

Supreme Court precedent, this is not a close call. As explained in Section I, below, individualized advice is speech entitled to First Amendment protection. As explained in Section II, this speech does not fall within any recognized exception to the First Amendment, and, indeed, this Circuit has expressly rejected the notion that "professional" speech falls outside the scope of the First Amendment. For these reasons, and as explained in Section III, Florida's regulation of speech about diet should be subject to the strict scrutiny that applies to all content-based regulations of speech. Florida's law cannot survive that scrutiny, and Plaintiff's motion for summary judgment should therefore be granted.

ARGUMENT

I. Heather Del Castillo's Advice About Diet Is Speech, Not Conduct.

The threshold question in this case is whether a restriction on providing advice about diet and nutrition is a restriction on free speech subject to heightened scrutiny or simply a restriction on medical treatment subject to rational-basis review. Under binding precedent from the U.S. Supreme Court, the answer to that question is clear: When a restriction on a speaker's activities hinges entirely on whether that speaker engages in speech of a particular content, that is a restriction on speech subject to First Amendment scrutiny.

The controlling case is *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the U.S. Supreme Court's most recent and most authoritative

pronouncement on the distinction between speech and conduct and the standards of review that apply to restrictions on both. In that case, the Supreme Court considered the constitutionality of a federal law that prohibited anyone from providing "material support" to designated foreign terrorists in the form of (among other things) "training" or "expert advice or assistance." *Id.* at 8-9, 130 S. Ct. at 2712-13. The plaintiffs included "two U.S. citizens and six domestic organizations" that wished to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 10, 14-15, 130 S. Ct. at 2713, 2716. They wanted, in other words, to give "material support" solely by communicating individualized advice. *See id.*

The parties in *Humanitarian Law Project* disagreed—as Plaintiff anticipates the parties here will disagree—on whether the law at issue regulated speech or conduct. The plaintiffs argued that, as applied to their activities, the material-support prohibition was a restriction on "pure political speech" subject to strict scrutiny. *Id.* at 25, 130 S. Ct. at 2722. The government, by contrast, argued that "material support," even when it took the form of speech, was a form of conduct,

and that restrictions on that conduct were subject to only intermediate scrutiny. *Id.* at 25-26, 130 S. Ct. at 2723.[6]

The Supreme Court ultimately rejected both side's characterizations of the speech before it but still held that the law operated as a content-based restriction on speech subject to strict scrutiny. *See id.* at 28, 130 S. Ct. at 2724. This holding is notable for two reasons. First, although the Court categorically rejected the idea that the government had banned the plaintiffs' "pure political speech," it still held that strict scrutiny was the applicable standard of review. *See id.* at 25, 28, 130 S. Ct. at 2723-24. [7] Simply put, it was irrelevant that the plaintiffs' speech was not "pure political speech" because all content-based restrictions on speech are subject to strict scrutiny. *See id.*; *accord Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Second, the Court's opinion lays out a clear test for distinguishing speech from conduct. Above all, this test does not turn on some metaphysical distinction between "speech" and "conduct." Instead, the test looks at whether the applicability of a law turns on what a speaker wishes to say:

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[6] Notably, even the government in *Humanitarian Law Project* did not argue that this fact eliminated *all* First Amendment scrutiny. *See* 561 U.S. at 26-27, 130 S. Ct. at 2723. Instead, the government argued only that the material-support statute was subject to intermediate scrutiny under *United States v. O'Brien,* 391 U.S. 367, 376–77 (1968). *See id.*

[7] Although the Court did not use the phrase "strict scrutiny" to describe the standard of review it applied in *Humanitarian Law Project*—referring to it merely as a "more demanding" standard than intermediate scrutiny, 561 U.S. at 28, 130 S. Ct. at 2724—the Court has subsequently clarified that the standard it applied in *Humanitarian Law Project* was strict scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Humanitarian Law Project, 561 U.S. at 27, 130 S. Ct. at 2723-24 (citations omitted).

The Court also rejected the notion that the material-support prohibition could escape strict scrutiny because it "*generally* function[ed] as a regulation of conduct." *Id.* at 27-28, 130 S. Ct. at 2724 (emphasis in original). As the Court observed, even when a law "may be described as directed at conduct," strict scrutiny is still appropriate when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28, 130 S. Ct. at 2724.

This analysis is directly applicable to the claims here. Heather Del Castillo wants to talk to her customers, and "whether [she] may do so . . . depends on what [she] say[s]." *Id.* at 27, 130 S. Ct. at 2723-24. If Ms. Del Castillo wants to render advice about how to burn calories through vigorous exercise, that advice is perfectly legal. But if Ms. Del Castillo wants to render advice about how to lose

weight by cutting out carbohydrates, she is forbidden from doing so unless she first obtains a license from the state. Under the rule of *Humanitarian Law Project*, Florida's law is triggered by speech and is therefore a content-based restriction on speech subject to strict scrutiny.

The conclusion that Florida's law is content-based is further bolstered by the fact that the government's sole interest in regulating Ms. Del Castillo's speech is concern about the communicative impact of that speech. Florida does not complain that Ms. Del Castillo's speech is too loud or too distracting or that it is occurring in an inappropriate place. Rather, the Department is afraid that a listener might be *persuaded* by her advice and *choose* to eat something that the Department would consider inappropriate for that person. To ensure that listeners do not act on Ms. Del Castillo's advice, they have prohibited her from providing it. This concern for the communicative impact of Ms. Del Castillo's speech is the essence of a content-based restriction on speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (defining content-based laws as "those that target speech based on its communicative content," and noting that such laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests").

II. Ms. Del Castillo's Advice About Diet Is Fully Protected Speech.

Having established that advice about diet is speech, not conduct, and that Florida's regulation of that speech is based on its content, the next question is whether Florida's law should be treated like any other content-based regulation of speech—i.e., subject to strict scrutiny—or whether some special rule applies that would relieve the government of its obligations under strict scrutiny.

No special rule applies here. Discussions among laypeople about what to eat are surely as old as speech itself. Common experience tells us that Americans constantly discuss what is best to eat, give each other advice and emotional support when dieting, and help each other apply the latest dietary tips and knowledge. Vigorous debate and the freewheeling exchange of dietary advice among laypeople have been with us since the founding generation.[8]

Because advice about diet has been a ubiquitous part of American discussion since the founding, there can be no argument that such advice constitutes an unprotected category of speech. As the Supreme Court has recently explained, although there are a handful of categorical exceptions to the First Amendment—such as obscenity or incitement—the only acceptable method for determining that

[8] Benjamin Franklin, for example, recounts in his autobiography how he encouraged a friend to adopt a vegetarian diet. When his friend objected that he doubted his "constitution [could] bear that," Franklin "assur'd him it would, and that he would be the better for it." Benjamin Franklin, *The Autobiography of Benjamin Franklin* 31 (1793) (P.F. Collier & Sons 1909). His friend "agreed to try the practice, if [Franklin] would keep him company. [Franklin] did so, and [they] held it for three months." *Id.*

a given category of speech falls outside the protection of the First Amendment is to examine whether that category has been "historically unprotected." *United States v. Stevens*, 559 U.S. 460 (2010). [9] Here, there is no evidence the speech about diet has historically been considered unprotected. And this should come as no surprise, since no state in the country regulated speech about diet until the 1980s, and many states still allow anyone to render dietary advice to whomever they wish.

Plaintiff expects that Defendant will argue that this case is not controlled by *Humanitarian Law Project*, but instead by *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), in which a three-judge panel of the Eleventh Circuit—without discussion of *Holder*—upheld Florida's licensure of interior designers against a First Amendment challenge. In so holding, the panel adopted an argument advanced by Justice Byron White in a concurrence in *Lowe v. SEC*, 472. U.S. 181, 232 (1985) (White, J., concurring), that there was a constitutionally significant distinction between regulating speech to the public at large and regulating direct, personalized speech with clients. *Locke*, 643 F.3d at 1191. The latter, Justice White argued, was a regulation of professional conduct that placed only an incidental burden on speech, and was therefore subject to only rational basis

[9] *See also United States v. Alvarez*, 638 F.3d 666, 671 (9th Cir. 2011) (Smith, J., concurring in denial of rehearing en banc) ("To the extent the Court has articulated a test for determining whether a certain type of speech belongs on that list, the test is whether '[f]rom 1791 to the present,' that speech has been 'historically unprotected.'" (quoting *Stevens*, 130 S. Ct. at 1584–86)).

review. But whatever vitality the panel's decision had when it was handed down has been fatally undermined by the U.S. Supreme Court's recent decision in *Reed*, 135 S. Ct. 2218, and the Eleventh Circuit's *en banc* decision in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (*en banc*).

To the extent the panel in *Locke* found the Supreme Court's decision in *Holder* unclear on whether individualized advice was speech or conduct, *Reed* removes any doubt. *Reed* confirms that laws that "defin[e] regulated speech by particular subject matter" are "obvious[ly]" content-based and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227. *Locke*'s holding—that a law that singled out advice about interior design for licensure triggered no First Amendment scrutiny whatsoever—cannot be squared with *Reed*.

The Eleventh Circuit's *en banc* decision in *Wollschlaeger* also supports this conclusion. That case involved a constitutional challenge to a Florida law that prohibited physicians from routinely asking patients questions about gun ownership. Florida defended that law by arguing that "the First Amendment [was] not implicated because any effect on speech [was] merely incidental to the regulation of professional conduct." *Wollschlaeger*, 848 F.3d at 1308. But the *en banc* court rejected that argument as "unprincipled and susceptible to manipulation." *Id.* Although the court did not expressly overrule *Locke*, it did expressly reject its central holding. *Id.* at 1310-11 ("In sum, we do not think it

appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review."). The *en banc* court also compared the panel decision in *Locke* to the Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013)—which also adopted Justice White's *Lowe* concurrence—and then stated that there are "serious doubts about whether *Pickup* was correctly decided." *Wollschlaeger*, 848 F.3d at 1309. Finally, in conflict with *Locke*, the *en banc* court reviewed the challenged law under the First Amendment, concluding that it could not survive even intermediate scrutiny. *Id.* at 1312.

In sum, *Locke* was wrong the day it was decided, and its incompatibility with basic First Amendment principles has only become clearer since then. Its reasoning cannot be squared with the then-recent decision in *Holder v. Humanitarian Law Project*, let alone with the Supreme Court's and this Circuit's recent decisions in *Reed* and *Wollschlaeger*.

Finally, even if *Locke* remained good law, it is distinguishable because it involved a facial, rather than an as-applied challenge. As Florida's statutes make clear, interior design encompasses several activities, some of which—such as the administration of design contract, Fla. Stat. § 481.203(8), and satisfying the requirements for the issuance of a building permit, *id.* § 481.2131(1)—are not purely speech. Here, by contrast, it is undisputed that the only activity that subjected Heather to punishment was her provision of advice on diet, and that is

the only activity for which she seeks constitutional protection. Thus, this Court should review the burdens Florida has imposed on Plaintiff's speech the same way it would review any other content-based restriction on speech, subjecting them to strict scrutiny, which they cannot survive.

III. Florida's Dietetics Practice Act Cannot Survive First Amendment Scrutiny.

Because Ms. Del Castillo's speech is fully protected, the only remaining question is whether the government can carry the high burden of justifying a law that prohibits unlicensed speakers from providing any individualized dietary advice to any person in any setting. It cannot. Content-based regulations are subject to strict scrutiny, which requires the government to prove that the burdens it imposes on speech are narrowly tailored to address a compelling government interest. The government cannot satisfy either prong of this standard.

As for the state's interest, the government has no compelling interest in regulating ordinary advice about diet rendered to adults who are free to accept or reject it. A compelling government interest addresses a core government function. In *Humanitarian Law Project*, for example, the Department of Justice asserted a compelling interest in suppressing material assistance to murderous foreign terrorists. 561 U.S. at 28, 130 S. Ct. at 2725 ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.") There is no comparable interest here. Although the Department's expert

assembled a handful of anecdotes about the dangers of bad dietary advice, what these anecdotes show is that there is nothing unique, or uniquely dangerous, about individualized dietary advice that would merit the burdens Florida has imposed on it. Instead, this evidence tends to show that people are as likely to receive bad dietary advice from a book or another licensed health professional as they are from a health coach like Heather. *See* Kauwell Dep. 48:8–49:12. Moreover, the fact that all the anecdotes are decades old tends to show that the dangers of bad dietary advice are minimal. *Cf. Wollschlaeger*, 848 F.3d at 1312 ("the question for us is whether, in a state with more than 18 million people as of 2010, six anecdotes (not all of which address the same concerns) are sufficient to demonstrate harms that are real, and not merely conjectural") (citation omitted).

The case law confirms the lack of any compelling government interest. There is no case supporting the proposition that the government has a compelling interest in suppressing ordinary dietary advice. Indeed, suppressing that advice usurps the right of listeners to decide for themselves which speakers are worth listening to, an outcome anathema to the First Amendment. *See Citizens United v. FEC*, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to

control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

This conclusion is confirmed not just by Supreme Court precedent, but also by history and common sense. Advice on diet is no doubt as old as language. It is ubiquitous in our society, as is the tradition of sharing this sort of advice one-on-one. Such speech, which has long been wholly unregulated, cannot now be regulated for the first time without any evidence showing the compelling need to do so. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2736–38 (2011) (citing the long history of violent entertainment aimed at children as a basis for concluding that such entertainment is entitled to First Amendment protection). And, as discussed above, no such evidence exists.

In addition to lacking a compelling government interest, the Department's regulation of Ms. Del Castillo's speech also fails the narrow-tailoring prong of strict scrutiny. Specifically, the Board's censorship is fatally underinclusive because "it discriminates against some speakers but not others without a legitimate 'neutral justification' for doing so." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–30 (1993)); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("[T]he notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.").

Here, there is no legitimate neutral justification for the fact that Florida prohibits Plaintiff's dietary advice while leaving vast amounts of materially identical speech—in the form of newspapers, books, television shows, and Internet discussion forums—totally unregulated. Florida's newspapers and airwaves—not to mention the Internet—are filled with advice personalities answering questions on every facet of health and wellness, many of which seemingly fall within the broad scope of Florida's definition of the "practice of dietetics." Florida's dietetics laws exempt a host of other licensed health professionals, including even acupuncturists, who may not have any particular training in diet and nutrition. Fla. Stat. § 468.505(1)(a). An even though most of the examples of supposed harm cited by the Department's expert involved persons who rendered dietary while selling nutritional supplements, Florida law exempts these people as well. *Id.* § 468.505(1)(g)–(h). That the state has targeted only Plaintiff's speech, while leaving the rest of this advice totally untouched, is entirely arbitrary.

As the Supreme Court has recognized, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted). Accordingly, the Department's censorship of Plaintiff's dietary advice fails narrow tailoring.

Finally, even if Florida's regulation of Heather's speech were subject to intermediate scrutiny, Heather would still prevail. Intermediate scrutiny is a demanding standard. The U.S. Supreme Court made clear in *McCullen v. Coakley* that courts applying intermediate scrutiny under the First Amendment must consider things like the evidence supporting the government's assertions and the availability of less-restrictive alternatives. 134 S. Ct. 2518, 2535–39 (2014). Here, there are obvious less-restrictive alternatives, such as regulating who may use the title "state-licensed dietitian/nutritionist" without prohibiting unlicensed people from speaking. Indeed, the Department's own expert testified to the variety of different regulatory approaches states have taken towards speech like Heathers, but was unable to identify any evidence that Florida's prohibition on unlicensed speech about diet provides any demonstrable benefits to the public. *See* Kauwell Dep. 57:24–58:8. Under intermediate scrutiny, that absence of evidence is fatal to Florida's law.

Conclusion

For these reasons, this Court should grant Plaintiff's motion for summary judgment, declare Florida's dietetics practice act unconstitutional as applied to pure advice about diet, and enjoin the Florida Department of Health from enforcing the dietetics practice act against Plaintiff and others similarly situated.

Dated this 15th day of May 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Motion and Memorandum of Law comply with Local Rule 7.1(F) and 56.1(E) because, combined, they contain 6,066 words.

/s/ Ari Bargil
Ari Bargil
INSTITUTE FOR JUSTICE

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2018, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND MEMORANDUM IN SUPPORT** was filed using the Court's CM/ECF system and served on the following counsel of record:

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