IN THE CIRCUIT COURT OF CLINTON COUNTY
STATE OF MISSOURI

MISSOURI VETERINARY MEDICAL BOARD 3605 Missouri Boulevard P.O. Box 1335 Jefferson City, MO 65102	)	
Petitioner,	)	
vs.	)	
BROOKE RENE GRAY 6227 SE Perren Road Holt, Missouri 64048	)	Case No. 10CN-CV00842
and	)	
B & B EQUINE DENTISTRY 6227 SE Perren Road Holt, Missouri 64048	)	
Defendants.	)	

DEFENDANTS' SUR-REPLY TO PETITIONER'S REPLY TO DEFENDANTS' RESPONSE TO PETITIONER'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Respectfully submitted,

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As a Sur-Reply to Petitioner's Reply to Defendants' Response to Petitioner's Motion for Partial Judgment on the Pleadings, Defendants offer the following Suggestions:

I. Introduction

As Defendants demonstrated in their Response to Petitioner's Motion for Partial Judgment on the Pleadings, this Court may only grant Petitioner's Motion 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 purposes of this Motion, the following facts (and all reasonable inferences that can be drawn therefrom) are established and are sufficient to support all of Defendants' Affirmative Defenses:

(1) Horse teeth floating has been performed by non-veterinarian laypersons for hundreds of years (Defs' Ans. ¶ 30);

(2) A number of non-veterinarians in Missouri have, through formal education and/or hands-on experience, become skilled floaters (Id. ¶ 31);

(3) Many non-veterinarian floaters trained at special schools where the entire curriculum is dedicated to the practice (Id. ¶ 32);

(4) Floating is not a part of the core curriculum at any veterinary school (Id. ¶ 42);

(5) 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 (Id. ¶ 43);

(6) Most veterinarians who regularly float horses' teeth learn the practice at one of the schools specializing in equine dentistry, not in veterinary school (Id. ¶ 44);

(7) Petitioner has no evidence that floating represents a bona fide threat to the health, safety, or welfare of Missouri's citizens (Id. ¶ 34);

(8) Petitioner has no evidence that floating represents a bona fide threat to the health, safety, or welfare of Missouri's horses (Id. ¶ 35);

(9) Petitioner has no evidence that floating becomes more dangerous if a person is compensated for providing that service (Id. ¶ 36);

(10) Many horse owners would prefer to have someone who specializes in the task float their horses' teeth, rather than attempting to do the work themselves (Id. ¶ 51);

(11) Many horse owners choose to pay experienced non-veterinarian floaters to provide this service (Id. ¶ 52);

(12) Petitioner has long been aware that non-veterinarian floaters were providing services in Missouri for compensation (Id. ¶ 65);

(13) But before Petitioner filed this case, it had never suggested to a court that non-veterinarian floaters were engaging in the criminal act of practicing veterinary medicine without a license (Id. ¶ 66);

(14) Petitioner's decision that the law prohibits non-veterinarians from floating horses' teeth did not follow any rule-making or any other formal explanation of why Petitioner changed its approach to enforcing this law (Id. ¶ 67);

(15) Petitioner never considered any evidence or public testimony regarding whether, in the absence of non-veterinarian floaters, there are enough licensed veterinarians providing floating services to meet the needs of Missouri horse owners (Id. ¶ 68);

(16) Petitioner never considered any evidence or public testimony regarding the danger posed to the health of Missouri's horse population in an inadequate number of veterinarians are providing floating services (Id. ¶ 69);

(17) Petitioner is has also long been aware that non-veterinarian laypersons in Missouri accept compensation for providing animal husbandry services that would fall within the definition of "veterinary medicine," such as horseshoeing, branding, birthing, dehorning, tail-docking, castration, and artificial insemination (Id. ¶ 73);

(18) Many of these other practices are far more likely than floating to endanger the health, safety, and welfare of Missourians and their livestock (Id. ¶ 74);

(19) Nevertheless, Petitioner has not sought an injunction agaisnt any non-veterinarian providing any of these other services (Id. ¶¶ 75-81).

As Defendants have shown through the cases they have cited, these facts demonstrate that Defendants have a sound basis for asserting the constitutional affirmative defenses that Petitioner has asked this Court to disregard. Petitioner is only

entitled to the requested Partial Judgment on the Pleadings if it has shown that there is *no* possibility that Defendants could succeed in these claims; otherwise, this Court is obliged to allow Defendants the opportunity to make their case.

In its filings related to this motion Petitioner has rarely confronted the substance of Defendants' affirmative defenses. Instead, Petitioner has made a series of bare assertions that the legislature *might* have had rational reasons for imposing the prohibitions and requirements at issue in this case, but has not explained *why*, in light of the facts established for the purpose of this motion, the regulations imposed by the legislature are rationally related to the accomplishment of specific government interests. Having utterly failed to demonstrate that the facts asserted by Defendants could never warrant a finding in the Defendants' favor, Petitioner has not met the necessary burden required for this Court to grant its Motion for Partial Judgment on the Pleadings. The Motion should be overruled.

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

Defendants' Response to Petitioner's Motion for Partial Judgment on the Pleadings explained the analytical distinction between substantive due process claims and equal protection claims. (Defs' Resp. at 12-13). Petitioner's Reply failed to acknowledge any such distinction and instead cited a mish-mash of cases in which courts emphasized the extent to which certain legislative determinations are entitled to judicial deference under the "rational basis" test. Defendants do not dispute the existence of many cases in which regulations have been found to be rationally related to a legitimate

government interest, but they *do* dispute Petitioner's apparent conclusion that, essentially, "rational basis" review amounts to *no judicial review at all* of legislative determinations.

"The touchstone of due process is the protection of the individual against arbitrary action of the government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The Fourteenth Amendment's due process guarantee includes more than just procedural fairness. *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 197 (1979); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976). The amendment also prohibits the government from imposing impermissible substantive restrictions on individual liberty. *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1994); *Harrah Independent School Dist.*, 440 U.S. at 197. Defendants have cited three recent federal cases demonstrating that *facts* matter, because where the facts demonstrate that a restriction on a citizen's right to earn a living has no rational relation to a legitimate government interest the Constitution prohibits the enforcement of that restriction.[1] For the purpose of this Motion for Partial Judgment on the Pleadings, Defendants need only show that a sufficient showing of facts could *permit* a judgment in their favor.

Defendants have no interest in becoming veterinarians, but they *are not* challenging Missouri's authority to require licenses for veterinarians. They *are* challenging whether section 340.200(28), which defines "veterinary medicine" as

[1] While Petitioner has argued that one of those cases, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), did not involve the right to earn a living, that right was, in fact, the basis on which the plaintiffs in that case founded their Substantive Due Process claim and the right relied upon by the District Court to find in the plaintiffs' favor. *Craigmiles v. Giles*, 110 F.Supp.2d 658, 661 (E.D. Tenn. 2000) ("Plaintiffs indisputably have a liberty interest in the right to pursue their chosen occupation.").

including "changing... any animal... physical or mental condition" may constitutionally be applied to require citizens who only want to float horses' teeth to obtain a veterinarian's license.[2] Defendants remind the Court that, for the purposes of their first affirmative defense, there are two questions: (1) is the regulation at issue supported by a legitimate government interest; and (2) is there a rational relationship between the government's interest and the means chosen to achieve it?

In its Motion for Partial Judgment on the Pleadings, Petitioner asserted that the legislature has an interest in "protecting the health, safety, and welfare of the public" and that it may try to address that interest by enacting licensing laws. (Petr's Mot. Part. Judg. on Plead. at 4). Petitioner then made three bare assertions, for which it offered neither evidence nor citation: (1) that "animal dentistry has a significant effect on the health and welfare of animals"; (2) that members of the public should be assured that those who perform animal dentistry "are trained, competent, and accountable for the services they perform"; and (3) the legislature could rationally choose to require licensure for this practice or it could rationally choose not to. (Id. at 5). Nothing in Petitioner's Reply added anything to support or further these assertions, nor have any of Petitioner's filings offered any explanation for *why* it might be rational to compel a citizen to attain the educational requirements necessary to obtain a veterinary license before they may lawfully earn a living providing basic animal husbandry services. "The mere assertion of

[2] Petitioner focuses on the statute's specific reference to "dentistry" and suggests that this case is about statutory interpretation. At no point in this litigation have Defendants suggested that the activity in which they are alleged to have engaged would fall outside the statute's definition of "veterinary medicine." In fact, the statutory definition is so comprehensive in scope that practically *any* interaction with an animal would fall within this definition.

a legitimate government interest has never been enough to validate a law." *Craigmiles v. Giles*, 110 F.Supp.2d at 662.

Requiring citizens to meet the veterinary licensing requirements before they are permitted to earn a living in these traditional professions is not rationally related to the state's interest in protecting the public health, safety, and welfare. As noted above, a number of facts have already been established for the purposes of this Motion: (1) horse teeth floating has been performed by non-veterinarian laypersons for hundreds of years; (2) a number of non-veterinarians in Missouri are skilled floaters; (3) many non-veterinarian floaters trained at special schools where the entire curriculum is dedicated to the practice; (4) floating is not a part of the core curriculum at any veterinary school; (5) most veterinarians who float horses' teeth learn the practice at one of the schools specializing in equine dentistry; (6) Petitioner has no evidence that floating represents a bona fide threat to the health, safety, or welfare of Missouri's citizens;[3] and (7) Petitioner has no evidence that floating becomes more dangerous if a person is compensated for providing that service.[4]

These facts demonstrate that obtaining a veterinary license has little or nothing to do with one's ability to provide safe, high-quality horse teeth floating services. To the

[3] Defendants have also established that Petitioner has no evidence that floating represents a bona fide threat to the health, safety, or welfare of Missouri's horses. Defendants *do not* concede that the state's authority to protect health, safety, or welfare of its *human* population means that the state also has the authority to make laws protecting the health or safety of livestock. In fact, while the law may punish human cruelty to animals because such cruelty indicates an anti-social depravity that could threaten the public welfare, Missouri law has always permitted human animal husbandry practices and even the *slaughter* of livestock and game animals—a practice that is quite demonstrably antithetical to the health or safety of those animals. Where there is no suggestion that animal husbandry practices are themselves inhumane, the state's police power does not properly extend to the protection of animal health or safety.

[4] These last two facts, in particular, make clear that the challenged regulation is not rationally related to protecting the public health, safety, or welfare. Nevertheless, Defendants will offer a more thorough explanation of how the facts of this case fit the analytical framework established by the cases Defendants have cited.

contrary, they suggest that non-veterinarians who have specialized in this practice will be far more competent than most licensed veterinarians in providing these services, even if the person providing the services is compensated for doing so. As such, the legal requirement that one obtain a veterinary license prior to earning a living by floating horses' teeth has absolutely no relationship to protecting the public health, safety, and welfare, nor does it in any way assure the public that those who float horses' teeth "are trained, competent, and accountable for the services they perform."

In *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999), the court held that California could not constitutionally require African hair braiders to obtain 1600 hours of cosmetology training before practicing their craft, when "well below ten percent" of the mandatory cosmetology curriculum was relevant to African hair braiding. Under the facts of this case, Defendants have established that the animal husbandry practice at issue is not part of the core curriculum of any veterinary school and that specialty schools such as the Academy of Equine Dentistry offer a full curriculum on the subject – which is why both laypersons *and* licensed vets attend these schools. This last point makes Defendants' case even stronger than that of the plaintiff in *Cornwell* by making concrete a matter that was only speculative in that case; veterinary schools present so little training in regard to floating that even licensed veterinarians seek training elsewhere if they intend to specialize in this sort of work, meaning that the educational burden for a floater consists not only of the incredible time and money necessary to complete veterinary school, but of the additional specialized training as well. *See id.* at 1112. Not only must veterinarians seek additional training to become competent floaters, they frequently seek

this training *in the same specialized schools attended and taught by non-veterinarian floaters*. Thus, merely holding a veterinarian's license says nothing about whether a person may be presumed to be trained or competent to float horses' teeth, and restricting floating (and other animal husbandry practices) to veterinarians would exclude a number of trained, competent laypersons from providing needed services to Missouri's livestock owners. These facts demonstrate that Missouri's veterinary licensure requirements violate horse teeth floaters' right to earn a living.

In *Craigmiles v. Giles*, the Sixth Circuit confronted a slightly different argument about health and safety, but still ended up rejecting the regulations at issue in that case. Tennessee had argued that casket salespersons needed to be licensed funeral directors to ensure that the caskets being sold were adequate to prevent the spread of disease. The court found this argument unpersuasive. Not only was there no evidence that the caskets sold by licensed funeral directors were any safer than those sold by the plaintiffs, the law permitted citizens to build their own caskets or to obtain a casket from friends — as long as they do not pay for it! — or even to bury a body with no casket at all. *Craigmiles*, 312 F.3d at 225. The court determined that "[e]ven if casket selection has an effect on public health and safety, restricting the selling of caskets to licensed funeral directors bears no rational relationship to managing that effect." *Id.* at 226. The same reasoning applies to the facts before this Court. Petitioner has not suggested that Defendants or other non-veterinarian floaters are providing services that are particularly dangerous. In fact, Petitioner has no evidence that floating poses *any* significant threat to the health, safety, or welfare of Missourians. Furthermore, as in *Craigmiles*, the law at issue allows horse

owners with no training at all to float their own animals' teeth or to have unskilled friends or neighbors do the work — as long as they do not pay for it! — or to forgo having their horses' teeth floated altogether. This clearly shows that any interest the state might have in protecting health, safety, and welfare by applying the licensing requirements is vanishingly slight, and it is in no way advanced by requiring floaters to become licensed veterinarians before accepting compensation for services provided to Missouri's livestock owners.

Petitioner cited *Missouri Dental Board v. Alexander*, 628 S.W.2d 646 (Mo. 1982), a case in which the Missouri Supreme Court rejected a denture fitter's claim that that he shouldn't have to obtain a dental license to do his work. In that case the court relied upon factual findings of the sort that Petitioner cannot present in this case — particularly that "[o]nly a dentist has the education and training necessary" to perform the sort of work the *Alexander* defendants sought to perform. *Id.* at 648. As discussed above, the facts of this case show that veterinarians cannot be assumed to have "the education and training necessary" to float horses' teeth, and many non-veterinarians are highly skilled in this practice. *Alexander* is not on point and cannot control the outcome of the instant case.

Defendants have shown, through the facts established in raising their affirmative defenses and application of the reasoning of several courts, that this Court *could* find that Petitioner's attempted application of section 340.216 would violate Defendants' right to earn a living, as protected by the Due Process clauses of the Fourteenth Amendment and Article I, section 10, of the Missouri Constitution. As such, the Court cannot grant

Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' First Affirmative Defense.

III. Second Affirmative Defense: Substantive Due Process – Arbitrary Classifications

Neither Petitioner's Motion for Partial Judgment on the Pleadings nor its Reply addressed the substance of Defendants' argument in regard to Article III, section 40(30), of the Missouri Constitution. As discussed in Defendants' Response to Petitioner's Motion, section 340.216.1, RSMo., allows compensated non-veterinarians (horse owners' full-time employees) to float horses' teeth, and it does so without any regard to these non-veterinarians' training or experience. Petitioner made no effort to explain how it could be considered rational to permit this group to accept compensation for floating teeth, but not to permit trained, experienced non-veterinarian floaters to do so, nor did Petitioner make any effort to explain how this distinction is in any way related to advancing its asserted interest in protecting the public health and safety.

Petitioner did attempt to suggest that a distinction between compensated services and uncompensated services might be consistent with Missouri precedent, citing *Hulse v. Criger*, 247 S.W.2d 855 (Mo. banc 1952), *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo banc 1992), and *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008), but there are two problems with Petitioner's use of these cases. First, Petitioner fails to indicate how animal husbandry practitioners' acceptance of compensation has any relationship to the public health, safety, or welfare. Second, the cited cases are completely irrelevant to the issues raised by the case before this Court. Each of these

cases evaluated whether various professionals were illegally practicing law by filling out forms and offering legal advice separate from the contracts they dealt with. While Petitioner suggests that the cases stand for the proposition that it is reasonable for a statute to make a distinction based on whether one accepts compensation for work, the cases *never address this issue* – Article III, section 40(30) is not even mentioned in any of the cases, and none includes any substantive analysis of the rationality of distinguishing between compensated services and uncompensated services.

As established above, 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. This court cannot grant Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' Second Affirmative Defense.

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

Regarding the Third Affirmative Defense, Petitioner's Reply does more to confirm Defendants' right to enjoy the gains of their own industry than it does to refute that right. Petitioner repeated its unsubstantiated assertion that the government has a rational basis

for distinguishing between compensated labor and uncompensated labor, but none of the cases it cited for that proposition addressed citizens' right to enjoy the gains of their industry. Even if the Court found for the purposes of other affirmative defenses that the legislature could rationally distinguish between work performed for compensation and work provided *gratis*, that reasoning could not be applied to Defendants' Third Affirmative Defense.

As discussed in Defendants' Response, in *Moler v. Whisman*, 147 S.W. 985 (Mo. 1912), the Missouri Supreme Court held that a law prohibiting barber students and instructors from accepting compensation for their services violated the Missouri Constitution's guarantee of citizens' natural right to enjoy the gains of their own industry. Nothing in the law at issue in *Moler required* these workers to provide barbering services; the workers would have suffered no adverse consequences if they had chosen to do something else with their time. The Court's holding in *Moler* hinged on the fact that, while the law permitted these citizens to provide their services if they made no charge for them, the plaintiffs were deprived of the right to enjoy the gains of their industry because the law forbade them to accept compensation for those services. This is precisely the same situation as presented by the instant case. Section 340.216.1 permits Defendants (or any other layperson, trained or otherwise) to float horses teeth, as long as they are not compensated for doing so. According to the Missouri Supreme Court's reasoning in *Moler*, this violates Article I, section 2, of the Missouri Constitution because it deprives Defendants of their right to enjoy the gains of their industry.

Petitioner's Reply correctly suggests that *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. banc 1985), stands for the proposition that the right to enjoy the gains of one's industry only applies if the government is compelling a citizen to work without compensation. In that case an attorney had been assigned to represent an indigent "without compensation and without provision for litigation expenses." *Id.* at 759. The government's position in that case was that, as an officer of the court, the attorney's acceptance of the work was not optional. As Petitioner noted, Missouri Supreme Court ruled that attorneys could not be compelled to provide services without compensation. Nothing about the facts or reasoning in *Roper* affected the Missouri Supreme Court's reasoning in *Moler*. *Moler* makes clear that Article I, section 2, of the Missouri Constitution does not permit the government to deprive a citizen of the right to accept compensation for services that would otherwise be lawful. This Court cannot grant Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' Third Affirmative Defense.

V. Fourth Affirmative Defense: Freedom of Speech

Regarding the Fourth Affirmative Defense, it appears that Petitioner has definitively waived its original argument that Defendants had violated section 340.216.1 by allegedly "participat[ing] in an interview with *Homestead* magazine, in which she discussed equine dentistry and discussed the 'floating' procedure with reporter Dean Houghton." (Petition ¶ 17). Because Petitioner continues to maintain that non-veterinarian citizens would violate section 340.216.1 if they distributed cards indicating

that they provide equine dentistry services, the Court must still address this Affirmative Defense. Under First Amendment precedent, advertising is treated as "commercial speech" which, while not entitled to the strict scrutiny afforded other types of speech, is still entitled to constitutional protection.[5]

This Court should not assume that a business card advertises unlawful services. Unless an advertisement indicates that there will be a charge for the services advertised it cannot be presumed that the services offered would be unlawful, nor should this Court presume that the services advertised would be provided in the state of Missouri. If Missouri citizens choose to avail themselves of the advertised services and those services are provided in another state, such as Kansas, Oklahoma, or Iowa, they would not violate Missouri law and they would be beyond Petitioner's jurisdiction. In fact, many states permit businesses to advertise out-of-state services that would be illegal if provided in the state where advertised.[6] Advertisements are entitled to constitutional protection and because Petitioner has alleged that certain advertisements would violate section 340.216, this Court cannot grant Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' Fourth Affirmative Defense.

VI. Fifth Affirmative Defense: Procedural Due Process

Petitioner asserts that *United Pharmacal Co. of Missouri v. Board of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006), has no relevance to the instant case because the court

[5] Defendants reassert their contention that Article I, section 8, of the Missouri Constitution does not permit Missouri courts to afford a lesser level of protection for speech based on its subject matter or content.
[6] For example, many states forbid the operation of casinos within their borders, but they cannot prohibit out-of-state casinos to advertise to their citizens.

in that case did not reach the due process claim asserted by the plaintiffs. The court's reasoning in *United Pharmacal* is certainly applicable to the facts before this Court, even if this Court considers Defendants' Procedural Due Process claim to be a matter of first impression.

It is undisputed that the current Veterinary Practice Act has been on the books for nearly twenty years and that for that entire time members of the Veterinary Medical Board has been aware that non-veterinarian laypersons have been providing animal husbandry services for compensation. Even prior to the current version of the Veterinary Practice Act, the legislature had authorized the pursuit of criminal penalties and injunctive relief to prevent the unlicensed practice of veterinary medicine. Nevertheless, in more than 105 years of regulating the practice of veterinary medicine, this case is the *very first* that a government body has filed, either criminal or civil, suggesting that horse teeth floating constitutes such practice.

Petitioner makes the perplexing contention that this litigation is all the due process to which Defendants (and all similarly situated) are entitled, yet Petitioner also argues that this court is not *permitted* to evaluate whether there was good reason for the government to suddenly decide that, after more than a century of coexistence with Missouri's veterinary practice laws, animal husbandry workers are no longer free to assist farmers and ranchers who need help dealing with their livestock. "When something as valuable as the right to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection

against arbitrary, capricious, and unreasonable government action." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 589 (1972) (Justice Marshall, dissenting). This Court should permit Defendants to introduce facts supporting their contention that the constitutional guarantee of procedural due process requires a regulatory agency to offer an explanation of its reasons before it applies a longstanding statute in a *literally* unprecedented way. This Court cannot grant Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' Fifth Affirmative Defense.

VII. Sixth Affirmative Defense: Equal Protection

Defendants' Sixth Affirmative Defense is concerned with the ways in which Missouri citizens are treated differently under sections 340.216.1 and 340.276. If a government is going to apply a law differently to similarly-situated citizens, the Equal Protection guarantees enshrined in the Fourteenth Amendment and Article I, section 2, of the Missouri Constitution require the government to have a legitimate interest in doing so, and the differences in treatment must be rationally related to that interest.[7] As established in Defendants' Response to Petitioner's Motion for Partial Judgment on the Pleadings, section 340.216.1 creates formal classifications and Petitioner's selective application of section 340.276 creates informal classifications. While Petitioner's Reply only addressed the formal classifications, Defendants challenge both types.

[7] Defendants' Response offers a full explanation of *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), which establishes the proper analysis of Equal Protection challenges in the context of occupational licensing laws. Defendants will not belabor the arguments made in their Response, but they do wish to point out that Petitioner's Reply blatantly misstated the Ninth Circuit's holding in *Merrifield*. While Petitioner claimed that "the *Merrifield* court consider[ed] due process and equal protection claims... and reject[ed] them all," (Petr. Reply at 8), the *Merrifield* court actually ruled that California had violated the Fourteenth Amendment's Equal Protection Clause by exempting certain non-pesticide-using pest controllers from licensing requirements while refusing to exempt other non-pesticide-using pest controllers from licensing requirements. *Merrifield*, 547 F.3d at 992.

Petitioner never argued that the exemptions found in section 340.216 are supported by the state's interest in protecting the public health and safety, but Defendants infer that this argument will eventually arise.[8] Defendants concede that the legislature might rationally conclude that it would be consistent with public health and safety concerns to exempt various out-of-state veterinarians, veterinary students, veterinary technicians, government workers, or persons in emergency situations from the statute's prohibitions. The set of exemptions that *cannot* rationally be squared with any public health or safety interest are those found in section 340.216.1(5), which exclude animal owners and their full-time employees, and the group of non-veterinarians who would be willing to perform various types of work on animals without receiving compensation. Defendants incorporate by reference the arguments they made on this point above in regard to their Third Affirmative Defense.

Both at the hearing on this Motion and in its Reply, Petitioner did attempt to justify these exemptions by stating that the government interest in allowing animal owners "to take risks with their own property." (Petr's Reply at 16). At the hearing, Petitioner argued that animal owners could be trusted to decide for themselves whether to perform animal husbandry on their own livestock, to compensate a full-time employee to do the work, or to ask an uncompensated neighbor to do the work. Petitioner suggested that this distinction reflects the legislature's drawing a line between permissible

[8] Petitioner suggests that section 340.216.1 does not "exempt" uncompensated non-veterinarians from the definition of "veterinary medicine" because the definition is so written as *not to include* uncompensated non-veterinarians. Semantics aside, the important point for the purposes of Equal Protection analysis is that the law allows one group of people to engage in a certain behavior (in this case, basic animal husbandry), while forbidding another group to engage in the same behavior.

"treatment of one's own property" and decisions that threaten "foreseeable injury to others." (*Id.*). Defendants do not challenge the government's interest in allowing animal owners "to take risks with their own property." The question is whether the legislature has drawn a rational line between risks that livestock owners are *permitted* to take and risks that the law *forbids* them to take. It has not.

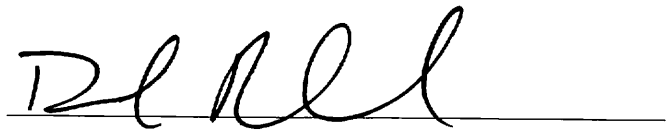
From Petitioner's perspective, an animal owner can be trusted to choose to work on their own livestock, regardless of their training or experience in doing that kind of work. An animal owner can be trusted to choose a full-time employee to work on their livestock, regardless of that employee's training or experience in doing that kind of work. An animal owner can be trusted to choose an uncompensated friend, neighbor, or even a stranger to work on their livestock, regardless of any of those persons' training or experience in doing that kind of work. And an animal owner can be trusted to choose a licensed veterinarian to work on their livestock, regardless of the vet's training or experience doing that kind of work. In fact, the *only* time the government suggests that an animal owner cannot be trusted to make this decision for themselves is when the owner might choose to pay a trusted non-veterinarian to help them out — in which case no level of training, experience, or customer satisfaction could save that worker from thousand-dollar fines and incarceration if the wrong people found out about their crime. Especially when the established facts show that many non-veterinarians are at least as competent as most licensed vets to perform basic animal husbandry tasks, the lines the legislature has drawn simply cannot be considered rational.

Petitioner never attempted to assert any government interest or rationale that would justify filing a lawsuit against Defendants while refraining from filing similar lawsuits against laypersons providing any of a range of other animal husbandry services, most of which are more threatening to public health and safety than floating horses' teeth. Petitioner's only response to this point has been that horse teeth floaters are not a "suspect classification" entitled to higher levels of scrutiny under Equal Protection analysis. (Petr's Mot. for Part. Judg. on Pleadings at 14). Of course, this simply means that the Court must apply the rational basis test to Defendants' constitutional claim — it does not relieve Petitioner of having to address it. Because Petitioner has made absolutely no effort to counter Defendants' challenge to the informal classifications the Board has made in enforcing section 340.276, it has not even remotely established its entitlement to have this affirmative defense dismissed. This Court cannot grant Petitioner's Motion for Partial Judgment on the Pleadings in regard to Defendants' Sixth Affirmative Defense.

VIII. Conclusion

For these reasons, Defendants respectfully request that the Court overrule Petitioner's Motion for Partial Judgment on the Pleadings.

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 March 1, 2011, addressed to:

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