

**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' RESPONSE TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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The basic premise of the Defendants’ summary judgment motion—that vocational licensing laws are necessarily immune from any meaningful judicial review—is mistaken. As demonstrated below, vocational regulations do not suspend the First Amendment or trump the Commerce Clause, and even the rational basis test requires at least a veneer of legitimacy that Florida’s interior design law simply does not possess.

DISPUTED FACTS

Plaintiffs dispute the following factual or quasi-factual assertions in the Defendants’ summary judgment brief:

1. For the reasons set forth in their earlier preliminary injunction motion and in Part IV below, Plaintiffs dispute that it is “misleading” for people who lawfully perform residential interior design services without a license, as specifically authorized by Fla. Stat. § 481.229(6)(a), to use the terms “interior design” or “interior designer” to describe what they do. Defs.’ MSJ Br. at 3-4, 17-21.

2. Plaintiffs dispute that Florida’s interior design law “promotes the general welfare or some other legitimate governmental aim.” *Id.* at 6. To the contrary, the Defendants admit they have no evidence that the unregulated practice of interior design presents any bona fide public welfare concerns,¹ and no evidence that the challenged restrictions “actually protect public health and welfare, protect consumers, or advance any other legitimate state interest.”² The Defendants have also stated that they “do[] not

¹ Defs.’ Answer ¶ 24.

² Neily MSJ Decl., Ex. 5 at p. 2 (Defs.’ Resp. to Interrog. No. 7).

contend anything” with respect to whether the practice act advances a legitimate state interest.³

3. Finally, Plaintiffs dispute the Defendants’ assertion that “[p]urely aesthetic services *are not regulated*” by Florida’s interior design law. Defs.’ MSJ Br. at 16. First, the statute contains no exemption for “purely aesthetic” services (whatever those might be), but instead covers *all* “designs, consultations, studies, drawings, [and] specifications . . . relating to nonstructural interior elements of a building or structure.” Fla. Stat. § 481.203(8).⁴ Second, the Defendants’ suggestion that there is a blanket exemption for “interior decorator services,” Defs.’ MSJ Br. at 16, is mistaken because the statute specifically provides that “interior decorator services” are *only* exempt when performed in a “residential application” *or* by “[a]n employee of a retail establishment . . . in the furtherance of a retail sale or prospective retail sale.” Fla. Stat. §§ 481.229(6)(a) & (b). Moreover, the statute itself renders the term “interior decorator services” incapable of blanket application because it only includes items that are “not subject to regulation under applicable building codes”—an inquiry that can only be made on an item-by-item and jurisdiction-by-jurisdiction basis. Fla. Stat. § 481.203(15).⁵

ARGUMENT AND AUTHORITIES

Defendants’ motion for summary judgment should be denied because they have not shown that they are entitled to judgment as a matter of law on any of the Plaintiffs’

³ Neily MSJ Decl., Ex. 5 at pp. 1-2 (Defs.’ Resp. to Interrog. No. 6).

⁴ *See also* Neily MSJ Decl., Ex. 6 Johnson Dep. 68.19-69.18 (testifying that Florida’s interior design law covers selection of carpeting and wall paint).

⁵ *See also* Neily Decl., Ex. 22 & Neily Decl., Ex. 21 Minacci Dep. 45.10-48.14 (no exemption for items that are covered by an “applicable building code”); *see also id.* at 61.13-62.22 (applicability of building codes can only be determined on an item-by-item and jurisdiction-by-jurisdiction basis).

claims based on the undisputed facts of this case. Fed. R. Civ. P. 56(c)(2); *see also Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1252 (11th Cir. 2003). To the contrary, the undisputed facts show that the Plaintiffs are entitled to summary judgment on claims 1, 2, and 7 of their Complaint because Florida's interior design law is unconstitutionally overbroad, impermissibly vague, and imposes an undue burden on interstate commerce.

This response begins by explaining why the Defendants' overbreadth and vagueness arguments miss the mark. It then shows that the Defendants' take on *Pike* balancing under the dormant Commerce Clause conflicts with binding Supreme Court and Eleventh Circuit precedent. Next it demonstrates that the constitutionality of Florida's interior design law under rational basis review presents triable issues of fact, rendering summary judgment on those claims premature. Finally, Plaintiffs establish that it is not "misleading" for them to use the terms "interior designer" and "interior design," and that their use of those terms is protected by the First Amendment.⁶

⁶ The Defendants are not entitled to summary judgment on claim 6 of the Plaintiffs' Complaint for the simple reason that all of the citations and arguments in the Defendants' brief relate to Article IV's Privileges *and* Immunities Clause, rather than the Fourteenth Amendment's Privileges *or* Immunities Clause, upon which claim 6 is clearly based. Pls.' Compl. ¶ 59. In fact, the two provisions are quite distinct. The Article IV provision prevents states from discriminating between their own citizens and temporary visitors from other states. *See, e.g.*, Defs.' MSJ Br. at 9-11. But the Fourteenth Amendment's Privileges or Immunities Clause protects specific *substantive* rights against infringement by state and local governments. There has been much debate about exactly *which* rights are protected by the Privileges or Immunities Clause, *e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002), and the Supreme Court has recently granted certiorari in a gun rights case from Chicago that may well shed new light on the question. *See McDonald v. City of Chicago*, 130 S. Ct. 48 (2009). *See also* Brief of Amicus Curiae Institute for Justice in Support of Petitioners, *McDonald v. City of Chicago*, 2009 WL 4099506 (November 23, 2009) (No. 08-1521) (arguing that Privileges or Immunities Clause was originally understood and intended to protect individual rights most valuable to newly freed slaves including free expression, armed self-defense, and economic liberty).

I. Vocational Regulations Are Not Exempt From First Amendment Scrutiny.

Florida's interior design practice act makes it a crime to express various ideas—including “purely aesthetic” ideas—about the interior elements of a nonresidential building or structure without a license. But instead of trying to justify that censorship under applicable First Amendment standards, the Defendants seek to avoid the issue altogether by asserting, in essence, that the First Amendment does not apply to vocational regulations. They also claim that the practice act does not cover “purely aesthetic services” and that the Plaintiffs' First Amendment vagueness claim is actually a “due process challenge” to which much lower standards of clarity apply. Defs.' MSJ Br. at 15-17. The Defendants are mistaken on all counts.

A. The Practice Act Is Not Immune From First Amendment Scrutiny Simply Because It Purports To Be A “Professional Regulation.”

As Plaintiffs explained in their summary judgment brief, the various designs, consultations, studies, and drawings regulated by Florida's interior design law are all forms of protected speech under the First Amendment. Pls.' MSJ Br. 12-13. The Defendants disagree and argue that the practice act “is a professional regulation and does not raise First Amendment issues any more than regulation of beauticians does.” Defs.' MSJ Br. at 15. But they cite no authority for that assertion, nor do they provide any explanation for how designs, consultations, studies, and drawings—all of which communicate information—are something other than speech. *See Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 632 (1980) (noting that “communication of information” is a speech interest “within the protection of the First Amendment”). Indeed, the Defendants' comparison of the interior design practice act to the state's

regulation of beauticians is particularly inapt, because Florida’s cosmetology laws regulate the physical process of cutting or treating hair, but do not regulate, for example, “consultations” relating to hair.⁷

Further, contrary to the Defendants’ tacit suggestion, there is no blanket rule that vocational regulations are immune from First Amendment scrutiny. For example, in *In re Primus*, the Supreme Court held that states could not prohibit ACLU attorneys from soliciting clients absent some evidence that pro bono solicitations present a genuine public harm. 436 U.S. 412, 434-35 (1978). The Eleventh Circuit has even held that nude dancing enjoys First Amendment protection. *Int’l Food & Beverage Sys. v. Ft. Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (“We may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers”); *see also Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) (same). Numerous other cases confirm the principle that people do not surrender their First Amendment rights just because they are being paid for speaking. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (medical doctors); *see also Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988) (professional fundraisers); *Meyer v. Grant*, 486 U.S. 414 (1988) (paid petition-signature gatherers); *Thomas v. Collins*, 323 U.S. 516 (1945) (union organizers); *Taucher v. Born*, 53 F. Supp. 2d 464 (D.D.C. 1999) (publishers of financial newsletters).

⁷ See Fla. Stat. § 477.013(4) (defining “cosmetology” as “the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes, including, but not limited to, hair shampooing, hair cutting, hair arranging, hair coloring, permanent waving, and hair relaxing for compensation. This term also includes performing hair removal, including wax treatments, manicures, pedicures, and skin care services.”).

While not specifically discussed in their brief, Defendants' use of the phrase "professional regulation" suggests they may be relying upon the so-called "speaking professions" doctrine articulated by Justice White in his concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985). Though the Defendants have not specifically invoked it, the Plaintiffs will briefly describe that doctrine and explain why it does not exempt the practice act from First Amendment scrutiny.

In *Lowe*, the Supreme Court held that the publisher of a financial newsletter was not an "investment advisor" within the meaning of the Investment Advisors Act, and therefore the SEC could not prevent him from publishing the newsletter. *Id.* at 211. Justice White concurred in the result, but thought it necessary to resolve the First Amendment question of when the government may require a license to practice a profession that predominantly involves speaking. *Id.* at 228 (White, J., concurring). Justice White suggested that the state could legitimately restrict entry into professions in which one "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Id.* at 232. Applying this reasoning, he argued that the state could not license the publication of general investment advice in newsletters like those at issue in *Lowe*. *Id.* at 232-33.

Justice White's concurrence, of course, is not binding precedent. But even if it were, the "speaking professions" doctrine would not justify the regulation of interior designers for two reasons. First, not every vocation that involves providing individualized advice is a "profession" within Justice White's definition, and no court has

ever suggested that the “speaking professions” doctrine applies to all vocations generally.⁸ Notably, interior design would not be classified as a “profession” under Florida’s professional-malpractice statute because licensure as an interior designer does not require a four-year degree.⁹ This, combined with the fact that 47 states do not license the practice of interior design and therefore have *no* educational prerequisites for those wishing to perform interior design services, strongly suggests that interior design is not a “profession” for purposes relevant to this case.

Second, Justice White’s “speaking professions” dictum is inapplicable to this case because interior design services simply do not involve the kind of professional judgment that would justify the sweeping speech restrictions at issue here. Unlike a lawyer, whose courtroom statements can bind a client and who may make final decisions about legal strategy on a client’s behalf, interior designers simply offer recommendations that their customers may accept or reject. *See, e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978). By contrast, the Defendants have admitted they have no evidence that the unregulated practice of interior design presents any bona fide public welfare concerns or that licensing interior designers benefits the public in any demonstrable way.¹⁰

⁸ Indeed, that would plainly be unconstitutional, as noted above. Moreover, Plaintiffs’ research identified only two cases invoking Justice White’s “speaking professions” dictum, both involving certified public accountants. *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988); *Accountants’ Ass’n of La. v. State*, 533 So. 2d 1251 (La. App. 4 Cir. 1988).

⁹ *Compare Garden v. Frier*, 602 So. 2d 1273, 1276 (Fla. 1992) (“[A] vocation is not a profession if there is any alternative method of admission that omits a required four-year undergraduate degree or a graduate degree.”) with Fla. Stat. § 481.209(c)-(d) (authorizing interior design licensure with either two or three years of post-secondary education).

¹⁰ Defs.’ Answer ¶¶ 24 & 25; *see also* Neily MSJ Decl., Ex. 5 at p. 1 (Defs.’ Resp. to Interrog. No. 4).

B. Florida’s Interior Design Practice Act Is Unconstitutionally Overbroad And Is Not Susceptible To A Narrowing Construction.

Defendants’ summary judgment brief devotes a single paragraph, with no citations, to the Plaintiffs’ overbreadth challenge. They claim that the practice act is not overbroad because it does not prevent anyone from “express[ing] themselves with regard to aesthetic considerations in the decorating of a space.” Defs.’ MSJ Br. 17. As noted in the Disputed Facts section above, however, this is factually incorrect because the statute contains no blanket exemption for “aesthetic considerations”—whatever those might be.

But even if there were a blanket exemption for purely aesthetic matters, the Plaintiffs’ overbreadth claim would still prevail for two reasons. First, even studies, consultations, and drawings of a non-aesthetic nature (again, whatever that means) are protected by the First Amendment. For example, the plain language of the statute covers an individual who offers consultations or provides drawings regarding the placement of furniture and shelving to help maximize the sale of merchandise in a retail store¹¹ or the flow of customers in a bank.¹² It also covers a simple sketch by a wedding planner showing the caterer how to set up the room for a reception.¹³ The communication of those ideas is clearly protected speech even though the ideas themselves are not “purely aesthetic.” *Cf. Schaumburg*, 444 U.S. at 632. Accordingly, the state must provide evidence that the harms it posits are real and that the challenged restrictions will in fact alleviate them. *See United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 475 (1995); *see also Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392 (2000) (“We have

¹¹ John Doe Decl. ¶¶ 7, 14; Miarecki Decl. ¶¶ 4-10.

¹² Neily MSJ Decl. Ex. 2 Minacci Dep. 115.8-118.2.

¹³ Neily MSJ Decl., Ex. 6 Johnson Dep. 73:10-75:3

never accepted mere conjecture as adequate to carry a First Amendment burden . . .”). But the Defendants have conceded they have no evidence that licensing interior designers provides any public benefits.¹⁴ Thus, because the vast majority (if not the totality) of the conduct regulated by Florida’s interior design law constitutes protected speech, and because the Defendants have conceded they have no evidence that regulating this speech provides any public benefits, the practice act is impermissibly overbroad.

Second, even if the Defendants had produced some evidence of public harm, which they did not, the plain language of the statute extends far beyond interior design. As the Plaintiffs showed in their summary judgment brief, the practice act is so broad that it regulates the activities of such diverse vocations as wedding planners, caterers, office supply dealers, sellers of retail display products, branding consultants, and even theater-set designers—because they all involve consultations, studies, and sometimes drawings “relating to nonstructural interior elements of a building or structure.” Pls.’ MSJ Br. at 15-16. Accordingly, because the practice act regulates a substantial amount of expressive activity beyond the actual practice of interior design, and because Defendants have offered no evidence whatsoever of any actual public benefits, the law is unconstitutionally overbroad and facially invalid. *See Dimmitt v. Clearwater*, 985 F.2d 1565, 1570-71 (11th Cir. 1993).

Defendants’ suggestion that this result can be avoided by refusing to adopt “an absurdly broad reading of the statute,” Defs.’ MSJ Br. 17, is unavailing because the Court is bound to interpret the law according to its literal terms. *E.g.*, *Gay Lesbian Bisexual*

¹⁴ Defs.’ Answer ¶ 25.

Alliance v. Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997) (refusing to adopt a narrowing construction that was “inconsistent with the plain meaning of the words of the statute”); *Fla. Retail Fed’n, Inc. v. Attorney General*, 576 F. Supp. 2d 1281, 1296-97 (N.D. Fla. 2008) (same). Construing the practice act to avoid the absurd results produced by its literal language would require this Court to effectively rewrite the statute, which it may not do. *See Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326 (11th Cir. 2001) (“We will not . . . rewrite the clear terms of a statute in order to reject a facial challenge, and, as a federal court, we must be particularly reluctant to rewrite the terms of a *state* statute”) (internal quotation and citation omitted); *Fla. Retail Fed’n*, 576 F. Supp.2d at 1296-97.

C. Applying The Appropriate Level Of First Amendment Scrutiny, Florida’s Practice Act Is Unconstitutionally Vague.

Finally, the Defendants contend that the practice act is not unconstitutionally vague because the statute “is not vague in all its applications.” Defs.’ MSJ Br. at 17. But they are applying the wrong test for vagueness. The test articulated by the Defendants applies only to laws that do not regulate speech. *See Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1277 (11th Cir. 1999). As demonstrated above and in the Plaintiffs’ summary judgment brief, however, the practice act plainly does regulate speech and must therefore meet a heightened standard of clarity. Under this standard, the “government may regulate . . . only with narrow specificity,” *NAACP v. Button*, 371 U.S. 415, 433 (1963), and the law must not be written so that different enforcement officials could attach different meanings to its terms. *Shamloo v. Miss. State Bd. of Trs.*, 620 F.2d 516, 523-524 (5th Cir. 1980).

The undisputed fact record shows that Florida’s interior design law falls far short of those standards. Key terms in the statute are not defined and, as documented on pages 19-20 of the Plaintiffs’ summary judgment brief, enforcement officials plainly *do* attach different meanings to those terms. The Defendants have even acknowledged that the use of the term “relating [to]” in the practice act makes it “impossible” for them to answer basic questions about the scope of the law.¹⁵ This is precisely the sort of uncertainty that the First Amendment vagueness doctrine is intended to prevent. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

II. The Defendants Misconceive The *Pike* Balancing Test For Dormant Commerce Clause Claims.

Besides the First Amendment, Florida’s interior design law violates the Commerce Clause because it fails the balancing test established by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In requesting summary judgment on that claim, the Defendants neglect Eleventh Circuit precedent and rely instead on Fifth Circuit case law that represents the less persuasive side of an established circuit split over the meaning of “putative local benefits.” But this Court need not take sides on that question because this case is fully resolved by a different aspect of the *Pike* test on which there is controlling circuit precedent.

As this Court has noted, when evaluating a dormant Commerce Clause claim under *Pike*, “the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*” *Freiberg v. Francois*, No. 4:05cv177, 2006 WL

¹⁵ Neily MSJ Decl., Ex. 5 at pp. 7-8 (RFA Nos. 15-25).

2362046, at *7 (N.D. Fla. Aug. 15, 2006) (internal quotations and citations omitted). The Eleventh Circuit has specifically invoked *Pike*'s lesser-impact prong in striking down a county resolution banning the importation of out-of-county waste. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991). Indeed, the court described as "crucial" to its decision "the fact that Monroe County could have achieved its objectives 'as well with a lesser impact on interstate activities.'" *Id.* at 945 (quoting *Pike*, 397 U.S. at 142).

Likewise, the undisputed fact record in this case makes clear that whatever objectives the state of Florida might have regarding the practice of interior design can be promoted as well with a lesser impact on interstate activities. In particular, the Plaintiffs have offered unrebutted expert testimony that "licensing interior designers is neither necessary nor helpful in promoting public welfare . . . because there are so many checkpoints between an interior designer's vision and specifications for a commercial space and the final product itself."¹⁶ This includes the sophistication of the parties in commercial settings; the participation of architects, engineers, and other professionals in most commercial projects; and the extensive government oversight of commercial design and construction projects.¹⁷ When asked whether they contended that those and other factors "are insufficient to properly protect public health, safety, and welfare," the Defendants stated that "[t]he Board does not contend anything here."¹⁸ The Defendants also admit they have no evidence that regulating interior designers has benefited the

¹⁶ Bowden Decl. ¶ 12.

¹⁷ *Id.* ¶¶ 13-15.

¹⁸ Neily Decl., Ex. 5 at p. 5 (Defs.' Resp. to Interrog. No. 19).

public in any way.¹⁹ Meanwhile, on the other side of the *Pike* ledger, is the commerce-burdening impact of a law that makes it illegal for companies like Staples, OfficeMax, and Office Depot to conduct normal businesses operations in Florida unless they appoint a Florida-licensed interior as a principal corporate officer. See Pls.’ MSJ Br. at 3 & n.8; 21-22. It is difficult to imagine a more glaring violation of the “lesser impact” principle, as applied by the Eleventh Circuit in *Diamond Waste*, than Florida’s interior design law.

But the Defendants do not discuss *Diamond Waste* or the “lesser impact” inquiry in their summary judgment brief, relying instead on two Fifth Circuit cases for the proposition that the government may rely on pure conjecture to satisfy the “putative local benefits prong” of the *Pike* balancing test. Defs.’ MSJ Br. at 14. In advancing that argument, however, the Defendants fail to acknowledge a clear circuit split on exactly that question. On one side of that split are the First, Fifth, Ninth, and D.C. Circuits, which have interpreted “putative local benefits” as not requiring any actual evidence, thus reducing *Pike* balancing to nothing more than rational basis review.²⁰ By contrast, the Second, Third, Eighth, and Tenth Circuits have taken the opposite approach and still require the government to produce actual evidence of local benefits.²¹ While the Eleventh Circuit has not yet weighed in on this split (which again, is entirely beside the point, given the Eleventh Circuit’s reliance on the lesser-impact principle in *Diamond*

¹⁹ Defs.’ Answer ¶ 25.

²⁰ See, e.g., *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005); *Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005); *Electrolert Corp. v. Barry*, 737 F.2d 110 (1984).

²¹ See, e.g., *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008); *Southold v. E. Hampton*, 477 F.3d 38 (2d Cir. 2007); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002); *Blue Circle Cement, Inc. v. Bd. of County Comm’rs*, 27 F.3d 1499 (1994). The Fourth, Sixth, and Seventh Circuits have intra-circuit splits on the issue.

Waste), both Supreme Court precedent and Eleventh Circuit case law favor a rule requiring the government to produce real evidence of local benefits.

Perhaps the most instructive Supreme Court case is the fractured decision in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), which applied the dormant Commerce Clause to strike down an Iowa regulation on the use of 65-foot double tractor-trailers within the state. *Kassel* is most notable not for its result, but for the fact that all nine Justices agreed that the state must, at a minimum, show that the supposed benefits of a commerce-burdening law are real and not “speculative” or “insubstantial.” *See id.* at 671-74 (plurality opinion); *id.* at 686-87 (Brennan, J., concurring); *id.* at 696 (Rehnquist, J., dissenting). The Defendants certainly have not met that standard on the present record.

The Eleventh Circuit’s reasoning in *Diamond Waste* is also instructive. In striking down Monroe County’s waste-importation ban under *Pike*’s lesser-impact prong, the court specifically noted that it might have upheld the ban had the county “*demonstrated* a more pressing need for preserving landfill space.” 939 F.2d at 945-46 (emphasis added). Thus, in neither *Kassel* nor *Diamond Waste* were purely hypothetical assertions of local benefit sufficient to uphold the challenged law. And that makes perfect sense because *Pike* is, after all, a *balancing* test. The notion that courts can somehow balance actual burdens on interstate commerce on the one hand against purely hypothetical benefits on the other makes little sense. *Cf. Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 183 (5th Cir. 1990) (holding that product-liability plaintiff’s failure to produce evidence related to a portion of applicable balancing test entitled

defendant to summary judgment because “[o]ne cannot balance items of indeterminate weight”).

III. Plaintiffs’ Due Process And Equal Protection Claims Present Triable Issues Of Fact.

The Plaintiffs have a substantive due process right to earn a living in the occupation of their choice free from arbitrary or unreasonable government interference.²² They also have an equal protection right not to be arbitrarily saddled with burdensome regulations that are not applicable to others similarly situated. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (equal protection violation where certain exemptions in state pest control law lacked rational basis); *Brown v. Barry*, 710 F. Supp. 352, 355-56 (D.D.C. 1989) (same, outdoor shoeshine stands); *see also Fla. Retail Fed’n v. Attorney Gen. of Fla.*, 576 F. Supp.2d 1281, 1291-93 (N.D. Fla. 2008) (no rational basis for imposing different obligations on businesses depending on whether they did or did not have at least one employee with a concealed-carry permit).

Though deferential, the rational basis test is still a test. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (striking down Tennessee law that allowed only state-licensed funeral directors to sell caskets). Moreover, the Supreme Court has

²² *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment’s conception of “liberty” includes the right “to engage in any of the common occupations of life”); *Schwartz 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”); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (explaining 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”). Defendants’ citation to *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), is inapposite because that case involved termination of public employees, not arbitrary licensing requirements for private employment. Defs.’ MSJ Br. at 5 n.2.

specifically noted that “[w]here the existence of a rational basis . . . depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (noting that “the record does not reveal any rational basis for believing that the [proposed group home for mentally retarded adults] would pose any special threat to the city’s legitimate interests”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 535, 537 (1973) (striking down food stamp regulation where the factual assumptions underlying the government’s differential treatment of various recipients were “wholly unsubstantiated”).

Besides its extraordinary breadth, Florida’s interior design law is riddled with exemptions and inconsistencies that seriously undermine the Defendants’ health, safety, and welfare claims. Defs.’ MSJ Br. at 7. Among the issues the Plaintiffs plan to explore at trial include:

- Whether it is rational for a law that purports to regulate the practice of interior design to sweep in an array of other businesses such as office supply companies, retail business consultants, sellers of retail display equipment, and wedding planners, to name just a few, and make it a crime for people to engage in those businesses without an interior design license simply because they often involve consultations, studies, and drawings “relating to” the “interior elements” of buildings.
- Whether it is rational to require an interior design license to work on commercial projects—which typically involve sophisticated parties and multiple layers of government inspection and review²³—but not residential projects, where customers tend to be less sophisticated and there is far less government oversight;

²³ *E.g.*, Pls.’ MSJ Appendix, Bowden Decl. ¶¶ 12-16.

- Whether it is rational to exempt manufacturers of commercial food service equipment and their employees from the statute,²⁴ with the result that no license is required to design the entire kitchen in a restaurant or hotel (including space plans depicting the placement of such items as deep fryers, commercial steam cookers, and stovetops²⁵), but a license is required just to “consult” with the owner regarding such pedestrian items as the carpeting, wall paint, or lighting in the lobby of the same facility.²⁶
- Whether it is rational to “grandfather in” an indeterminate number of people as state-licensed interior designers without requiring them to meet the current standards for education, examination, and experience and without maintaining current records regarding the identity of those licensees and their actual qualifications.²⁷

The Defendants may have rational explanations for those anomalies, or they may not. But given the present state of the record, it seems unwarranted to simply assume that they do. *See, e.g., Craigmiles*, 312 F.3d at 225 (“Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which the provision is very well tailored”—economic protectionism for industry insiders).

IV. Plaintiffs’ Use Of The Terms “Interior Design” And “Interior Designer” Is Not Misleading.

As explained in their earlier preliminary injunction motion, it is illegal for the individual Plaintiffs to “[u]se the name or title . . . ‘interior designer’ . . . or words to that effect,” Fla. Stat. § 481.223(1)(c), even though they lawfully perform residential interior design services pursuant to the statutory exemption set forth in Fla. Stat. § 481.229(6)(a).

²⁴ *See* H.B. 425, 2009 Leg., Reg. Sess. (Fla. 2009) (amending Fla. Stat. § 481.229).

²⁵ Neily MSJ Decl., Ex. 5 at p. 8 (Defs.’ Resp. to RFA Nos. 26-28).

²⁶ *See* Neily MSJ Decl., Ex. 6 Johnson Dep. 67.17-69.22.

²⁷ Neily MSJ Decl., Ex. 5 at pp.3-4 (Defs.’ Resp. to Interrog. No. 9); *see also id.* at p. 9 (Defs.’ Resp. to RFA Nos. 32-37) (admitting licensees who were grandfathered in may not possess the requisite credentials and are not required to disclose that fact to potential customers). The relevant legislative history regarding the grandfather clause is attached hereto. Neily Decl., Ex. 23.

To justify that censorship, the state must show *either* that: (a) the speech in question is misleading or relates to unlawful conduct, in which case it receives no First Amendment protection at all; or (b) the restriction meets the three remaining elements of the *Central Hudson* test for regulating commercial speech. *See* Pls.’ Prelim. Inj. Br. at 9-10. The Defendants contend that it is “misleading or potentially misleading” for the Plaintiffs to use the term “interior design” without some sort of limiting description indicating that they are only authorized to perform *residential* interior design services. Defs.’ MSJ Br. at 18.

There is a very simple response to that assertion. The statute specifically authorizes nonlicensees to provide “*interior design services*” for any residential application. Fla. Stat. § 481.229(6)(a) (emphasis added). It is nothing short of Orwellian for the government to claim that it is misleading for a citizen to use the same term to describe his or her work that the government itself uses in *authorizing* that work. Likewise, someone who lawfully performs interior design services must be allowed to call herself an “interior designer,” just as someone who lawfully practices psychology must be allowed to call herself a “psychologist.” *Abramson v. Gonzalez*, 949 F.2d 1567, 1576-77 (11th Cir. 1992).

To the extent it might be *potentially* misleading for nonlicensees who perform residential interior design services to use the terms “interior design” or “interior designer” without qualification, the Supreme Court and the Eleventh Circuit have made abundantly clear that the government must satisfy the remaining *Central Hudson* prongs, which the Defendants have not even attempted to do. *See, e.g., In re R.M.J.*, 455 U.S. 191, 203

(1982); *Peel v. Att’y Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 109 (1990); *Borgner v. Brooks*, 284 F.3d 1204, 1210 (11th Cir. 2002). Indeed, the Eleventh Circuit provides an extensive discussion of precisely that point in *Abramson*, 949 F.2d at 1576-77, which plainly controls this case notwithstanding the Defendants’ unpersuasive attempt to distinguish it. Defs.’ MSJ Br. at 18 n.5; *see also* Pls.’ Prelim. Inj. Br. at 11-12, 15-16 (anticipating and refuting Defendants’ attempt to distinguish *Abramson*).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Defendants’ summary judgment motion in its entirety and grant the Plaintiffs’ motion for summary judgment on claims 1, 2, and 7 of their Complaint.

Dated this 4th day of January, 2010.

Respectfully submitted,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2010, a true and correct copy of
**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY
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