IN THE SUPREME COURT OF ALABAMA

CASE NO.: 1050224

STATE OF ALABAMA,

Appellant,

vs.

DIANE BURNETTE LUPO,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
CV-02-5201

AMICUS BRIEF

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INTEREST OF AMICUS

The Alabama Decorators, Artists, and Designers Right to Work Coalition (ADAD) was founded in 2003 for the purpose of promoting new business and supporting existing businesses related to decorating and design in Alabama. By opposing laws that unnecessarily interfere with and limit the opportunities of design professionals, ADAD is committed to encouraging growth in the decorating and design trade and promoting a spirit of regulatory openness and fair play. ADAD's proposed *amicus* brief is desirable because it provides this Court with a broader perspective than might otherwise be available concerning the history of occupational freedom in this country and the violence Alabama's regulation of interior designers does to that basic constitutional right.

SUMMARY OF THE ARGUMENT

America is known throughout the world as "the land of opportunity" because people have traditionally been more free here than anywhere else to choose their field of employment and enjoy the fruits of their labor. While many other countries stifle the entrepreneurial spirit, America

honors it. And while many countries pay mere lip service to individual rights, in America they are *enforced*.

This case is about one of the most sacred of those rights -- the ability to earn a living free from unreasonable government interference -- and whether that right should receive mere lip service or genuine respect from the courts. In assessing the constitutionality of Alabama's misnamed Interior Design Consumer Protection Act, Ala. Code § 34-15B-1 *et seq.*, this Court must decide whether to apply a standard of review that treats occupational freedom as a genuine constitutional right entitled to meaningful protection, or an empty standard that upholds any regulation for which some *ad hoc* justification may be contrived. While the U.S. Supreme Court and others have chosen the latter path, this Court can and should choose the former.

The argument proceeds in three steps. First, *amicus* will show that the basic right of occupational freedom has never been doubted in this country, though disagreement exists concerning what level of protection it should receive from the courts. Second, *amicus* will demonstrate that Alabama's interior design law is a classic example of

special interest legislation enacted to promote the agenda of a particular faction within the interior design community at the expense of other interior designers and the general public. Finally, *amicus* will explain why it is both desirable and appropriate for this Court to apply a meaningful standard of review in this case and not the rubber-stamp approach urged by the State.[1]

ARGUMENT

I. AMERICANS HAVE A CONSTITUTIONAL RIGHT TO EARN A LIVING IN THE OCCUPATION OF THEIR CHOICE.

Contrary to what is taught in most law schools and reflected in modern jurisprudence, the right to earn a living in the occupation of one's choice is one of our oldest and most consistently recognized constitutional rights. But while courts have always *recognized* the right to earn a living, they have not always been willing to *enforce* it. As a result, there is distinct uncertainty in

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[1] This Court has used the term "hands off" to describe the sort of hyper-deferential standard of review advocated by the State in its brief. *E.g.*, *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1212 (Ala. 1980). While "hands off" is certainly accurate, *amicus* uses the term "rubber-stamp" because it carries the further sense of courts actually giving their *imprimatur* to challenged legislation, which is surely what happens when thousands of suddenly unemployed people are told they have suffered no violation of their constitutional right to earn a living.

the case law about what role, if any, courts should play in resisting the tendency of special interests to manipulate the political process to achieve their own selfish ends by enacting oppressive and unreasonable occupational licensing regimes like the one at issue here. *Compare Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (striking down state law that allowed only fully licensed funeral directors to sell caskets and observing that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose"), *with Powers v. Harris*, 379 F.3d 1208, 1222-23 (10th Cir. 2004) (upholding nearly identical Oklahoma law on the grounds that protecting particular members of an industry from competition is a legitimate state interest).

This Court has repeatedly held that the right to due process under the Alabama Constitution is violated by regulations "that do not bear some *substantial* relation to public health, safety, or morals, or to the general welfare, the public convenience, or the general prosperity." *Friday v. Ethanol Corp.*, 539 So. 2d 208, 216 (Ala. 1988) (emphasis added). As demonstrated below, there

is *no* relationship between Alabama's interior design law and any genuine public welfare concern, let alone a "substantial" relationship. As further demonstrated below, the right to earn a living in the occupation of one's choice is among the most basic rights protected by due process, and it merits the same respect this Court would give to any other constitutional right.

A. The U.S. Supreme Court Has Consistently Recognized a Constitutional Right to Earn a Living.

The Supreme Court has repeatedly recognized that Americans have a constitutional right to earn a living in the occupation of their choice. As the Court explained in *Truax v. Raich*, 239 U.S. 33, 41 (1915), "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." Indeed, the right to earn a living was among the first "unenumerated" rights ever recognized by the Supreme Court, *e.g.*, *Dent v. West Virginia*, 129 U.S. 114, 121 (1889), and it has been a constant fixture of the Court's jurisprudence since then.[2]

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[2] *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment's conception of "liberty" includes

As Justice Field explained in his justly famous *Slaughter-House* dissent,

> when the Colonies separated from the mother country ***no privilege was more fully recognized*** or more completely incorporated into the fundamental law of the country ***than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations*** of the country, subject only to such restraints as equally affected all others.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 104 (1873) (Field, J., dissenting).

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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*, 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") (citing *Meyer v. Nebraska*, *supra*); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (quoting *Dent* and *Schware*, *supra*, for proposition that 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); *Connecticut 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").

There is no disputing the centrality of occupational freedom to America's conception of itself as the land of the free, for "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." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Justice Douglas was surely correct when he described the right to work as "the most precious liberty that man possesses." *Barsky v. Board of Regents of Univ.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

B. State Courts Have Likewise Recognized a Right of Occupational Freedom in the Federal and State Constitutions.

This Court has consistently held that "the right to earn a livelihood is an inalienable right guaranteed by the Bill of Rights." *Estes v. City of Gadsden*, 94 So. 2d 744, 750 (Ala. 1957); *Weill v. Gaillard*, 34 So. 2d 132, 138 (Ala. 1948); *State v. Polakow's Realty Experts*, 10 So. 2d 461, 462 (Ala. 1942). Courts in most other states have likewise recognized that citizens have a constitutional right to earn an honest living in the occupation of their choice. *E.g.*, *City of Shreveport v. Curry*, 357 So. 2d

1078, 1081 (La. 1978) (striking down frog-gigging restriction and noting that government "may pass only those laws which are reasonably related to protection or promotion of a public good such as health, safety, or welfare"); *State v. Balance*, 51 S.E.2d 731, 735 (N.C. 1949) ("the legislature can neither deny nor unreasonably curtail the common right secured to all men by . . . the State Constitution to maintain themselves and their families by the pursuit of the usual legitimate and harmless occupations of life"); *Hosack v. Yocum*, 186 So. 448, 451 (Fla. 1939) (the "fundamental right to earn a livelihood in pursuing some lawful occupation is protected by the Constitution").[3]

Unfortunately, the right of occupational freedom is under constant assault from special interest groups that seek to stifle competition by erecting barriers to entry into particular occupations. State courts have long

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[3] A comprehensive review of state court decisions invalidating occupational licensing regulations on due process grounds is provided in Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time*, 55 Am. U. L. Rev. 457 (2005). The article documents 30 state supreme courts that have protected the right to earn a living by striking down illegitimate occupational licensing laws, *see id.* at 484 nn.153 & 154, and contains a state-by-state listing of "economic substantive due process" decisions. *Id.* App. A.

recognized that tendency and the violence it does to the basic liberty of occupational freedom. *E.g.*, *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1214 (Ala. 1980). Thus, in striking down a law that singled out particular street vendors for regulation while leaving others free to ply their trade, the Michigan Supreme Court observed that it is "quite common" for people in various occupations to approach the government seeking "legislation against another class of citizens engaged in the same business, but in some other way." *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889). Such legislation "seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted" and "should receive no encouragement at the hands of the courts . . . ." *Id.*; *see also In re Jacobs*, 98 N.Y. 98, 114-15 (1885) (rejecting public health justification for ordinance prohibiting the manufacture of cigars in dwellings when true purpose of the law was plainly to suppress competition). As Professor Gellhorn observed in his seminal article, "[o]nly the credulous can conclude that licensure is in the main intended to protect the public rather than those who have been licensed." Walter

Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 25 (1976).[4]

Much to their credit, state courts have been less inclined than federal courts to ignore the realities of interest group politics by using a simulacra-without-substance standard of review that pays lip service to occupational freedom without actually protecting it. *E.g.*, *Mount Royal Towers*, 388 So. 2d at 1213-14 (noting that "Alabama is not alone among the states in exercising a more rigorous judicial scrutiny of state economic regulations"); *see also* Sanders, *New Judicial Federalism*, *supra* at 487-499 (listing states). As explained below, the U.S. Supreme Court's decision to exchange a meaning*ful* standard of review for a meaning*less* standard was an act of expedience rather than principle and is inconsistent with any serious belief in occupational freedom.

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[4] *See also id.* at 13-18 (describing various barriers to entry for harmless occupations); Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 255-61 (2003) (arguing that "licensing statutes are all too frequently used as a method of monopolizing trade for a few privileged individuals or corporations" and providing examples).

C. The Decision to Stop Protecting Occupational Freedom Was an Act of Judicial Will, Not Constitutional Principle.

In what is sometimes called the "constitutional revolution" of 1937, the U.S. Supreme Court suddenly abandoned the notion of occupational freedom and began upholding virtually any economic regulation, no matter how contrived or absurd its purported justification. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Prods.*, 304 U.S. 144 (1938); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955). This marked a sharp change from the Court's earlier practice of reviewing economic legislation in a thoughtful, balanced manner that gave significant deference to legislative prerogatives while still recognizing the important role of courts in limiting the influence of factions. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 279 (1932) (striking down state law forbidding unlicensed manufacture of ice and noting that the true purpose of the law was "not to regulate the business [of ice making] but to preclude persons from engaging in it"); *see generally* J. Madison *The Federalist* No. 10 (Modern College Library ed.) at 56-57 (warning about legislature's vulnerability to manipulation

by factions); A. Hamilton, *The Federalist* No. 78 (Modern College Library ed.) at 508 (explaining important role of courts in preventing the "injury of the private rights of particular classes of citizens, by unjust and partial laws").

Commentators have argued persuasively that the Supreme Court's decision to abandon economic liberty while simultaneously protecting an increasing number of unenumerated "personal" rights was an act of judicial will, not principle. *See, e.g.*, Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 Wm. & Mary L. Rev. 3 (1999); Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 245-55, 254 (2003). Even members of the Court have recognized that there is no inherent distinction between economic liberties and personal or privacy-based rights. *E.g.*, Antonin Scalia, *Economic Affairs as Human Affairs,* in Economic Liberties and the Judiciary 31, 31-32 (James A. Dorn & Henry G. Manne eds., 1987) (rejecting notion that "economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called

civil rights"); *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (Rehnquist, C.J.) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .").

Perhaps recognizing the unprincipled nature of the distinction, most states did not immediately follow the Supreme Court's lead in abandoning economic liberty and instead continued to subject occupational licensing and other vocational regulations to a meaningful level of scrutiny. *See* Sanders, *New Judicial Federalism*, *supra* at 475. Although most state supreme courts did eventually come to embrace the Supreme Court's rubber-stamp standard of review for economic regulations, some never did. *See Mount Royal*, 388 So. 2d at 1214 (noting the tendency of interest groups to pervert the political process for their own selfish ends and observing that "[t]his Court has ever maintained its vigilance on behalf of individuals encroached upon by governmental regulation"); Sanders, *New Judicial Federalism* at 489-94 (noting that Florida, Illinois, and Georgia have not adopted rational basis

review for economic regulations and instead apply a more robust standard of review).

In the remaining Parts of this brief, *amicus* will demonstrate first that Alabama's interior design law serves no truly public purpose and second that the courts of this state have an appropriate role to play in identifying and eliminating illegitimate occupational licensing laws like this one.

II. ALABAMA'S INTERIOR DESIGN LAW IS A CLASSIC EXAMPLE OF SPECIAL INTEREST LEGISLATION DESIGNED TO PROMOTE THE ECONOMIC INTERESTS OF A PARTICULAR FACTION AT THE EXPENSE OF WOULD-BE COMPETITORS AND THE GENERAL PUBLIC.

Simply put, Alabama's interior design law has no connection to any genuine public purpose. Instead, the history and content of the law show it was enacted to promote the interests of a particular faction within the interior design community, and far from protecting consumers it harms them by limiting their choices and driving up prices. Although enjoined by the trial court, the mere presence of this law on the books has seriously disrupted the lives of many designers, and it threatens to put thousands more perfectly competent, highly experienced designers out of work simply to prevent them from competing

with other interior designers who happen to possess a particular set of credentials.

This Part begins by showing that Alabama's interior design law is part of larger effort by certain members of the interior design community to suppress competition and promote greater "professionalization" by drastically limiting who may work as an interior designer. Notably, those efforts have been consistently rebuffed in states where proponents' spurious public welfare arguments have been carefully scrutinized and -- as inevitably happens when they are carefully scrutinized -- rejected. The Part concludes with a brief analysis of Alabama's interior design law that shows how implausible it is to believe the law was enacted to promote any truly public purpose.

A. Regulation of Interior Design Is Being Pushed by Members of the Industry, Not Consumers or Government Officials.

It is clear from a wide variety of sources that the push for more regulation of interior designers has come not from the public or the government, but rather from certain members of the industry itself. According to a detailed history in the trade journal *Architecture*, a faction led by the American Society of Interior Designers (ASID) began

lobbying legislatures in the late 1970s for restrictions on who could work as an interior designer. Bradford McKee, *Interior Motives*, 89 Architecture, Mar. 1, 2000, at 68. Those efforts were motivated by a desire to establish interior designers as a profession that is distinct from and not subordinate to architects. *Id.*

That history is confirmed by various other sources, including "sunrise reviews" prepared for the Colorado and Washington legislatures in connection with proposed interior design regulations in those states. *See Interior Designers - 2000 Sunrise Review*, Colorado Dept. of Regulatory Agencies Office of Policy and Research at 22 (hereafter "Colorado Sunrise Review") ("There is a concerted effort by members of the interior design profession across the nation to be regulated")[5]; *Sunrise Review of Interior Designers, Report to House Committee on Commerce and Labor*, Washington State Dept. of Licensing, Dec. 2005 at 1 (hereafter "Washington Sunrise Review") (observing that "Interior Designers favor regulation as a

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[5] http://www.dora.state.co.us/opr/archive/InterDesign2000.pdf (last visited March 16, 2006).

means of gaining parity as professionals with their colleagues").[6]

According to the *Architecture* article, pro-regulation efforts began in 1979 with interior design lobbyists' unsuccessful attempt to persuade the New York Assembly to pass a "right-to-practice" act limiting entry into the occupation. McKee, *supra*. The lobbyists scored their first success in Alabama in 1982 with the passage of a "title act" that dictated not who could *work* as an interior designer, but rather who could use that term to refer themselves. *Id.*

Despite its zealous pursuit of additional licensing laws around the country, the pro-regulation faction led by ASID has met with remarkably little success, particularly with respect to "right to practice" acts. At present only four states -- Alabama, Florida, Nevada, and Louisiana (plus the District of Columbia)[7] -- dictate who may perform

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[6] http://dol.wa.gov/agency/SunriseInteriorDesigners.pdf (last visited March 20, 2006).

[7] Ala. Code § 34-15B-1 *et seq.*; Fl. Stat. §§ 481.2131 & 481.229 (exemption for residential design work); Nev. Rev. Stat. §§ 623.0225 & 623.360; La. Rev. Stat. § 37.3171 et seq. (distinguishing between "designers" and "decorators" and not regulating the latter); D.C. Code Ann. §§ 47.2853-101 (only regulating interior design work that protects occupants' health, safety, or welfare).

interior design work, and Alabama's regulation is by far the most sweeping. As explained in the next Section, despite repeated opportunities around the country to establish some genuine public welfare concern, proponents of interior design regulation have consistently failed to do so.

B. Other States Have Rejected Calls for Regulation of Interior Designers Because There Is No Genuine Public Welfare Concern.

An interesting feature of ASID's and other interest groups' campaign to promote greater regulation of interior designers has been their consistent failure to produce any credible evidence of public harm despite multiple opportunities -- and strong incentives -- to do so. For example, in October 2000, Colorado's Department of Regulatory Agencies conducted an exhaustive "sunrise review" in connection with a proposal to begin regulating interior designers. As explained in the report, despite being given the opportunity, proponents of the regulation submitted no information "demonstrating that harm to the public has occurred, or that the public was endangered . . . from the unregulated practice of interior design." Colorado Sunrise Review at 16. The Department found "no

evidence of physical or financial harm being caused to Colorado consumers by the unregulated practice of interior designers," *id.*, and concluded that it was "difficult to see a benefit to the public in regulating interior designers." *Id.* at 22.

Five years later, in Washington State, proponents of regulation again failed to offer any credible evidence of public harm from unlicensed interior design practice. Washington Sunrise Review at 12 ("Current evidence does not suggest the public is being harmed by non-regulation"). At least eight other states have reached the same conclusion in rejecting efforts by ASID and others to enact protectionist legislation designed to eliminate competition and maintain high barriers to entry into the interior design field.[8]

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[8] *See*, AIA Government Affairs, *Licensing Discussion Materials* Mar. 1, 2002 at 4-5 (summarizing rejection of pro-licensing efforts in Colorado, California, New Jersey, Connecticut, Ohio, South Carolina, and Virginia). Available at http://www.aianewmexico.org/WebSiteResources/LicensingMaterials.pdf (last visited March 16, 2006). An updated version of this document adds Maryland and Georgia to the list of states that have rebuffed efforts to seek regulation of interior designers. *See* http://www.aia-ri.org/The%205%20Standards%20of%20Professional%20Regulation-2003%20update.doc (last visited March 16, 2006).

C. Besides Being Unreasonable on Its Face, the Act Is Riddled With Exceptions And Inconsistencies.

Even a cursory examination of Alabama's interior design law reveals that it has nothing to do with any *genuine* public health, safety, or welfare concerns. The following are just two of many possible examples.

1. *Retail Sales Exemption.* On page 9 of its opening brief, the State offers a concrete example of the kind of public safety threat Alabama's interior design law might have been enacted to address: namely, ensuring that the "pile height" of carpets and rugs will permit safe wheelchair passage. But that argument is utterly destroyed -- along with all other safety-related arguments -- by the Act's sweeping retail sales exemption that excludes from the licensing requirement all interior design services performed in connection with "selling, selecting, or assisting in selecting personal property or fixtures . . . pursuant to a retail sale." Ala. Code § 34-15B-3(4).

What this means is that in Alabama someone with a college degree in interior design, several decades of experience, and countless satisfied customers commits a *crime* if she picks out a rug or suggests a shade of paint for a customer. By contrast, a teenager at Home Depot with

no education and no experience can sit down with a customer and redesign the interior of an entire *home* as long as the customer buys a squeegee or a roll of duct tape on her way out of the store. At the risk of understatement, this is not a reasonable state of affairs.

2. *Scope of Coverage*. While the precise scope of Alabama's interior design law is far from clear, it is plainly quite broad, as the testimony of those charged with enforcing it confirms. Thus, it is a crime for someone not licensed under the Act to charge a fee for advising another person to use a lighter shade of paint in their living room or put some throw pillows on their couch. *Compare* T. 22-25 (Interior Design Board Chair Courtney Ogelsby testifying that the Act forbids unlicensed persons from charging a fee for giving advice about paint color and throw pillows) *with* Brief of Appellant at 16-17 (arguing that "[t]he language of the Act does not compel such a broad reading").

Of course, it is one thing for the government to regulate what sorts of advice people may give about medical, legal, or other learned subjects where the harm of error can be catastrophic. But regulating the expression of personal opinions about fundamentally aesthetic subjects

like paint colors and accessories is beyond unreasonable, it is tyrannical. Having gotten precisely what they asked for -- namely, a sweeping law designed not to *regulate* interior designers but to put most of them out of business -- those who lobbied for the regulation must live with the consequences. Interest groups should be reminded from time to time that the more narrowly self-interested their agenda in the legislature, the harder it may be to defend in court. See, e.g., *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1214 (Ala. 1980) (noting that striking down special interest legislation can have beneficial effects).

III. Alabama Courts Should Subject Occupational Licensing Regulations to a Meaningful Level of Review.

To recap, the ability to earn a living in the occupation of one's choice is a basic constitutional right; Alabama's interior design law interferes with that right by imposing onerous credentialing and testing requirements on gainful employment activities that pose no genuine threat to public welfare. The only remaining question is whether Alabama courts may properly strike down such laws.

The State urges this Court to "'afford the Legislature the highest degree of deference'" and not "'substitute its

judgment'" for that of the legislature. Appellant's Br. at 13 (quoting *Monroe v. Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000)) and 18 (quoting *Scott & Scott, Inc. v. City of Mountain Brook*, 844 So. 2d 577, 595 (Ala. 2002)). Of course, those are familiar rallying cries when the government defends occupational licensing laws and other economic regulations against constitutional challenge. Indeed, any time a citizen turns to the courts to vindicate her constitutional right to earn a living, she may expect to hear the government urging the courts to stay out of it because to do otherwise would be to "substitute" their judgment for the legislature's.

Unlike many others, however, this Court has not turned a blind eye to reality and has instead recognized that "interest groups are often able to procure passage of legislation which is in their own, rather than the public interest." *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1214 (Ala. 1980) (citing John C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U. L. Rev. 226, 249 (1958)). Thus, far from improperly supplanting the legislature in such instances, courts are simply "impos[ing] limits upon the

power of the legislature to impair the exercise of individual rights" -- such as the right of occupational freedom. *Id.*

Time and again, this Court has held that the proper standard of review in cases like this is not one of "hands off" indifference to the rights of citizens, but rather one of "dual balancing, between the frequently competing interests of society and the individual, and between the power of the legislature to pass laws and that of the courts to review them." *Id.* at 1211; *see also Ross Neely Express, Inc. v. Alabama Dep't of Envtl. Mgmt.*, 437 So. 2d 82, 85 (Ala. 1983); *City of Russellville v. Vulcan Materials Co.*, 382 So. 2d 525, 527 (Ala. 1980). The touchstone of that balancing test is whether the challenged regulation's restraint on individual liberty is "disproportionate to the amount of evil that will be corrected." *Ross Neely*, 437 So. 2d at 86. In this case, it is clear there is no "evil" that will be corrected by Alabama's extraordinarily sweeping regulation of interior designers, while the imposition on individual liberty is extensive.

Again, unlike other courts, this Court has consistently refused to turn a blind eye to reality and has instead been willing to confront the true purposes of legislation when those purposes are reasonably clear. *E.g.*, *City of Russellville*, 382 So. 2d at 527 (validity of a police power regulation depends on whether it was "really designed" to accomplish legitimate public purpose). The discussion in Part II above shows that Alabama's interior design law was not "really" designed to advance any genuine public welfare concerns and was instead enacted at the behest of an interest group seeking more "professionalization" and less competition. Because "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002), and because Alabama's interior design law serves no other purpose, it cannot be sustained.

CONCLUSION

The right to earn a living in the occupation of one's choice is among the most basic liberties that American citizens possess. Alabama's interior design law, which criminalizes even perfectly harmless conduct such as recommending paint colors and throw pillows, plainly

interferes with that right in a way that is utterly disproportionate to any "evils" that might be avoided as a result. Accordingly, *amicus* respectfully urges this Court to affirm the trial court's conclusion that Alabama's interior design law, Ala. Code § 34-15B-1 *et seq.*, violates the due process provisions of the Alabama Constitution.

Dated March __, 2006

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