

No. 10-11052-EE

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

EVA LOCKE, PATRICIA ANNE LEVENSON,
BARBARA VANDERKOLK GARDNER, NATIONAL
FEDERATION OF INDEPENDENT BUSINESS,

Plaintiffs-Appellants,

v.

JOYCE SHORE, JOHN P. EHRIG, AIDA BAO-GARCIGA,
ROASSANA DOLAN, WANDA GOZDZ, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

**BRIEF OF THE INTERIOR DESIGN PROTECTION COUNCIL,
ALABAMA DECORATORS, ARTISTS, AND DESIGNERS, INC.,
ASSOCIATION OF DESIGN EDUCATION, ASSOCIATION OF
INTERIOR DESIGN PROFESSIONALS, DECORATING DEN
SYSTEMS, INC., DESIGNER SOCIETY OF AMERICA,
FOODSERVICE EQUIPMENT DISTRIBUTORS ASSOCIATION,
INTERIOR DESIGN SOCIETY, INTERIOR REDESIGN INDUSTRY
SPECIALISTS, NORTH AMERICAN ASSOCIATION OF FOOD
EQUIPMENT MANUFACTURERS, AND REAL ESTATE STAGING
ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANTS**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

I certify that, in addition to the persons and entities listed in the appellants' brief, the following persons and entities known to *amici curiae* have an interest in the outcome of this case:

Alabama Decorators, Artists, and Designers, Inc. (*amicus curiae*)

Anderson, Ann (interest in *amicus curiae*)

Association of Interior Design Professionals (*amicus curiae*)

Bugg, Jr., James S. (interest in *amicus curiae*)

Bugg, Sr., James S. (interest in *amicus curiae*)

Decorating Den Systems, Inc. (*amicus curiae*)

Designer Society of America (*amicus curiae*)

Foodservice Equipment Distributors Association (*amicus curiae*)

Interior Design Protection Council (*amicus curiae*)

Interior Design Society (*amicus curiae*)

Interior Redesign Industry Specialists (*amicus curiae*)

James S. Bugg Family Limited Partnership

(interest in *amicus curiae*)

Kry, Robert (attorney)

Merritt, Kimberly (interest in *amicus curiae*)

MoloLamken LLP (law firm)

Newbury Creations LLC d/b/a Association of Design Education

(amicus curiae)

North American Association of Food Equipment Manufacturers

(amicus curiae)

Real Estate Staging Association *(amicus curiae)*

Younts, Natasha (interest in *amicus curiae*)

I certify that, to the best of my knowledge, the list of persons and entities in the appellants' brief is otherwise complete.

Amicus curiae Interior Design Protection Council states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Alabama Decorators, Artists, and Designers, Inc., states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Association of Design Education states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Association of Interior Design Professionals states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Decorating Den Systems, Inc., states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Designer Society of America states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.


Amicus curiae Foodservice Equipment Distributors Association states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Interior Design Society states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Interior Redesign Industry Specialists states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae North American Association of Food Equipment Manufacturers states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amicus curiae Real Estate Staging Association states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.



Robert K. Kry

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STATEMENT OF THE ISSUE

Whether Florida's licensing regime for interior designers violates the First Amendment.

INTEREST OF AMICI CURIAE

Amici curiae are eleven organizations representing a broad array of interior designers and allied professionals. *Amici* include some of the Nation's leading design societies and trade associations, and collectively represent many thousands of individual designers, decorators, suppliers, and other professionals. *Amici* are committed to protecting interior designers' right to practice their profession, free from unnecessary and counterproductive government regulation.

Amici submit this brief because they are gravely concerned about the impact the district court's decision will have on the practices of their members and other design professionals. Many of those individuals perform services that could be deemed "interior design" under Florida law. If allowed to stand, the district court's decision would not only threaten the livelihoods of those individuals, but also harm the public by denying them a full range of choices in selecting a professional.

Amici include the following eleven organizations:

The Interior Design Protection Council ("IDPC") is a national, non-partisan interior design business league. IDPC has approximately 25,000 members or supporters, including interior designers, decorators, educators, students, and other pro-

professionals. IDPC seeks to educate legislators and the public through the presentation of information and opinion. It strives to preserve diversity, vision, and creativity in interior design by opposing anticompetitive, unnecessary regulation.

Alabama Decorators, Artists, and Designers, Inc., is a non-profit organization representing interior designers, decorators, and artists. Its goal is to prevent the enactment of unnecessary and restrictive legislation that would inhibit its members' right to practice and maintain a thriving business.

The Association of Design Education was formed to promote excellence in the field of specialized design education. It offers continuing education and ongoing support to professionals. Its members include interior designers, redesigners, real estate stagers, and others.

The Association of Interior Design Professionals is a non-profit resource for interior designers, trade industry partners, and student members. It seeks to help designers prosper by building business relationships, connecting with the public, and benefiting from educational opportunities.

Decorating Den Systems, Inc., is a franchisor of nearly 400 interior decorators who provide residential and commercial decorating services and related products, including draperies, hardware, fabric, furnishings, accessories, decorative shades, wallpaper, and carpet. Thirty-eight of its franchisees are located in Florida.

The Designer Society of America is a society of interior design professionals. Many of its members have been hurt by licensing laws and have come together to be supportive and to focus on the continuation of their careers.

The Foodservice Equipment Distributors Association is the national trade association for food service equipment dealers. Founded in 1933, it provides a strong dealer advocacy voice in the food service equipment industry.

The Interior Design Society is a national interior design organization with more than 3,000 members. One of the country's largest design societies, it provides credentials, education, and benefits to its members.

Interior Redesign Industry Specialists is an international non-profit organization of professional redesigners and stagers. It seeks to establish high industry standards, promote public awareness, expand the fields of redesign and staging, and empower its members through education and business development.

The North American Association of Food Equipment Manufacturers is a trade association of more than 625 food equipment and supplies manufacturers. Its biennial trade show attracts approximately 20,000 food service professionals.

The Real Estate Staging Association is the trade association for professional home stagers. It works to bring legitimacy and excellence to home staging in addition to protecting the rights of home stagers.

All parties have consented to the filing of this brief.¹

SUMMARY OF ARGUMENT

The district court's decision rests on basic misapprehensions about the nature of interior design and the burdens of, and justifications for, Florida's licensing statute. The court deemed Florida's statute no different from laws regulating doctors, lawyers, or other professionals. But interior design is different: The whole point of interior design is to create an artistic vision that communicates a message. When the government restricts interior design, it restricts artistic expression.

The court compounded that error by ignoring the severe burdens that Florida's statute imposes. Licensing statutes are prior restraints—the most offensive form of regulation under the First Amendment. Florida's statute in particular imposes onerous burdens while leaving professionals to speculate about its scope.

The court further erred by uncritically accepting the State's justification for the statute. Professional groups have long sought licensure, not because of any genuine threat of public harm, but because of the economic and status-based benefits it confers. Interior design stands out, however, for the degree to which profes-

¹ Neither plaintiffs nor their counsel, the Institute for Justice, authored this brief in whole or in part or made any monetary contribution toward the preparation or submission of this brief. *Cf.* Supreme Court Rule 37.6. For purposes of disclosure, however, IDPC notes that one plaintiff is a member of IDPC, another plaintiff is a former member, and one of plaintiffs' counsel is currently a member of (and chair of) IDPC's five-person board.

sional groups have failed to substantiate their claims of public harm. A dozen state agencies have studied whether interior design regulation is necessary to protect the public, and they have uniformly concluded that it is not.

Ignoring all those considerations, the district court held that professional expression is categorically exempt from the First Amendment whenever a “personal nexus” exists between professional and client. But Supreme Court case law refutes that theory. Several times—particularly where a profession implicated heightened First Amendment values—the Court has invalidated restrictions despite the existence of a personal nexus. The district court’s standard, moreover, lacks any foundation in First Amendment principle because it undermines the free trade in ideas that the First Amendment was designed to preserve.

Florida’s licensing statute is unconstitutional because it imposes severe burdens on core artistic expression while advancing no discernable state interest. The district court’s decision upholding the statute should be reversed.

ARGUMENT

I. THE DISTRICT COURT’S DECISION RESTS ON BASIC MISUNDERSTANDINGS ABOUT INTERIOR DESIGN AND FLORIDA’S LICENSING REGIME

The district court reached the wrong result because it misunderstood or ignored three basic features of interior design and its regulation. It misconceived the nature of the First Amendment values at stake. It ignored the severity of the bur-

dens imposed. And it uncritically accepted the State's justifications despite overwhelming evidence refuting them.

A. Interior Design Is Fundamentally Expressive Activity

The district court upheld Florida's statute because it failed to perceive any First Amendment difference between interior design and other professions. The court recognized that "practicing interior design involves speech" because "[a]n interior designer consults with the client and may prepare drawings or studies in the course of the work." *Locke v. Shore*, No. 4:09cv193, — F. Supp. 2d —, 2010 WL 430950, at *6 (N.D. Fla. Feb. 4, 2010). But it saw no distinction between that speech and the sort of communication a doctor, lawyer, or investment adviser might engage in while advising a client.

That analysis betrays a basic misunderstanding of the First Amendment values at stake. An interior designer does indeed engage in speech when consulting with a client. But that is hardly the most important expression at issue. The whole point of interior design is to create something expressive and artistic: a room that communicates a message. That distinguishes interior design from other professions. A doctor may advise her patient to get more exercise; a lawyer may advise his client to settle a case; an investment adviser may advise his client to buy collateralized debt obligations. But in each case communication is simply a means to a non-expressive end. With interior design, by contrast, expression is the end itself.

Arguing that interior design implicates the First Amendment only because the designer engages in speech when consulting with clients is like arguing that *Casablanca* implicates the First Amendment only because the director told the production crew how to operate the movie camera during filming. It misses the point that the end product itself is artistic expression.

The expressive nature of interior design is indisputable. As one leading text explains, “[t]he designer’s aim is to make the realities of a designed space—its form, materials, furnishings, and so on—express in an appropriate way a set of ideas that the designer wishes to communicate.” John F. Pile, *Interior Design* 49 (4th ed. 2007). “The *fundamental concern* of interior design is to resolve how space can be used as an *expressive medium*.” *Id.* at 65 (emphasis added). That expressive element is paramount because “[a] company reveals something about itself by the interior design decisions it makes and the image its interiors portray.” Christine M. Piotrowski & Elizabeth A. Rogers, *Designing Commercial Interiors* 47 (2d ed. 2007). “The interior designer must attempt to express that image when selecting the products, colors, textures, and styles that create the final interior design of the facilities.” *Id.* at 48.

In designing office space, for example, a designer would consider multiple audiences: “[T]he setting in which employees spend their regular working days heavily influences their attitudes toward their employers and their consequent pro-

ductivity.” Pile, *supra*, at 522. And “[v]isitors to an office form impressions and draw conclusions about the business’s character and quality based on the design of the offices they see.” *Id.* “For a small firm like a small law office, high-priced furnishings and finishes will frighten potential clients away. By contrast, clients of a top legal firm will expect an expensive interior.” Piotrowski & Rogers, *supra*, at 47-48. In a bank or store, the designer would seek to “rais[e] [consumers’] confidence and encourag[e] a return visit.” Pile, *supra*, at 521. And in a hospital, “[c]olor can play an important part in the healing of patients.” Piotrowski & Rogers, *supra*, at 245.

Of course, interior design involves functional concerns too. “[A] creative and attractive office that does not work or is not safe is not helpful to the client.” Piotrowski & Rogers, *supra*, at 8. But those functional elements are not the sole or even predominant aspect of a designer’s practice. Health and safety concerns are at most incidental to a designer’s artistic work, not the other way around.

Leading designers, for example, consistently emphasize their artistry, not their functional know-how. One famous designer compares himself to a still-life painter: “Interior Design has always been for me a hybrid between fine art and applied art. I think of interiors as a walk-in still life, not unlike a painter who gathers objects on a table to paint, but more precisely chosen and arranged.” John Saladino, *Interiors*, http://www.saladinostyle.com/#/section/sdg%20interiors/sdg_pic

ture_id/13. Another likens himself to a movie director: “Philippe Starck designs his hotels and restaurants in the same way a director makes a film, developing scenarios that will lift people out of the everyday and into an imaginative and creative mental world.” Starck, *Menu: Philippe Starck: Biography*, <http://www.starck.com>.

A third invokes both metaphors:

Trained at San Francisco’s Academy of Art College, Ms. Barry suffuses her work with a painterly touch. Her artist’s eye conjures a subtle range of hues—sage, ochre, seafoam, taupe—within a restrained color scheme. Texture, line, and pattern harmonize in pleasing visual rhythms. But cinema may be a more apt metaphor for the Los Angeles based designer’s work Akin to a set designer, Ms. Barry composes feature-length productions, overseeing every variable of the mise-en-scene from the upholstery to the water decanters to, in some cases, how the linens are folded.

Interior Design, *Hall of Fame: Bio: Barbara Barry*, <http://www.interiordesign.net/HoFDesigners/125.html>. Famous designers describe themselves as artists because they are artists. What separates the truly great designers from the mediocre is artistic vision, not a superior ability to place air conditioning units where they will not obstruct wheelchair access.

Interior design schools confirm that artistic focus. Many Florida design programs, for example, are affiliated with an organization known as The Art Institutes. See The Art Institutes, *Design Programs*, <http://ai.interiordesignschools.org/artinstitutes/aiDesignHome.php>. Florida State University’s design program is “housed in the College of Visual Arts, Theatre and Dance.” Florida State Univer-

sity, Dep't of Interior Design, *Welcome to Interior Design at Florida State University*, <http://interiordesign.fsu.edu>. And interior design programs routinely describe their curricula in overtly artistic terms. For example: “There is, at the beginning, an empty space—and a world of infinite possibilities. Through a creative process . . . , you begin to visualize and apply elements such as color, texture, form, and light, and that empty space becomes a space of functional and beautiful art.” Ringling College of Art & Design, *Programs of Study: Interior Design*, <http://www.ringling.edu/ID.32.0.html>.

Artistic expression falls squarely within the First Amendment’s protections. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“[E]xpression about . . . artistic . . . matters” is “entitled to full First Amendment protection.”); *Miller v. California*, 413 U.S. 15, 34-36 (1973). Indeed, acknowledgment of art’s centrality to free expression predates the First Amendment itself. *See* Letter from the Continental Congress to the Inhabitants of Quebec, in 1 Journal of the Continental Congress 105, 108 (Oct. 1774), *available at* <http://memory.loc.gov/ammem/amlaw/lwjc.html> (“The importance of [freedom of the press] consists . . . [of] the advancement of truth, science, morality, *and arts in general*” (emphasis added)). The dangers of allowing the government to pick and choose who may express themselves are no less alarming here than in any other context. “[W]hat is good art[] varies with individuals as it does from one generation to another. . . .

[A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.” *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-58 (1946).

To treat interior design no differently from any other profession is to ignore its artistic and expressive nature. Laws restricting the practice of interior design suppress expression, not just because they prevent designers from communicating with their clients, but because they suppress the artistic and expressive end product that designers and clients together create. When the government licenses interior design, it licenses art.

B. Interior Design Licensing Statutes Impose Severe Burdens on Expression

Having exempted Florida’s licensing statute from all First Amendment scrutiny, the district court ignored the burdens the statute imposes on expression. But the court’s failure to address those burdens should not obscure their existence. Florida’s statute is not a mere disclosure requirement that obligates professionals to inform clients of their credentials. It is not a narrowly tailored civil or criminal statute that punishes particular instances of misconduct that threaten health or safety. It is a *licensing* statute—a law that requires citizens to obtain the government’s permission before expressing themselves.

In the First Amendment context, there is no more oppressive burden than that. “[P]rior restraints on speech and publication are the most serious and least

tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). That extreme disdain stems in part from the First Amendment’s historical backdrop: abuses under English statutes licensing the press. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-23 (1931); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002). But it also reflects the practical reality that licensing is an exquisitely heavy-handed form of regulation. Licensing laws are onerous; they confer enormous discretion on state officials; and they suppress an inordinate amount of expression relative to the evils they seek to prevent. See *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.* 648 (1955).

Florida’s licensing statute has the defining hallmark of a prior restraint: It prohibits anyone without a license from practicing nonresidential interior design. Fla. Stat. § 481.223(1)(b). But that bare requirement only begins to describe its burdens. Obtaining an interior design license is an extremely arduous and expensive process. Would-be designers must have a total of six years of specialized post-secondary education at a board-approved design school and “diversified interior design experience.” Fla. Stat. § 481.209(2). Regulations define that “design experience” to require “training and experience under the direct supervision of a registered interior designer or registered architect performing interior design services” in five different areas. Fla. Admin. Code R. 61G1-22.001(1)(a)-(e).

The costs are enormous. A four-year post-secondary degree in interior design can cost more than \$80,000 for tuition and books alone. *See, e.g.,* Florida State University, *Cost of Attendance: Fall 2010/Spring 2011*, http://financialaid.fsu.edu/apply/cost_ungrad.html. And because few practicing designers are both financially able to hire an apprentice and willing to train their future competitors, the limited number of positions available to satisfy the training requirement are typically unpaid internships (essentially, indentured servitude). *See* Interior Design Protection Council, *The Truth About IDAF's False Statements: Interior Design Associations Foundation Talking Points 1* (Feb. 10, 2009), http://www.idpcinfo.org/IDPC_Rebuttal_IDAF_Talking_Points.pdf (“*IDPC Rebuttal*”). Those burdens are daunting for any aspiring young designer. But they are essentially insurmountable for individuals already formally trained in another field (such as fine art, fashion, or textile design) who might otherwise enter the profession.

Prospective designers must also pay fees and pass an examination. Fla. Stat. §§ 481.207, .209(2). The fee just to sit for the exam is \$835. *See* Nat’l Council for Interior Design Qualification, *2010 Exam Fees*, <http://www.ncidq.org/Exam/Fees.aspx>. Study materials and preparation courses often drive the cost over \$2,000, and preparing can take up to six months. *See IDPC Rebuttal, supra*, at 3. First-

time pass rates have historically been as low as about 50%—less than the bar exam in most States. *See id.*²

The Florida statute also suppresses expression by unlicensed professionals in related fields who are unsure whether their conduct is covered. Even as written, the statutory terms are hardly self-defining. But the district court’s narrowing construction—which divorces the statute’s coverage from any customary understanding of “interior design”—has spawned utter confusion. Apparently, the statute now “ordinarily” covers “fixtures” but “ordinarily” does not cover “[a] table or other piece of stand-alone furniture.” *Locke*, 2010 WL 430950, at *3. But there is an entire spectrum between those extremes, and the word “ordinarily” implies that even standalone furniture might not always be exempt. State officials are already contemplating broad interpretations that would allow them to keep regulating such things as carpets and fabric finishes. *See Board of Architecture & Interior Design, General Board Meeting, Audio Recording at 21:50 to 22:15 (Mar. 16, 2010), available at http://www.ij.org/index.php?option=com_content&task=view&id=2724&Itemid=165.*

² The examining organization currently reports pass rates in the 65%-75% range, but those figures represent separate pass rates for *each section* of the exam, which of course significantly overstate the fraction of candidates passing *all three* sections as required. *See NCIDQ Releases Fall 2009 Exam Results*, <http://www.ncidq.org/AboutUs/AboutNCIDQ/News/Fall2009ExamResults.aspx>.

Since the district court's decision, IDPC has received numerous calls and e-mails from its members and other professionals expressing confusion about what the statute now covers. Those individuals have included presidents of other design organizations. If the leaders of those groups cannot discern the statute's scope, it is certain that rank-and-file members cannot. The statute's vagueness requires professionals to speculate about the lawfulness of their actions and confers enormous discretion on State enforcement authorities.

The consequences of guessing wrong are severe. Unlicensed practice is punishable by up to a year in prison, Fla. Stat. §§ 481.223(2), 775.082(4)(a), plus fines and civil penalties, *id.* §§ 455.228(2), 775.083(1)(d). Florida has been extremely aggressive enforcing the act, pursuing about 600 cases since 2001. *See Florida Interior Design FOIA Index*, http://www.idpcinfo.org/FL_Disciplinary_Actions.pdf (listing actions). A number of those cases were brought against nationally recognized luminaries such as Los Angeles designer Kelly Wearstler and New York designer Juan Montoya. *See id.* at 10, 52. Enforcement actions have also routinely targeted persons who were not interior designers at all but merely happened to incorporate some aspect of design practice in their work—including office furniture dealers, restaurant equipment suppliers, flooring companies, wall covering companies, fabric vendors, builders, real estate developers, remodelers, accessories retailers, antique dealers, drafting services, lighting companies, kitchen

designers, workrooms, carpet companies, art dealers, stagers, yacht designers, and even a florist. *See, e.g., id.* at 27. The Florida statute has thus had—and continues to have—a severe chilling effect on all sorts of expression.

C. Interior Design Licensing Statutes Serve No Countervailing Public Interest

The district court also went seriously astray in estimating the strength of the state interests supporting Florida’s statute. Its analysis consisted of little more than assertions that “a reasonable legislature might or might not accept” the argument that interior design licensure promotes competence and public safety. *Locke*, 2010 WL 430950, at *2, *5. The only way a “reasonable” legislature could accept that argument, however, is if it were totally oblivious to the decades of real-world history surrounding this issue.

From time immemorial, occupational groups have pressed state governments to license their professions. Their entreaties invariably sound in the need to protect the public, but their real motivations are typically the economic and status-based benefits that licensure confers by restricting competition. There is a rich literature, amply supported by empirical evidence, documenting that phenomenon. *See, e.g.,* Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006); S. David Young, *The Rule of Experts: Occupational Licensing in America* (1987); Walter Gelhorn, *Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1976); Deborah L. Rhode, *Policing the Professional Monopoly*, 34 Stan. L.

Rev. 1 (1981). This case, however, does not require the Court to weigh in on that debate writ large: Interior design stands out from other professions for the sheer degree to which professional groups have been unable to substantiate their claims of public harm.

1. The best evidence of the lack of any genuine public need for interior design licensure is the overwhelming rejection of such provisions by state legislatures. This is not a field like medicine or law where States have uniformly licensed professionals for decades. Rather, as the district court recognized, “only two other states” besides Florida require a license to practice interior design. *Locke*, 2010 WL 430950, at *2; *see also* Interior Design Protection Council, *State Laws*, <http://www.idpcinfo.org/StateLaws.html> (listing jurisdictions with practice or title acts).³

That scarcity of practice acts is not for any lack of effort by proponents of regulation. Invariably, however, those clamoring for licensure are not aggrieved consumers but interior design professional groups themselves. Professional organizations routinely urge their members to support such legislation. The International Interior Design Association, for example, proclaims that its official position

³ The other two States with practice acts are Louisiana and Nevada. *See* La. Rev. Stat. Ann. § 37:3176(A)(1); Nev. Rev. Stat. § 623.360(1)(c). Alabama formerly had one but it was struck down. *See* p. 23, *infra*. The District of Columbia and Puerto Rico also have practice acts. *See* D.C. Code § 47-2853.102; P.R. Laws Ann. tit. 20, § 2232. Consistent with professional custom, this brief refers to statutes that restrict who may practice interior design as “practice acts” and those that restrict how unlicensed professionals may describe themselves as “title acts.”

is “to promote licensure/registration and/or certification for interior designers” and “encourages its members to seek enforceable legislation.” Int’l Interior Design Ass’n, *Position Statement on Licensing/Registration/Certification 1* (Mar. 2001), http://www.iida.org/resources/content/1/0/1/documents/IIDAPolicy_Licensure.pdf. The National Council for Interior Design Qualification publishes model licensing legislation for States to enact. See Nat’l Council for Interior Design Qualification, *Core Provisions of Interior Design Registration: Model Legislation* (Nov. 2008), <http://www.ncidq.org/pdf/ModelLegislation.pdf>. The American Society of Interior Designers (“ASID”) has a webpage of resources “to assist state interior design coalitions with legislative initiatives.” Am. Soc’y of Interior Designers, *Grassroots Motivation and Fundraising Resources*, <http://www.asid.org/legislation/resources/grassroots>. And although ASID’s current “official” position on practice acts is less than clear, cf. ASID Legislative Policy, Bylaws art. III, § 1(1) (Jan. 2009), <http://www.asid.org/NR/rdonlyres/81D9C044-3010-4FE2-9519-4E9A438A272F/0/LegPositiononletterhead.pdf>, the organization has not shied from pushing for such legislation in the past: Local chapters of ASID helped draft Florida’s title and practice acts and paid lobbyists to support the legislation. See Interior Design Ass’n’s Found., Inc., *Interior Design Legislation History*, <http://www.idaf.us/idleg/history.html>.

Interior design schools also regularly pressure their students to support such legislation. In September 2009, the Chair of Florida State University's design department sent an open letter to faculty and students urging them to "stand firm and continue to support and defend professional licensing in Florida and nationwide." Letter to Educators and Students (Sept. 4, 2009), *available at* http://www.idpcinfo.org/FSU_Letter_to_Students_090409.pdf. And a professor at another accredited design school actually offered students extra credit if they lobbied to support pending legislation. *See* Patti Morrow, *Students Should Not Be Forced To Support Licensing* (June 11, 2009), <http://idpcinfo.wordpress.com/2009/06/11/patti-morrow-students-should-not-be-forced-to-support-licensing>; *Extra Credit for REVIT Spring 2009*, *available at* http://www.idpcinfo.org/AIP_Extra_Credit.pdf.

2. Those intense efforts have led to dozens of bills. *See* Interior Design Protection Council, *Legislation*, <http://www.idpcinfo.org/legislation.html> (cataloguing proposals). Almost without exception, however, those bills have failed. By IDPC's count, state legislatures rejected 15 out of 16 attempts to regulate designers in 2006, 25 out of 25 in 2007, 30 of 30 in 2008, and approximately 21 of 22 in 2009. *See id.* States have rejected those efforts because, while professional groups routinely assert that regulation is necessary to protect the public, they have repeatedly failed to substantiate those claims. On about a dozen occasions, state agencies have investigated whether interior design regulation is necessary to pro-

tect the public (often under state “sunrise” statutes that require such review before enacting occupational regulations). Without exception, they have found no meaningful evidence of threatened or actual harm. *See* Interior Design Protection Council, *Government Reports*, <http://www.idpcinfo.org/Govt-Reports.html>.

In 2008, for example, a Colorado agency conducted a detailed study. *See* Colorado Dep’t of Regulatory Agencies, Office of Policy, Research & Regulatory Reform, *2008 Sunrise Review: Interior Designers* (Dec. 16, 2008), *available at* http://www.idpcinfo.org/CO_Sunrise_2008.pdf. It “researched all the jurisdictions (26) that regulate Interior Designers in an attempt to identify harm to consumers.” *Id.* at 20. Examining enforcement records, it found that—practically without exception—complaints concerned mere administrative matters rather than actual threats of harm. *See id.* at 20-24. Its research “failed to identify [any] Interior Design practice that resulted in harm to consumers.” *Id.* at 26. The agency thus concluded that “no regulation of Interior Designers is justified.” *Id.*

Washington State reached similar conclusions in 2005. *See* Washington State Dep’t of Licensing, Report to House Comm. on Commerce & Labor, *Sunrise Review of Interior Designers* (Dec. 2005), *available at* http://www.idpcinfo.org/WA_Sunrise.pdf. Surveying data from several jurisdictions, it found that “[c]urrent evidence does not suggest the public is being harmed by non-regulation.” *Id.* at 12. It recommended against licensure because “there was no clear evidence that

unregulated practice can clearly harm or endanger the health, safety, or welfare of the citizens of the state.” *Id.* at 13.

More recently, a Texas committee examined whether that State should retain its interior design title act. *See* House Comm. on Gov’t Reform, Texas House of Representatives, *Interim Report 2008: A Report to the House of Representatives, 81st Texas Legislature 49-50* (Jan. 13, 2009), available at http://www.idpcinfo.org/Texas_GovernmentReform80th.pdf. It concluded that the claims of public harm supporting the regulation were essentially pretextual, and that the regulation was actually devised to protect the economic interests of designers:

The state’s regulation of interior designers indicates protectionist practices that favor a certain industry segment to the exclusion of others. . . . Advocates for these regulations, notably the American Society of Interior Designers (ASID), claim that such regulation is necessary for public health, safety, and welfare. . . . [T]hese claims ring hollow under close scrutiny.

Id. The report noted that “[s]ince 1907 only 52 lawsuits have been filed against interior designers in the United States,” and that “[t]he majority of these cases involved contract disputes, and not damages that represented a menace to public health, safety, and welfare.” *Id.* at 50. It also pointed out that the governors of Indiana and New York had recently vetoed interior design regulations due to the absence of any showing of public harm. *See id.* at 50 & nn.196-97.

In 2002, a Maryland agency considered whether that State should retain its title act. Dep’t of Legislative Servs., Office of Policy Analysis, *Sunset Review:*

Evaluation of the State Board of Certified Interior Designers (Oct. 2002), available at http://www.idpcinfo.org/Maryland_Sunset_Review_Oct_2002.pdf. Its findings were unequivocal: “Regulation of interior designers is not needed to protect the health, safety, and welfare of the public from the unregulated practice of the profession.” *Id.* at ix.

A California agency undertook a similar review in 1996. Joint Legislative Sunset Review Comm., *Review and Evaluation of the Interior Design Certification Program* (Feb. 1996), available at http://www.idpcinfo.org/Sunset_1996.pdf. It noted “concern that the interior design law provides for a state-sanctioned cartel” and “may restrict competition for a large number of otherwise qualified interior designers.” *Id.* at 5. And it found “no evidence that the unregulated practice of interior design would endanger the health, safety or welfare of the public and cause significant public harm.” *Id.* at 11 (emphasis omitted).

Numerous other reports have reached similar conclusions. *See, e.g.,* South Carolina State Reorg. Comm’n, *The Sunrise Review Process: Review of Occupational Registration and Licensing for Interior Designers* 14 (Dec. 4, 1991), available at http://www.idpcinfo.org/SC_Sunrise_1991.pdf (“The Subcommittee found no instance of documented evidence of public harm occurring or threatening to occur in South Carolina as the result of unregulated practice of interior design.”); Georgia Occupational Regulation Review Council, *Review of Senate Bill 305*

Which Proposes To License Interior Designers in Georgia 19 (Dec. 1989), available at http://www.idpcinfo.org/GA_Occupational_Regulation_Review__1989.pdf (“[T]here is no substantial evidence that the presence of harm to the public’s health, safety and welfare exists.”); *Report of the Virginia Board of Commerce on the Study of the Need for Certifying Interior Designers*, House Doc. No. 6, at 17 (1988), available at http://www.idpcinfo.org/VA_Sunrise_1988.pdf (“The research data provided little documentation of actual harm to the public.”). The inability of professional groups to persuade even a single one of these agencies—despite many, many attempts—speaks volumes about the substance of their claims.

Regulatory efforts have floundered not just in state legislatures, but in the courts too. In *State v. Lupo*, 984 So. 2d 395 (Ala. 2007), the Alabama Supreme Court struck down that State’s practice act. Despite the legislature’s recital that it was “a matter of public interest, safety protection, and concern . . . that only qualified persons be permitted to practice interior design,” the court unanimously held that the statute “impose[d] restrictions that are unnecessary and unreasonable” and “d[id] not bear some substantial relation to the public health, safety, or morals.” *Id.* at 406 (quotation marks omitted). Other courts have struck down title acts on related grounds. See *Byrum v. Landreth*, 566 F.3d 442, 447-48 (5th Cir. 2009) (reversing denial of preliminary injunction); *Roberts v. Farrell*, 630 F. Supp. 2d 242, 251-55 (D. Conn. 2009). The district court did so here, in a portion of its decision

the State evidently deems so unassailable that it declined to appeal. *Locke*, 2010 WL 430950, at *11-12. Thus, even where professional groups have convinced States to regulate, the statutes have often failed to withstand scrutiny of the consumer-protection rationales supposedly supporting them.

That track record refutes the district court's assertion that "a reasonable legislature might or might not accept" the need for licensure. *Locke*, 2010 WL 430950, at *2. Perhaps, under the weakest form of rational-basis review, a court might close its eyes to that overwhelming real-world evidence and speculate about what a "reasonable legislature" might believe in some counterfactual fantasy world. *But see Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (courts need not accept "incidental or pretextual public justifications" even under rational-basis review). But the "'rational basis' [test] . . . c[an] not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right [such as] the freedom of speech." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.27 (2008). Florida's statute severely burdens core artistic expression, and it does so based on a public safety rationale that State after State has rejected as at best insubstantial and at worst pretextual. The district court's perfunctory acceptance of the State's purported justifications was wholly inappropriate in a First Amendment case like this one.

II. THE DISTRICT COURT’S “PERSONAL NEXUS” TEST CONFLICTS WITH PRECEDENT AND UNDERMINES CORE FIRST AMENDMENT VALUES

The district court held that Florida’s statute is “not subject to First Amendment scrutiny” *at all* because “there is a ‘personal nexus’ between the interior designer and the client.” *Locke*, 2010 WL 430950, at *7. That decision represents a dramatic and unwarranted expansion of the professional speech doctrine.

A. Supreme Court Precedent Forecloses the Claim That Professional Regulations Are Immune from First Amendment Scrutiny Whenever a “Personal Nexus” Exists

Although some individual Justices and lower courts have applied a “personal nexus” standard in certain contexts, the Supreme Court has never treated that standard as the sole test for evaluating First Amendment challenges to professional regulations. To the contrary, “on several occasions, the Supreme Court has ruled that [professional] speech was protected by the First Amendment despite the fact that it was . . . person-to-person,” because “the substance of the speech involved values that are particularly important in the First Amendment hierarchy.” Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 919 (2000). The district court ignored those cases.

In *NAACP v. Button*, 371 U.S. 415 (1963), for example, the Court rejected an attempt to regulate the NAACP’s legal staff. The Court did not apply a “personal nexus” standard—a test the defendant clearly would have failed. Instead, it

held the activities protected because they implicated important First Amendment values. “[T]he activities of the NAACP,” it explained, “are modes of expression and association protected by the First and Fourteenth Amendments” *Id.* at 428-29. The Court has applied *Button* to sustain challenges to professional regulations in at least three other cases, without once suggesting that a personal nexus mattered. *See Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

The Court has similarly refused to apply a “personal nexus” standard in cases involving professional charitable fundraisers. *See Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat’l Fed. of the Blind of N.C.*, 487 U.S. 781 (1988); *see also Meyer v. Grant*, 486 U.S. 414 (1988) (professional petition circulators). Instead, the Court has invalidated the challenged restrictions because the professionals’ conduct was “characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.” *Schaumburg*, 444 U.S. at 632. Even though the professionals engaged in personal interactions, the Court was not “persuaded by the . . . assertion that this statute merely licenses a profession” or that licensure was “devoid of all First Amendment implication.” *Riley*, 487 U.S. at 801 n.13.

Another area where the Court has refused to apply a “personal nexus” test is professionals’ in-person solicitation of clients. In *In re Primus*, 436 U.S. 412 (1978), the Court sustained a challenge to a statute prohibiting personal solicitation by a public-interest lawyer, and in *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court sustained a similar challenge by an accountant. The Court rejected a challenge by a *non*-public interest lawyer in *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978), but only after carefully weighing the State’s interest against the burdens on expression. Those cases are inexplicable if, as the district court believed, a “personal nexus” gives the State free rein to regulate. Indeed, because solicitation is commercial speech subject to *reduced* First Amendment protection, it makes no sense to give States unbounded authority to regulate professional expression but only limited authority to regulate *personalized solicitation about* that expression.

The district court’s “personal nexus” theory is also hard to square with the Supreme Court’s recent decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, Nos. 08-1119 & 08-1225, 2010 WL 757616 (Mar. 8, 2010). *Milavetz* involved a statute regulating what advice bankruptcy lawyers could give their clients. Although the Court upheld the statute, it did so only after full consideration of whether the statute was so vague as to “chill protected speech.” *See id.* at *6-11. If a mere personal nexus exempted professional speech from all First Amendment scrutiny, the Court’s entire opinion could have been two lines long.

Other cases where courts have struck down professional regulations on First Amendment grounds despite a personal nexus abound. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality) (upholding restriction but conceding First Amendment’s applicability); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (similar). The lesson is clear: There is no universal “personal nexus” standard that exempts all professional regulation from First Amendment scrutiny. Rather, the Court routinely invalidates restrictions despite a personal nexus (or sustains them under ordinary First Amendment standards). The Court most often does so in cases like *Button* or *Riley* implicating additional First Amendment values beyond the professional’s mere rendering of advice. But as cases like *Edenfield* demonstrate, the Court has applied ordinary First Amendment scrutiny even absent such interests.

B. The “Personal Nexus” Test Lacks Any Foundation in First Amendment Principles

The Supreme Court’s reluctance to apply a “personal nexus” standard is not surprising: The standard makes little sense as a matter of First Amendment principle. The First Amendment is designed to foster “free trade in ideas,” on the ground that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see* Kent Greenawalt, *Free Speech Justifications*, 89

Colum. L. Rev. 119, 135-36 (1989). That rationale explains why, for example, the government can proscribe demonstrably false statements of fact (which do not advance the search for truth); why disclosure requirements are more tolerable than prohibitions; and why content-neutral regulations (which typically do not distort debate) are more tolerable than content-based ones.

The “personal nexus” standard, however, bears no discernable relation to that rationale. “When the government restricts the number of potential sources of . . . information, whether from impersonal publishers or personal advisors, the recipient’s ability to weigh competing points of view is hampered.” Kry, *supra*, at 960. Indeed, because a personal nexus often helps the speaker convey the most relevant information, burdens on that form of expression are particularly damaging to the free trade in ideas. Conversely, the government’s interest in regulating such speech is, if anything, weaker. “While a personal counselor can deceive or mislead only the person he advises, an impersonal publisher’s false advice potentially harms all of his readers.” *Id.*

In no other context is a “personal nexus” thought to exempt expression from constitutional scrutiny. The First Amendment protects the lonely “sidewalk counselor” who persuades her fellow citizens through personal dialogue no less than the pamphleteer or the newspaper magnate. *See, e.g., Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women’s Health Center, Inc.*, 512 U.S.

753 (1994); *cf. Hill v. Colorado*, 530 U.S. 703 (2000). The “personal nexus” test is unfounded in principle and should not be elevated to a universal standard governing all restrictions on professional speech. *See Kry, supra*, at 957-73.⁴

Rather than apply a “personal nexus” standard that lacks support in precedent, has never been applied in analogous contexts, and defies the First Amendment’s underlying principles, this Court should take a more common-sense approach and resolve this case by asking the sorts of self-evidently relevant questions that courts typically consider when giving serious consideration to a substantial First Amendment challenge:

*How much expression does Florida’s licensing statute burden? A lot. Interior design is not like other professions, because its very object is artistic expression. That additional First Amendment attribute makes this case much more similar to *Button* and *Riley* than *Thomas* or *Lowe*. Arguing that the State’s power to license doctors or lawyers implies a power to license interior designers is like arguing that the State’s power to license motor vehicle operators implies a power to license the press. It makes no sense.*

⁴ The district court’s reliance on the article cited in text—of which undersigned counsel was the author—is rather ironic. *See Locke*, 2010 WL 430950, at *6. The *central thesis* of that article was that the “personal nexus” standard is insufficiently protective of First Amendment values. *See Kry, supra*, at 957-73.

How severe a burden does the statute impose? Exceptional. Florida's statute is a prior restraint on artistic expression—a law requiring citizens to obtain the government's permission before expressing themselves (and to pay up to \$80,000 or more for the privilege). This case is about licensing art.

How substantial are the State's interests justifying the burden? Nonexistent. Professional groups have tried to convince state legislatures that unlicensed interior design is a menace to the public akin to the unlicensed practice of medicine or law, and they have failed—again and again and again. The state government reports rejecting their claims are not polemical rants of interest groups; they are thoroughly researched views of public agencies statutorily charged with evaluating such claims. Where the First Amendment is at stake, proponents of licensure must do more than concoct overwrought hypotheticals about exploding fabric finishes and furniture-placement deathtraps for the disabled. Yet for all their years of trying, that is all those proponents have been able to muster.

CONCLUSION

The district court's decision sustaining the constitutionality of Florida's licensing requirement should be reversed.

Dated: April 26, 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.



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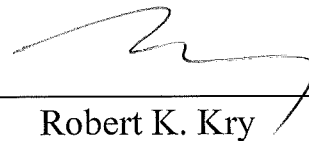
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