

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

HEATHER KOKESCH DEL CASTILLO,

Plaintiff,

v.

CASE NO. 3:17-cv-00722

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

Defendant.

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**MOTION FOR SUMMARY JUDGMENT**

Defendant Celeste Philip, MD, MPH, in her official capacity as Surgeon General and Secretary of the Florida Department of Health (hereinafter “Defendant”), by and through undersigned counsel and pursuant to Rule 56, Fed. R. Civ. P., and Rule 56.1, N.D. Fla. Loc. R., moves for entry of Final Summary Judgment in her favor, and in support thereof would show:

1. Plaintiff Heather Kokesch Del Castillo (hereinafter “Plaintiff”) alleges that through enforcement of the Florida Dietetics and Nutrition Practice Act codified in chapter 468, part X, Florida Statutes (the Act), Defendant has violated her rights of free speech and association under the First Amendment of the United States Constitution. Defendant asserts that the Act is a lawful framework for the regulation of the practice of the profession of dietetics and nutrition or nutrition counseling, that

any restriction of speech is incidental to that regulation, and that the Act therefore does not violate Plaintiff's First Amendment rights.

2. The Florida Legislature has determined that the public health and safety requires that the practice of dietetics and nutritional counseling be regulated to ensure that practitioners meet minimum requirements for competent practice. § 468.502, Fla. Stat. Accordingly, the Legislature codified the Act in sections 468.501-518, Florida Statutes. Because the Legislature has designated dietitians and nutritional counselors as "health care practitioners" (*see* § 456.001(4), Fla. Stat.), the practice of dietetics and nutritional counseling is also regulated by chapter 456, Florida Statutes.

3. The Act requires that anyone wishing to practice dietetics or nutritional counseling for remuneration in the state of Florida, or to hold himself or herself out as a practitioner of dietetics or nutrition counseling, must be licensed in accordance with its provisions. *See* § 468.504, Fla. Stat. The Act does not prohibit discussing dietetics or nutrition without remuneration (*see* § 468.504, Fla. Stat.) or the free dissemination of information, conducting classes or seminars, or giving speeches related to nutrition. (*See* § 468.505(2), Fla. Stat.) Nor do the provisions of the Act have any application to the practice of religion. *See* § 468.505(3), Fla. Stat.

4. To become licensed as a dietitian or nutritional counselor in Florida, a practitioner is required to meet certain minimal educational requirements, complete

a “pre-professional experience component of not less than 900 hours” or its equivalent, and pass an examination administered by the Department of Health (the “Department”) or demonstrate established professional credentials. *See* §§ 468.508, 468.509, Fla. Stat.

5. The Act defines dietetics and nutrition practice to include, in part, “assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; [and] improving health status through nutrition research, counseling, and education...” *See* § 568.503(5), Fla. Stat.

6. Prior to May 2, 2017, Plaintiff operated a business, “Constitution Nutrition,” in the state of Florida, through which she offered dietary and nutritional advice for remuneration. Compl. ¶¶ 5, 8, 10, 11, 15, 18; Plaintiff dep. 24:6-18: 25:18–26:12, 41:17–46:9, April 11, 2018.

7. Plaintiff lacks the educational and pre-professional experience required by the Act to become licensed as a dietitian or nutritional consultant. Compl. ¶ 7; Plaintiff dep. 8:8–9:23, 13:2-5, 14:13-16; 17:20-18:5, 62:20-63:3, p. 63:23-64:1, 70:1-5, 71:21-23. Nor is there any record evidence that Plaintiff has applied for, taken, or passed the examination required by section 468.509, Florida Statutes.

8. On May 2, 2017 the Department served Plaintiff with a Notice to Cease and Desist, notifying her to cease practicing as an unlicensed dietitian/nutritionist in

Florida. *See* Compl. Ex. B, Ex. C, p. 12, 13. Plaintiff paid a fine of \$500.00 and investigative costs of \$254.09, and the Department closed its investigation. Plaintiff dep., 22:18-23, 23:20-24:1, Ex. C, p. 64.

9. On October 3, 2017 Plaintiff filed her Complaint, alleging that the Department's enforcement action against her for unauthorized practice of dietetics and nutritional counseling for remuneration violates her First Amendment rights, and requesting that the Act be declared unconstitutional to the extent it prohibits Plaintiff from providing advice about diet and nutrition for a fee, and further requesting that the Department be enjoined from further enforcement of the Act.

10. The Act sets forth generally applicable licensing provisions which limit the class of persons who may practice the profession of dietetics and nutritional counseling.

11. The record before this Court reflects that there are no material issues of disputed fact, and that Defendant is entitled to entry of summary judgment in her favor as a matter of law.

12. The following exhibits are being filed in support of this motion: Ex. A – deposition transcript of Plaintiff Heather Kokesch Del Castillo; Ex. B – deposition transcript of Defendant's expert Gail Kauwell and exhibits thereto; Ex. C – Department's investigative file. Citations to the deposition transcripts will be denoted as "Plaintiff dep. p #:l ## - p.##:l ##" and "Kauwell dep. #:l ## - p #:l

##.” Citations to the Department’s investigative file will be denoted “Ex. C, p. \_\_\_.”

Citations to the complaint will be denoted “Compl. ¶ \_\_\_.”

**MEMORANDUM OF LAW**  
**Statement of Facts**

Prior to May 2, 2017, Plaintiff conducted business in Florida under the name Constitution Nutrition, through which she offered and provided dietary and nutritional advice to paying clients. Compl. ¶¶ 5, 8, 10, 11, 15, 18; Plaintiff dep. 24:16-18, 25:18-26:12, 41:17–46:9, Ex. C, pp. 9, 10, 15, 17, 19. Plaintiff is not licensed to practice dietetics and nutrition or nutritional counseling in Florida, and lacks the education and clinical experience required for licensure by the Dietetics and Nutritional Practice Act set forth in chapter 468, part X, Florida Statutes. Compl. ¶ 7; Plaintiff dep. 8:8–9:23,13:2-5, 14:13-16, 17:20–18:5, 62:20-63:3, 63:23-64:1, 70:1-5, 71:21-23. On May 2, 2017, an investigator for the Florida Department of Health served Plaintiff with a Notice to Cease and Desist the unlicensed practice of dietetics and nutrition or nutritional counseling in Florida, along with a citation assessing a fine of \$500.00 and costs of \$254.09. Ex. C, p. 12-14, 64. Plaintiff waived her right to request an administrative hearing to challenge the citation and paid the assessed fine and costs. Compl. ¶¶ 20-23.

On October 3, 2017, Plaintiff filed her complaint seeking declaratory and injunctive relief against Defendant in her role as Surgeon General and Secretary of the Department. Plaintiff maintains that the Act and related administrative rules “are

unconstitutional to the extent that they prohibit Plaintiff...and others similarly situated from offering individualized advice about diet and nutrition.” Compl. ¶ A of Prayer for Relief.

### **Florida’s Regulatory Scheme for Practice of Dietetics and Nutritional Counseling**

In Florida, the practice of dietetics and nutrition or nutritional counseling is regulated by chapters 456 and 468, part X (sections 501-518), Florida Statutes. Chapter 458 provides general provisions for the regulation of health professions and occupations, while chapter 468, part X, the Dietetics and Nutrition Practice Act (*See* § 468.501, Fla. Stat.), provides regulations specific to the practice of dietetics and nutrition or nutritional counseling. Demonstrating the importance which the Florida Legislature has placed on the practice of dietetics and nutritional counselors with respect to the public safety and welfare, it has designated licensed dietitians and nutritional counselors as “health care practitioners.” *See* § 456.001(4), Fla. Stat. In providing general provisions for the regulation of health professions and occupations, including dietetics and nutrition practice or nutrition counseling, the Legislature stated its intent in section 456.003, Florida Statutes, as follows:

#### **456.003 Legislative intent**

- (1) It is the intent of the Legislature that persons desiring to engage in any lawful profession regulated by the department shall be entitled to do so as a matter of right if otherwise qualified.
- (2) The Legislature further believes that such professions shall be

regulated only for the preservation of the health, safety, and welfare of the public under the police powers of the state. Such professions shall be regulated when:

(a) Their unregulated practice can harm or endanger the health, safety, and welfare of the public, and when the potential for such harm is recognizable and clearly outweighs any anticompetitive impact which may result from regulation.

(b) The public is not effectively protected by other means, including, but not limited to, other state statutes, local ordinances, or federal legislation.

(c) Less restrictive means of regulation are not available.

(3) It is further legislative intent that the use of the term “profession” with respect to those activities licensed and regulated by the department shall not be deemed to mean that such activities are not occupations for other purposes in state or federal law.

(4)(a) Neither the department nor any board may create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions. Neither the department nor any board may take any action that tends to create or maintain an economic condition that unreasonably restrict competition, except as specifically provided by law.

(b) Neither the department nor any board may create a regulation that has an unreasonable effect on job creation or job retention in the state or that places unreasonable restrictions on the ability of individuals who seek to practice or who are practicing a profession or occupation to find employment.

(c) The Legislature shall evaluate proposals to increase the regulation of regulated professions or occupations to determine the effect of increased regulation on job creation or retention and employment opportunities.

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In enacting the regulations specific to the practice of dietetics and nutrition or nutrition counseling in the Act, the Florida Legislature set forth its findings and intent in section 468.502, Florida Statutes, as follows:

**Purpose and intent.** – 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.

To implement its intent to protect the public safety and welfare, the Legislature provided in section 468.504, Florida Statutes, that “[n]o person may engage for remuneration in dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provision of this part.” To become licensed in Florida, a dietitian or nutritionist must satisfy the following educational requirements:

Possess a baccalaureate or postbaccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management, or an equivalent major course of study, 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...

§ 468.509(2)(a)1, *Fla. Stat.*

In addition to these degree requirements, a candidate for licensure as a nutritionist or dietitian in Florida must have “completed a preprofessional experience component of not less than 900 hours or has education or experience determined to be equivalent by the board...”<sup>1</sup> § 468.509(2)(a)2, *Fla. Stat.* The Act defines “preprofessional experience component” as “a planned and continuous supervised practice experience in dietetics or nutrition.” *See* § 468.503(11), *Fla. Stat.* Only after determining that an applicant for licensure has satisfied the required educational and preprofessional practice requirements, completed the required application, and paid the requisite fee may the Department allow that applicant to sit for the licensure examination.<sup>2</sup> *See* § 468.509(2), *Fla. Stat.*

The Act also defines the meaning of dietetics and nutrition practice, thus delineating the scope of practice requiring licensure. Section 468.503, Florida Statutes, specifies in pertinent part:

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<sup>1</sup> “Board” refers to the Board of Medicine. *See* § 468.503(1), *Fla. Stat.*

<sup>2</sup> Section 468.509(b), Florida Statutes, provides an alternate method by which applicants with qualifying degrees from foreign countries may satisfy the requirements to sit for the licensure examination. However, Plaintiff has not obtained a foreign degree, and that alternate method is therefore not applicable.

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

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(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.

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

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(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.

Florida's scheme for the regulation of the practice of dietetics and nutrition or nutrition counseling set forth in chapters 458 and 469, part X, Florida Statutes, sets forth in pertinent part the following prohibitions and penalties in section 456.065:

**456.065 Unlicensed practice of a health care profession; intent; cease and desist notice; penalties; enforcement; citations; fees; allocation and disposition of moneys collected.-**

(1) It is the intent of the Legislature that vigorous enforcement of licensure regulation for all health care professions is a state priority in order to protect Florida residents and visitors from the potentially serious and dangerous consequences of receiving medical and health care services from unlicensed persons whose professional education and training and other relevant qualification have not been approved through the issuance of a license by the appropriate regulatory board or the department when there is no board. The unlicensed practice of a health care profession or the performance or delivery of medical or health care services to patients in this state without a valid, active license to practice that profession, regardless of the means of performance or delivery of such services, is strictly prohibited.

(2) The penalties for unlicensed practice of a health care profession shall include the following:

(a) When the department has probable cause to believe that any person not licensed by the department...has violated any provision of this chapter or any statute that relates to the practice of a profession regulated by the department, or any rule adopted pursuant thereto, the department may issue and deliver to such person a notice to cease and desist from such violation...

(b) In addition to the remedies under paragraph (a), the department may impose by citation an administrative penalty not to exceed \$5,000 per incident...The penalty shall be a fine of not less than \$500 nor more than \$5,000...The department shall be entitled to recover the costs of investigation and prosecution in addition to the fine levied pursuant to

the citation.<sup>3</sup>

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(d) In addition to the administrative and civil remedies under paragraphs (b) and (c) and in addition to the criminal violations and penalties listed in the individual health care practice acts:

1. It is felony of the third degree...to practice, attempt to practice, or offer to practice a health care profession without an active, valid Florida license to practice that profession... Holding oneself out, regardless of the means or communication, as able to practice a health care profession or as able to provide services that require a health care license shall be deemed to be an attempt or offer to practice such profession without a license...

To ensure that the regulations of the Act do not cut too broadly as to interfere with the practice of licensed health care practitioners other than dietitians and nutritionists or interfere with the First Amendment rights of the public, the Legislature provided numerous exemptions to the licensing requirements of the Act in section 468.505, Florida Statutes. Section 468.505(1)(a) provides that individuals licensed in Florida under chapter 457 (acupuncture), chapter 458 (medicine), chapter 459 (osteopathic medicine), chapter 460 (chiropractic medicine), chapter 461 (podiatric medicine), chapter 462 (naturopathy), chapter 463 (optometry), part I of chapter 464 (Nurse Practice Act), chapter 465 (pharmacy), chapter 466 (dentistry, dental hygiene, and dental laboratories), chapter 480 (message practice), chapter 490

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<sup>3</sup> Plaintiff was assessed a fine of \$500 and investigative costs in the amount of \$254.09. Complaint, ¶ 21, Plaintiff deposition, p. 21, lines 18-23.

(psychological services), and chapter 491 (clinical, counseling, and psychotherapy) need not be licensed as nutritional counselors or dietitians when rendering services within the scope of the profession or occupation for which they are licensed. The Legislature has reasonably concluded that the scope of practice of licensed practitioners in those professions should not be curtailed because those practitioners are not also licensed as dietitians or nutritional consultants. Sections 468.505(1)(b)-(m), Florida Statutes, provide other exemptions to the licensing requirements of the Act, none of which apply to the Plaintiff's circumstances in this case.

Sections 468.505(2) and (3), Florida Statutes, contain exceptions intended to limit the scope of the Act to ensure that its licensing requirements do not infringe upon the public's First Amendment rights. Those sections provide:

**468.505 Exemptions; exceptions**

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(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.

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The Department has not prohibited Plaintiff from the free dissemination of information, or from conducting classes or seminars or giving speeches related to nutrition. Instead, the Department sanctioned Plaintiff for the unlicensed practice of

dietetics and nutrition counseling for remuneration in violation of the Act. *See* §§ 468.504, Fla. Stat. Nor has Plaintiff alleged that she is offering dietetic or nutritional services in furtherance of any religious practice. Consequently, the exemptions to the licensing requirements of the Act set forth in sections 468.505(2) and (3), Florida Statutes, do not apply to Plaintiff.

### **The Record before the Court**

#### **A. Plaintiff’s unlicensed practice of dietetics and nutritional counseling**

Before being cited by the Department for the unlicensed practice of dietetics and nutritional counseling, Plaintiff conducted business in Florida under the name Constitutional Nutrition. Compl. ¶¶ 5, 8, 10, 11, 15, 18; Plaintiff dep. 24:6-18, 25:18–26:12, 41:17-46:9; Ex. C, pp 9, 10, 15, 17, 19. She sought new clients for her “health coaching” services by “putting up a flyer in the gym” or posting Facebook advertisements in Natural Awakenings magazine. Plaintiff dep. 38:24-39:12, Ex. C, pp. 9, 10, 15, 17, 19. Through these advertisements, Plaintiff held herself out as able to practice dietetics or nutritional counseling in Florida, and therefore as a health care professional, without the required license in violation of section 456.065(2)(d)1, Florida Statutes.

The Plaintiff has a bachelor’s degree in geography from California State University, Long Beach, and a master’s degree in education. Plaintiff dep. 8:8-17, 15:8, 9. Although obviously well educated, Plaintiff does not possess a baccalaureate

or post-baccalaureate degree with a major course of study in human nutrition, food and nutrition, dietetics, or food management, or the equivalent as required for licensure in dietetics and nutritional counseling by section 468.509(2)(a)1, Florida Statutes. Plaintiff also has a certificate in “holistic health coaching” from the Institute for Integrative Nutrition in New York, a non-accredited institution. Plaintiff dep. 9:12-25; 13:2-4. Plaintiff received that certificate after completing a program consisting of 40 online modules (Plaintiff dep. 10:1-10), and acknowledges that it does not satisfy the educational requirements of the Act as set forth in section 468.509(2)(a)1, Florida Statutes. Plaintiff dep. 63:4-64-1, 70:1-5. Nor has Plaintiff completed any portion of the pre-professional experience component or clinical internship of at least 900 hours required by section 468.509(2)(a)2, Florida Statutes. Plaintiff dep. 17:20–18:4, 70:13-23. Nor has Plaintiff applied to take, taken, or passed, the examination required for licensure by section 468.509(1), Florida Statutes. In short, Plaintiff fails to satisfy the minimum criteria required to practice as a licensed dietitian and nutritionist or nutritional counselor in Florida.

In her sworn deposition testimony Plaintiff acknowledges offering Florida clients a six-month program consisting 13 counseling sessions over six months. Plaintiff dep. 26:25-28:13; Ex. C, p 17. While the initial consultation was free, Plaintiff charged a fee of either \$95 for each of the remaining 12 sessions (Plaintiff dep. 26:25–28:13) or \$1,170 for the entire program. Compl. ¶ 11. Plaintiff directed

each new client complete a “health history form.” Plaintiff dep. 51:24–52:5; Ex. C, pp 23-25. Plaintiff further acknowledges providing nutritional consulting services to two residents of Florida at their homes. Plaintiff dep. 25:18–26:12. One of those clients had been diagnosed with the MTHFR gene mutation, which caused the client to be unable to tolerate a long list of foods. Plaintiff dep. 42:1-14, 50:2-4. Plaintiff conducted internet research about the MTHFR gene mutation, and used the information she gleaned to provide dietary advice to that client. Plaintiff dep. 43:21-46:9. In addition, Plaintiff led group 21-day and 30-day “clean eating programs” based on the “Whole 30 diet” at a cost of \$79 to \$129 for each member of the group. Compl. ¶ 11; Plaintiff dep. 29:4–30:1; Ex. C, p 19. Plaintiff’s sworn testimony makes clear that in offering her services for remuneration, she was “assessing nutrition needs and status,” “recommending appropriate dietary regimens, nutrition support, and nutrient intake” and at least recommending, if not ordering, “therapeutic diets.” Her activities fall squarely within dietetics and nutrition practice as defined by section 468.503(5), Florida Statutes.

Plaintiff admits that by bringing this suit, she hopes to “talk to willing individuals about food for pay.” (Plaintiff dep. 78:8-10) The record before this Court conclusively establishes that Plaintiff was impermissibly engaged in the unlicensed practice of dietetics and nutritional consulting in Florida, and was properly cited by the Department. Plaintiff may not avoid entry of summary judgment in favor of



Defendant by attempting to recast her dietetic and nutritional services as holistic life coaching.

**B. Expert testimony of Gail Kauwell**

The Department's expert witness, Gail Kauwell, PhD, holds masters and doctorate degrees in Food Science and Human Nutrition from the University of Florida. She is a licensed dietitian and nutritionist in Florida, and is a registered dietitian nutritionist with the Commission on Dietetic Registration of the American Dietetic Association. She is currently a Professor Emeritus and Distinguished Teaching Scholar at the University of Florida, having retired earlier this year after a 36-year teaching career there. *See* Kauwell dep., Ex. 2.

Dr. Kauwell played a role in persuading the Florida Legislature to pass the Dietetic and Nutrition Practice Act<sup>4</sup> in 1988 while serving as president of the Florida Dietetic Association (FDA).<sup>5</sup> *Kauwell dep. 22:19–23:13.* To demonstrate the need to protect the public health and safety through regulation of the practice of dietetics and nutritional counseling, the FDA presented the Legislature with examples of serious injuries and deaths which had resulted from incompetent dietary and nutritional advice. *Kauwell dep. 23:14–24:5.* Examples of the unfortunate events presented to the Legislature are presented in Dr. Kauwell's expert report. *See Ex. 1*

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<sup>4</sup> Ch. 88-236, Laws of Fla.

<sup>5</sup> Now known as the Florida Academy of Nutrition and Dietetics.

to Kauwell dep., pp.150-159. Faced with evidence of the potential for harm resulting from the unregulated practice of dietetics and nutritional counseling, the Florida Legislature reasonably concluded that the practice of dietetics and nutritional counseling by unskilled and incompetent practitioners presented a danger to public health and safety. As spelled out in section 648.502, Florida Statutes, the Legislature's "sole...purpose" in codifying the Act "is to ensure that every person who practices dietetics and nutrition or nutrition counseling in this state meets minimum requirements for safe practice."

Dr. Kauwell's testimony offers important insight into how the advice of a dietitian or nutritional consultant lacking the minimum standards required for Florida licensure could cause severe harm to the public. As noted above, Plaintiff has provided dietary services to a Florida resident with the MTHFR genetic mutation, and leads groups in "30-day challenges" based upon the Whole 30 diet. The Whole 30 diet eliminates essentially all enriched cereals and grains. Kauwell dep. 45:17-25. Research, including work in which Dr. Kauwell has been personally involved, reveals that folic acid, a B vitamin, is important in amino acid metabolism, the synthesis of DNA, and cellular reproduction. Kauwell dep. 10:1-15. If women of childbearing potential are placed on the Whole 30 diet or a similar low-grain diet without being instructed to take 400 micrograms of folic acid daily and then become pregnant, those women will be at increased risk of delivering a baby with neural tube

defects, including spina bifida and anencephaly.<sup>6</sup> Kauwell dep. 10:1–12:7. The risk of conceiving a child with these birth defects is even higher for women with the MTHMF genetic mutation. Kauwell dep. 11:16-12:2. Studies have revealed that women who consume folic acid prior to and during pregnancy can reduce the risk of delivering a child with spina bifida or anencephaly by 50 to 70 percent. Kauwell dep. 11:4-15. Individuals lacking the education, clinical experience, and demonstrated competence required of a Florida licensed dietician/nutritionist may not be aware of the inherent dangers of recommending the Whole 30 diet to a woman who may become pregnant<sup>7</sup>, especially if the woman has the MTHFR gene mutation. Practitioners, including holistic life coaches, who fail to meet the minimum requirements for safe practice as determined by the Florida Legislature therefore place the public at increased risk.

### **Standard for Summary Judgment**

“A district court properly grants summary judgment when ‘the pleadings, depositions, answers to interrogatories, and admissions on file...show that there is

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<sup>6</sup> Babies born with anencephaly usually die shortly after birth. Children born with spina bifida usually survive into young adulthood or longer, depending upon the severity of their condition. Kauwell dep. 10:20–11:3.

<sup>7</sup> Approximately 45 percent of all pregnancies in the United States for women between 15 and 44 years of age are unplanned. For teenage women between 15 and 19 years of age, 75 percent of pregnancies are unplanned. Consequently, it is important for all women of reproductive potential to ingest adequate folic acid daily even if not planning a pregnancy. Kauwell dep. Ex. 1, p. 8.

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Thomas v. City of Jacksonville*, 2018 WL 1920341 (11<sup>th</sup> Cir. April 23, 2018), quoting *Durruthy v. Pastor*, 351 F.3d 1080 (11<sup>th</sup> Cir. 2003). In reviewing summary judgment motions, district courts must view the facts in the light most favorable to the non-moving party. *Lee v. Ferrano*, 284 F.3d 1188, 1190 (11<sup>th</sup> Cir. 2002). “However, the mere existence of a factual dispute will not defeat summary judgment.” *Haves v. City of Miami*, 52 F.3d. 918, 921 (11<sup>th</sup> Cir. 1995). To preclude entry of summary judgment, a “factual dispute must be both relevant and genuine, i.e., material to an issue affecting the outcome of the case and supported by evidence sufficient for a reasonable jury to return a verdict in favor of the non-moving party.” *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11<sup>th</sup> Cir. 1995). “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

### **The Act is not Subject to First Amendment Scrutiny**

As detailed above, Plaintiff was actively engaged in advertising dietary and nutritional services and in providing those services directly to members of the public for remuneration without a license, in direct violation of the Act. She argues that the Act unconstitutionally restricts her First Amendment right to provide dietary and

nutritional advice to Florida residents and visitors for pay. However, “[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.” *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011), quoting *Accountant’s Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). “If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech...subject to First Amendment scrutiny.” *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 2584, 86 L.Ed. 2d 130 (1985). Therefore, if the Act’s inhibition of speech is merely incidental, Plaintiff cannot be heard to complain that it is unconstitutional.

To determine if the burden placed on speech by the Act is merely incidental to its regulation of the practice of dietetics and nutrition or nutritional counseling, the nature of the burden must be examined. In the U.S. Supreme Court’s *Lowe v. SEC* decision, Justice White explained that:

One 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. [In those situations,] the professional’s speech is incidental to the conduct of the profession... Where 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 [First Amendment scrutiny].

*Lowe*, 472 U.S. at 232. In *Locke v. Shore*, 634 F.3d 1185, the Eleventh Circuit examined Florida’s statutory scheme requiring licensure to practice interior design.<sup>8</sup> In rejecting a First Amendment challenge to that regulation, the Eleventh Circuit stated that “[t]here is a difference between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients... Because the license requirement governs ‘occupational conduct, and not a substantial amount of protected speech,’ it does not implicate constitutionally protected activity under the First Amendment.” *Locke* at 1191.

In the case currently before the Court, the Act has been applied to restrict only Plaintiff’s direct, personalized speech purporting to exercise judgment for remuneration on behalf of clients considering their individual needs or circumstances. The Act does not restrict any speech which a licensed professional would be otherwise competent to give by the exceptions or exemptions in sections 468.505(1)(a)-(m), Florida Statutes; none of those exceptions or exemptions apply to Plaintiff. The Act does not prohibit Plaintiff’s uncompensated dissemination of information relating to dietetics or nutrition, or from conducting classes or seminars or giving speeches. *See* § 468.505(2), Fla. Stat. Nor does the Act prohibit Plaintiff

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<sup>8</sup> Ch. 481, part I, Fla. Stat.

from writing books, articles, or a blog about nutrition. Therefore, any restriction of speech by the Act is merely “the incidental effect of observing an otherwise legitimate regulation.” *Id.* at 1191 Therefore, the Act does not implement protected activity under the First Amendment, and is not subject to First Amendment scrutiny.

Plaintiff’s complaint wrongly asserts that the Act constitutes a content-based restriction on her First Amendment rights and is therefore subject to strict scrutiny. Compl. ¶ 43. As set forth above, any restriction of speech by the Act is merely incidental to its regulation of the practice of dietetics and nutrition or nutritional consulting, and is not subject to any level of First Amendment scrutiny. While Plaintiff has not explicitly alleged that the Act violates her rights under the substantive due process or equal protection clauses of the Fourteenth Amendment, any such claims would be subject to rational basis review because the right to practice a particular profession is not a fundamental right. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955). A statute regulating a particular profession is therefore constitutional if “there is any reasonably conceivable state of facts that could provide a rational basis for [it].” *Id.* at 313, 113 S.Ct. at 2101. Plaintiff would have the burden of proving that the Act lacks a rational basis. *Bah v. City of Atlanta*, 103 F.3d 964, 967 (11<sup>th</sup> Cir. 1997). “States have a compelling interest in the practice of professions within their boundaries, and...have broad power to establish standards for licensing practitioners

and regulating the practice of professions.” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975).

The Florida legislature has 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.” § 468.502, Fla. Stat. The Legislature has also found 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.” *Id.* Through the Act, the Legislature has sought to protect the public health and safety by ensuring that “every person who practices dietetics and nutrition or nutrition counseling in [Florida] meets minimum requirements for safe practice.” *Id.*, *Kauwell dep.* 66:25-68:15. The Legislature’s determination that the public health and safety is best served by requiring dietetics and nutrition practitioners to be licensed and meet minimum standards is well within the discretion which it is afforded under the Constitution. *Locke v. Shore*, 682 F.Supp.2d 1283 (N.D. Fla. 2010). The Act therefore cannot be deemed violative of the due process or equal protection clauses of the Fourteenth Amendment.

Nor has Plaintiff explicitly alleged that the Act is impermissibly overbroad. As noted, the Act does not prohibit Plaintiff from giving speeches, conducting classes or seminars, or writing books about dietetics and nutrition. Nor does the Act bar Plaintiff from offering advice on those topics without compensation. The Act is



narrowly tailored to protect the public health and safety while protecting First Amendment rights not merely incidental to the practice of dietetics and nutrition or nutritional counseling, and therefore is not overbroad.

### **CONCLUSION**

For the reasons set forth above, there are no material issues of disputed fact and the Defendant, Celeste Philip, MD, MHP, is entitled to entry of summary judgment in her favor as a matter of law.

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the above Memorandum of Law contains 4,798 words, excluding case style, signature block, and Certificate of Service, in compliance with Local Rule 56.1.

/s/ Elizabeth Teegen  
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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing document was served by e-mail  
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