RECORD NO. 10-11052-EE

In The United States Court of Appeals For The Eleventh Circuit

EVA LOCKE, PATRICIA ANNE LEVENSON, BARBARA VANDERKOLK GARDNER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

Plaintiffs – Appellants,

v.

JOYCE SHORE, JOHN P. EHRIG, AIDA BAO-GARCIGA, ROASSANA DOLAN, WANDA GOZDZ, *et al.*,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EVA LOCKE, et al.,
Appellants,

v. Docket No. 10-11052-EE

JOYCE SHORE, et al.,
Appellees.

APPELLANTS' AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 11th Cir. R. 26.1, Appellants Eva Locke, Patricia Anne Levenson, Barbara Vanderkolk Gardner, National Federation of Independent Business, hereby file this Amended Certificate of Interested Persons and Corporate Disclosure Statement:

Bao-Garciga, Aida – Appellee/Defendant

Dolan, Roassana – Appellee/Defendant

Ehrig, John P. – Appellee/Defendant

Gardner, Barbara Vanderkolk – Appellant/Plaintiff

Glogau, Jonathan A. – Counsel for Appellees/Defendants

Gozdz, Wanda – Appellee/Defendant

Grigsby, Mary Jane – Appellee/Defendant

Gustafson, Garrick – Appellee/Defendant

Hall, E. Wendell – Appellee/Defendant

Hinkle, Robert L. – United States District Court Judge

Kuritsky, Eric – Appellee/Defendant

Johnson, Emory, J. – Appellee/Defendant (NEW PARTY)

Levenson, Patricia Anne – Appellant/Plaintiff

Locke, Eva – Appellant/Plaintiff

Mellor, William H. – Counsel for Appellants/Plaintiffs

Membiela, Roymi – Appellee/Defendant

National Federation of Independent Business – Appellant/Plaintiff

Neily III, Clark M. – Counsel for Appellants/Plaintiffs

Sherman, Paul M. – Counsel for Appellants/Plaintiffs

Sherrill, Jr., William C. – United States Magistrate Judge

Shore, Joyce – Appellee/Defendant

Solera, Lourdes – Appellee/Defendant

Woodring, Daniel J. – Counsel for Appellants/Plaintiffs

Appellants/Plaintiffs are not subsidiaries or affiliates of a publicly owned corporation, and no publicly owned corporation, not a party to the litigation, has a financial interest in the outcome of this case.

Dated this 19th day of April, 2010.

Respectfully submitted,

INSTITUTE FOR JUSTICE

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants respectfully request oral argument as this case presents novel and complex questions of constitutional law, including the extent of the government's power to criminalize the creation of drawings and the expression of ideas under the guise of an occupational licensing law for interior designers.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULE

OTHER AUTHORITIES

TABLE OF RECORD REFERENCES IN THE BRIEF

59-4	Exhibit 23 to Declaration of Clark Neily: Relevant Portions of Legislative History regarding the Grandfather Clause that used to be a part of Fla. Stat. 481.201, *et seq*.	40, 52
60	Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment	14, 30
65	Joint Pretrial Stipulation	3, 6, 7, 32, 34, 42, 44, 46, 48, 52
68-4	Exhibit 3 to Declaration of Paul Sherman: Excerpts of the Transcript of Deposition of Joyce Shore	18
68-5	Exhibit 4 to Declaration of Paul Sherman: Excerpts of the Transcript of Deposition of Lisa K. Waxman, Ph.D.	19, 21
69	Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment	14, 16
70	Transcript of Proceedings before The Honorable Robert L. Hinkle	15, 22, 23
71	Plaintiffs' Motion for Leave to Supplement the Record and Provide Supplemental Authority	2
71-9	Exhibit 6 to Declaration of Clark Neily: Excerpts of the Transcript of Deposition of David K. Minacci	45
71-10	Exhibit 7 to Declaration of Clark Neily: Printouts from Staples The Office Superstore's website	45

74	Opinion on the Merits	2, 3, 10, 14, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 33, 37, 38, 43, 46, 50, 53
75	Order Denying Summary Judgment Motions	2
76	Judgment	2

STATEMENT OF JURISDICTION

The district court had jurisdiction over this constitutional challenge to a state statute under 42 U.S.C. § 1983. The district court issued a final judgment disposing of all claims on February 4, 2010. Plaintiff-Appellants ("Plaintiffs") filed a timely notice of appeal on March 5, 2010. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

It is illegal to practice interior design in Florida without a license. But the "practice" of interior design consists almost entirely of making drawings and speaking to other people about how they might wish to arrange and furnish the spaces they occupy, which presents significant constitutional concerns. The issues on appeal are:

1. Did the district court err by effectively rewriting Florida's interior design law to give it a narrower scope than its plain language provides and the legislature intended?

2. Does the expression regulated by Florida's interior design law constitute "professional speech" akin to legal or medical advice, the licensing of which receives no First Amendment scrutiny?

3. Is Florida's interior design law unconstitutionally overbroad?

4. Does Florida's interior design law violate equal protection, due process, or the dormant Commerce Clause?

STATEMENT OF THE CASE

This is a constitutional challenge to a Florida law that regulates the advertising and provision of interior design services. Plaintiffs filed their seven-count complaint for declaratory and injunctive relief in May 2009. R-1-1.[1] In August, the district court entered a preliminary injunction forbidding the state from enforcing the advertising restrictions. R-1-B at 9 (No. 32). Following discovery, the parties filed cross-motions for summary judgment. The district court heard argument on the motions during a pretrial hearing on January 20, 2010. The parties agreed at the hearing to forgo a bench trial and submit the case for final decision on the summary judgment record. The Plaintiffs filed a motion to supplement the record on January 28, 2010. R-4-71. On February 4, 2010, the district court issued a final decision disposing of all pending claims and denying, in relevant part, the Plaintiffs' motion to supplement the record. R-4-74, -75, -76.

In its merits opinion, the district court held that the advertising restriction—which forbade nonlicensees from using the term "interior designer" even when lawfully performing residential interior design services for which no license is required—violated the First Amendment by censoring truthful commercial speech. R-4-74 at 21-26. Regarding the practice restriction, the district court recognized the

[1] In accordance with Circuit Rule 28-1(i), references to the record conform to the following format: R-<volume number>-<document number>-<sub-document number, if any> at <page or paragraph number, if applicable>.

"substantial constitutional issues" that would arise if the statute were interpreted as broadly as the plain language suggested. *Id*. at 10. Adopting a much narrower construction premised on a plain misreading of key statutory terms, the district court rejected the Plaintiffs' constitutional challenges and upheld the practice restriction. *Id*. at 10-21. Plaintiffs filed their notice of appeal on March 5, 2010. R-1-B at 15 (No. 80). The state did not file a cross-appeal.

STATEMENT OF FACTS

Only three states in the country—Florida,[2] Louisiana,[3] and Nevada[4]—regulate the practice of interior design. Like the others, Florida's interior design law was enacted not at the behest of consumers or building officials, but by industry insiders seeking to limit competition. R-2-54-24 at 13-14.[5] The state conceded it has no evidence that the unlicensed practice of interior design presents any bona fide public welfare concerns or that licensing interior designers has benefited the public in any demonstrable way. R-3-65 at 8 ¶¶ 15-16.

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[2] Fla. Stat. § 481.223(b).

[3] La. Rev. Stat. Ann. § 37:3176(A)(1).

[4] Nev. Rev. Stat. § 623.360(1)(c).

[5] *See also* R-2-54-23; Dick M. Carpenter II, *Regulation Through Titling Laws: A Case Study of Occupational Regulation*, 2 Reg. & Governance 340 (Sept. 2008), *available at* http://www3.interscience.wiley.com/journal/121388415/abstract.

Florida law provides that a person may not knowingly "[p]ractice interior design unless the person is a [state-]registered interior designer."[6] As defined in the challenged statute,

> "Interior design" means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure. "Interior design" includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings.[7]

The law contains exemptions for: (1) "A person who performs interior design services or interior decorator services for any *residential application*," and (2) "An *employee of a retail establishment* providing 'interior decorator services' on the premises of the retail establishment or in the furtherance of a retail sale or prospective retail sale."[8] The law also exempts, under certain conditions, "A manufacturer of commercial food service equipment or the manufacturer's representative, distributor, or dealer or an employee thereof, who prepares designs, specifications, or layouts for the sale or installation of such equipment."[9]

Getting an interior design license in Florida is a long and expensive process. An applicant must complete a combined total of six years of post-secondary

[6] Fla. Stat. § 481.223(1)(b).

[7] Fla. Stat. § 481.203(8).

[8] Fla. Stat. § 481.229(6)(a)-(b) (emphases added).

[9] Fla. Stat. § 481.229(8).

education at a Board-approved school and "diversified interior design experience" (i.e., an apprenticeship) under a state-registered interior designer.[10] The applicant must then pass a national licensing exam administered by a private testing body called the National Council of Interior Design Qualifications (NCIDQ).[11] Notably, however, not all state-licensed interior designers in Florida meet these requirements. After Florida's law was enacted, an indeterminate number of then-practicing interior designers were "grandfathered in" without having to meet these requirements. R-2-54-27 at 3-4, 9 (Nos. 9, 32-35). These individuals are not subject to any restrictions on their practice of interior design, nor are they required to make any disclosures to potential customers either of the fact that they were grandfathered in or what their specific credentials or qualifications actually are. R-2-54-27 at 9 (Nos. 36-37). The window for "grandfathering" has since closed.[12]

Florida's interior design law applies to companies as well as individuals. Any company "offering interior design services to the public" must obtain a certificate of authorization, which requires, among other things, that "[o]ne or

[10] Fla. Stat. § 481.209(2); Fla. Admin. Code r. 61-G1-22.001(1).

[11] Fla. Stat. §§ 481.207, .209(2).

[12] 1996 Fla. Laws ch. 309 (amending Fla. Stat. § 481.209(2)(e) to extend period to apply for grandfathered admission through April 30, 1998); 2000 Fla. Laws ch. 332, *18 (repealing grandfather clause).

more of the principal officers of the corporation" be a Florida-licensed interior designer.[13]

Plaintiff-Appellants are three individuals and the National Federation of Independent Business ("NFIB"). Plaintiffs Eva Locke and Pat Levenson live in Palm Beach, Florida. They both have two-year interior design degrees from Palm Beach Community College. R-1-54-1 at 1 ¶ 2; R-1-54-2 at 1 ¶ 2. Barbara Gardner is an interior designer who resides in New Jersey and keeps offices there and in Florida. R-1-54-3 at 1-2 ¶¶ 2-3. Gardner has been the target of two enforcement actions by the Board, and it is unclear to her exactly what work she may and may not do in Florida. R-1-54-3 at 4-8 ¶¶ 10-17. None of the Plaintiffs are eligible for licensure because they lack the statutorily mandated credentials described above.

Plaintiff NFIB is the nation's leading small-business association, with approximately 350,000 member-businesses nationwide, including 11,000 in Florida. R-3-65 at 6 ¶ 1. Some of NFIB's members—including members who do not consider themselves to be "practicing interior design"—have been the subject of enforcement actions under Florida's interior design law. R-3-65 at 6 ¶ 2. NFIB members are concerned about the breadth of Florida's interior design law and the aggressive manner in which it is being enforced, including against people and

[13] Fla. Stat. § 481.219(3), (7)(b).

businesses who do not consider themselves to be in the interior design business at all. R-3-65 at 6 ¶ 2; R-1-54-5 at 1-2 ¶¶ 3-4.

Enforcement of Florida's interior design law, which was enacted in two phases in 1988 and 1994, was lax at first. In 2002, the Board of Architecture and Interior Design ("Board") retained the law firm of Smith, Thompson, Shaw & Manausa to provide stronger enforcement of the interior design and architecture laws, R-2-54-27 at 6-7 (No. 5), and enforcement actions against nonlicensees "skyrocketed." R-2-54-32 at 2; R-2-54-27 at 5-6 (No. 22). Since outsourcing enforcement responsibilities to the Smith Thompson law firm in 2002, the Board has averaged several hundred disciplinary cases per year, mostly against nonlicensees. *E.g.*, R-2-54-32 at 2.

Florida's interior design law substantially burdens interstate commerce by making it impracticable for out-of-state designers to work in Florida and by making it illegal for companies like Staples, OfficeMax, or Office Depot to do business as usual in Florida, including offering free "space planning" in connection with the sale of office furniture. R-2-54-27 at 5-6 (No. 22); R-2-54-37, -38, -39. The state admits it is unaware of any local benefits produced by the challenged restrictions. R-2-54-27 at 4 (No. 12).

STANDARD OF REVIEW

The district court made no findings of fact and based its decision entirely on its interpretation of Florida's interior design law. "'The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review.'" *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009) (quoting *Kephart v. Hadi*, 932 So.2d 1086, 1089 (Fla. 2006)); *see also United States v. Dodge*, 597 F.3d 1347, 1350 (11th Cir. 2010) (en banc) (district court's determination of state law is reviewed *de novo*); *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1302 (11th Cir. 2008) ("We also review the district court's interpretation of a statute and the application of law *de novo*.").

SUMMARY OF ARGUMENT

It is illegal to "practice interior design" in Florida without a license. But virtually everything an interior designer does—from consulting with clients to making various kinds of drawings—is speech that can only be regulated with great care, if at all. In seeking to avoid the "substantial constitutional issues" this case presents, the district court made four basic errors. First, the court effectively rewrote Florida's interior design law to give it a much narrower meaning than the text of the law can support and the legislature plainly intended. Second, it mistakenly classified the expression at issue in this case as "professional speech" that receives no First Amendment protection, and as a result applied the incorrect

standard of scrutiny to the Plaintiffs' overbreadth challenge. Third, it misapplied the Supreme Court's dormant Commerce Clause doctrine to the undisputed facts of this case, which show that Florida's interior design law imposes massive, discriminatory burdens on interstate commerce for no good reason. Finally, it incorrectly held that Florida's interior design law survives rational basis review, even though the law is so riddled with exemptions that it is implausible to believe the law advances any legitimate government interest.

ARGUMENT

I. The District Court Erred by Rewriting Florida's Interior Design Law.

In construing a state statute, federal courts look to state rules of construction. *Mun. Utils. Bd. v. Ala. Power Co.*, 21 F.3d 384, 387 (11th Cir. 1994). The "cardinal rule" of statutory construction in Florida "is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute." *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 579 (Fla. 1984) (citation and quotation omitted). When the plain meaning of the words can be determined, courts are "bound to apply that plain meaning to resolve legal disputes that involve application of the statute or rule." *Calabro v. State*, 995 So.2d 307, 314 (Fla. 2008). The district court failed to observe those canons in construing Florida's interior design law.

As the state recognized early on in this litigation, the plain language of Florida's interior design law covers a vast array of activities. R-2-54-27 at 7-8 (Nos. 15-16, 19-25). But when it became clear that this broad scope presents significant constitutional difficulties, the state adopted the litigating position that the law was, in fact, far narrower than its plain language indicates. Thought bound to follow the plain language of the law, the district court mistakenly deferred to this litigating position to avoid the "substantial constitutional issues" this case presents. R-4-74 at 10. In doing so, the court effectively rewrote Florida's interior design law, adopting an interpretation that is irreconcilable with the law's plain language and that renders the statute largely incomprehensible.

A. "Interior design" has the same broad meaning in common usage and in Florida law.

Florida law restricts the practice of "interior design," a term that has both a common usage and a statutory meaning in Florida that are fully consistent with one another. In common usage, the term "interior design" means "the design and coordination of the decorative elements of the interior of a house, apartment, office, or other structural space, including color schemes, fittings, furnishings, and

sometimes architectural features."[14] According to the industry group whose members drafted and lobbied for Florida's interior design law, the American Society of Interior Designers:

> Interior design is a multifaceted profession in which creative and technical solutions are applied within a structure to achieve a built interior environment. . . .
>
> [Interior design] services may include any or all of the following tasks: . . .
>
> - Formulation of preliminary space plans and two and three dimensional design concept studies and sketches . . .;
> - Selection of *colors, materials, and finishes* . . . ;
> - Selection and specification of *furniture, fixtures, equipment, and millwork,* including layout drawings and detailed product description; . . .[15]

The statutory definition of "interior design" in Florida is consistent with common usage and equally broad:

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[14] *See* Dictionary.com, Interior Design, *available at* http://dictionary.reference.com/browse/interior+design. *See also* Merriam-Webster Online, Interior Design, *available at* www.merriam-webster.com/dictionary/interior design (defining interior design as "the art or practice of planning and supervising the design and execution of architectural interiors and their furnishings").

[15] *See* American Soc'y of Interior Designers, Definition of Interior Design, www.asid.org/NR/rdonlyres/9A223396-B6C2-42DE-87C2-19EDCBDEA718/0/DefID.pdf (last visited Apr. 19, 2010) (emphases added).

> "Interior design" means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure. "Interior design" includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings.[16]

The term "interior design" appears one other place in the Florida Statutes outside the Professions and Occupations Title—in the Real and Personal Property Title, where it again reflects a broad legislative understanding:

> 713.79. Liens for interior design services
>
> Any person who, as part of his or her services performed as an *interior designer*, furnishes any articles of *furniture*, including, but not limited to, *desks, tables, lamps, area rugs, wall hangings, photographs, paintings or other works of art, or any items of furnishing* . . . shall have a lien upon all such articles furnished . . . .[17]

The state's discovery responses and the testimony of its witnesses reflect this same broad understanding of the term "interior design." Thus, in responses to requests for admission, the state agreed that an interior design license is required to make drawings relating to such items as furniture, flooring, wallcoverings, file cabinets, shelving and display racks, and the placement of chairs and couches in a

[16] Fla. Stat. § 481.203(8).

[17] Fla. Stat. § 713.79 (emphases added).

hotel lobby. R-2-54-27 at 7-8 (Nos. 15-25).[18] Defendant-Appellee Joyce Shore, who is the Chair of the Board of Architecture and Interior Design and a working interior designer (and former instructor of interior design), described as examples of her interior design work the use of paintings, rugs, wood paneling, animal figurines, and paint colors to create a particular atmosphere in a home or office. R-2-54-26 at 18-22. On her website, Ms. Shore lists among her areas of "design expertise" art, antiques, furnishings, wall coverings, window treatments, and flooring.[19]

In short, all of the evidence in this case, including testimony from knowledgeable practicing interior designers, establishes that the plain meaning of "interior design" is quite broad, and there is nothing in Florida's statutory definition of interior design that conflicts with this plain meaning.

[18] This interpretation is consistent with what appears to have been the common understanding of term "interior design" when Florida's practice restriction was enacted in 1994. For example, a 1994 textbook on office interior design has a chapter called "Interior Design Elements" that includes among those elements: furniture, file systems, shelving systems, relocatable wall systems, ceiling systems, lighting, color, acoustics, and finish materials (including flooring, wall coverings, and window treatments). Julie K. Rayfield, THE OFFICE INTERIOR DESIGN GUIDE: AN INTRODUCTION FOR FACILITY AND DESIGN PROFESSIONALS 170 (1994) (Exhibit A to Appellants' Motion for Leave to File Attachment).

[19] *See* Joyce Shore Interiors, Inc., Our Services, www.joyceshore.com/pages/services.html (last visited Apr. 18, 2010).

B. The state adopted a litigating position that conflicted with the plain language of Florida's interior design law and was entitled to no deference.

While the state initially agreed with the understanding of "interior design" described above, late in the proceedings below the state radically altered its interpretation of Florida's interior design law and adopted a much narrower litigating position in order "to obtain a favorable ruling in this case." R-4-74 at 10. According to the state's new interpretation, Florida's interior design law does *not* cover things like "loose furnishings" or "surface treatments," R-3-69 at 3, because the term "interior design" encompasses only "fixed items." R-3-60 at 12. The state did not define "fixed items," nor did it attempt to reconcile this new interpretation with its contrary discovery responses or the contrary testimony of its own witnesses. Instead, the state argued that the existence of another term in the statute—"interior decorator services"[20]—necessarily gives "interior design" a far narrower meaning in Florida law than it has in common usage or than the Board itself had ever realized. There are several problems with the state's litigating position.

First, contrary to the state's assertion, the statute contains no blanket exemption for "interior decorator services," but instead only specific and limited

[20] "'Interior decorator services' includes the selection or assistance in selection of surface materials, window treatments, wallcoverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under applicable building codes." Fla. Stat. § 481.203(15).

exemptions for interior decorators services in *residential settings*[21] and interior decorator services performed by "[a]n *employee of a retail establishment* . . . on the premises of the retail establishment or in the furtherance of a retail sale or prospective retail sale."[22] As the district court noted during the summary judgment hearing, the state's argument—that the statute contains a blanket exemption for all "interior decorator services" regardless of the setting in which they are performed—renders those more-specific provisions mere surplusage. R-3-70 at 24-27. Accordingly, it cannot be a proper interpretation of Florida law. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) ("A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage."); *Clines v. State*, 912 So.2d 550, 558 (Fla. 2005) (same).

Similarly, as used in the statute, the term "interior decorator services" only applies to the "selection" of various materials; it does not authorize nonlicensees to create space plans or other drawings depicting the placement of those items in a building or structure.[23] To the contrary, the statute specifically provides that "'[i]nterior design includes . . . space planning," meaning both "preliminary space

[21] Fla. Stat. § 481.229(6)(a).

[22] Fla. Stat. § 481.229(6)(b) (emphasis added).

[23] Fla. Stat. § 481.203.

layouts" and final design plans.[24] As we know from the state's discovery responses, an interior design license *is* required to create drawings regarding such non-"fixed" elements as furniture, flooring, wallcoverings, file cabinets, shelving and display racks, and the placement of chairs and couches in a hotel lobby. R-2-54-27 at 7-8 (Nos. 15-25). Thus, by the state's own admissions (with which its litigating position is in sharp and irreconcilable conflict), Florida's interior design law contains no blanket exemption for "interior decorator services" that allows unlicensed persons to make drawings, offer consultations, or perform studies relating to "loose furnishings," "surface treatments," or other supposedly decorative interior elements of a building. R-3-69 at 3.

Moreover, even if the exemptions for "interior decorator services" did allow nonlicensees to create drawings depicting the placement of various interior elements—a proposition the state specifically rejected in its discovery responses, R-2-54-27 at 7-8 (Nos. 15-25)—the exemption only applies to items that are "not subject to regulation under applicable building codes."[25] Since that determination can only be made on an item-by-item and jurisdiction-by-jurisdiction basis, R-2-59-2 at 45-48, 61-62, there is simply no way the term "interior decorator services" can provide the blanket exemption the state claims.

[24] Fla. Stat. § 481.229(8), (12).

[25] Fla. Stat. § 481.203(15).

Given its flatly contradictory discovery responses in this proceeding and the contradictory testimony of its own witnesses, the state's new interpretation of the interior design law, invented in a transparent attempt "to obtain a favorable ruling in this case," R-4-74 at 10, is merely a litigating position that is entitled to no deference from the courts. *See, e.g.*, *Fla. Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) ("We do not defer to an agency's post hoc 'convenient litigating position' that is wholly unsupported by prior regulations, interpretations, rulings, or administrative practices."); *see also William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (holding that, where agency had taken contradictory positions in different litigation, "even if deference ought to be given, we would not be inclined to defer to an inconsistent position."). Moreover, it was a litigating position in conflict with the law's plain language, and therefore an impermissible interpretation in any event. *Fla. Manufactured Hous. Ass'n*, 53 F.3d at 1574.

C. The district court improperly adopted the state's litigating position, effectively rewriting Florida's interior design law.

Faced with these competing interpretations of Florida's law—one fully supported by the evidence and testimony regarding the plain meaning of the statute's terms and the other invented by the state for this litigation—the district court essentially adopted the state's litigating position. This was error. The district court's interpretation not only contravened its duty to interpret the law according to

its plain meaning, *Calabro*, 995 So.2d at 314, it also rendered Florida's interior design law largely incomprehensible.

Beginning with the language of the statute, Florida law makes it a crime to "[p]ractice interior design" without a license.[26] The key terms in this case then are "practice" and "interior design." As explained below, the district court misinterpreted both of these terms.

1. The district court erroneously narrowed the scope of "interior design."

In parsing the term "interior design," the district court correctly noted that the activities listed in the statutory definition—designs, drawings, consultations, etc.—only constitute "interior design" if they relate to the "nonstructural interior elements of a building or structure." R-4-74 at 7 (citing Fla. Stat. § 481.203(8)). The statute defines "nonstructural element" as "an element which does not require structural bracing and which is something other than a load-bearing wall, load-bearing column, or other load-bearing element of a building . . . ."[27] As Board Chair Joyce Shore confirmed, the term "nonstructural interior elements" means "pretty much everything inside the four walls of a building that is not holding it up," R-3-68-4 at 60, and specifically includes art and antiques, furnishings, wall coverings, window treatments, flooring, and lighting. *Id.* at 58-60. Likewise, the

[26] Fla. Stat. § 481.223(1)(b).

[27] Fla. Stat. § 481.203(10).

state's expert witness, Florida State University interior design professor Lisa Waxman, testified that "nonstructural interior elements" includes furnishings, cabinets, millwork, interior doors, flooring, and window treatments. R-3-68-5 at 134-135.

But the district court gave the term a much narrower meaning, which it defined by illustration only. According to the district court, "[a] fixture ordinarily *is* a 'nonstructural interior element of a building or structure.' A table or other piece of stand-alone furniture ordinarily *is not*." R-4-74 at 7-8 (emphases added). Besides finding no support in common usage or in the record of this case, that construction presents two significant problems.

First, the district court's construction conflicts with the express language of the statute. The statutory definition of "interior design" specifically includes "furnishings."[28] But the district court's definition of "interior design" excludes "stand-alone furniture" by excluding it from the meaning of "nonstructural interior elements." Thus, because "furnishings" and "stand-alone furniture" appear to have the same meaning, the district court's interpretation contradicts the express terms of the statute by *excluding* an item from the court's definition of "interior design" that the statutory definition specifically *includes*.

[28] Fla. Stat. § 481.203(8).

Second, besides contradicting the express language of the statute, the district court's definition of "nonstructural interior elements" is so imprecise and incomplete that it renders Florida's interior design law largely incomprehensible. Summarizing the effect of the district court's ruling, we know that nonlicensees may now work with "stand-alone furniture" in commercial spaces because stand-alone furniture is not—according to the district court's understanding of the term—a "nonstructural interior element" and therefore does not fall within the statutory definition of "interior design." R-4-74 at 8 ("Suggesting where to put a stand-alone table—or any number of them—is not 'interior design.'"). We also know that nonlicensees are prohibited from working with "fixtures," because, in the district court's view, those are "nonstructural interior elements." *Id*. at 7. But what about all of the other items that interior designers commonly work with? According to the American Society of Interior Designers, the items that interior designers specify on a regular basis are:

> fabric, carpet, lighting, wall coverings, accessories, office furniture, window coverings, hard flooring, paint, surface materials, casegoods/desks, ceilings, contract seating, rugs, storage/filing, bathroom fixtures and fittings, hardware, office systems [cubicles, panel systems, etc.], outdoor (casual furniture, fabric and fixtures), building products (windows, doors, etc.), residential furniture, kitchen cabinets, and kitchen appliances.[29]

[29] American Soc'y of Interior Designers, THE INTERIOR DESIGN PROFESSION FACTS AND FIGURES 22-23 (2007) (Exhibit B to Appellants' Motion for Leave to File Attachment).

Applying the district court's opinion to the items on that list yields the following results:

Not Covered[30]	Unknown	Covered
office furniture, casegoods/desks, contract seating	fabric, carpet, lighting, wall coverings, accessories, window coverings, hard flooring, paint, surface materials, rugs, storage/filing, hardware, office systems, kitchen cabinets and appliances [in non-residential settings]	ceilings, bathroom fixtures and fittings, windows, doors

The district court appears to have grounded its narrow reading of "nonstructural interior elements" in its belief that the terms "interior decorator services" and "interior design" are "mutually exclusive, or nearly so." R-4-74 at 9. But that is simply not true, as demonstrated by the preceding list of materials specified by *interior designers*, by the testimony and experience of knowledgeable witnesses,[31] by the Board's discovery responses,[32] and by the state's counsel, who specifically advised the district court during the summary judgment hearing that

[30] Actually, it appears there is some question about whether the items in this category are or are not covered by the district court's "limited construction" of the statute. Comments by Board members and their counsel at a public meeting on March 16, 2010, indicate that the Board may pursue enforcement actions against nonlicensees for working with loose furnishings and other materials listed in the statutory definition of "interior decorators services" if those items are "subject to regulation under applicable building codes." Fla. Stat. § 481.203(15). Audio recording of March 16, 2010, General Meeting of the Florida Board of Architecture and Interior Design, at 22:19-23:38, *available at* http://www.ij.org/images/audio/interiordesign.mp3.

[31] R-2-54-26 at 27.15-.18; R-3-68-5 at 134.17-135.10.

[32] R-2-54-27 at 7-8 (Nos. 15, 16, 19-22, 25).

"interior design" and "interior decorator services" were not "mutually exclusive categories."[33] All of this makes quite clear that: (1) in common usage and as used in the statute, interior decorator services are merely a subset of interior design; and (2) the "practice of interior design" includes working with such supposedly "decorative" items as wall coverings, window coverings, paint, floor coverings, and loose furnishings.

2. The district court erroneously concluded that the term "practice" substantially limited the scope of the law.

Besides imposing a textually inconsistent and unnaturally narrow meaning on the term "interior design," the district court also misconstrued the word "practice," both as it is used in the challenged statute and in Florida vocational licensing law generally. Correctly noting that the statute only restricts the "practice" of interior design, the district court mistakenly concluded that "to 'practice' interior design means to provide services to a design client, with or without compensation. This is a substantial limitation on the statute's scope." R-4-74 at 7.

Again, however, the district court's interpretation conflicts both with the literal terms of the statute and common usage. The text of the statute makes clear that the legislature understood the "practice" of interior design to mean nothing

[33] R-3-70 at 22.14-.16 ("Q. Do you think interior design and interior decorator services are mutually exclusive categories? A. No, your Honor. I think that interior designers certainly do things that interior decorators do . . . .").

more than the "rendering" or "performance" of interior design services. *See* Fla. Stat. §§ 481.223(1)(b), .229(6)(a) (using terms "practice," "render," and "perform" synonymously). Indeed, the Board's prosecuting attorney David Minacci specifically testified that a doctor receiving suggestions from his or her receptionist about what kind of cubicles to use in the back office would constitute the "practice" of interior design. R-2-54-24 at 106-107. The state's attorney confirmed this interpretation when asked by the district court whether an interior designer would be needed to specify the selection and placement of cubicles in the court clerk's office. R-3-70 at 31.3-.21.

This is fully consistent with other Florida vocational licensing restrictions—such as medicine, law, engineering, and architecture—where "practice" means nothing more than to engage in the statutorily defined activities. *See, e.g.*, Fla. Stat. § 458.305(3) ("'Practice of medicine' means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition."); *Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs.*, 7 So.3d 511, 517 (Fla. 2009) (explaining that "practice of law" depends not on a given relationship or type of client, but rather on "the *performance* of services," such as "representing another before the courts," "the giving of legal advice," and "the preparation of legal instruments"). And this broad understanding of "practice" makes sense—no one would suggest that an individual who designs a

three-story addition to an office building is not "practicing architecture" if he happens to own the building rather than performing the work for a "design client," a sentiment shared by the Board's prosecuting attorney. R-2-54-24 at 106.

Thus, contrary to the district court's understanding, there is no evidence that the legislature understood or intended the word "practice" to represent a "substantial limitation on the statute's scope," R-4-74 at 7—any more than it does in other vocational licensing schemes.

* * *

As noted above, the state's "post hoc 'convenient litigating position'" regarding the meaning of Florida's interior design law is entitled to no deference. *Fla. Manufactured Hous. Ass'n*, 53 F.3d at 1574. Nor is any deference owed to the district court's interpretation of Florida's interior design law, which this Court reviews *de novo*. *See Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1302 (11th Cir. 2008). To the contrary, this Court is bound to avoid the mistake the district court made in trying to "improve" Florida's interior design law by giving it a different interpretation sharply at odds with the broad scope the legislature seems plainly to have intended. *See Wright v. Moore*, 278 F.3d 1245, 1255 (11th Cir. 2002). Accordingly, this Court should reject the interpretation adopted by the district court, interpret Florida's interior design law according to its plain language, and

evaluate Plaintiffs' constitutional challenges to Florida's interior design law in light of the full statutory sweep commanded by that language.

II. The District Court Misapplied the "Professional Speech" Doctrine.

After effectively rewriting Florida's interior design law to give it a far narrower scope than the legislature intended, the district court went on to hold that the burdens imposed by the law's vocational licensing provision—which makes it a crime to create drawings and engage in various forms of speech "relating to" the interior elements of buildings without a government-issued license—are completely immune from First Amendment scrutiny. R-4-74 at 12-16. That ruling was error.

Essentially, the district court held that because *some* of the speech regulated by Florida's interior design law *might* involve giving advice to individual clients, *all* of the expression the law restricts is beyond the protection of the First Amendment under the auspices of the so-called "professional-speech doctrine." But that holding cannot be squared with decades of Supreme Court jurisprudence establishing the very narrow circumstances in which particular categories of speech may be cast entirely outside the bounds of the First Amendment. Properly understood, all or substantially all of the expression that Florida regulates as the "practice of interior design" is pure speech subject to full constitutional protection.

Interior design is a creative and inherently expressive occupation; designers are paid primarily for their ideas, not their technical know-how or "advice." Florida's statutory definition of "interior design" reflects the fundamentally expressive nature of the vocation by regulating, among other things, "consultations," "studies," and "drawings" "relating to nonstructural interior elements of a building or structure."[34] The district court recognized that all of those things—consultations, studies, and drawings—are speech. R-4-74 at 13 ("It is true of course that practicing interior design involves speech. An interior designer *consults* with the client and may prepare *drawings* or *studies* in the course of the work.") (emphases added). The court's error was in concluding that none of that speech—no matter how purely creative or aesthetic (*e.g.*, Juan Montoya renderings, R-2-54-35)—is entitled to First Amendment protection.

When assessing the constitutionality of speech restrictions, the general rule, of course, is that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538 (1992). The Supreme Court has, however, recognized a few narrow categories of speech—like obscenity, defamation, and fighting words—that are not protected by the First Amendment. *Id.* at 382-83. A handful of lower courts have suggested that a similar exemption exists for certain categories of "professional speech," like legal, medical, or

[34] Fla. Stat. § 481.203(8).

accounting advice. *See, e.g.*, *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 603-04 (4th Cir. 1988). Neither the Supreme Court nor this Court has ever specifically endorsed this nascent doctrine, and its primary exposition remains Justice White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181, 105 S. Ct. 2557 (1985).

Lowe involved the publisher of a financial newsletter, Christopher Lowe, who was charged by the Securities and Exchange Commission with acting as an unlicensed investment advisor. A majority of the Supreme Court concluded that Lowe's newsletter fell within a statutory exemption for "bona fide publications," and therefore Lowe was not subject to licensure. *Id.* at 211. Justice White, joined by two other Justices, disagreed that Lowe's newsletter met the statutory exemption and thought it necessary to reach the First Amendment question whether the government could "prohibit publication of newsletters by unregistered advisers." *Id.* at 227-28 (White, J., concurring).

In concluding that the government's application of the regulation to Lowe's newsletter violated the First Amendment, Justice White articulated a two-part test for determining when the government may permissibly license the practice of a "speaking profession." First, the speaker must "take[] the affairs of a client personally in hand." *Id.* at 232. Second, the speaker must "purport[] to exercise judgment on behalf of the client in the light of the client's individual needs and

circumstances." *Id.* Applying this test to Lowe's newsletter, Justice White concluded that the lack of any "personal nexus" between Lowe and his readers was dispositive, and concluded that the licensure requirement was unconstitutional as applied. *Id.*

The district court's principal error in this case was interpreting Justice White's concurrence to mean that licensing requirements are immune from First Amendment scrutiny anytime there is a "personal nexus" between the speaker and the client. R-4-74 at 16. That reading of *Lowe* leaves out half of Justice White's test. To be subject to licensure, individualized advice must also be of such a character that the speaker "exercise[s] judgment on behalf of the client." *Lowe*, 472 U.S. at 232. Thus, Justice White's test would clearly cover, for example, the practice of law because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55 (1932). Accordingly, a lawyer's clients cannot reasonably be said to exercise independent judgment about the advice they receive; they rely on the lawyer's judgment in place of their own. The same is true of accounting. *See, e.g.*, *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 618 (7th Cir. 2001) ("While a client contracts with an accountant regarding some general matters, an accountant must make his own decisions regarding many significant matters, and the final decision he makes is not necessarily contingent on the contract he

executes with his client."). Notably, every post-*Lowe* decision the district court cited in support of applying the professional-speech doctrine to interior design dealt with the regulation of either lawyers or accountants. Research revealed no decision where a court has applied Justice White's concurrence to permit the regulation of speech outside of those two fields.

But interior design is significantly different from law or accounting. While interior designers do work directly with their clients and sometimes offer individualized "advice," they do not ordinarily substitute their judgment for that of their client. And, unlike lawyers and accountants, much of what interior designers bring to the table is their aesthetic sensibility—their personal sense of style, taste, and artistic creativity. Consistent with this, Florida Statutes list among the items interior designers might furnish to their customers "photographs, paintings or other works of art."[35]

Further, the record in this case shows that Florida's interior design law regulates a substantial amount of speech that cannot remotely be considered the giving of "advice." For example, interior designers commonly create preliminary drawings or "renderings" that are used to convey the designer's initial conceptual vision for a project. R-2-54-34 at 51.3-.12. These non-technical drawings are often the start of a collaborative process between the designer and the client, who will

[35] Fla. Stat. § 713.79.

trade drawings, going back and forth until they settle on a design that the *client* deems acceptable. *Id.* at 51.3-.25; R-2-54-26 at 26.17-27.20. This sort of collaboration is common in interior design because—unlike matters of law or accounting—an interior designer's ideas for a project often relate to matters of taste and aesthetics that customers are perfectly capable of evaluating on their own. *Cf. Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780 (1971) ("the Constitution leaves matters of taste and style . . . largely to the individual."). Obviously, these types of conceptual, "conversational" drawings cannot remotely be considered "professional speech," but they are indisputably covered by the literal text of Florida's interior design law[36] and remain so even under the district court's interpretation. As a result, it remains a crime in Florida for unlicensed persons to create purely conceptual renderings like those done by world-famous New York designer Juan Montoya (who is not licensed in Florida) in connection with the International Design Center in Naples, Florida. R-2-54-35. The state's only response to this point is its assurance that it would never apply the statute in such an unreasonable manner. R-3-60 at 7. But this assurance is constitutionally irrelevant. Where First Amendment rights are at stake, discretionary enforcement is a vice, not a virtue. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 466-467, 107 S. Ct. 2502 (1987) (declaring facially invalid an overbroad municipal ordinance

[36] Fla. Stat. § 481.203(8)

because it "accord[ed] the police unconstitutional discretion in enforcement"); *see also Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513-14 (11th Cir. 1985) ("The danger in an overbroad statute *is not that actual enforcement will occur or is likely to occur*, but that third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute." (emphasis added)).

Besides misapplying Justice White's concurrence in *Lowe*, the district court's broad conception of the professional-speech doctrine sharply conflicts with the Supreme Court's unprotected-speech jurisprudence. Categorical exceptions to the First Amendment are quite rare. Federal courts are loath to create them and, once created, loath to expand them.[37] If "professional speech" is to become a categorical exception to the First Amendment—and to reiterate, neither this Circuit nor the Supreme Court has ever held that it is—the boundaries of that exception must be drawn narrowly to address real harms and with due regard for the value of

[37] *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 122 S. Ct. 1389 (2002) (refusing to expand child-pornography exemption to include virtual child pornography); *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (refusing to expand child-pornography exemption to include depictions of cruelty to animals); *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997) (refusing to "expand the[] narrow categories of [unprotected] speech to include depictions of violence."); *Waters v. Chaffin*, 684 F.2d 833, 838 n.11 (11th Cir. 1982) (refusing to extend the "rightly narrow list" of categories of unprotected speech to include "[s]tatements by public employees that do not deal with matters of public concern"); *see also R.A.V.*, 505 U.S. at 383 ("Our decisions since the 1960's have *narrowed* the scope of the traditional categorical exceptions for defamation, and for obscenity . . . ." (emphasis added, internal citations omitted)).

the First Amendment rights at stake. But the district court did not undertake this careful inquiry and, to the contrary, failed to note the state's concession that it is unaware of any evidence that the licensure of interior design actually promotes public health and safety or that the unlicensed practice of interior design—which is the norm in 47 states—poses any bona fide threat to public health and safety. R-3-65 at 8 ¶¶ 15-16.

Beyond its implications for design-related speech in Florida, the district court's ruling has grave implications for other vocations as well. Countless occupations—from computer salesman, to tennis coach, to guidance counselor—involve the giving of individualized advice. Under the district court's conception of "professional speech," the government could regulate any speech that it defines as falling within the "practice" of those vocations, just as Florida has done with interior design, simply because there is a "personal nexus" between practitioners and their customers. No court in the country has ever applied the professional-speech doctrine so broadly, and this Court should not do so either. Accordingly—and particularly in light of the state's concession that there is literally nothing at stake should the Court strike down a vocational licensing law that 47 other states eschew, R-3-65 at 8 ¶¶ 15-16—Plaintiff-Appellants respectfully request that this Court reverse the district court's improper application of the professional-speech

doctrine and hold that all or substantially all of the speech defined by Florida as "the practice of interior design" is subject to full First Amendment protection.

III. Florida's Interior Design Law Is Unconstitutionally Overbroad.

Based on the district court's erroneous conclusion that Florida's interior design law was immune from First Amendment scrutiny, the court further erred by holding that Florida's interior design law was not subject to challenge for overbreadth. R-4-74 at 16. But as discussed above, most of the activity covered by Florida's interior design law is pure speech entitled to full First Amendment protection, and therefore the First Amendment overbreadth doctrine applies. Under this doctrine, Florida's interior design law is substantially overbroad and therefore facially unconstitutional on any reading—whether according to common usage and legislative intent as set forth above, or even the "limited construction" adopted by the district court in an unsuccessful effort to avoid the "substantial constitutional issues" this case presents. R-4-74 at 10.

Under the First Amendment overbreadth doctrine "if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep," the law will be invalidated on its face. *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849 (1999) (internal quotations omitted); *Clean-Up '84*, 759 F.2d at 1513. Because Florida's interior design law is a content-based regulation of pure speech, the law's legitimate sweep—if it has any—are

those applications that satisfy strict scrutiny. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). Under this standard of review, a court "must ensure that a compelling interest supports *each application* of a statute restricting speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478, 127 S. Ct. 2652 (2007). Applications that are not supported by a compelling interest are unconstitutional. *See id.* at 481.

The Board has failed to carry its weighty burden under strict scrutiny. As discussed above, *supra* pp. 10-13, the plain language of Florida's interior design law sweeps broadly to cover all aspects of the practice of interior design, including the expression of purely aesthetic ideas about the selection or placement of furniture and art. Indeed, the law is worded broadly enough to prohibit activity that most people would not consider "interior design" at all—sellers of retail display equipment, for example, routinely make drawings for their customers, R-1-54-10 at ¶¶ 6-8, as do office-furniture dealers and furniture manufacturers to show how their products might fit into a given space and what they would look like. R-1-54-7 at ¶ 8; R-2-54-17 ¶¶ 5-8; R-2-54-18, -19, -20, -21. But the Board has produced no evidence that any activity covered by the law poses a genuine threat to the public, and has actually conceded that it is unaware of any such evidence. R-3-65 at 8 ¶¶ 15-16. This is fatal because under strict scrutiny the government must demonstrate with actual evidence that the harms it recites "are real, not merely

conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475, 115 S. Ct. 1003 (1995) (internal quotation marks and citation omitted). Because the Board has not produced evidence that any application of Florida's interior design law satisfies strict scrutiny, the law is necessarily overbroad.

Moreover, this conclusion does not change even if the scope of Florida's law is limited to the district court's erroneous construction, under which Florida's interior design law is limited to the practice of interior design as it relates to "fixtures." Again, because the state has produced no real evidence of harm, it has necessarily failed to show that drawings, consultations, or studies related to the placement of "fixtures"—however defined—poses any genuine risk to the public. Accordingly, censoring this interior-design-related speech does not plausibly advance any government interest "in a direct and material way." *Id.*

"[T]he First Amendment cannot be encroached upon for naught." *SpeechNow.org v. FEC*, No. 08-5223, 2010 U.S. App. LEXIS 6254, *20 (D.C. Cir. Mar. 26, 2010). The government has not demonstrated that any of the speech regulated by Florida's interior design law poses any threat to the public, yet the challenged law makes this speech a crime punishable by up to one year in jail.[38] If the law has any legitimate applications—and the state has not shown that it does—

[38] Fla. Stat. §§ 481.223(2), 775.082(4)(a).

these applications are insubstantial in comparison to the vast quantity of protected speech criminalized under the law. Accordingly, Florida's interior design law is substantially overbroad and facially unconstitutional. The district court's contrary ruling should be reversed.

IV. Florida's Interior Design Law Discriminates Against and Unduly Burdens Interstate Commerce.

Besides censoring protected speech, Florida's interior design law violates the Commerce Clause by discriminating against and placing an impermissible burden on interstate commerce. Under the Supreme Court's dormant Commerce Clause doctrine, state laws that interfere with the free flow of commerce among the states can be unconstitutional in either of two ways. First, if a state law facially discriminates against interstate commerce or has the effect of favoring in-state economic interests over out-of-state interests, it is generally struck down "without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080 (1986). Second, even facially neutral state laws that have the incidental affect of burdening interstate commerce will be held unconstitutional if they fail the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970). After incorrectly suggesting that vocational licensing laws are wholly immune from Commerce Clause scrutiny and failing to undertake the analysis required by binding Supreme Court and Circuit precedent, the district court simply asserted that that "even if the dormant

Commerce Clause applies, the Florida statute does not violate it" under either of the tests described above. R-4-74 at 18-19. Both the analysis and the holding are in error.

A. Florida's interior design law is subject to scrutiny under the dormant Commerce Clause.

The district court's initial mistake was its conclusion that it is "doubtful" whether occupational licensing regulations implicate the dormant Commerce Clause at all. R-4-74 at 19. The district court based that conclusion on a single Fourth Circuit case, *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009), which it appears to have misread. *See id*. at 18 (describing the issue in *Brown* as "whether a Maryland statute that requires a license to practice mortuary science violates the dormant Commerce Clause," when in fact the challenged regulation involved the corporate ownership of funeral homes, not the practice of mortuary science).

Whatever the merits or relevance of the Fourth Circuit's holding in *Brown*, this Court has specifically applied dormant Commerce Clause analysis to the licensing of locally performed professional services. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 103 (11th Cir. 1995) (legal services). Other circuits, including the Fourth Circuit, have done the same. *See Goldfarb v. Supreme Court of Va.*, 766 F.2d 859, 862 (4th Cir. 1985) (legal services); *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 802-06 (6th Cir. 2005) (optometrists); *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703-07 (7th Cir. 2009) (Posner, J.) (legal services); *Nat'l Ass'n of Optometrists &*

Opticians v. Brown, 567 F.3d 521, 523-28 (9th Cir. 2009) (opticians); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040-44 (10th Cir. 2009) (legal services). Moreover, a controlling Fifth Circuit case recognized that, "[t]he movement of persons falls within the protection of the commerce clause," even if the services provided by those persons occur entirely intrastate. *See Serv. Mach. & Shipbldg. Corp. v. Edwards*, 617 F.2d 70, 73 (5th Cir. 1980) (invalidating ordinance that burdened commerce by requiring the registration of itinerant laborers)[39]; *accord Wiesmueller*, 571 F.3d at 705 ("[T]he movement of persons across state lines, for whatever purpose, is a form of interstate commerce."). Accordingly, there is no question that Florida's regulation of interior designers—like the regulation of lawyers and laborers—is subject to review under the dormant Commerce Clause.

B. Florida's interior design law has the practical effect of discriminating against interstate commerce.

The district court correctly recognized that "laws that discriminate against out-of-state residents are subject to exacting scrutiny and are rarely upheld." R-4-74 at 19 (*citing Bainbridge v. Turner*, 311 F.3d 1104, 1108-09 (11th Cir. 2002)). But the district court erred by concluding that, simply because Florida's interior design law facially treats locals the same as non-residents, the law was not discriminatory. This conclusion misapprehends the discrimination test. While it is

[39] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

true that facial discrimination is a *sufficient* condition to render a state law unconstitutional under the dormant Commerce Clause, facial discrimination is not a *necessary* condition for finding a Commerce Clause violation. Rather, the Supreme Court and the Eleventh Circuit have made clear that the relevant inquiry is whether the "practical effect" of the law is to discriminate against interstate commerce. *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (citing *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 350, 97 S. Ct. 2434 (1977)). Such laws are subject to elevated scrutiny and are "virtually *per se* invalid." *Id.* at 847 & n.3.

A key point to remember throughout is the fact that the very purpose of Florida's interior design law is to allow only *Florida*-licensed interior designers to work in Florida. While non-resident designers have the ability to become licensed in Florida in theory, they obviously have much less incentive to do so than a Florida resident would. The predictable result of the licensing scheme is to disproportionately exclude non-resident designers, few if any of whom will have the same incentive to spend six years of their lives and thousands of dollars just to become licensed in a state where they do not live. *See Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) (noting that while local ordinance prohibiting chain restaurants "does not facially discriminate between in-state and out-of-state

interests," the prohibition is "not evenhanded in effect, and disproportionately targets restaurants operating in interstate commerce").

The effects of Florida's interior design law are similar to those in two discriminatory-effects cases from the First Circuit. The first case is *Walgreen Co. v. Rullan*, in which the court considered the constitutionality of a Puerto Rico law that conditioned the opening or relocation of a new pharmacy on the receipt of a certificate of public convenience and necessity. 405 F.3d 50, 52 (1st Cir. 2005). While facially neutral, the law grandfathered in existing pharmacies, 92 percent of which were locally owned. *Id.* at 55-56. The court rejected the argument that the law was not discriminatory because it "treats all newcomers equally" and recognized that the practical effect of the law was to give "an on-going competitive advantage to the predominantly local group of existing pharmacies." *Id.* at 58.

Florida's interior design law favors the state's existing interior designers in a very similar way because many of them—including the Board's chair, Joyce Shore—were grandfathered in when the law was first passed. R-2-54-27 at 3-4 (No. 9); R-2-59-4. Like the grandfathered pharmacies in *Rullan*, these incumbent designers enjoy a significant competitive advantage over out-of-state designers who wish to offer their services in Florida, because the grandfathered designers in Florida were able to become licensed without meeting the onerous and time-consuming educational and apprenticeship requirements that are sure to discourage

large numbers of non-resident designers from seeking to become licensed in Florida.

Another First Circuit case with analogous facts is *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986). In that case, the First Circuit considered the constitutionality of a Rhode Island law that defined the practice of law to include all forms of debt collection, which meant that only members of the Rhode Island Bar could engage in the practice of debt collecting. *Id.* at 286. As the First Circuit recognized in striking down that restriction, even though the law was facially neutral, the effect of the law was to "bar[] out-of-staters from offering a commercial service within [the state's] borders and [to] confer[] the right to provide that service—and to reap the associated economic benefit—upon a class largely composed of Rhode Island citizens." *Id.* at 290. In such circumstances, the court held, "it might appear that the local purpose, rather than being legitimate, is, in substantial part, to benefit the local bar." *Id.* That characterization applies with equal force to Florida's interior design licensing law, which likewise confers upon a class largely composed of Floridians the opportunity to service Florida's interior design market, and raises the same specter of favoritism towards established local interests.

Because Florida's interior design law has the practical effect of discriminating against interstate commerce, the burden shifts to the state "to justify

the ordinance's discriminatory effects," and, in particular, to show that the law is supported by "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Island Silver & Spice*, 542 F.3d at 847. But the state presented no evidence that nondiscriminatory alternatives would not serve the state's interest equally well, and, indeed, presented no evidence that Florida's law's law produces any benefits at all. R-3-65 at 8 ¶¶ 15-16. The state's failure to carry its burden should have resulted in a judgment for the Plaintiffs on their dormant Commerce Clause claim. *See Island Silver & Spice*, 542 F.3d at 848.

C. Florida's interior design law fails *Pike* balancing because it imposes substantial burdens on interstate commerce with no local benefits.

Even if Florida's interior design law did not have a discriminatory effect, which is does, it would still fail the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under that test, a facially neutral law that has the incidental effect of burdening interstate commerce is invalid if the burden it imposes on interstate commerce is clearly excessive in relation to the law's putative local benefits. *Id.* at 142; *see also Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 944-46 (11th Cir. 1991). As more-specifically documented below, Florida's interior design law imposes a massive burden on the interstate market for interior design services while creating no discernable local benefits. The district court's contrary holding was error.

The district court's error seems to have stemmed, in part, from a misunderstanding of the Fifth Circuit's controlling decision in *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir. 1980) (Tjolfat, J.), *aff'd mem.*, 449 U.S. 913, 101 S. Ct. 287 (1980). The district court cited that case for the proposition that *Pike* creates a lenient standard of review under which laws are rarely invalidated. R-4-74 at 20. But *Edwards* contains no such statement, and, to the contrary, struck down under *Pike* balancing a municipal ordinance that was far less burdensome than Florida's interior design law.

Edwards dealt with a Louisiana-parish ordinance that required itinerant laborers to register with the parish and receive an identification card. 617 F.2d at 72. The parish had asserted that the ordinance was enacted to reduce crime associated with the sudden influx of workers for the growing offshore oil and gas industry. *Id.* at 71. Under the ordinance, "itinerant laborers" was defined to include not just nonresidents who travelled to the parish, but also residents who changed jobs within the parish. *Id.* at 71 n.2. The law imposed no qualifications for registration, and only required that applicants fill out a form with personal identifying information, provide fingerprints, and pay $10 for the identification card. *Id.* at 71-72 & n.2.

Applying *Pike* balancing, the Fifth Circuit found, on one side of the scale, that the parish's registration requirement imposed a "weighty" burden on interstate

commerce. *Id.* at 76. On the other side of the scale, the court found little evidence to justify this burden. After first noting that "a court [applying *Pike* balancing] must examine the benefits that supposedly result from the local law, and not rely merely on the assertion of an accepted local interest," *Id.* at 75, the court concluded that the ordinance's supposed benefits were "somewhat illusory." *Id.* at 76. The court also found that a more narrowly tailored scheme—such as asking less-intrusive questions on the registration form—would advance the parish's interest in fighting crime just as well while having a lesser impact on interstate commerce. *Id.* Accordingly, the court concluded that the ordinance was unconstitutional under *Pike*. *Id.*

If the ordinance at issue in *Edwards* failed *Pike* balancing, then surely Florida's interior design law must fail as well. In contrast with the relatively modest burden imposed on laborers in *Edwards*—consisting of filling out a form and paying a $10 fee—Florida's burden on interior designers is immense. As described above, *supra* pp. 4-5, obtaining an interior design license in Florida requires a minimum of six years of combined education and experience. R-3-65 at 7 ¶ 7. Interior designers must also pass a national licensing exam. *Id.* These are not theoretical burdens on interstate commerce. It is indisputable that out-of-state designers—who may lawfully practice interior design in 47 other states—would accept design jobs in Florida if the market were open to them. R-1-54-3 at 6-8

¶¶ 14-17; R-1-54-6 at 8-9 ¶ 18. The record in this case also shows that the state has aggressively enforced Florida's law against well-known out-of-state interior designers for practicing in Florida without a license. R-2-54-40, -41.

Florida's interior design law also requires that businesses that wish to offer services defined as "interior design" in Florida secure a certificate of authorization, which requires them to have a *Florida-licensed* interior designer as a principal officer of the company. Fla. Stat. § 481.219(7)(b). This too is indisputably burdensome. Sean Kellenbarger, a commercial-kitchen designer from Arizona testified that if his corporation were required to name a Florida-licensed interior designer as a principal corporate officer as a condition of doing business in Florida, it would simply stop doing business in the state. R-2-54-14 at 2-3 ¶¶ 6, 8. The Board has even launched investigations of interstate office-supply retailers Staples, OfficeMax, and Office Depot—none of which are authorized to practice interior design in Florida—merely for offering "space planning" services on their websites, which the Board's prosecuting attorney confirmed represents a "violation" of Florida's interior design law. R-2-54-37, -38, -39; R-4-71-9 at 145.7-146.12; R-4-71-10. Altogether, the extensive, indisputable burdens that Florida's interior design law imposes on interstate commerce far exceed those that the pre-split Fifth Circuit declared "weighty" in *Edwards*. This is made even clearer by the Eleventh Circuit's subsequent decision in *Diamond Waste*, in which this Court recognized

that when evaluating the burden on interstate commerce, a court must not only consider the direct effects of the law under review, but also consider what the cumulative effect on commerce would be if other states adopted similar protectionist laws. 939 F.2d 944-45 & n.10

Turning to the other side of the *Pike* ledger, local benefits, the state admitted in effect that there are none—at least none that it could document. R-1-54-27 at 2 ¶ 7. Indeed, the state actually stipulated that "[n]either the Defendants nor the State of Florida have any evidence that the unregulated practice of interior design presents any bona fide public welfare concern," and that "[n]either the Defendants nor the State of Florida have any evidence that licensing of interior designers has led to better job performance by interior designers, greater safety, fewer building code violations, or otherwise benefited the public in any demonstrable way." R-3-65 at 8 ¶¶ 15-16. The only source the district court relied upon for its contrary conclusion was a 22-year-old legislative-staff analysis that simply repeats uncritically the unsubstantiated assertions of pro-licensing industry members about the supposed dangers of "incompetent" interior designers. R-4-74 at 20 (citing Fla. S. Comm. on Approp., CS/CS/SB 127 (1988) Staff Analysis 1-2 (May 18, 1988)).[40] But this is nothing more than the sort of "mere[] . . . assertion of an accepted local interest" that the court in *Edwards* held was insufficient to justify a

[40] A copy of this staff report is provided as Exhibit C to Appellants' Motion for Leave to File Attachment.

far less substantial burden on interstate commerce than the one in this case. 617 F.2d at 75-76.

The utter lack of evidentiary support for Florida's interior design law is in keeping with more than half-a-dozen legislative analyses that have found no support for the proposition that the unlicensed practice of interior design posed any genuine public welfare concerns.[41] These finding are consistent with the testimony of Plaintiffs' expert witness, Jere Bowden, who testified that, after 25 year's experience in interior design, she was unaware of "any evidence that the unlicensed practice of interior design—in Florida or anywhere else—presents a threat to public health or safety." R-1-54-6 at 4 ¶ 9. Compared to the evidence of local benefits found insufficient in *Edwards*, the evidence in support of Florida's law is not merely "somewhat illusory," it is wholly absent. *Edwards*, 617 F.2d at 76. This absence of any supporting evidence is by itself sufficient grounds to hold Florida's law unconstitutional. *See Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 522 (11th Cir. 1990) (holding that even a "slight"

[41] *See*, *e.g.*, Colo. Dep't of Regulatory Agencies, *2008 Sunrise Review: Interior Designers* 26 (2008), *available at* http://idpcinfo.org/CO_Sunrise_2008.pdf (noting that "research . . . failed to identify Interior Design practice that resulted in harm to consumers"); Wash. State Dep't of Licensing, *Sunrise Review of Interior Designers* 12 (2005), *available at* http://idpcinfo.org/WA_Sunrise.pdf (recommending against licensure of interior design because "[c]urrent evidence does not suggest the public is being harmed by non-regulation").

burden is unconstitutional when there is a "complete absence of any local purpose.").

Finally, as in *Edwards*, it is apparent that whatever interest Florida has in promoting public health and safety would be served equally well by means that were less burdensome on interstate commerce. The most obvious evidence of this is that 47 states do not regulate the practice of interior design in any way, and yet the state has no evidence that the citizens of these states have in any way been harmed by this lack of regulation. R-3-65 at 8 ¶¶ 15-16. This strongly suggests that the harms the state posits are already being adequately addressed in these states by something less than full-blown licensure. This is consistent with the testimony of Plaintiffs' expert, Ms. Bowden, who observed that the sophistication of parties involved in commercial interior design, the involvement of architects and general contractors, and the level of oversight from building- and code-compliance officials all make harm from the unlicensed practice of interior design extremely unlikely. R-1-54-6 5-8 at ¶¶ 12-16; *accord* Fla. S. Comm. on Approp., CS/CS/SB 127 (1988) Staff Analysis 2 (May 18, 1988) (noting that "[l]ocal building and fire codes currently provide standards which must be met in designing the interiors of buildings," and that "[t]he federal Flammable Fabrics Act, and rules thereunder. . ., also provide a level of protection to consumers." (internal citation omitted)). The existence of these less-burdensome alternatives makes Florida's absolute ban on

the unlicensed practice of interior design clearly excessive in relation to the law's purely hypothetical local benefits. *Diamond Waste*, 939 F.2d at 946 ("the fact that less restrictive alternatives are available to Monroe County makes the burden imposed by the [law burdening interstate commerce] clearly excessive in relation to the local benefits created."). Accordingly, Florida's interior design law is unconstitutional under *Pike*.

While there is no clear line separating laws subject to review under the discrimination test and those subject to *Pike* balancing, *Wyoming v. Oklahoma*, 502 U.S. 437, 455 n.12, 112 S. Ct. 789 (1992), under either test, Florida's interior design law is unconstitutional. Appellants respectfully request that the district court's contrary holding be reversed.

V. Florida's Interior Design Law Violates Due Process and Equal Protection.

In addition to violating the First Amendment and the dormant Commerce Clause, Florida's interior design law infringes Plaintiffs' right under the Due Process Clause of the Fourteenth Amendment to earn a living in the occupation of

their choice free from unreasonable or arbitrary government interference.[42] The law also infringes Plaintiffs' right under Equal Protection Clause of the Fourteenth Amendment not to be arbitrarily saddled with burdensome regulations that are not applicable to others similarly situated.[43] The district court recognized that these claims are subject to review under the rational basis test, under which a law will be upheld as long as it is rationally related to a legitimate government interest. R-4-74 at 10-12. But the Court's application of that test was flawed. Though deferential, the rational basis test is not "toothless." *See, e.g., Craigmiles v. Giles*, 312 F.3d

[42] *See Connecticut v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292 (1999) ("this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation"); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (explaining that citizens have a right to follow any lawful calling subject to licensing requirements that are rationally related to their fitness or capacity to practice the profession); *Bd. of Regents v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701 (1972) (recognizing the right "to engage in any of the common occupations of life"); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39, 77 S. Ct. 752 (1957) ("[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment"); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 43 S. Ct. 625 (1923) (Fourteenth Amendment's conception of "liberty" includes the right "to engage in any of the common occupations of life").

[43] *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (equal protection violation where certain exemptions in state pest-control law lacked rational basis); *Brown v. Barry*, 710 F. Supp. 352, 355-56 (D.D.C. 1989) (same, outdoor shoeshine stands); *see also Fla. Retail Fed'n v. Attorney Gen. of Fla.*, 576 F. Supp. 2d 1281, 1291-93 (N.D. Fla. 2008) (no rational basis for imposing different obligations on businesses depending on whether they did or did not have at least one employee with a concealed-carry permit).

220, 229 (6th Cir. 2002) (striking down Tennessee law that allowed only state-licensed funeral directors to sell caskets). In this case, it is apparent that while the protection of health and safety and consumer protection are both undoubtedly legitimate government interests, Florida's interior design law is not rationally related to those interests and is therefore unconstitutional.

This case is similar to *Craigmiles*, 312 F.3d 220, in which the Sixth Circuit struck down a Tennessee law that granted a monopoly on the sale of caskets to state-licensed funeral directors. As the state has in this case, Tennessee defended its law by appealing to public health and safety, arguing that the sale of leaky caskets could promote the spread of disease. *Id.* at 225-26. But the Sixth Circuit rejected that rationale as implausible, because the law did not establish any "standards for casket selection to which licensed funeral directors [were] held accountable." *Id.* at 225. Further, there was "no evidence in the record that licensed funeral directors were selling caskets that were systematically more protective than those sold by independent casket retailers." *Id.* at 225-26. Accordingly, the court held 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." *Id.* at 226.

As in *Craigmiles*, the state argues in this case that Florida's interior design law is necessary to promote public health and safety and to protect consumers. But

these claims are implausible. First, there is no evidence that Florida's law produces any health or safety benefits, or that the unlicensed practice of interior design in the 47 states with no practice requirements poses any threat to the public, and the state has admitted as much. R-3-65 at 8 ¶¶ 15-16. More importantly, the state's asserted interests in both health and safety and consumer protection are undercut by multiple irrational exemptions in Florida's interior design law. First, an indeterminate number of licensed interior designers were grandfathered in when the licensing requirement was first enacted. R-2-54-27 at 3-4 (No. 9). These individuals are currently allowed to practice interior design in Florida with no restrictions, even though they were not required to have any formal education in interior design or to pass any examination, both of which are required for new entrants into the field. *See* 1995 Fla. Laws ch. 389, *4 (amending Fla. Stat. § 481.209 to permit licensure on the basis of experience only); R-2-59-4 at 2-3 (legislative history of grandfather clause noting that, without grandfathering, "approximately 2,500 practitioners . . . and . . . perhaps several thousand more . . . [would] have no prospect of obtaining the license necessary for them to continue to work . . . ."). Additionally, Florida's interior design law was recently amended to exempt any "manufacturer of commercial food service equipment or the manufacturer's representative, distributor, or dealer or an employee thereof," who

designs the layout of a commercial kitchen.[44] So while a person must have six years of education and experience to design the layout of a restaurant dining room, there are literally no education or experience requirements for those who prepare drawings or specifications relating to the placement of deep fryers, commercial steam cookers, stovetops, or food-preparation counters in a restaurant kitchen. R-2-54-27 at 8-9 (Nos. 26-29). Finally, while a license is required to perform commercial interior design, individuals who perform only residential interior design are not required to have any qualifications, even though commercial projects are subject to much greater oversight and generally involve more sophisticated actors. R-1-54-6 at 5-8 ¶¶ 12-16.

These exemptions render Florida's statutory scheme irrational. While it is true that "a legislature need not treat businesses of all types the same or equally ban all activities that present similar perceived harms," R-4-74 at 12, even under the district court's improperly narrow interpretation of Florida's law, a rational person could not conclude that the selection of cubicles poses a greater danger to public health and safety than the placement of deep fryers or food preparation counters. Nor could a rational person believe that two people with equivalent levels of design experience pose different levels of risk to the public merely because one

[44] Fla. Stat. § 481.229(8).

gained that experience in Georgia, and was not eligible to be grandfathered in, while the other gained that experience in Florida, and was eligible.

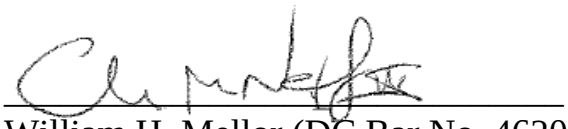
Stripped of its supposed health-and-safety and consumer-protection justifications, "we are left with the more obvious illegitimate purpose to which the licensure provision is very well tailored," *Craigmiles*, 312 F.3d at 228, namely, protecting Florida's licensed interior designers from competition. But "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224 (collecting cases). Accordingly, because Florida's interior design law is not rationally related to a legitimate government interest, it is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court's contrary holding should be reversed.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court reverse the district court's decision to uphold the practice restrictions of Florida's interior design law and render judgment that those restrictions violate the First Amendment, the Commerce Clause of the U.S. Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Dated this 19th day of April, 2010.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,606 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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I certify that on this 19th day of April, 2009, I filed with the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit, via UPS Next Day Air, the required number of copies of this **BRIEF OF APPELLANTS and RECORD EXCERPTS**, and further certify that I served, via UPS Next Day Air, the required number of this **BRIEF OF APPELLANTS and RECORD EXCERPTS** to the following:

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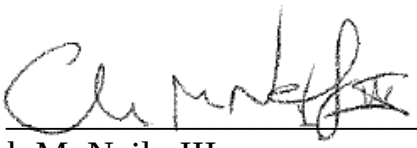
By: 

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ADDENDUM

ADDENDUM

FLORIDA CODE CHAPTER 481

ARCHITECTURE, INTERIOR DESIGN, AND LANDSCAPE ARCHITECTURE

481.203 Definitions.

481.209 Examinations.

481.213 Licensure.

481.2131 Interior design; practice requirements; disclosure of compensation for professional services.

481.219 Certification of partnerships, limited liability companies, and corporations.

481.223 Prohibitions; penalties; injunctive relief.

481.229 Exceptions; exemptions from licensure.

481.203 Definitions.--As used in this part:

(1) "Board" means the Board of Architecture and Interior Design.

(2) "Department" means the Department of Business and Professional Regulation.

(3) "Architect" or "registered architect" means a natural person who is licensed under this part to engage in the practice of architecture.

(4) "Certificate of registration" means a license issued by the department to a natural person to engage in the practice of architecture or interior design.

(5) "Certificate of authorization" means a certificate issued by the department to a corporation or partnership to practice architecture or interior design.

(6) "Architecture" means the rendering or offering to render services in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures. These services include planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts.

(7) "Townhouse" is a single-family dwelling unit not exceeding three stories in height which is constructed in a series or group of attached units with property lines separating such units. Each townhouse shall be considered a separate building and shall be separated from adjoining townhouses by the use of separate exterior walls meeting the requirements for zero clearance from property lines as required by the type of construction and fire protection requirements; or shall be separated by a party wall; or may be separated by a single wall meeting the following requirements:

(a) Such wall shall provide not less than 2 hours of fire resistance. Plumbing, piping, ducts, or electrical or other building services shall not be installed within or through the 2-hour wall unless such materials and methods of penetration have been tested in accordance with the Standard Building Code.

(b) Such wall shall extend from the foundation to the underside of the roof sheathing, and the underside of the roof shall have at least 1 hour of fire resistance for a width not less than 4 feet on each side of the wall.

(c) Each dwelling unit sharing such wall shall be designed and constructed to maintain its structural integrity independent of the unit on the opposite side of the wall.

(8) "Interior design" means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure. "Interior design" includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the **fabrication of nonstructural elements** within and surrounding interior spaces of buildings. "Interior design"

specifically excludes the design of or the responsibility for architectural and engineering work, except for specification of fixtures and their location within interior spaces. As used in this subsection, "architectural and engineering interior construction relating to the building systems" includes, but is not limited to, construction of structural, mechanical, plumbing, heating, air-conditioning, ventilating, electrical, or vertical transportation systems, or construction which materially affects lifesafety systems pertaining to firesafety protection such as fire-rated separations between interior spaces, fire-rated vertical shafts in multistory structures, fire-rated protection of structural elements, smoke evacuation and compartmentalization, emergency ingress or egress systems, and emergency alarm systems.

(9) "Registered interior designer" or "interior designer" means a natural person who is licensed under this part.

(10) "Nonstructural element" means an element which does not require structural bracing and which is something other than a load-bearing wall, load-bearing column, or other load-bearing element of a building or structure which is essential to the structural integrity of the building.

(11) "Reflected ceiling plan" means a ceiling design plan which is laid out as if it were projected downward and which may include lighting and other elements.

(12) "Space planning" means the analysis, programming, or design of spatial requirements, including preliminary space layouts and final planning.

(13) "Common area" means an area that is held out for use by all tenants or owners in a multiple-unit dwelling, including, but not limited to, a lobby, elevator, hallway, laundry room, clubhouse, or swimming pool.

(14) "Diversified interior design experience" means experience which substantially encompasses the various elements of interior design services set forth under the definition of "interior design" in subsection (8).

(15) "Interior decorator services" includes the selection or assistance in selection of surface materials, window treatments, wallcoverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under applicable building codes.

(16) "Responsible supervising control" means the exercise of direct personal supervision and control throughout the preparation of documents, instruments of service, or any other work requiring the seal and signature of a licensee under this part.

History.--ss. 2, 19, ch. 79-273; ss. 2, 3, ch. 81-318; ss. 27, 48, ch. 82-179; ss. 3, 23, 24, ch. 88-383; s. 4, ch. 91-429; s. 297, ch. 94-119; s. 171, ch. 94-218; s. 2, ch. 95-389; s. 1, ch. 2006-276.

481.209 Examinations.--

(1) A person desiring to be licensed as a registered architect shall apply to the department to take the licensure examination. The department shall administer the licensure examination for architects to each applicant who the board certifies:

(a) Has completed the application form and remitted a nonrefundable application fee and an examination fee which is refundable if the applicant is found to be ineligible to take the examination;

(b)1. Is a graduate of a school or college of architecture accredited by the National Architectural Accreditation Board; or

2. Is a graduate of an approved architectural curriculum, evidenced by a degree from an unaccredited school or college of architecture approved by the board. The board shall adopt rules providing for the review and approval of unaccredited schools and colleges of architecture and courses of architectural study based on a review and inspection by the board of the curriculum of accredited schools and colleges of architecture in the United States; and

(c) Has completed, prior to examination, 1 year of the internship experience required by s. 481.211(1).

(2) A person desiring to be licensed as a registered interior designer shall apply to the department for licensure. The department shall administer the licensure examination for interior designers to each applicant who has completed the application form and remitted the application and examination fees specified in s. 481.207 and who the board certifies:

(a) Is a graduate from an interior design program of 5 years or more and has completed 1 year of diversified interior design experience;

(b) Is a graduate from an interior design program of 4 years or more and has completed 2 years of diversified interior design experience;

(c) Has completed at least 3 years in an interior design curriculum and has completed 3 years of diversified interior design experience; or

(d) Is a graduate from an interior design program of at least 2 years and has completed 4 years of diversified interior design experience. Subsequent to October 1, 2000, for the purpose of having the educational qualification required under this subsection accepted by the board, the applicant must complete his or her education at a program, school, or college of interior design whose curriculum has been approved by the board as of the time of completion. Subsequent to October 1, 2003, all of the required amount of educational credits shall have been obtained in a program, school, or college of interior design whose curriculum has been approved by the board, as of the time each educational credit is gained. The board shall adopt rules providing for the review and approval of programs, schools, and colleges of interior design and courses of interior design study

based on a review and inspection by the board of the curriculum of programs, schools, and colleges of interior design in the United States, including those programs, schools, and colleges accredited by the Foundation for Interior Design Education Research. The board shall adopt rules providing for the review and approval of diversified interior design experience required by this subsection.

History.--ss. 5, 19, ch. 79-273; s. 357, ch. 81-259; ss. 2, 3, ch. 81-318; ss. 7, 23, 24, ch. 88-383; s. 4, ch. 91-429; s. 300, ch. 94-119; s. 4, ch. 95-389; s. 5, ch. 96-309; s. 18, ch. 2000-332; s. 3, ch. 2001-269.

481.213 Licensure.--

(1) The department shall license any applicant who the board certifies is qualified for licensure and who has paid the initial licensure fee. Licensure as an architect under this section shall be deemed to include all the rights and privileges of licensure as an interior designer under this section.

(2) The board shall certify for licensure by examination any applicant who passes the prescribed licensure examination and satisfies the requirements of ss. 481.209 and 481.211, for architects, or the requirements of s. 481.209, for interior designers.

(3) The board shall certify as qualified for a license by endorsement as an architect or as an interior designer an applicant who:

(a) Qualifies to take the prescribed licensure examination, and has passed the prescribed licensure examination or a substantially equivalent examination in another jurisdiction, as set forth in s. 481.209 for architects or interior designers, as applicable, and has satisfied the internship requirements set forth in s. 481.211 for architects;

(b) Holds a valid license to practice architecture or interior design issued by another jurisdiction of the United States, if the criteria for issuance of such license were substantially equivalent to the licensure criteria that existed in this state at the time the license was issued; provided, however, that an applicant who has been licensed for use of the title "interior design" rather than licensed to practice interior design shall not qualify hereunder; or

(c) Has passed the prescribed licensure examination and holds a valid certificate issued by the National Council of Architectural Registration Boards, and holds a valid license to practice architecture issued by another state or jurisdiction of the United States. For the purposes of this paragraph, any applicant licensed in another state or jurisdiction after June 30, 1984, must also hold a degree in architecture and such degree must be equivalent to that required in s. 481.209(1)(b). Also for the purposes of this paragraph, any applicant licensed in another state or jurisdiction after June 30, 1985, must have completed an internship equivalent to that required by s. 481.211 and any rules adopted with respect thereto.

(4) The board may refuse to certify any applicant who has violated any of the provisions

of s. 481.223, s. 481.225, or s. 481.2251, as applicable.

(5) The board may refuse to certify any applicant who is under investigation in any jurisdiction for any act which would constitute a violation of this part or of chapter 455 until such time as the investigation is complete and disciplinary proceedings have been terminated.

(6) The board shall adopt rules to implement the provisions of this part relating to the examination, internship, and licensure of applicants.

(7) For persons whose licensure requires satisfaction of the requirements of ss. 481.209 and 481.211, the board shall, by rule, establish qualifications for certification of such persons as special inspectors of threshold buildings, as defined in ss. 553.71 and 553.79, and shall compile a list of persons who are certified. A special inspector is not required to meet standards for certification other than those established by the board, and the fee owner of a threshold building may not be prohibited from selecting any person certified by the board to be a special inspector. The board shall develop minimum qualifications for the qualified representative of the special inspector who is authorized under s. 553.79 to perform inspections of threshold buildings on behalf of the special inspector.

History.--ss. 8, 19, ch. 79-273; ss. 2, 3, ch. 81-318; ss. 9, 23, 24, ch. 88-383; s. 5, ch. 89-66; s. 9, ch. 89-162; s. 4, ch. 91-429; ss. 155, 236, 302, 308, ch. 94-119; ss. 5, 6, ch. 95-389; s. 129, ch. 98-166; s. 38, ch. 2000-141; s. 189, ch. 2000-160.

481.2131 Interior design; practice requirements; disclosure of compensation for professional services.--

(1) A registered interior designer is authorized to perform "interior design" as defined in s. 481.203. Interior design documents prepared by a registered interior designer shall contain a statement that the document is not an architectural or engineering study, drawing, specification, or design and is not to be used for construction of any load-bearing columns, load-bearing framing or walls of structures, or issuance of any building permit, except as otherwise provided by law. Interior design documents that are prepared and sealed by a registered interior designer may, if required by a permitting body, be submitted for the issuance of a building permit for interior construction excluding design of any structural, mechanical, plumbing, heating, air-conditioning, ventilating, electrical, or vertical transportation systems or that materially affect lifesafety systems pertaining to firesafety protection such as fire-rated separations between interior spaces, fire-rated vertical shafts in multistory structures, fire-rated protection of structural elements, smoke evacuation and compartmentalization, emergency ingress or egress systems, and emergency alarm systems.

(2) An interior designer shall, before entering into a contract, verbal or written, clearly determine the scope and nature of the project and the method or methods of compensation. The interior designer may offer professional services to the client as a consultant, specifier, or supplier on the basis of a fee, percentage, or markup. The interior designer shall have the responsibility of fully disclosing to the client the manner in which

all compensation is to be paid. Unless the client knows and agrees, the interior designer shall not accept any form of compensation from a supplier of goods and services in cash or in kind.

History.--ss. 10, 24, ch. 88-383; s. 4, ch. 91-429; s. 303, ch. 94-119.

481.219 Certification of partnerships, limited liability companies, and corporations.--

(1) The practice of or the offer to practice architecture or interior design by licensees through a corporation, limited liability company, or partnership offering architectural or interior design services to the public, or by a corporation, limited liability company, or partnership offering architectural or interior design services to the public through licensees under this part as agents, employees, officers, or partners, is permitted, subject to the provisions of this section.

(2) For the purposes of this section, a certificate of authorization shall be required for a corporation, limited liability company, partnership, or person practicing under a fictitious name, offering architectural services to the public jointly or separately. However, when an individual is practicing architecture in her or his own name, she or he shall not be required to be certified under this section. Certification under this subsection to offer architectural services shall include all the rights and privileges of certification under subsection (3) to offer interior design services. 481.219 (3)

(3) For the purposes of this section, a certificate of authorization shall be required for a corporation, limited liability company, partnership, or person operating under a fictitious name, offering interior design services to the public jointly or separately. However, when an individual is practicing interior design in her or his own name, she or he shall not be required to be certified under this section.

(4) All final construction documents and instruments of service which include drawings, specifications, plans, reports, or other papers or documents involving the practice of architecture which are prepared or approved for the use of the corporation, limited liability company, or partnership and filed for public record within the state shall bear the signature and seal of the licensee who prepared or approved them and the date on which they were sealed.

(5) All drawings, specifications, plans, reports, or other papers or documents prepared or approved for the use of the corporation, limited liability company, or partnership by an interior designer in her or his professional capacity and filed for public record within the state shall bear the signature and seal of the licensee who prepared or approved them and the date on which they were sealed.

(6) The department shall issue a certificate of authorization to any applicant who the board certifies as qualified for a certificate of authorization and who has paid the fee set in s. 481.207.

(7) The board shall certify an applicant as qualified for a certificate of authorization to offer architectural or interior design services, provided that:

(a) One or more of the principal officers of the corporation or limited liability company, or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as architects, are registered as provided by this part; or

(b) One or more of the principal officers of the corporation or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as interior designers, are registered as provided by this part.

(8) The department shall adopt rules establishing a procedure for the biennial renewal of certificates of authorization.

(9) The department shall renew a certificate of authorization upon receipt of the renewal application and biennial renewal fee.

(10) Each partnership, limited liability company, and corporation certified under this section shall notify the department within 30 days of any change in the information contained in the application upon which the certification is based. Any registered architect or interior designer who qualifies the corporation, limited liability company, or partnership as provided in subsection (7) shall be responsible for ensuring responsible supervising control of projects of the entity and upon termination of her or his employment with a partnership, limited liability company, or corporation certified under this section shall notify the department of the termination within 30 days.

(11) No corporation, limited liability company, or partnership shall be relieved of responsibility for the conduct or acts of its agents, employees, or officers by reason of its compliance with this section. However, the architect who signs and seals the construction documents and instruments of service shall be liable for the professional services performed, and the interior designer who signs and seals the interior design drawings, plans, or specifications shall be liable for the professional services performed.

(12) Disciplinary action against a corporation, limited liability company, or partnership shall be administered in the same manner and on the same grounds as disciplinary action against a registered architect or interior designer, respectively.

(13) Nothing in this section shall be construed to mean that a certificate of registration to practice architecture or interior design shall be held by a corporation, limited liability company, or partnership. Nothing in this section prohibits corporations, limited liability companies, and partnerships from joining together to offer architectural, engineering, interior design, surveying and mapping, and landscape architectural services, or any combination of such services, to the public, provided that each corporation, limited liability company, or partnership otherwise meets the requirements of law.

(14) Corporations, limited liability companies, or partnerships holding a valid certificate of authorization to practice architecture shall be permitted to use in their title the term "interior designer" or "registered interior designer."

History.--ss. 7, 19, ch. 79-273; ss. 2, 3, ch. 81-318; ss. 13, 23, 24, ch. 88-383; s. 6, ch. 89-66; s. 10, ch. 89-162; s. 4, ch. 91-429; ss. 119, 304, ch. 94-119; s. 7, ch. 95-389; s. 415, ch. 97-103; s. 1, ch. 2005-124.

481.223 Prohibitions; penalties; injunctive relief.--

(1) A person may not knowingly:

(a) Practice architecture unless the person is an architect or a registered architect; however, a licensed architect who has been licensed by the board and who chooses to relinquish or not to renew his or her license may use the title "Architect, Retired" but may not otherwise render any architectural services.

(b) Practice interior design unless the person is a registered interior designer unless otherwise exempted herein; however, an interior designer who has been licensed by the board and who chooses to relinquish or not to renew his or her license may use the title "Interior Designer, Retired" but may not otherwise render any interior design services.

(c) Use the name or title "architect" or "registered architect," or "interior designer" or "registered interior designer," or words to that effect, when the person is not then the holder of a valid license issued pursuant to this part.

(d) Present as his or her own the license of another.

(e) Give false or forged evidence to the board or a member thereof.

(f) Use or attempt to use an architect or interior designer license that has been suspended, revoked, or placed on inactive or delinquent status.

(g) Employ unlicensed persons to practice architecture or interior design.

(h) Conceal information relative to violations of this part.

(2) Any person who violates any provision of subsection (1) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3)(a) Notwithstanding chapter 455 or any other law to the contrary, an affected person may maintain an action for injunctive relief to restrain or prevent a person from violating paragraph (1)(a), paragraph (1)(b), or paragraph (1)(c). The prevailing party is entitled to actual costs and attorney's fees.

(b) For purposes of this subsection, the term "affected person" means a person directly affected by the actions of a person suspected of violating paragraph (1)(a), paragraph

(1)(b), or paragraph (1)(c) and includes, but is not limited to, the department, any person who received services from the alleged violator, or any private association composed primarily of members of the profession the alleged violator is practicing or offering to practice or holding himself or herself out as qualified to practice.

History.--ss. 14, 19, ch. 79-273; ss. 2, 3, ch. 81-318; ss. 15, 23, 24, ch. 88-383; s. 111, ch. 91-224; s. 4, ch. 91-429; ss. 234, 305, ch. 94-119; s. 417, ch. 97-103; s. 4, ch. 2001-269; s. 3, ch. 2006-276.

481.229 Exceptions; exemptions from licensure.--

(1) No person shall be required to qualify as an architect in order to make plans and specifications for, or supervise the erection, enlargement, or alteration of:

(a) Any building upon any farm for the use of any farmer, regardless of the cost of the building;

(b) Any one-family or two-family residence building, townhouse, or domestic outbuilding appurtenant to any one-family or two-family residence, regardless of cost; or

(c) Any other type of building costing less than $25,000, except a school, auditorium, or other building intended for public use, provided that the services of a registered architect shall not be required for minor school projects pursuant to s. 1013.45.

(2) Nothing contained in this part shall be construed to prevent any employee of an architect from acting in any capacity under the instruction, control, or supervision of the architect or to prevent any person from acting as a contractor in the execution of work designed by an architect.

(3) Notwithstanding the provisions of this part, a general contractor who is certified or registered pursuant to the provisions of chapter 489 is not required to be licensed as an architect when negotiating or performing services under a design-build contract as long as the architectural services offered or rendered in connection with the contract are offered and rendered by an architect licensed in accordance with this chapter.

(4) Notwithstanding the provisions of this part or of any other law, no registered engineer whose principal practice is civil or structural engineering, or employee or subordinate under the responsible supervision or control of the engineer, is precluded from performing architectural services which are purely incidental to his or her engineering practice, nor is any registered architect, or employee or subordinate under the responsible supervision or control of such architect, precluded from performing engineering services which are purely incidental to his or her architectural practice. However, no engineer shall practice architecture or use the designation "architect" or any term derived therefrom, and no architect shall practice engineering or use the designation "engineer" or any term derived therefrom.

(5)(a) Nothing contained in this part shall prevent a registered architect or a partnership,

limited liability company, or corporation holding a valid certificate of authorization to provide architectural services from performing any interior design service or from using the title "interior designer" or "registered interior designer."

(b) Notwithstanding any other provision of this part, all persons licensed as architects under this part shall be qualified for interior design licensure upon submission of a completed application for such license and a fee not to exceed $30. Such persons shall be exempt from the requirements of s. 481.209(2). For architects licensed as interior designers, satisfaction of the requirements for renewal of licensure as an architect under s. 481.215 shall be deemed to satisfy the requirements for renewal of licensure as an interior designer under that section. Complaint processing, investigation, or other discipline-related legal costs related to persons licensed as interior designers under this paragraph shall be assessed against the architects' account of the Regulatory Trust Fund.

(c) Notwithstanding any other provision of this part, any corporation, partnership, or person operating under a fictitious name which holds a certificate of authorization to provide architectural services shall be qualified, without fee, for a certificate of authorization to provide interior design services upon submission of a completed application therefor. For corporations, partnerships, and persons operating under a fictitious name which hold a certificate of authorization to provide interior design services, satisfaction of the requirements for renewal of the certificate of authorization to provide architectural services under s. 481.219 shall be deemed to satisfy the requirements for renewal of the certificate of authorization to provide interior design services under that section.

(6) This part shall not apply to:

(a) A person who performs interior design services or interior decorator services for any residential application, provided that such person does not advertise as, or represent himself or herself as, an interior designer. For purposes of this paragraph, "residential applications" includes all types of residences, including, but not limited to, residence buildings, single-family homes, multifamily homes, townhouses, apartments, condominiums, and domestic outbuildings appurtenant to one-family or two-family residences. However, "residential applications" does not include common areas associated with instances of multiple-unit dwelling applications.

(b) An employee of a retail establishment providing "interior decorator services" on the premises of the retail establishment or in the furtherance of a retail sale or prospective retail sale, provided that such employee does not advertise as, or represent himself or herself as, an interior designer.

(7) Nothing in this part shall be construed as authorizing or permitting an interior designer to engage in the business of, or to act as, a contractor within the meaning of chapter 489, unless registered or certified as a contractor pursuant to chapter 489.

History.--ss. 11, 19, ch. 79-273; ss. 25, 26, ch. 81-302; ss. 2, 3, ch. 81-318; ss. 26, 48, ch. 82-179; s. 3, ch. 83-265; ss. 19, 23, 24, ch. 88-383; s. 2, ch. 89-115; s. 68, ch. 89-162; s.

4, ch. 91-429; s. 307, ch. 94-119; s. 20, ch. 94-292; s. 8, ch. 95-389; s. 420, ch. 97-103; s. 1026, ch. 2002-387; s. 5, ch. 2005-124.