**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF FLORIDA**
**Tallahassee Division**

EVA LOCKE, et al.,
Plaintiffs,

v.

Civil Action No.
4:09cv193-RH/WCS

JOYCE SHORE, et al.,
Defendants.

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**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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The pending cross-motions for summary judgment are fully resolved by the following three points, about which there is no *genuine* dispute:

1. Florida's interior design law regulates primarily, if not exclusively, speech;

2. It has proven impossible to get a straight, consistent answer from the Defendants and their representatives concerning the scope of the practice act; and

3. There is no evidence that the unlicensed practice of interior design—which is the norm in this country since 47 states do not regulate it in any way—presents any bona fide public welfare concerns.

The only remaining question is the legal significance of those facts.

Many of the arguments raised in Defendants' response brief are addressed at length in Plaintiffs' Response to Defendants' Motion for Summary Judgment and will not be repeated here. Instead, this reply will focus on three of Defendants' new arguments. First, Plaintiffs will show that Florida's interior design law does not contain any "core meaning," much less the one invented by the Defendants in their response brief. Plaintiffs will then briefly address what evidence this Court may consider in ruling on the law's vagueness. Finally, Plaintiffs will rebut errors in Defendants' discussion of Plaintiffs' dormant Commerce Clause claim.

## I. The Defendants' Attempt to Invent a "Core Meaning" for the Practice Act Is Both Unpersuasive and Inconsistent with the Fact Record.

Unable to defend Florida's interior design law as written, the Defendants have simply invented an interpretation far narrower than that permitted by the law's plain language. Under this strained interpretation, the law's prohibition on interior design "drawings" applies only to "technical specifications"; the regulation of "furnishings" inexplicably excludes all furniture; and the narrow exemption of "interior decorator

services" has all but swallowed the prohibition on unlicensed commercial interior design.[1] But as shown by testimony from the Chair of the Board of Architecture and Interior Design, the prosecuting attorney charged with enforcing the law, the Defendant's expert witness, and the man who actually wrote Florida's interior design law, this interpretation of the law is nothing more than a litigating position, which this Court can and should reject. *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (holding that court owes no deference to an agency's "mere litigating position").[2]

The Defendants' principal interpretive error is their continued insistence that Florida's interior design law contains a blanket exemption for "interior decorator services."[3] As Plaintiffs explained in their response to Defendant's motion for summary judgment, this is incorrect.[4] The law is quite specific that "interior decorator services" are exempt in only two situations: 1) when the services are provided for a "residential application," or 2) when the services are provided 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." Fla. Stat. § 481.229(6). Interpreting Florida's interior design law to exempt all interior decorator services—without regard to who performed them or where they were performed—would render these provisions meaningless, and therefore cannot be the correct interpretation of the law. *See United*

[1] Defs.' Resp. Br. at 7, 11-13.
[2] Because Defendants' new assertions regarding their interpretation of Florida's interior design law depart so sharply from the text of that law and from the testimony of the witnesses in this case, Plaintiffs are left with no choice but to submit rebuttal evidence in support of this reply. Plaintiffs' new exhibits include a declaratory statement by the Board of Architecture and Interior Design that Defendants cite in their response to Plaintiffs' motion for summary judgment (but do not produce), and additional excerpts from deposition transcripts that opposing counsel have consented to Plaintiffs submitting.
[3] Defs.' Resp. Br. at 11; Defs.' MSJ Br. at 16-17.
[4] Pls.' Resp. Br. at 2.

*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.").[5]

Defendants' narrow view of the law is also refuted by the testimony in this case. The Board's prosecuting attorney, David Minacci, testified that the law applies to any furnishings that could affect ingress or egress.[6] Defendant Joyce Shore, the Chair of the Board of Architecture and Interior Design, went even further, agreeing that the "nonstructural interior elements" regulated by the interior design law include "pretty much everything inside the four walls that is not holding up the building," including art, antiques, furnishings, wall coverings, window treatments, flooring, and lighting.[7] This interpretation was echoed by Lisa Waxman, the Defendants' expert witness, who testified that "interior elements" include cabinets, millwork, flooring, window treatments, and furnishings.[8] It was also shared by Emory Johnson, the former enforcement expert for the Board's prosecuting attorney, who testified that the interior design law covered window treatments, furniture, carpets, paint, and lighting.[9]

Mr. Johnson's testimony is particularly illuminating because he actually drafted the original language of Florida's interior design practice act.[10] So, for example, while the Defendants argue that a wedding planner's sketch showing the layout of a reception

[5] For this same reason, the Board's declaratory statement purporting to exempt all drawings relating to the sale of furnishings—whether or not sold at retail—is an incorrect interpretation of the law. *See* Sherman Decl. Ex 1 (Board of Architecture and Interior Design's declaratory statement 2008-082 (Jan. 23, 2009)). That interpretation makes surplusage of the "retail" requirement in the "retail sale" exemption. *See* Fla. Stat. § 481.229(6)(b).
[6] Sherman Decl. Ex. 2 (Minacci Dep. 133.3-.14).
[7] Sherman Decl. Ex. 3 (Shore Dep. 58.22-60.8).
[8] Sherman Decl. Ex. 4 (Waxman Dep. 134.17-135.10).
[9] Neily Decl. Ex. 6 (Johnson Dep. 67.10-69.22).
[10] Neily Decl. Ex. 6 (Johnson Dep. 31.7-.17).

would not be covered,[11] Mr. Johnson testified that this drawing is not only covered by the plain language of the law but that the legislature *intended* to cover it.[12] Similarly, while the Defendants argue that "artistic renderings" are not "drawings" within the meaning of the statute, Mr. Johnson testified precisely the opposite.[13] Plaintiffs do not mean to suggest that Mr. Johnson's interpretation of the law is authoritative. But the fact that the experienced interior designer who drafted the law holds these interpretations shows that they are not, as the Defendants claim, absurd. *Cf.* 2A Norman J. Singer, Statutes and Statutory Construction § 46:07, 199 (6th ed. 2000) ("[T]he absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.").

In short, Defendants have offered no compelling reason why Florida's interior design law should not be "construed to mean exactly what it says in plain, unmistakable language." *Fla. Retail Fed'n, Inc. v. Attorney General*, 576 F. Supp. 2d 1281, 1297 (N.D. Fla. 2008). That plain language is undoubtedly broad—as Mr. Manacci admitted, there is nothing in the language of the law that would exempt a drawing reflecting the *existing* arrangement of desks and chairs in an office.[14] But this Court is not obliged to divine a narrower "core meaning" from a law that admits of no limitations. *Broward Coal. of Condos. v. Browning*, No. 4:08cv445, 2009 U.S. Dist. LEXIS 43925, at *24 (N.D. Fla. May 22, 2009) ("Writing a statute that is constitutionally sound is a task best

[11] Defs.' Resp. Br. at 12.
[12] Neily Decl. Ex. 6 (Johnson Dep. 73.10-75.3).
[13] Neily Decl. Ex. 6 (Johnson Dep. 78.7-80.10).
[14] Neily Decl. Ex. 2 (Minacci Dep. 118.3-120.14).

suited for the elected legislature, not the judicial branch of government."). This Court should decline Defendants' invitation to do so. For the reasons set forth in Plaintiffs' motion for summary judgment, the statute as written is unconstitutionally overbroad and vague.

## II. While Vagueness Is a Question of Law, This Court Is Not Required to Ignore Evidence.

Faced with evidence of genuine confusion about the application of Florida's interior design law, the Defendants argue that the evidence is immaterial because vagueness is a question of law.[15] While Defendants are correct that the ultimate determination of vagueness is left to the court, this Court is not required to make that determination in an evidentiary vacuum. Indeed, the importance of evidence to this determination is supported by *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005), the very case Defendants rely on for their argument. In that case, the plaintiff alleged that a local zoning code was unconstitutionally vague, and produced evidence that different enforcement officials had differing interpretations of the code. The Eleventh Circuit did not ignore this evidence, but rather held that it showed an "inherent risk of discriminatory enforcement" that "established the vagueness of the Code." *Id.* at 1330-31.

In this case, Plaintiffs have produced evidence of significant disagreements among enforcement officials about the scope of Florida's interior design law.[16] Additionally, the Plaintiffs, who all have training or experience as interior designers,

[15] Defs.' Resp. Br. at 8, 17-18.
[16] Pls.' MSJ Br. at 19-20; *see also supra* at 3.

have testified that they find the law confusing.[17] While not determinative, these facts are certainly *probative* of vagueness. Defendants have cited no caselaw that would compel this Court to close its eyes to this evidence, and this Court should not do so. Instead, this Court should consider this evidence along with the undefined terms of Florida's interior design law, and hold that both the practice act and the title act are unconstitutionally vague because they are not written with the "narrow specificity" demanded by the First Amendment. *See NAACP v. Button*, 371 U.S. 415, 433 (1963).

## III. Florida's Interior Design Law Burdens Interstate Commerce, and the "Lesser Impact" Prong of *Pike* Is Fully Applicable to This Case.

In Plaintiffs' motion for summary judgment, they presented unrebutted evidence that Florida's interior design law burdens interstate commerce, including testimony from individuals from outside of the state who feel inhibited in their ability to transact business within the state due to the law.[18] Plaintiffs also presented evidence that Defendants have launched investigations into three of the largest office-supply retailers in the country simply for doing (and offering to do) business as usual in Florida.[19] Defendants contend that these investigations were started at Plaintiffs' behest.[20] This is inaccurate. Plaintiffs informed Defendants of possible violations during the deposition of David Minacci.[21] Later, Plaintiffs merely asked Defendants through interrogatories if, on the basis of this information, they had begun an investigation into these possible violations and, if not,

[17] Gardner Decl. ¶¶ 15-16; Levenson Decl. ¶¶ 6, 8, 11-13; Locke Decl. ¶ 7.
[18] Pls.' MSJ Br. at 21-22.
[19] *Id.*
[20] Defs.' Resp. Br. at 15.
[21] Sherman Decl. Ex. 2 (Minacci Dep. 145.7-148.7).

why not.[22] Further, Defendants' suggestion that it began investigating these companies despite their actions "never [having been] considered to be violations" is implausible. Mr. Minacci testified that before any investigation can begin, there must be a determination that a complaint states a legally sufficient violation of the law.[23] Based on this uncontroverted testimony, the Court can safely assume that the prosecuting attorney, acting under color of state law, would not have opened investigations into these companies unless that standard was satisfied. Accordingly, this Court should consider the burdens imposed on these companies as part of its dormant Commerce Clause analysis.

Plaintiffs' motion for summary judgment argues that the local benefits of Florida's interior design law—assuming there are any—could be achieved equally well through means that do not produce these burdens on interstate commerce and, therefore, Florida's interior design law fails the "lesser impact" prong of *Pike* balancing. *See Diamond Waste v. Monroe County*, 939 F.2d 941, 945 (11th Cir. 1991) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Defendants dismiss this argument in a footnote, claiming that the "lesser impact" prong does not apply to statutes that are "facially evenhanded."[24] But the Defendants have it backwards. *Pike* balancing—including the "lesser impact" prong—applies *only* to laws that are facially evenhanded. *Pike*, 397 U.S. at 142 (holding that test applies when "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are

[22] Neily Decl. Ex. 5, pp. 5-6 (Pls.' Interrogatory 22).
[23] Sherman Decl. Ex. 2 (Minacci Dep. 20.12-21.10).
[24] Defs.' Resp. Br. at 16 n.8.

only incidental").[25] Accordingly, the "lesser impact" prong of *Pike* is fully applicable to this case, and this Court should hold that Florida's interior design law violates the dormant Commerce Clause on those grounds.

## CONCLUSION

For the reasons set forth above and in Plaintiffs' motion for summary judgment, Plaintiffs respectfully request that the Court grant their motion for summary judgment and enter judgment in their favor on claims 1, 2, and 7 of their Complaint.

Dated this 11th day of January, 2010.

Respectfully submitted,

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[25] Laws that facially discriminate against interstate commerce are not subject to *Pike* balancing because they are "virtually *per se* invalid." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of January, 2010, a true and correct copy of **PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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