IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

CASE NO. 4:09-cv-00193-RH-WCS

Eva Locke, Patricia Anne Levenson, Barbara Banderkolk Gardner, National Federation of Independent Business,

Plaintiffs,

v.

Joyce Shore, in her official capacity as Chair of the Florida Board of Architecture and Interior Design; John P. Ehrig, in his official capacity as Vice-Chair of the Florida Board of Architecture and Interior Design; and Aida Bao-Garciga; Roassana Dolan; Wanda Gozdz; Mary Jane Grigsby; Garrick Gustafson; E. Wendell Hall; Eric Kuritsky; Roymi Membiela and Lourdes Solera, in their official capacities as members of the Florida Board of Architecture and Interior Design,

Defendants.
_________________________________/

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

Defendants' reply to Plaintiffs' response begins, as a general matter, with another look at the actual reach of the prohibitions of the subject statute. Plaintiffs take words out of context to create the false impression that this statute regulates conduct far broader than a fair reading of the statute would dictate. It is

noteworthy that Plaintiffs again ignore very important aspects of the statute to create this illusion. Properly read, this statute contains only a narrow set of prohibitions. If someone wishes to practice interior design, he or she may do so at any time either in residential space or under the supervision of a licensed interior designer or architect for other than residential space. The prohibition applies to the practice of interior design in commercial spaces without the supervision of another licensed professional.

In order to understand this statute properly, the Court must examine more than just the definition of Interior Design. That definition provides:

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

§ 481.203(8), Fla. Stat. The statute then prohibits: the "practice [of] interior design unless the person is a registered interior designer unless otherwise exempted herein." § 481.223, Fla. Stat. In contrast to the definition of interior design, the statute defines interior decoration:

> the selection or assistance in selection of surface materials, window treatments, wallcoverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under applicable building codes.

§ 481.203(15), Fla. Stat. The law contains *no prohibition* on these services.

Prohibited interior design services only apply to the "nonstructural interior elements of a building or structure" and Plaintiffs focus on the words "consultations, studies, drawings" taken out of context to posit the broad reach of the statute. Read in context and given meanings consistent with the intent of the statute, these words are not so broad or vague as Plaintiffs assert. Whether it is the wedding planner drawing the set up of a reception or a decorator choosing a color pattern, the prohibitions do not apply. Although, in their broadest terms, the statutory definitions could encompass these activities, in the context of this law, they do not relate to the "nonstructural interior elements of a building or structure." We are dealing there with loose furnishings and surface treatments, both of which come within the definition of interior decorating. Notwithstanding the hysteria created by plaintiffs in this case, the statute conveys a core meaning that gives reasonable people fair warning of what is prohibited. And what is prohibited is not so broad as to violate any constitutional principles.

Defendants do not argue that vocational regulations are exempt from the First Amendment. Rather, as the cases cited reflect, any effect on free speech rights in this case are only "the incidental effect of an otherwise valid regulatory law." *Wilson v. State Bar of Ga*., 132 F.3d 1422, 1429 -1430 (11th Cir. 1998). Referring back to the initial discussion above, only by vastly exaggerating the

reach of this law can Plaintiffs take this case into the realm of strict scrutiny under the First Amendment. When the statute is given a reasonable interpretation, "[Plaintiffs'] asserted belief that they have to forego the constitutionally protected speech they pose in order to avoid sanctions under the [statute] is not objectively reasonable." *Id.*

As to Plaintiffs' Commerce Clause claim, it also is infected with their absurd reading of the statute. They posit massive burdens on interstate commerce and, under *Pike*, assert that the balance clearly tilts in their favor. This argument should be rejected for three reasons. First, there is no massive burden on interstate commerce. No goods are being impeded in their interstate travel. In addition, anyone from anywhere can work as an interior designer on any project in Florida. Out of state individuals can, just like anyone in Florida, work on residential projects, and on commercial projects under the supervision of a licensed architect or interior designer.

According to Plaintiffs' own expert, commercial projects are typically completed by a team including a licensed architect. If Plaintiffs' characterizations of interior design as being nothing more than recommendations is correct, those recommendations only need to be communicated under contract to the architect and through design specifications signed and sealed by the architect to be legal. Nothing is preventing Ms Bowden from working in Florida other than her own

insistence on a specific business model under which to operate. The commerce clause does not protect any particular form of business, it only protects markets.

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. *See Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. As indicated by the Court in *Hughes*, the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-128 (1978). Plaintiffs have not proven that the market for interior designers has been unconstitutionally impeded.

Second, Plaintiffs' reliance on the so called "lesser impact" test is misplaced. This analysis only comes into play when the law is first found to be discriminatory. It is then that the government must justify the restriction by showing that there is "no other means to advance a legitimate local interest." *Allstate Ins. Co. v. Abbott,* 495 F.3d 151, 160 (5th Cir. 2007), citing *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). Nothing in *Diamond Waste* is to the contrary. The lesser impact analysis was included there because the ordinance discriminated on its face. Here, no

discrimination has been proven and none exists on the face of the statute. The classic *Pike* rule applies.

Third, Plaintiff wants this court to balance the putative local benefit of the protection of the public with the illusory impact on interstate commerce. Plaintiffs point to a supposed split among the circuits on the issue of proof of the putative local benefit. The Supreme Court has held, in a commerce clause context, "We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 92 (1987). In *CTS*, the court found "the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders." *Id.* Similarly here, the possibility of harm from improper design is sufficient to justify the regulations. When a designer can be engaged to design the entire interior layout of spaces of unlimited size, it is clearly rational to regulate those practices. The unmeasurable quality of protecting the public welfare must prevail under the Commerce Clause against the asserted, but illusory, burden on interstate commerce. This case is different from *Pike* and other commerce clause cases where the asserted justification was either clearly pretextual or pure economic protectionism.

Plaintiffs assert that there are triable issues of fact in the due process and equal protection claims. There are no genuine issues of fact that need to be tried

here. Plaintiffs' asserted issues are either questions of law or the result of the aforementioned excessively broad reading of the statute. This court only need recognize that it is rational for the State to require a license for the design of complex, large interior spaces to uphold this law.

Even if the law regulates more broadly than this rationale would require, overinclusiveness is not fatal. State legislatures are "allowed leeway to approach a perceived problem incrementally, even if its incremental approach is significantly over-inclusive. . *Williams v. Morgan,* 478 F.3d 1316, 1320 -1321 (11th Cir. 2007). The law survives rational basis review even if it "seems unwise ... or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996). More importantly, there is no need to show that the law specifically promotes safety, so long as it promotes the general welfare or some other legitimate governmental aim. *Leib v. Hillsborough County Public Transp. Com'n*, 558 F.3d 1301, 1309 (11th Cir. 2009). Under rational basis review, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 1306 (citing *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)); *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 315 (1993) ("Thus, the absence of 'legislative facts' explaining the distinction on the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.")

On the Privileges and Immunities Clause, Plaintiffs vastly overstate their case. They claim that "there has been much debate about exactly which rights are protected by the Privileges and Immunities Clause," citing *Craigmiles v. Giles,* 312 F.3d 220, 229 (6th 2002). There, the court merely stated, after first specifically stating that "we need not reach this argument," that "There has been some recent speculation that the Privileges and Immunities Clause should have a broader meaning." But, even if Plaintiffs are right and the Clause of the 14th amendment does protect some substantive rights other than the limited ones from the *Slaughterhouse Cases,* the right to make a living in the profession of one's choice has never been included in those "fundamental rights and liberties" that may be covered. *Saenz v. Roe,* 526 U.S. 489, 524 (1999)(Thomas dissenting)

The Eleventh Circuit, in a substantive due process case stated, "there is no fundamental right to practice law, let alone to practice law free of any obligation to provide pro bono legal services to the poor." *Schwarz v. Kogan* 132 F.3d 1387, 1391 n.2 (11th Cir. 1998). Similarly there is no fundamental right to practice interior design, let alone to practice it free from regulation. The arguments of Plaintiffs notwithstanding, the proper scope of the 14th Amendment Privileges and Immunities Clause remains as set forth in the *Slaughterhouse Cases.* The Supreme Court held in 1999, that

> it has always been common ground that this Clause protects the third component of the right to travel.

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State."

Saenz v. Roe, 526 U.S. 489, 503 (1999). Under any reading of either Privileges and Immunities Clause, Plaintiffs' claim is without merit.

Defendants are entitled to summary judgment and this case should be dismissed.

Respectfully submitted this 11th day of January, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served by first class mail and e-mail filing with this Court's CM/ECF system this 11th Day of January, 2010, on:

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