



October 24, 2024

**VIA ECF**

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Catherine O'Hagan Wolfe  
Clerk of Court  
United States Court of Appeals for the Second  
Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, NY 10007

**Re: Council for Responsible Nutrition v. James, No. 24-1343**

Dear Ms. Wolfe:

This firm represents Appellant, Council for Responsible Nutrition (“CRN”), in the above-referenced appeal, which is fully briefed and pending oral argument. CRN respectfully submits *Hines v. Pardue*, No. 23-40483, 2024 WL 4297014 (5th Cir. Sept. 26, 2024) as supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j). The Fifth Circuit’s recent decision in *Hines* supports reversal of the District Court’s denial of CRN’s request for a preliminary injunction enjoining the New York Attorney General’s enforcement of N.Y. Gen. Bus. Law § 391-00 (the “Act”).

In *Hines*, the Fifth Circuit analyzed whether a Texas law regulating veterinary practice—and in particular, requiring veterinarians to conduct an in-person physical examination prior to engaging in speech relating to the practice of veterinary medicine—violated the First Amendment. *Hines* at \*4-7. The court made clear that merely “calling an act ‘speech’ or ‘conduct’ (or ‘actions’) does not make it speech or conduct for First Amendment analysis.” *Id.* Relying on the same case law CRN relies in its appellate briefing, the court held it must “determine whether the physical-examination requirement *primarily* affects [the plaintiff’s] speech ... or his conduct by looking at ‘what trigger[s] coverage under the statute.’” *Id.*

Applying this analysis, the Fifth Circuit held the challenged law regulated speech, not conduct. *id.* at \*6-7. The Fifth Circuit was persuaded by the fact that plaintiff’s alleged violation of the law involved “email exchanges in which he communicated individualized diagnoses and treatment plans with various animal owners.” *See id.* at \*6. The court recognized that the plaintiff was “penalized . . . for his *communication*,” *id.*, and concluded that “[b]ecause the act in which Dr. Hines engaged that ‘trigger[ed] coverage’ under the physical-examination requirement was the communication of a message, the State primarily regulated [plaintiff’s] speech.” *Id.*

The *Hines* decision also offers further support for application of a rigorous intermediate scrutiny analysis. *See id.*

Catherine O'Hagan Wolfe  
October 24, 2024  
Page 2

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Respectfully submitted,

COZEN O'CONNOR

*/s/ Michael de Leeuw*

By: Michael B. de Leeuw

cc: All Counsel (via ECF)