

1998

HORTON HODSEN, as agent for
Nutriphysiology (previously known as
Nutribionics and Biochem Research Services), and
for himself personally, as Horton E. Tatarian, and
GAIL ANDERSON v. CRAIG JACKSON,
Director of the Division of Occupational and
Professional Licensing, Department of Commerce,
State of Utah, in his official capacity : Appellant's

Reply Brief
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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HORTON HODSEN, as agent for)	
Nutriphysiology (previously known)	
as Nutribionics and Biochem)	Appellate No. 981554 — CA
Research Services), and for himself)	
personally, as Horton E. Tatarian, and)	
GAIL ANDERSON,)	
)	
Plaintiffs,)	Priority # 15
)	
vs.)	
)	
CRAIG JACKSON, Director of the)	
Division of Occupational and)	Appeal from the order of the
Professional Licensing, Department)	Fifth Judicial District Court,
of Commerce, State of Utah, in his)	Washington County, The
official capacity,)	Honorable James L. Shumate
)	
Defendant.)	

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Utah Court of Appeals

AUG 11 1999

Julia D'Alesandro
Clerk of the Court

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TABLE OF CONTENTS

Cover page	i
Table of Contents	ii
Table of Authorities	iv
Constitutional Provisions	iv
Cases	iv
Utah Appellate Opinions	iv
Federal Opinions	v
Other State Opinions.	v
Statutes	vi
Utah Statutes	vi
Other State Statutes..... .	vi
Other Authorities	vi
POINT I: REPLY TO STATEMENT OF FACTS BY DOPL	1
A. Lack of Factual Foundation Makes Various Statements and Arguments by DOPL Irrelevant	1
B. Ignoring Factual Stipulations Regarding Hodsen and Anderson Does Not Change Their Legal Relevance.	3
C. Any “Legal Argument” in the Statement of Facts of Hodsen Can Be Clarified on Reply as “Fact” or “Law”.	4

POINT II: AS APPLIED TO HODSEN AND ANDERSON, UMPA IS NOT JUSTIFIED BY COMPELLING INTERESTS AND IS OVERBROAD.	5
A. As Applied, UMPA is Not Justified By a “Compelling” Governmental Interest	6
B. As Applied to Hodsen and Anderson, UMPA Is Overbroad.	7
POINT III: LEGAL PRECEDENT OF DOPL DOES NOT JUSTIFY THE PROHIBITING OF EXCHANGE OF TRUTHFUL INFORMATION	9
A. Hodsen and Anderson Have Properly Presented Different Analysis of Protections of the Utah and United States Constitutions.	9
B. The Precedent Relied Upon By DOPL to Justify UMPA Is Not Relevant to the Facts of this Case.	10
POINT IV: THE RELIGIOUS FREEDOMS OF ANDERSON ARE SPECIFICALLY VIOLATED BY UMPA	13
POINT V: THE PROHIBITION ON HODSEN’S PROPOSED MODIFIED USE OF “M.D.” UNJUSTIFIABLY INFRINGES ON HIS SPEECH RIGHTS	20
CONCLUSION	23
CERTIFICATE OF HAND DELIVERY.	24

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution, First Amendment.	11
Utah Const., Article I § 4	15
Utah Const., Article I § 11.	6
Utah Const., Article III § 1.	15
Washington Const., Art. I § 11.	19

Cases

Utah Appellate Opinions

<u>Board of Commissioners of the Utah State Bar v. Peterson</u> , 937 P.2d 1263 (Utah 1997).	7
<u>Elks Lodge # 719 and # 2021 (Moab) v. Department of Alcoholic Bev. Control</u> , 905 P.2d 1189 (Utah 1995) <u>cert. denied</u> 517 U.S. 1221, 116 S.Ct. 1850, 134 L.Ed.2d 950 (1996).	8, 15
<u>Jeffer v. Stubbs</u> , 917 P2d. 1234 (Utah 1998)	6
<u>J.M., N.P., and R.S. v. State of Utah</u> , 940 P.2d 527 (Utah Ct. App. 1997).	7
<u>Marboy v. Utah State Tax Commission</u> , 904 P.2d 662 (Utah 1995) . .	7
<u>West v. Thomson Newspapers</u> , 872 P.2d 999, 1004 (Utah 1994) . .	11

Federal Opinions

<u>Crane v. Johnson</u> , 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348 (1917).	16
<u>Ibanez v. Florida Dept. of Business and Professional Regulation</u> , 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994)	22
<u>Lowe v. Securities Exchange Commission</u> , 472 U.S. 181, 211, 105 S.Ct. 2557, 2573, 86 L.Ed.2d 130 (1985), (White, J., concurring in result).	9,11
<u>Accountants' Society of Virginia v. Bowman</u> , 860 F.2d 602 (4 th Cir. 1988).	12
<u>Peckham v. Thompson</u> , 745 F. Supp. 1388 (C.D.C. Ill. 1990) <u>remanded with instructions</u> , 966 F.2d 295 (7 th Cir. 1992)	20
<u>Rutherford v. United States</u> , 616 F.2d 455 (10 th Cir. 1980) <u>cert. denied</u> 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 937 (1980). ..	19,20

Other State Opinions

<u>Accountants' Association of Louisiana v. State of Louisiana</u> , 533 So.2d 1251, 1254-1255 (La. Ct. App. 1988), <u>cert. denied</u> 538 So.2d 593 (La. 1989), <u>cert. denied sub. nom. Louisiana</u> <u>Society of Independent Accountants v. Louisiana</u> , 493 U.S. 813, 110 S.Ct. 60, 107 L.Ed.2d 28 (1989)	13
<u>In re Rowe</u> , 80 N.Y.2d 336, 604 N.E.2d 728, 590 N.Y.S.2d 179 (Ct.App. 1992).	12,21
<u>People v. Vogelgesang</u> , 221 N.Y. 290, 116 N.E. 977 (Ct. App. 1917).	16
<u>Steina v. State ex. rel. Medical Licensing Board of Indiana</u> , 513 N.E.2d 1234 (Ind. Ct. App. 1987).	18
<u>Washington v. Verbon</u> , 167 Wash. 140, 8 P.2d 1083 (1932).. . . .	17

Statutes

Utah Statutes

U.C.A. § 58-49-1. 1

U.C.A. § 58-67-102 (4)(d).1,2, 18

U.C.A. § 58-67-102 (8)(d) 22

U.C.A. § 58-67-305 (3)(a)(i)16

U.C.A. § 58-67-305 (3)(a)(ii)17

U.C.A. § 58-67-305 (3)(b)17

U.C.A. § 58-67-305 (4) 16

Other State Statutes

Burns Ind. Code Ann. § 25-22.5-1-1.1 (1998). 18

O.R.S. § 667.010 (1997).18

Other Authorities

Doctrine and Covenants 89: 11 4

POINT I

REPLY TO STATEMENT OF FACTS BY DOPL

A. Lack of Factual Foundation Makes Various Statements and Arguments by DOPL Irrelevant

DOPL correctly states that Hodsen is not licensed as a dietitian in the State of Utah.¹ However, this statement is legally irrelevant because certification (rather than licensure) of dietitians in Utah is only necessary for those who use the initials “C.D.” or “D.” In both the original and present DOPL proceedings, there is no evidence that Hodsen has ever used the initials “C.D.” or “D.”; hence, the question of certification under the Dietician Certification Act is not relevant.²

DOPL correctly states that Judge Eves previously found that the exchange of information between Hodsen and Anderson constituted “diagnosis”.³ The UMPA prohibition applicable at this time to Hodsen and Anderson only prohibits “diagnosis”; DOPL did not place in the stipulated facts presented to Judge Shumate, nor raise in the arguments before Judge Shumate, that the prohibited conduct of Hodsen was more than “diagnosis”. Nonetheless, DOPL’s present legal argument claims that Hodsen’s conduct “included the actual diagnosis of and

¹ DOPL Brief at 5.

² See U.C.A. § 58-49-1 et. seq.

³ U.C.A. § 58-67-102(4)(d).

prescription of treatment for specific human ailments and medical considerations for monetary consideration.”⁴ DOPL’s later citation of legal precedent that addresses prohibitions on medical “treatment” or “procedure” is a continuation of DOPL’s erroneous reliance on the existence of facts or prohibitions beyond the limited aspect of “diagnosis” relying on truthful and non-misleading information.⁵

Furthermore, no factual stipulations or findings have been made as to monetary consideration involved in the “diagnosis” that occurs when Hodsen uses truthful and non-misleading information provided by Anderson when he gives truthful and non-misleading advice to Anderson. Even if Hodsen’s compensation were assumed to be based on the sale to Anderson of the recommended herb or other product of nature, it was specifically stipulated that Anderson (or any other customer) need not purchase any of the product from Hodsen.⁶

Thus, these legal arguments are irrelevant because they are without factual foundation.

⁴ DOPL Brief at 17.

⁵ See U.C.A. § 58-67-102(4)(d). Furthermore, the statutory exemption for those involved in the “sale of vitamins, health foods, dietary supplements, herbs or other products of nature, the sale of which is not otherwise prohibited by state or federal law” is only limited by those who “diagnose” a condition; to “treat, correct, or prescribe” or “advise” (deleted from the definition of the practice of medicine in 1996) is exempted from licensure.

⁶ See Agreed Statement of Undisputed Facts ¶ 23; Record at 283.

B. Ignoring Factual Stipulations Regarding Hodsen and Anderson Does Not Change Their Legal Relevance

The material facts of this case were established by stipulation and affidavit of Anderson in the district court below . DOPL “objects to Hodsen’s statement of facts because it mixes stipulated facts with argument.”⁷ This statement does not justify ignoring facts that show varied conditions that may be constitutionally significant in protecting the constitutional rights of Hodsen and Anderson.

For example, as it relates to Hodsen, DOPL has failed to (1) acknowledge that the information provided to Hodsen can be “a written diagnosis by a licensed health care provider indicating . . .a certain health condition,” (2) that Hodsen identifies what he “believes the nutritional needs of the person most likely are, and determines what uncontrolled and lawful herbal or other products of nature would likely contribute to satisfying those needs,” and (3) that Hodsen may or may not disclose the rationale for the advice that he gives to the recipient of his advice.⁸

As it relates to Anderson, DOPL has failed to acknowledge that (1) Anderson’s health condition had not responded to conventional medical treatment, (2) Anderson consulted with Hodsen when DOPL had determined he was exempt from licensure, (3) her condition has become manageable and her quality of life has

⁷ DOPL Brief at 5 n. 1.

⁸ R. at 282-283; Hodsen and Anderson’s Opening Brief at 10-11.

vastly improved, (4) Anderson is and has been under the care of a licensed physician and acupuncturist, (5) Anderson desires the advice or information from Hodsens to formulate her religious beliefs regarding the use of wholesome herbs and other products of nature “with prudence and thanksgiving”⁹ and receive both physical and spiritual blessings by her exercise of this belief, and (6) her inability to receive the information essential to her formulation of belief and exercise has damaged her physically, spiritually, and diminished her quality of life.¹⁰

These factual omissions are legally significant in both state and federal constitutional analysis addressing the validity of DOPL’s need to protect the “public health” as applied to Hodsens and Anderson, the significance of the 1996 deletion of the word “advise” from the definition of “practice of medicine,” and the nature of the religious belief that Anderson desires to form and exercise.

**C. Any “Legal Argument” in the Statement of Facts of Hodsens
Can Be Clarified on Reply as “Fact” or “Law”**

Hodsens and Anderson included in their Statement of Facts an explanation of how their exchange of truthful and non-misleading information was prohibited under the definitions of “diagnose” and the “practice of medicine.”¹¹ Hodsens and

⁹ Doctrine and Covenants 89:11.

¹⁰ See references to the Record in Hodsens and Anderson’s Opening Brief at 8, 11-14.

¹¹ See Opening Brief of Hodsens and Anderson at 8-12.

Anderson believed such an explanation was a necessary inference of the stipulated facts, e.g. to show why after 1996 their previously lawful conduct now exposed them to criminal and civil prosecution. To the degree that this explanation was not properly stated as facts, Hodsen and Anderson request that this portion of the disputed “facts” be recognized as an legal explanation of how the exchange of truthful and non-misleading information by Hodsen and Anderson in this case violates the statutory provisions prohibiting a person to “diagnose” when marketing lawful herbs and other products of nature, and incorporate the same in this brief.

POINT II

AS APPLIED TO HODSEN AND ANDERSON, UMPA IS NOT JUSTIFIED BY COMPELLING INTERESTS AND IS OVERBROAD

In determining whether the State may act to override an individual’s freedom to reject government’s paternalistic protection, a balancing of the necessity of the State’s interest for the public good must be weighed against the importance of the individual’s rights as recognized in express constitutional texts. Generic exercise of governmental power is restricted when it infringes upon or impedes the individual exercise of inherent and inalienable, or fundamental rights.

**A. As Applied, UMPA is Not Justified By
a “Compelling” Governmental Interest**

Hodsen and Anderson do not dispute that Utah Supreme Court opinions have assumed that the State of Utah has a basic interest in generally regulating the practice of medicine for the benefit of the public. Both parties have quoted language from Utah Supreme Court cases recognizing that interest. However, notwithstanding DOPL’s characterization in their brief of this interest as being “compelling,” there is no Utah appellate court precedent that specifically identifies this interest as being on par with those that have been labeled as being classified as being “compelling.”

“A compelling state interest is a ‘paramount’ interest, one of ‘the highest order.’”¹² Various opinions of the Utah Supreme Court have identified situations when the State of Utah has compelling interests. Some compelling interests focus on ensuring certain rights of citizens are protected. For example, because of the rights protected by Article I § 11 of the Utah Constitution, “[t]he State has a compelling interest in insuring that all parties are able to resolve legal disputes before a neutral tribunal. . .keeping the courts open.”¹³ Others are based on the exercise of governmental power specifically referred to in the constitutional text.

¹² Jefferies v. Stubbs, 970 P.2d 1234, 1250 (Utah 1998) (citation omitted.)

¹³ Id. at 1250-1251.

For example, it is not surprising that the power to tax has been recognized as being a “compelling interest.”¹⁴ Finally, there has been judicial recognition of situations when the Legislature has identified certain interests as being “compelling.”¹⁵ However, unlike these identified interests, the regulatory practice of medicine has not been specifically recognized by Utah appellate courts as being “compelling,” or a state interest identified as such by either a specific constitutional provision mandating the same or specific determinations by the Legislature that an interest reflected in laws of general application (without exceptions) was a “compelling” governmental interest.

B. As Applied to Hodsen and Anderson, UMPA Is Overbroad

The statutory authority DOPL is relying on to regulate the truthful and non-misleading conduct of Hodsen and Anderson is overbroad.

Statutory overbreadth. . . is a substantive due process question which addresses the issue of whether ‘the statute in question is so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well.’¹⁶

¹⁴ Marboy v. Utah State Tax Commission, 904 P.2d 662, 669 (Utah 1995).

¹⁵ J.M., N.P., and R.S. v. State of Utah, 940 P.2d 527, 534 (Utah App. 1997) citing U.C.A. § 78-30-4.12(2)(a) (“The state has a compelling interest in providing a stable and permanent homes for adoptive children in a prompt manner”.)

¹⁶ Board of Commissioners of the Utah State Bar v. Peterson, 937 P.2d 1263, 1268 (Utah 1997) (citations omitted.)

In time of conflict, “[t]he less a right is protected the lower the threshold for state regulation, while the more the right deserves protection, the more compelling the state’s interest must be to merit interference.”¹⁷ Hodsen and Anderson have relied on specific provisions of the Utah or United States Constitutions that protect private or religious speech, commercial speech, or part of Anderson’s formulation of religious belief, free exercise of religious practice, and exercise of personal, physical autonomy.¹⁸ When the right asserted is expressly protected by the text of the Utah Constitution, “the more compelling the state’s interest must be to merit interference.” A general reliance on a need to protect public health is insufficient to constitute a “compelling interest” of significant enough magnitude to prevent two competent adults from formulating religious belief and practice through the truthful and non-misleading private or commercial speech regarding herbs and other products of nature that are lawfully sold in the marketplace.

¹⁷ Elks Lodge # 719 and # 2021 (Moab) v. Department of Alcoholic Bev. Control, 905 P.2d 1189, 1195 (Utah 1995), cert. denied 517 U.S. 1221, 116 S.Ct. 1850, 134 L.Ed.2d 950 (1996).

¹⁸ Anderson’s position on appeal to a right of personal autonomy and bodily integrity has been grounded on Fourteenth Amendment substantive due process precedent recognizing the same.

POINT III

LEGAL PRECEDENT CITED BY DOPL DOES NOT JUSTIFY THE PROHIBITING OF EXCHANGE OF TRUTHFUL INFORMATION

DOPL has claimed that Hodsen and Anderson have failed to properly distinguish between state and federal constitutional claims.¹⁹ DOPL has also discussed a 1985 concurring opinion by Justice Byron White of the United States Supreme Court²⁰ (which is not relevant to its other cited state or federal opinions) to suggest a form of analysis that should be followed in this case. Both positions are erroneous.

A. Hodsen and Anderson Have Properly Presented Different Analysis of Protections of the Utah and United States Constitutions

Hodsen and Anderson have properly sought protection of their inherent and inalienable rights of religion and speech under the Utah Constitution. Relevant, self-executing provisions of the Utah Constitution have been applied after determining whether or not there is informative history provided by Utah's Constitutional Convention, the text's plain language, comparable texts available from sister jurisdictions, and the relevant constitutional texts as a whole. The express State constitutional provisions relied upon are not found in the United States

¹⁹ DOPL Brief at 12-13.

²⁰ Lowe v. Securities Exchange Commission, 472 U.S. 181, 211, 105 S.Ct. 2557, 2573, 86 L.Ed.2d 130 (1985) (White, J., concurring in result).

Constitution.²¹ Seeking protection from state constitution provisions before turning to federal protections allows for greater protection of inherent and inalienable rights that have deep meaning in Utah's unique heritage and reaffirms important concepts of comity and federalism.

Federal analysis of religious rights, regulation of private and public or commercial speech, (a distinction not addressed in the text of the Utah Constitution or Utah case law), suggests a different form of analysis than that suggested by present interpretation of the Utah Constitution. Achieving a similar result — allowing truthful and non-misleading expression — can be achieved by both even though the form and nature of analysis could well be different.

B. The Precedent Relied Upon By DOPL to Justify UMPA Is Not Relevant to the Facts of this Case

DOPL has asserted that a 1985 concurring opinion by Justice Byron White and other state and federal decisions are instructive of the analysis that should be applied in this case. This claim is erroneous as a matter of law and fact.

There are at least four reasons why this court should not follow the suggestion by DOPL that the application of the UMPA to Hodsen and Anderson is

²¹ See Opening Brief of Hodsen and Anderson at 19-21 (religious freedoms).

justified by dicta in Justice Byron White's 1985 concurring opinion which explored possible constitutional constraints associated with regulating the speech by one who had previously engaged in illegal conduct regarding security laws. First, the opinion is not binding on this court or any federal court.²² Second, Hoffman II was decided by the Utah Supreme Court after the 1985 concurring opinion and made no reference to it or engaged in any of the analysis contained in the same. Third, none of the three state court opinions that were represented in DOPL's brief as "adopting. . .Justice Byron White's detailed First Amendment analysis"²³ cite or make reference to the concurring opinion or the main opinion; this is not surprising since two of the three cases were decided before the 1985 opinion was issued. Fourth, the Utah Supreme Court has already indicated a preference for Utah constitutional analysis; therefore, is no need to begin with a federal analysis.²⁴

Furthermore, the three opinions involved with regulating speech and licensure that Hodsen and Anderson have located that followed Justice White's

²² DOPL concedes as much. See Brief of DOPL at 18 n. 10.

²³ Brief of DOPL at 18.

²⁴ See West v. Thomson Newspaper, 872 P.2d 999, 1004 (Utah 1994).

analysis are also distinguishable. In 1992, the New York Court of Appeals opinion in In re Rowe²⁵ applied the opinion of Justice White to determine that a suspended attorney's preparation of a law-related article for general reading and use of initials J.D. after his name did not constitute the practice of law.²⁶ This case is distinguishable from that of Hodsen and Anderson because the conduct complained of did not involve any particular client. In 1988, the Court of Appeals for the Fourth Circuit in Accountants' Society of Virginia v. Bowman,²⁷ held that "the restrictions imposed . . . on the use of certain terms in the work product of non-CPAs, amount to the permissible regulation of a profession, not an abridgement of speech by the first amendment."²⁸ This opinion prohibited certain speech engaged in by the non-licensed persons; in this case the source of the communication that is prohibited by UMPA arises from the speech of others, even if the speech is (1) in writing from a licensed health care provider, (2) derived from government approved, home-use testing equipment, (3) derived from a religiously based or spiritual experience of the speaker, or (4) based on oral or written history provided by the person. A 1988 in the opinion of the Louisiana Court of Appeals opinion in

²⁵ 80 N.Y.2d 336, 604 N.E.2d 728, 590 N.Y.S.2d 179 (Ct. App. 1992).

²⁶ Id. at 342, id. at 741.

²⁷ 860 F.2d 602 (4th Cir. 1988).

²⁸ Id. at 604.

Accountants' Association of Louisiana v. State of Louisiana,²⁹ forbade non-licensed accountants from issuing "review" reports (which are less than audits but more than simply information gathering) which stated they were "prepared in accordance with established standards" rather than the phrase "in accordance with the standards established by the American Institute of Certified Public Accountants". This prohibition is distinguishable from this case because the providing of information by a client to an unlicensed accountant was not forbidden nor his truthful and non-misleading communication in return. The truthful and non-misleading information provided by Hodsen does not claim or imply it is in accordance with the standards of any organization of persons licensed by the State of Utah.

POINT IV

THE RELIGIOUS FREEDOMS OF ANDERSON ARE SPECIFICALLY VIOLATED BY UMPA

Anderson's religious beliefs regarding the use of herbs and other products of nature with "prudence and thanksgiving" depend upon and find meaning and enlargement in conjunction with the receipt of secular as well as Divinely inspired information. Before the 1996 amendments to UMPA, Anderson had been allowed to provide truthful and non-misleading information to Hodsen regarding herself and

²⁹ 533 So.2d 1251, 1254-1255 (La. Ct. App. 1988), cert. denied 538 So.2d 593 (La. 1989), cert. denied sub. nom. Louisiana Society of Independent Accountants v. Louisiana, 493 U.S. 813, 110 S.Ct. 60, 107 L.Ed.2d 28 (1989)

receive truthful and non-misleading information about herbs and other products of nature from Hodsen. DOPL, Hodsen and Anderson knew that Hodsen was not licensed as a physician but had graduated from medical school and thereafter gained substantial education and experience regarding the beneficial uses of herbs and other products of nature. Hodsen and Anderson believed Hodsen sought and received Divine inspiration in providing suggestions to Anderson who was free to purchase or not purchase lawful products from Hodsen. DOPL does not contest that Anderson's beliefs are sincerely held or that as a result of the 1996 amendments, Anderson is unable to share and receive information that has harmed her, damaged her physically and spiritually, and diminished her quality of life. The State's prohibition of an exchange of information under these circumstances is significantly different from the example given in DOPL's brief regarding having an unlicensed driver drive a vehicle for another person.³⁰ There is no express constitutional right — much less an inherent and inalienable one — to have or use a driver's license.³¹ Thus, DOPL's driver's license analogy is only

³⁰ See DOPL Brief at 30.

³¹ Obviously such a right could not have been considered at the 1896 Constitutional Convention before widespread use of automobiles, creation of roads, gasoline taxes, and licensing requirements. No express text guarantees the right to drive on public roads.

relevant to those rights where “the less a right is protected, the lower threshold for state regulation”.³²

On the other hand, an inherent and inalienable right to engage in truthful speech to formulate religious belief and act thereon in accordance with one’s conscience has been assumed to exist from the founding of our nation. The Utah constitution’s guarantee of “[p]erfect toleration of religious sentiment”³³ and assurance that “the rights of conscience shall not be infringed”³⁴ are mandates that this type of conduct merits constitutional protection from any infringement or inhibition imposed by a lawfully constituted government except in the most exigent circumstances. As these rights of Anderson and other prospective clients are subject to specified protections provided in the Declaration of Rights in Utah’s constitution, examination of infringement upon or impediment to the exercise of their rights is more analogous to those situations where “the more the right deserves protection, the more compelling the state’s interest must be to merit interference.”³⁵

³² Elks Lodge # 719 and # 2021 (Moab) v. Department of Alcoholic Bev. Control, *supra*, 905 P.2d at 1195.

³³ Utah Const., Art. III § 1.

³⁴ Utah Const., Art. I § 4.

³⁵ Elks Lodge # 719 and # 2021 (Moab) v. Department of Alcoholic Bev. Control, *supra*, 905 P.2d at 1195.

The legal authorities relied upon by DOPL to justify prohibiting the exchange of truthful information are distinguishable from the facts and law applicable to this case. The 1917 United States Supreme Court case Crane v. Johnson³⁶ was decided solely on the basis of an Fourteenth Amendment equal protection challenge. Since neither Hodsen nor Anderson have asserted this claim under either the Utah or the United States Constitution, this precedent is irrelevant.

The 1917 case of People v. Vogelgesang³⁷ determined that an unlicensed practitioner could not use a religious exemption to licensure when treatment provided involved both spiritual components and application of temporal remedies. This is distinguishable in two ways from this case. First, Hodsen has not asserted that his conduct is protected by the traditional religious exemption of UMPA.³⁸ (Because Hodsen has not done so, Anderson may not seek truthful information from Hodsen regarding lawful products of nature unless Hodsen receives no truthful information from her or anyone else regarding any condition of Anderson.) Second, in the absence of diagnosis, UMPA does not require the licensure of those involved in sale of herbs and other products of nature³⁹ nor prohibit the exchange of truthful

³⁶ 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348 (1917).

³⁷ 221 N.Y. 290, 116 N.E. 977 (Ct.App. 1917).

³⁸ See U.C.A. § 58-67-305(4).

³⁹ See U.C.A. § 58-67-305(3)(a)(i).

and non-misleading information regarding herbs and other products of nature.⁴⁰ Thus, both Hodsen's position and that of the State of Utah is contrary to the decision of New York to narrowly limit a religious exemption to medical licensure as applying solely to religious means and not religious and secular means.

The 1932 Washington Supreme Court opinion of Washington v. Verbon⁴¹ is also distinguishable. In response to a contention that Verbon's religious freedom was being violated, the Washington Court held

[t]he enforcement of reasonable and necessary regulations in the practice of medicine, so commonly provided for under the statutes of the different states enacted under the general police power as essential in the preservation of the public health and general welfare, must not be taken to be violative of this provision of the constitution.⁴²

These observations are distinguishable from this case for at least two reasons. First, only three states presently define "diagnose" or "diagnosis" so that the

⁴⁰ "Exemption from licensure is allowed for "a person acting in good faith for religious reasons, as a matter of conscience, or based on personal belief, when obtaining or providing any information regarding health care and the use of . . . [herbs or other products of nature, which is not otherwise prohibited by state or federal law]." U.C.A. § 58-67-305(3)(a)(ii). This exemption, however, does "not allow a person to diagnose" or "prohibit providing truthful and non-misleading information regarding any of the products under Subsection 3a(i)." U.C.A. § 58-67-305(3)(b). Perhaps the tension between not prohibiting truthful and non-misleading information regarding herbs, protecting access to information about the same, and prohibiting diagnosis arose simply because of the failure of those amending the legislation to recognize that Utah's unique definition of diagnosis included solely reliance on information rather than the more tradition components that are also included in the definition.

⁴¹ 167 Wash. 140, 8 P.2d 1083 (1932).

⁴² Id. at 148-149, id. at 1086.

prohibited conduct may include only reliance on information supplied by another. The three states are Indiana,⁴³ Oregon,⁴⁴ and Utah.⁴⁵ Oregon effectively eliminates the constitutional conflict present in this case because of a broad exemption stating that

*[n]othing in this chapter interferes in any manner with an individual's right to select the practitioner or mode of treatment of an individual's choice, or interferes with the right of the person so employed to give the treatment so chosen if public laws and rules are complied with.*⁴⁶

The 1932 rationale of the Washington Supreme Court presumed that the “reasonable and necessary regulations in the practice of medicine, [are] commonly provided for under the statutes of the different states.” Indiana is the sole state that has upheld regulations similar to that of Utah.⁴⁷ This minimal companion precedent for the extreme position taken by the 1996 UMPA amendments is insufficient to

⁴³ Burns Ind. Code Ann. § 25-22.5-1-1.1 (1998) (“It is not necessary that the examination be made in the presence of the patient; it may be made on information supplied either directly or indirectly by the patient.”)

⁴⁴ O.R.S. § 667.010 (1997) (“It is not necessary that the examination be made in the presence of the patient; it may be made on information supplied either directly or indirectly by the patient.”)

⁴⁵ U.C.A. § 58-67-102(4)(d). (“[T]o make an examination or determination as described in Subsection 4(a) upon or from information supplied directly or indirectly by another person, whether or not in the presence of the person attempting the diagnosis or examination.”)

⁴⁶ O.R.S. § 677.060(6) (1997).

⁴⁷ See Steina v. State ex. rel. Medical Licensing Board of Indiana, 513 N.E.2d 1234 (Ind. Ct. App. 1987).

establish the assumption made by the Washington Court. Second, the provisions of the Washington Constitution that guaranteed “absolute freedom of conscience in all matters of religious sentiment, belief, and worship” were specifically limited by an express provision disavowing any intent to “justify practices inconsistent with the peace and safety of the state.”⁴⁸ Utah does not have such a generic provision. Even if it did, the exemptions afforded under UMPA to truthful and non-misleading speech or speech involving an exchange of information for religious or other deeply held beliefs undermine any claim that the State has some compelling interest in denying the liberties and freedoms Hodsen and Anderson desire to exercise.

The 1980 case of Rutherford vs. United States⁴⁹ can be distinguished from this case for at least two reasons. First, the case dealt with FDA marketing requirements, not patient receipt of information.

It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health. The premarketing requirement of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, is an exercise of Congressional authority to limit the patient’s choice of medication.⁵⁰

⁴⁸ Wash. Const., Art. I § 11.

⁴⁹ 616 F.2d 455 (10th Cir. 1980) cert. denied 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 937 (1980).

⁵⁰ Id. at 457.

Second, the limitation arose because of failure to follow federal procedures in demonstrating pre-market safety, consistency, and validity of claims regarding laetrile. In this case, the information provided deals with products that are in conformity with state and federal law.

The 1990 federal district court case of Peckham v. Thompson,⁵¹ can be distinguished from this case for at least two reasons. First, the opinion cites the Rutherford precedent for the proposition that “there is no constitutional right to select a particular treatment of procedure over the rational objections of government.”⁵² For reasons cited above, this authority is distinguishable. Second, the district court opinion found the alleged licensing prohibitions as to midwifery were too vague to enforce against midwives. Hodsen and Anderson’s challenge focuses on overbreadth not vagueness.

POINT V

THE PROHIBITION ON HODSEN’S PROPOSED MODIFIED USE OF “M.D.” UNJUSTIFIABLY INFRINGES ON HIS SPEECH RIGHTS

Hodsen has received a M.D. degree from U.C.L.A. Hodsen would like to use this title on business cards and journal articles, adding a disclaimer that he is a

⁵¹ 745 F. Supp. 1388 (C.D.C. Ill. 1990) remanded with instructions, 966 F.2d 295 (7th Cir. 1992).

⁵² Id. citing Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980) cert. denied 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 937 (1980).

“Graduate of U.C.L.A. School of Medicine” and a “Research Biochemist not in medical practice.” DOPL interprets UMPA as prohibiting Hodsen’s speech because even with the added clarifications, Hodsen’s use of the designation “M.D.” after his name “might cause a reasonable person to believe that Hodsen is a licensed physician and that such use, in connection with Hodsen’s business, may be deceptive or misleading regarding Hodsen’s status” in terms of licensure. This concern is unjustified in this case for at least three reasons.

First, the use of the modified “M.D.” designation in journal articles will not confuse or mislead a “reasonable person” as to the licensure status of Hodsen. If DOPL is correct is that Justice White’s analysis has merit in regulating speech and professional licensure, regulating Hodsen’s speech in a journal article that is designed for general rather than individual use violates the First Amendment. Furthermore, since in Hodsen’s case the use of the designation “M.D.” — is limited by the express language referring to his status of graduating from a particular school and stating he is not in medical practice — the distinctions recognized previously by the New York Court of Appeals in the 1992 case of In re Rowe would be applicable here. Under this analysis, the efforts of DOPL to distinguish the application of limited commercial speech restrictions in the United States Supreme

Court Ibanez opinion⁵³ as being limited to only those who were professionally licensed⁵⁴ has no meaning because for journal article writing, Hodsen would not have to be licensed.

Second, as it relates to use by Hodsen of a business card with his disclaimed M.D. designation, the prohibition is overbroad. So long as any sale is done without “diagnosis” being involved, Hodsen is exempt from licensure. When a sale is done that includes “diagnosis” as outlined in this case, the language that brings Hodsen within licensure regulation does not come from Hodsen; hence, no individual is going to be misled by Hodsen’s truthful and non-misleading speech in response to the same.

Third, if DOPL agreed that the speech was not misleading as clarified, the statute prohibits Hodsen from listing his M.D. degree without listing “of the branch of the healing arts for which the person has a license.”⁵⁵ Such a requirement is an absolute bar on Hodsen’s listing of truthful and non-misleading information about himself. This type of prior restraint is unlawful under both the Utah and United States Constitution.

⁵³ 512 U.S. 316, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994).

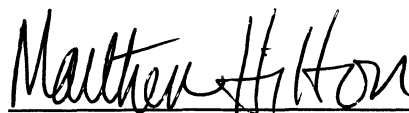
⁵⁴ DOPL Brief at 27-28.

⁵⁵ U.C.A. § 58-67-102(8)(d).

CONCLUSION

DOPL has been unable to demonstrate a compelling governmental interest that would justify the prohibition on an exchange of information between Hodsen and Anderson that is truthful and non-misleading. The prohibition infringes upon the rights of Hodsen and Anderson to give and receive private and commercial speech as well as Anderson's right to formulate religious belief and act on the same, whether as an exercise of religious freedom or privacy to one's personal autonomy and bodily integrity. Hodsen also has a right of private and commercial speech to use the term "M.D." after his name with the suggested disclaimers to ensure that no reasonable person is misled as to his licensure status with DOPL by his use of the same.

DATED and EXECUTED this 11th day of August, 1999.

A handwritten signature in black ink that reads "Matthew Hilton". The signature is written in a cursive, flowing style.

Matthew Hilton of Matthew Hilton, P.C.
Attorney for Hodsen and Anderson

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 11th day of August, 1999, two copies of the foregoing REPLY BRIEF OF APPELLANTS was hand delivered to counsel for Appellee as follows:

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DATED this 11th day of August, 1999.


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