NO. 05-30450

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHAMILLE PETERS; BARBARA PEACOCK; KAYODE HOWELL

Plaintiffs - Appellants

v.

BOB ODOM; VAN COX; WALTER IMAHARA; RANDY HARRIS; HAROLD TANI; ROGER MAYES; STEPHEN HOOVER; MATTHEW KEPPINGER; PAUL COREIL; EMILY STICH; ROB BARRY, III; DONALD KELLY; THOMAS SPEDALE; RICHARD HEROMAN

Defendants - Appellees

On Appeal from the United States District Court
for the Middle District of Louisiana
C.A. No. 03-960-B-M2

APPELLANTS' BRIEF

MICHAEL R. FONTHAM
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
Phone: (504) 593-0810
Fax: (504) 596-0810

Attorneys for Plaintiffs - Appellants

WILLIAM H. MELLOR
CLARK M. NEILY III
Institute for Justice
1717 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Phone: (202) 955-1300
Fax: (202) 955-1329

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties

Plaintiffs-Appellants:

Shamille Peters, Barbara Peacock, Kayode Howell

Defendants-Appellees:

Members of the Louisiana State Horticulture Commission: Bob Odom, Van Cox, Walter Imahara, Randy Harris, Harold Tani, Roger Mayes, Stephen Hoover, Matthew Keppinger, Paul Coreil, Emily Stich, Rob Barry III, Donald Kelly, Thomas Spedale, Richard Heroman

B. Attorneys

For Plaintiffs-Appellants:

Clark M. Neily III
William H. Mellor
Institute for Justice
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Michael R. Fontham
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130

Scott Wilson, Esq.
12605 South Harrell's Ferry Rd
Suite 6
Baton Rouge, LA 70816
(District Court only)

For Defendants-Appellees:

David McFadden
Clark Richard
Gelpi and Associates, PLC
203 Carondelet St., Ste. 907
New Orleans, LA 70130

Dated: July 1, 2005

Respectfully submitted,

INSTITUTE FOR JUSTICE

By: _____

Clark M. Neily III
William H. Mellor
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
Phone: (202) 955-1300
Fax: (202) 955-1329

Attorneys for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument as this case presents weighty constitutional questions regarding their right to earn an honest living free from arbitrary or unreasonable government interference. Plaintiffs believe oral argument will materially assist the Court in resolving those questions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES & REGULATIONS

OTHER PUBLICATIONS

STATEMENT OF JURISDICTION

Plaintiffs-Appellants (hereafter "Plaintiffs") filed this civil rights action in the United States District Court for the Middle District of Louisiana under 28 U.S.C. §§ 1331 and 1343. The district court dismissed the action with prejudice on March 2, 2005. Plaintiffs then filed a motion to alter or amend judgment, which the district court denied on April 7, 2005. Plaintiffs filed their notice of appeal on April 20, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

Louisiana is the only state in the country that dictates who may work as a florist and who may not based on its assessment of a person's talent. The issues presented are:

1. Does Louisiana's florist licensing scheme violate the right to earn a living protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

2. Does the Privileges or Immunities Clause of the Fourteenth Amendment protect a citizen's right to work in a harmless occupation like flower arranging without seeking permission from the government?

3. Did the district court err in denying Plaintiffs' motion to alter or amend judgment based on newly discovered evidence that further establishes the irrationality of Louisiana's florist licensing scheme?

STATEMENT OF THE CASE

Plaintiffs Shamille Peters, Barbara Peacock, and Kayode Howell filed this lawsuit in December 2003 to vindicate their constitutional right to earn an honest living free from arbitrary or irrational government interference.[1] Peters, Peacock, and Howell are all talented floral designers with years of experience. Nevertheless, the state of Louisiana has forbidden them from working as retail florists because they—like thousands of others—have been unable to pass the state's antiquated, subjective, and arbitrarily graded licensing exam.

The right to earn a living is protected by three separate provisions of the Fourteenth Amendment: the Due Process Clause, the Equal Protection Clause, and the Privileges or Immunities Clause. As set forth in Plaintiffs' First Amended Complaint, Louisiana's florist licensing scheme violates each of those provisions because it is not rationally related to any legitimate government purpose. Record ("R.") 115-117 ¶¶ 18-22, 29-36.

Defendants, who are the fourteen members of the Louisiana Horticulture Commission ("Commission"), filed a motion to dismiss Plaintiffs' equal

[1] Plaintiff Sandy Meadows passed away in October 2004. Accordingly, Ms. Meadows is not a party to this appeal, although her name has been retained in the caption of the case.

protection and privileges or immunities claims in November 2004. Shortly thereafter, in December 2004, the parties filed cross-motions for summary judgment on all three of Plaintiffs' claims. On February 14, 2005, the district court granted Defendants' motion to dismiss Plaintiffs' privileges or immunities claim. On March 2, 2005, the district court entered an order granting Defendants' motion for summary judgment on the two remaining claims (due process and equal protection), denying Plaintiffs' summary judgment motion, and dismissing the action with prejudice.

In its summary judgment ruling, the district court found the Defendants had established a rational relationship between Louisiana's florist licensing scheme and three legitimate government interests: (i) protecting public health and safety, Record Excerpts ("R.E.") 57-58; (ii) ensuring that floral arrangements are prepared in a "proper, cost-efficient manner," *id.*; and (iii) "enhancing the reputation of the retail floral industry," R.E. 58-59.

On March 11, 2005, Plaintiffs moved the district court to alter or amend its judgment based on evidence produced by the Defendants just days before the court issued its summary judgment ruling. The evidence showed that Defendants' own expert witness had serious and previously undisclosed criticisms of Louisiana's florist licensing scheme, including his belief that "*this is a case of a mismatch between the state's goal of licensing credible florists and the means*

to achieve that goal." R.E. 156 (emphasis added). The district court denied Plaintiffs' motion to alter or amend judgment, and this appeal followed.

STATEMENT OF FACTS

1. *Introduction.*

Shamille Peters, Barbara Peacock, and Kayode Howell enjoy flowers and would like to make a living arranging and selling them. If they lived in any other state, it would be between them and their customers whether they were good enough to do so. But Louisiana is different. Alone among the states, Louisiana says government officials, not customers, should decide who is talented enough to work as a florist and who is not. R.E. 72-73. The state makes that determination using a highly subjective licensing exam that is judged by applicants' own future competitors—namely, working state-licensed florists. R.E. 67 ¶ 11. The historical pass rate on the florist exam is 36%—about half that of the Louisiana Bar Exam. R.E. 71-72 (3001 florist exams given from April 1995 through May 2004; 1087 passed); Mathew Sanders, *LSU Law Graduates Struggle on 2004 Exam*, The Reveille, Oct. 5, 2004, at 1, *available at* LEXIS, News, Most Recent Two Years (showing 65% pass rate on July 2004 bar exam). As a result, Louisiana routinely prohibits would-be florists from working in the occupation of their choice for no legitimate reason. *See* R.E. 71-72; *see infra* note 9 and accompanying text.

2. *Louisiana's regulation of florists.*

Louisiana began regulating florists in 1950. *See* 1950 La. Acts 224. State law distinguishes between "cut flower dealers" and "retail florists." Cut flower dealers may sell flowers "either singly or in bunches" and are not required to meet any testing or credentialing requirements—they simply pay a nominal fee for a permit. *See* La. Rev. Stat. tit. 3, ch. 24 § 3808(I) (hereafter "Horticulture Law § ___"); La. Admin. Code tit. 7, Part XXIX, § 109(D) (hereafter "Horticulture Reg. § ___"). But when flowers are "organized in a systematic fashion," they become an *arrangement*, which only a state-licensed retail florist may sell. Horticulture Law § 3808(B)(1); R.E. 138 at 12:14-19 (assistant director of Commission explaining difference between cut flowers and "arrangement"). Thus, for example, when a department store like Target sells roses for Valentine's Day, it is not unusual for an inspector from the Commission to show up and order the store to separate the roses, the baby's breath, and the greenery into three separate piles, which may then be sold together in one package as "cut flowers." R.E. 164-65; R.E. 130 at 98:14-25 (Commission employee describing "unbundling" process).

Any business that sells floral "arrangements"—as opposed to just cut flowers—must employ a state-licensed retail florist at least 32 hours per week. R.E. 66. But the licensed florist is not required to personally supervise any of the

work being done at the store and indeed need not even be on the premises when arrangements are being prepared and sold. R.E. 136 at 29:2-30:7; R.E. 118 at 9:13-16. Thus, so long as it has one state-licensed florist on staff, a business may employ an unlimited number of unlicensed floral "designers" who may arrange and sell flowers with no direct supervision from the licensee. R.E. 136 at 29:2-10; R.E. 118 at 9:13-16. This is a common practice in the industry. *E.g.*, R.E. 80 ¶ 1; R.E. 101 ¶ 9.

Similarly, florist shops that lose their state-licensed florists are routinely given 90-day grace periods during which they may continue selling arrangements with no licensee on staff. Horticulture Reg. § 117(A)(4); R.E. 132 at 184:17-186:20. The Commission does not step up its oversight of shops operating without a licensed florist under a 90-day grace period, nor does it require those shops to advise their customers of their unlicensed status. R.E. 133 at 187:4-8; R.E. 120 at 96:20-25.

Floral arrangements present no genuine health and safety concerns of any kind. Millions of people around the world handle floral arrangements created by unlicensed designers every year without being harmed. R.E. 77 ¶ 11; *see also* R.E. 90 ¶ 9 ("people handle thousands of arrangements created by unlicensed designers around the country (including Louisiana) every day without getting hurt"). The Commission keeps no records regarding floral-related injuries, nor

does it do anything to advise the public about the supposed hazards of handling floral arrangements. R.E. 135 at 25:15-26:2. When asked what was the worst injury he had ever heard of anyone getting from a floral arrangement, Commissioner Bob Odom replied, "I haven't paid any attention to it." R.E. 142 at 47:20-22.

Neither the materials prepared by the Commission to help applicants study for the florist exam nor the exam itself cover health and safety issues to any significant degree. There are no questions whatsoever about health and safety on the written exam, Docket # 50 - Sealed Exhibit to Pltfs' Mot. Summ. J. (hereafter "Docket # 50 - Sealed Exams"),[2] and the only safety-related question on the practical exam deals with the placement of corsage pins. R.E. 68 (Question B-7). But there is no evidence that anyone has ever suffered more than a pricked finger from an improperly placed corsage pin. R.E. 129 at 65:8-12.

The Commission has prepared a 72-page "Flower Arranging" handbook that it sells to applicants to help them prepare for the florist exam. Docket # 44 - Exhibits to Pltfs' Mot. Summ. J., Tab 2. The only safety-related information in the entire handbook concerns the use of pick machines, which are used to attach metal points ("picks") to the stems of flowers so they can be mounted in

[2] There are three versions of the written exam, which enables the Commission to give a new test to someone who has flunked it before. The exams have been filed under seal to prevent dissemination and are contained in the record as a sealed exhibit to Plaintiffs' Motion for Summary Judgment.

styrofoam. *Id.* at 53, 71. But instead of explaining how to use them safely, the handbook simply advises applicants that the use of pick machines on the florist exam is *optional* and that they should not attempt to use one if they do not know how. *Id.*; *see also* R.E. 128 at 59:10-21 (Commission employee Ben Knight notes that "a lot of people can't afford" metal pick machines and applicants can use wooden picks instead). Accordingly, applicants are not required to know anything about metal picks or how to use them safely in order to pass the licensing exam. *See id.*

Non-party witnesses, many of whom have decades of experience in the industry and impeccable credentials, confirm that floral arrangements present no genuine health and safety concerns of any kind. For example, 81-year-old William "Billy" Heroman, whose family has been in the floriculture industry since 1878 and who is among the preeminent florists in the state, explained "[t]here is no significant health or safety risk from arranging and selling flowers." R.E. 92 ¶ 10; *see also* R.E. 90 ¶ 9 (nationally recognized florist and former exam judge Mary Dark: "there is absolutely no connection between Louisiana's florist licensing law and any public health and safety concerns"); R.E. 95 ¶ 13 (award-winning florist and shop owner Amy Trestman: "making flower arrangements simply does not present any genuine health or safety issues, and Louisiana's licensing exam certainly does not test people on those things").

3. *The licensing exam.*

To obtain a retail florist license, applicants must pass a two-part examination consisting of a written test and a practical test that requires the applicant to create four different floral arrangements in four hours. Horticulture Law § 3807(B)(2); R.E. 66-67 ¶ 5. The written exam covers such subjects as proper care and nourishment of plants, principles of floral design, and horticulture law. Docket # 50 - Sealed Exams. On the practical exam, judges rate applicants on such points as whether the flowers in their arrangements are "spaced effectively," whether the arrangement has the "proper focal point," and whether the flowers and greenery are wired properly. R.E. 68-69 (sample score sheet).

As explained below, both the Defendants' and the Plaintiffs' expert witnesses agree there are serious problems with the written and the practical exams that render them invalid and/or unfair to applicants.

a. *The written exam.*

According to the Commission employee who is primarily responsible for administering the licensing exam, "[t]he only questions that can be included in the retail florist written test have to come from" the Commission's Flower Arranging handbook. R.E. 127 at 41:19-21. But Defendants' expert Jim Johnson, who is the head of the prestigious Benz School of Floral Design at Texas A&M, found that "about 25% of the questions in each [version of the written] test used

wording that did not match the wording in the [handbook]—or was incomplete, confusing, or altogether absent." R.E. 160. According to Mr. Johnson, "[i]ncorrect answers on these questions alone would cause near failure of the test. In light of the above findings, *I would have to question the quality of the testing procedure*." *Id.* (emphasis added). As he observed in an email to Defendants' counsel:

> Once I got into the "Flower Arrnging" [sic] manual and took the tests (this alone took 4 hours) I found a lot of discrepancies. I thought to myself: "If it takes me 4 hours to take these three tests with the book open—gosh how can a novice do it?"

R.E. 156.

Plaintiffs' expert Ralph Null said he found some of the questions on the written exam factually inaccurate, while others relate to "off-tangent subjects that have little or nothing to do with being a florist." R.E. 79 ¶¶ 21-22. Mr. Null believes the written test, as currently formulated, is not a "valid testing instrument." *Id.* ¶ 22.

b. *The practical exam.*

The practical exam is even more flawed than the written test. Most of its problems relate to content and grading.

Exam Content. There is widespread agreement among witnesses—including representatives of the Commission—that the practical exam is outdated and tests applicants on skills that have little or no relevance to modern floral

design. For example, Billy Heroman, who is among the half-dozen most experienced florists in the state and who has supervised hundreds of licensed and unlicensed floral designers during his five decades in the industry, says the practical exam is "totally outdated and a complete waste of time. The techniques that are tested, such as extensive wiring of flowers and greenery, are not used very much in today's industry. The floral industry has moved on to a new phase that is not reflected in the test." R.E. 92 ¶ 9.

Mary Dark, a well-known teacher of floral design who has worked in the Louisiana floral industry since 1971 and has judged the floral exam several times says "[t]he content of the test is heavily weighted to techniques like wiring and taping that have much less relevance in today's industry than they had in the past." R.E. 89 ¶ 5. In fact, Ms. Dark actually has to teach two classes at her school—one called "Cram for the Exam," for people who want to pass the retail florist exam—and another for people who want to learn design techniques for the real world. *Id.* ¶ 6.

Plaintiffs' expert Ralph Null, who is professor emeritus of retail floral design at Mississippi State University and one of the most respected florists in the country, notes that nearly 50% of the points on the practical exam relate to how an arrangement is wired, despite the fact that "wiring plays an extremely small role in modern floral design." R.E. 77 ¶ 13; *see also* R.E. 131 at 103:25-104:1

(Commission employee Ben Knight, who is primarily responsible for the content of the exam, acknowledges that "they don't use a lot of wire now" in modern floral design). Accordingly, Mr. Null believes the practical exam is "outdated, unrealistic, and does not reflect the types of skills and abilities that are actually needed by florists in today's market." R.E. 77 ¶ 13. Indeed, Mr. Null doubts that most designers working today—himself included—would be able to pass the exam without going back and learning the specific, mostly outdated skills that are required on the exam. R.E. 79 ¶ 20.

Even former Commission member Allen Addison agrees there are "some areas" of the practical exam "that probably need to be revisited, techniques of design mechanics and other things that could certainly be revisited." R.E. 121 at 101:6-8. Specifically, Mr. Addison believes the advent of such tools and techniques as spray bars, floral cages, and hot glue for fastening flowers represent "advancements . . . within our industry that could certainly be revisited and possibly included on the exam." *Id.* at 101:12-21. Many other witnesses agree that Louisiana's florist licensing exam is antiquated and heavily oriented towards skills that are of little or no relevance to modern floral designers.[3]

---

[3] R.E. 81 ¶ 9 (Kayode Howell says the "skills and techniques tested on the licensing exam were not at all like the ones I use when I'm making floral designs for real people in a shop"); R.E. 86 ¶ 8 (Barbara Peacock says the florist exam is so old-fashioned it's like "making an auto mechanic show you that he knew how to use a crank to get a car started"); R.E. 95 ¶ 9 (Amy Trestman finds the test "totally outdated, with heavy emphasis on techniques—such as wiring and taping—that are rarely used by most florists today and that I never use at all in my shop");

Grading. Once an applicant has prepared her four designs for the practical exam—wedding, corsage, funeral, and occasional—they are judged by a panel of three to six working florists who score each arrangement according to criteria listed on the judges' score sheet. R.E. 67 ¶ 11; R.E. 68-69 (sample score sheet). In national and international floral competitions, scoring discrepancies among judges of more than 20% (i.e., one judge awards a contestant a score of say, 95, and another judge gives her a 74 or less on the same question) are not tolerated and must be resolved on the spot. R.E. 78-79 ¶ 18. But on Louisiana's florist licensing exam, scoring discrepancies of more than 20%—even up to 100%—are not just tolerated, they are routine.

For example, when Barbara Peacock took the licensing exam on October 21, 2002, there was a greater-than-20% discrepancy between the highest and lowest judges' scores on every single one of her arrangements; indeed, the scoring discrepancy on her funeral design was a remarkable **41 points out of 100**. R.E. 70. The discrepancies on individual questions were even more extreme, with Judges' scores on items A5, A7, C4, C5, and D3 ranging all the way from

---

R.E. 99 ¶ 12 (Pat Heard says most of the skills required for the licensing exam are irrelevant to the work she does in her shop); R.E. 101 ¶ 11 (shop owner and long-time florist Stephanie Mann says taking the exam "was like going back to the 1930's and being forced to do work that no floral designer does today and no customer would ever want to see done on their arrangements"); R.E. 103-04 ¶ 5 (Deborah Wood says the test focuses on practice from the 1930's) R.E. 106-07 ¶ 6 (Ashley Bateman found the techniques so antiquated that they were not even used in the florist shop she worked at in Carthage, Mississippi, "which is about as out of the mainstream as you can get"); R.E. 113 ¶ 4 (Ruth Nix says the test is outdated and "they ask you to do floristry from the 1940's").

zero to *perfect* on the same question—a scoring discrepancy of **100%**. *Id.* Ms. Peacock felt the scoring of her test was "inexcusable and totally unfair" and she found it "impossible to have any faith in the process" as a result. R.E. 87 ¶ 11. Defendants' expert Jim Johnson agreed that he would have been "furious" if he were Ms. Peacock. R.E. 149 at 110:13-15.

Raw score sheets obtained from the Commission show that the kind of arbitrary scoring discrepancies experienced by Ms. Peacock are not exceptional but routine. Docket # 44 - Exhibits to Pltfs' Mot. Summ. J., Tab 50. Plaintiffs have summarized those score sheets with tables that show the average scoring differential among judges and the percentage of applicants who experienced differentials of greater than 20% on each particular design. R.E. 151-53.[4] (The table shows, for example, that during the July 2004 test administration, nearly 50% of applicants had score discrepancies of greater than 20% on their wedding and occasional designs, while 33% and 42% of applicants had score discrepancies of greater than 20% on their corsage and funeral designs, respectively. R.E. 151.) Declarations from people who have taken the exam confirm that the subjective

[4] The summary was tendered as a "pedagogical device" for the court's convenience; it is not an evidentiary exhibit. *See, e.g., Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) (distinguishing summaries offered as "pedagogical devices" based on documents in the record and summaries of voluminous evidence submitted in lieu of such documents under Fed. R. Evid. 1006).

and inconsistent scoring of the practical exam presents a significant problem for applicants.[5]

Defendants' expert Jim Johnson was quite candid about the significance of the massive scoring discrepancies on Louisiana's florist licensing exam. He explained that in his view the judges needed to be better trained

> ***so that they understand the importance of the career opportunities that is being evaluated***, and the importance of each judge understanding what they are judging, I think that's important. They may get training, they may not. I have no idea but that ***it appears from the scores that they don't have enough training***.

R.E. 150 at 114:20-115:2 (emphases added).

4. *The effect of the regulatory scheme.*

Louisiana's florist licensing exam does not fairly measure an applicant's true talent, and it routinely excludes people from the floral industry for no good reason.

Defendants' own expert witness Jim Johnson concluded that the florist licensing exam is *not* "fundamentally fair" because "only applicants who have found an excellent teacher or mentor from which to learn, would pass this test."

---

[5] R.E. 84 ¶ 8 (Shamille Peters found the judges' scores "were all over the place—it was like they weren't even grading the same arrangement"); R.E. 82 ¶ 13 (Kayode Howell says "[t]he test is so unfair that I am still afraid no matter how well I do on the exam, they might still flunk me anyway"); R.E. 89 ¶ 4 (Mary Dark is a former exam judge who "personally observed many discrepancies in the way exams were graded by different judges"); R.E. 98 ¶ 8 (Pat Heard found that the "grading of the exam is incredibly inconsistent"); R.E. 115 ¶ 4 (Roxanne Kellum says "I always do the funeral section the exact same way and failed it twice and received an 84 once. It is very unclear what the judges want"); R.E. 116 ¶ 4 (LaFrance Rhone says her "scores fluctuated so much between tests that it was impossible for me to understand how to improve").

R.E. 160-61. Plaintiffs' expert Ralph Null agrees, adding that he doubts "most working designers, no matter how good they are, would be able to pass Louisiana's florist licensing exam without going back and learning the specific, mostly outdated skills that are required on the exam." R.E. 79 ¶ 20. The experiences of the Plaintiffs and other witnesses support those conclusions.

For example, Plaintiff Kayode Howell has worked as a full-time florist for over five years, first in Georgia and then in Louisiana. R.E. 80-81 ¶¶ 3-4. Even though she has no license, Ms. Howell was once asked by a former employer to take over one of his florist shops on the Westbank in New Orleans. *Id.* ¶ 4. Until just recently, Ms. Howell worked at one of New Orleans' top-rated florist shops, Villere's Florist, and her designs went out the door with no supervision or oversight of any kind. R.E. 80 ¶ 1. To prepare for the florist licensing exam, Ms. Howell studied the Commission's Flower Arranging handbook, studied materials from a friend who had taken a test-preparation course at the local community college, and practiced with fresh flowers "every chance [she] had" in order to make sure there was no doubt she would pass the test. R.E. 81 ¶ 8. Despite her long experience, demonstrated talent, and assiduous preparation, Ms. Howell flunked the retail florist exam—twice. R.E. 81-82 ¶¶ 10-12.

The two other Plaintiffs, Shamille Peters and Barbara Peacock, had similar experiences with the licensing exam,[6] and so have many others. To take just one further example, would-be florist Deborah Wood has a Master of Fine Arts degree and she prepared for the retail florist exam by taking an 80-hour specialized test preparation class and a day-long "refresher" class immediately before the exam; she made tape-recordings of the Commission's Flower Arranging handbook and listened to them; she made flash cards and practiced with them; and she worked extensively with flowers and greenery to perfect the techniques she had learned in the test preparation classes. R.E. 104 ¶ 7. Altogether, Ms. Wood spent more than $2,000 preparing for the exam. R.E. 103 ¶ 4. She flunked. R.E. 104 ¶ 8. Ms. Wood's experience is not unusual.[7]

---

[6] R.E. 85-86 ¶¶ 1, 3, 6, 9 (Barbara Peacock has been "around flowers" her whole life; took a 9-week floral design course at community college and paid $1,000 for a 5-day private tutorial; practiced doing designs; studied the handbook "until it was dog-eared"—flunked twice); R.E. 83-84 ¶¶ 3-6 (Shamille Peters has 4 years design experience; prepared by taking two 6-week floristry classes at community college; studied the handbook; spent several hundred dollars on flowers and greenery with which she practiced for hours on end—flunked exam 5 times).

[7] *See, e.g.*, R.E. 94-95 ¶¶ 2-6, 12 (Amy Trestman has Master of Fine Arts degree and has been studying floral design and competing in design contests around the world for 15 years; she has run her own florist shop in New Orleans for 10 years; she flunked the exam in February 2004); R.E. 97-98 ¶¶ 4-6 (Pat Heard prepared extensively for the test, including a 6-week design class and a mock test with a certified Louisiana Master Florist—she has flunked the exam 4 times); R.E. 100-01 ¶¶ 5, 10, 12 (Stephanie Mann had 8 years design experience, practiced extensively and was coached by two state-licensed florists one of whom was a former judge of the exam—she flunked 4-5 times); R.E. 92 ¶ 7 (top designers in Billy Heroman's shop—including daughter and grandson—have failed the exam while lesser designers have passed); R.E. 106 ¶¶ 2-4 (Ashley Bateman failed the exam after 15 years experience working in florist shops); R.E. 108 ¶¶ 2-3 (Dawn Crain had one year experience in a florist shop; her work goes out untouched by her employer and she has never had a customer complaint; she failed the exam in October 2003); R.E. 110 ¶¶ 2-3 (Donna Duplaisir has worked with silk flowers since 1985 and fresh flowers since 1998; has done work at many shops and by referral; has loyal customers; has

Besides the experiences of witnesses who have taken the exam, there is widespread consensus among people working in the industry that Louisiana's florist licensing exam is not a reliable indicator of an applicant's true talent and that whether someone has passed the licensing exam is totally irrelevant in assessing a person's capabilities as a floral designer.[8]

While someone who has not passed the licensing exam may be able to work for a licensee as a "floral designer," it is clear that in many cases the effect of the licensing regime has been to exclude people from the industry altogether. R.E. 84 ¶ 9 (lack of license has prevented Shamille Peters from getting jobs); R.E. 117 ¶ 5 (Stanley Pounds says he is "currently unemployed because I need a license to get a job at a floral shop"); R.E. 110 ¶ 6 (Donna Duplaisir is "seriously thinking about moving to another state so I can be a florist"). Others who have

---

flunked exam twice); R.E. 109 ¶¶ 2-3 (Michelle Crosby has been doing floristry most of her life, including one year in a florist shop; has flunked exam twice); R.E. 113 ¶¶ 2-3 (Ruth Nix spent 11 years making floral arrangements; she owns "French Quarter Florist" in New Orleans—she flunked twice); R.E. 112 ¶¶ 2-3 (Kathryn Plank had 20 years experience with silk flowers; she filled in at floral shop and her designs were sold to customers untouched—she flunked twice); R.E. 114 ¶¶ 2-3 (Stacy Mack had 6 years paid work as florist; flunked exam twice).

[8] R.E. 90 ¶¶ 10, 11 (floral design teacher Mary Dark says the most talented students often have hardest time passing exam while least talented have passed); R.E. 98-99 ¶ 11 (florist shop operator Pat Heard had two of her most talented designers flunk the exam even though their work was better than 90% of state-licensed designers she has hired); R.E. 92-93 ¶¶ 7, 11 (based on five decades in the industry, Billy Heroman says the licensing scheme does nothing to distinguish talented florists from bad or inexperienced florists; whether someone has passed the licensing exam is completely irrelevant to him in hiring designers); R.E. 81 ¶ 5 (Plaintiff Kayode Howell says there was no difference at all in the quality of work by licensed and unlicensed designers at the shop where she worked); R.E. 102 ¶ 14 (as the operator of a florist shop hiring new designers, Stephanie Mann says that whether someone has passed the licensing exam is meaningless as an indication of person's actual skills); R.E. 96¶ 17 (New Orleans floral shop owner Amy Trestman—same); R.E. 107 ¶ 10 (lifelong florist Ashley Bateman—same).

wanted to go out and start their own businesses have been prevented from doing so. *See, e.g.*, R.E. 80, R.E. 82 ¶ 6, 13 (Kayode Howell "wanted something with more opportunity—to work for myself instead of someone else.").[9]

SUMMARY OF ARGUMENT

The right to work has been called "the most precious liberty that man possesses." *Barsky v. Board of Regents of Univ.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). As a nation of free people, we enjoy our liberties—including the liberty to choose our field of employment—not at the sufferance of government officials but as a matter of right subject only to reasonable regulation. Louisiana's florist licensing law is manifestly *unreasonable* because it is not supported by any legitimate public purpose.

The state claims its one-of-a-kind florist licensing scheme is justified by the need to (i) protect people from the physical hazards of handling poorly designed floral arrangements, (ii) protect consumers, and (iii) enhance the industry's reputation by excluding people whose supposed lack of talent might reflect poorly on other florists. But the evidence shows that none of those justifications can be taken seriously and none of them provides a rational basis for

[9] *See also* R.E. 103, 105 ¶¶ 4, 11 (Deborah Wood took steps to create her own home-based floral business but has had to reverse her plans because she flunked the florist licensing exam); R.E. 111 ¶ 3 (Chasity Wolfe said "[f]ailing the test changed my plans a lot because I wanted to start my own business. I cannot afford to try to retake the exam anytime soon"); R.E. 112 ¶ 5 (Kathryn Plank has been unable to get a florist license, which she needs to be able to retire from her work as an office manager and open her own floral shop); R.E. 114 ¶ 6 (Stacy Mack says not being able to pass the florist exam has kept her from opening her own business).

upholding the scheme under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Louisiana's florist licensing scheme also violates the Fourteenth Amendment's Privileges or Immunities Clause, at least as it was understood by those who enacted it. Although the Privileges or Immunities Clause was all but written out of the Constitution by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), there is a growing consensus that *Slaughter-House* was wrongly decided and should be revisited in an appropriate case. Indeed, this Court has observed that "it would be more conceptually elegant" to think of the substantive rights currently protected through the Due Process Clause as "privileges or immunities of citizens of the United States." *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988).

STANDARD OF REVIEW

On appeal. The Court reviews the grant or denial of summary judgment *de novo*. *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 246-47 (5th Cir. 2000); *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir. 1994). The same standard applies to the grant of a motion to dismiss for failure to state a claim, *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 341 (5th Cir. 2005), and to the denial of a motion to alter or amend judgment so long as the district court actually considered the

newly obtained evidence upon which the motion was based, which it did. *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004).

On the merits. Because it does not involve a right deemed "fundamental" by the Supreme Court or a "suspect classification," the substantive legal standard in this case is the rational basis test. *E.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). In occupational liberty cases like this one, some courts analyze plaintiffs' claims through the rubric of substantive due process, others use equal protection, and some make no distinction. *Compare Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 247 (1957) (due process) *and Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (equal protection), *with Brennan v. Stewart*, 834 F.2d 1248, 1257-58 (5th Cir. 1988) ("lump[ing] together" due process and equal protection claims in occupational licensing case) *and Craigmiles*, 312 F.3d at 223-24 (declaring licensing requirement "unconstitutional under the Fourteenth Amendment" without distinguishing between due process and equal protection).

This Court has observed that "the only difference between applying the rational relationship analysis to an equal protection claim and applying it to a substantive due process claim is the focus on what must be justified." *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 935 n.14 (5th Cir. 1988). What must be justified in this case is Louisiana's decision to subject would-be florists—but not people in other vocations—to an irrational licensing scheme that is unrelated to

any legitimate public purpose. Whether the Court considers that question as one of due process or equal protection "makes little difference." *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 149 (5th Cir. 1991); *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973).

ARGUMENT

I. CITIZENS HAVE A RIGHT TO WORK IN THE OCCUPATION OF THEIR CHOICE SUBJECT ONLY TO REASONABLE GOVERNMENT REGULATION.

The Supreme Court has consistently recognized a constitutional right to work in the occupation of one's choice.[10] This Court has likewise made clear that among the liberties protected by the Fourteenth Amendment is "the right to practice any of the common occupations of life." *Shaw v. Hosp. Auth'y of Cobb*

---

[10] *E.g.*, *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) ("[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition"); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment's conception of "liberty" includes the right "to engage in any of the common occupations of life"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) ("nothing is more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them") (internal quotations and citations omitted); *Schware v. Bd. of Bar Exam'rs of N.M.* 353 U.S. 232, 238-39 (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"); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life"); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (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); *Conn. v. Gabbert*, 526 U.S. 286, 291-92 (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").

County, 507 F.2d 625, 628 (5th Cir. 1975). Any law that interferes with that right must be rationally related to a legitimate public purpose, *e.g.*, *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957), and that inquiry should be undertaken in the spirit of the Supreme Court's recognition that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In applying the rational basis test to Louisiana's florist licensing scheme, two points bear special emphasis. First, the presumption of constitutionality that attaches in rational basis cases does not relegate judicial review "to a perfunctory rubber-stamping of legislative whim." *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1061 (5th Cir. 1984). The rational basis test is not "toothless," as it is sometimes portrayed, but instead requires genuine analysis of the government's arguments in light of the record. *See, e.g.*, *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 253 (5th Cir. 2000) (citing extensively to the fact record in finding lack of rational basis for government action); *Harris County v. CarMax Auto Superstores, Inc.*, 177 F.3d 306, 323-24 (5th Cir. 1999) (plaintiff's assertions regarding statute's irrationality should be "carefully examined" by the district court). Moreover, there is nothing "sacred about economic lawmaking" when it comes to judicial review. *Ball*, 746 F.2d 1057; *cf. Texas Office of Public*

Utility Counsel v. FCC, 265 F.3d 313, 328-29 (5th Cir. 2001) (finding no rational basis for FCC-imposed "X-factor" fee in telecommunications case).

Second, the right to earn a living is, like other rights, prone to abuse by government officials seeking to promote the interests of favored groups at the expense of individual citizens. With one exception, courts have consistently rejected such economic protectionism as a legitimate public purpose under the rational basis test. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (striking down Tennessee law that required would-be casket retailers to obtain funeral directors license).[11]

The exception is *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), where the Tenth Circuit approved a casket sales restriction like the one at issue in *Craigmiles*. Like *Craigmiles*, the *Powers* court recognized that the statute was "very well tailored" to protecting funeral directors from competition. *Id.* at 1223. Indeed, the Tenth Circuit went further and acknowledged a fundamental truth rarely mentioned in rational basis cases—namely, that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain

---

[11] *See also Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440-441 (S.D. Miss. 2000) (casket sales restriction lacked rational basis); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1108-11 (S.D. Cal. 1999) (no rational basis for requiring African hair braiders to obtain cosmetology license); *Santos v. City of Houston*, 852 F. Supp. 601, 608-09 (S.D. Tex. 1994) ("[t]he purpose of the [anti-jitney]statute was economic protectionism in its most glaring form, and this goal was not legitimate"); *Brown v. Barry*, 710 F. Supp. 352, 355-56 (D.D.C. 1989) (no rational basis for prohibiting shoe shine stands—but not other businesses—from operating in public).

in-state industries remains the favored pastime of state and local governments." *Id.* at 1221. Specifically rejecting *Craigmiles*' holding on this point, however, *Powers* concluded that such "economic protectionism" was a legitimate state interest under the rational basis test. *Id.* at 1223-25.

In upholding Louisiana's florist licensing scheme, the district court "agree[d] with the decision rendered in *Powers*" and said it would rely on *Powers* in deciding this case. R.E. 53-54. That was erroneous because this Court has already rejected economic protectionism as a legitimate public purpose in a prior rational basis case. *See Simi Inv. Co.*, 236 F.3d at 253-54 (noting that the "only basis in the record" for the challenged government conduct was that it would benefit plaintiff's business competitor, which was not a "legitimate governmental purpose").

Thus, the only remaining question is whether there is any conceivable justification for Louisiana's florist licensing scheme besides the economic protectionism to which it plainly lends itself. *See Craigmiles*, 312 F.3d at 228. The record shows there is not.

II. LOUISIANA'S FLORIST LICENSING SCHEME VIOLATES DUE PROCESS AND EQUAL PROTECTION BECAUSE IT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE PUBLIC PURPOSE.

No other state besides Louisiana dictates who may work as a florist and who may not. That fact alone raises serious doubts about the rationality of the

licensing scheme. *DeWeese v. Palm Beach*, 812 F.2d 1365, 1369 (11th Cir. 1987) (absence of similar laws "is a strong suggestion that the [challenged] ordinance is arbitrary and irrational"); *Roller v. Allen*, 96 S.E.2d 851, 859 (N.C. 1957) (finding absence of similar laws "persuasive" in striking down licensing requirement for tile installers and observing that "if the regulation is in the public interest, it does seem strange indeed that no sister state has discovered that fact"). Those doubts are compounded and confirmed by the Defendants' failure to offer a single justification for the florist licensing scheme that is not thoroughly undermined by their own conduct, the opinions of their retained expert, and the unrebutted testimony of fact witnesses.

A. Licensing Florists Has Nothing to Do With Protecting Health and Safety.

Defendants claim a possible justification for licensing florists is to protect people from the physical hazards of handling poorly constructed flower arrangements. R. 498-99. The district court accepted that assertion. R.E. 57. But Defendants' health and safety argument is contradicted by their own conduct, which shows they recognize that floral arrangements present no genuine safety concerns of any kind.

First, the Commission does not test applicants on health and safety issues to any significant degree. As noted above, there are no questions whatsoever about health and safety on the written exam, Docket # 50 - Sealed Exams, and the

only safety-related question on the practical exam relates to the proper placement of corsage pins, which is not a genuine safety concern. R.E. 68 (Question B-7); R.E. 129 at 65:8-12. Likewise, the absence of questions about infectious flowers or dirt, which the district court identified as a possible safety concern, R.E. 57, means that state-licensed florists in Louisiana are no more equipped to deal with those issues than anyone else. Accordingly, there is no "rational relationship" between preventing dirt- or flower-borne infections and Louisiana's florist licensing scheme. *See Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 937 (5th Cir. 1988) (there must be a "real" relationship between the challenged regulation and its asserted purpose); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (even in rational basis cases, "we insist on knowing the relation between the classification adopted and the object to be attained").

Defendants' health and safety rationale is further undercut by the Commission's failure to keep any records regarding floral-related injuries, by the fact that it does nothing to warn the public about floral-related safety hazards, and by Commissioner Odom's admission that he doesn't "pay any attention" to the issue. R.E. 136 at 25:15-26:1; R.E. 142 at 47:20-22. Moreover, if floral arrangements presented any *genuine* safety risk, it is inconceivable that the Commission would allow unlicensed designers to prepare and sell floral arrangements with no direct supervision from a licensed retail florist, as it does,

R.E. 136 at 29:2-10; R.E. 118 at 9:13-16, nor would the Commission allow shops to operate for up to 90 days without a licensed florist on staff and without warning their customers, as it also does. R.E. 133 at 187:4-8; R.E. 120 at 96:20-25.

Even in rational basis cases, the government should not be permitted to assert as "conceivable" justifications that are flatly contradicted by its own conduct. *See Simi Inv. Co.*, 236 F.3d at 253 ("the County's claim that a park has always existed is belied by the fact that the park has not been treated as such by the County"). To hold otherwise would transform rational basis review from a genuine test into a "toothless rubberstamp," which this Court has made clear it is not. *Ball*, 746 F.2d at 1061.

B. The Licensing Scheme Is Not Rationally Related to Consumer Protection.

Like their health and safety argument, Defendants' consumer protection rationale is thoroughly undermined by their own conduct. Also, because it is not tied to any concrete injury or harm—but rather to the government's subjective assessment of a person's aesthetic abilities—Defendants' consumer protection rationale opens the door to arbitrary government action, which is forbidden. *E.g.*, *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). Those points are addressed in turn.

1. Defendants' consumer protection rationale is contradicted by their own conduct.

Putting aside for a moment the question of what, exactly, floral customers need protection *from*, Defendants' conduct makes clear that it cannot be anything serious. First, as documented above, the Defendants allow unlicensed floral designers to prepare and sell arrangements without direct supervision and they also permit unlicensed florist shops to operate during a "grace period" without notifying customers of their unlicensed status.

Second, the two Commissioners who are themselves florists testified that when ordering arrangements for their own customers from out-of-state florists (who are by definition unlicensed) they do not check the out-of-state florists' qualifications or credentials. R.E. 119 at 71:20-24 (does not check out-of-state florists' credentials); R.E. 125 at 43:11-44:1 (often uses particular out-of-state florists who do "quality work," but also uses unfamiliar out-state-florists without knowing anything about them). Defendants' willingness to entrust their own customers' orders to unlicensed florists in other states whose work they have never seen and whose credentials they have not investigated further demonstrates the absence of any *genuine* consumer protection concerns.

Finally, the florist licensing exam is so plainly inadequate for distinguishing genuinely talented from untalented florists that it has no "real" relationship to that end. *Mahone*, 836 F.2d at 937. The exam's many flaws are

documented in part three of the Fact Section above and include defective questions, outdated and irrelevant content, arbitrary grading, and a track record of flunking large numbers of perfectly qualified applicants regardless of their true level of skill, experience, or preparation. The Defendants have done nothing to validate the exam, R.E. 74, and have instead taken what may fairly be described as a "head in the sand" approach to its manifest infirmities. *Compare* R.E. 139 at 23:24-25 (Commission director Craig Roussel says "I think and firmly believe the exam is very fair"); *with* R.E. 160-61 (Defendants' expert concludes licensing exam is not "fundamentally fair" to applicants). In short, as Plaintiffs' expert Ralph Null has explained, "whatever the true purposes of the licensing regime are, distinguishing between talented or 'qualified' florists and untalented or 'unqualified' florists cannot be among them." R.E. 79 ¶ 19.

2. Seeking to "raise the quality" of practitioners in a given occupation, not to prevent any specific harm but merely for its own sake, is not a legitimate public purpose.

Besides being factually implausible, Defendants' consumer protection rationale fails because the florist licensing scheme does not "protect" consumers from any identifiable harm, and is instead supposedly designed—again, purely hypothetically, since the record suggests otherwise—simply to "improve the quality of retail florists" in Louisiana. R. 307, R. 497; *see also* R.E. 78 ¶ 17 and R.E. 148 at 62:13-63:1 (Plaintiffs' and Defendants' expert witnesses both agree

that the quality of florists in Louisiana is no better than anywhere else). Even in its most permissive formulation of the rational basis test, the Supreme Court still says regulations should be directed toward some "evil" that the regulation is a rational way to *correct*. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). Here, there is no "evil at hand for correction," *id.*, as demonstrated in part by the absence of any similar laws in other states and by the Defendants' rather relaxed attitude towards unsupervised floral arranging. Instead, there is if anything merely a free-floating goal of simply "raising quality" for its own sake.

When the government acts to prevent some concrete, identifiable harm, there are readily identifiable limits on the scope of its power: those measures that might plausibly prevent the stated harms are permitted; others are not. But here, the "consumer protection" rationale is at best merely an attempt by the government to increase the chances that customers will be happy with the quality of their floral purchase—or, turning it around, to decrease the chances of disappointment. But the risk of disappointment is inherent in any consumer transaction; it cannot be eliminated—particularly in fundamentally aesthetic vocations like flower arranging, writing, film-making, photography, cooking, etc. A law that prohibits thousands of people from working in the occupation of their choice simply to diminish the risk of consumer disappointment by some

theoretical and unknowable quantum is inherently arbitrary and not a rational exercise of government power.

C. "Enhancing" an Industry's Reputation by Excluding Supposedly Untalented People Is Not a Legitimate Public Purpose, Nor Does the Licensing Scheme Serve That Interest in Any Event.

Defendants' final justification for the licensing scheme is that it enhances the reputation of Louisiana's floral industry by excluding people whose supposed lack of talent might bring discredit upon their fellow florists. *E.g.*, R.E. 122 at 19:3-9; R.E. 137 at 30:20-31:11. By way of illustration, Defendants posit that customers who have a bad experience with a particular florist may abandon the industry altogether and spend their money on something else besides flowers. R.E. 141 at 45:17-18 (Commissioner Odom speculating that "[i]f the arrangement happens to be bad, next time they may buy candy" instead of flowers); R.E. 134 at 191:25-192:14 (Commission employee Ben Knight testifying that people who make "un-quality arrangements" would cause customers to get a bad idea of retail floristry, which might cause them to choose another product next time, like chocolate). The district court accepted that rationale, holding that "industry protectionism as a goal of such legislation does not invalidate it." R.E. 59.

Defendants' "industry enhancement" theory is simply a reformulation of their consumer protection rationale and therefore suffers from all the same flaws. The fundamentally arbitrary nature of both theories is vividly illustrated by the

Defendants' own testimony. When asked whether the rationale could be extended to other occupations, Commissioner Odom readily acknowledged there are "all types of ways it can be extended, yes. I agree with that. *It could be extended to professional athletes for example.* [You] might not enjoy the game if you show up and got people playing basketball that aren't very good." R.E. 142 at 46:7-11 (emphasis added). Thomas Spedale made the same point with food:

> A. [I]f you go out and you ***go to a Burger King and you get a bad hamburger***, you go back and try them again, it's a bad hamburger, ***you're not going to want a hamburger anymore.***
>
> Q. Well, I may not want a hamburger at Burger King any more.
>
> A. Yes. But you know, you may just get to the point where, I'll go get a chicken sandwich.

R.E. 122 at 19:11-18 (emphases added).

Besides athletes and florists, Defendants' "industry enhancement" rationale could be extended to literally any other vocation. For example, Defendants' expert Jim Johnson agreed that cooking, photography, sculpture, painting, and even interior design are all similar to floristry in that each of them involve both basic techniques and personal creativity that combine to produce the final product. R.E. 146-47 at 47:22-49:15. Does that mean the government may set itself up as the arbiter of who has enough "talent" to open a restaurant, film a wedding, paint a portrait, or redecorate a house? According to Defendants, the answer must be yes.

The North Carolina Supreme Court confronted—and rejected—that very premise when it struck down a photographer-licensing law less than a decade after initially approving it:

> It is undoubtedly true that the photographer must possess skill. But so must the actor, the baker, . . . ***the horticulturist*** . . . and every other person successfully engaged in a definitely specialized occupation. . . . Yet, who would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?

State v. Ballance, 51 S.E.2d 731, 735-36 (N.C. 1949), *overruling State v. Lawrence*, 197 S.E. 586 (N.C. 1938) (emphasis added).

It is a touchstone of due process and equal protection doctrine that the government cannot dictate arbitrarily who may work in a given occupation and who may not. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the very idea that one man may be compelled to hold his life, or the means of living . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself"); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (striking down occupational licensing requirement for African hair braiders and noting that "[t]here are limits to what the State may require before its dictates are deemed arbitrary and irrational"). Because that is precisely the effect of Defendants' nebulous consumer protection and industry

enhancement rationales, they are not valid justifications for Louisiana's florist licensing scheme.

D. The Only Conceivable Purpose for Louisiana's Florist Licensing Law Is Impermissible Industry Protectionism.

The only plausible explanation for Louisiana's florist licensing scheme is economic protectionism of the type erroneously approved by the Tenth Circuit in *Powers*, *supra*, and embraced by the district court in this case. R.E. 54, R.E. 59. That point is dramatically underscored by what happened in the Louisiana legislature last year when a bill was introduced that would have eliminated the florist licensing law entirely.

In May 2004, the Louisiana House of Representatives voted 92-3 in favor of House Bill 1409, which would have eliminated the state's florist licensing law altogether. Docket # 44 - Exhibits to Pltfs' Mot. Summ. J., Tab 11 at 7-8. The bill was then sent to the Senate Agriculture Committee, where it was killed without receiving a floor vote in the Senate. *Id.* at 11; R.E. 126 at 47:9-11. Besides a lobbying effort headed up by Louisiana State Florists Association president Patsy Spedale, R.E. 126 at 46:15-47:8; R.E. 121 at 100:14-15, the bill was opposed by Defendant Bob Odom, who testified that he "helped the florists kill it" because of a long-standing agreement he has with the industry to follow its bidding in supporting or opposing such legislation. R.E. 143 at 56:9-12; R.E. 140 at 40:7-10. In fact, Mr. Odom testified that he "committed to the florists" when

he ran for Agriculture Commissioner in 1980 that he would "support their desires of either having or get[ting] rid of the [florist licensing] law." R.E. 143 at 57:14-16. Mr. Odom consulted only with state-licensed florists in deciding to help "kill" H.B. 1409; he did not consult with any consumers or consumer groups. R.E. 140 at 38:24-39:6; R.E. 143-44 at 57:11-58:1.

Although it is said the "true purpose" for the government's conduct "is irrelevant for rational basis analysis," *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 246-47 (5th Cir. 2000) (internal quotations and citation omitted), that is only true when there is some conceivably legitimate purpose for a challenged regulation. When no such explanation has been offered, courts are certainly not required to turn a blind eye to reality. That point is illustrated by *Simi Investment*, where this Court rejected Harris County's attempt to justify maintaining a 3,000-foot by 5-foot "park" that just happened to prevent the plaintiff from accessing a major thoroughfare, to the commercial benefit of his politically powerful neighbor. *Id.* at 243. In finding no rational basis for the County's actions, this Court said the "[m]ost troubling" aspect of the case was the "illegitimate plan to benefit the interests" of the politically connected neighbor "whose properties were financially benefited by the denial of access to the other properties abutting Fannin Street." *Id.* at 251.

The public purposes advanced by the Defendants in this case are every bit as "nonexistent" as the ersatz park in *Simi Investment*. *Id.* at 243. In neither case is the government's conduct plausibly related to any legitimate state interest, and in both cases the intent to benefit purely private interests is manifest. *See, e.g.*, R.E. 143-44 at 57:14-58:1 (Defendant Bob Odom "committed" himself to supporting the desires of state-licensed florists in either keeping or eliminating the florist licensing law). As the *Craigmiles* court observed in striking down Tennessee's protectionist casket sales law, "[t]his measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review." 312 F.3d at 229; *see also Kelo v. City of New London*, No. 04-108, 2005 WL 1469529, at *10 (U.S. June 23, 2005) (Kennedy, J., concurring) (noting that "a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications").

III. LOUISIANA'S FLORIST LICENSING LAW VIOLATES THE "PRIVILEGES OR IMMUNITIES" OF WOULD-BE FLORISTS WHO HAVE BEEN PREVENTED FROM WORKING IN LOUISIANA.

The Privileges or Immunities Clause of the Fourteenth Amendment was intended to prevent state governments from violating the basic civil rights of their

own citizens.[12] Chief among those was the right to earn an honest living, which many states systematically violated in order to keep African-Americans in constructive bondage following the Civil War. While a bare majority of the Supreme Court effectively wrote the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), few decisions have been more harshly and consistently criticized by such a distinguished assortment of judges and scholars. Thus, while recognizing that *Slaughter-House* has not yet been overturned, Plaintiffs share with many others the conviction that it was wrongly decided and should be reevaluated in an appropriate case—like this one. *E.g.*, *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting).

At issue in *Slaughter-House* was the constitutionality of a Louisiana law that compelled New Orleans butchers to do their work at a privately-owned facility that charged them a fee for the privilege. 83 U.S. at 59-60. Among other things, butchers challenging the statute claimed it violated their right to earn a living under the Privileges or Immunities Clause of the recently enacted Fourteenth Amendment. *Id.* at 66. Writing for a 5-4 majority, Justice Miller rejected that argument on the grounds that the Privileges or Immunities Clause should not be construed to protect basic civil rights like occupational freedom

[12] The Clause reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. Const. amend. XIV, § 1.

from state infringement, but rather a limited class of rights arising from a person's federal—as opposed to state—citizenship. *Id.* at 78-79. According to Miller, those federal rights were: the right to come to the seat of government and assert "any claim [a citizen] may have upon" it; the right of free access to seaports, subtreasuries, land offices, and courts of justice in the several states; protection of the federal government while on the high seas or within the jurisdiction of a foreign government; the right to peaceably assemble and petition for redress of grievances; *habeas corpus*; the right to use the navigable waters of the United States; and the right to become a citizen of any state. *Id.* at 79-80.

As Justice Field noted in dissent, Justice Miller's construction rendered the Privileges or Immunities Clause a "vain and idle enactment, which accomplished nothing." *Id.* at 96. The breadth and near unanimity of scholarship rejecting Justice Miller's construction is staggering. Indeed, several commentators have stated without significant exaggeration that "everyone" agrees Miller's opinion was wrong. *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 627 (1994); Thomas B. McAffee, *Constitutional Interpretation–the Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 282 (1986) ("this is one of the few important constitutional issues about which virtually every modern commentator is in agreement"); *see also* Derek Shaffer, Note, *Answering*

Justice Thomas in Saenz: Granting the Privileges for Immunities Clause Full Citizenship Within the Fourteenth Amendment, 52 Stan. L. Rev. 709, 711 (2000) (summarizing literature). That belief is shared by renowned scholars like John Hart Ely,[13] Laurence Tribe,[14] Akhil Amar,[15] and others.[16]

But even if there were some logical or constitutional basis for Justice Miller's bifurcation of state versus federal rights, the right of occupational freedom is clearly one that people possess by virtue of their national citizenship—not merely their status as citizens of their particular states. As the Supreme Court has observed, "[t]he Framers of the Fourteenth Amendment modeled [the Privileges *or* Immunities] Clause upon the 'Privileges *and* Immunities Clause' found in Article IV." *Saenz*, 526 U.S. at 503 n.15 (emphasis added). And among the most fundamental "privileges and immunities" encompassed by Article IV is the right to earn a living. *E.g.*, *Supreme Court of New Hampshire v. Piper*, 470

---

[13] John Hart Ely, Democracy and Distrust 22 (1980) ("[T]here is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless. Yet the Slaughter-House interpretation persists to the present day.").

[14] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1297 n.247 (1995) ("it does not trouble me that the Slaughter-House Cases would have to be overruled" in order to abandon substantive due process and protect liberties using the Privileges or Immunities Clause, because "I have elsewhere explained my view that the Slaughter-House Cases incorrectly gutted the Privileges or Immunities Clause") (internal citation omitted).

[15] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1258-59 (1992) (noting that Miller's reading "has the effect of rendering the privileges or immunities clause wholly unnecessary" and "strangl[ed] the privileges or immunities clause in its crib").

[16] *See, e.g.*, William J. Rich, *Taking Privileges or Immunities Seriously: A Call to Expand the Constitutional Canon*, 87 Minn. L. Rev. 153, 154-56 (2002) (listing scholars and sources).

U.S. 274, 280 n.9 (1985) ("the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause") (internal quotations and citation omitted); Erwin Chemerinsky, Constitutional Law 450 (2d ed. 2002) ("[t]he vast majority of cases under the [Article IV] privileges and immunities clause involve states discriminating against out-of-staters with regard to their ability to earn their livelihood").

From those twin premises it necessarily follows that the Framers of the Fourteenth Amendment intended for the Privileges or Immunities Clause to prevent the states from continuing to violate people's right to earn an honest living, as many of them had been doing systematically during Reconstruction. That conclusion is further supported by the Framers' extensive citation to Justice Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1825), to illustrate the kinds of rights they intended the Fourteenth Amendment to protect from state interference. *See, e.g., Cong. Globe,* 39th Cong., 1st Sess., 2766 (1866) (Statement of Sen. Howard) (discussing the meaning of Article IV's "privileges and immunities" as described in *Corfield* and explaining that the "great object" of the Fourteenth Amendment is to "restrain the power of the states and compel them at all times to respect these great fundamental guarantees").

This Court has observed that "it would be more conceptually elegant" to think of the substantive rights currently protected through the Due Process Clause as "privileges or immunities of citizens of the United States." *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988). As demonstrated above, it would not only be more elegant to do so, it would be more faithful to history, text, and intent as well.

IV. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT BASED ON NEWLY OBTAINED EVIDENCE REGARDING THE IRRATIONALITY OF THE FLORIST LICENSING SCHEME.

Just days before the district court issued its summary judgment ruling in their favor, Defendants produced pursuant to an order from the magistrate judge documents containing serious and previously undisclosed criticisms of the licensing scheme by their own expert witness, Jim Johnson. Plaintiffs promptly filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), R. 544-52, which the district court denied. R. 584-86. The district court appears to have based that ruling at least in part on its belief that the newly disclosed evidence related exclusively to the defective florist licensing exam, which the district court said "was not an issue in this case." R.E. 62. As explained below, the district court was mistaken on both points: the evidence concerned more than just the licensing exam, and the exam itself certainly is an

issue in this case. Those points are addressed in turn after a brief comment on the standard of review.

Although the district court gave Mr. Johnson's previously undisclosed criticisms of Louisiana's florist licensing scheme little weight, it does appear the court at least considered the new evidence. *See* R.E. 62-63 ("[t]he facts of this case do not support plaintiffs' request [to alter or amend judgment] as a matter of law, *nor would the proposed evidence change the Court's decision in this case*") (emphasis added). Accordingly, the proper standard of review is *de novo*. *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004).

The new documents upon which Plaintiffs based their motion to alter or amend judgment included emails between Defendants' counsel and their expert witness, Jim Johnson, as well as initial drafts of Mr. Johnson's report. Although many of his comments relate to the licensing exam, others relate to the overall licensing scheme itself and Mr. Johnson's difficulty in finding anything positive to say about it. Thus, in transmitting the initial draft of his report to Defendants' counsel, Mr. Johnson candidly acknowledged that despite his effort to "come down as easy as I possibly can," his report was "not very supportive of your client," and he expressed his hope that the report had not "destroyed your case!" R.E. 156. He summarized his overall reaction by explaining that "[t]o me, this is

a case of a mismatch between the state's goal of licensing credible florists and the means to achieve that goal." *Id.*

Mr. Johnson transmitted a second version of his report less than 24 hours later, "[a]fter a long conversation" with Defendants' counsel. R.E. 162. Notwithstanding that long conversation, Mr. Johnson plainly was still uncomfortable with his efforts to find something positive to say about the licensing scheme:

> This has turned into a nightmare, I'm afraid. I had no idea I could find so many problems. Anyway, I have addressed only aspects I can address positively, and some of those frankly, sound a bit lukewarm. Here is my revised report. Let me know how I can improve it for you.

Id. Later that evening, Mr. Johnson thanked Defendants' counsel "for your help today" and told them he had "tweaked" his report and felt "a little better about this now." R.E. 163. Taken together, the foregoing statements go beyond the licensing exam itself and tend to support Plaintiffs' claim that the overall scheme is arbitrary, irrational, and unrelated to any genuine public purpose.

In its ruling denying Plaintiffs' motion to alter or amend judgment, the district court stated that it was "clear from plaintiffs' own judicial admissions that the content of the exam was not an issue in this case." R.E. 62. This echoes a passage in the district court's summary judgment ruling where the court summarily rejected all evidence concerning the licensing exam's many

shortcomings. R.E. 56 (stating that Plaintiffs' criticisms of the licensing exam "are not based on constitutional grounds" and therefore will not be considered); *see also* R. 486-87 (Defendants arguing that documents related to licensing exam are "immaterial because they concern the manner in which the test is administered").

But the Defendants' and the district court's reasoning proves too much: the mere fact that Plaintiffs have not challenged the actual administration of the licensing exam on procedural due process grounds certainly does not mean the exam cannot be relevant to some other issue, including the overall lack of seriousness with which the Defendants administer the licensing scheme and what that says about its rationality. *Cf. Simi Inv. Co. v. Harris County*, 236 F.3d 240, 253 (5th Cir. 2000) (County's failure to treat alleged park as if it really existed fatally undermines County's attempt to assert rational basis for maintaining it in the face of legal challenge). Accordingly, the district court's decision not to consider evidence pertaining to the state's defective licensing exam was erroneous, both in its summary judgment ruling and in its ruling on Plaintiffs' motion to alter or amend judgment.

CONCLUSION

Plaintiffs have a constitutional right to arrange and sell flowers without the government's permission. Therefore, Plaintiffs respectfully request that the

district court's judgment be reversed and that this Court render judgment in Plaintiffs' favor on their summary judgment motion seeking to vindicate that basic right.

Dated: July 1, 2005

Respectfully submitted,

INSTITUTE FOR JUSTICE

By: _____
Clark M. Neily III
William H. Mellor
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
Phone: (202) 955-1300
Fax: (202) 955-1329

Michael R. Fontham
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
Phone: (504) 593-0810
Fax: (504) 596-0810

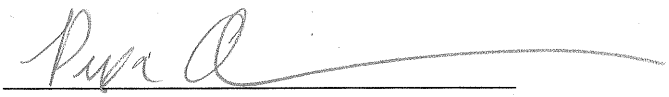
Attorneys for Plaintiffs-Appellants Shamille Peters, Barbara Peacock and Kayode Howell

CERTIFICATE OF SERVICE

I hereby certify that the foregoing APELLANTS' BRIEF has been sent via overnight courier to the office of the Clerk for the United States Court of Appeals for the Fifth Circuit and the counsel listed below on this 1 day of July, 2005.

Via Overnight Courier – Federal Express

David McFadden
GELPI AND ASSOCIATE, PLC
203 Carondelet St., Ste. 907
New Orleans, LA 70130
P: (504) 522-1153
F: (504) 523-7365



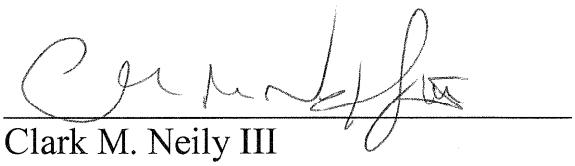
Puja Ahluwalia
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
Phone: (202) 955-1300
Fax: (202) 955-1329

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 11,714 words, excluding the parts of the brief exempted by FED.R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 (version 9.0) in 14 point font and Times New Roman.



Clark M. Neily III
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
Phone: (202) 955-1300
Fax: (202) 955-1329

Attorney for Appellants

Dated: July 1, 2005