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 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.

[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.

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 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

[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.

[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.

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 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

[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.

[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.

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. 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 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

[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).

[12] "'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." FLA. STAT. § 468.503(9).

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] *Id.* The statute therefore requires any person 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.

[13] The Department has submitted an expert report written by Gail P.A. Kauwell, PhD, a registered and Florida-licensed dietitian nutritionist and former Professor at the University of 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.

§ 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), 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]

[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).

[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

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 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 nonmoving 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

program that has been approved by a qualified dietician or nutritionist; and hospital and nursing home workers. *See* § 468.505(1).

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).

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.

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] 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

[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 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.*

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 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

[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.

is not subject to heightened scrutiny because it is a 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 1191.

[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).

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*,

[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.

558 F.3d 1301, 1306 (11th 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

[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").

imperfect fit between means and ends"). 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

[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.

U.S. 781, 795 (1988)). The Court then discussed whether the professional speech doctrine– 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 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

[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.

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.

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

[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.

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 "appropriate to subject content-based restrictions on *speech by those*

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

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 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

[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." *Wollschlaeger*, 848 F.3d at 1311.

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 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

[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.

[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.

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 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]

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

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

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 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

[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.

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