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HEALTH COACHING: YOUR RIGHT TO PRACTICE GUIDE

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This document contains information about health coaching and the law, and is designed to help Health Coaches better understand the legal landscape in which they practice, as well as their rights to practice. The legal information contained in this document is not the same as legal advice, which is the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, this communication does not create an attorney-client relationship.

I. EXECUTIVE SUMMARY

A. What are Health Coaches?

Health Coaches work in many settings and, among other services, provide: general wellness and nutrition information; options, recommendations, guidance, motivation, and skill-building to establish healthier lifestyle routines; and other support mechanisms to achieve client-focused personal health goals.

Health Coaches:

- Are wellness guides and supportive mentors that motivate individuals to cultivate positive health choices;
- Educate and support clients to achieve client-focused health goals through lifestyle and behavior adjustments;
- Empower their clients to take responsibility for their own health;
- Support client efforts to implement and sustain healthy lifestyle changes;
- Help clients with weight management, food cravings, sleep, energy improvement, stress management, digestive wellness, and improved diet.

Health Coaches are poised to become an integral part of an emerging preventative healthcare model. By helping clients develop and progress towards their personal wellness goals, Health Coaches fill a vital void that complements and does not replace the work of healthcare professionals. Health coaching is now recognized by some of the most acclaimed health institutions in the country as an important tool to improve health and help lower healthcare expenditures.

Health Coaches play a crucial role in addressing our nation's healthcare crisis by creating lasting, positive, and individually-tailored changes in clients' lives. The United States Preventative Services Task Force ("USPSTF")—comprised of the nation's foremost experts on preventative health and medicine—recently recommend the use of behavior counseling to improve the health of overweight and obese individuals at risk of cardiovascular disease. Not only did the USPSTF conclude in their report that behavioral counseling was effective in improving health, it also reaffirmed health coaching's overwhelming safety and commended the diversity of practitioners in the field.¹

¹ United States Preventive Services Task Force, *Healthful Diet and Physical Activity for Cardiovascular Disease Prevention in Adults With Cardiovascular Risk Factors: Behavioral Counseling Statement, Behavioral Counseling in Primary Care to Promote a Healthy Diet*, <http://www.uspreventiveservicestaskforce.org/Page/Document/UpdateSummaryFinal/healthy-diet-and-physical-activity-counseling-adults-with-high-risk-of-cvd>

B. A State License Is Not, *Per Se*, Required to Provide Health Coaching Services

Although laws regulating the practice of dietetics currently exist in twenty-one (21) states, Health Coaches can provide a wide array of health and wellness services regardless of their state's dietetic practice law.

Health Coaches can be certified through private credentialing bodies and do not require a state license to practice so long as they do not engage in regulated activities, including, but not limited to, using regulated terms such as “Registered Dietitian” or “Licensed Nutritionist.” Although laws regulating the practice of dietetics currently exist in twenty-one (21) states, Health Coaches can provide a wide array of health and wellness services regardless of their state's dietetic practice law.

It is difficult to provide a one-size-fits-all definition of the practice of dietetics or how states' dietetics practice laws are enforced. Generally, the statutes that define and regulate the practice of dietetics are broad, constitutionally suspect,^{2,3} and contain numerous exemptions for non-licensed practitioners⁴—such as Health Coaches. In states where only license holders may practice dietetics, dietetics is generally characterized as the application of advanced individualized nutrition care,⁵ which is often defined in state laws as the application of an individualized nutritional care process for a specific person that entails: a nutritional assessment; diagnosis, development, and implementation of an individualized care plan; and follow-up monitoring and evaluation.⁶

Health Coaches that possess a background in nutrition science and wish to incorporate such an intensive modality should be mindful of states' respective dietetics practice laws, as they will likely be subject to them if they decide to implement the individualized nutritional care process. Section II of this document, “Health Coaching,” addresses how the activities of Health Coaches in one-on-one client sessions—which can include providing general wellness and nutrition information; options, recommendations, guidance, motivation, and skill-building to establish healthier lifestyle routines; and other support mechanisms to achieve client-focused personal health goals—are not the practice of dietetics or the implementation of an individualized nutrition care process.

² See *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013).

³ Lynette Norr, Assistant Attorney General office of the Florida Attorney General, stated during the January 17, 2014 Florida Dietetics and Nutrition Practice Board Meeting that sections of the Florida Dietetics and Nutrition Practice Law were “very likely unconstitutional.” At minute 33:30, See <http://ww10.doh.state.fl.us/pub/medical-therapies/ND/2014/January>

⁴ E.g., Maryland and Tennessee exempt individuals from their respective dietetics licensing law as long as the information and services offered are “non-medical.”

⁵ Academy of Nutrition and Dietetics, *Nutrition Care Process*, <http://www.eatright.org/HealthProfessionals/content.aspx?id=7077> (last accessed Aug. 20, 2014).

⁶ See, e.g., Ohio Rev. Code Ann. § 4759.01(A) (defining the “practice of dietetics” to include, *inter alia*, “[n]utritional assessment to determine nutritional needs and to recommend appropriate nutritional intake, including enteral and parenteral nutrition” and “nutritional counseling or education as components of preventative, curative, and restorative health”); Ohio Admin. Code 4759-2-01(A) (defining “nutritional assessment” to mean “the integrative evaluation of nutritionally relevant data to develop an individualized nutritional care plan,” which may include, but is not limited to, nutrient intake, socio-economic factors, and current medical diagnosis and medications); Ohio Admin. Code 4759-6-01 (explaining the standards of practice in nutrition care).

C. Enforcement of Dietetics Laws by States Invite Serious Legal Challenges

Dietetics boards and their members are liable under federal law and may be prosecuted and sued for civil damages for anticompetitive actions. Additionally, courts will likely invalidate state dietetic licensing schemes, as applied, if they are used to restrict the commercial or non-commercial speech of those who are neither in the regulated class (licensed dietitian or licensed nutritionist) nor hold themselves out to be, or if they are used to suppress commercial speech that is truthful and non-misleading.

The Supreme Court recently held that state licensing boards are liable for anticompetitive actions under the Sherman Antitrust Act when they are comprised of active market participants who use the power of the state to force out competition and protect their financial interests.⁷ See *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101, 1111 (2015) (“[A]ctive market participants cannot be allowed to regulate their own market free from antitrust accountability.”). Although laws that restrict the practice of dietetics exist in 21 states, the enforcement of those laws by state dietetics board may trigger federal criminal civil prosecution.

The Alliance for Natural Health USA sent letters to dietetics boards warning them of this Supreme Court decision and requesting dietetics boards come into compliance with the Court’s decision of face criminal or civil prosecution.⁸

When applied to Health Coaches who do not hold themselves out as licensed professionals, state dietetics licensing schemes impose censorship on speech by prohibiting Health Coaches from providing: general wellness and nutrition information; options, recommendations, guidance, motivation, and skill-building to establish healthier lifestyle routines; and other support mechanisms to achieve client-focused personal health goals. This invites First Amendment challenges. Courts will likely invalidate licensing schemes, as applied, if they are used to restrict the commercial or non-commercial speech of those who are neither in the regulated class nor hold themselves out to be, or if they are used to suppress commercial speech that is truthful and non-misleading. For example, regardless of whether a person is licensed, if the state employs dietetic licensing laws to prosecute a person for the communication of truthful and non-misleading commercial speech, the attempt to suppress truthful commercial speech will likely not meet the constitutional standard articulated in the four pronged test of *Central Hudson Gas & Electric* (as subsequently modified by later cases).

D. Dietetics Practice Laws in Doubt: Legislative and Legal Challenges

There are multiple legislative and legal challenges to the enforcement of some professional licensing laws.

State Legislation: Since 2011, no new dietetics practice laws have been enacted. This is despite multiple, fevered efforts by the Academy of Nutrition and Dietetics (“AND”), formerly the

⁷ A nonsovereign actor controlled by active market participants, such as a dietetics board, only enjoys immunity from an antitrust violation if: (1) the challenged restraint was clearly articulated and affirmatively expressed by state policy; and (2) the state actively supervises the policy. See *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015).

⁸ See Alliance for Natural Health USA, *ANH-USA Takes the Initiative against Monopolistic Dietetics Boards* (June 23, 2015), <http://www.anh-usa.org/anh-usa-takes-the-initiative-against-monopolistic-dietetics-boards/>.

American Dietetic Association (“ADA”). AND-drafted and supported bills failed in 11 states, including California, Colorado, Hawaii, Indiana, New York, Virginia, New Jersey, West Virginia, and Oklahoma. On July 1 2014, the Governor of Michigan signed a bill that repealed their existing restrictive dietetic licensure law⁹. In North Carolina, legislation and guidance was enacted to permit persons such as bloggers and general health, wellness and exercise coaches and instructors, to provide dietary, weight loss, and nutritional advice. Considering the recent groundswell of opposition to restrictive dietetics practice laws, it is likely that additional states will seek repeal.

Legal Challenges: Individuals have standing to bring First Amendment claims against licensing boards when those licensing boards limit the dissemination of truthful and general advice regarding diet, nutrition, and lifestyle. For instance, the Fourth Circuit Court of Appeals recently held that bloggers who dispensed nutritional advice outside of a practitioner-patient relationship and without claiming a state license, or registration holder had standing to sue licensing boards that prohibited the dissemination of that content. *See Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013). The North Carolina Board of Dietetics/Nutrition eventually settled with the plaintiff and, as mentioned above, agreed to promulgate new guidelines permitting unlicensed persons, such as bloggers and general health, wellness and exercise coaches and instructors, to provide dietary, weight loss, and nutritional advice.

The Obama Administration’s Council of Economic Advisors: The groundbreaking report counsels for elimination of licenses not clearly necessary for health or safety, based on a rigorous cost-benefit analysis, and a reduction in how much time and money it costs to obtain those that remain. States should do much more to recognize one another’s licenses and should rely on mandatory bonding, or insurance, rather than licensing as a means of consumer protection.¹⁰

Congressional Interest: The United States House of Representatives’ Committee on Small Business held multiple hearings that emphasized bipartisan concern over the growth of questionable occupational licensing schemes, such as dietetics practice laws. The Committee found these schemes to stifle innovation, burden business with needless regulation, and prohibit qualified individuals from entering the market. Congressional action on the matter is pending.

Federal Regulatory Interest: In March 2014, the Federal Trade Commission (“FTC”) held a workshop examining competition within the healthcare market. During this workshop, the FTC heard testimony from multiple parties regarding unnecessary, restrictive dietetics practice laws and the anti-competitive efforts of AND and its state affiliates. Multiple nutrition practitioner organization filed official documents to the FTC seeking agency comments and possible action into the AND’s anti-competitive actions.

Media: Numerous articles and editorials in media outlets such as *Forbes*, *The New York Times*, *The Washington Post*, *The Des Moines Register*, *The Indiana Tribune-Star*, *Carolina Journal Online*, and dozens of online publications have all questioned the motivations, legality, and commonsense of restrictive dietetic licensure laws.

⁹ See Gov. Rick Snyder signs legislation increasing access to physical therapy devices, http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-332292--,00.html (last accessed Aug. 20, 2014).

¹⁰ White House Council of Economic Advisors, *Trends in Occupational Licensing and Best Practices for Smart Labor Market Regulation* (July 28, 2015)

II. HEALTH COACHING

A Health Coach's scope of practice includes providing: general wellness and nutrition information; options, recommendations, guidance, motivation, skill-building to establish healthier lifestyle routines; and other support mechanisms for achieving client-focused personal health goals.

The National Consortium for Credentialing Health & Wellness Coaches further defines health and wellness coaches as

professionals from diverse backgrounds and education who work with individuals and groups in a client-centered process to facilitate and empower the client to achieve self-determined goals related to health and wellness. Successful coaching takes place when coaches apply clearly defined knowledge and skills so the clients mobilize internal strengths and external resources for sustainable change.¹¹

Key to both of these definitions regarding health coaching is that the client (often after consulting a healthcare professional) sets his or her own goals and drives the process to achieve lasting wellness changes. Because health coaching is a client-driven experience, rather than a traditional healthcare patient/client relationship, the application of decades-old dietetics practice laws to Health Coaches would be inaccurate and likely unconstitutional if applied.

Therefore, the use of a Health Coach's general wellness and nutrition tools is not the practice of dietetics (which was defined previously in section I. B.), for to practice dietetics is to implement an individualized nutrition care process. *See, e.g.*, Ohio Admin. Code 4759-2-01(C) (explaining that an unlicensed person is not prohibited from "providing general non-medical nutrition information if the person does not violate division (B) of section 4759.02 of the Revised Code");¹² *id.* at 4759-2-01(M) (defining "general non-medical nutritional information" to mean: "(1) Principles of good nutrition and food preparation; (2) Food to be included in the normal daily diet; (3) The essential nutrients needed by the body; (4) Recommended amounts of the essential nutrients; (5) The actions of nutrients on the body; (6) The effects of deficiencies or excesses of nutrients; or (7) Food and supplements that are good sources of essential nutrients").¹³

Health Coaches help clients develop and progress towards their personal wellness goals by empowering them to take responsibility for their own health. Health Coaches do not diagnose diseases; rather, Health Coaches work with generally healthy people who have made the highly personal decision of changing their lifestyle. These self-motivated individuals are seeking a support system to help them progress towards their goals.

¹¹ National Consortium for Credentialing of Health & Wellness Coaches. <http://ncchwc.org/index.cfm?page=resources>

¹² Division (B) of section 4759.02 of the Revised Code prohibits an unlicensed person from using the title "dietitian" and "any other title, designation, words, letters, abbreviation, or insignia or combination of any title, designation, words, letters, abbreviation, or insignia tending to indicate that the person is practicing dietetics."

¹³ Accordingly, a Health Coach in Ohio may, for instance: demonstrate how to prepare and cook food; provide information about food guidance systems, healthy eating out or healthy snacks; discuss how the body needs nutrients, such as carbohydrates, proteins, fats; provide statistical information about the relationship between chronic disease and the excesses or deficiencies of certain nutrients; and provide nutrition information about a food or dietary supplement. *See* Ohio Board of Dietetics, *Continuing Education Self-Instruction Module: Topic: General Non-Medical Nutrition Information*, <http://dietetics.ohio.gov/pdfs/GenNonMedInfo-jcpeu-module.pdf> (last accessed Aug. 21, 2014).

Health Coaches recognize that being healthy involves more than just proper diet. As such, health coaching also focuses on non-dietary aspects of a person's life, in order to improve clients' overall, holistic wellbeing. Health Coaches, in addition to providing general nutrition information and recommendations to their clients, help their clients develop strategies to incorporate more physical activity into their daily routines, learn how to nurture good relationships, and proactively eliminate harmful influences from their lives, among many other things. Health Coaches ultimately teach clients how to make healthy lifestyle choices and become self-sufficient. The actions of a Health Coach are thus drastically different than that of a dietician who provides expert nutrition counseling as it relates to the application of an individualized nutritional care plan.

The value that Health Coaches add is undeniable; Health Coaches are increasingly utilized by healthcare practitioners and such institutions as physicians' offices, health insurance companies, and hospitals.

III. THE FIRST AMENDMENT AND STATE LICENSING SCHEMES

A. States' Authority to License Occupations and Professions

For centuries, professional and occupational licensing schemes have provided a way for states to define and regulate these activities within their borders. In general, federal courts recognize this state authority to regulate professional activity. *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (“[T]he liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment . . . subject to reasonable government regulation”). If a state’s licensure system does not concern a suspect classification¹⁴ or burden a fundamental right,¹⁵ it is ordinarily subject to rational basis review, i.e., the system is generally deemed constitutional if it has a reasonable relationship to a legitimate government interest. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”). Courts generally uphold state licensing schemes that are reasonably related means to the goal of protecting the public interest in competency within professions, in fair dealing, and in the advancement of public health. *See, e.g., Graves v. Minn.*, 272 U.S. 425 (1926) (licensing of dentists); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (licensing of doctors). In rare instances, a licensing scheme will not survive rational basis review. *See Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2004) (holding that a funeral director licensing scheme requiring casket sellers to obtain a license was unconstitutional for failure to survive rational basis scrutiny because the state specifically amended its legislation to include casket retailers, and singling out a particular economic group with no rational or logical reason for doing so was strong evidence of an economic animus with no relation to public health, morals, or safety).

¹⁴ Suspect classes included: race, national origin, religion, and alienage. *See Korematsu v. U.S.*, 323 U.S. 214 (1944).

¹⁵ Fundamental rights include, *inter alia*, the right to free speech and freedom of religion. *See, e.g., Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 572 (4th Cir. 2013) (noting that the regulatory scheme for fortune tellers did not trigger strict scrutiny under the Equal Protection Clause, even though the defendant claimed she was classified on the basis of her First Amendment rights, because the regulations did not infringe her right to free speech or the free exercise of religion).

Recently, there has been an explosion of state professional licensing requirements. See Dick M Carpenter II, Angela C. Erickson, and John K. Ross, *Licensure to Work: A National Study of Burdens from Occupational Licensing* (May 2012) (noting that in the 1950s only one in twenty workers were required to have a license to work, while that figure now stands at almost one in three);¹⁶ See Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 955 (2000). In the wake of increased licensing requirements, new legal challenges to onerous, unfair, unnecessary, and self-serving professional licensing schemes are stemming the tide. For example, a Louisiana florist and the Institute for Justice filed a lawsuit against the state for requiring persons to pass a licensing exam before they could create and sell floral arrangements. In response to the lawsuit, the state legislature amended the law, abolishing the demonstration portion of the licensing exam to ensure that it was not a substantial barrier to would-be florists.¹⁷ In July of 2014, U.S. Court of Appeals for the D.C. Circuit ruled that tour guides in the District of Columbia do not need to acquire a government license to operate. The court noted that licensing fees and requirements violated the business owners’ right to free speech and conduct and that the District of Columbia did not show a “substantial government interest” to regulate the profession. According to the Court, the free market—with its numerous consumer protections against unscrupulous actors—sufficiently protect the public as well as “numerous consumer review websites, like Yelp and TripAdvisor, which provide consumers a forum to rate the quality of their experiences.”¹⁸

B. Dietitian Licensing Schemes in General

The Academy of Nutrition and Dietetics (“AND”),¹⁹ a private trade association that accredits and represents the interests of registered dietitians, lobbied to pass, in every state, “scope of practice” laws that limit who can provide nutritional counseling. See AND, *Licensure HOD Backgrounder* (2011) (describing licensure initiatives as a “Mega Issue”).²⁰ The AND claims that such scope of practice laws are necessary to protect public health, yet an in-depth review of four state Dietetics Boards’ records spanning three years produced not a single documented case of harm as it relates to the unlicensed dispensation of general nutritional advice. See Alliance for Natural Health Legal, *ANH-USA Uncovers Suspicious Activity by State Dietetic and Health Boards* (2013).²¹ Accordingly, critics of AND licensing efforts posit that the trade association has an ulterior motive—to limit market competition for its Registered Dietitian members, so as to benefit Registered Dietitians. See Michael Ellsberg, *Is the ADA Intentionally Using State Legislatures to Block Alternative Nutrition Providers?* (July 10, 2012).²² Indeed, limiting competition, rather than protecting public health, appears to be the AND’s main

¹⁶ Dick M. Carpenter II *et al.*, *Licensure to Work: A National Study of Burdens from Occupational Licensing*, http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf (last accessed Aug. 21, 2014).

¹⁷ Institute for Justice, *Victory for Louisiana Florists* (July 12, 2010), <http://www.ij.org/victory-for-louisiana-florists> (last accessed Aug. 21, 2014).

¹⁸ *Edwards v. D.C.*, 755 F.3d 996 (D.C. Cir. 2014).

¹⁹ The AND was formerly known as the American Dietetic Association (“ADA”).

²⁰ Available at <http://www.reallyeatright.org/wp-content/uploads/2012/05/HOD-Licensure-Backgrounder-2011-07-22-11.pdf> (last accessed Feb. 12, 2014).

²¹ Available at <http://www.anh-usa.org/anh-usa-uncovers-suspicious-activity-by-state-dietetic-and-health-boards/> (last accessed Aug. 21, 2014).

²² Michael Ellsberg, *Is The ADA Intentionally Using State Legislatures To Block Alternative Nutrition Providers?* (July 10m 2012), http://www.forbes.com/sites/michaelellsberg/2012/07/10/american_dietetic_association_2/ (last accessed Aug. 21, 2014).

objective. Mary Haschke, former AND President, once wrote to members in the organization's journal:

Like other professionals, dietitians can justify the enactment of licensure laws because *licensing affords the opportunity to protect dietitians from interference in their field by other practitioners*. Licensure also can protect dietitians by limiting the number of practitioners through restrictions imposed by academic, experience, and examination requirements. *This protection provides a competitive advantage and therefore is economically beneficial for dietitians.*²³ [Emphases added]

Despite the presence of AND-supported dietetics laws in 21 states, some states are beginning to repeal such laws. On July 1 2014, the Governor of Michigan signed a bill that repealed their existing restrictive dietetic licensure law²⁴. In North Carolina, legislation and guidance was enacted to permit bloggers, general health, wellness and exercise coaches, and instructors, to provide dietary, weight loss and nutritional advice. Considering the recent groundswell of opposition to restrictive dietetics practice laws, it is likely that additional states will seek repeal of their antiquated dietetics practice laws.

C. Dietitian Licensing Schemes Act as Prior Restraints

A dietitian licensing scheme that broadly prohibits nutritional services without a license may invite First Amendment scrutiny. In such an instance, the licensure requirement acts as a prior restraint on speech because a person must obtain permission from the government, in the form of a license, before assessing a person's nutritional needs and counseling such person on his or her diet. *See, e.g., Weinberg v. City of Chi.*, 310 F.3d 1029, 1044 (7th Cir. 2002) (requiring a license to engage in protected speech may be regarded as a prior restraint).

The U.S. Supreme Court has "interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments." *Alexander v. U.S.*, 509 U.S. 544, 566 (1993). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."). As a result, prior restraints are presumptively invalid. *See N.Y. Times Co. v. U.S.*, 403 U.S. 713, 824 (1971) ("Any system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity") (internal quotation marks and citation omitted). Nonetheless, as explained below, a prior restraint regulating occupational speech is generally upheld when it has an incidental effect on a legitimate professional licensing scheme. The licensing scheme must not, however, place unbridled discretion in the hands of a government official or agency or "fail[] to place limits on the time within [which] the decisionmaker must issue the license[.]" *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226, 110 S. Ct. 596, 605, 107 L. Ed. 2d 603 (1990).

D. Application of Dietitian Licensure Laws and Health Coaching

Even if a state dietitian licensing law is constitutional on its face, it can nonetheless be unconstitutional, depending upon how it is applied to a particular set of facts. *See U.S. v. Kaczynski*,

²³ J. Am. Dietetic Assn. 84:4.

²⁴ Gov. Rick Snyder signs legislation increasing access to physical therapy devices, http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-332292--,00.html (last accessed Aug. 21, 2014).

551 F.3d 1120, 1126 (9th Cir. 2009) (explaining that “[a]n as-applied challenge ‘contends that the law is unconstitutional as applied to the litigant’s particular speech activity, even though the law may be capable of valid application to others’”) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)); see also *Acosta v. City of Costa Mesa*, 718 F.3d 800, 822 (9th Cir. 2013) (noting that “[f]acial and as-applied challenges can be viewed as two separate inquiries”) (citing *Bd. Of Trs. Of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 n. 19 (1984)); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 314 (4th Cir. 2008) (Michael, J., dissenting) (explaining that “because a facially valid [] regulation can have unconstitutional applications, the regulation remains susceptible to a proper as-applied challenge”) (citing *Wis. Right to Life, Inc. v. Fed. Election Comm’n*, 546 U.S. 410 (2006)); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (stating that “[a] court may hold a statute unconstitutional either because it is invalid ‘on its face’ or because it is unconstitutional ‘as applied’ to a particular set of circumstances”); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1119 (D. Neb. 1998) (explaining that “[a] law may be challenged as unconstitutional in two ways. The law may be challenged ‘as applied’ and ‘facially.’”) (citing *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012–13 (1992) (Scalia, J., dissenting)) (other citations omitted).

As explained above, a state may regulate the practice of a profession, including the practice of dietetics, without necessarily running afoul of the First Amendment. See *Lowe*, 472 U.S. at 232 (White, J., concurring) (“If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny”). Thus, generally applicable licensing provisions may limit the class of persons who may practice dietetics, but that very same provision may be found unconstitutional if it attempts to restrain an unlicensed person’s speech about nutrition.

Although dietitian licensing laws may be upheld on their face as constitutional under a state’s authority to license and regulate professionals, if a state enforces dietetic licensing laws in ways that would restrict public discussion and commentary on nutrition or truthful non-misleading information, that application of the law is likely unconstitutional. See *Moore-King*, 708 F.3d at 569. Moreover, if a Health Coach’s speech does not amount to the practice of dietetics because, for example, the Health Coach is providing general wellness and nutrition information as well as options, recommendations, guidance, motivation, and skill-building to establish healthier lifestyle routines; and other support mechanisms for achieving client-focused personal health goals, such speech will receive full protection under the First Amendment and the courts will review it under strict scrutiny. Strict scrutiny is the most stringent standard of judicial review. It is part of the hierarchy of standards that courts use to weigh the government’s interest against a constitutional right or principle. Under strict scrutiny, a restriction on a Health Coach’s speech is unconstitutional unless it is: i) justified by a compelling government interest, ii) narrowly tailored to achieve that interest, and iii) the least restrictive means for achieving that interest.

The existence of dietetics practice laws should not prevent an unlicensed Health Coach from raising a First Amendment challenge to a dietitian licensing scheme if it is applied to his or her practice. See *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013). In *Cooksey*, a North Carolina resident filed an action alleging that the North Carolina Board of Dietetics and Nutrition violated his First Amendment rights by causing him to self-censor certain speech on his Internet website, which he used to provide both free and fee-based dietary advice to website visitors. *Id.* at 229. For example,

because Cooksey was unlicensed, the State Board prohibited him from addressing diabetics' specific questions and working with individuals one-on-one, and offering fee-based life coaching practices. *Id.* at 232. The District Court held that he did not have standing to bring these claims because he did not suffer an actual or imminent injury-in-fact, injury-in-fact being one of the threshold requirements to bringing a lawsuit. *Id.* at 229. On appeal, the Fourth Circuit reversed, holding that he did have standing to bring his claims because he "show[ed] that the State Board's actions had an objectively reasonable chilling effect on the advice and commentary he posted on his website." *Id.* The court reasoned that the appellee state's argument that the citizen did not have standing because his rights were not violated under the professional speech doctrine "put the merits cart before the standing horse." *Id.* at 239 (internal quotations omitted). Specifically, the court stated, "In arguing that Cooksey's claims are not justiciable, Appellees first look to the merits of his First Amendment claims and contend that the professional speech doctrine precludes them. In so doing, they rely on cases that were decided on the merits and did not address a justiciability challenge." *Id.* The court noted that "[t]he Supreme Court has explained, whether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis," assuming his claim has legal validity. *Id.* (internal quotations omitted).

E. The Commercial Speech Doctrine

A Health Coach's engagement in a commercial transaction, such as advertisement of services, constitutes commercial speech. *Id.* at 484. *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 484 (1988). *See also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining "commercial speech" as "expression related solely to the economic interests of the speaker and its audience"). "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994), summarizing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

"The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Id.* at 142 n. 7 (additional citation omitted). "The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Ibanez*, 512 U.S. at 143, quoting *Zauderer*, 471 U.S. 626, 646 (1985). "[M]ere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez*, 512 U.S. at 143, quoting *Edenfield*, 507 U.S. 761, 770-771 (1993).

In the context of advertising by licensed professionals, the Supreme Court has applied the commercial speech doctrine. *See, e.g., Bates v. Ariz.*, 433 U.S. 350, 382 (1977) (holding that a Supreme Court of Arizona rule prohibiting all advertising by licensed attorneys violated the First Amendment); *Shapiro*, 486 U.S. at 472 (holding that the state could not categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems). In *Bingham v. Hamilton*, the court found that a state board of dental examiners could not prohibit a dentist from advertising the credentials from an organization of which the board did not recognize. *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1234 (E.D. Cal. 2000) ("The only evidence that the Dental Board offers that the advertising of

AAID credentials would be misleading is conclusory, anecdotal, and speculative”). The court then stated that although an outright ban of advertisement of truthful credentials was prohibited, a disclaimer could be appropriate in some instances to prevent public confusion. 100 F. Supp. 2d at 1240.²⁵

Although each of these cases involved licensed professionals whose speech was chilled by their state licensing board, any restraint of an unlicensed professional’s commercial speech should similarly be analyzed under the intermediate scrutiny espoused in *Central Hudson Gas & Electric*, 447 U.S. at 566, as modified by its progeny, to be constitutional. Moreover, as a practical matter, commercial speech cases invite greater First Amendment scrutiny than individual speech, when truthful advertising information is censored or subjected to a prior restraint, even when communicated by one not deemed appropriately licensed. See *Ibanez*, 512 U.S. at 139 (CPA who was also a lawyer did not fall within the regulatory class allowed to identify a specialization, yet the court struck down the restriction at issue because it caused the suppression of truthful commercial speech).

Enforcement to suppress commercial speech that is truthful and non-misleading by a licensed professional, e.g., a licensed dietitian, would invite at least intermediate First Amendment scrutiny despite a state’s authority to license professions. Similarly, the commercial speech of an unlicensed Health Coach should also be subject to protection under the First Amendment, assuming it is not false or misleading. As explained above, however, unlicensed persons must ensure that their speech, including commercial speech, does not amount to the practice of dietetics, generally defined as the practice of advanced individualized nutrition care, lest they be accused of practicing dietetics without a license by a jurisdiction requiring a license.²⁶

IV. LICENSURE LAWS AND UNFAIR METHODS OF COMPETITION

The Federal Trade Commission Act (“FTCA”) declares as unlawful, “[u]nfair methods of competition.” 15 U.S.C. § 45(a)(1). A violation of Section 1 of the Sherman Act, which prohibits “[e]very contract, combination . . . , or conspiracy in restraint of trade,” constitutes a method of unfair competition under the FTCA, and is thus unlawful. See *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 717 F.3d 359, 371 (4th Cir. 2013). Dietetic board members may be held liable for violations of Section 1 of the Sherman Act. To establish a violation of Section 1 of the Sherman Act, a plaintiff must prove that a contract, combination, or conspiracy imposed an unreasonable restraint of trade. *Id.*

In *N. Carolina State Bd. of Dental Examiners*, the Federal Trade Commission (“FTC”) found that the North Carolina State Board of Dental Examiners violated the FTCA by engaging in unfair competition in the market for teeth whitening services in North Carolina. *N. Carolina State Bd. of*

²⁵ “[I]f the certification had been issued by an organization that had made no inquiry into petitioner’s fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading.” *Peel v. Attorney Registration & Disciplinary Comm’n of Illinois*, 496 U.S. 91, 102, 110 S. Ct. 2281, 2288, 110 L. Ed. 2d 83 (1990). “To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.” *Peel*, 496 U.S. at 110.

²⁶ States have varying definitions of what constitutes the practice of dietetics. Accordingly, Health Coaches should consult their applicable state laws to determine which definition and exemptions apply in their state.

Dental Examiners v. F.T.C., 717 F.3d at 364. The Board was a state agency that regulated the practice of dentistry. *Id.* It was comprised of six licensed dentists, one licensed dental hygienist, and one consumer member. Excluding the one consumer member, members were required to maintain an active dentistry practice while serving on the Board. *Id.* Like some state dietetic licensing laws, North Carolina’s Dental Practice Act prohibited the practice of dentistry in North Carolina without a license from the Board. Also, the Board could bring an action to enjoin the unlicensed practice of dentistry. *Id.* After the Board received complaints about teeth-whitening services performed in North Carolina by non-dentists, it investigated the complaints and issued 47 cease and desist letters to 29 non-dentist teeth whitening providers. *Id.* at 364-65. As a result, “the Board successfully expelled non-dentist providers from the North Carolina teeth-whitening market.” *Id.* The FTC then issued an administrative complaint against the Board alleging that it violated 15 U.S.C. § 45(a)(1) by excluding non-dentists from providing teeth whitening services.

The Fourth Circuit held that the Board was not exempt from the antitrust laws under the “state action doctrine” because it was a “private actor,” “operated by market participants who are elected by other market participants,” whose actions were not actively supervised by the state. *Id.* at 366-70. The Court also held that the Board’s actions violated the FTCA. Specifically, the court reasoned that the Board was capable of conspiring under Section 1 of the Sherman Act because its members were actual or potential competitors, and the Board engaged in concerted action to discourage non-dentist teeth whitening services. *Id.* at 370-73. Thus, the Court concluded that the Board engaged in the type of “combination or conspiracy” as prohibited under Section 1 of the Sherman Act. *Id.* at 373. Further, the Court held that the Board’s actions amounted to an unreasonable restraint of trade under Section 1 of the Sherman Act because it was likely to cause significant anticompetitive harms. *Id.* at 374. Specifically, the court stated, “[i]t is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer’s price for that service.” *Id.* Applying similar reasoning, a state’s dietetics board may face FTC scrutiny, or even legal liability, if it operates as the Board did in *N. Carolina State Bd. of Dental Examiners*, without state oversight and with anti-competitive motives.

The Board appealed to the U.S. Supreme Court, which affirmed the Fourth Circuit’s decision, holding that state licensing boards are liable for anticompetitive actions under the Sherman Antitrust Act when they are comprised of active market participants who use the power of the state to force out competition and protect their financial interests.²⁷ See *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 135 S. Ct. 1101, 1111 (2015) (“[A]ctive market participants cannot be allowed to regulate their own market free from antitrust accountability.”). Although laws that restrict the practice of dietetics exist in 21 states, the enforcement of those laws by state dietetics board may trigger federal criminal civil prosecution.

The Alliance for Natural Health USA sent letters to dietetics boards warning them of this Supreme Court decision and requesting dietetics boards come into compliance with the Court’s decision of face criminal or civil prosecution.²⁸

²⁷ A nonsovereign actor controlled by active market participants, such as a dietetics board, only enjoys immunity from an antitrust violation if: (1) the challenged restraint was clearly articulated and affirmatively expressed by state policy; and (2) the state actively supervises the policy. See *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015).

²⁸ See Alliance for Natural Health USA, *ANH-USA Takes the Initiative against Monopolistic Dietetics Boards* (June 23, 2015), <http://www.anh-usa.org/anh-usa-takes-the-initiative-against-monopolistic-dietetics-boards/>.

I. CONCLUSION

In addition to the protections the First Amendment affords to Health Coaches, dietetics board members can be held liable for unfair methods of competition under the FTCA for violations of the Sherman Act. For those in states with dietetic practice laws, the First Amendment provides the greatest protection for Health Coaches providing: general wellness and nutrition information; options, recommendations, guidance, and motivation to establish healthier lifestyle routines; and other support mechanisms for achieving client-determined personal health goals. In such a situation, a court will apply the strict scrutiny standard of review because such Health Coaches are not engaging in regulated speech. Health Coaches' commercial speech is also protected under the First Amendment when it is truthful and not misleading. In such circumstances, the state will have to satisfy the intermediate scrutiny commercial speech test prescribed in *Central Hudson Gas & Electric* and its progeny. If a Health Coach engages in the advanced individualized nutrition care, e.g., dietetics, and is subsequently disciplined, however, state laws may apply, and the courts will generally hold that the Health Coach's First Amendment rights were not violated, assuming the licensing law at issue was a legitimate regulation that had only an incidental effect on speech.