No. 11-348

In The
Supreme Court of the United States

EVA LOCKE, ET AL.

Petitioners,

v.

JOYCE SHORE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL KITCHEN AND BATH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The National Kitchen and Bath Association (NKBA) is an international trade association representing all facets of the kitchen and bath industry, including designers, contractors, distributors, and manufacturers. NKBA has 1,983 members in Florida, including designers, manufacturers, distributors, retailers, and their employees. *Amicus* is interested in this case because many of its members are being prevented by Florida's onerous licensing requirements from speaking with numerous potential clients. Because such restriction on their speech has no basis in public welfare or any other legitimate government interest, the restriction is little more than a naked barrier to entry favoring established interior designers. Whatever the permissibility of such pernicious barriers in general, where they involve barriers to speech, they should be subject to at least some level of First Amendment scrutiny.

SUMMARY OF ARGUMENT

The court of appeals below severely narrowed the First Amendment by holding that "direct, personalized speech with clients," constitutes only "'occupational conduct, and not a substantial amount of pro-

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[1] This brief is filed with the consent of all parties. Counsel for respondents was notified of the intent to file this brief 7 days prior to its filing and consented notwithstanding the slightly shortened notice. (As respondents have waived their opposition, there is no prejudice to such shortened notice.) No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

tected speech.'" *Locke* v. *Shore*, 634 F.3d 1185, 1191 (CA11 2011) (citation omitted). In so concluding, the court sidestepped any further First Amendment analysis, thereby upholding Florida's onerous licensing requirements for interior designers, whose services constitute almost exclusively speech in the form of designs, advice, and suggestions. Such services have not been shown to pose any potential harm to clients or the public that would justify their regulation. Pet. at 2-3 (noting stipulated lack of evidence regarding public welfare concerns).

None of the elements of the court of appeal's new category of direct, personalized speech to clients justify depriving such speech of all First Amendment protection. And, if such an unprotected category of speech is accepted, it would similarly deny First Amendment protection to a wide range of other speech. Numerous speakers address their speech directly and personally to individuals and small groups who pay for such speech and thus are "clients" of the speaker. Teachers, tutors, and consultants of all kinds offer direct and personalized information, opinion, and advice to listeners for pay. The legal rule adopted below would subject them all to state licensing and other restrictions without even the barest First Amendment scrutiny. Such a rule is contrary to the First Amendment and contrary to numerous cases protecting a wide variety of speakers and should be reviewed by this Court.

While the State may often have a demonstrable justification for licensing various professional activities that directly or incidentally involve speech – law, medicine, and public accountancy being obvious ex-

amples – such justifications do not eliminate the need for First Amendment scrutiny of licensing rules. Rather, they are often sufficient to justify those rules and satisfy appropriate First Amendment scrutiny. But even thus justified, the First Amendment must stand as a bulwark against overreaching rules that restrict more speech than necessary to accomplish legitimate government interests.

The court below also erred in its reliance on Justice White's concurring opinion in *Lowe* v. *SEC,* 472 U.S. 181, 232 (1985) (White, J., concurring in the result). In *dicta* concerning why some professional licensing was permissible, Justice White distinguished regulation of professional conduct having only incidental effects on speech from regulation of speech itself. The distinction, ignored by the court below, depended on professionals taking a client's affairs "in hand" and acting "on behalf" of the client, not merely speaking directly and in a personalized manner to the client. Interior designers simply do not share those additional characteristics of the professionals to which Justice White seems to be referring.

Furthermore, even if the licensing scheme here were viewed as regulating conduct and only incidentally restricted speech, the proper First Amendment test is that set out in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The licensing scheme here would fail that test.

ARGUMENT

The State of Florida imposes onerous licensing requirements for persons seeking to engage in "interior design" for commercial, as opposed to residential,

clients. Pet. at 2. Unlike architecture, however, "interior design" involves only non-structural aspects of the arrangement and furnishing of a commercial space. The work of interior designers has nothing to do with the health or safety of the workplace, but rather with the aesthetic and functional layout of commercial spaces.

Virtually all of the activities of an interior designer constitute speech in the ordinary sense of that word: a designer discusses various aspects of the space being designed, proposes designs to the client and makes recommendations on how various designs would satisfy a client's goals and tastes. Pet. at 3.

Relying on *dicta* from Justice White's concurring opinion in *Lowe* v. *SEC,* 472 U.S. at 232 (White, J., concurring in the result), the court of appeals held that Florida's onerous licensing requirements for interior designers was not subject to any level of First Amendment scrutiny because they regulate only the designer's "direct, personalized speech with clients," thereby governing "'occupational conduct, and not a substantial amount of protected speech.'" *Locke* v. *Shore*, 634 F.3d at 1191 (citation omitted).

The suggestion that ordinary speech can be converted into mere occupational "conduct" not entitled to any First Amendment protection merely by being directed towards and personalized for a "client" – *i.e.*, a person paying for the speech – is startling and mistaken. Such a rule would create a yawning gap in the First Amendment and is contrary to numerous cases providing First Amendment protection to speech personally directed at persons who pay for such speech.

I. Depriving All First Amendment Protection to Direct and Personalized Speech to Clients Creates a Broad Category of Unprotected Speech and Conflicts with the First Amendment.

Petitioners have already described the general proposition that speech does not lose protection merely because it is made for pay. Pet. at 7. They have likewise pointed to professionals such as lawyers whose individualized speech to clients has been analyzed under the First Amendment and not summarily excluded from the First Amendment, as was the case in the court of appeals below. Pet. at 7-10. But the court of appeal's new rule excluding direct, personalized speech for pay goes well beyond those examples. Numerous other professions and occupations likewise involve selling personalized speech to the person or persons paying for it:

- Portrait artists and photographers are routinely hired to provide personalized "speech" directly to persons hiring them. Yet paintings and photographs are plainly protected by the First Amendment.[2]

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[2] *See, e.g.*, *Kaplan* v. *California,* 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings * * * have First Amendment protection"); *Roth* v. *United States*, 354 U.S. 476, 487 (1957) ("The portrayal of sex, e.g., in art, literature and scientific works,[fn omitted] is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."); *ETW Corp.* v. *Jireh Pub., Inc.*, 332 F.3d 915, 924 (CA6 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paint-

- Paid speakers are routinely engaged to talk at private business functions, talking directly to their clients and often personalizing the speech to the specific identities, circumstances, or needs of the clients.

- Consultants of all sort are hired to provide endless amounts of direct and personalized advice to clients, including political advice, public relations advice, fashion advice, wine purchasing advice, executive coaching, and sensitivity training, just to name a few. Each such consultant engages in direct and personalized communications with select individuals and groups for pay.[3]

- Tutors and college professors/advisors likewise offer educational speech and advice on numerous topics for pay. Whether it's a history tutor hired to help a struggling student, a piano teacher giving individual lessons, a college professor supervising a student's thesis, or a faculty advisor assisting with the selection of courses and a major, each engages in direct

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ings, drawings, engravings, prints, and sculptures.") (citations omitted).

[3] Furthermore, while the Florida's licensing requirements do not apply to *residential* interior designers, the rule adopted by the Eleventh Circuit certainly does. Interior decorators – advising on fabrics, paintings, pillows, and the like – also would be denied First Amendment protection under the rule below, even if Florida currently excludes such professionals from its requirements. The rule of law adopted by the court of appeals thus is far broader than the particular statute in this case.

and personalized communications with a person who is paying (or whose parents are paying) for such directed speech. Educational speech is, of course, covered by the First Amendment.[4]

- News collators, clipping services, or research professionals also provide direct and personalized speech to clients with a need to stay current on particular events and news of interest to them. While the speech in such cases is largely in the form of editorial services – collecting, summarizing, and prioritizing news items based on the particular client's needs and desires – editors as well as authors are protected by the First Amendment.[5]

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[4] *See Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment"); *Board of Trustees of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 482 (1989) (listing "tutoring, legal advice, and medical consultation provided (for a fee)" as examples of protected non-commercial speech); *cf. Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (striking down, under the Fourteenth Amendment, a law restricting the teaching of German in private schools: "Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment").

[5] *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) ("the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security").

The above examples demonstrate the breadth of the legal rule adopted by the court below and also its error. It is fanciful to suggest that the government could impose restrictive licensing requirements on such speakers without clearing significant First Amendment hurdles.

Merely describing paid speakers as "professionals," and therefore subject to licensing, adds nothing to the First Amendment analysis. In the traditionally regulated professions, there are typically good and demonstrable reason for licensing and regulation: doctors, lawyers, and CPAs generally act as fiduciaries for their clients and any lack of skill or dereliction of duty can have serious consequences both for the clients and often for society in general. Inadequate training in those fields can cause death and disease, wrongful incarceration, and widespread financial chaos. It is the particular nature of their activities, and the demonstrable government interest in seeing that they are done by skilled practitioners, that supports licensing regimes in those fields. To the extent such licensing burdens speech it survives not because the First Amendment does not apply, but because the First Amendment has been satisfied. And where it is not, as in some bar restrictions on speech by lawyers and judges, those aspects of the regime are invalidated.

In this case, by contrast, the State has not offered a shred of evidence regarding the importance of any interests served by its licensing law or any harm that might result from unlicensed interior designers. Perhaps such interests exist, but the record in this case demonstrates none. Indeed, the law in question was

subjected only to rational basis scrutiny and upheld on the mere speculation of a state interest. 634 F.3d at 1196. Such speculation is, of course, insufficient for even minimal First Amendment scrutiny.

II. The Court of Appeals Misconceived the First Amendment Standards for Even "Incidental" Restrictions on Speech.

As petitioners have explained, and *amicus* agrees, the decision below is inconsistent with this Court's First Amendment jurisprudence, both as to the treatment of professional speech and as to the impropriety of carving out wholesale exceptions to First Amendment protections. *Amicus* will not repeat such arguments, but instead will elaborate on two points regarding Justice White's concurring opinion in *Lowe* and the proper analysis of speech restrictions even where they are deemed merely incidental to the regulation of conduct.

First, the court of appeal's reliance on Justice White's concurring *dicta* in *Lowe* is misplaced in that it fails to consider the full context of that *dicta*. 634 F.3d at 1191 (quoting *Lowe* concurrence). In *Lowe*, Justice White concurred in the result reached by this Court by finding that the investment newsletter at issue was indeed speech protected by the First Amendment. It was only in describing what was *not* presented in that case that Justice White stated:

> "One who *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 is properly viewed as engaging in the practice of

> a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. * * * Where the personal nexus between professional and client does not exist, and a speaker *does not purport to be exercising judgment on behalf of any particular individual* with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J., concurring in the result) (emphasis added).

An important aspect of Justice White's *dicta* is that the professional he describes does not merely communicate directly and personally with the client, but rather he takes the client's "affairs personally in hand" and acts "on behalf of the client." A contextual and more sensible reading of Justice White's *dicta* thus demonstrates that it is actions taken on behalf of the client and *in lieu* of the client that constitutes the professional "conduct" to which speech may be incidental.

Such a notion of professional conduct that may be regulated with only incidental impact on speech aptly describes the conduct of of lawyers, accountants, investment professionals, and even architects, who in-

deed *act* for their clients in a variety of ways. But it is a distinctly poor description of the work of interior designers, whose services do not involve delegated responsibilities for structural safety and the like, but instead more resemble pure speech in the form of advice, suggestions and proposed designs to suit aesthetic and functional goals.

To the extent that speech by interior designers is alleged to be incident to other professional conduct justifying regulation, it is the government's burden to at least *demonstrate* such conduct and the nature of its regulatory interests rather than merely speculate.

Second, even assuming, *arguendo*, that the extensive speech of interior designers and other paid speakers were merely "incidental" to regulable professional "conduct," that still does not justify the complete absence of First Amendment scrutiny. Indeed, even laws that unequivocally regulate physical "conduct" are reviewed under the First Amendment where they have an indirect impact on speech. The test for such incidental restrictions on speech was established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), concerning a law prohibiting the burning of draft cards. While this Court upheld the law, it squarely subjected it to First Amendment scrutiny and established the controlling test:

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. * * * [A] government regulation is sufficiently justi-

> fied if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77.

Even if Florida's licensing scheme were thus viewed as a regulation of professional conduct with merely incidental impact on speech, the State would still have to demonstrate its "important" or "substantial" interest in regulation and show how the regulation does not burden speech beyond the degree "essential to the furtherance of that interest." On the stipulated record below, the State could not possibly pass that test. Pet. at 2-3 (noting stipulated lack of evidence regarding the need to regulate interior design). It was only by limiting its analysis to rational basis scrutiny that the court of appeals was able to uphold the licensing statute. 634 F.3d at 1196 (discussing lack of evidence of government interest in the context of due process and equal protection).

Whether viewed as a regulation of persons engaged in pure speech or of persons engaged in conduct the regulation of which incidentally restricts speech, Florida's licensing scheme for interior designers is subject to at least *some* First Amendment scrutiny. In adopting a new rule regarding direct personalized speech to clients that provides *no* First Amendment scrutiny, the decision below conflicts

with this Court's First Amendment jurisprudence and should be reviewed.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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