**IN THE CIRCUIT COURT OF CLINTON COUNTY**
**STATE OF MISSOURI**

| | | |
|---|---|---|
| MISSOURI VETERINARY MEDICAL BOARD | ) | |
| Petitioner, | ) | |
| v. | ) | |
| BROOKE RENE GRAY | ) | Case No. 10CN-CV00842 |
| and | ) | |
| B & B EQUINE DENTISTRY | ) | |
| Defendants. | ) | |

**DEFENDANTS' RESPONSE TO PETITIONER'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Respectfully submitted,

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES


I. Introduction…… 6

II. Rule of Lenity…… 7

III. First Affirmative Defense:
Substantive Due Process – Right to Earn a Living…… 8

IV. Second Affirmative Defense:
Substantive Due Process – Arbitrary Classification…….. 14

V. Third Affirmative Defense:
Right to the Enjoyment of the Gains of Industry…… 17

VI. Fourth Affirmative Defense:
Freedom of Speech…….. 20

A. Article I, Section 8, of the Missouri Constitution…….. 21

B. The First Amendment……. 22

C. Compensated Speech is Fully Protected……. 23

VII. Fifth Affirmative Defense:
Procedural Due Process……. 24

VIII. Sixth Affirmative Defense
Equal Protection……. 27

IX. Conclusion……. 31

## TABLE OF AUTHORITIES

CASES

*Bd. of Regents v. Roth*,
408 U.S. 564 (1972)…… 8

*Cantor v. Union Mut. Life Ins. Co.*,
547 S.W.2d 220 (Mo. App. 1977)……... 7

*Citizens United v. FEC*,
130 S. Ct. 876, 908 (January 21, 2010)……... 22

*City of Lakewood v. Plain Dealer,*
486 U.S. 750 (1988)…… 23

*City of St. Louis v. McCann*,
57 S.W. 1016 (Mo. banc 1900)…… 18

*Cornwell v. Hamilton*,
80 F. Supp. 2d 1101 (S.D. Cal. 1999)…… 10, 12-14

*Craigmiles v. Giles*,
312 F.3d 220 (6th Cir. 2002)…… 9, 11, 13-14

*Eaton v. Mallinckrodt, Inc.*,
224 S.W.3d 596 (Mo. banc 2007)…… 7

*Ex parte Harrison*,
110 S.W. 709 (Mo. 1908)…… 21

*First Nat'l Bank of Boston v. Bellotti*,
435 U.S. 765 (1978)……. 22

*Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*,
527 U.S. 173, (1999)…… 23

*Habhab v. Hon*,
536 F.3d 963 (8th Cir. 2008)…… 8

*Heath v. Motion Picture Mach. Operators Union No. 170*,
290 S.W.2d 152 (Mo. 1956)…… 8

*In re Marriage of Busch*,
310 S.W.3d 253 (Mo. App. E.D. 2010)…….. 7

*Joint Anti-Fascist Refugee Committee v. McGrath*,
341 U.S. 123 (1951)…… 25

*Marx & Haas Jeans Clothing Co. v. Watson*,
67 S.W. 391 (Mo. banc 1902)……..... 21

*Merrifield v. Lockyer*,
547 F.3d 978 (9th Cir. 2007)…… 11-13, 29-30

*Meyer v. Grant*,
484 U.S. 414 (1988)…… 24

*Meyer v. Nebraska*,
262 U.S. 390 (1923)…… 8

*Moler v. Whisman*,
147 S.W. 985 (Mo. 1912)…… 18-19

*Riley v.Nat'l Federation of the Blind*,
487 U.S. 781 (1988)……. 23

*Schware v. Board of Bar Exam. of State of N.M.*,
353 U.S. 232 (1957)……. 25

*Simon & Schuster, Inc. v. New York State Crime Victims Bd.*,
502 U.S. 105 (1991)……. 24

*State ex inf. Barrett ex rel. Bradshaw v. Hedrick*,
241 S.W. 402 (Mo. banc 1922)…… 15

*State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*,
782 S.W.2d 381 (Mo. banc 1990)…… 15

*State ex rel. Jimmy's Western Bar-B-Q, Inc. v. City of Independence*,
527 S.W.2d 11 (Mo. App. 1975)…….. 25

*State v. Graham*,
204 S.W.3d 655 (Mo. banc 2006)…… 8

*Thomas v. Collins*,
323 U.S. 516 (1945)…… 24

*United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*,
208 S.W.3d 907 (Mo. 2006)…… 26

*U.S. v. Nat'l Treasury Employees Union*,
513 U.S. 454 (1995)…… 23-24

*U.S. v. Playboy Entertainment Group, Inc.*,
529 U.S. 803 (2000)…… 21

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,
425 U.S. 748 (1976)……..…….. 17

STATUTES

Mo. Stat. Chapter 340…… 7

Mo. Stat. § 340.200…… 19, 26

Mo. Stat. § 340.216…… 7, 23

Mo. Stat. § 340.216.1……. *passim*

Mo. Stat. § 340.216.1(5)…… 19

Mo. Stat. § 340.218……. 7, 23

Mo. Stat. § 340.276……7, 23-24, 27

Mo. Stat. § 340.294……. 7, 23

Mo. Stat. § 340.330…….. 19, 26

Missouri L. 1905 [H.B. 254]…… 24

Veterinary Practice Act (1949)…… 24

Veterinary Practice Act (1953)…… 24

Veterinary Surgery, Medicine and Dentistry Act (1909)…… 24

Veterinary Surgery, Medicine and Dentistry Act (1919)…… 24

Veterinary Surgery, Medicine and Dentistry Act (1929)……. 24

Veterinary Surgery, Medicine and Dentistry Act (1939)…….. 24

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I…….. 20-24

U.S. Const. Amend. XIV…… *passim*

Mo. Const. Art. I, § 2…….. 17-19

Mo. Const. Art. I, § 8…….. 20-24

Mo. Const. Art. I, § 10……. 8

Mo. Const. Art. III, § 40(30)……. 14-15, 17

OTHER SOURCES

*The Right to Earn a Living: Economic Freedom and the Law*
Timothy Sandefur, Cato Institute (2010)…… 17-18

**SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

In opposition to Petitioner's Motion for Partial Judgment on the Pleadings, Defendants offer the following Suggestions:

## I. Introduction

Petitioner filed this lawsuit, alleging that Defendants have engaged in activity that, if proven, would constitute the criminal offense of practicing veterinary medicine without a license. In response to Petitioner's allegations, Defendants have raised six Affirmative Defenses challenging the constitutionality of Petitioner's attempt to apply sections

340.216, 340.218, and 340.276, RSMo., to non-veterinarians practicing traditional animal husbandry.[1] Petitioner's Motion for Partial Judgment on the Pleadings has asserted that each of these Affirmative Defenses should be rejected because no possible set of facts or evidence that could support the Affirmative Defenses as a matter of law.

A motion for judgment on the pleadings is not favored. *Cantor v. Union Mut. Life Ins. Co.*, 547 S.W.2d 220 (Mo. App. 1977). Where one party seeks judgment on the pleadings, "[t]he well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007). Judgment on the pleadings is only appropriate if the facts pleaded by the non-movant, together with all the reasonable inferences drawn therefrom, show that the non-movant could not prevail on the legal theories asserted. *See In re Marriage of Busch*, 310 S.W.3d 253, 260 (Mo. App. E.D. 2010).

For the following reasons, Defendants *will* prevail on the legal theories advanced in their Affirmative Defenses. Accordingly, this Court should overrule Petitioner's Motion for Partial Judgment on the Pleadings.

## II. Rule of Lenity

There is at least one important matter of statutory interpretation that need be mentioned at the outset. The statutes at issue in this case are *criminal* statutes because any person violating one of the provisions "shall, upon conviction in a court of competent jurisdiction, be adjudged guilty of a Class A misdemeanor for each offense." § 340.294. This is critical because where a statute providing for criminal penalties is susceptible of

[1] Defendants *are not* at this time challenging the facial validity of these sections or any other part of Chapter 340.

two plausible interpretations, the rule of lenity requires that the ambiguity be resolved against the party seeking to exact statutory penalties. *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). In this case, Petitioner is attempting to exact statutory penalties against Defendants and, accordingly, this Court should resolve against the Petitioner any ambiguities found in any relevant statute.

## III. First Affirmative Defense: Substantive Due Process – Right to Earn a Living

The Fourteenth Amendment and Article I, section 10, of the Missouri Constitution prohibit governments from depriving "any person of life, liberty, or property without due process of law."[2] The U.S. Supreme Court has repeatedly held that the liberty component of the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] to engage in any of the common occupations of life[.]" *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *see also Habhab v. Hon*, 536 F.3d 963, 968 (8th Cir. 2008) (Fourteenth Amendment protects the liberty to pursue a chosen calling or occupation); *Heath v. Motion Picture Mach. Operators Union No. 170*, 290 S.W.2d 152, 157 (Mo. 1956) (Fourteenth Amendment protects an individual's right "to earn a livelihood at any common occupation"). While this right is, of course, limited by the government's power to protect citizens' health and safety, the government does not have free rein to impose arbitrary or unreasonable restrictions on a person's ability to earn a living. Where the government attempts to impose restrictions on an occupation, those restrictions "must be

[2] Missouri courts do not differentiate between due process claims brought under the Fourteenth Amendment and those brought under Article I, section 10, of the Missouri Constitution.

rationally related to legitimate government interests." *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002).

There is a distinction between the way a rational basis test applies in the substantive due process context as opposed to the equal protection context; a substantive due process claim is broader, challenging whether a legislature may lawfully impose certain regulations, while an equal protection claim challenges whether, within the context of a regulatory scheme, the government may apply the law differently to similarly-situated groups. In this case, Defendants are advancing both substantive due process and equal protection claims. Defendants' substantive due process claim asserts that the legislature cannot require citizens to become licensed veterinarians before they are allowed to earn a living providing traditional animal husbandry practices – in other words, they argue that because the animal husbandry practices that livestock workers provide are distinct and separate from the far more complex field of veterinary medicine, there is no rational basis for requiring livestock workers to become veterinarians before engaging in these practices.[3]

Where substantive due process is concerned, the test has two components: (1) the state legislation must have a legitimate government purpose; and (2) there must be a rational relationship between that purpose and the means chosen by the state to achieve it. *Id*. In this case the Defendants do not question that the state has a legitimate interest in requiring licensure for those who would treat animal diseases or injuries and prescribe

[3] As explained below, Defendants' equal protection claim is markedly different. That claim focuses on the fact that section 340.216.1(5) exempts certain non-veterinarians from the licensure requirements without regard for whether those exempted have any more training or experience than the non-veterinarian livestock workers who could be subjected to criminal penalties for engaging in the very same actions.

drugs, medicines or anesthesia. But Defendants do assert that there is no rational basis for requiring those practicing traditional animal husbandry to spend years of their lives and hundreds of thousands of dollars to become a veterinarian, especially given that veterinarian schools devote very little time to training in basic animal husbandry and many non-veterinarian livestock workers have attended specialized schools that offer ample training for the limited services that traditional animal husbandry workers provide.

There are three recent cases that offer guidance on this question:

In *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999), a federal court prohibited California from requiring African hair braiders to obtain a cosmetology license before earning a living in their chosen profession. The licensing scheme at issue in that case required 1600 hours of cosmetology training, but the court noted that "well below ten percent" of the mandatory cosmetology curriculum was relevant to African hair braiding and that even the availability of supplementary curriculum could not ameliorate the "the irrationality of forcing hair braiders to study nail care and other irrelevant subjects[.]" *Id.* at 1110-11. Rejecting the state's claim that its licensing requirement was rationally related to its interest in protecting the public health and safety, the court concluded that the educational requirements did little to prepare students to practice African hair braiding and they required braiders to learn a wide range of tasks completely unrelated to their chosen field of work. *Id.* at 1119. As a result, the court ruled that California had denied substantive due process by attempting to force African hair braiders to obtain cosmetology licenses before they were permitted to earn a living in their chosen profession.

In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals enjoined the enforcement of a Tennessee statute requiring one to become a licensed funeral director before one could lawfully sell coffins to the public. The court rejected Tennessee's claim that the licensing requirement advanced the state's interests in protecting public health and safety, ruling that "[e]ven if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect." *Craigmiles*, 312 F.3d at 226. The court also disregarded the state's "consumer protection" rationale, pointing out that the legislative history of the statute more clearly indicated its intent to protect licensed funeral directors from facing competition for casket sales. *Id*. at 228. The court determined that the state's effort "to privilege certain businessmen over others at the expense of consumers" could be considered neither a legitimate governmental purpose, nor rationally related to the accomplishment of any legitimate governmental purpose. *Id*. at 229. As such, Tennessee had denied substantive due process by requiring casket salespersons to become licensed funeral directors before they were permitted to earn a living in their chosen profession.

The third relevant case is *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2007), in which the Ninth Circuit ruled that a pest controller licensing statute unconstitutionally exempted certain workers from its provisions while continuing to bind similarly-situated workers. The plaintiff in that case made a living "installing spikes, screens, and other mechanical devices in or on buildings and other structures so as to remove vertebrate pests--e.g., skunks, raccoons, squirrels, rats, pigeons, starlings, bats--or to keep them away from structures"; he did not use pesticides as part of his work. *Id*. at 980.

California law required most pest controllers to be trained in the use of pesticides and to pass a test demonstrating knowledge about dealing with pesticides, but the law specifically exempted "persons engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides." *Id.* at 981-82. The California Structural Pest Control Board determined that state law required the plaintiff to possess a license in order to lawfully provide his services, but the plaintiff contended that the licensure requirements were not rationally related to the pesticide-free services he provided and that he should enjoy the same exemption offered to other workers specializing in removing or excluding vertebrate pests without the use of pesticides.

The Ninth Circuit distinguished between a substantive due process claim, which argues that a licensing scheme creates an unconstitutional barrier to practicing one's chosen profession, and an equal protection claim, which argues that a law unconstitutionally denies one group of people what is permitted to another similarly-situated group. The court rejected Merrifield's due process claim, ruling that the licensing of pest controllers was supported by the state's interest in protecting public health and safety and that the training required for licensure was more reasonably related to that interest than was the training required in *Cornwell*. *Id.* at 987. The court did, however, rule that the licensing scheme could not constitutionally exempt one subset of

persons engaging in non-pesticide pest control while still requiring workers like the plaintiff to obtain a license.[4] *Id*. at 991.

This Court should determine that, as applied to Defendant Gray, the licensing requirements of this case are far more similar to those found in *Cornwell* and *Craigmiles* than they are to those in *Merrifield*, and thus they similarly run afoul of the right to earn a living secured by the Due Process Clause of the Fourteenth Amendment. Occupations do not come more common than those associated with the practice of traditional animal husbandry, including that of floating horses' teeth. Floaters have been filing horses' teeth for hundreds of years, with the service typically being performed by non-veterinarian laypersons. (Defs' Ans. ¶ 30.) A number of non-veterinarians in Missouri have, through formal education and/or hands-on experience, become skilled floaters. (Defs' Ans. ¶ 31.) In fact, non-veterinarian floaters may be even better prepared to float horses' teeth than most veterinarians because many non-veterinarian floaters receive training at specialized schools, such as the Academy of Equine Dentistry, where the entire curriculum is dedicated to the practice, while floating is not part of the core curriculum at any veterinary school. (Defs' Ans. ¶ 42-43.) Furthermore, most veterinarians who regularly float horses' teeth learn the practice from an experienced non-veterinarian floater or at one of the specialized equine dentistry schools, not at a veterinary school. (Defs' Ans. ¶ 44.) Thus, the facts demonstrate that non-veterinarian floaters are at least as well prepared as licensed veterinarians to safely provide the limited services required for their profession – and in some circumstances non-veterinarian floaters are even more qualified.

[4] Defendants discuss this point thoroughly below in regard to their Sixth Affirmative Defense: Equal Protection.

Given these undisputed facts, the legislature may not, as Petitioner has suggested, lawfully prohibit any non-veterinarian from accepting compensation for floating horses' teeth, particularly where (as in *Craigmiles*) there is not any suggestion that animals or their owners are more at risk of harm from services provided by trained non-veterinarians than they are from licensed veterinarians providing the same services.[5] Furthermore, just as in *Cornwell* and *Craigmiles*, the vast expense and training necessary to obtain the demanded license far exceeds the scope of work actually done by horse teeth floaters and others who make a living in traditional animal husbandry. Even conceding that Missouri has a legitimate interest in requiring veterinarians to be licensed, there simply is no reasonable fit between the state's purported goal of protecting the public health and safety and requiring horse teeth floaters to obtain a veterinarian's license before being permitted to earn a living in their chosen profession.

## IV. Second Affirmative Defense: Substantive Due Process – Arbitrary Classifications

Article III, section 40(30), of the Missouri Constitution prohibits the legislature from adopting laws that create classifications that are arbitrary or unreasonable given the purpose of the law, stating that "The General Assembly shall not pass any local or special law… where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to

[5] This point is put into more glaring relief by Petitioner's admission that "some veterinarians are not qualified by training to perform equine dentistry." (Petr's Mot. for Part. Judg. on the Pleadings at 6.) Defendants also note that Petitioner's admission completely undercuts its assertion that the government's licensing requirements ensure the public that "those who hold themselves out as qualified to perform [veterinary medicine, which includes veterinary dentistry,] are trained, competent, and accountable for the services they perform." (Petr's Mot. for Part. Judg. on the Pleadings at 5.)

any legislative assertion on the subject." Although Missouri courts do typically evaluate alleged violations of this constitutional prohibition by asking if a classification is reasonable, the provision's explicit instruction that courts are *not* to defer to legislative assertions requires courts to use a higher degree of scrutiny than is offered under the standard Equal Protection analysis. As the Missouri Supreme Court has held, "[t]he basis of sound legislative classification is similarity of situation or condition with respect to the feature which renders the law appropriate and applicable." *State ex inf. Barrett ex rel. Bradshaw v. Hedrick*, 241 S.W. 402, 420 (Mo. banc 1922). Pursuant to this constitutional restriction, "a law may not include less than all who are similarly situated." *State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 385 (Mo. banc 1990).

Section 340.216.1 creates several classifications regarding which persons are legally permitted to perform animal husbandry services on livestock. The most significant and obvious of these is the distinction between licensed veterinarians and those who do not possess a license from the Missouri Veterinary Medical Board. For all of the reasons discussed in Defendants' First Affirmative Defense, this distinction is not rational and should be struck down as a violation of Article III, section 30(40). But section 340.216.1 also creates additional classifications in that it subdivides the group of non-veterinarian citizens and applies the law differently to the subdivisions. Specifically, section 340.216.1 allows three groups of unlicensed – and potentially untrained – citizens lawfully to perform horse teeth floating: 1) the horse's owner; 2) the owner's full-time employees; or 3) any person who did not accept compensation in return for the services

provided.[6] Because the statute does not apply equally to all non-veterinarians this statute is a "special law" in violation of the Missouri Constitution.

Where a statute creates classifications, the classifications can only be considered rational if they flow logically from the statute's underlying purpose. In this case, Petitioner asserts that the licensing of veterinarians is necessary to protect the public health and safety from harms that might result from the incompetent treatment of animals. As a result, classifications created by the statute must flow logically from this goal; a classification could only be considered rational if it is consistent with the government's interest in protecting public health and safety. Regarding the first classification, ownership of an animal says nothing whatsoever about a person's qualifications or competence to float horses' teeth or to perform any of the other tasks that, but for the statutory exemption, would require a veterinarian's license. Similarly, the fact that a person might be a full-time employee of an animal owner is completely unrelated to that person's fitness to perform animal husbandry — especially since the statute is entirely silent as to *what kind* of full-time employee is permitted to work on animals.

But the most perplexing classification is the statute's distinction between floating services provided for compensation and those provided in the absence of compensation. Indeed, this distinction seems to imply that any person (including Defendant Gray) could float horses' teeth in Missouri – so long as they were willing to do the work without

[6] Defendants expect Petitioner to contend that section 340.216.1 also prohibits non-veterinarians from providing animal husbandry services even if they are *not* compensated. In addition to the fact that this interpretation of the law is unwarranted by the plain language of the statute, it would also prevent Missouri's farmers and ranchers from helping each other with some of the most basic tasks necessary to help their livestock in good health and good order.

being paid for it. This distinction between compensated labor and uncompensated labor is absolutely unrelated to the worker's skills or qualifications because the same person could find themselves in one or the other classifications depending entirely on whether they accepted a paycheck for their work. There is no evidence indicating that floating services performed for compensation pose any greater threat to the health, safety, or welfare of Missourians than floating services performed free of charge. (Defs' Ans. ¶ 47). Thus, it is manifestly irrational for the law to sanction uncompensated work that would otherwise be considered the practice of veterinary medicine, but to forbid citizens to accept compensation for providing precisely the same work. Because section 340.216.1 applies the licensing requirements differently to similarly-situated groups of citizens, it is a special law that violates Article III, section 40(30), of the Missouri Constitution.

## V. Third Affirmative Defense: Right to the Enjoyment of the Gains of Industry

One of the more unique aspects of the Missouri Constitution is that, in addition to acknowledging Thomas Jefferson's perspective that all citizens enjoy a right to life, liberty, and the pursuit of happiness, Article I, section 2, of the Missouri Constitution also secures citizens' natural right to the enjoyment of the gains of their own industry. This provision was adopted alongside a nationwide push by anti-slavery Republicans to ensure that the former slave states could not enact new laws that would prevent freed slaves from earning a living or owning property. *See* Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law*, 40 (2010). The phrasing adopted by the

Missouri Constitutional Convention of 1875 echoed the terminology used just a few years earlier as part of the Congressional debates over whether the Fourteenth Amendment should be adopted to, in part, protect citizens' right to earn a living.[7] Although the right to the enjoyment of the gains of one's industry was added to the Missouri Constitution more than a century ago, state courts have not yet offered a thorough analysis of its history or its proper application.[8] Defendants can point to one case, however, in which the Missouri Supreme Court applied Article I, section 2, of the Missouri Constitution to a set of facts similar to those presented in this case.

In *Moler v. Whisman*, 147 S.W. 985 (Mo. 1912), the Missouri Supreme Court reviewed a statute that forbade student barbers or their instructors to accept any compensation for services the students provided. The plaintiff in that case asserted that denying the students or instructors the opportunity to be compensated for the services they provided amounted to an unconstitutional denial of their right to enjoy the gains of their industry. The Missouri Supreme Court agreed and struck down the prohibition, specifically noting that the "part of the law under consideration cannot even be said to tend to promote the public health, which is the pretended purpose for which it was

[7] Representative John Bingham, the author of the Fourteenth Amendment's privileges or immunities clause, noted that the clause was intended to protect the freedom "to work in an honest calling and… to be secure in the enjoyment of the fruits of your toil." *Id.* at 41. Another representative argued that every person had a right "to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself or against public policy, or morally wrong, or against the natural rights of others[.]" *Id.*

[8] In its Motion for Partial Judgment on the Pleadings, Petitioner cited *City of St. Louis v. McCann*, 57 S.W. 1016 (Mo. banc 1900), although it is unclear what Petitioner was trying to establish in doing so. The plaintiffs in McCann argued that license taxes violated their enjoyment of the gains of their industry. Defendants have made no such assertion. Rather, it is their contention that the state may not prohibit a citizen from accepting payment for services that would otherwise be lawful. Petitioner's Motion argued that the legislature might rationally *desire* to deny citizens the gains of their industry, but this right is enshrined in the Constitution *to prevent the legislature from doing so*.

enacted" and that a scheme intended to inhibit economic competition "is entirely un-American because it is the policy of a free commonwealth to encourage thrift and industry among its citizens and to keep the door of opportunity ajar so that every qualified and deserving person who so desires may enter thereat." *Id.* at 988-89.

In the instant case, section 340.216.1 makes it "unlawful for any person not licensed as a veterinarian under the provisions of sections 340.200 to 340.330 to practice veterinary medicine or to do any act which requires knowledge of veterinary medicine *for valuable consideration*[.]" The implication of this provision is that a non-veterinarian would be permitted to engage in traditional animal husbandry practices as long as they are not compensated in exchange for them.[9] This is an important point because it establishes that there is nothing *inherently* unlawful about the practice of traditional animal husbandry, and the legislature has not attempted to completely restrict these practices to licensed veterinarians.[10] To the contrary, the law permits citizens to apply their labor to these tasks on the express condition that they not receive consideration as a consequence of that labor. As such, the law plainly denies those who make a living providing animal husbandry services of "the enjoyment of the gains of their own industry" in precisely the way that the Missouri Supreme Court ruled unconstitutional in *Moler*.

[9] Defendants note that Petitioners may contend that section 340.216.1 is ambiguous in its prohibitions and that even uncompensated actions could be prosecuted as the unlicensed practice of veterinary medicine. As noted above, if the statute's provisions are ambiguous, they must be construed against the government.

[10] The same cannot be said for all practices falling within the statute's definition of "veterinary medicine," as is evidenced by the statement in section 340.216.1(5) that "only a licensed veterinarian may immunize or treat an animal for diseases which are communicable to humans and which are of public health significance[.]"

## VI. Fourth Affirmative Defense: Freedom of Speech

Section 340.216.1, as applied by Petitioner, violates the expressive liberties safeguarded by the First Amendment of the U.S. Constitution (made applicable to the states through the Fourteenth Amendment of the U.S. Constitution) and Article I, section 8, of the Missouri Constitution because it prohibits or requires punishment for the communication of truthful, non-misleading information. In its Petition for Preliminary and Permanent Injunction, Petitioner specifically alleged that Defendant Gray had violated § 340.216.1 by distributing business cards (Pet. for Prelim. and Perm. Inj. ¶ 16) and by participating in a magazine interview in which "she discussed equine dentistry and discussed the 'floating' procedure with reporter Dean Houghton."[11] (Pet. for Prelim. and Perm. Inj. ¶ 17). The clear implication of these allegations is that Petitioner considers a non-veterinarian's mere discussion of the practice of horse teeth floating to be a criminal act, regardless of whether the speaker is being compensated for the information provided. The statute includes no exception for truthful, harmless information about either the practice of floating or about the training and experience that an unlicensed person might have floating horses' teeth. (Def. Ans. ¶ 58.) Petitioner cannot name any Missouri horse owner who has been harmed as a result of receiving truthful, non-misleading information about the practice of horse teeth floating. (Def. Ans. ¶ 59.) Petitioner's proposed application of § 340.216.1 would allow the government to

[11] Surprisingly, Petitioner's Motion for Partial Judgment on the Pleadings completely ignores these allegations, stating that "[t]he petition for injunction does not seek to restrain Defendants from talking about equine dental issues[.]" (Petr's Mot. for Part. Judg. on the Pleadings 9.) Defendants believe this change of heart may constitute a waiver of these particular allegations but will present their free speech arguments, nonetheless.

pick and choose which private speakers are permitted to offer precisely the same information. (Def. Ans. ¶ 61.) Where a law imposes a restriction on speech, the government (in this case, Petitioner) bears the burden of justifying it. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

**A. Article I, Section 8, of the Missouri Constitution**

Article I, section 8, of the Missouri Constitution forbids any legislative body in the state to pass any law impairing the freedom of speech and also guarantees "that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, no matter by what means communicated." "Anything which makes the exercise of a right more expensive or less convenient, more difficult or less effective, impairs that right." *Ex parte Harrison*, 110 S.W. 709, 710 (Mo. 1908). As the Missouri Supreme Court has stated, "[l]anguage could not be broader, nor prohibition nor protection more amply comprehensive." *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391 (Mo. banc 1902).

Of particular importance in this case is the Missouri Constitution's guarantee that every person has the right to communicate "whatever he will *on any subject*". While Petitioner's Motion for Partial Judgment on the Pleadings implies that its application of § 340.216.1 merely prohibits "commercial speech" (Petr's Mot. for Part. Judg. on the Pleadings 9-10), the plain language of Article I, § 8, does not permit Missouri courts to apply a lesser level of scrutiny to restrictions on speech based on the subject of that speech. To the extent that the First Amendment permits a lower level of scrutiny for "commercial speech," the Missouri Constitution's own protections for expressive

freedom are more extensive than those provided in the U.S. Constitution. Thus, Missouri courts are required to apply strict scrutiny to any law, regulation, order, or decree that would impair or limit communication, regardless of the communication's subject.

**B. The First Amendment**

The First Amendment protects not only the rights of speakers, but also the rights of those interested in hearing what those speakers have to say. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); see also *Citizens United v. FEC*, 130 S.Ct. 876, 908 (January 21, 2010). It is no defense for the government to argue that the citizen might receive the same information from another source. *Virginia State Board of Pharmacy*, 425 U.S. at 757, fn 15. "The Government may not… deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Citizens United*, 130 S.Ct. at 899. The court should hold that neither the Missouri General Assembly nor Petitioner may constitutionally deprive the general public of their right to receive truthful, harmless information about animal husbandry from non-veterinarians.

Additionally, Petitioner's proposed application of §340.216.1 would allow the government to pick and choose which private speakers are permitted to offer precisely the same information. Restrictions distinguishing among different speakers, allowing speech by some but not by others, are prohibited under the First Amendment. *Id.* at 898 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). "[A] law or policy permitting communication in a certain manner for some but not for others raises

the specter of content and viewpoint censorship." *City of Lakewood v. Plain Dealer,* 486 U.S. 750, 763 (1988). “Even under the degree of scrutiny [the U.S. Supreme Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 193-94, (1999).

Absent any demonstrable and immediate threat to the health, safety, or welfare of Missouri’s livestock owners, neither the First Amendment nor Article I, section 8, of the Missouri Constitution will not permit Petitioner to apply sections 340.216, 340.218, 340.276, or 340.294 in a way that would deny citizens their freedom to share truthful, non-misleading information about animal husbandry.

**C. Compensated Speech is Fully Protected**

Additionally, Petitioner cannot justify the law’s restrictions on speech about horse teeth floating by claiming that the restrictions apply only if one accepts compensation in exchange for such speech. For the purposes of First Amendment analysis, the U.S. Supreme Court has made clear that a restriction on the acceptance of compensation for speech is no different than restricting the speech itself. In *Riley v.Nat’l Federation of the Blind*, 487 U.S. 781 (1988), the U.S. Supreme Court struck down licensing requirements for charitable solicitors, stating, “It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Id.* at 801. Similarly, in *U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), the U.S. Supreme Court applied the First Amendment to strike

down a statute that prohibited certain government officials from accepting compensation for speeches—even though the statute "neither prohibit[ed] any speech nor discriminate[d] among speakers"—because the "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *Id*. at 468-69. *See also Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down a statute that would discourage speech by denying criminals first five years' worth of compensation for books discussing their crimes); *Meyer v. Grant*, 484 U.S. 414 (1988) (striking down prohibition on paid petition circulators); *Thomas v. Collins*, 323 U.S. 516 (1945) (rejecting the notion that First Amendment freedoms may be disregarded on the basis that one "exercising these rights receives compensation for doing so."). As such, Petitioner's proposed application of sections 340.216.1 and 340.276 to the Defendants' speech would violate both the First Amendment and Article I, section 8, of the Missouri Constitution and therefore must be rejected.

## VII. Fifth Affirmative Defense: Procedural Due Process

Missouri has prohibited the unlicensed practice of veterinary medicine, including a specific prohibition against the practice of veterinary dentistry, for more than one hundred years.[12] For much of this time state law has made such practice a criminal offense and has also authorized the regulatory board overseeing the veterinary profession

[12] *See* Missouri L. 1905 [H.B. 254], pp. 209-212 – Medicine and Surgery: Veterinary Surgery Act. "AN ACT to regulate the practice of veterinary surgery, medicine and dentistry, create a veterinary examining board in the state of Missouri and prescribing a penalty for the violation thereof." See also, Veterinary Surgery, Medicine and Dentistry Act (1909); Veterinary Surgery, Medicine and Dentistry Act (1919); Veterinary Surgery, Medicine and Dentistry Act (1929); Veterinary Surgery, Medicine and Dentistry Act (1939); Veterinary Practice Act (1949), R.S.Mo. § 340.020 – "Any person shall be regarded as practicing veterinary surgery, veterinary medicine or veterinary dentistry…". The Veterinary Practice Act (1953) did not use the word "dentistry," but its definition was crafted almost as broadly as the current Veterinary Practice Act, adopted in 1992.

to take action against anyone practicing veterinary medicine without a license. The current statutory prohibitions relied upon by Petitioner have been in place since at least 1992. (Defs' Ans. ¶ 64.) Since the legislature adopted the current statutory prohibitions, members of the Missouri Veterinary Medical Board have been aware that non-veterinarian horse teeth floaters were providing services in Missouri for compensation. (Defs' Ans. ¶ 65.) And yet in Missouri's century-long history of regulating the practice of veterinary medicine, this case marks *the very first time* that the Missouri Veterinary Medical Board or any of its predecessors have filed a lawsuit accusing a horse teeth floater of practicing veterinary medicine without a license. (Petr's Reply to Defs' Aff. Def. ¶ 66.)

A government agency cannot exclude a person from any occupation in a manner that contravenes the Due Process Clause of the Fourteenth Amendment.[13] *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957). Even where one does not necessarily have a legal right to continue in a line of work, they cannot be made ineligible for that work illegally. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951) (J. Reed, dissenting). If a statute gives a government agency some discretion to act, that discretion may not be exercised arbitrarily. *See State ex rel. Jimmy's Western Bar-B-Q, Inc. v. City of Independence*, 527 S.W.2d 11, 12-13 (Mo. App. 1975).

[13] Defendants note that Petitioner has utterly misunderstood the nature of their Procedural Due Process claim, mistakenly assuming that Defendants asserted a violation of Missouri's Administrative Procedure Act.

In deciding to take action against horse teeth floaters, Petitioner never considered any evidence or public testimony suggesting that floaters posed a bona fide threat to the health, safety, or welfare of Missouri horse owners, (Defs' Ans. ¶ 68), nor did it consider whether in the absence of non-veterinarian floaters there are enough licensed vets providing floating services to meet the needs of Missouri's horse owners, (Defs' Ans. ¶ 69), nor did it consider the danger posed to the health of Missouri's horse population if an inadequate number of veterinarians are providing floating services. (Defs' Ans. ¶ 70.) Indeed, Petitioner's determination that Missouri law prohibits non-veterinarians from floating horses' teeth did not follow *any* formal rulemaking or other formal explanation of why Petitioner was changing its application of sections 340.200 to 340.330.

The Missouri Supreme Court recently addressed a similar situation in *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907 (Mo. 2006). In that case, a feed store had for twenty years been selling federal legend drugs to consumers for treatment of their animals, even though the store did not employ a licensed pharmacist. *Id*. at 908-09. The Board of Pharmacy had been aware of the store's practice since at least the early 1990s, but did not take any action until 2000, when the Board finally determined that the store was practicing pharmacy without a license. *Id*. at 909. In evaluating the case, the court pointed out not only that the regulatory board had for a decade refrained from taking action against feed stores dispensing animal drugs without having a licensed pharmacist on staff, but also that the state legislature had not intervened to require the board to do so. *Id.* at 912. Because it determined that the Board had

changed its application of the law without justification, the court found no reason to defer to the Board's new position. *Id*.

The facts of the instant case demonstrate an even more established interpretation of the law than was present in *United Pharmical*. While Missouri has a longstanding prohibition against "veterinary dentistry," horse teeth floaters have been a visible part of Missouri's agricultural life during that entire time and never before has a representative of the government brought a floater to court for allegedly violating the state's veterinary laws. Missouri's traditional animal husbandry practitioners have for more than a century enjoyed the presumption that they would be free to earn a living assisting this state's farmers and ranchers; principles of procedural due process demand that if that presumption is no longer valid, Petitioner must first offer some explanation for suddenly deciding to eliminate their livelihood. But Petitioner did not offer any such explanation, nor did it consider the consequences for Missouri's livestock owners if Petitioner denied them access to this group of experienced, trusted, and affordable workers. For the purposes of this Motion for Partial Judgment on the Pleadings, the Court must assume that there *is* no good explanation for the Board's change in policy toward animal husbandry workers, and must conclude that Petitioner has denied Defendants the procedural due process required by the Fourteenth Amendment.

## VIII. Sixth Affirmative Defense: Equal Protection

In its Sixth Affirmative Defense, Defendants assert that Petitioner's attempted application of sections 340.216.1 and 340.276 deny Defendants the equal protection of

the law guaranteed by the Fourteenth Amendment and Article I, section 2, of the Missouri Constitution. Specifically, Defendants allege that these constitutional provisions do not permit the legislature to prohibit some non-veterinarians from performing animal husbandry tasks while allowing other non-veterinarians (the animals' owners and full-time employees) to perform precisely the same tasks. Defendants also allege that Petitioner has denied equal protection of the law by filing suit to prevent non-veterinarians from floating horses' teeth while declining to file suit to prevent non-veterinarians from engaging in more dangerous animal husbandry practices.

Since the prohibitions of section 340.216.1 were enacted, Petitioner has been aware that non-veterinarian laypersons in Missouri accept compensation for providing animal husbandry services such as horseshoeing, branding, birthing, dehorning, taildocking, castration, and artificial insemination. (Def. Ans. ¶ 73). Many of these practices are far more likely than floating to endanger the health, safety, or welfare of Missourians and their livestock. (Def. Ans. ¶ 74). Despite these facts, Petitioner has not asked any court to punish these other practices as violations of section 340.216.1. (Def. Ans. ¶¶ 75-81). Defendants have asserted that Petitioner has violated the Equal Protection Clause by taking action against someone accused of floating horses' teeth, but failing to take action against other animal husbandry practitioners.[14] Defendants concede that the laws at issue in this case do not single them out as members of a suspect class or classification. For purposes of Equal Protection analysis, they also concede that no

[14] Petitioner may argue that it can take action against these other professions any time it chooses. This does not change the fact that even though it has been aware of non-veterinarians engaging in these practices for nearly *two decades*, it has only now decided to file a lawsuit against an alleged provider of animal husbandry services – and that lawsuit has targeted a practice far less dangerous than the others listed.

fundamental right is at issue and that rational basis review is appropriate.

In an equal protection case, the court's responsibility is to evaluate whether the facts on which a classification is apparently based "could reasonably be conceived to be true by the governmental decisionmaker." *Merrifield*, 547 F.3d at 989. The state is not required "to verify *logical* assumptions with statistical evidence… and rational distinctions may be made with *substantially less than mathematical exactitude*." *Id.* (emphasis in original). However, "while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id*. at 991. (emphasis in original).

As previously discussed, *Merrifield* is an excellent example of how a court can – and should – strike down licensing requirements where they irrationally deny equal protection of the laws. In that case, the Ninth Circuit determined that California did not violate the Due Process Clause of the Fourteenth Amendment by requiring non-pesticide-using pest controllers to obtain a license before pursuing their occupation, even though licensure required training and testing in the use and handling of pesticides. The court reached this conclusion because even pest controllers who did not themselves use pesticides might encounter places where they *had* been used, making it rational for the legislature to assume that training in pesticide use could lessen a potential threat to the public health or safety. *Id.* at 988. But the statute at issue in *Merrifield* also granted exemptions to "persons engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides." *Id.* at 981-82. The definition of "vertebrate pests" included "bats, raccoons, skunks, and squirrels"

but did not include "mice, rats, or pigeons". *Id.* at 982. The plaintiff's business focused on the pesticide-free removal or exclusion of rodents and pigeons, and he contended that there was no rational basis for exempting one group of non-pesticide using pest controllers while denying such an exemption to the plaintiff. The court agreed with the plaintiff and ruled that the legislature's limited exclusion violated the Equal Protection Clause. The exemption could not be considered rational because the *exempted* subset of non-pesticide-using pest controllers were, in fact, more likely than the plaintiff to find themselves in a situation that endangered health or safety. *Id.* at 991. In other words, the government was not permitted to justify its general licensing scheme as necessary for the protection of the public health and safety, then to create an exemption in favor of those engaging in more dangerous practices.

In the instant case, the government has created a licensing scheme for those citizens engaging in what the legislature has defined as "veterinary medicine," and it has justified this scheme as necessary to protect the public health or safety. But the legislature also formally exempted from the licensing requirements a set of citizens – livestock owners, their full-time employees, and uncompensated workers – who cannot be assumed to have any more expertise in basic animal husbandry than non-veterinarians who have made a career out of specializing in those services.[15] Furthermore, despite Petitioner's longstanding awareness that non-veterinarians were providing animal husbandry services to Missouri's farmers and ranchers, Petitioner has only filed a lawsuit

[15] Defendants incorporate the arguments made above in the section dealing with arbitrary classifications into this section dealing with equal protection.

to enjoin horse teeth floating – a practice far less dangerous than a number of traditional practices that Petitioner has refrained from disturbing.

No rational person could believe that these exemptions, both formal and informal, have any relation whatsoever to Petitioner's asserted interest in protecting public health and safety. Indeed, any fair observer must concede that the formal exemptions would permit animal husbandry work to be done by those with far less training and experience than many of the workers that Petitioner argues must be prohibited from working with animals. Similarly, Petitioner's decision to single out floaters while declining to file suit against farriers and other practitioners of traditional animal husbandry whose practices are more likely to result in injury to animals or their owners cannot be considered to be rational. As such, both the formal and informal exemptions afforded under section 340.216.1 violate the Equal Protection guarantees of the U.S. and Missouri Constitutions.

## IX. Conclusion

Defendants have demonstrated the merit of their Affirmative Defenses and so they should not be stricken. Defendants request that the Court overrule the Petitioner's Motion for Partial Judgment on the Pleadings and permit them to prove at trial the facts necessary to demonstrate that they are entitled to judgment as a matter of law.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served by email, on February 14, 2011, addressed to:

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