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

EVA LOCKE, et al.,
Plaintiffs,

v.

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

JOYCE SHORE, et al.,
Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT

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This is a constitutional challenge to a Florida law that makes it a crime to do a study, consultation, or drawing "relating to" the "interior elements" of any nonresidential building in Florida without a license. The law also makes it a crime to use the term "interior designer" (or other "words to that effect") without a license, even if they accurately describe work a person is lawfully performing. But making a drawing, performing a consultation or study, and describing one's work are all forms of speech under the First Amendment—speech that may only be regulated with great care, if at all. As demonstrated below, Florida's interior design law was not drawn with the fine brush strokes the Constitution requires but with an indiscriminate regulatory paint roller. To name only its most glaring defects, the law is unconstitutionally overbroad, impermissibly vague, and censors substantial amounts of constitutionally protected speech. Like every interior design law that has been challenged so far in other states, it cannot stand.

BACKGROUND AND UNDISPUTED FACTS[1]

1. A Short History Of Interior Design Regulation.

To understand how such a poorly crafted law could have gotten on the books, it helps to know something about the pedigree of interior design laws generally and of this law in particular. The impetus to regulate interior design comes not from legislators, consumers, or building officials, but from a politically active segment of the design

[1] The Court's August 19, 2009, Scheduling and Mediation Order [Document # 34] provides that Local Rule 56.1 does not apply in this case; accordingly, the undisputed facts are incorporated into this memorandum. Plaintiffs are moving for summary judgment only on claims 1, 2, and 7 of their Complaint (alleging First Amendment and dormant Commerce Clause violations). They are not moving for summary judgment on claims 3, 4, or 6 (equal protection, due process, and privileges or immunities). Plaintiffs will file a separate motion to voluntarily dismiss claim 5 (procedural due process and delegation).

community itself.[2] That is not unusual. The tendency of industry groups to seek recognition, status, and economic protection from the government through occupational licensing is well established.[3]

Florida's interior design law was the product of just such a lobbying effort by members of the American Society of Interior Designers (ASID) and its local affiliates. In 1988, Florida adopted a so-called "title act" that regulated use of the name "interior designer" and related terminology, but not the work itself. Six years later, in 1994, the law was expanded to include a so-called "practice act" regulating who could engage in various activities defined as "interior design" under the law. The practice act was drafted by former ASID chapter president Emory Johnson, and it was promoted in the legislature by Mr. Johnson and other pro-regulation designers along with their hired lobbyists.[4]

ASID's national lobbying campaign has been zealous but relatively ineffective so far, as only three states regulate the practice of interior design: Florida, Louisiana, and Nevada.[5] Alabama had a practice act like Florida's, but it was declared unconstitutional by the Alabama Supreme Court in 2007.[6] Thus, in 47 states *anyone* may perform interior design work, and, as demonstrated in section 4 below, there is no evidence that the unlicensed practice of interior design presents any genuine public welfare concerns.

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[2] *See, e.g.*, Dick M. Carpenter, *Designing Cartels*, Nov. 2007, *available at* http://www.ij.org/index.php?option=com_content&task=view&id=1619&Itemid=249.

[3] *See, e.g.*, Maxwell L. Stearns & Todd J. Zywicki, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 49-51 (2009); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 16-18 (1976).

[4] Declaration of Clark Neily ("Neily Decl."), Ex. 6 Johnson Dep. 13.23-14.23; 30.19-31.17. More information about the history of Florida's interior design law may be found on the website of Florida's leading pro-regulation coalition, the Interior Design Associations Foundation (IDAF): http://www.idaf.us/idleghistory.html, Neily Decl., Ex. 1. The Defendants' prosecuting attorney, David Minacci, described Mr. Johnson and IDAF president Janice Young as "the two driving forces behind the practice act." Neily Decl., Ex. 2 Minacci Dep. 13.5-14.6.

[5] Fla. Stat. § 481.201, *et seq*.; La. Rev. Stat. Ann. § 37:3176(A)(1); Nev. Rev. Stat. § 623.360(1)(c).

[6] *State v. Lupo*, 984 So. 2d 395, 406-407 (Ala. 2007).

2. An Overview Of Florida's Interior Design Law.

In Florida, only state-registered interior designers may practice what the state has defined as "interior design." Fla. Stat. § 481.223(1)(b). According to the statute:

> "Interior design" means designs, consultations, studies, drawings, specifications, and administration of 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 interior elements within and surrounding interior spaces of buildings.

Id. § 481.203(8). The performance of interior design services in residential applications is exempted, *id*. § 481.229(6)(a), and the law does not apply to "[a]n *employee of a retail establishment* providing 'interior decorator services' . . . in the furtherance of a retail sale . . . ." *Id*. § 481.229(6)(a) (emphasis added).[7]

Besides requiring that individuals who perform interior design services be licensed, the law requires any company that practices or offers to practice interior design in Florida to obtain a "certificate of authorization." *Id*. § 481.219(3). In order to obtain that certificate, at least one of the company's principal officers must be a Florida-licensed interior designer. *Id*. § 481.219(7)(b).[8]

Along with its practice act, Florida has a "title" provision that prohibits nonlicensees from using the term "interior designer" or other "words to that effect." *Id*. § 481.223(1)(c). There are two distinct problems with that provision. First, the Board of Architecture and Interior Design has never produced a comprehensive list of prohibited terms, leaving nonlicensees like the Plaintiffs to wonder exactly which other words they

[7] "'Interior decorator services' includes the selection or assistance in selection of surface materials, window treatments, wallcoverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under any applicable building codes." Fla. Stat. § 481.203(15).
[8] *See also* Neily Decl., Ex. 2 Minacci Dep. 38.9-39.19 (confirming and explaining requirements).

are prohibited from using.[9] (The Board's prosecuting attorney and enforcement history indicate that other forbidden terms include—but are not limited to—"interior design," "interior design consultant," "space planner," "space planning," and even "yacht design."[10]) The second problem stems from the interaction between the law's title restriction and the residential practice exemption. The result of those provisions is that while nonlicensees like the Plaintiffs may lawfully perform residential interior design services in Florida, they are forbidden from referring to themselves, accurately, as "interior designers," and they are forbidden from describing their work, again accurately, as "interior design" or "space planning," etc.[11]

Obtaining an interior design license in Florida is a long and expensive process. An applicant must complete a combined total of six years post-secondary education (at a Board-approved school) and "diversified interior design experience" (i.e., an apprenticeship) under a state-registered interior designer. Fla. Stat. § 481.209(2); Fla. Admin. Code 61G1-22.001(1). The applicant must then pass a national licensing exam administered by a private testing body called the National Council for Interior Design Qualification (NCIDQ), which maintains its own eligibility criteria to sit for the test. Fla. Stat. §§ 481.207 & 481.209(2).[12]

In 2002, after complaints about lax enforcement from industry members, the State Board decided to outsource enforcement of the interior design and architecture laws to a

[9] Declaration of Barbara Vanderkolk Gardner ("Gardner Decl.") ¶ 11; Declaration of Patricia Levenson ("Levenson Decl.") ¶¶ 6, 8; Declaration of Eva Locke ("Locke Decl.") ¶ 7.
[10] Neily Decl., Ex. 2 Minacci Dep. 32.18-23; 78.16-80.19; Neily Decl., Ex. 3. The terms "space planning," "interior design," and "yacht design" were culled from a summary of the Board's enforcement actions that the Defendants have agreed is accurate.
[11] Gardner Decl. ¶ 9; Levenson Decl. ¶¶ 5-6, Locke Decl. ¶¶ 2-4.
[12] Neily Decl., Ex. 4 Shore Dep. 7.20-.22; 32.3-33.11.

Tallahassee law firm called Smith, Thompson, Shaw & Manausa.[13] According to the Board's prosecuting attorney, David Minacci (who is also a partner at Smith Thompson), the firm's enforcement of Florida's interior design law has "definitely been more aggressive"—particularly regarding unlicensed activity—than the Board had been.[14] That is certainly evident from the publicly available summaries of the Board's enforcement actions, which show several hundred interior-design-related disciplinary actions per year, mostly against nonlicensees. Until recently, Smith Thompson employed Emory Johnson (the ASID chapter president who drafted and promoted the practice act) to serve as its enforcement and investigation expert.[15]

Practicing interior design or using the term "interior designer" (or other prohibited "words to that effect") without a license in Florida is a first degree misdemeanor punishable by up to one year in jail. Fla. Stat. § 481.223(2). The Board may also impose an administrative penalty, Fla. Stat. § 455.228, and it routinely threatens nonlicensees with a $5,000 fine for violations of the practice or title provisions of the interior design law.[16]

3. The Extraordinary Breadth Of Florida's Interior Design Law.

While the challenged law purports to regulate the practice of interior design, it actually sweeps far more broadly, ensnaring a whole host of vocations, activities, and expression that do not remotely constitute "interior design" as that term is commonly

[13] The services provided by Smith Thompson to the State Board are summarized on the firm's website: http://www.stslaw.com/adboard.asp.
[14] Neily Decl., Ex. 5 at pp. 9 (Defs.' Resp. to RFA 5); Neily Decl., Ex. 2 Minacci Dep. 11.3-11.11.
[15] Neily Decl., Ex. 2 Minacci Dep. 24.14-25.22; 28.15-29.1.
[16] *See, e.g.*, Letter of Mar. 30, 2009 from D. Minacci to B. Gardner, attached to Ms. Gardner's declaration as Exhibit A. Fines can be much higher when multiple violations are alleged. For example, New York designer Juan Montoya was fined $10,000 for a single project in Florida. Neily Decl. Ex. 19.

understood. Here again is Florida's definition of interior design, with key provisions underlined. Note that with a handful of statutory exceptions,[17] *everything* covered by this definition requires a license, no matter why it is done and even when not done for pay[18]:

> "Interior design" means designs, consultations, studies, drawings, specifications, and administration of 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 interior elements within and surrounding interior spaces of buildings.

Fla. Stat. § 481.203(8) (emphases added).

Putting aside the statute's failure to define the underlined terms, there are any number of settings in which ordinary people might have occasion to make a drawing, or study or consult with another person about the "interior elements" of a building. By way of example only, this would include a wedding planner[19] or caterer[20] making a sketch to show how a reception room will be set up; a business consultant showing how best to display sweaters[21] or watches[22] in a retail store; or someone picking out tables, paint, or carpeting for a court-reporter's office.[23] For the sake of simplicity, Plaintiffs will take just three terms from the statute—"drawings," "consultations," and "studies"—and use them to illustrate how incredibly broad Florida's interior design law is.

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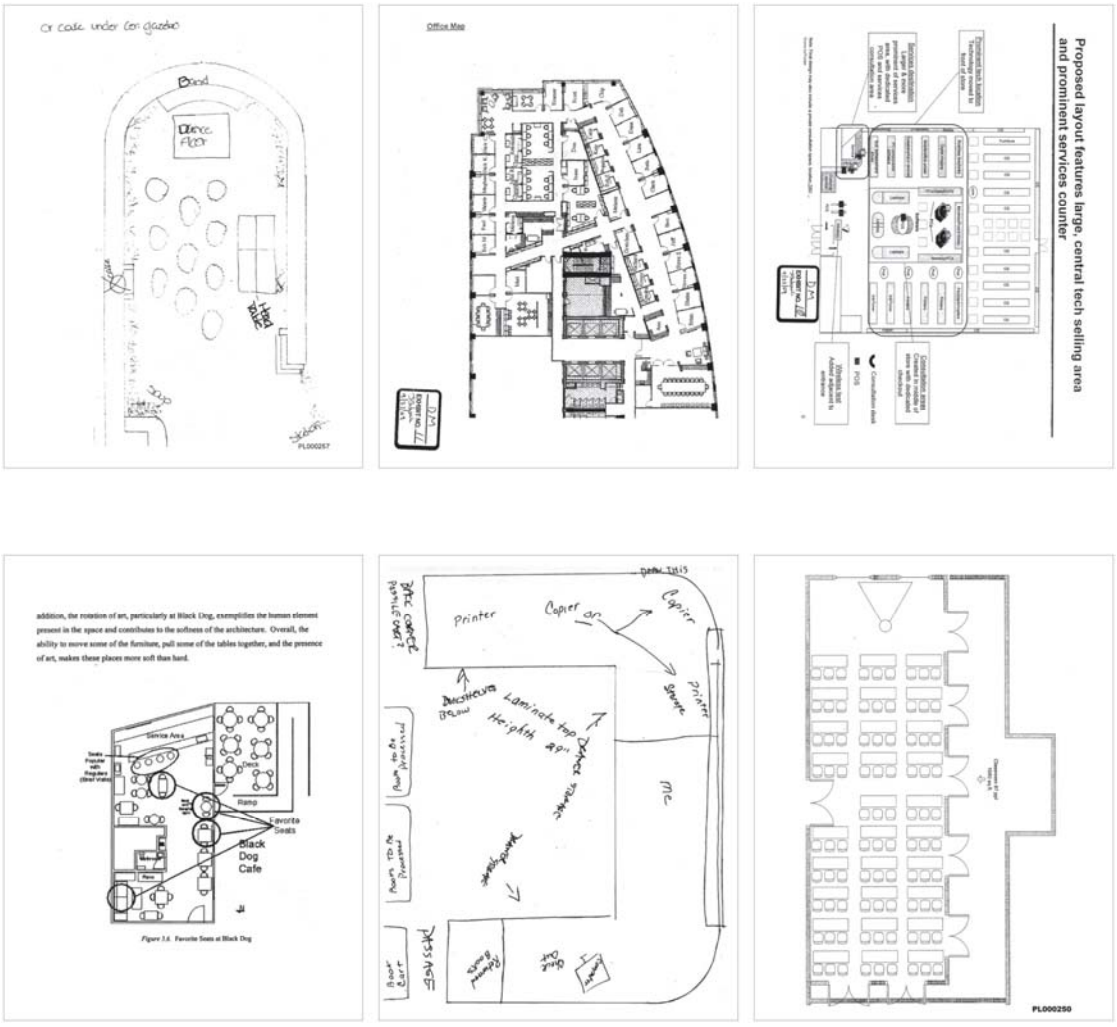
[17] Again, the law exempts activities performed in a "residential application" and by employees of retail establishments providing "interior decorator services." Fla. Stat. § 481.229(6)(a) & (b).
[18] Neily Decl., Ex. 2 Minacci dep. 104.22-106.3.
[19] Declaration of Brandee Gaar ("Gaar Decl.") ¶ 3.
[20] Gaar Decl. ¶ 4; Ex. A (PL000258-59).
[21] Declaration of John Doe ("John Doe Decl.") ¶ 6. Pursuant to the Court's order of Dec. 10, 2009, a redacted copy of Mr. Doe's declaration has been filed with this motion; an unredacted copy of the declaration has been filed with the Court under seal and provided to Defendants' counsel.
[22] Declaration of Michael Miarecki ("Miarecki Decl.") ¶¶ 3-7.
[23] Neily Decl., Ex. 6 Johnson Dep. 67.17-69.22.

Drawings. It is a *crime* in Florida for a nonlicensee to make any drawing "relating to" the "nonstructural interior elements of a building or structure." But people make drawings "relating to" the inside of buildings for all sorts of reasons having nothing to do with actual design plans. Here are just a few examples:



Starting at the top left, the drawings are: (1) a wedding planner's sketch showing how the reception will look[24]; (2) the seating plan of a law office[25]; (3) a business

[24] Gaar Decl., Ex. A (PL000257).
[25] Neily Decl., Ex. 7; *see also* Neily Decl., Ex. 2 Minacci dep. 118.3-120.14 (discussing seating plan).

consultant's idea for the "proposed layout" of a retail store[26]; (4) the inside of Tallahassee's Black Dog Cafe from the dissertation of the Defendants' expert, Professor Lisa Waxman[27]; (5) a drawing by the *customer* of an office supply company showing how she would like her office to look[28]; and (6) a web page from a hotel showing how it can configure one of its meeting rooms.[29]

Even actual interior design drawings present problems, because they can range from purely conceptual artistic renderings (known as "presentation drawings") to "working" or "design" drawings intended to serve as an actual basis for construction.[30] Thus, it is anyone's guess whether Florida's interior design law applies to renderings like those prepared by world-famous designer Juan Montoya in connection with the building of the International Design Center in Naples.[31] The State Board's prosecuting attorney David Minacci testified that the renderings would *not* be covered by the challenged law, but former Smith Thompson enforcement expert Emory Johnson testified that they *would*.[32]

Consultations. While not defined in the statute, "consultations" would seem to cover such things as the owner of a business that sells office furniture or

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[26] Neily Decl., Ex. 8; *see also* Neily Decl., Ex. 2 Minacci dep. 115.8-117.9 (discussing drawing).
[27] Neily Decl., Ex. 9; *see also* Neily Decl., Ex. 12 Waxman dep. 46.21-47.5 (discussing illustration).
[28] Declaration of Paola Pearce ("Paola Pearce Decl."), Ex. A. *See also* Neily Decl., Ex. 2 Minacci Dep 66.10-67.17 & Neily Decl., Ex. 10 at 3 (illegal for nonlicensee to sketch a conference table on a bar napkin if it could "inhibit[] ingress or egress").
[29] Neily Decl., Ex. 11. The picture is on the website of The Blue hotel (www.theblue.com) near Miami: http://www.theblue.com/pdf/Classroom87.pdf.
[30] Neily Decl., Ex. 12 Waxman Dep. 50.3-51.14 (explaining the difference between "presentation drawings" and "design drawings"); Neily Decl., Ex. 4 Shore Dep. 26.17-29.1 (distinguishing between "presentation drawings" and "design drawings" and characterizing the former as "the pretty pictures we give the client" to convey a visual impression because "frequently clients cannot imagine what things are going to look like").
[31] Neily Decl., Ex. 13.
[32] Neily Decl., Ex. 2 Minacci Dep. 120.15-123.5; Neily Decl., Ex. 6 Johnson Dep. 78.7-80.10.

retail display equipment speaking to customers to find out what sort of furnishings or display racks they might need.[33] It might also apply to a retail business consultant helping maximize a client's sales by making suggestions about store layout or product displays,[34] or even a doctor asking his receptionist for her thoughts about which chairs or carpeting to put in the waiting room and what kind of work stations to use in the back office.[35]

Studies. "Studies" is another broad term that might well describe an office furniture dealer, retail consultant, or other person's efforts to determine which furnishings or display items a business might need by finding out what sort of work they do, how many employees they have, and the size and layout of their office or store.[36] Moreover, by outlawing "studies" "relating to" the interior elements of buildings, the statute essentially makes it illegal to be an interior design student, since studying the insides of existing buildings is a significant part of their educational experience, as is creating statutorily forbidden sketches and drawings of those buildings.[37]

4. The Unlicensed Practice Of Interior Design Presents No Genuine Threat To The Public.

The Plaintiffs have challenged Florida's interior design law on several grounds, some of which would require the Defendants to prove that the law actually advances a

[33] Paola Pearce Decl. ¶¶ 4-6; Declaration of Chris Bates ("Bates Decl.") ¶ 6; John Doe Decl. ¶¶ 6, 9; *cf.* Neily Decl., Ex. 5 at p. 8 (Defs.' Resp. to RFAs 19-22) (admitting that the law would cover drawings of furniture, file cabinets, shelving, and display racks).
[34] Miarecki Decl. ¶¶ 4-10; *cf.* Neily Decl., Ex. 5 at p. 8 (Defs.' Resp. to RFAs 19-22).
[35] Neily Decl., Ex. 2 Minacci Dep. 106.24-107.21; *see also* Neily Decl., Ex. 6 Johnson Dep. 67.17-69.22.
[36] Bates Decl. ¶ 7; Miarecki Decl ¶ 8; John Doe Decl. ¶¶ 8-9
[37] Neily Decl., Ex. 12 Waxman Dep. 42.11-46.1.

genuine public purpose. The Defendants cannot make that showing because: (1) they admit they have no evidence that the unregulated practice of interior design presents any bona fide public welfare concerns[38]; (2) other states considering proposed legislation have found no evidence of public harm from the unregulated practice of interior design[39]; and (3) the Plaintiffs' expert witness, Jere Bowden, a nationally recognized practitioner with 25 years of interior design, general contracting, and project management experience in commercial and residential settings, has offered unrebutted testimony that "Florida's interior design licensing system provides no meaningful protection of public health, safety, or welfare."[40]

5. The Three Individual Plaintiffs Wish To Provide Commercial And Residential Interior Design Services And Refer To Themselves As "Interior Designers."

Plaintiffs Eva Locke, Pat Levenson, and Barbara Gardner all wish to perform commercial and residential interior design services in Florida and refer to themselves, accurately, as "interior designers."[41] But they are prevented from performing commercial work and from using the term "interior designer" (and other, unspecified, "words to that effect") by the challenged law. The individual Plaintiffs' backgrounds are described more fully on pages 4-7 of their July 17, 2009, preliminary injunction motion and in their declarations attached to this brief. Plaintiff National Federation of Independent Business

[38] Defs.' Answer ¶ 24 (admitting ¶ 24 of Complaint); Neily Decl., Ex. 5 at pp. 1-2, 4-5 (Defs.' Resp. to Interrogs. Nos. 4, 6, 7, 12, 18, 19) (generally disclaiming knowledge of any evidence that interior design regulation actually benefits the public).
[39] Those studies are collected here: http://idpcinfo.org/Govt-Reports.html.
[40] Declaration of Jere Bowden ("Bowden Decl.") ¶ 8.
[41] Gardner Decl. ¶¶ 9, 14-15, 17; Levenson Decl. ¶¶ 2-4, 6, 9-13; Locke Decl. ¶¶ 2-8.

has standing to challenge the law because its members have been targeted for enforcement.[42]

ARGUMENT AND AUTHORITIES

Florida's interior design law is riddled with constitutional defects, the most glaring of which is its extraordinary overbreadth. This is followed closely by the vagueness of the law, which leaves persons of ordinary intelligence to guess what is permitted under the law and what is forbidden. The law also burdens interstate commerce by making it unnecessarily difficult not just for interior designers but many other businesses from outside the state to work in Florida. Finally, as explained in the Plaintiffs' earlier preliminary injunction motion, the law's title provision censors truthful commercial speech by prohibiting people from using the words that most accurately describe work they lawfully perform. Those defects are addressed in turn.

I. Florida's Interior Design Law Is Unconstitutionally Overbroad and Vague.

Florida's interior design law censors the communication of ideas, including purely aesthetic ideas, "relating to" the "interior elements" of all nonresidential buildings in the state. Fla. Stat. §§ 481.223(1)(b), .229(6). But the expression of those ideas—whether communicated verbally, in writing, or through drawings—is protected speech that may only be regulated with great care, if at all. And while the challenged law *purports* to regulate the practice of interior design, its practical effect is far different. As demonstrated in the fact section above and in further detail below, the actual effect of Florida's interior design law is to censor vast amounts of expression—verbal, written,

[42] Declaration of Allen Douglas ("Douglas Decl.") ¶¶ 3-4.

and graphic—simply because it "relates to" the "interior elements of a building or structure." Fla. Stat. § 481.203(8). As a result, the law censors tremendous amounts of speech that the state has no legitimate authority to regulate. On top of that, because it fails to define key words and speaks in such broad, open-ended terms, the law is demonstrably vague and leaves substantial discretion in the hands of public officials regarding the scope of enforcement.

A. Florida's Interior Design Law Restricts Protected Speech.

The challenged law forbids nonlicensees from providing "consultations," performing "studies," or making "drawings" "relating to nonstructural interior elements of a building or structure." Fla. Stat. §§ 481.203(8); .223(1)(b). The law does not define the terms "consultations," "studies," "drawings," "relating to," or "interior elements," and they must therefore be construed "in accordance with [their] ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).[43] In doing so, this Court may rely on dictionary definitions. *See id.*

The dictionary definitions of "consultations," "studies," and "drawings" have one thing in common—they all describe the communication of ideas, information, and opinions in either spoken or written form. As a result, the statute's regulation of these activities must comport with the free-speech protections of the First Amendment. *See Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). The fact that the information being communicated "relates to" the "interior elements" of buildings or structures—as opposed to, say, religion or politics—is irrelevant because "words

[43] Neily Decl., Ex. 5 at p. 6 (Defs.' Resp. to RFA No. 1).

communicating information are 'speech' within the meaning of the First Amendment" regardless of the subject or the perceived importance of the information they convey. *Giebel v. Sylvester*, 244 F.3d 1182, 1186-1187 (9th Cir. 2001).

Drawings are also protected forms of expression. The Eleventh Circuit has held that the First Amendment applies to "graphic communication," *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993), and sister circuits have explicitly identified "drawings" as being entitled to First Amendment protection. *See, e.g., Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 618 (5th Cir. 2004); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003). Moreover, the types of drawings at issue in this case can be highly expressive and convey a wide variety of information and ideas—from the technical to the purely aesthetic—as confirmed by the Board's Chair, Joyce Shore, and the Defendants' expert witness, Lisa Waxman.[44] Indeed, Professor Waxman specifically described interior design drawings as a "communication tool."[45]

B. Florida's Interior Design Practice Act Is Unconstitutionally Overbroad Because It Regulates Substantial Amounts Of Protected Speech.

Under the First Amendment overbreadth doctrine, a regulation is facially invalid "if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (internal quotations omitted); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985). Because the Florida's interior design law is a content-based regulation of speech (in that it specifically targets speech "relating to the interior elements of a building or

[44] Neily Decl., Ex. 12 Waxman Dep. 50.3-51.14; Neily Decl., Ex. 4 Shore Dep. 26.20-29.1.
[45] Neily Decl., Ex. 12 Waxman Dep. 51.14

structure"), it is subject to strict scrutiny and must be narrowly tailored to promote a compelling government interest. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). This requires the government to demonstrate with actual evidence that the harms it recites "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995) (internal quotation marks and citation omitted).

The Defendants cannot make that showing because they have admitted that they have no evidence that the unregulated practice of interior design presents bona fide public welfare concerns.[46] The Defendants have also admitted that they have no evidence that licensing has led to better job performance by interior designers, greater safety, fewer building code violations, or otherwise benefited the public in any demonstrable way.[47] Those admissions comport with the unrebutted testimony of the Plaintiffs' expert Jere Bowden,[48] and with the Alabama Supreme Court's recent holding that Alabama's similar interior design law lacked any "substantial relation to the public health, safety, or . . . general welfare…." *State v. Lupo*, 984 So. 2d 395, 406 (Ala. 2007). Thus, there is no evidence of any actual risk from the unregulated expression of "interior design"-related speech under Florida law, and no evidence that the challenged law will in fact "alleviate" any genuine public harm. As a result, the Defendants cannot demonstrate that *any* application of Florida's interior design law satisfies strict scrutiny, and therefore the law has no "legitimate sweep" at all and is simply unconstitutional on its face.

[46] Answer ¶ 24.
[47] *Id*. ¶ 25.
[48] Bowden Decl. ¶¶ 8-17.

But even if the challenged law were found to have some legitimate sweep, it plainly lacks even minimal tailoring—much less the narrow tailoring required by the First Amendment. As demonstrated above, the law covers a vast array of communications "relating to nonstructural interior elements" of buildings in Florida, including communications having nothing to do with actual design or construction activities. Not only that, but there are no limiting provisions to be found anywhere in the law: No requirement that the speech in question implicate building codes or genuine safety concerns; no requirement that the regulated activities be undertaken for compensation[49]—not even an exception for people making drawings, studies, or specifications *regarding their own property*![50]

As noted above, the statutory definition of "interior design" is so broad that it covers many other occupations that routinely involve drawings and other speech "relating to nonstructural interior elements of a building or structure," but that are not remotely the practice of interior design. For instance, wedding planners and caterers consult with clients and make drawings relating to the placement of tables, chairs, and portable dance floors for wedding receptions.[51] Theater directors make drawings relating to the placement of furniture, props, and set pieces for plays and musicals.[52] Branding experts

[49] Neily Decl., Ex. 2 Minacci Dep. 104.11-25. But even if the interior design law were so limited, it would still be subject to First Amendment scrutiny. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988). Nor does the payment of money render the expression lesser-protected "commercial speech." *See, e.g., Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998) (holding that compensation of expert witnesses did not make their speech "commercial"); *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998) (explaining that *offering* to tell a fortune for pay is commercial speech, but actually *telling* the fortune for pay is not).

[50] Neily Decl., Ex. 2 Minacci Dep. 106.4-107.21

[51] Garr Decl. ¶¶ 3-7 & Ex. A.

[52] Declaration of Tom Buckland ("Buckland Decl.") ¶¶ 3-6 & Ex. A.

consult with clients and make drawings showing how the interior elements of a building can create a "branding vision."[53] Sellers of retail display equipment routinely make drawings for their customers,[54] as do office-furniture dealers and furniture manufacturers to show how their products might fit into a given space and what they would look like.[55] Indeed, even their own customers sometimes make drawings to show what they have in mind for their office or store.[56] The practice act's language is so broad that it even covers "consultations" and "specifications" regarding purely aesthetic items like a Picasso-print room divider or the placement of a wooden giraffe on a coffee table to add a touch of "whimsy" to a room or office,[57] and even an interior-design student sketching the layout of a bank lobby or coffee shop as part of a homework assignment.[58]

Censoring these different forms of expression does not plausibly advance any government interest, yet the challenged law makes each a crime punishable by up to one year in jail. Fla. Stat. §§ 481.223(2), 775.082(4)(a). And it is no answer to assert, as the Defendants might, that the law will not be applied so unreasonably. Indeed, the Eleventh Circuit rejected that precise argument in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985). *Heinrich* involved a prohibition on soliciting petition signatures within 100-yard radius of a polling place, which the court struck down because the plain language of the statute could be enforced against signature gathering in private homes or businesses that happened to fall within the 100-yard radius. *Id.* at 1513-14. The court specifically

[53] Miarecki Decl. ¶¶ 3-11.
[54] John Doe Decl. ¶¶ 6-8.
[55] Paola Pearce Decl. ¶¶ 5-8 & Exs. C-D; Bates Decl. ¶¶ 4, 8.
[56] Paola Pearce Decl., Ex. A.
[57] Neily Decl., Ex. 4 Shore Dep. 19.22-22.20.
[58] Neily Decl, Ex. 12 Waxman Dep. 44.5-46.1.

rejected the state's counterargument that "no evidence was presented that any sheriff or supervisor has ever done so, and it [was] unlikely an elected official would use the power of his office or her office in such an abusive manner," noting that this argument

> misconceives the overbreadth inquiry. The danger in an overbroad statute *is not that actual enforcement will occur or is likely to occur,* but that third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.

Id. (emphasis added).

Moreover, the First Amendment does not permit courts to simply take the government's word that it will enforce an overbroad law in a "reasonable" manner. Where First Amendment rights are at stake, discretionary enforcement is a vice, not a virtue. *See, e.g.*, *Houston v. Hill*, 482 U.S. 451, 466-467 (1987) (declaring facially invalid an overbroad municipal ordinance because it "accord[ed] the police unconstitutional discretion in enforcement"). Additionally, given the Defendant's history of aggressively enforcing Florida's interior design laws, individuals who fall within the law's broad terms have little reason to trust that it will be enforced narrowly. For example, in 2006 the Board assessed a $5,000 fine against interior designer Sheryl Braxton simply because a webpage for the CBS television show "Big Brother," on which Ms. Braxton had been a contestant in 2001, identified her occupation as "interior designer."[59] The Board reached this conclusion without any evidence that Ms. Braxton was responsible for the webpage.[60] Similarly, Smith Thompson's former enforcement expert Emory Johnson testified that he believed the practice act applies against wedding

[59] Neily Decl., Ex. 14 (*Sheryl Lyn Braxton v. Dep't of Bus. & Prof'l Reg.*, Final Order at 7-11).
[60] *Id.* at 7-8.

planners who make sketches to show the caterer how to set up tables at a reception,[61] an application that Defendants' own expert witness said would be unreasonable.[62]

C. Florida's Interior Design Law Is Unconstitutionally Vague.

Besides narrow tailoring, the Supreme Court has held that regulations of speech must meet a high standard of clarity. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). A speech regulation will be found unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . ." *Morales*, 527 U.S. at 56. Moreover, the "regulation must not be designed so that different officials could attach different meaning to the words in an arbitrary and discriminatory manner." *Shamloo v. Miss. State Bd. of Trs.*, 620 F.2d 516, 523-524 (5th Cir. 1980). Applying those standards to this case, the challenged law is unconstitutionally vague.

Florida law prohibits nonlicensees from engaging in various types of speech "relating to nonstructural interior elements" of a nonresidential building or structure. Fla. Stat. § 481.203(8). The statute provides no definition of the phrase "relating to," and courts have specifically noted how vague that term is. *See Republic Pictures Corp. v. Security-First Nat'l Bank*, 197 F.2d 767, 769 (9th Cir. 1952) ("The words 'relating to' are vague words and we find no help from the dictionary in answering our question."); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) ("[T]he vagueness of [the phrase 'airport related'] itself presents serious constitutional difficulty.").

[61] Neily Decl., Ex. 6 Johnson Depo. 73:10-75:3.
[62] Neily Decl., Ex. 12 Waxman Depo. 148:10-149:13.

Even the Defendants have acknowledged how problematic the phrase "relating to" is in the challenged statute. Plaintiffs served the Defendants with eleven requests for admission asking whether the law would apply to drawings "relating to" various items such as furniture, file cabinets, and product display racks in a clothing store. The Defendants *objected* to those requests on the ground that "the use of the word 'relating' makes it impossible to directly answer."[63] But if the word "relating" makes it impossible for the Defendants to answer those questions, imagine how much harder it is for ordinary citizens to understand the law. This uncertainty will "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks and ellipsis omitted).[64]

The practice act's vagueness also creates a risk that "different officials could attach different meaning to the words in an arbitrary and discriminatory manner." *Shamloo*, 620 F.2d 523-524.[65] The deposition testimony of the Board's prosecuting attorney, David Minacci, and the former enforcement expert for the Smith Thompson law firm, Emory Johnson, shows they have different interpretations of the practice act.[66] Mr. Minacci also disagreed with Mr. Johnson about whether artistic renderings were covered.[67] Indeed, the practice act's vagueness seems to have led Mr. Minacci to base his enforcement decisions on irrelevant factors such as whether a nonstructural interior

[63] Neily Decl., Ex. 5 at pp. 7-8 (RFA Nos. 15-25).
[64] Gardner Decl. ¶ 16; Levenson Decl. ¶¶ 11-13; Locke Decl. ¶ 7; *cf.* John Doe Decl. ¶¶ 9-14.
[65] Plaintiffs need not demonstrate that the law has actually been enforced arbitrarily. "[W]hen a statute implicates First Amendment rights, [courts] may consider the *risk* of arbitrary enforcement…." *Konikov v. Orange County*, 410 F.3d 1317, 1330 (11th Cir. 2005).
[66] Neily Decl., Ex. 2 Minacci Dep. 109.23-110.15.
[67] See supra notes 31-32 and accompanying text.

element depicted in a drawing "affects ingress or egress, or whether the specific objects are regulated by the building code."[68]

Given its overbreadth, Mr. Minacci's unwillingness to enforce the law according to its literal terms is understandable. But if the practice act does not mean what it says, then its boundaries are unclear and individuals will be chilled from engaging in protected First Amendment expression—or worse, subject to the caprice of officials interpreting the law.[69] Either result is intolerable under the First Amendment. *See Reno v. ACLU*, 521 U.S. 844, 871-872 (1997) (vague content-based regulations of speech "raise[] special First Amendment concerns because of [their] obvious chilling effect on free speech."); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (holding that "[t]he prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement"). This is particularly improper where, as here, the challenged law imposes criminal penalties on speech because the desire to avoid "the opprobrium and stigma of a criminal conviction"—not to mention jail time—"may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno*, 521 U.S. at 872.

II. Florida's Interior Design Law Unduly Burdens Interstate Commerce.

Throughout its history, a perennial problem in America has been the tendency of states to promote their own local interests at the expense of interstate commerce. The Supreme Court has developed the so-called dormant Commerce Clause doctrine to address that problem. That doctrine not only prohibits states from discriminating against

[68] Neily Decl., Ex. 2 Minacci Dep. 98.15-100.12.
[69] *See supra* notes 60-62 and accompanying text.

interstate commerce, *e.g.*, *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-847 (11th Cir. 2008) (striking down zoning provision that effectively precluded interstate retail chains from opening new stores), but from unduly burdening it as well. Under the *Pike* test, courts must determine whether the burden imposed on interstate commerce by the challenged law is "clearly excessive in relation to its putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and whether those benefits "could have [been] achieved as well with a lesser impact on interstate activities." *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 945 (11th Cir. 1991) (internal quotation marks omitted).

The undisputed evidence shows that Florida's interior design law imposes massive burdens on interstate commerce. Indeed, as noted above, Florida's interior design law is so broadly worded that it purports to regulate a vast array of persons and businesses: everything from the actual practice of interior design as commonly understood, to retail business consulting, office furniture sales, caterers and wedding planners, and any other business that involves "consultations, studies, [or] drawings . . . relating to nonstructural interior elements of a building or structure," including specifically "furnishings." Fla. Stat. § 481.203(8). Not only that, but any corporation, limited liability company, or partnership that offers those services must have as a principal officer or partner a *Florida*-licensed interior designer. *Id.* § 481.219(3) & (7).[70]

These concerns are not remotely hypothetical. The State Board has recently accused three of the nation's largest office supply companies—Staples, OfficeMax, and

[70] Neily Decl., Ex. 2 Minacci Dep. 38.9-39.19.

Office Depot—of violating the challenged law *simply by doing(and offering to do) business as usual* in Florida.[71] And not just the thousands of office supply companies around the nation,[72] but myriad other businesses[73] that involve "consultations," "studies," or "drawings" "relating to" the "interior elements" of commercial buildings—including something as mundane as shelving or clothing display racks in a retail store[74]—are forbidden from doing business in Florida unless they make a Florida-licensed interior designer a principal officer of the company. Rather than restructuring their corporate leadership for the privilege of doing business in Florida, it is likely that many businesses will respond by no longer offering their services in the state.[75]

Also prohibited from working in Florida are interior designers from other states, many of whom are world-famous. This includes, for example, celebrity designers such as Philippe Starck, Juan Montoya, Kelly Wearstler, Clodagh, and Carlton Varney—none of whom is licensed in Florida according the Department of Business and Professional Regulation.[76] Indeed, the State Board has disciplined two of those designers, Montoya and Wearstler, for working in Florida without a license, and even issued press releases announcing its successful campaign against Wearstler.[77] The message from those press releases is clear: "Outsiders be warned!" Plaintiff Barbara Gardner, who resides in New Jersey but maintains an office in Florida, has been similarly affected.[78]

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[71] Neily Decl., Ex. 5 at p. 5-6 (Defs.' Resp. to Interrog. No. 22); Neily Decl., Exs. 15-17.
[72] Bates Decl. ¶¶ 2, 4, 5, 9.
[73] Neily Decl., Ex. 20.
[74] Neily Decl., Ex. 5 at p. 8 (Defs.' Resp. to RFAs 21-22); John Doe Decl. ¶ 11-12.
[75] *E.g.*, Declaration of Sean Kellenbarger ("Kellenbarger Decl.") ¶¶ 6, 8.
[76] The Department maintains an on-line licensing portal: www.myfloridalicense.com/dbpr/index.html.
[77] Neily Decl., Ex. 18.
[78] Gardner Decl. ¶ 17.

Turning to the other side of the ledger, the challenged law fails both remaining prongs of the *Pike* test. First, the Defendants admit they are unaware of any local benefits produced by the law.[79] Second, it is quite clear that any public welfare objectives the state might assert—including public health and safety—can be achieved through less burdensome means because 47 states in this country do *not* regulate the practice of interior design, and there is no evidence of any problems of any kind in any of those states due to the non-licensing of interior designers.[80] This is further supported by the declaration of the Plaintiffs' expert, Jere Bowden, who offered unrebutted testimony based on her 25 years of experience in interior design, general contracting, and project management that licensing the practice of interior design "is neither necessary nor helpful in promoting public welfare."[81]

III. The "Title" Provision Of Florida's Interior Design Law Unconstitutionally Censors Truthful Commercial Speech.

As further explained on pages 9-18 of the Plaintiffs' earlier preliminary injunction motion, the "title" provision of Florida's interior design law also violates the First Amendment because it forbids people who lawfully perform residential interior design work in Florida without a license from using the words that most accurately describe what they do, including "interior design," "interior designer," "space planning," and "space planner." *See Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009); *Abramson v. Gonzalez*, 949 F.2d 1567, 1575-1578 (11th Cir. 1992); *Roberts v. Farrell*, 630 F. Supp. 2d 242, 254-255 (D. Conn. 2009). That provision is also unconstitionally vague because

[79] *See, e.g.*, Neily Decl., Ex. 5 at p. 4 (Defs.' Resp. to Interrog. No. 12).
[80] *See supra* notes 38-40 and accompanying text.
[81] Bowden Decl. ¶¶ 1, 8-17.

it forbids nonlicensees from using not only the term "interior designer" but also other, unspecified "words to that effect." Fla. Stat. § 481.223(1)(c). The Constitution does not permit such a lack of specificity, particularly with laws that criminalize speech. *E.g.*, *Mason v. Florida Bar*, 208 F.3d 952, 959 (11th Cir. 2000); *Primary Care Physicians Group, P.C. v. Ledbetter*, 634 F. Supp. 78, 82-83 (N.D. Ga. 1986).

CONCLUSION

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

Dated this 11th day of December, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2009, a true and correct copy of **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT** was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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