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

HEATHER KOKESCH DEL CASTILLO,

Plaintiff,

v. CASE NO. 3:17-cv-00722

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

Defendant.
_____/

DEPARTMENT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Defendant Celeste Philip, MD, MPH, by and through undersigned counsel and pursuant to this Court's Final Scheduling Order and Mediation Referral dated December 13, 2017, respectfully submits this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (motion).

Plaintiff's complaint asserts that enforcement of the Florida Dietetics and Nutrition Practice Act (the Act) violates her rights under the First Amendment, the Civil Rights Act of 1871 (42 U.S.C. § 1983), and the Declaratory Judgment Act (28 U.S.C. § 2201). *See* Compl. ¶ 1, 2. Plaintiff's Motion for Summary Judgment fails to address the legal analysis required to determine the constitutionality of the Act, to wit: 1) whether any infringement on Plaintiff's First Amendment right to free speech

is merely incidental to the Act's regulation of the occupation of dietetics and nutrition or nutritional counseling; 2) the application of the due process clause of the Fourteenth Amendment, through which the First Amendment applies to state action and by which Plaintiff's 42 U.S.C. § 1983 claim must be judged; and 3) whether the Act rationally relates to a legitimate state purpose. Plaintiff's motion should be denied.

I. Any infringement on Plaintiff's First Amendment Rights is merely incidental to the Act's legitimate regulation of the occupation of dietetics and nutrition or nutritional counseling.

The Supreme Court of the United States has long held that states have a compelling interest in regulating the practice of professions. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and…have broad power to establish standards for licensing practitioners and regulating the practice of professions.") Plaintiff's motion acknowledges that in conducting business as Constitution Nutrition in Florida, she was violating the "Dietetics and Nutrition Practice Act" (the Act) set forth in sections 468.501-518, Florida Statutes. *See* Plaintiff's motion, pp. 2, 4.

The plaintiffs in *Locke v. Shore*, 682 F.Supp.2d 1283 (N.D. Fla. 2010 sought declaratory and injunctive relief under 42 U.S.C. § 1983 based on allegations that Florida's regulatory scheme violated their rights under the First Amendment and the

equal protection and due process clauses of the Fourteenth Amendment. *Locke,* 682 F.Supp.2d at 1286. In rejecting the plaintiffs' claim that Florida's regulatory scheme requiring commercial interior designers to obtain licenses violated their First Amendment rights, the Eleventh Circuit stated "[a] statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Id.* at 1191, quoting *Accountant's Soc. Of Va. v. Bowman,* 860 F.2d 602, 604 (4th Cir. 1988).

The Act prohibits an individual from "[e]ngag[ing] in dietetics and nutrition practice or nutrition counseling *for remuneration* unless the person is licensed under this part…" § 468.517(1)(a), Fla. Stat. (emphasis added). It is important to note the Act does not prohibit any individual "from the free dissemination of information, or from conducting a class or seminar or giving a speech, related to nutrition." § 468.505(2), Fla. Stat. Nor would the Act prevent an individual from writing a book concerning nutrition, or from having one-on-one or group discussions with other individuals concerning dietetics and nutrition, *provided that those discussions are not conducted commercially for pay*. *Id. See Thomas v. Collins,* 323 U.S. 516, 544-45 (Jackson, J. concurring) (a state may prohibit an unlicensed individual from practicing law as a vocation, but may not prohibit an unlicensed individual from making a speech about the rights of man or of labor). Any inhibition of the Plaintiff's

right to free speech is merely incidental to Florida's legitimate regulation of the practice of dietetics and nutrition practice, and does not violate the First Amendment.

A. The Act does not constitute a content-based restriction of speech

Plaintiff contends that the Act constitutes a content-based restriction on speech, arguing that whether she can speak to her customers depends on *what* she says to them. Plaintiff's motion, p. 17. This contention is without merit. The Act does not prohibit Plaintiff from communicating with anyone about dietetics and nutrition, orally or in writing, whether to individuals or to groups. The Act merely prohibits Plaintiff from engaging in the practice of dietetics and nutrition practice *for remuneration* without the required license. § 468.517(1)(a), Fla. Stat. "The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted [the] regulation…because of [agreement or] disagreement with the message it conveys.'" *Crawford v. Lungren,* 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed 2d 497(1994)). Plaintiff was not fined because she spoke about dietetics and nutrition or nutritional counseling, but rather because she offered to engage, and in fact did engage, in the unlicensed practice of dietetics and nutrition or nutritional counseling *for remuneration*.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) and *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015) are inapplicable to Plaintiff's case. As a threshold

matter, neither *Holder* nor *Reed* involved the regulation of an occupation or profession. Beyond that, unlike the case currently before this Court, the applicability of the laws in both *Holder* and *Reed* did turn upon what a speaker wished to say. In *Holder*, the law prohibiting material support of terrorist organizations applied to speech communicating "specific skills" or "specialized knowledge." *Holder*, 561 U.S. at 27. In *Reed*, the restrictions imposed by the town's sign ordinance depended upon the topic discussed or the idea or message expressed, thus drawing distinctions based upon the message being expressed by a particular speaker. Unlike the speakers in *Holder* and *Reed*, Plaintiff is not being barred from speaking based upon the content of what she wants to say. She can communicate about dietetics and nutrition to anyone she wants, orally or in writing, provided she does not do so for pay.

Unlike *Holder* and *Reed, Nat. Ass'n for the Advancement of Psychoanalysis (NAAP) v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000), *cert. denied* 532 U.S. 972, 149 L.Ed.2d 469 is analogous to Plaintiff's case. In 1967, the California Legislature recognized the potential for public harm which could result from the "unlicensed, unqualified or incompetent practice of psychology"[1] and

[1] In enacting the Dietetics and Nutrition Practice Act, the Florida Legislature found that "the practice of dietetics and nutrition or nutritional counseling by unskilled and incompetent practitioners presents a danger to the public health and safety. The Legislature further finds that it is difficult for the public to make informed choices about dietitians and nutritionists and that the consequences of wrong choices could seriously endanger the public health and safety." *See* § 468.502, Fla. Stat.

enacted the Psychology Licensing Law. *NAAP*, 228 F.3d at 1047. That law included a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology." *Id.*, Cal. Bus. & Prof. Code § 2900. Under California law, the practice of psychology requires a license, and is defined as rendering psychological services to the public "for a fee." *Id.*, Cal. Bus. & Prof. Code § 2903.[2] To become licensed as a psychologist in California, an applicant is required to have a doctorate or equivalent degree and at least two years of supervised professional experience. Cal. Bus. & Prof. Code §§ 2914(b) and (c)[3].

The plaintiffs in *NAAP* filed suit alleging that California's statutory requirements for licensing of mental health professionals violated their First and Fourteenth Amendment rights. In rejecting the plaintiffs' First Amendment challenge, the Ninth Circuit concluded that California's licensing scheme was content neutral and therefore did not trigger strict scrutiny. *NAAP*, 228 F.3d at 1055.

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[2] This is similar to section 468.517(1)(a), Florida Statutes, which provides that "[a] person may not knowingly: (a) Engage in dietetics and nutrition practice or nutrition counseling for remuneration unless the person is licensed under this part."

[3] Sections 468.509(2)(a)1. and 2., Florida Statutes, require applicants for licensure as dietitian/nutritionist to "[possess] a baccalaureate or postbaccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course of study…" and to "[complete] a preprofessional experience component of not less than 900 hours…" or the equivalent.

"California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment. Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis *if no fee is charged*." *Id.* (emphasis added). With respect to that portion of California's regulatory scheme defining the practice of psychology as the provision of psychological services for a fee, the Ninth Circuit stated, "We agree with the district court that the statutory scheme does not prevent plaintiffs from engaging in psychoanalysis if they do not charge a fee." *Id.*, note 8. For the same reasons, the Act before this Court is content neutral in that it does not prevent Plaintiff from discussing diet and nutrition with others provided she does not charge a fee.

Plaintiff's assertion that *Wollschlaeger v. Governor, State of Florida*, 848 F.3d 1293 (11th Cir. 2017) expressly rejected the central holding of *Locke* is erroneous. The law at issue in *Wollschlaeger* imposed a content-based restriction on speech by licensed physicians and was therefore subject to heightened scrutiny. *Wollschlaeger*, 848 F.3d at 1301. *Wollschlaeger* did not involve a law which set forth a scheme for the regulation of physicians or any other occupation. Conversely, the law at issue in *Locke* sets forth Florida's licensing scheme for commercial interior designers to which rational-basis scrutiny applied. *Locke*, 634 F. 3d at 1195.[4]

[4] Neither Judge Hinkle's opinion in *Locke* at the trial level (642 F.Supp.2d 1283) or

In contrast to the content-based restrictions in *Wollschlaeger*, the Act does not limit speech based upon its content. Unlicensed individuals such as Plaintiff are not prohibited from communicating about dietetics or nutritional counseling, if they do not offer such advice for remuneration and thus engage in the unlicensed practice of that occupation. Plaintiff's reliance on *Wollschlaeger* in arguing that that the Act is a content-based restriction on speech subject to enhanced scrutiny is therefore misplaced.

The Eleventh Circuit also noted that, unlike the case currently before this Court and Locke v. Shore, Wollschlaeger did not involve a licensing scheme. "Locke v. Shore …is not of much help here, as it involves a Florida law requiring that interior designers obtain a state license, and not one which limited or restricted what licensed interior designers could say on a given topic while practicing their profession. The law, as we said, did not implicate constitutionally protected activity under the First Amendment." Wollschlaeger, 848 F.3d at 1309. (internal quotation marks omitted).

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the Eleventh Circuit's opinion in *Locke* (634 F.3d 1185) included a discussion of whether Florida's regulatory scheme for commercial interior designers constituted a content-based restriction on speech. However, both Judge Hinkle and the Eleventh Circuit concluded that the law was subject only to rational basis scrutiny, indicating that it was not a content-based restriction on speech. *See Reed v. Town of Gilbert*, 135 S.Ct. at 2224 (provisions of town's sign ordinance "are content-based regulations of speech that cannot survive strict scrutiny.")

B. Defendant does not contend that the Act regulates conduct but not speech.

Denying Plaintiff's motion, and granting Defendant's, does not depend to any extent on whether Plaintiff's unlicensed practice of dietetics and nutritional counseling is termed speech or conduct. As was expressed by the Third Circuit in *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3rd Cir. 2014), "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by *Humanitarian Law Project.* Further, the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *See also Pickup v. Brown*, 740 F.3d 1208, 1215-16 (9th Cir. 2013) (O'Scannlain, J. dissenting) ("[B]y what criteria do we distinguish between utterances that are truly 'speech' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'"?) The proper criteria for evaluating Plaintiff's First Amendment claims is whether any restriction the Act may impose upon speech is merely incidental to its regulation of the profession of dietetics and nutritional counseling. If so, and if the Act bears a rational relation to the Florida Legislature's stated goal of protecting the public from the dangers inherent in the unlicensed practice of dietetics and nutritional counseling, it does not violate the First Amendment. Creating an artificial distinction between "speech" and "conduct" has no bearing on that analysis.

The Defendant respectfully submits that any restriction on Plaintiff's speech by the Act is merely incidental to its regulation of the occupation of dietetics and nutritional counseling. The Plaintiff is free to speak and write about diet and nutrition to anyone, so long as she does engage in the unlicensed practice of dietetics and nutritional counseling by offering her advice for pay. See §§ 468.505(2), 468.517(1)(a), Florida Statutes; NAAP, 228 F.3d at 1055.

C. Because any restriction of the Act on Plaintiff's First Amendment rights is merely incidental to its regulation of the occupation of dietetics and nutritional counseling, it is not subject to First Amendment Scrutiny.

Because Plaintiff's argument that the Act constitutes a content-based restriction on speech is unsupported by law, her argument that the Act must be subjected to strict scrutiny, or at least intermediate scrutiny, is unsupported as well. In *Locke*, 634 F.3d at 1191, the Eleventh Circuit stated "[b]ecause the license requirement governs 'occupational conduct, and not a substantial amount of protected speech, "*it does not implicate constitutionally protected activity under the First Amendment*." (emphasis added). See also *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (generally applicable licensing provisions limiting the class of persons who may practice a profession *do not enact a limitation of freedom of speech subject to First Amendment scrutiny*) (emphasis added); *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 2584 (1985) (White, J., concurring) ("If the government enacts generally applicable licensing provisions limiting the class of

persons who may practice the profession, *it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny*.") (emphasis added). These cases hold that if any limitation of speech occasioned by the Act is merely incidental to the regulation of dietetics and nutritional counseling, it is not subject to *any* degree of First Amendment scrutiny.[5]

As the Act is not subject to strict scrutiny, Plaintiff's argument that it fails the narrow-tailoring prong of strict scrutiny must also fail. Plaintiff's suggestion that the Act is "fatally underinclusive" because it does not apply to newspapers, books, television shows, and internet discussion forums is illogical. The Act is narrowly tailored to apply only to the regulation of the practice of dietetics and nutrition or nutrition counseling. As a result, any restriction on Plaintiff's right to free speech is merely incidental to that regulation, which is rationally related to the compelling state interest of protecting the public health and safety. If, as Plaintiff suggests, the Act were extended to apply to newspapers, books, television shows, and internet discussion forums, it would constitute a content-based restriction on free speech subject to strict scrutiny. The Act on its face does not apply to speech which is not

[5] In contrast, *see Reed*, 135 S.Ct. at 2232 ("Not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are.") and *Wollschlaeger*, 848 F.3d at 1307 ("We conclude…that the record-keeping, inquiry, and anti-harassment provision of FOPA constitute speaker-focused and content-based restrictions on speech…As a result, there can be no doubt that these provisions trigger First Amendment Scrutiny."

related to the practice of dietetics and nutrition counseling. *See* §§ 468.505(2), 468.505(3), 468.517(1)(a), Fla. Stat.

D. The First Amendment applies to state action though the Fourteenth Amendment

The First Amendment to the U.S. Constitution applies to state action through the due process clause of the Fourteenth Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 753, 96 S.Ct. 1817, 181821 (1976); *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328 (1963); *New York Times v. Sullivan*, 376 U.S. 254, 277, 84 S.Ct. 710, 724 (1964). Prior to the adoption of the Fourteenth Amendment, the protections of the First Amendment were not applicable to state governments. *New York Times v. Sullivan*, 376 U.S. at 276-77. "The conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

Plaintiff's complaint does not expressly allege a claim against Defendant under the due process clause of the Fourteenth Amendment. In fact, neither Plaintiff's complaint nor Plaintiff's Motion for Summary Judgment reference the due process or equal protection clauses, or even to the Fourteenth Amendment in general.. Even if Plaintiff had asserted these due process claims, those claims would be analyzed under the rational basis standard as will be discussed below in section

III of this response. Regardless, Plaintiff's insistence in her motion that the Act's lawful regulation of the practice of dietetics and nutrition or nutritional counseling is subject to strict scrutiny review is without merit. To the extent it may be implied that Plaintiff has alleged a claim under the Fourteenth Amendment by virtue of her First Amendment claim, that implied claim is subject to rational basis scrutiny.

II. The Due Process and Equal Protection clauses of the Fourteenth Amendment apply to Plaintiff's claim under 42 U.S.C. § 1983 and to any implied claim under the Fourteenth Amendment

Plaintiff's Motion for Summary Judgment makes no mention of her claim under 42 U.S.C. § 1983, either. Again, perhaps this is because an analysis of that claim would necessitate the conclusion that it is subject to rational basis scrutiny. The plaintiffs in *Locke* brought a 1983 claim challenging the constitutionality of Florida's licensing scheme for interior designers, arguing that it violated their due process and equal protection rights under the Fourteenth Amendment to earn a living in their chosen profession. *Locke*, 634 F.3d at 1195. In denying those due process and equal protection claims, the Eleventh Circuit explained that "[r]ational basis review applies to Due Process and Equal Protection Clause challenges to state professional regulations, because the right to practice a particular profession is not a fundamental one." *Locke*, 634 F.3d at 1195. See also *Kirkpatrick v. Shaw*, 70 F.3d 100, 103 (11th Cir. 1995) ("The right to practice law is not a fundamental right and therefore rational basis review is the appropriate standard for classifications

affecting applicants for admission to the bar."); *NAAP*, 228 F.3d at 1049 (California's licensing scheme for psychologists does not implicate a fundamental right).

In *Maguire v. Thompson*, 957 F.2d 374 (7th Cir. 1992), the plaintiffs sued under 42 U.S.C. § 1983, claiming that Illinois's licensing scheme for the practice of medicine and other healing arts deprived them of their Fourteenth Amendment rights to due process and equal protection. The plaintiffs in *Maguire* were doctors of naprapathy unable to obtain licenses to "treat human ailments without drugs or operative surgery" without obtaining the additional education required to obtain a chiropractic degree. *Id.* at 375. The district court dismissed the complaint and plaintiffs' motion for reconsideration, finding a rational basis for Illinois's licensing scheme. *Id.* at 376. In upholding the district court's dismissal of plaintiffs' complaint, the Seventh Circuit stated "[u]nless a statute implicates a fundamental right or makes a suspect classification, to withstand fourteenth amendment scrutiny the law must bear only a rational basis relation to a legitimate state purpose...Thus...the statute should be evaluated to determine whether it violates either the due process or the equal protection clauses of the fourteenth amendment using the rational basis test." *Id.*

Just as the plaintiffs in *Locke, Kirkpatrick, and Maguire* did not have a fundamental right to practice their respective occupations under the Fourteenth

Amendment, Plaintiff does not have a fundamental right to practice the occupation of dietetics and nutrition or nutritional counseling in Florida. Rational basis review therefore applies to her 1983 challenge and any implied Fourteenth Amendment challenge to the Act. *Locke*, 643 F.3d at 1196.

III. Plaintiff's 42 U.S.C. § 1983 claim, and any implied Fourteenth Amendment claim, is subject to rational basis scrutiny, and the Act is rationally related to Florida's compelling interest in regulating the occupation of dietetics and nutrition counseling

Application of the rational-basis standard requires a conclusion that the Act does not violate Plaintiff's rights under the Fourteenth Amendment or 42 U.S.C. § 1983. "On rational-basis review, a classification in a statute…bears a strong presumption of validity." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 113 S.Ct. 2096, 2101-02 (1993). "A statute is constitutional if 'there is any reasonably conceivable state of facts that could provide a rational basis for [it]." Id. at 313, 113 S.Ct. at 2101. Where a statute imposing a licensure requirement is rationally related to a state's substantial interest in regulating a profession or occupation, it does not violate the due process clause or the equal protection clause. *Kirkpatrick v. Shaw*, 70 F.3d at 103. "…Florida may require bar applicants to undergo a character and fitness investigation before being allowed to practice law. This requirement is rationally related to Florida's interest in regulating the practice of law." Id. *See NAAP*, 228 F.3d at 1049 ("To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest…") ;

Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1985) *cert. denied* 530 U.S. 1261, 120 S.Ct. 2717. ("We need only determine whether the licensing scheme has a 'conceivable basis' on which it might survive rational basis scrutiny.")

In codifying the Act, the Florida Legislature found that:

> …the practice of dietetics and nutrition or nutritional counseling by unskilled and incompetent practitioners presents a danger to the public health and safety. The Legislature further finds that it is difficult for the public to make informed choices about dietitians and nutritionists and that the consequences of wrong choices could seriously endanger the public health and safety. The sole legislative purpose in enacting this part is to ensure that every person who practices dietetics and nutrition or nutrition counseling in this state meets minimum requirements for safe practice. It is the legislative intent that any person practicing dietetics and nutrition or nutrition counseling who falls below minimum competency or who otherwise presents a danger to the public be prohibited from practicing in this state. It is also the intent of the Legislature that the practice of nutrition counseling be authorized and regulated solely within the limits expressly provided by this part and any rules adopted pursuant thereto.

§ 468.502, Fla. Stat.

The Florida Legislature has made the policy determination that requiring practicing dietitians and nutritional counselors to meet minimum levels of education and experience and to obtain licenses best protects public health and safety. In granting summary judgment in favor of the state of Florida in *Locke*, Judge Hinkle noted that "the state says the interior designer, like the physician's assistant or nurse practitioner, should be licensed in order to promote competence. It is an argument that a reasonable legislature might or might not accept and that most apparently have

rejected. Still, accepting the argument is within the wide range of discretion that the Constitution affords a state legislature." *Locke*, 682 F.Supp.2d at 1283. In upholding Illinois's licensing regimen for medical practitioners, which excluded naprapaths, against a Fourteenth Amendment challenge, the Seventh Circuit found that:

> …the details of the educational requirement indicate that the General Assembly considered the amount of education necessary to guarantee adequately trained doctors. While [plaintiff] characterizes the additional education received by other types of doctors as "irrelevant," the General Assembly could have concluded that this level of education provides better training in theories of disease. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970). Logically, better training leads to better diagnosis and better treatment. While the naprapaths may have treated many people competently over the years, it is within the legislative prerogative to limit the practice of medicine to those who provide the safest service.

Maguire, 957 F.2d at 377.

Applying the rational basis standard elucidated in *Locke* and *McGuire*, the licensing requirements established by the Florida Legislature in the Act are rationally related to Florida's compelling state interest in protecting the public health and safety. While Plaintiff disagrees with the policy judgments made by the Legislature in this regard, this does not change the standard of review. "A state need not prove that its legislative judgments are correct; they need only have a rational basis." *Locke*, 682 F.2d at 1290. Further, Plaintiff cannot overcome the rational relation of the Act to the state's legitimate interests by arguing that the Legislature's motivation in enacting the Act may have been wrong or unwise. As Judge Hinkle

further noted in *Locke*, "regardless of the legislature's actual motivation, it is sufficient to defeat the plaintiff's Due Process and Equal Protection claims that the statute has a rational basis, that is, one that a reasonable legislature could have accepted." *Id.*

Plaintiff bears the burden of proving to this Court that the Act lacks a rational basis to the Florida Legislature's stated purpose and intent. *Locke,* 634 F.3d at 1196; *Beach Commc'ns, Inc.*, 508 U.S. at 314-15, 113 S.Ct. at 2101-02. Plaintiff does not meet this burden, and instead ignores well-established rules of constitutional analysis in a failed attempt to transform the Act into a content-based restriction on speech subject to strict scrutiny. It is not. In any event, Plaintiff cannot not meet her burden of proof. The Act bears a rational basis to Florida's compelling state interest in regulating the occupation of dietetics and nutrition or nutrition counseling. Plaintiff's challenges to the Act under the due process and equal protection clauses of the Fourteenth Amendment must fail.

CONCLUSION

For the reasons set forth above, this Court should deny Plaintiff's Motion for Summary Judgment and grant Defendant's Motion for Summary Judgment.

Respectfully submitted this 14th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Memorandum of Law contains 4,083 words, excluding case style, signature block, and Certificate of Service, in compliance with Local Rule 56.1.

/s/ *Timothy L. Newhall*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served by e-mail this 14th day of June, 2018, on:

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