No. _____

In The

Supreme Court of the United States

HEATHER KOKESCH DEL CASTILLO,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF HEALTH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *National Institute of Family and Life Advocates (NIFLA)* v. *Becerra*, this Court declined to treat so-called "professional speech" as a "unique category that is exempt from ordinary First Amendment principles." 138 S. Ct. 2361, 2375 (2018). In the wake of that decision, the Fourth, Fifth, and Ninth Circuits have abandoned their pre-*NIFLA* professional-speech cases to hold that ordinary First Amendment principles govern as-applied challenges to laws that regulate entry into an occupation. In the decision below, the Eleventh Circuit split from these courts to hold that its pre-*NIFLA* precedent remained good law and that a "statute that governs the practice of an occupation" is exempt from First Amendment scrutiny, even if its application is triggered solely by the act of communicating a message. The question presented is:

Whether a government prohibition on communicating a message is exempt from First Amendment scrutiny simply because that prohibition flows from a statute that governs the practice of an occupation.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Heather Kokesch Del Castillo was the sole plaintiff in the Northern District of Florida and the sole appellant in the United States Court of Appeals for the Eleventh Circuit. In the district court, the sole defendant was Celeste Philip, sued in her then-official capacity of Secretary of the Florida Department of Health. The sole appellee in the Court of Appeals for the Eleventh Circuit was the Secretary of the Florida Department of Health, an office first occupied by Secretary Philip and then later by Secretary Joseph Ladapo, who remains the current Secretary.

STATEMENT OF RELATED CASES

Del Castillo v. *Philip* (N.D. Fla.) No. 17-cv-0722 (judgment entered July 17, 2019);

Del Castillo v. *Secretary, Florida Department of Health* (11th Cir.) No. 19-13070 (judgment entered February 18, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 26 F.4th 1214. The opinion of the district court, App. 28a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2022. On April 14, 2022, the Eleventh Circuit entered an order denying a timely filed petition for rehearing en banc. On May 4, 2022, Justice Thomas extended the time to file a petition for a writ of certiorari to August 12, 2022. This petition is timely filed on August 11, 2022. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law * * * abridging the freedom of speech." The text of Florida's Dietetics and Nutrition Practice Act (Fla. Stat. §§ 468.501–.518) is set forth at App. 59a.

STATEMENT

Heather Kokesch Del Castillo was fined by the State of Florida because she communicated individualized diet advice without a license. Florida makes it a crime for anyone other than a licensed dietician to give ordinary diet advice like "you should eat more leafy greens" to willing listeners who suffer from any number of common maladies like high cholesterol. Because Heather said things like this to her clients, Florida fined Heather for engaging in the unlicensed practice of dietetics and ordered her to shut down her health-coaching business, through which she had dispensed advice about exercise (which was legal) and diet (which was a crime).

This case is about whether that restriction on speech receives any First Amendment scrutiny at all. This Court's decision in *National Institute of Family and Life Advocates* v. *Becerra*, which disavows any special treatment for so-called "professional speech," suggests that it should—and, in at least the Fourth, Fifth, and Ninth Circuits, it would have. Each of those courts treats occupational-licensing laws the same as any other law and therefore allows plaintiffs to bring as-applied First Amendment challenges when otherwise-valid occupational-licensing laws operate to squelch their speech. In the Eleventh Circuit, the law is otherwise. So long as a restriction on speech flows from a generally valid prohibition on unlicensed "occupational conduct," the Eleventh Circuit will subject it to no more than rational-basis review—even if, as here, the only "conduct" at issue consists of communicating a message. This Court should grant certiorari

to resolve this important split affecting the rights of millions of Americans.

I. Background

This petition arises in the wake of this Court's decision in *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018). Prior to *NIFLA*, a number of courts of appeals had adopted a special rule governing what they termed "professional speech" to deal with First Amendment cases involving occupational-licensing laws. *See generally* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 68 (2016). In a series of cases, various courts of appeals carved out a rule under which state licensing laws could restrict one-on-one speech with clients without satisfying the burdens of ordinary First Amendment scrutiny. *See Hines* v. *Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015); *King* v. *Governor of N.J.*, 767 F.3d 216, 230–32 (3d Cir. 2014); *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014); *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 568–70 (4th Cir. 2013); *Locke* v. *Shore*, 634 F.3d 1185 (11th Cir. 2011). These courts largely grounded the doctrine in Justice White's concurrence in *Lowe* v. *SEC*, which would have held that "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession" and not engaging in speech at all. *Lowe* v. *SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring); *see also Alldredge*, 783 F.3d at 201 (citing Justice White's *Lowe* concurrence); *King*, 767 F.3d at 229–30 (same) *Pickup*, 740 F.3d at 1227 (same); *Moore-King*,

708 F.3d at 568 (same); *Locke*, 634 F.3d at 1191 (same).

The professional-speech doctrine was not without its critics. A panel of the Fifth Circuit, for example, warned that this Court had never endorsed the professional-speech doctrine in the first place and urged courts to apply it narrowly to speech within fiduciary relationships, if at all. *Serafine* v. *Branaman*, 810 F.3d 354, 359–60 & n.2 (5th Cir. 2016) (citing *Moore-King*, *Pickup*, and *Locke*). And Judge O'Scannlain, dissenting from denial of rehearing en banc in *Pickup* itself, derided the doctrine as a tool with which government could "nullify the First Amendment's protections for speech by playing [a] labeling game." 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

In *NIFLA*, this Court sided with the doctrine's detractors. This Court held that it had never recognized "professional speech" as a category entitled to less First Amendment protection. 138 S. Ct. at 2372. And it found no reason to do so. The dangers of content-based regulation and the importance of preserving the marketplace of ideas are not reduced in the context of so-called professional speech. *Id.* at 2374–75. And the malleability of "professional speech" as a category would give "States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375.

Canvassing its precedents, this Court identified only two areas in which it had blessed the regulation of "professional" speech: compelled disclosures tied to commercial speech and regulations of

professional conduct rather than speech. *Id.* at 2372. The paradigmatic example of this second category was *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, in which the Court upheld a law requiring physicians to obtain informed consent before they performed an abortion. *Id.* at 2373 (citing *Casey*, 505 U.S. 833, 884 (1992)). This, the Court explained, was a regulation of professional conduct because it regulated a medical procedure—namely, the conduct of performing the abortion—rather than a regulation of speech. *Id.* at 2373–74. By contrast, the law challenged in *NIFLA* was "not tied to a procedure at all" and applied "regardless of whether a medical procedure [was] ever sought, offered, or performed." *Ibid.* Because the requirement was not *triggered* by any conduct, its burdens on speech were not *incidental* to any regulation of professional conduct. *Ibid.*

For most courts of appeals, *NIFLA* marked the end of the professional-speech doctrine. This Court's opinion specifically cited three of the above-named cases as exemplars of the doctrine it was rejecting. *NIFLA*, 138 S. Ct. at 2371–72 (citing *King*, 767 F.3d at 232; *Pickup*, 740 F.3d at 1227–29; and *Moore-King*, 708 F.3d at 568–70). And the Fifth Circuit, which was not cited in the *NIFLA* decision itself, nonetheless promptly recognized that *NIFLA* abrogated its opinion in *Alldredge*. *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 928 (5th Cir. 2020). In short, of the five leading professional-speech cases cited above, four—*Moore-King*, *Pickup*, *King*, and *Alldredge*—have all been expressly abrogated. Only one, the Eleventh Circuit's *Locke* opinion, remains standing.

II. Facts And Procedural History

Petitioner Heather Kokesch Del Castillo is a privately certified health coach who started her business, Constitution Nutrition, while living in California. Constitution Nutrition sold exactly one product: Heather's advice about exercise and diet. She provided her clients with one-on-one advice and encouragement about health, exercise, and diet through written and spoken communication. Though she was giving advice about healthy diets, she always made clear to her clients that she was a health coach and not a dietician or a nutritionist. She was, in essence, just a fitness enthusiast with opinions about how best to eat healthy.

And Constitution Nutrition was a success. Clients left positive reviews on sites like Yelp, and Heather looked forward to continuing her business when her husband (an airman in the United States Air Force) was transferred to a base in Florida.

But, unbeknownst to Heather, moving from California to Florida came with new laws that governed advice about diet. In California, Constitution Nutrition had been perfectly legal. Rather than limiting who may give dietary advice, California instead limits who may legally call themselves a *registered* dietician.[1] Registration carries certain benefits—facilities like hospitals may choose to hire only registered dieticians or insurers may choose to pay only for products ordered by a registered dietician[2]—but registration itself is entirely optional. In Florida, by contrast,

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[1] Cal. Bus. & Prof. Code § 2585.

[2] *E.g.* Cal Health & Safety Code § 1374.56(d)(1).

anything that constitutes the practice of "dietetics and nutrition * * * counseling" requires a license. Fla. Stat. § 468.504.

This distinction matters because Florida's definition of what counts as the practice of "dietetics and nutrition counseling" is broad and encompasses a great deal of pure speech. "Dietetics" includes anything "recommending appropriate dietary regimens[.]" Fla. Stat. § 468.503(5). "Nutrition counseling" includes "advising and assisting individuals or groups of appropriate nutrition intake by integrating information from [a] nutrition assessment." Fla. Stat. § 468.503(10).[3] In short, the one-on-one advice that was perfectly legal in California was a crime in Florida—as Heather soon learned to her chagrin.

Heather's trouble started with a complaint from a licensed dietician who saw Heather's small advertisement in a local magazine and contacted the Department of Health to complain that Heather did not have the proper license to offer diet advice. The Department quickly swung into action. An undercover investigator, using the *nom de guerre* "Pat Smith," sent Heather an email posing as a potential customer and asking what services Constitution Nutrition

[3] While this case was pending in the Eleventh Circuit, Florida narrowed the scope of the statute somewhat, clarifying that its ban on diet advice applies only if the listener is "under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention." App. 8a–9a n.1. As the opinion below correctly notes, this change does not materially affect the analysis, as Heather testified that her health-coaching services had been and would continue to be open to people with underlying medical conditions like high cholesterol or food allergies if those people want health coaching. *Id.*

offered. Heather responded with a brief overview of her business and a standard background form created by the Institute for Integrative Nutrition.

That was all it took. Without further investigation, the Department determined that there was probable cause to believe that Heather was practicing as a dietician or nutritionist without a license. It ordered her to stop and to pay fines and fees of $754.09 for "providing individualized dietary advice in exchange for compensation in Florida." App. 6a. Cowed, Heather complied, paid the fine, and closed her business.

Then she sued, alleging that Florida's prohibition on unlicensed dietary advice violated the First Amendment. Her argument was straightforward. The Department did not contend that Heather had done anything other than provide advice or that Heather's advice had resulted in any sort of harm; instead, it forthrightly admitted that "the sole basis for th[e] complaint is that Ms. Del Castillo was not licensed to provide dietary advice."[4] And the record provided no justification for this broad, prophylactic restriction that could survive any serious scrutiny.

For one thing, the restriction on dietary advice was rife with holes and exceptions. Heather's advice would have been perfectly legal, for example, if she had been selling nutrition supplements instead of just selling advice and encouragement. Fla. Stat. § 468.505. In other words, taking five dollars as compensation for telling someone "eating fewer

[4] C.A. R.E. Doc. 25-1 – Pg. 14

carbohydrates will help you lose weight" is a crime, but telling that same person "you can lose weight if you eat fewer carbohydrates and give me five dollars for this miraculous pill" is perfectly legal. More, the Department was unable to explain why its restrictions were necessary when 23 other states (like Heather's native California) do not license dietary advice and have suffered no ill effects from their less speech-restrictive rules.

But, for the district court, none of that mattered because no scrutiny was required. App. 41a–43a. Instead, Heather's First Amendment claim failed because it was controlled by the Eleventh Circuit's decision in *Locke* v. *Shore*, 634 F.3d 1185 (11th Cir. 2011). Under *Locke*, "generally applicable licensing provisions limiting the class of persons who may practice the profession are not subject to First Amendment scrutiny." App. 39a–40a & n.19 (quotation marks omitted). The district court reasoned that *Locke* controlled here because, like in *Locke*, this case is an as-applied challenge to "a generally applicable licensing statute [ ] that regulates a profession in which speech is a component." App. 40a. Viewed this way, Heather's challenge to Florida's prohibition on unlicensed diet advice was subject only to rational-basis review.

The district court also rejected the idea that *Locke* was undermined by this Court's admonition in *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018), that "'speech is not unprotected merely because it is uttered by 'professionals.'" App. 46a–48a. In the district court's view, nothing in *NIFLA* requires courts to apply the First Amendment to laws restricting the

practice of a profession, even where the only "aspect of the profession" a plaintiff wishes to engage in "is carried out through speech." App. 50a. Instead, it said, First Amendment challenges may be brought only against laws that restrict what a licensed professional may say in the course of their work. App. 51a–53a. To the extent a generally applicable licensing law operates to forbid an unlicensed person from speaking on certain topics, that law is categorically immune from as-applied First Amendment challenges like this one. App. 51a–55a.

A panel of the Eleventh Circuit affirmed for largely the same reasons. It held that it remained bound by the earlier decision in *Locke* notwithstanding this Court's direct rejection of the so-called "professional speech doctrine" in *NIFLA*. App. 17a–20a. In the panel's view, *Locke* had two alternative holdings. One was derived from Justice White's concurrence in *Lowe* v. *SEC* and held that "direct, personalized speech with clients" was entitled to reduced First Amendment protection. App. 12a–14a. This holding, acknowledged the panel, was abrogated by *NIFLA*. App. 17a–18a. But that did not mean that *NIFLA* required courts to treat First Amendment challenges to professional-licensing laws in the same fashion as they treat First Amendment challenges to all other laws. Instead, the panel reaffirmed what it said was a different holding from *Locke*: namely, that a "statute that governs the practice of an occupation is not unconstitutional as an abridgement 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." App. 18a.

And applying that rule to the claims here doomed them. Yes, the panel acknowledged, the specific things Heather wanted to do—"get information from her clients and convey her advice and recommendations"—were speech. App. 26a. But that speech was forbidden because it was related to "occupational conduct" like "[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment." App 25a. In other words, Florida's law—though triggered here only by Heather's act of communicating a message to her clients—nonetheless escaped constitutional scrutiny because Florida's statute was not directly aimed at criminalizing speech. It was aimed at "occupational conduct," including the "occupational conduct" of deciding what to say.

This petition followed.

REASONS FOR GRANTING THE PETITION

In the wake of this Court's decision in *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018), the lower courts have split over how the First Amendment applies to occupational-licensing laws, with some applying ordinary First Amendment principles and others (as in the decision below) giving states a wide berth to outlaw speech in the name of regulating "occupational conduct." This split is important because it has resulted in a patchwork of constitutional rules at the very moment when the widespread adoption of videoconferencing technology has made speech across jurisdictional lines more common. And this case, in which no facts were disputed on cross-motions for

summary judgment and the split was the sole basis for the decision below, is a good vehicle to resolve it.

I. The Circuits Are Divided Over How The First Amendment Applies To Licensing Laws.

When this Court reaffirmed in *NIFLA* that nothing in that opinion upsets the longstanding distinction between speech and conduct, it made clear that it intended only to invoke the line between the two that was "long familiar to the bar." 138 S. Ct. at 2373. Nonetheless, the lower courts have split over what that line means for First Amendment challenges to occupational-licensing laws. As explained more fully below, in the Eleventh Circuit, occupational-licensing laws that forbid unlicensed people from speaking on certain topics do not face First Amendment scrutiny. In the Fourth, Fifth, and Ninth Circuits, they do. In other words, in the wake of *NIFLA*, at least three circuits self-corrected and abandoned their prior professional-speech cases. In the decision below, the Eleventh Circuit stuck to its guns, hewed to its pre-*NIFLA* view, and broke with two of its neighboring circuits along with the Ninth. The petition for certiorari should therefore be granted to resolve this split of authority. *See* Rule 10(a).

A. The ruling below applies a special speech-conduct test for occupational-licensing laws.

The usual method for determining whether a challenged law regulates "speech" or "conduct" (and thus whether it is subject to First Amendment scrutiny) is to ask whether "as applied to [particular]

plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder* v. *Humanitarian Law Proj.*, 561 U.S. 1, 28 (2010).[5] This as-applied approach has allowed the Court to avoid what Judge O'Scannlain has said would otherwise devolve into a "labeling game" designed to "nullify the First Amendment's protections for speech." *Pickup* v. *Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc). After all, all speakers engage in some conduct. In *Cohen* v. *California*, for example, the petitioner engaged in the *conduct* of wearing a jacket, but his punishment was triggered by the message that jacket conveyed, and his punishment was therefore subject to First Amendment scrutiny. 403 U.S. 15, 18 (1971).

One might expect the same result to follow here. The conduct triggering Heather's coverage under the challenged law was "providing individualized dietary advice" without a license. App. 6a. And, as this Court squarely held in *Humanitarian Law Project*, a law that is triggered by "communicat[ing] advice" is a restriction on speech. 561 U.S. at 27.

But that did not happen because the panel below did not follow *Humanitarian Law Project*. Instead, it followed circuit precedent that required it to analyze First Amendment challenges to licensing laws by asking whether *the laws themselves* primarily govern "'occupational conduct'" instead of asking what *triggered* the law's application in a particular

[5] Three Justices dissented from the Court's holding in *Humanitarian Law Project*, but they expressly agreed that, as applied, the challenged law regulated speech, not conduct. 561 U.S. 41–42 (Breyer, J., dissenting).

instance. App. 25a–26a (citing *Locke* v. *Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)). Under *Locke*, someone like Heather can be punished for simply communicating a message, so long as the state has labeled that sort of message the "unlicensed practice of dietetics."

The ruling below represents a special First Amendment rule that applies only to laws that impose a licensing requirement, as the Eleventh Circuit (sitting en banc) has made clear. In *Wollschlaeger* v. *Governor of Florida*, the Eleventh Circuit expressly distinguished *Locke* because "it involved a Florida law requiring that interior designers obtain a state license [in order to speak], and not one which limited or restricted what licensed interior designers could say on a given topic [once licensed.]" 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc). *Locke*, said the Eleventh Circuit, was of a piece with (now-abrogated) cases like *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2013) or *Moore-King* v. *County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), but its application was limited to laws that forbade the unlicensed from speaking, rather than laws that restricted the speech of those who held the proper license. *Wollschlaeger*, 848 F.3d at 1309; *see also Otto* v. *City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020), *reh'g en banc denied*, 2022 WL 2824907 (11th Cir. July 21, 2022) (applying strict scrutiny to prohibition on licensed counselors' attempts to alter their patients' sexual orientation).

In other words, by reaffirming *Locke*, the panel below confirmed the Eleventh Circuit has two different tests to distinguish speech from conduct in the context of licensing laws. One applies ordinary First Amendment scrutiny "to regulations which limit the

speech of professionals to clients based on content." *Wollschlaeger*, 848 F.3d at 1310; *accord Otto*, 981 F.3d at 866 (citing *Cohen* v. *California*, 403 U.S. 15, 18 (1971) and *Bartnicki* v. *Vopper*, 532 U.S. 514, 527 (2001)). The other test, used below, applies only rational-basis review to regulations that prohibit unlicensed people from engaging in "occupational conduct"—even if that conduct, as applied, consists solely of communicating a message. App. 25a–26a. In practice, then, if a licensed dietician gives Floridians advice about how to lose weight by adopting the All-Ice-Cream Diet, the Eleventh Circuit's cases say she is engaged in speech protected by the First Amendment. But if Heather gives those same people advice about how to lose weight by eating more leafy greens, the Eleventh Circuit says she is engaged in conduct, no different from if she helped them lose weight by performing liposuction.

But this distinction between laws that silence licensees and laws that silence the unlicensed presents at least two problems. First, the rule articulated below gives "States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. Indeed, both *Pickup* and *Moore-King*—the cases from the Fourth and Ninth Circuits that the Eleventh Circuit named in *Wollschlaeger* to justify its special approach to licensing laws—were disapproved by name in this Court's opinion in *NIFLA*. *Id.* at 2371. And second, as explained more fully below, since *NIFLA* at least three courts of appeals have adopted rules directly contrary to the one followed by the panel below. The petition for certiorari should therefore be granted.

B. In contrast with the Eleventh Circuit, the Fourth, Fifth, and Ninth Circuits have all held that licensing laws are subject to First Amendment scrutiny when their application is triggered by the conduct of communicating a message.

The ruling below conflicts directly with the law of at least three other circuits, each of which has held that this Court's decision in *NIFLA* requires it to subject licensing laws to the same First Amendment standards as any other laws.

Begin with the Fifth Circuit. The Fifth, like the Eleventh, had previously held that "state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution." *Hines* v. *Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015). But the Fifth Circuit has recognized that this Court's decision in *NIFLA* rejected that holding. When an unlicensed corporation brought an as-applied challenge to Mississippi's licensing law for surveyors, the Fifth Circuit observed that this Court had "recently disavowed the notion that occupational-licensing regulations are exempt from First Amendment scrutiny." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 928 (5th Cir. 2020); *see also id.* at 931 ("*NIFLA* makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections."). Instead, the Fifth Circuit explained that "the relevant question is whether, *as applied to* [*the plaintiff*], Mississippi's licensing requirements regulate only speech, restrict speech only incidentally to their

regulation of non-expressive professional conduct, or regulate only non-expressive conduct." *Id.* at 931 (emphasis supplied). In other words, courts evaluating challenges to occupational-licensing laws must only confront "the traditional conduct-versus-speech dichotomy." *Id.* at 932 (citing *NIFLA*, 138 S. Ct. at 2374–76). The earlier decision in *Alldredge* had therefore been abrogated. *Id.* at 933–34.[6]

But the substantive rule in *Alldredge*, which the Fifth Circuit held ran afoul of this Court's decision in *NIFLA*, is almost exactly the same as the rule the panel below used to decide this case. Consider them side-by-side:

Fifth Circuit rule (abrogated by *NIFLA*)	**Eleventh Circuit rule (not abrogated by *NIFLA*)**
"[S]tate regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution."[7]	"A statute that governs the practice of an occupation is not unconstitutional as an abridgement 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."[8]

[6] Indeed, in the wake of *NIFLA*, a district court has already concluded that the very same limitation on veterinary speech that was challenged in *Alldredge* is properly subject to strict scrutiny. *Hines* v. *Quillivan*, No. 1:18-cv-155, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021).

[7] *Alldredge*, 783 F.3d at 201.

[8] App. 24a (quotation marks omitted).

Neither of these rules can be squared with *Humanitarian Law Project*'s articulation of the question as whether, "as applied to [particular] plaintiffs[,] the conduct triggering coverage under the statute consists of communicating a message." *Humanitarian Law Proj.*, 561 U.S. at 28. Instead, each represents a special speech-conduct test for occupational-licensing laws—and the circuits disagree about whether that special test survives *NIFLA*. Simply put, the Fifth Circuit has expressly rejected the proposition that its First Amendment analysis must change when an unlicensed person "challenge[s a] regulation [that] is part of an occupational-licensing scheme." *Vizaline*, 949 F.3d at 932 (directly rejecting the district court's contrary interpretation of *NIFLA*). The Eleventh Circuit, by contrast, has expressly adopted that same proposition. *See Wollschlaeger*, 848 F.3d at 1309 (distinguishing *Locke* v. *Shore* because it "involved a Florida law requiring that interior designers obtain a state license and not one which limited or restricted what licensed interior designers could say * * * in practicing their profession").

So too with the Fourth. As noted above, like the Fifth and Eleventh Circuits, the Fourth Circuit had previously followed Justice White's concurrence in *Lowe* v. *SEC* to hold that no First Amendment scrutiny was required when a plaintiff's speech was "incidental to the conduct of [a licensed] profession." *Accountant's Soc'y of Va.* v. *Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). But no longer. Now, the law of the Fourth Circuit is that generally applicable business regulations are still subject to First Amendment scrutiny where they are triggered by "speech or expressive conduct." *Billups* v. *City of Charleston*, 961 F.3d 673,

683–84 (4th Cir. 2020). In *Billups*, the Fourth Circuit confronted a challenge to a licensing requirement for tour guides and squarely held that "a law aimed at regulating businesses can be subject to First Amendment scrutiny even though it does not directly regulate speech." *Billups* v. *City of Charleston*, 961 F.3d at 683 (4th Cir. 2020) (citing *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010)). Restrictions on non-expressive conduct could escape scrutiny, of course, but a law that in operation "completely prohibit[ed] unlicensed guides from leading visitors on paid tours" necessarily restricted the speech of the unlicensed guides. *Ibid.* Even though the ordinance itself was not *aimed* at speech—the Fourth Circuit "acknowledge[d] that the City enacted the Ordinance to protect Charleston's economic well-being and safeguard its tourism industry"—in practice it outlawed the plaintiffs' speech, and that is what mattered for First Amendment purposes. *Id.* at 683–84.

Had the Fourth Circuit adopted the Eleventh Circuit's rule, though, *Billups* would have come out the other way. After all, tour guides undoubtedly engage in what the panel below called "occupational conduct": They "assess[] a client's [ ] needs" to decide what stories to tell or monuments to highlight and "conduct[historical] research" and the like. *See* App. 25a. But the law of the Fourth Circuit is different: There, it does not matter whether a plaintiff also engages in something that can be labeled "occupational conduct." Instead, the First Amendment applies if a law's application is triggered by "speech or expressive conduct." 961 F.3d at 683–84; *accord Humanitarian Law Proj.*, 561 U.S. at 28.

And the split runs still deeper. The Ninth Circuit, too, has recognized that *NIFLA* requires it to abandon its earlier professional-speech doctrine. In *Pacific Coast Horseshoeing School, Inc.* v. *Kirchmeyer*, that court heard an as-applied challenge to California's licensing law for post-secondary schools. 961 F.3d 1062, 1069–70 (9th Cir. 2020). The court acknowledged, of course, that the challenged law was "a form of education licensing[.]" *Id.* at 1069. And it further acknowledged that the plaintiff school engaged in some conduct by entering into "enrollment agreements" with its students. *Ibid.* But the Ninth Circuit nonetheless held that the law was a restriction on speech because, as applied in that case, its application hinged solely on the *type* of education an institution provided: A school providing *vocational* training was restricted in whom it could enroll, but a school providing *avocational* training was not. *Ibid.* And a regulation that was triggered by offering one type of educational course rather than another was, necessarily, a restriction on speech. *Ibid.* (citing *Humanitarian Law Proj.*, 561 U.S. at 27).

Here, again, the circuits' different rules led to different outcomes. The plaintiff in *Pacific Horseshoeing* engaged in what the panel below would call "occupational conduct" by entering into enrollment agreements with its students. *Compare* App. 25a *with* 961 F.3d at 1069. The difference in the outcomes is that, in the Ninth Circuit, *Humanitarian Law Project* controls even in a case about "licensing" and in the

Eleventh Circuit, it does not. The Court should therefore grant certiorari to resolve this important dispute.[9]

II. The Question Presented Is Important.

The petition for certiorari should also be granted because it is particularly important that there be a uniform rule governing the constitutional status of licensing laws that purport to restrict ordinary advice. It is universally understood that online communication in the form of video-conferences and other remote communication has boomed in recent years. *See*, *e.g.*, Kyle Wiggers, *TaskHuman lands $20M to expand its virtual coaching platform*, TechCrunch (June 30, 2022) <https://tinyurl.com/56kfb66x>; Jeffrey Kluger, *Online Therapy, Booming During the Coronavirus Pandemic, May Be Here to Stay*, Time (Aug. 27, 2020) <https://tinyurl.com/yp7y2u47>. In the modern world, countless people (including Heather) earn a living by communicating their thoughts and advice via email or online conferencing or other technology. These communications routinely cross state lines, and the current

[9] At least two district courts have also indicated that they believe their Circuits will side with the majority in this circuit split. In one, the Southern District of New York expressly acknowledged the circuit split raised here, citing the panel opinion below as evidence that "some circuits—but, notably, not the Second Circuit—have crystallized Justice White's concurrence [in *Lowe*] to uphold other types of licensing regimes that impact speech." *Upsolve, Inc.* v. *James*, No. 22-cv-627, 2022 WL 1639554, at *13 (May 24, 2022). In another, the District Court for the District of Columbia relied on this Court's decision in *NIFLA* to hold that a prohibition on unlicensed counselors' providing talk therapy was subject to strict scrutiny. *Brokamp* v. *District of Columbia*, No. 20-3574, 2022 WL 681208 (D.D.C. Mar. 7, 2022).

circuit split means that all of these people face not only a patchwork of licensing laws that might govern their speech but a patchwork of constitutional rules that determine how those laws might be enforced. In some jurisdictions, their constitutional rights will vary up or down depending on whether a state or local government has exercised its "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. In others, licensing laws will be subject to rigorous scrutiny before they are allowed to silence online conversations.

The result is an incoherent jumble of differing rules governing when the government can regulate speech, including speech on the internet. In Florida, Heather has no First Amendment right to communicate with her clients. If she goes home to California, it's different. If she goes north to the Carolinas, it's different. If she goes west to Mississippi, it's different. In a nation with communication services, including coaching and advice, increasingly being provided across state lines, patchwork precedent on a question as fundamental as *Does the First Amendment even apply?* calls for this Court's intervention. *Cf. Brokamp*, 2022 WL 681208 (applying strict scrutiny to D.C.'s prohibition on Virginia-based counselor talking to D.C.-based clients over internet video).

III. This Case Is a Good Vehicle.

This case is a good vehicle to resolve the circuit split described above. The question presented is outcome-determinative, and the relevant facts are simple and undisputed.

First, the only basis for the decision below was that, under the Eleventh Circuit's test for First Amendment challenges to licensing laws, Heather's advice to her clients was "occupational conduct" rather than protected speech. App. 25a–27a. Indeed, that was the only ground even advanced by Respondent, which never contended on appeal that its prohibition on unlicensed dietary advice could survive any First Amendment scrutiny. *See generally* Resp. C.A. Br. The outcome of this case turns solely on whether courts follow the rule of law below or the rule of law adopted by the Fourth, Fifth, or Ninth Circuits.

Second, the facts are undisputed and straightforward. They are undisputed because this case arises on cross-motions for summary judgment. And they are straightforward because there is no dispute that Heather was cited only for "providing individualized dietary advice in exchange for compensation" (App. 6a) without a license and that, going forward, she only seeks the right to talk with Florida clients about diet and exercise. There is no suggestion that anyone was misled about Heather's credentials or status, nor that anyone was harmed by anything Heather said. Similarly, Heather does not engage in any separately regulable conduct—like preparing meals, prescribing controlled substances, or drawing blood—that might complicate the constitutional analysis of her right to communicate a message to her clients. And the advice she wants to give (tips about what to eat or not eat) is the sort of advice that millions of Americans routinely give and receive without government intervention. If that advice can be removed from the ambit of the First Amendment simply by adopting a licensing law, then any advice could be.

The petition for certiorari should therefore be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

August 11, 2022

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APPENDIX

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Appendix A

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 19-13070

HEATHER KOKESCH DEL CASTILLO,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF HEALTH,

Defendant-Appellee.

Appeal from the United States District Court

for the Northern District of Florida

D.C. Docket No. 3:17-cv-00722-MCR-HTC

Appendix A

Opinion of the Court

Before BRANCH, LUCK, and ED CARNES, Circuit Judges.

LUCK, Circuit Judge:

Heather Kokesch Del Castillo, an unlicensed dietician and nutritionist, claims that Florida's Dietetics and Nutrition Practice Act, which requires a license to practice as a dietician or nutritionist, violates her First Amendment free speech rights to communicate her opinions and advice on diet and nutrition to her clients. The district court granted summary judgment for the Florida Department of Health, which enforces the Act, on Del Castillo's First Amendment free speech claim because, the district court concluded, it was bound by our decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011). *Locke* held that a similar state licensing scheme for commercial interior designers did not violate the free speech rights of unlicensed interior designers.

Del Castillo argues that the district court erred, and we are not bound by *Locke*, because *Locke* was abrogated by the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). So the narrow question for us is whether *Locke* is still good law after *NIFLA*. After reviewing what we said in *Locke*, what the Supreme Court said in *NIFLA*, and our prior panel precedent rule, we hold that it is. And because *Locke* is still good

law, we conclude that we are bound to affirm the district court's summary judgment for the department.

FACTUAL BACKGROUND

Del Castillo owned and operated a health-coaching business called Constitution Nutrition. She started her business in California, which did not require her to have a license to operate it. After moving to Florida in 2015, Del Castillo continued to run her business—meeting online with most of her clients and meeting in person with two clients who lived in Florida. She described herself as a "holistic health coach" and not as a dietician. Del Castillo tailored her health coaching to each client, which included dietary advice. She advertised her business in a local health magazine, on Facebook, and on flyers at a local gym.

Del Castillo's business focused on "[o]ne-on-one health coaching," which she described as "meeting with clients and discussing overall health and wellness, as well as goal setting." She gave them tailored advice on dietary choices, exercise habits, and general lifestyle strategies. For example, Del Castillo recommended vitamin supplements to some clients with low energy and told them to consult with their physicians before taking the supplements. For another client with food intolerances, Del Castillo recommended health goals that fit within a list of foods to avoid provided by the client's doctor.

Before her initial consultation with a new client, Del Castillo would ask them to fill out a "health

history form." The health history form sought general background information about the client, like his or her age and occupation, as well as particulars about the client's dietary health, including past serious illness or recent weight change. Del Castillo used this form to get an overall picture of her client's health but did not make medical conclusions. Instead, she would recommend that a client consult a doctor if the client had experienced something unusual like drastic weight loss. Del Castillo never held herself out to her clients as a health care professional, never gave a diagnosis or provided medical treatment, and never gave advice contrary to physician advice.

Del Castillo had a certificate in holistic health coaching that she received from an online school. But she did not have a Florida dietician or nutritionist license. Del Castillo was not qualified to receive a license because she lacked the necessary education and professional experience.

Del Castillo's lack of a license eventually became a problem for her business. Florida regulates dietetics and nutrition counseling through the Dietetics and Nutrition Practice Act. Fla. Stat. §§ 468.501–.518. The Act defines "[d]ietetics" 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." *Id.* § 468.503(4). It defines "[n]utrition counseling" as "advising and assisting individuals or groups on appropriate nutrition intake by

integrating information from the nutrition assessment." *Id.* § 468.503(10). The Act provides that "[d]ietetics and nutrition practice" "include[s] assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling, and education; and developing, implementing, and managing nutrition care systems." *Id.* § 468.503(5). And, relevant to this appeal, the Act provides that "[n]o person may engage for remuneration in dietetics and nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provisions of this part." *Id.* § 468.504. Under the Act, a person who knowingly engages in unlicensed "dietetics and nutrition practice or nutrition counseling for remuneration" commits "a misdemeanor of the first degree." *Id.* § 468.517(1), (2).

In March 2017, a licensed dietician filed a complaint against Del Castillo with the Florida Department of Health, alleging that Del Castillo was violating the Act by providing nutritionist services without a license. The department's practice was to investigate every complaint, so it opened an investigation into Del Castillo. A department investigator posed as a client and contacted Del Castillo about her services. In response, Del Castillo described her services and provided the investigator with a health history form to fill out. The department concluded that Del Castillo

was violating the Act and, in May 2017, sent her a citation and a cease-and-desist order. Del Castillo paid the department $500.00 in fines and $254.09 in investigatory fees for "providing individualized dietary advice in exchange for compensation in Florida."

PROCEDURAL HISTORY

Del Castillo brought a 42 U.S.C. section 1983 action against the department, claiming that the Act, as applied to her, violated her First Amendment free speech rights. She sought a declaratory judgment that the Act is "unconstitutional to the extent that [it] prohibit[s] [her] and others similarly situated from offering individualized advice about diet and nutrition." She also requested injunctive relief and attorneys' fees and costs.

After discovery, both parties moved for summary judgment. The department argued that the Act was a lawful regulation of the dietetics and nutritionist profession. Because any restriction of Del Castillo's speech was merely incidental to the regulation of professional conduct, the department maintained, the Act was not subject to First Amendment scrutiny and did not violate Del Castillo's free speech rights. The department relied on our decision in *Locke*, which upheld Florida's licensing scheme for interior designers against a free speech challenge similar to Del Castillo's challenge in this case because that regulation governed occupational conduct with only an incidental effect on speech.

Del Castillo argued in her motion for summary judgment that her dietary advice to her clients was pure speech rather than conduct. Del Castillo argued that the Act was a content-based regulation of her speech and was, therefore, subject to strict scrutiny. The Act couldn't survive strict scrutiny, Del Castillo maintained, because it wasn't narrowly tailored to address a compelling government interest. Finally, Del Castillo argued that *Locke* had been abrogated by the Supreme Court's recent decision in *NIFLA* be- cause *Locke* relied on the "professional speech doctrine" and the *NIFLA* Court "expressly rejected the professional speech doctrine."

The district court granted the department's motion for summary judgment and denied Del Castillo's. It concluded that our "binding" decision in *Locke* "controls the outcome of this case." The district court explained that in *Locke*, we rejected a challenge to Florida's licensing scheme for commercial interior designers because a statute that governs "the practice of an occupation is not unconstitutional as an abridgement 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." The district court said that *Locke* also relied on the principle that "generally applicable licensing provisions limiting the class of persons who may practice the profession" are not subject to First Amendment scrutiny.

The district court concluded that the Act's dietician and nutrition licensing scheme was like the licensing scheme we upheld in *Locke*. This was because,

the district court said, the licensing scheme that Del Castillo challenged had an "impact on speech" that was "merely incidental to the regulation of the profession" of dieticians and nutritionists. The district court concluded that, under *Locke*, the Act was "not subject to heightened scrutiny because it is a generally applicable professional licensing statute with a merely incidental impact on speech."

The district court rejected Del Castillo's argument that the Supreme Court's decision in *NIFLA* had abrogated *Locke*. The district court reasoned that although the *NIFLA* Court had declined to recognize "professional speech" as a unique category of speech exempt from ordinary First Amendment principles, the second reason for *Locke's* holding, it had reaffirmed that states "may regulate professional conduct, even though that conduct incidentally involves speech," consistent with the first reason for *Locke*'s holding. Thus, the district court applied rational basis review to Del Castillo's First Amendment claim and concluded that the Act was rationally related to a legitimate state interest: the promotion of public health and safety.

Del Castillo appeals the district court's summary judgment for the department.[1]

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[1] After we heard oral argument in this case, the department filed a motion to dismiss the appeal as moot. In 2020, Florida amended the Act to exempt from the state's licensing

requirement certain persons providing nutritional advice. The new exception applies to:

> Any person who provides information, wellness recommendations, or advice concerning nutrition, or who markets food, food materials, or dietary supplements for remuneration, if such person does not provide such services to a person under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention, not including obesity or weight loss, and does not represent himself or herself as a dietitian, licensed dietitian, registered dietitian, nutritionist, licensed nutritionist, nutrition counselor, or licensed nutrition counselor, or use any word, letter, symbol, or insignia indicating or implying that he or she is a dietitian, nutritionist, or nutrition counselor.

Fla. Stat. § 468.505(1)(n) (2020). The department argues that this amendment exempts Del Castillo's business and moots her appeal. Del Castillo responds that her business is not covered by the new exception because she has had, and in the future wants to be free to have, clients who are "under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention."

"Generally, when an ordinance is repealed any challenges to the constitutionality of that ordinance become moot." *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000). But, "when an ordinance is repealed by the enactment of a superseding statute, then the superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law." *Id.* (quotation marks omitted). Here, the amendment to the Act did not remove all of the Act's features that Del Castillo challenged. Del Castillo still challenges the part of the Act prohibiting her from giving dietetic

Appendix A

STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Buending v. Town of Redington Beach*, 10 F.4th 1125, 1130 (11th Cir. 2021). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, a court must "resolve all ambiguities and draw reasonable factual inferences from the evidence in the non-movant's favor." *Buending*, 10 F.4th at 1130 (quotation marks omitted).

DISCUSSION

Del Castillo argues that the Act, as applied to her and her business of giving clients individualized dietary and nutrition advice, is a content-based regulation of speech that is subject to strict scrutiny. She contends that the district court erred in relying on *Locke* because *NIFLA* abrogated *Locke*. And regardless of what level of scrutiny we apply to the Act, Del Castillo argues, the department failed to justify the burden on her First Amendment free speech rights.

We conclude that *Locke* is still good law and controls the outcome of this case. We break up our discussion into four parts. First, we discuss *Locke* and

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and nutritional advice to paying clients who are under the supervision of a doctor for a disease or medical condition requiring nutrition intervention. Thus, her First Amendment challenge to the Act is not moot.

the two reasons the *Locke* court gave for why Florida's interior designer licensing scheme did not violate the First Amendment: the professional speech doctrine; and the licensing scheme regulated professional conduct with only an incidental effect on speech. Second, we review *NIFLA*, its refusal to recognize the professional speech doctrine, and its reaffirmation that the regulation of professional conduct that has only an incidental effect on speech does not violate the First Amendment. Third, we apply our prior panel precedent rule and discuss how one of the two independent reasons for our decision in *Locke*— that the regulation of professional conduct with an incidental effect on speech does not violate the First Amendment—was not abrogated by, but instead survived, *NIFLA*. And finally, we apply *Locke* to this case and conclude that the Act's dietician and nutritionist licensing scheme did not violate Del Castillo's free speech rights because, like the interior designer licensing scheme in *Locke*, the Act regulated her professional conduct and had only an incidental effect on her speech.

Our decision in Locke v. Shore

Locke involved a First Amendment free speech challenge to a Florida law "requir[ing] interior designers practicing in nonresidential, commercial settings within the state to obtain a state license." 634 F.3d at 1189. The statute defined "'interior design' as 'designs, consultations, studies, drawings, specifications, and administration of design construction contracts relat[ed] to nonstructural interior elements of a building or structure." *Id.* (quoting what is now Fla. Stat.

§ 481.203(10)). To get a license, a designer had to "complete a combined total of six years of interior design education and internship experience with a licensed interior designer" and "pass an examination administered by the National Council of Interior Design Qualifications." *Id.* "Practicing interior design in commercial settings in Florida without a license" could result in a misdemeanor charge and an administrative penalty. *Id.* at 1189–90.

The plaintiffs were educated and trained in interior design and practiced in residential settings in Florida. *Id.* at 1190. They "wish[ed] to expand their practice to commercial settings," but they were not licensed as interior designers by the state. *Id.* The plaintiffs "argue[d] that the license requirement unconstitutionally burden[ed] protected speech under the First Amendment." *Id.* at 1191. "We conclude[d] that Florida's license requirement [was] constitutional under the First Amendment," *id.* at 1192, and gave two distinct reasons for our holding.

The first reason we gave was that a "statute that governs the practice of an occupation is not unconstitutional as an abridgement 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 (quotation marks omitted). We relied, in part, on *Wilson v. State Bar of Georgia*, 132 F.3d 1422, 1430 (11th Cir. 1998), which recognized that "regulations that 'govern occupational conduct' with only an 'incidental effect' on speech withstand First Amendment scrutiny." *Locke*, 634 F.3d at

1191 (parenthetically quoting from *Wilson*). "Because the [interior designer] license requirement govern[ed] 'occupational conduct, and not a substantial amount of protected speech,'" *Locke* said, it did "not implicate constitutionally protected activity under the First Amendment." *Id.* (quoting *Wilson*, 132 F.3d at 1429).

This first reason was an independently adequate reason for our holding in *Locke*. It was not only the first reason we gave but also the reason we reiterated in the concluding paragraph of our discussion. *Id.* at 1192 (concluding "that Florida's license requirement is constitutional under the First Amendment" "[b]ecause the license requirement is a professional regulation with a merely incidental effect on protected speech"). In case there was any doubt about the matter, in her separate concurring opinion in the *Locke* case, Judge Black nailed down our holding and the reason for it. *Id.* at 1197 (Black, J., concurring in the result) ("As I understand the majority opinion, it holds that Florida's licensing scheme does not violate the First Amendment because it is a regulation of occupational conduct with only an incidental impact on protected speech.").

As courts sometimes do, the *Locke* court also gave an additional reason for its holding. The second reason we gave for concluding that the interior designer licensing scheme did not violate the First Amendment was that, if "the government enact[ed] 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

. . . subject to First Amendment scrutiny." *Id.* at 1191 (majority opinion) (omission in original) (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)). There was "a difference," we reasoned, "for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Id.* The interior designer "license requirement regulate[d] solely the latter," we said. *Id.* This second reason, derived from Justice White's concurring opinion in *Lowe*, is the professional speech doctrine.

Both reasons supported our conclusion that the interior designer licensing statute did not violate the plaintiffs' First Amendment free speech rights.

The Supreme Court's decision in NIFLA v. Becerra

NIFLA involved California's regulation of crisis pregnancy centers—"pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." 138 S. Ct. at 2368 (quoting report). The state's regulation required centers that qualified as licensed covered facilities to "disseminate a government-drafted notice on site," which read: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and

abortion for eligible women." *Id.* at 2369 (quotation marks omitted).[2]

A licensed pregnancy center sued, alleging that the notice requirement "abridge[d] the freedom of speech protected by the First Amendment." *Id.* at 2370. The district court denied the center's motion for a preliminary injunction, and the Ninth Circuit affirmed because the notice requirement "survive[d] the lower level of scrutiny that applie[d] to regulations of professional speech." *Id.* (quotation marks omitted)

The Supreme Court reversed. *Id.* The Court began by explaining that when it enforces the First Amendment prohibition on the abridgment of the freedom of speech, it distinguishes "between content-based and content-neutral regulations of speech." *Id.* at 2371. Content-based regulations "target speech based on its communicative content," and generally they "are presumptively unconstitutional and may be justified only if" they survive strict scrutiny—"the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (quotation marks omitted). The notice requirement for licensed pregnancy centers was a content-based regulation because it compelled the center to speak a particular message. *Id.*

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[2] California's regulation had a separate notice requirement for unlicensed pregnancy centers, *NIFLA*, 138 S. Ct. at 2369–70, but the notice requirement for unlicensed centers isn't relevant to whether *Locke* has been abrogated.

But, the *NIFLA* Court explained, some courts of appeals, like the Ninth Circuit, had "recognized 'professional speech' as a separate category of speech that is subject to different rules." *Id.* (citing cases from the Third, Fourth, and Ninth Circuits). These courts defined professional speech as speech that is based on expert knowledge and judgment by individuals who provided personalized services to clients and who are subject to a generally applicable licensing and regulatory regime. *Id.* "[T]hese courts except[ed] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny." *Id.*

The *NIFLA* Court refused to recognize "'professional speech' as a separate category of speech." *Id.* "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72. A government cannot impose content-based restrictions on speech, the Court explained, "without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id.* at 2372 (cleaned up). While the Court had never recognized "a tradition for a category called 'professional speech,'" it has traditionally "afforded less protection for professional speech in two circumstances." *Id.*

First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* And second, the Court has said that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* The Supreme Court "has upheld

regulations of professional conduct that incidentally burden speech" because the "First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 2373 (quotation marks omitted).

Neither traditional circumstance applied to California's notice requirement for licensed pregnancy centers. *Id.* at 2372–74. And the *NIFLA* Court found no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. Even applying the easier-to-meet standard of intermediate scrutiny, the Court concluded that California's notice requirement couldn't meet it because the notice requirement wasn't sufficiently drawn to achieve the state's claimed substantial interest. *Id.* at 2375–76.

NIFLA *did not abrogate* Locke

Del Castillo argues that *NIFLA* abrogated *Locke*. And her argument goes something like this. *Locke*'s holding relied on the "professional speech doctrine" to conclude that Florida's interior designer licensing scheme did not violate the plaintiffs' First Amendment free speech rights. But *NIFLA* rejected the "professional speech doctrine." So the prop supporting *Locke*'s holding has been taken away, and *Locke* has been abrogated. For three reasons, we disagree.

First, *Locke*'s First Amendment holding relied on more than the "professional speech doctrine." The *Locke* court also concluded that the interior designer

licensing requirement did not violate the First Amendment because it was "a professional regulation with a merely incidental effect on protected speech." 634 F.3d at 1192; *see also id.* at 1197 (Black, J., concurring in the result) ("As I understand the majority opinion, it holds that Florida's licensing scheme does not violate the First Amendment because it is a regulation of occupational conduct with only an incidental impact on protected speech."). "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 (majority opinion).

Second, while the *NIFLA* Court "refused to recognize professional speech as a new speech category deserving less protection," *Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020), it also reaffirmed that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech," *NIFLA*, 138 S. Ct. at 2372. The *NIFLA* Court explained that "regulations of professional conduct that incidentally burden speech" have been "upheld," and the "First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 2373 (quotation marks omitted).

Third, *NIFLA* did not undermine *Locke* to the point of abrogation. "We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of

abrogation by a subsequent en banc or Supreme Court decision." *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). A prior panel precedent is "undermined," we explained in *United States v. Petite*, where the "Supreme Court's subsequent decision . . . so *fully* undermined our prior panel's decision . . . as to abrogate its holding." 703 F.3d 1290, 1297 (11th Cir. 2013) (emphasis added). To "fully undermine[]" a prior panel decision, the later Supreme Court decision must "demolish[]" and "eviscerate[]" each of its "fundamental props." *See id.* at 1297–98. Because *Locke*'s holding relied on more than the "professional speech doctrine"—and the only thing *NIFLA* refused to recognize was the "professional speech doctrine"—both of *Locke*'s props have not been demolished; its holding is still standing.

The *NIFLA* Court spoke with unmistakable clarity about the line of precedents upholding regulations of professional conduct that incidentally burden speech and another line of precedents (upholding laws compelling the disclosure of information in certain contexts): "neither line of precedents is implicated here." 138 S. Ct. at 2372. Reasoning based on a line of Supreme Court precedents that the Court itself emphasizes in a later decision is not implicated by that later decision cannot have been rejected, overruled, or abrogated by the later decision.

So what we have here is a prior panel precedent—the holding in *Locke*—that rests on two bases, only one of which has been rejected by the Supreme Court while the other basis has not been. If anything, that

surviving basis or rationale has been endorsed by the Supreme Court. And it takes only one valid basis or rationale for a prior holding to make it binding precedent. *See McLellan v. Miss. Power & Light Co.,* 545 F.2d 919, 925 n.21 (5th Cir. 1977) (en banc) ("It has long been settled that all alternative rationales for a given result have precedential value."); *see also Massachusetts v. United States,* 333 U.S. 611, 623 (1948) (explaining that where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both").

Two of our decisions illustrate this point. The first is an example of a dual-rationale prior precedent that was abrogated by a supervening Supreme Court decision because the supervening Supreme Court decision was inconsistent with both rationales of the prior precedent. In the *Petite* case, "we ha[d] a prior panel opinion on all fours with the case before us." 703 F.3d at 1297. That prior panel decision was *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). *Petite*, 703 F.3d at 1297. "In *Harrison*"—the prior panel opinion—we had "held that the offense of simple vehicle flight . . .—the same offense at issue [in *Petite*]—was *not* a violent felony for purposes of the Armed Career Criminal Act." *Id.* "*Harrison*," we said, "rested on two fundamental props." *Id.* "The first foundational prop was the panel's conclusion that Florida's simple vehicle flight offense, as ordinarily committed, was not 'roughly similar' to the ACCA's enumerated offenses in 'degree of risk posed.'" *Id.* (quoting *Harrison*, 558

F.3d at 1294). "The second prop on which the panel's holding in *Harrison* rested was that, even assuming a serious potential risk of physical injury exists . . . Florida's simple vehicle flight offense was not roughly similar in kind to the ACCA's enumerated offenses." *Id.* (cleaned up).

But both of those two "foundations of *Harrison* were demolished by the Supreme Court's subsequent decision in *Sykes* [*v. United States*, 564 U.S. 1 (2011)]."[3] *Petite*, 703 F.3d at 1298. "As for the degree of risk posed by vehicle flight"—the first prop—"the Supreme Court rejected our prior panel's risk calculus, which had suggested that the confrontational act of vehicle flight does not necessarily translate into a serious potential risk of physical injury in the absence of high speed or reckless driving on the part of the offender." *Id.* (quotation marks omitted). And "[t]he Supreme Court in *Sykes* also eviscerated the second of *Harrison*'s props— that, even assuming a serious risk of injury, simple vehicle flight was not a violent felony for ACCA purposes because it was not similar in kind to the ACCA's enumerated crimes." *Id.* Because *Sykes* demolished both of the two foundations supporting *Harrison*'s holding, we concluded in *Petite* that *Harrison* had been so fully undermined that it had been abrogated by *Sykes*. *Id.* at 1299. This is what it takes for

[3] *Sykes* and *Petite* both involved an analysis under the ACCA's residual clause, a provision which has since been declared unconstitutionally vague. See *Johnson v. United States*, 576 U.S. 591 (2015).

a Supreme Court decision to demolish or eviscerate a prior precedent.

The other example of a dual-rationale prior precedent illustrates what happens when only one of two rationales is rejected by a later Supreme Court decision. *See DeLong Equip. Co. v. Wash. Mills Electro Mins. Corp.*, 997 F.2d 1340 (11th Cir. 1993). We held in *DeLong Equipment* that postjudgment interest would be awarded from the date of the original judgment, rather than from the date of the judgment on remand. *Id.* at 1341. That holding was consistent with *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 509 F.2d 784 (5th Cir. 1975), which was binding "prior precedent" from the former Fifth Circuit. *DeLong Equip. Co.*, 997 F.2d at 1342.

We acknowledged in *DeLong Equipment* that the Supreme Court had since "rejected the narrow holding of" our *Woods Exploration* decision. *Id.* at 1342 n.1 (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990)). As a result, one rationale or point on which our earlier decision had rested was gone. But we explained that the supervening Supreme Court decision "did not cast doubt on the *Woods* case's larger point that the earlier date is the one from which equity normally requires the accrual of postjudgment interest to run." *Id.* Thus, we held that the Supreme Court's rejection of one basis or rationale of our prior decision did not change the precedential force of the rationale that was unaddressed and unabrogated by the Supreme Court. *See id.* The situation in *Locke* is like the situation in *DeLong Equipment*.

The point we made in *Locke* about the regulation of professional conduct that incidentally burdened speech remains undisturbed and binding.

Here, unlike in *Petite*, the Supreme Court has not "demolished" or "fully undermined" both props making up *Locke*'s foundation. *Locke*, like our prior panel decision in *Harrison*, relied on two props to hold that Florida's interior designer licensing scheme did not violate the plaintiffs' First Amendment free speech rights: (1) "the license requirement [was] a professional regulation with a merely incidental effect on protected speech"; and (2) the professional speech doctrine. *Locke*, 634 F.3d at 1191–92. In *NIFLA*, the Supreme Court refused to recognize the "professional speech" doctrine. *See Otto*, 981 F.3d at 861 (explaining that the Supreme Court in *NIFLA* "rejected an attempt to regulate speech by recharacterizing it as professional conduct"). But the *NIFLA* Court reaffirmed that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." 138 S. Ct. at 2372; *see also id.* at 2373 ("[T]his Court has upheld regulations of professional conduct that incidentally burden speech.").

After *NIFLA*, one of the two props supporting *Locke*'s foundation still stands. It has not been eviscerated. It has not been demolished. And it is has not been undermined. "[W]e are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Fla. League of Pro. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996); *see*

also United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) ("[T]he doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." (quotation marks omitted)). Unlike in *Petite*, because only one—but not both—of *Locke*'s independently adequate props has been taken away, we are not compelled to conclude that *Locke* has been so fully undermined as to be abrogated by *NIFLA*.

Rather, under our prior precedent rule, *Locke*'s first rationale is still good law: "A statute that governs the practice of an occupation is not unconstitutional as an abridgement 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." 634 F.3d at 1191. We must follow this part of *Locke* to the extent it applies to Del Castillo and the Act's licensing scheme for dieticians and nutritionists. And, as we explain below, it does apply.

Locke *controls the First Amendment question here*

Applying *Locke* to this case, we conclude that the Act's licensing scheme for dieticians and nutritionists regulated professional conduct and only incidentally burdened Del Castillo's speech. Because the burden on her speech rights was only incidental, the Act's licensing scheme did not violate her First Amendment free speech rights. *See Locke*, 634 F.3d at 1192.

Appendix A

The Act regulates "dietetics and nutrition practice," Fla. Stat. § 468.504, which involves

> assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling, and education; and developing, implementing, and managing nutrition care systems, which includes, but is not limited to, evaluating, modifying, and maintaining appropriate standards of high quality in food and nutrition care services.

Id. § 468.503(5). And the Act regulates "nutrition counseling," *id.* § 468.504, which entails "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment," *id.* § 468.503(10). In enacting this regulation, the Florida legislature specifically found that "the *practice* of dietetics and nutrition or nutrition counseling by unskilled and incompetent practitioners presents a danger to the public health and safety." *Id.* § 468.502 (emphasis added).

Assessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are "occupational conduct"; they're what a dietician or nutritionist does as

part of her professional services. *See Locke*, 634 F.3d at 1191 (quotation marks omitted).

The profession also involves some speech—a dietician or nutritionist must get information from her clients and convey her advice and recommendations. But, to the extent the Act burdens speech, the burden is an incidental part of regulating the profession's conduct.

The Act's effect on speech for dieticians and nutritionists is as incidental as was the licensing scheme in *Locke*'s effect on speech for interior designers. The interior designer licensing scheme in *Locke* defined "interior design" as "designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure." *Id.* at 1189 (quoting what is now Fla. Stat. § 481.203(10)). Interior design included "reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings." *Id.* (quotation marks omitted).

But interior design also involved some speech. An interior designer not only creates designs and drawings of nonstructural interior elements of a building, *id.*; she also has to talk to her clients about their preferences and communicate the final designs and drawings to the clients. Even so, the fact that the profession involved speech did not mean that the licensing scheme for interior designers violated the First Amendment. Rather, because "the [interior designer]

license requirement [was] a professional regulation with a merely incidental effect on protected speech," we held that it was "constitutional under the First Amendment." *Id.* at 1192.

We're bound by *Locke* to reach the same conclusion here. Like the interior designer licensing scheme in *Locke*, the Act regulated the professional conduct of dieticians and nutritionists and only incidentally burdened Del Castillo's free speech rights. Because the Act "is a professional regulation with a merely incidental effect on protected speech," it is "constitutional under the First Amendment." *See id.*

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HEATHER KOKESCH DEL CASTILLO,

Plaintiff,

v. **Case No. 3:17-cv-722-MCR-HTC**

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

Defendant.
_____/

ORDER

Pending before the Court are cross motions for summary judgment by Defendant Celeste Philip, MD, MPH, in her official capacity as Surgeon General and Secretary of the Florida Department of Health, (the "Department"),[1] ECF No. 24, and Plaintiff Heather Kokesch Del Castillo, ECF No. 25. Having fully

[1] Because Defendant Celeste Philip has been sued in her official capacity as Surgeon General and Secretary of the Florida Department of Health, the Court will refer to Defendant Philip as the "Department" for the purposes of this Order.

considered the record and the arguments of the parties, the Court finds Defendant's Motion for Summary Judgment is due to be granted, and Plaintiff's Motion for Summary Judgment is due to be denied.

Background[2]

Del Castillo is a Florida resident who owned and operated Constitution Nutrition, a health-coaching business, in the state. Del Castillo first opened Constitution Nutrition while she was living in California, after she received a certificate in holistic health coaching from the Institution for Integrative Nutrition ("IIN"), an unaccredited New York-based online school, in February 2015. *See* ECF No. 24-1 at 10–14. She continued to operate the business after moving to Florida, where she advertised her business in a magazine entitled Natural Awakenings of Northwest Florida,[3] on Facebook, and through flyers. *See* ECF No. 24-1 at 39–40. Notably, as part of her business in

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[2] For the limited purposes of this summary judgment proceeding, the Court views "the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party." *Martin v. Brevard Cty. Pub. Sch.*, 543 F.3d 1261, 1265 (11th Cir. 2008) (internal marks omitted).

[3] In one of her advertisements, posted under a 'nutritional counseling' subsection of the magazine, Del Castillo offered a customized holistic health program and offered to help clients with their diet, exercise, and motivation by reviewing their health histories and setting health goals. *See* ECF No. 25-1 at 42.

Florida, Del Castillo offered individualized dietary advice to clients for remuneration.[4] Specifically, she offered a six-month health coaching program in which she gave health and dietary advice to individual clients over the course of 13 sessions[5] and provided health coaching services and dietary advice to two Florida residents at their homes.[6] *See* ECF No. 24-1 at 26–29. Del Castillo, however, did not have a license to practice dietetics in Florida, did not complete the requisite educational[7] and preprofessional experience requirements, and did not apply for or take the licensure exam.[8] After a complaint was filed against Del Castillo, the Department launched an investigation to

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[4] The parties do not dispute the fact that Del Castillo offered individualized dietary advice to clients for pay in Florida. *See* ECF Nos. 1, 24, 25.

[5] Del Castillo offered a free initial consult for the first session but charged a $95 dollar fee for each of the remaining 12 sessions. *See* ECF No. 24-1 at 28–29.

[6] In addition to meeting some clients in person, Del Castillo also had meetings with clients via telephone, Skype, and Google Hangouts. *See* ECF No. 24-1 at 26–27.

[7] Del Castillo has a bachelor's degree in Geography, a master's degree in Education, and a holistic health coaching certificate from IIN. *See* ECF No. 24-1 at 9. She does not dispute that she does not satisfy the Dietetics and Nutrition Practice Act's education requirements. *See* ECF No. 25 at 11.

[8] It is undisputed that Del Castillo failed to meet these requirements. *See* ECF No. 25 at 11 n.1.

determine if she was unlawfully practicing dietetics without a license.[9] An investigator for the Department, posing as a potential customer, reached out to Del Castillo via email, and Del Castillo responded by email describing her services and attaching a health-history form for him to fill out. *See* ECF Nos. 24-3 at 22–23, 25-1 at 17–20. Thereafter, the Department notified Del Castillo that it had probable cause to believe that she was unlawfully practicing in the State as a dietician/nutritionist without a license and, accordingly, directed her to cease and desist her practice. *See* ECF Nos. 1-2, 24-3 at 13. Thereafter, Del Castillo paid the Department $500.00 in fines and $254.09 in investigatory fees for "providing individualized dietary advice in exchange for compensation in Florida." ECF No. 25 at 14; *see* ECF Nos. 1-3, 24-1 at 23–24, 24-3 at 64.

De Castillo brought the instant action, arguing that the Dietetics and Nutrition Practice Act, FLA. STAT. § 468.501, *et seq.*, (the "DNPA"), as applied to her, violates her First Amendment right to freedom of speech, *see* 42 U.S.C. § 1983. She seeks a declaration that the DNPA and the regulations promulgated pursuant to the statute "are unconstitutional to the extent they prohibit Plaintiff Del Castillo and others similarly situated from offering individualized advice about diet and nutrition." *See* ECF No. 1 at 12.

[9] A member of the public, a Florida-licensed dietician, filed a complaint against Del Castillo for suspected unlicensed practice of dietetics after seeing one of her advertisements. *See* ECF No. 25-1 at 13, 38–41.

Additionally, Del Castillo requests injunctive relief and attorneys' fees and costs pursuant to 42 U.S.C. § 1988. *See id.*

The State of Florida regulates the practice of dietetics and nutrition or nutrition counseling under the DNPA. *See* FLA. STAT. § 468.501, *et seq.* In relevant part, the DNPA requires persons who "engage for remuneration in dietetics and nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling" to be licensed by the state.[10] FLA. STAT. § 468.504. The statute 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."[11] FLA. STAT. § 468.503(4). Additionally, the DNPA specifically provides that 'dietetics and nutrition practice' "include[s] assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling, and

[10] For the purposes of this Order, the Court will refer to the practice of dietetics and nutrition or nutrition counseling as "dietetics" or "the practice of dietetics."

[11] The DNPA further provides that dietetics is "an integral part of preventive, diagnostic, curative, and restorative health care of individuals, groups, or both." FLA. STAT. § 468.503(4).

education; and developing, implementing, and managing nutrition care systems." § 468.503(5). Lastly, "nutrition counseling" is defined as "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment."[12] § 468.503(10). Florida has designated licensed dietitians and nutritional counselors as "health care practitioners." *See* FLA. STAT. § 556.001(4); *see also* FLA. STAT. Ch. 468 part X (the "DNPA").

The DNPA provides "that the practice of dietetics and nutrition or nutrition counseling by unskilled and incompetent practitioners presents a danger to the public health and safety." FLA. STAT. § 468.502 (noting "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."). According to the statute, the "sole legislative purpose in enacting [the DNPA] is to ensure that every person who practices dietetics and nutrition or nutrition counseling in this state meets minimum requirements for safe practice."[13]

seeking to practice dietetics to pass a licensure exam.[14] *See* FLA. STAT. § 468.509. Additionally, a person seeking a license must have an "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" from an accredited school or program, FLA. STAT. § 468.509(2)(a)(1), and must complete a "preprofessional experience component of not less than 900 hours or [have] education or experience determined to be equivalent by the [Board of Medicine]."[15] § 468.509(2)(a)(2); *see also* FLA. STAT. § 468.503(1).[16] Notably, practicing dietetics for remuneration without a license is first degree misdemeanor. *See* FLA. STAT. § 468.517; *see also* FLA. STAT. §§ 775.082(4)(a),

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Florida, in support of its motion for summary judgment. *See* ECF No. 24-2 at 74–201. Dr. Kauwell was also deposed. *See id.* at 1–73.

[14] A person seeking a license must also pay the required application, examination, and licensure fees. *See* FLA. STAT. §§ 468.508, 468.509.

[15] "'Preprofessional experience component' means a planned and continuous supervised practice experience in dietetics or nutrition." FLA. STAT. 468.503(11).

[16] The DNPA alternatively allows individuals with equivalent educational experience from a foreign country to take the licensure exam, FLA. STAT. § 468.509(2)(b), and also allows the Board to waive the examination requirement for certain applicants who are registered dietitians, registered dietitian/nutritionists, or certified nutrition specialists. *See* § 468.509(3).

775.083(1)(d) (establishing the maximum term of imprisonment and maximum fines for misdemeanors of the first degree).

The DNPA should not be construed as restricting medical professionals, and their employees, who are licensed by the state under other statutory provisions, from engaging in their respective practices.[17] *See* FLA. STAT. § 468.505(1)(a).[18] Furthermore, the DNPA does not "prohibit or limit any person from the free dissemination of information, or from conducting a class or seminar or giving a speech, related to nutrition," § 468.505(2), and the statute has "no application to

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[17] Specifically, the DNPA does not restrict the practice of licensed acupuncturists, physicians, osteopathic physicians, chiropractors, podiatrists, naturopathic physicians, optometrists, nurses, pharmacists, dental professionals, massage therapists, psychologists, and psychotherapists. *See* FLA. STAT. § 468.505(1)(a); *see also* FLA. STAT. Chs. 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 480, 490, and 491.

[18] The statute also provides that it should not be construed as restricting the services or activities of certain educators; students pursuing a course of study in dietetics; persons fulfilling the statute's supervised experience component; government dietitians; cooperative extension home economists; dietetic technicians; certain marketers or distributors of food products and supplements; individuals that provide weight control services or weight control products in program that has been approved by a qualified dietician or nutritionist; and hospital and nursing home workers. *See* § 468.505(1).

the practice of the religious tenets of any church in this state." § 468.505(3).

Legal Standard

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the non-moving party, "shows that there is no genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (a); *see also Martin v. Brevard Cty. Pub. Sch.*, 543 F.3d 1261, 1265 (11th Cir. 2008). Summary judgment is not appropriate "if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995). An issue of fact is "material" if it might affect the outcome of the case under the governing law, and it is "genuine" if the record taken as a whole could lead a rational fact finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc). The court will not make credibility determinations or weigh the evidence presented on summary judgment. *Frederick v. Sprint/United Mgm't Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). Whenever sufficient, competent evidence is present to support the non-moving party's version of the disputed facts, the court will resolve disputes in the non-moving party's favor. *See Pace v. Capobianco*, 283 F.3d 1275, 1276 (11th Cir. 2002).

Appendix B

Discussion

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (citing U.S. CONST. amend. I). In general, content-based laws, those that "appl[y] to particular speech because of the topic discussed or the idea or message expressed," *id.* at 2227, are subjected to strict scrutiny, and therefore, "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). Notably, a "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. In contrast, a content-neutral regulation of speech– one that is not related to the content of the speech– is subjected to intermediate scrutiny, *see id.* at 2232 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)), and will be upheld only if "it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997)). Courts have also recognized that certain categories of speech, such as obscenity, defamation, fraud,

incitement, child pornography, fighting words, and "speech integral to criminal conduct," are completely outside the protection of the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted); *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011) (citations omitted). Furthermore, the Supreme Court has generally recognized that the First Amendment does not necessarily prevent states from regulating conduct merely because "it was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Here, Del Castillo argues that the DNPA, as applied to her, is a content-based restriction on speech subject to strict scrutiny because it prevents her, as someone without a dietetics license, from giving dietary advice to her clients for renumeration. The Department argues that the DNPA is not subject to First Amendment scrutiny, pursuant to the Eleventh Circuit's decision in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1004 (2012), because its impact on speech is merely incidental to the state's lawful regulation of the occupation of dietetics. In response, Del Castillo argues that *Locke* is no longer good law, and that the DNPA is an ordinary content-based restriction of speech that cannot survive strict scrutiny.

Appendix B

In *Locke*, a group of residential interior designers, who wanted to expand their practice to commercial settings, brought a First Amendment challenge to a Florida law that required commercial interior designers to obtain a state license. 634 F.3d at 1189–91. The court held "that a statute governing the practice of an occupation is not unconstitutional as an abridgement 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." 634 F.3d at 1191 (quoting *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (citing *Ohralik*, 436 U.S. at 456–57). The court also recognized that "generally applicable licensing provisions limiting the class of persons who may practice the profession" are not subject to First Amendment scrutiny. *Id.* (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)).[19]

[19] In his concurrence in *Lowe*, Justice White set forth a framework for determining when professional licensing laws, and other types of professional regulations, implicate First Amendment scrutiny. 472 U.S. at 228–233. Justice White explained that, as a general matter, regulations on entry to a profession are constitutional as long as they "'have a rational connection with the applicant's fitness or capacity to practice' the profession," *id.* at 228 (citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)), and that the government does not lose its power to regulate the practice of a profession merely because the "profession entails speech." *Id.* He nonetheless recognized that "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press," subject to First Amendment scrutiny. *Id.* at 230. Drawing this line, Justice White concluded that "generally applicable licensing provisions limiting the class of persons who may practice the profession" do not constitute a "limitation on freedom of speech or the

The court concluded that the interior design statute in *Locke* did not violate the First Amendment because it was a generally applicable professional licensing law with a merely incidental impact on protected speech and because it only regulated professionals' direct, personal speech with clients, not speech to the public at large. *See id.* at 1192.

The Court agrees with the Department that *Locke* controls the outcome of this case. Del Castillo, like the plaintiffs in *Locke*, is challenging a generally applicable professional licensing statute– one that regulates a profession in which speech is a component– as an abridgment of her right to freedom of speech. Similar to the statute in *Locke*, the DNPA has some impact on speech because the practice of dietetics involves, among other things, the provision of individualized

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press subject to First Amendment scrutiny," when their impacts on speech are merely incidental to the practice of the profession being regulated. *See id.* at 232. Notably, Justice White defined the 'practice of a profession' "as tak[ing] the affairs of a client personally in hand and purport[ing] to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Id.* at 232. He then explained that "[w]here the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'" *Id.*

dietary advice and recommendations.[20] Also like *Locke*, however, the statute's impact on speech is merely incidental to the regulation of the profession, and importantly, as in *Locke*, the DNPA only impacts professionals' direct, personal speech with clients, not speech to the public at large. *See Locke*, 634 F.3d at 1192. Indeed, the DNPA does not prevent Del Castillo, and other unlicensed individuals, from providing dietary advice for free nor does it prevent her from conducting classes or seminars, giving speeches, or otherwise writing or publishing information related to diet or nutrition.[21] *See* §§ 448.504, 468.505(2); *see also Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring) ("[T]he state may prohibit the pursuit of medicine as an occupation without [a] license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought."). Accordingly, under the binding precedent of *Locke*, the DNPA is not subject to heightened scrutiny because it is a

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[20] Del Castillo is specifically challenging this aspect of the DNPA. *See* ECF Nos. 1, 25.

[21] Del Castillo stated in her deposition that the State, through the enforcement of the DNPA, prevented her from talking one on one "to willing individuals about food for pay," but she does not claim that the State is preventing her from blogging, writing a book, or otherwise writing about diet and nutrition online. *See* ECF Nos. 24-1 at 74–76, 25.

generally applicable professional licensing statute with a merely incidental impact on speech.[22]

The court in *Locke* did not explicitly apply a standard of review to the plaintiffs' First Amendment claims; rather, it held that the licensing requirement did not "implicate constitutionally protected activity under the First Amendment" and rejected the plaintiffs' First Amendment claims without any further discussion. *See* 634 F.3d at 1191; *see also Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) (noting that the law in *Locke* "did not implicate constitutionally protected activity under the First Amendment") (citation omitted). Pursuant to *Locke*, the Court similarly concludes that the DNPA does not "implicate constitutionally protected activity under the First Amendment." 634 F.3d at

[22] Del Castillo argues that *Locke* is distinguishable from her case because she is bringing an as-applied challenge, as opposed to a facial challenge, to the DNPA. *See* ECF No. 25 at 27–28. This is a distinction without significance in this case. While the plaintiffs in *Locke* brought a facial challenge to the interior design statute, the analysis in that case applies here, where it is undisputed that Del Castillo is challenging the DNPA as it applies to individualized dietary advice offered to clients for compensation. *See Locke*, 634 F.3d at 1191 (holding that the statute was constitutional as a generally applicable professional licensing regulation with a merely incidental impact on speech because it only regulated professionals' direct, personal speech with clients, not speech to the public at large); *see also Lowe*, 472 U.S. at 233 (White, J., concurring) ("As applied to limit entry into the profession of providing investment *advice tailored to the individual needs of each client*, then, the Investment Advisers Act is not subject to scrutiny as a regulation of speech.") (emphasis added).

1191. However, to the extent a rational basis review applies in this case, the DNPA clearly survives it.

Under rational basis review, a party challenging a statute has the burden of showing that it is not "rationally related to a legitimate state interest." *See Cook v. Bennett*, 792 F.3d 1294, 1301 (11th Cir. 2015); *Locke*, 634 F.3d at 1196 (citing *Bah v. City of Atlanta*, 103 F.3d 964, 967 (11th Cir. 1997)). Under this standard, a statute "is constitutional if there is any reasonably conceivable state of facts that could provide a rational basis for [it]." *Locke*, 634 F.3d at 1196 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 113 (1993)). Here, the Florida legislature enacted the DNPA to promote public health and safety. *See* FLA. STAT. 468.502. Promoting public health and safety is clearly a legitimate state interest, and states are given great latitude to regulate and license professions in furtherance of this interest. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing that "[s]tates have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."); *Ohralik*, 436 U.S. at 460 ("In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions."); *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("[T]he police power of

the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.").

Del Castillo concedes that the promotion of public health and safety is legitimate state interest, *see* ECF No. 27 at 23, and she has failed to show that the DNPA is not rationally related to this interest. Notably, it is, at the very least, reasonably conceivable that the unlicensed practice of dietetics could lead to improper dietary advice from unqualified individuals, which in turn could harm the public.[23] *See Locke*, 634 F.3d at 1196. Additionally, a purported lack of empirical support or evidence for the DNPA does not render the law invalid under rational basis review. *See id.* (noting that a law will survive rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data" and will not be invalid simply because the rationale for the law "seems tenuous" (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *Romer v. Evans*, 517 U.S. 620, 632, (1996)); *see also Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th

[23] While it is Del Castillo's burden to show that no there are no "reasonably conceivable state of facts that could provide a rational basis for [the statute]," *see Locke*, 634 F.3d at 1196, the Court notes that the Department has presented evidence describing how improper dietary advice can harm different groups of people. For example, a carbohydrate-restricted diet, without supplemental folic acid intake, presents increased risks of birth defects to women who are pregnant or who may become pregnant. *See* ECF No. 24-2 at 45–46.

Cir. 2009) ("[U]nder rational basis review, a state 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'") (citation omitted). Furthermore, the fact that other states have not imposed similar licensing requirements for dieticians is of no moment. *See Locke,* 634 F.3d at 1196. Moreover, the fact that the statute regulates individualized dietary advice but not dietary advice from books, speeches, the internet, and television and the fact that it exempts, under certain circumstances, groups of people– such as acupuncturists and sellers of dietary supplements[24]– from its licensure requirement does not render the statute invalid. *See id.* at 1197–98 (finding that a licensure statute is not invalid merely because the state exempts certain groups from the licensure requirement, even if those exemptions "seem unwise or illogical in light of the safety concerns behind the statute"); *see also Leib*, 558 F.3d at 1306 ("Under rational basis review, a court must accept a legislature's generalizations even when there is an imperfect fit between means and ends").

[24] Del Castillo seems to suggest that the DNPA wholly exempts sellers of dietary supplements from its coverage. *See* ECF No. 25 at 26. This is not the case. In relevant part, the DNPA provides that it does not restrict the practice, services, or activities of "[a] person who markets or distributes food, food materials, or dietary supplements, or any person who engages in the explanation of the use and benefits of those products or the preparation of those products, if that person does not engage for a fee in dietetics and nutrition practice or nutrition counseling," FLA. STAT. § 468.505(g), or if that person is "an employee of an establishment permitted pursuant to chapter 465." § 468.505(h); *see also* FLA. STAT. Ch. 465 (the "Florida Pharmacy Act").

Accordingly, the DNPA survives rational basis review, assuming such review applies.

Del Castillo argues that *Locke* is no longer good law in light of *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) and *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc). The Court disagrees. In *Becerra*, pro-life crisis pregnancy centers brought a First Amendment challenge to a California law requiring licensed facilities offering pregnancy-related services to publish a government-drafted notice, which informed patients of public programs providing family planning services, including abortions.[25] 138 S. Ct. at 2368–69. The Supreme Court, reversing the Ninth Circuit's denial of the plaintiffs' motion for a preliminary injunction, concluded that the plaintiffs were likely to succeed on the merits of their First Amendment challenge. *Id.* at 2375–76. The Court first determined that the notice requirement was a content-based restriction, reasoning that "[b]y requiring petitioners to inform women how they can obtain state- subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech." *Id.* at 2371 (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). The Court then discussed whether the professional speech doctrine–

[25] The plaintiffs also challenged a second notice requirement that applied to unlicensed pregnancy centers, which is not particularly relevant to the instant case. *See id.* at 2369–70.

which recognizes that certain speech made by professionals, based on their expert knowledge or made within the confines of a professional relationship, is entitled to less First Amendment protection[26]– applied to the case.[27] The Court noted that it had not

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[26] Courts have addressed professional speech in two distinct contexts. In one line of cases, courts have rejected First Amendment challenges to generally applicable professional licensing regimes. *See Young v. Ricketts*, 825 F.3d 487, 492–94 (8th Cir. 2016); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691–695 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 950 (2015); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568–570 (4th Cir. 2013); *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1053–56 (9th Cir. 2000), *cert. denied*, 532 U.S. 972, 1053–57 (2001); *Bowman*, 860 F.2d at 603–05; *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992), *cert. denied*, 510 U.S. 992 (1993); *see also Lowe*, 472 U.S. at 233 (White, J., concurring). In another line of cases, courts have rejected First Amendment challenges to laws that restrict what professionals can or cannot say while engaging in their profession. *See e.g., King v. Governor of New Jersey*, 767 F.3d 216, 220, 240 (3rd Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015) (rejecting First Amendment challenge to law that prohibited licensed counselors from counseling individuals to change their sexual orientation); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014) (same). While it did not explicitly invoke the "professional speech doctrine," *Locke* is consistent with the first line of cases rejecting First Amendment challenges to generally applicable professional licensing statutes. *See* 634 F.3d at 1191–92.

[27] The Ninth Circuit affirmed the denial of the plaintiffs' motion for a preliminary injunction, concluding that they could not show a likelihood of success on the merits because the notice requirement survived "the 'lower level of scrutiny' that applies to regulations of 'professional speech.'" *See id.* at 2370.

generally recognized professional speech as a separate category of unprotected or less protected speech and that "speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72. The Court did, however, recognize two circumstances where professional speech has been afforded less protection. *Id.* at 2372 (citations omitted). First, the Court noted that it had applied "deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* Second, the Court recognized that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992); *Ohralik*, 436 U.S. at 456). After noting that neither of these circumstances applied to the content-based restriction in *Becerra* and finding that the licensed notice requirement in that case could not survive even intermediate scrutiny, the Court declined to decide whether "professional speech" is a "unique category of speech that is exempt from ordinary First Amendment principles."[28] *See id.* at 2375.

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[28] In relevant part, the Court noted: "[N]either California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny." *Becerra*, 138 S. Ct. at 2375.

The principle that "States may regulate professional conduct, even though that conduct incidentally involves speech," *Becerra*, 138 S. Ct. at 2372 (citing *Casey*, 505 U.S. at 884; *Ohralik*, 436 U.S. at 456), is in line with the Eleventh Circuit's holding in *Locke* "that a statute governing the practice of an occupation is not unconstitutional as an abridgement 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." 634 F.3d at 1191 (quoting *Bowman*, 860 F.2d at 604 (citing *Ohralik*, 436 U.S. at 456–57)); *see also Jarlstrom v. Aldridge*, No. 3:17-CV-00652-SB, 2018 WL 6834322, at *4 (D. Or. Dec. 28, 2018) (noting that *Becerra* "reaffirmed the continuing validity of professional licensing regulations."). As similarly recognized by the Supreme Court in *Casey*, states can enact professional regulations that implicate speech so long as the speech is implicated "only as part of the *practice* of the [profession], subject to reasonable licensing and regulations by the state." *See* 505 U.S. at 884 (emphasis added).

Here, the DNPA only implicates speech as part of the practice of dietetics, and its impact on speech is merely incidental to regulating who can practice in this field. Del Castillo's claimed speech rights are implicated only because the part of the practice she wishes to engage in without a license, the provision of individualized dietary advice for renumeration, is carried out by means of language. *See id*; *see also Rumsfeld*, 547 U.S. at 62; *Ohralik*, 436 U.S. at 456; *Giboney*, 336 U.S. at 502 (recognizing that the First

Amendment does not prevent government from regulating conduct merely because "it was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). Therefore, the DNPA permissively regulates professional conduct, by setting forth generally applicable licensing requirements for those who wish to practice dietetics, although that conduct incidentally involves speech. *See Becerra*, 138 S. Ct. at 2372.

Del Castillo attempts to distinguish her case, arguing that the rule allowing states to regulate professional conduct with a merely incidental impact on speech does not apply here, where the professional conduct being regulated, which she frames as "talking to people about their diet," is itself speech. ECF No. 28 at 9. The Court rejects this argument. As noted above, the DNPA is a generally applicable professional licensing statute that prescribes who may practice the profession of dietetics. The statute only implicates speech because an aspect of the profession, by its nature, involves or is carried out through speech. *See Casey*, 505 U.S. at 884 (recognizing that states can regulate speech as long as it is being regulated as "*part of the practice* of the [profession], subject to reasonable licensing and regulations by the state.") (emphasis added); *see also Lowe*, 472 U.S. at 228–29, 232 n.10 (White, J., concurring) (a generally applicable regulation governing entry to a profession is not impermissive under the First Amendment merely because the profession, by its nature, involves speech). For these same reasons, Del Castillo's further

attempts to distinguish the caselaw recognizing this rule are rejected out of hand.

The Court also disagrees with Del Castillo's argument that *Wollschlaeger* has abrogated or fatally undermined *Locke*. In *Wollschlaeger*, physicians and medical organizations challenged provisions of a Florida law that restricted doctors and medical professionals from asking their patients about their firearm ownership and keeping records of the information. *See* 848 F.3d at 1302–03. In addition, the law prohibited them from discriminating against or harassing patients based on firearm ownership. *See id.* at 1303. The court concluded that the record-keeping, inquiry, and anti-harassment provisions violated the First Amendment.[29] *See* 848 F.3d at 1319. The court first observed that these provisions constituted speaker-focused and content-based restrictions on speech because they applied "only to the speech of doctors and medical professionals, only on the topic of firearm ownership." *See id.* at 1307. Thereafter, the court rejected the government's argument that rational basis review should apply pursuant to the professional speech doctrine,[30] concluding that it was not

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[29] In contrast, the court did not find that the anti-discrimination provision, as construed, violated the First Amendment. *Wollschlaeger*, 848 F.3d at 1319.

[30] Specifically, the court declined to apply Justice White's professional speech framework from *Lowe* to subject the plaintiffs' First Amendment challenge to rational basis review. *See Wollschlaeger*, 848 F.3d at 1308–09 (citing *Lowe*, 473 U.S. at 232

"appropriate to subject content-based restrictions on *speech by those engaged in a certain profession* to mere rational basis review."[31] *See id.* at 1311 (emphasis added). The court ultimately declined to decide whether the law should be subject to strict scrutiny because it found that it nonetheless failed to satisfy intermediate scrutiny. *See id.* at 1311–12 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011)).

The court in *Wollschlaeger* explicitly discussed *Locke*, finding it distinguishable because it "involved 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 in practicing their profession." *Id.* The court then reiterated that the law in Locke "did 'not implicate constitutionally protected activity under the First Amendment.'" *Id.* Notably, this highlights a key distinction between the instant case and *Locke* on the one hand and cases like *Becerra* and *Wollschlaeger* on

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(White, J., concurring); *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 802 (1986) (White, J., dissenting)).

[31] Illustrating its concerns with applying a rationality standard in this context, the court explained that "[i]f rationality were the standard, the government could—based on its disagreement with the message being conveyed—easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on." *Wolschlaeger*, 848 F.3d at 1311.

the other. While the instant case and *Locke* involve First Amendment challenges to generally applicable professional licensing statutes, premised on an argument that those licensing requirements abridged unlicensed individuals' First Amendment rights, the regulations in *Becerra* and *Wollschlaeger* restricted what professionals could or could not say regarding a particular topic while engaging in their licensed professions.[32] *See Wollschlaeger*, 848 F.3d at 1309; *see also id*. at 1325 (Wilson, J., concurring) ("Proscribing access to a profession is entirely different than prohibiting the speech of an entire group of professionals." (citing *Thomas*, 323 U.S. at 544 (Jackson, J., concurring)). Neither *Becerra* nor *Wollschlaeger* abrogated or fatally undermined *Locke*.

Del Castillo also argues that *Holder v. Humanitarian Law Project* has fatally undermined *Locke*. 561 U.S. 1 (2010). The plaintiffs in *Holder*, non-profit groups and individuals who wished to provide political, humanitarian, and legal support to designated foreign terrorist organizations, brought a First Amendment challenge to a statute making it illegal to provide "material support or resources" to foreign

[32] Specifically, the law in *Wollschlaeger* restricted doctors' and medical professionals' ability to speak about the topic of gun ownership while engaging in their profession, *see* 848 F.3d at 1302–03, 1307–09, while the law in *Becerra* compelled licensed pro-life crisis pregnancy centers to publish a government message on the topic of abortion while they engaged in their professional practice. *See* 138 S. Ct. at 2368–69, 2371.

terrorist organizations.[33] *See id.* at 7–14. In relevant part, the Supreme Court rejected the Government's argument that the statute should be subjected to intermediate scrutiny as a content-neutral regulation because the statute was a regulation of conduct that "only incidentally burden[ed] the plaintiffs' expression." *Id.* at 26 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The Court reasoned that the statute was content-based because "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 27. This was the case even though the statute only prohibited speech based on "a 'specific skill' or [that] communicate[d] advice derived from 'specialized knowledge'" and did not bar speech based on "general or unspecialized knowledge." *Id.* The Court nonetheless upheld the statute under strict scrutiny. *See id*; *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (noting that the Court applied strict scrutiny in *Holder*).

Holder is distinguishable because the statute at issue in that case was not a generally applicable licensing statute regulating entry into a profession, like the statutes at issue in the instant case and in *Locke*. In any event, to the extent *Holder* could be considered a professional speech case, see *Becerra*, 138 S. Ct. at 2374 (citing *Holder*, 561 U.S. at 26–27), it is more closely aligned with *Becerra* and *Wollschlaeger*, in

[33] Specifically, the plaintiffs challenged four types of material support prohibited by the statute– "'training,' 'expert advice or assistance,' 'service,' and 'personnel.'" *Holder*, 561 U.S. at 14.

that it restricted what professionals could say regarding a certain topic– political and legal advice about international law and politics– while they were engaging in their professions. *See Becerra*, 138 S. Ct. at 2368–69, 2371; *Wollschlaeger*, 848 F.3d at 1302–03, 1307–09. As discussed, this type of statute is "materially different" from the generally applicable professional licensing statutes at issue in the instant case and in Locke. *See Wollschlaeger*, 848 F.3d at 1325 (Wilson, J., concurring).[34]

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[34] Del Castillo also argues that the Supreme Court in *Riley* implicitly rejected Justice White's professional speech framework. *See* ECF No. 27 at 19 (citing *Riley*, 487 U.S. at 801 n.13). In *Riley*, the Court noted, in a footnote, that it was "not persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review." *Riley*, 487 U.S. at 801 n.13. The Court further noted that "[a]lthough Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication." *Id.* (citing *Thomas*, 323 U.S. at 544– 545 (Jackson, J., concurring)). To the extent this footnote is entitled to any weight in this context, the Court notes that the licensing requirement in *Riley* is materially different than the licensing statutes in *Locke* and the instant case. In *Riley*, the Court held that a law requiring professional fundraisers, but not volunteer fundraisers, to obtain a temporary license before they could engage in solicitation violated the First Amendment. *Id.* at 801. Unlike the licensing statutes at issue in this case and *Locke*, the statute in *Riley* was not a generally applicable statute proscribing entry into a certain profession; rather, it was a statute requiring professional fundraisers to get a temporary license before engaging in a certain type of speech, i.e., solicitations for charities. *See id.* Additionally, unlike the instant case, the law in *Riley* also presented

Lastly, the Court acknowledges that some circuit and district courts have treated First Amendment challenges to tour guide licensing laws differently. *See Edwards v. D.C.*, 755 F.3d 996, 1009 (D.C. Cir. 2014) (holding that tour guide licensing scheme failed to meet intermediate scrutiny under the First Amendment); *Billups v. City of Charleston, S.C.*, 331 F. Supp. 3d 500, 517 (D.S.C. 2018) (same); *Freenor v. Mayor and Alderman of the City of Savannah*, Case No. CV414-247 (N.D. Ga. May 20, 2019) (same); *cf. Kagan v. City of New Orleans, La.*, 753 F.3d 560, 562 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015) (upholding tour guide licensing scheme under intermediate scrutiny).[35] None of these cases, however, are binding on this Court, and they are otherwise distinguishable.[36] Specifically, unlike the DNPA and the licensing statute in *Locke*, the tour guide licensing laws at issue in these cases did not regulate the "practice of a profession," which Justice White defined as "tak[ing] the affairs of a client personally in hand and purport[ing] to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Lowe*, 472 U.S. at 232 (White, J., concurring). Notably, unlike dieticians, interior

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concerns related to unconstrained discretion by the licensors. *See id.*

[35] Del Castillo recently filed a notice of supplemental authority regarding *Freenor*. *See* ECF No. 33.

[36] The Court further notes that the court in *Freenor* did not address or discuss *Locke*. *See Freenor*, Case No. CV414-247.#

designers, lawyers, and psychiatrists, tour guides do not engage in direct, personal speech with clients based on the client's individual needs and circumstances; they, rather, "provide virtually identical information to each customer." *Edwards*, 755 F.3d at 1000 n.3 (distinguishing *Lowe*); see *Lowe*, 472 U.S. at 232 (White, J., concurring); *Locke*, 634 F.3d at 1192. The Court therefore finds the aforementioned cases distinguishable.

Based on the foregoing, the Court concludes that *Locke* remains good law, and that, unless and until the Eleventh Circuit or the Supreme Court overrules or abrogates *Locke*, it remains binding precedent that this Court must follow. Therefore, for the reasons discussed above, the DNPA, as applied to Del Castillo, does "not implicate constitutionally protected activity under the First Amendment," *Locke*, 634 F.3d at 1191, and Del Castillo's First Amendment claim fails as a matter of law.

Accordingly,

1. Defendant's Motion for Summary Judgment, ECF No. 24, is **GRANTED,** and Plaintiff's Motion for Summary Judgment, ECF No. 25, is **DENIED**.

2. The Clerk is directed to enter summary final judgment in favor of the Defendant and against the Plaintiff and close the file.

3. Costs are to be taxed against the Plaintiff.

DONE AND ORDERED this 17th day of July, 2019.

s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

Appendix C

West's F.S.A. § 468.501

468.501. Short title

Currentness

This part may be cited as the "Dietetics and Nutrition Practice Act."

Credits

Laws 1988, c. 88-236, § 1. Amended by Laws 1996, c. 96-367, § 1, eff. Oct. 1, 1996.

West's F. S. A. § 468.501, FL ST § 468.501

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.502

468.502. Purpose and intent

Currentness

The Legislature finds that the practice of dietetics and nutrition or nutrition 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.

Credits

Laws 1988, c. 88-236, § 2. Amended by Laws 1996, c. 96-367, § 2, eff. Oct. 1, 1996.

Appendix C

West's F. S. A. § 468.502, FL ST § 468.502

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.503

468.503. Definitions

Effective: May 10, 2016

Currentness

As used in this part:

(1) "Board" means the Board of Medicine.

(2) "Commission" means the Commission on Dietetic Registration, the credentialing agency of the Academy of Nutrition and Dietetics.

(3) "Department" means the Department of Health.

(4) "Dietetics" means 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. It is an integral part of preventive, diagnostic, curative, and restorative health care of individuals, groups, or both.

(5) "Dietetics and nutrition practice" shall include assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling, and education; and developing, implementing, and managing nutrition care

systems, which includes, but is not limited to, evaluating, modifying, and maintaining appropriate standards of high quality in food and nutrition care services.

(6) "Dietetic technician" means a person who assists in the provision of dietetic and nutrition services under the supervision of a qualified professional.

(7) "Licensed dietitian/nutritionist" means a person licensed pursuant to s. 468.509.

(8) "Licensed nutrition counselor" means a person licensed pursuant to s. 468.51.

(9) "Nutrition assessment" means the evaluation of the nutrition needs of individuals or groups, using appropriate data to determine nutrient needs or status and make appropriate nutrition recommendations.

(10) "Nutrition counseling" means advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment.

(11) "Preprofessional experience component" means a planned and continuous supervised practice experience in dietetics or nutrition.

(12) "Registered dietitian" or "registered dietitian/nutritionist" means an individual registered with the commission.

Appendix C

Credits

Laws 1988, c. 88-236, § 3. Amended by Laws 1994, c. 94-218, § 144, eff. May 20, 1994; Laws 1996, c. 96-367, § 3, eff. Oct. 1, 1996; Laws 2015, c. 2015-125, § 1, eff. July 1, 2015; Laws 2016, c. 2016-10, § 57, eff. May 10, 2016.

West's F. S. A. § 468.503, FL ST § 468.503

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.504

468.504. License required

Currentness

No person may engage for remuneration in dietetics and nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provisions of this part.

Credits

Laws 1988, c. 88-236, § 4. Amended by Laws 1996, c. 96-367, § 4, eff. Oct. 1, 1996.

West's F. S. A. § 468.504, FL ST § 468.504

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.505

468.505. Exemptions; exceptions

Effective: May 13, 2022

Currentness

(1) Nothing in this part may be construed as prohibiting or restricting the practice, services, or activities of:

(a) A person licensed in this state under chapter 457, chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 465, chapter 466, chapter 480, chapter 490, or chapter 491, when engaging in the profession or occupation for which he or she is licensed, or of any person employed by and under the supervision of the licensee when rendering services within the scope of the profession or occupation of the licensee.

(b) A person employed as a dietitian by the government of the United States, if the person engages in dietetics solely under direction or control of the organization by which the person is employed.

(c) A person employed as a cooperative extension home economist.

(d) A person pursuing a course of study leading to a degree in dietetics and nutrition from a program or school accredited pursuant to s. 468.509(2), if the activities and services constitute a part of a supervised

course of study and if the person is designated by a title that clearly indicates the person's status as a student or trainee.

(e) A person fulfilling the supervised experience component of s. 468.509, if the activities and services constitute a part of the experience necessary to meet the requirements of s. 468.509.

(f) Any dietitian or nutritionist from another state practicing dietetics or nutrition incidental to a course of study when taking or giving a postgraduate course or other course of study in this state, provided such dietitian or nutritionist is licensed in another jurisdiction or is a registered dietitian or holds an appointment on the faculty of a school accredited pursuant to s. 468.509(2).

(g) A person who markets or distributes food, food materials, or dietary supplements, or any person who engages in the explanation of the use and benefits of those products or the preparation of those products, if that person does not engage for a fee in dietetics and nutrition practice or nutrition counseling.

(h) A person who markets or distributes food, food materials, or dietary supplements, or any person who engages in the explanation of the use of those products or the preparation of those products, as an employee of an establishment permitted pursuant to chapter 465.

(i) An educator who is in the employ of a nonprofit

organization approved by the council; a federal, state, county, or municipal agency, or other political subdivision; an elementary or secondary school; or an accredited institution of higher education the definition of which, as provided in s. 468.509(2), applies to other sections of this part, insofar as the activities and services of the educator are part of such employment.

(j) Any person who provides weight control services or related weight control products, provided the program has been reviewed by, consultation is available from, and no program change can be initiated without prior approval by a licensed dietitian/nutritionist, a dietitian or nutritionist licensed in another state that has licensure requirements considered by the council to be at least as stringent as the requirements for licensure under this part, or a registered dietitian.

(k) A person employed by a hospital licensed under chapter 395, by a nursing home licensed under part II of chapter 400, by an assisted living facility licensed under chapter 429, or by a continuing care facility certified under chapter 651, if the person is employed in compliance with the laws and rules adopted thereunder regarding the operation of its dietetic department.

(*l*) A person employed by a nursing facility exempt from licensing under s. 395.002(12), or a person exempt from licensing under s. 464.022.

(m) A person employed as a dietetic technician.

(n) Any person who provides information, wellness

recommendations, or advice concerning nutrition, or who markets food, food materials, or dietary supplements for remuneration, if such person does not provide such services to a person under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention, not including obesity or weight loss, and does not represent himself or herself as a dietitian, licensed dietitian, registered dietitian, nutritionist, licensed nutritionist, nutrition counselor, or licensed nutrition counselor, or use any word, letter, symbol, or insignia indicating or implying that he or she is a dietitian, nutritionist, or nutrition counselor.

(2) Nothing in this part may be construed to prohibit or limit any person from the free dissemination of information, or from conducting a class or seminar or giving a speech, related to nutrition.

(3) The provisions of this part have no application to the practice of the religious tenets of any church in this state.

(4) Notwithstanding any other provision of this part, an individual registered by the commission has the right to use the title "Registered Dietitian" or "Registered Dietitian/Nutritionist," and the designation "R.D." or "R.D.N." An individual certified by the Certification Board for Nutrition Specialists has the right to use the title "Certified Nutrition Specialist" and the designation "CNS," and an individual certified by the American Clinical Board of Nutrition has the right to use the title "Diplomate of the American Clinical

Board of Nutrition" and use the designation "DACBN."

Credits

Laws 1988, c. 88-236, § 5. Amended by Laws 1995, c. 95-210, § 41, eff. July 1, 1995; Laws 1996, c. 96-367, § 5, eff. Oct. 1, 1996; Laws 1998, c. 98-89, § 39, eff. July 1, 1998; Laws 1998, c. 98-171, § 63, eff. July 1, 1998; Laws 2000, c. 2000-153, § 127, eff. July 4, 2000; Laws 2000, c. 2000-318, § 134, eff. July 1, 2000; Laws 2006, c. 2006-197, § 94, eff. July 1, 2006; Laws 2007, c. 2007-230, § 179, eff. July 1, 2007; Laws 2015, c. 2015-125, § 2, eff. July 1, 2015; Laws 2020, c. 2020-160, § 18, eff. July 1, 2020; Laws 2021, c. 2021-112, § 12, eff. July 1, 2021; Laws 2022, c. 2022-4, § 48, eff. May 13, 2022.

West's F. S. A. § 468.505, FL ST § 468.505

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.506

468.506. Dietetics and Nutrition Practice Council

Effective: July 1, 2008

Currentness

There is created the Dietetics and Nutrition Practice Council under the supervision of the board. The council shall consist of four persons licensed under this part and one consumer who is 60 years of age or older. Council members shall be appointed by the board. Licensed members shall be appointed based on the proportion of licensees within each of the respective disciplines. Members shall be appointed for 4-year staggered terms. In order to be eligible for appointment, each licensed member must have been a licensee under this part for at least 3 years prior to his or her appointment. No council member shall serve more than two successive terms. The board may delegate such powers and duties to the council as it may deem proper to carry out the operations and procedures necessary to effectuate the provisions of this part. However, the powers and duties delegated to the council by the board must encompass both dietetics and nutrition practice and nutrition counseling. Any time there is a vacancy on the council, any professional association composed of persons licensed under this part may recommend licensees to fill the vacancy to the board in a number at least twice the number of vacancies to be filled, and the board may appoint from the submitted list, in its discretion, any of those persons

so recommended. Any professional association composed of persons licensed under this part may file an appeal regarding a council appointment with the State Surgeon General, whose decision shall be final. The board shall fix council members' compensation and pay their expenses in the same manner as provided in s. 456.011.

Credits

Laws 1988, c. 88-236, § 6. Amended by Laws 1996, c. 96-367, § 6, eff. Oct. 1, 1996; Laws 1998, c. 98-166, § 91, eff. July 1, 1998; Laws 1999, c. 99-397, § 130, eff. July 1, 1999; Laws 2000, c. 2000-160, § 150, eff. July 4, 2000; Laws 2008, c. 2008-6, § 94, eff. July 1, 2008.

West's F. S. A. § 468.506, FL ST § 468.506

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.507

468.507. Authority to adopt rules

Effective: July 4, 2000

Currentness

The board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this part and chapter 456 conferring duties upon it. The powers and duties of the board as set forth in this part shall in no way limit or interfere with the powers and duties of the board as set forth in chapter 458. All powers and duties of the board set forth in this part shall be supplemental and additional powers and duties to those conferred upon the board by chapter 458.

Credits

Laws 1988, c. 88-236, § 7. Amended by Laws 1996, c. 96-367, § 7, eff. Oct. 1, 1996; Laws 1998, c. 98-166, § 92, eff. July 1, 1998; Laws 1998, c. 98-200, § 136, eff. July 1, 1998; Laws 2000, c. 2000-160, § 151, eff. July 4, 2000.

West's F. S. A. § 468.507, FL ST § 468.507

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.508

468.508. Fees

Currentness

The board shall, by rule, establish fees to be paid for applications and examination, reexamination, licensing and renewal, licensure by endorsement, temporary permits, renewal, renewal of inactive licenses, reactivation of inactive licenses, recordmaking, and recordkeeping. The board shall establish fees which are adequate to administer and implement the provisions of this part.

(1) The application fee shall not exceed $100 and shall not be refundable.

(2) The examination fee shall not exceed $500 and shall be refundable if the applicant is found to be ineligible to take the licensure examination.

(3) The initial licensure fee shall not exceed $500.

(4) The fee for reexamination shall not exceed $250.

(5) The biennial renewal fee shall not exceed $500.

(6) The fee for licensure by endorsement shall not exceed $350.

(7) The fee for a temporary permit shall not exceed $200.

(8) The fee for reactivation of an inactive license shall not exceed $50.

Credits

Laws 1988, c. 88-236, § 8; Laws 1989, c. 89-162, § 43; Laws 1989, c. 89-374, § 44. Amended by Laws 1996, c. 96-367, § 8, eff. Oct. 1, 1996.

West's F. S. A. § 468.508, FL ST § 468.508

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.509

468.509. Dietitian/nutritionist; requirements for licensure

Effective: May 10, 2016

Currentness

(1) Any person desiring to be licensed as a dietitian/nutritionist shall apply to the department to take the licensure examination.

(2) The department shall examine any applicant who the board certifies has completed the application form and remitted the application and examination fees specified in s. 468.508 and who:

(a) 1. Possesses 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, from a school or program accredited, at the time of the applicant's graduation, by the appropriate accrediting agency recognized by the Commission on Recognition of Postsecondary Accreditation and the United States Department of Education; and

2. Has completed a preprofessional experience component of not less than 900 hours or has education or experience determined to be equivalent by the board; or

(b) 1. Has an academic degree, from a foreign country, that has been validated by an accrediting agency approved by the United States Department of Education as equivalent to the baccalaureate or postbaccalaureate degree conferred by a regionally accredited college or university in the United States;

2. Has completed a major course of study in human nutrition, food and nutrition, dietetics, or food management; and

3. Has completed a preprofessional experience component of not less than 900 hours or has education or experience determined to be equivalent by the board.

(3) The board shall waive the examination requirement for an applicant who presents evidence satisfactory to the board that the applicant is:

(a) A registered dietitian or registered dietitian/nutritionist who is registered with the commission and complies with the qualifications under this section; or

(b) A certified nutrition specialist who is certified by the Certification Board for Nutrition Specialists or who is a Diplomate of the American Clinical Board of Nutrition and complies with the qualifications under this section.

(4) The department shall license as a dietitian/nutritionist any applicant who has remitted the initial

licensure fee and has passed the examination in accordance with this section.

Credits

Laws 1988, c. 88-236, § 9. Amended by Laws 1991, c. 91-220, § 25; Laws 1994, c. 94-310, § 27, eff. May 29, 1994; Laws 1996, c. 96-367, § 9, eff. Oct. 1, 1996; Laws 2015, c. 2015-125, § 3, eff. July 1, 2015; Laws 2016, c. 2016-10, § 58, eff. May 10, 2016.

West's F. S. A. § 468.509, FL ST § 468.509

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.51

468.51. Nutrition counselor; renewal of licensure

Currentness

Any person previously certified as qualified by the board and holding a license to practice as a nutrition counselor in this state which was issued during the period from July 1, 1988, to March 30, 1997, based upon documentation that the person was employed as a practitioner of nutrition counseling previous to and on April 1, 1988, shall be eligible to renew his or her license pursuant to s. 468.514.

Credits

Laws 1988, c. 88-236, § 10. Amended by Laws 1996, c. 96-367, § 10, eff. Oct. 1, 1996; Laws 1996, c. 96-367, § 11, eff. April 1, 1997.

West's F. S. A. § 468.51, FL ST § 468.51

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.511

468.511. Dietitian/nutritionist; temporary permit

Currentness

(1) A temporary permit to practice dietetics and nutrition may be issued by the board on the filing of an application, payment of a temporary permit fee, and the submission of evidence of the successful completion of the educational requirement under s. 468.509. The initial application shall be signed by the supervising licensee.

(2) A person practicing under a temporary permit shall be under the supervision and direction of a licensed dietitian/nutritionist.

(3) A temporary permit shall expire 1 year from the date of issuance.

(4) One extension of a temporary permit may be granted for good cause shown.

(5) If the board determines that an applicant is qualified to be licensed by endorsement under s. 468.513, the board may issue the applicant a temporary permit to practice dietetics and nutrition until the next board meeting at which license applications are to be considered, but not for a longer period of time.

(6) If the board determines that an applicant has not passed an examination recognized by the board and is not qualified to be licensed by endorsement, but has

otherwise met all the requirements of s. 468.509 and has made application for the next scheduled examination, the board may issue the applicant a temporary permit allowing him or her to practice dietetics and nutrition under the supervision of a licensed dietitian/nutritionist until notification of the results of the examination.

Credits

Laws 1988, c. 88-236, § 11. Amended by Laws 1996, c. 96-367, § 12, eff. Oct. 1, 1996.

West's F. S. A. § 468.511, FL ST § 468.511

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.512

468.512. License to be displayed

Currentness

(1)(a) A licensed dietitian/nutritionist may use the words "dietitian," "licensed dietitian," "nutritionist," or "licensed nutritionist," in connection with the licensee's name or place of business, to denote licensure under this part.

(b) A licensed nutrition counselor may use the words "nutrition counselor," "licensed nutrition counselor," "nutritionist," or "licensed nutritionist," in connection with the licensee's name or place of business, to denote licensure under this part.

(2) Each person to whom a license is issued under this part shall keep such license conspicuously displayed in his or her office, place of business, or place of employment and, whenever required, shall exhibit such license to any member or authorized representative of the board.

Credits

Laws 1988, c. 88-236, § 12. Amended by Laws 1996, c. 96-367, § 13, eff. Oct. 1, 1996.

West's F. S. A. § 468.512, FL ST § 468.512

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from

the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.513

468.513. Dietitian/nutritionist; licensure by endorsement

Effective: May 10, 2016

Currentness

(1) The department shall issue a license to practice dietetics and nutrition by endorsement to any applicant who the board certifies as qualified, upon receipt of a completed application and the fee specified in s. 468.508.

(2) The board shall certify as qualified for licensure by endorsement under this section any applicant who:

(a) Presents evidence satisfactory to the board that he or she is a registered dietitian; or

(b) Holds a valid license to practice dietetics or nutrition issued by another state, district, or territory of the United States, if the criteria for issuance of such license are determined by the board to be substantially equivalent to or more stringent than those of this state.

(3) The department shall not issue a license by endorsement under this section to any applicant who is under investigation in any jurisdiction for any act which would constitute a violation of this part or chapter 456 until such time as the investigation is

complete and disciplinary proceedings have been terminated.

Credits

Laws 1988, c. 88-236, § 13. Amended by Laws 1996, c. 96-367, § 14, eff. Oct. 1, 1996; Laws 1998, c. 98-166, § 93, eff. July 1, 1998; Laws 2000, c. 2000-160, § 152, eff. July 4, 2000; Laws 2016, c. 2016-10, § 59, eff. May 10, 2016.

West's F. S. A. § 468.513, FL ST § 468.513

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.514

468.514. Renewal of license

Effective: May 10, 2016

Currentness

(1) The department shall renew a license under this part upon receipt of the renewal application, fee, and proof of the successful completion of continuing education requirements as determined by the board.

(2) The department shall adopt rules establishing a procedure for the biennial renewal of licenses under this part.

Credits

Laws 1988, c. 88-236, § 14. Amended by Laws 1994, c. 94-119, § 202, eff. July 1, 1994; Laws 1996, c. 96-367, § 15, eff. Oct. 1, 1996; Laws 2016, c. 2016-10, § 60, eff. May 10, 2016.

West's F. S. A. § 468.514, FL ST § 468.514

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.515

468.515. Inactive status

Effective: May 10, 2016

Currentness

(1) A license under this part which has become inactive may be reactivated pursuant to this section.

(2) The department shall reactivate a license under this part upon receipt of the reactivation application, fee, and proof of the successful completion of continuing education prescribed by the board.

(3) The board shall adopt rules relating to licenses under this part which have become inactive and for the reactivation of inactive licenses. The board shall prescribe, by rule, continuing education requirements for reactivating a license. The continuing education requirements for reactivating a license may not exceed 20 classroom hours for each year the license was inactive.

Credits

Laws 1988, c. 88-236, § 15. Amended by Laws 1994, c. 94-119, § 203, eff. July 1, 1994; Laws 1996, c. 96-367, § 16, eff. Oct. 1, 1996; Laws 2016, c. 2016-10, § 61, eff. May 10, 2016.

Appendix C

West's F. S. A. § 468.515, FL ST § 468.515

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.516

468.516. Practice requirements

Effective: July 1, 2015

Currentness

(1)(a) A licensee under this part shall not implement a dietary plan for a condition for which the patient is under the active care of a physician licensed under chapter 458 or chapter 459, without the oral or written dietary order of the referring physician. In the event the licensee is unable to obtain authorization or consultation after a good faith effort to obtain it from the physician, the licensee may use professional discretion in providing nutrition services until authorization or consultation is obtained from the physician.

(b) The licensee shall refer a patient to a physician licensed under chapter 458 or chapter 459 upon the recognition of a condition within the scope of practice as authorized under chapter 458 or chapter 459, unless the patient has been referred by or is currently being treated by a physician licensed under chapter 458 or chapter 459.

(2)(a) A licensee under this part shall not implement a dietary plan for a chiropractic condition for which the patient is under the active care of a chiropractic physician licensed under chapter 460, without the oral or written dietary order of the referring chiropractic physician. In the event the licensee is unable

to obtain authorization or consultation after a good faith effort to obtain it from the chiropractic physician, the licensee may use professional discretion in providing nutrition services until authorization or consultation is obtained from the chiropractic physician.

(b) The licensee shall refer a patient to a chiropractic physician licensed under chapter 460 upon the recognition of a condition within the scope of practice as authorized under chapter 460, unless the patient has been referred or is currently being treated by a chiropractic physician licensed under chapter 460.

(3) This section does not preclude a licensed dietitian/nutritionist from independently ordering a therapeutic diet if otherwise authorized to order such a diet in this state.

Credits

Laws 1988, c. 88-236, § 16. Amended by Laws 1996, c. 96-367, § 17, eff. Oct. 1, 1996; Laws 2015, c. 2015-125, § 4, eff. July 1, 2015.

West's F. S. A. § 468.516, FL ST § 468.516

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.517

468.517. Prohibitions; penalties

Currentness

(1) 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;

(b) Use the name or title "dietitian," "licensed dietitian," "nutritionist," "licensed nutritionist," "nutrition counselor," or "licensed nutrition counselor," or any other words, letters, abbreviations, or insignia indicating or implying that he or she is a dietitian, nutritionist, or nutrition counselor, or otherwise hold himself or herself out as such, unless the person is the holder of a valid license issued under this part;

(c) Present as his or her own the license of another;

(d) Give false or forged evidence to the board or a member thereof;

(e) Use or attempt to use a license that has been suspended, revoked, or placed on inactive or delinquent status;

(f) Employ unlicensed persons to engage in dietetics and nutrition practice or nutrition counseling; or

(g) Conceal information relative to any violation of this part.

(2) A person who violates any provision of this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Credits

Laws 1988, c. 88-236, § 17. Amended by Laws 1991, c. 91-224, § 100; Laws 1994, c. 94-119, § 204, eff. July 1, 1994; Laws 1996, c. 96-367, § 18, eff. Oct. 1, 1996.

West's F. S. A. § 468.517, FL ST § 468.517

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

Appendix C

West's F.S.A. § 468.518

468.518. Grounds for disciplinary action

Effective: May 10, 2016

Currentness

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(a) Violating any provision of this part, any board or department rule adopted pursuant thereto, or any lawful order of the board or department previously entered in a disciplinary hearing held pursuant to this part, or failing to comply with a lawfully issued subpoena of the department. The provisions of this paragraph also apply to any order or subpoena previously issued by the Department of Health during its period of regulatory control over this part.

(b) Being unable to engage in dietetics and nutrition practice or nutrition counseling with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.

1. A licensee whose license is suspended or revoked pursuant to this paragraph shall, at reasonable intervals, be given an opportunity to demonstrate that he or she can resume the competent practice of dietetics

and nutrition or nutrition counseling with reasonable skill and safety to patients.

2. Neither the record of the proceeding nor the orders entered by the board in any proceeding under this paragraph may be used against a licensee in any other proceeding.

(c) Attempting to procure or procuring a license to practice dietetics and nutrition or nutrition counseling by fraud or material misrepresentation of material fact.

(d) Having a license to practice dietetics and nutrition or nutrition counseling revoked, suspended, or otherwise acted against, including the denial of licensure by the licensing authority of another state, district, territory, or country.

(e) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of dietetics and nutrition or nutrition counseling or the ability to practice dietetics and nutrition or nutrition counseling.

(f) Making or filing a report or record that the licensee knows to be false, willfully failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing, or inducing another person to impede or obstruct such filing. Such reports or records include only those that are signed in the

capacity of a licensed dietitian/nutritionist or licensed nutrition counselor.

(g) Advertising goods or services in a manner that is fraudulent, false, deceptive, or misleading in form or content.

(h) Committing an act of fraud or deceit, or of negligence, incompetency, or misconduct in the practice of dietetics and nutrition or nutrition counseling.

(i) Practicing with a revoked, suspended, inactive, or delinquent license.

(j) Treating or undertaking to treat human ailments by means other than by dietetics and nutrition practice or nutrition counseling.

(k) Failing to maintain acceptable standards of practice as set forth by the board and the council in rules adopted pursuant to this part.

(*l*) Engaging directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services, or profiting by means of a credit or other valuable consideration, such as an unearned commission, discount, or gratuity, with any person referring a patient or with any relative or business associate of the referring person. Nothing in this part prohibits the members of any regularly and properly organized business entity that is composed of licensees under this part and recognized under the laws of this state from making any division

of their total fees among themselves as they determine necessary.

(m) Advertising, by or on behalf of a licensee under this part, any method of assessment or treatment which is experimental or without generally accepted scientific validation.

(n) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

(2) The board may enter an order denying licensure or imposing any of the penalties in s. 456.072(2) against any applicant for licensure or licensee who is found guilty of violating any provision of subsection (1) of this section or who is found guilty of violating any provision of s. 456.072(1).

(3) The department shall reissue the license of a disciplined dietitian/nutritionist or nutrition counselor upon certification by the board that the disciplined dietitian/nutritionist or nutrition counselor has complied with all of the terms and conditions set forth in the final order.

Credits

Laws 1988, c. 88-236, § 18. Amended by Laws 1994, c. 94-119, § 205, eff. July 1, 1994; Laws 1996, c. 96-367, § 19, eff. Oct. 1, 1996; Laws 1998, c. 98-166, § 94, eff. July 1, 1998; Laws 2001, c. 2001-277, § 41, eff. July 1, 2001; Laws 2005, c. 2005-240, § 17, eff. July 1, 2005; Laws 2016, c. 2016-10, § 62, eff. May 10, 2016.

Appendix C

West's F. S. A. § 468.518, FL ST § 468.518

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.