

**IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

VICKEE BYRUM et al.,

Plaintiffs,

v.

GORDON E. LANDRETH, et al.

Defendants.

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Civil Action No. A07CA344 LY

**PLAINTIFFS’ COMBINED MOTIONS FOR SUMMARY JUDGMENT
AND PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT**

This is a case about government censorship of interior designers. In Texas, anyone may perform interior design work, but only people with a state-issued license may use the words “interior design” or “interior designer” to describe what they do. Because the First Amendment prohibits the government from censoring truthful commercial speech, that law cannot stand.

I. BACKGROUND

Texas is one of handful of states that has what is known as a “titling” law for interior designers. This means that in Texas, while anyone may perform interior design services for a fee, the words “interior design” or interior designer” are off limits to all but a small handful of government-licensed practitioners. This lawsuit is brought by four highly capable, experienced, professional interior designers who do not believe they should have to obtain what amounts to a free-speech license in order to refer to themselves, accurately, as “interior designers.”

The history of these laws is instructive. Title acts like Texas’ are part of an effort by some industry members to promote greater government regulation of interior designers. For that pro-regulation group, which is led nationally by the American Society of Interior Designers

(ASID) and in Texas by the Texas Association for Interior Designer (TAID), titling acts serve three distinct purposes. First, title acts serve as a first step towards full-blown occupational licensing (so-called “practice acts”)—they are the camel’s nose under the regulatory tent, so to speak. Second, titling laws force unlicensed designers to use terms such as “decorator” or “consultant” that are understood by some to connote a lower vocational status than “interior designer.” Third, title acts prevent nonlicensees from effectively advertising their services. For example, even though it is perfectly legal to perform interior design services in Texas without a license, an unlicensed person may not list herself under the “interior design” section of the Yellow Pages, may not use the terms “interior design” or “interior designer” on her web site (meaning she will not show up when a potential customer does an Internet search for “interior designers”), and may not hand out business cards with the accurate—but forbidden—words “interior design” or “interior designer” on them.

Texas’ interior design title act was enacted in 1991, and pro-regulation designers have consistently worked to expand it into a full-blown practice act since then.¹ So far, those efforts have been unsuccessful in Texas, as they have in nearly every other state as well.²

II. UNDISPUTED FACTS

The following facts are undisputed:

1. In Texas, anyone may work as an interior designer. No license is required. Tex. Occ. Code § 1051.604 (“This article does not: (1) limit the practice of interior design . . .”).

¹ For example, the most recent legislative session saw the introduction of “practice acts” in both houses (HB 1985 & SB 832). The House bill nearly made it to a floor vote but failed on a point of order. *See* <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB1985> (last visited June 11, 2007).

² *See* Dick M. Carpenter II, Ph.D., DESIGNING CARTELS (Institute for Justice, Sept. 2006) at 6, 11, 16-18 (describing interior design regulations in different states and documenting efforts to enact “title” laws and then expand them into full-blown practice acts). Available at <http://www.ij.org/publications/other/designing-cartels.html>; *see also* <http://www.asid.org/legislation/> (ASID website documenting existing and proposed interior design regulations throughout the country) (last visited June 11, 2007).

2. Texas law defines “interior design” as “the: (A) identification, research, or development of a creative solution to a problem relating to the function or quality of an interior environment; (B) the performance of a service relating to an interior space . . . ; or (C) preparation of an interior design plan, specification, or related document about the design of a non-load-bearing interior space.” Tex. Occ. Code § 1051.001(3).

3. While anyone may perform interior design services in Texas, the Interior Designers’ Registration Law (“Registration Law”) provides that only people with a state-issued license may use the terms “interior design” and “interior designer” to describe what they do. Tex. Occ. Code § 1053.151 (“A person other than an interior designer may not: (1) represent that the person is an ‘interior designer’ by using that title; or (2) represent, by using the term ‘interior design,’ a service the person offers or performs”). *See also* 22 Tex. Admin. Code § 5.133 (same).

4. The state vigorously enforces the Registration Law. Between January 1, 2004 and November 20, 2006, the Texas Board of Architectural Examiners (“the Board”), which is responsible for enforcing the Registration Law, sent at least 70 letters to people advising them that they may not use the terms “interior design” or “interior designer” without a license. *See* Exh. 1, Cover Letter & Summary of TBAE Public Records Production dated Nov. 20, 2006 (“Records Summary”). Two of the Plaintiffs, Nancy Pell and Veronica Koltuniak, have received such letters from the Board. Exh. 2, Letter dated 9/8/04 from TBAE to Plaintiff Nancy Pell; Exh. 3, Letter dated 1/12/04 from TBAE to Plaintiff Veronica Koltuniak.

5. The Board routinely advises people that unauthorized use of the terms “interior design” or “interior designer” may result in an administrative fine of up to \$5000 per violation or criminal prosecution. *See id.* Pell & Koltuniak letters; Exh. 1, Records Summary; *see also* Tex.

Occ. Code §§ 1053.351 (violation of title act is a Class C misdemeanor), 1051.451-52 (providing administrative penalty).

6. In none of those letters did the Board contend that the recipient's use of the terms "interior design" or "interior designer" was *factually* inaccurate. *See, e.g.*, Exhs. 2 & 3—Pell & Koltuniak Letters. Rather, the Board simply advised recipients that they were forbidden from using the terms "interior design" and "interior designer" because they were not licensed to do so. *Id.* Several recipients pointed out to the Board that they were performing interior design services and expressed their surprise and/or confusion over the fact that while it is lawful for them to provide interior design services without a license, it is unlawful for them to say that they do.³

7. On April 2, 2007, Plaintiffs' counsel advised the Board, through its general counsel, Scott Gibson, about the First Amendment concerns raised by the Registration Law and the fact that Plaintiffs' counsel had successfully challenged a nearly identical law in New Mexico a few months earlier. The Board has nevertheless continued to send cease-and-desist letters to unlicensed interior designers threatening them with civil penalties and criminal prosecution for using the terms "interior design" or "interior designer." *See, e.g.*, Exh. 5, Decl. of L. Long ¶¶ 5-6; Exh.4, Letter dated 5/7/07 from TBAE to Lynn Long.

8. All four of the Plaintiffs perform interior design work in Texas, and each Plaintiff considers him- or herself to be an interior designer. Exh. 6, Decl. of V. Byrum ¶¶ 2-3, 6; Exh. 7, Decl. of V. Koltuniak ¶¶ 2-3, 6; Exh. 8, Decl. of J. Mozersky ¶¶ 2-3, 7; Exh. 9, Decl. of N. Pell ¶¶ 2-3, 6.

³ *See, e.g.*, Exh. 1, Records Summary at 1, A. Hunsaker summary dated 6/21/06 (Ms. Hunsaker advised the Board that the employee responsible for designing her website "was not aware of the Texas law and the severe penalty for the use of the word 'designer or design,' [t]hrough our work encompasses all that it implies"); 13, J. Youngblood summary dated 4/23/04 (expressing surprise that she could not use the term "interior designer" and explaining that she will comply with the law "even though it appears this is more an attempt at restraint of trade than anything else"); 13-14, A. Klump summary dated 4/16/04 ("although I am puzzled as to the restrictions and what I can only guess are the reasons behind them, I do want to comply").

9. None of the four Plaintiffs is licensed under the Registration Law. It is therefore illegal for them to refer to themselves as “interior designers” or to describe what they do as “interior design” work, even though they are interior designers and even though they lawfully perform interior design work in Texas.

10. The Plaintiffs would all like to use the terms “interior design” and “interior designer” to describe themselves and the services they provide. Plaintiffs do not use those terms because they reasonably fear adverse enforcement action by the Board, including fines and possible criminal prosecution, if they do. Exhs. 2 & 3—Pell & Koltuniak letters; Exh. 6, Decl. of V. Byrum ¶ 6; Exh. 7, Decl. of V. Koltuniak ¶ 6; Exh. 8, Decl. of J. Mozersky ¶ 7; Exh. 9, Decl. of N. Pell ¶ 6.

III. ARGUMENT AND AUTHORITIES

The question in this case is whether the government may censor truthful commercial speech. Specifically, may the government require that people who lawfully perform a certain kind of work obtain a license in order to use the words that most accurately describe that work? Several courts have considered that question and all have emphatically rejected this kind of occupational speech-licensing. *See, e.g., Abramson v. Gonzalez*, 949 F.2d 1567, 1576 (11th Cir. 1992) (psychologists); *Parker v. Kentucky Bd. of Dentistry*, 818 F.2d 504, 510-11 (6th Cir. 1987) (dentist lawfully performing orthodonture work); *Widner v. Dean*, No. 5:04-CV-341(Df), 2006 WL 3519285, at * 6-10 (M.D.Ga. Dec. 6, 2006) (use of word “engineering” by land surveyor); *Comprehensive Accounting Serv. Co. v. Maryland Bd. of Pub. Accountancy*, 397 A.2d 1019, 1026-27 (Md. 1979) (noncertified accountant).⁴

⁴ *But cf. Seabolt v. Texas Bd. of Chiropractic Exam'rs*, 30 F. Supp.2d 965, 968-69 (S.D. Tex. 1998). *Seabolt* involved a claim by a group of Texas chiropractors that they had a First Amendment right to call themselves “chiropractic physicians” despite the fact that there were not medical doctors and had no more training than normal chiropractors. Reviewing the record evidence, which included a survey showing the significant extent to which the

The Eleventh Circuit's *Abramson* decision is precisely on point. *Abramson* involved a Florida law that allowed anyone to practice psychology, but required a license in order to use the terms "psychologist," "psychology," etc. *Abramson*, 949 F.2d 1570-71. Summarizing the effect of the law, the court quipped that "in application, it allows all to practice, but few to speak," *id.* at 1573, which is a perfect description of Texas' interior design Registration Law.

Citing the governing Supreme Court precedent, which has not changed since then, the court explained that

[a]s long as commercial speech describes lawful activity and is *truthful* and *not fraudulent or misleading*, it is entitled to the protections of the first amendment. To regulate or ban commercial speech, the government must (1) have a *substantial* governmental interest, (2) which is *directly advanced* by the restriction, and (3) must demonstrate that there is a *reasonable fit* between the legislature's ends and the *narrowly tailored means* chosen to accomplish those ends. *Id.* at 1575 (emphases in original).

In defense of its titling law, Florida claimed the public might be misled into believing that people holding themselves out as "psychologists" possessed certain levels of education or training that made them "competent and qualified" to practice psychology. *Id.* at 1576. The court recognized that possibility but rejected the state's argument nonetheless because "when the first amendment is at issue, the 'preferred remedy is more disclosure, rather than less.'" *Id.* at 1577 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). The Supreme Court likewise emphasized the importance of this "more speech, not less" approach in suggesting that potentially misleading claims by attorneys regarding legal specialization could be addressed through "a disclaimer about the certifying organization or the standards of a specialty." *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990).

proposed title was misleading to the public, the court denied the chiropractors' motion for summary judgment. *Seabolt* is distinguishable from this case on a variety of grounds, including the fact that "chiropractic physician" is certainly not the most accurate way to describe a mere chiropractor, whereas "interior designer" certainly *is* the most accurate way to describe someone who performs statutorily defined "interior design" services.

Most states regulate neither the practice of interior design nor the use of the words “interior design” or “interior designer.” *E.g.*, DESIGNING CARTELS at 6, Table I.⁵ Moreover, within the interior design industry there are myriad professional membership organizations and private certifying bodies with a wide variety of credentialing and membership requirements. Accordingly, the notion that a person who calls herself an “interior designer” possesses any particular level of experience, skill, or qualifications is wholly untenable. Moreover, the “less speech, not more” doctrine is not only viable in this setting, it is precisely the approach used by fourteen of the seventeen states that have a title (but not a practice) act for interior designers. In those fourteen states, *anyone* may use the terms “interior design” and “interior designer”; but only people who are appropriately licensed, certified, or registered may use the terms “*licensed* interior designer,” “*certified* interior designer,” or “*registered* interior designer,” respectively. *See, e.g.*, DESIGNING CARTELS at 6, Table I. Texas could certainly have adopted one of those approaches, and indeed that is precisely what New Mexico did when its title act was challenged on First Amendment grounds last year.⁶

In light of the undisputed facts and persuasive legal authorities, Plaintiffs are entitled to judgment as a matter of law under Fed. R. Civ. P. 56 that Texas’ interior design Registration Law violates their First Amendment right to freedom of speech.

IV. PRELIMINARY INJUNCTION

Plaintiffs have moved for summary judgment at an early stage in this litigation so that this case may be swiftly and finally resolved in their favor. Because that process may take some

⁵ Only four states—Alabama, Florida, Louisiana, and Nevada (plus the District of Columbia)—regulate the practice of interior design. Alabama’s practice act was declared unconstitutional by a state trial court in a decision that is currently under review in the Alabama Supreme Court. *See* Exh. 10, Order in *State v. Lupo*, CV-02-5201-HSL (8/23/04).

⁶ *See* 2007 New Mexico Laws Ch. 245 (SB 535) (changing “pure” title act like Texas’ into a “licensed interior designer” title act).

time, and in light of the substantial constitutional injury faced by Plaintiffs and other Texans due to the Board's ongoing enforcement of the Registration Law, Plaintiffs respectfully request an order enjoining the Defendants from enforcing the law pending final resolution of this case.

The preliminary injunction standards in the Fifth Circuit are well-established. The moving party must show that: (i) she is substantially likely to succeed on the merits; (ii) there is a "substantial threat of irreparable injury" without the injunction; (iii) the potential injury to the plaintiff outweighs the injury to party opposing the injunction if it is granted; and (iv) the public interest will not be harmed by the injunction. *E.g.*, *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006); *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 114 (5th Cir. 1979). Those four requirements are easily met here.

First, as demonstrated above, the facts are undisputed and the case law points sharply in Plaintiffs' favor; accordingly, there is a substantial likelihood that Plaintiffs will prevail on the merits. Second, the Supreme Court has held that the suppression of speech protected by the First Amendment is "unquestionably" an irreparable injury, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the Fifth Circuit has likewise observed that "the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981). Third, when a party seeking a preliminary injunction in a First Amendment case has shown that she is substantially likely to prevail on the merits, courts will typically find that the threatened loss of free speech rights outweighs the government's inability to enforce the ordinance or law. *E.g.*, *Wexler v. City of New Orleans*, 267 F. Supp.2d 559, 568 (E.D. La. 2003). Fourth, "the public interest is best served by enjoining the effect of any ordinance which limits potentially

constitutionally protected expression until it can be conclusively determined that the ordinance withstands constitutional scrutiny.” *Id.* at 568-69.⁷

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court issue a preliminary injunction preventing the Defendants from enforcing Texas’ interior design Registration Law and associated regulations that prohibit unlicensed persons from using the terms “interior design” and “interior designer” when those terms accurately describe the work they lawfully perform. Plaintiffs also request that this Court grant their motion for summary judgment and issue a final order declaring those provisions of the Registration Law unconstitutional and permanently enjoining the Defendants from enforcing them.

DATED this 11th day of June, 2007

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⁷ Preliminary injunctions are commonly issued in free speech cases. *See, e.g., Speaks v. Kruse*, 445 F.3d 396 (5th Cir. 2006) (enjoining the enforcement of a law prohibiting the telephone number solicitation of certain customers by chiropractors); *Entm't Software Ass'n v. Foti*, 451 F. Supp.2d 823 (D. La. 2006) (enjoining the enforcement of a law that prevented the sale of violent video games to minors); *Wexler, supra*, 267 F. Supp. 2d at 568-69 (enjoining the enforcement of an ordinance preventing the sale of books on city sidewalks); *Goldstein v. Allain*, 568 F. Supp. 1377, 1387 (N.D. Miss. 1983) (enjoining enforcement of Mississippi obscenity law).

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I hereby certify that on the 11th day of June, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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