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 a Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

BRIEF OF *AMICI CURIAE* PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment imposes any degree of scrutiny on governmental licensing of "direct, personalized speech with clients."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages(s)

Cases

Statutes

Publications

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Pacific Legal Foundation ("PLF") is a nonprofit public interest legal organization founded to litigate in support of private property rights and economic freedom in both federal and state courts. Through its Economic Liberty Project, PLF files amicus briefs and represents parties in cases involving the fundamental right of all Americans to earn an honest living, including *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005) (amicus), and *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (amicus).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. The present case centrally concerns Cato because it involves government infringement on the right to earn an honest living.

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[1] Pursuant to this Court's Rule 37.2(a), *amici* gave at least 10-days' notice to all parties of its intent to file this brief, and has submitted to the Clerk letters of consent from all parties to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* states that this brief was not authored in whole or in part by counsel for any party, and that no counsel or party other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT

In Florida, only state-registered interior designers may practice what the State defines as "interior design." Fla. Stat. § 481.223(1)(b). "Interior design" is defined as "designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure." Fla. Stat. § 481.203(8). "'Interior design' includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings." *Id.* Florida's interior design licensing statute restricts the practice of interior design to individuals and entities that undergo a stringent and burdensome licensing process. Any companies that offer interior design services must have a Florida-licensed interior designer serving as a principal officer of the firm. Fla. Stat. § 481.201 et seq. (2009).

The Eleventh Circuit held that this statute regulates solely an interior designer's "direct, personalized speech with clients." Pet. App. 7a. The question presented is whether state licensing of, and restrictions on, "direct, personalized speech with clients" violates the First Amendment.

SUMMARY OF ARGUMENT

Interior design is an occupation founded on the designer's artistic vision expressed through the design of an interior space. This artistic expression is protected by the First Amendment, and any burden imposed upon it is subject to strict scrutiny.

In conflict with this Court's precedent, the Eleventh Circuit denied First Amendment protection

to a category of speech—interior designers' creative works—that was not historically unprotected speech. The court below ignored the inherently artistic nature of the practice of interior design and the First Amendment precedent protecting such artistic expression. The court formulated a broad categorical exception to the First Amendment, based not on tradition or history, as this Court requires, but rather on a misinterpretation of non-binding observations regarding regulation of doctors, lawyers, and accountants. But interior designers, unlike doctors, lawyers, or accountants, are not historically regulated—and for good reason. Unlike those traditionally regulated occupations, an interior designer's expression to clients is not incidental to non-expressive occupational conduct. Rather, a designer's job is almost *entirely* expressive, with the goal of producing an expressive end-product—a designed space. Further, no fiduciary relationship exists between designers and their clients any more than exists between painters or fashion designers and their clients. Thus, the precedents governing medical, legal, and accounting professionals have no application here.

Had the Eleventh Circuit properly evaluated the First Amendment implications of the Florida statute in accordance with this Court's holdings, it would have recognized the unconstitutionally oppressive prior restraint on expression created by the onerous licensing requirements. Florida's licensing scheme is a content-based prior restraint on speech, and accordingly must survive strict scrutiny. But in conflict with this Court's decisions, the Eleventh Circuit did not apply any scrutiny at all. The Eleventh Circuit also departed from the overbreadth analysis outlined in this Court's holdings, by creating

a new category of unprotected speech without construing the challenged regulation.

The Florida statute challenged in this case regulates the practice of interior design, but the Eleventh Circuit's holding affects speech far beyond this single industry. Under the ruling below, all workers whose occupations involve "direct, personalized speech with clients" are exposed to unfettered government restriction of expression on an unprecedented scale. A state government may now establish a burdensome licensing scheme for any job involving direct, personalized speech with clients, and may subsequently impose criminal penalties on those who fail to meet its requirements. The Eleventh Circuit's decision effectively strips service providers of the First Amendment protections previously mandated by this Court's precedents.

ARGUMENT

Under the Eleventh Circuit's decision, any "direct, personalized speech with clients" is no longer protected by the First Amendment, no matter how purely expressive that speech may be. The court effectively created an unjustified and unprecedented categorical exception to First Amendment protections of expression. This exception contradicts this Court's First Amendment precedents. The decision below establishes a new, far-reaching categorical exception to First Amendment protected speech, characterized as "direct, personalized speech with clients." That holding is irreconcilable with the principles this Court has articulated for identifying the narrow categories of speech that lack First Amendment protection. As a result, the Eleventh Circuit has upheld an unconstitutional burden on

artistic expression in a manner that conflicts with this Court's precedent.

I. THE DECISION BELOW CONTRADICTS THIS COURT'S HOLDING IN *UNITED STATES V. STEVENS* BY CREATING A BROAD, NEW CATEGORY OF UNPROTECTED SPEECH.

In *United States v. Stevens*, the Court emphasized that federal courts do not enjoy "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S. Ct. 1577, 1585-86 (2010). In fact, courts may do so only when the speech in question has been shown to be "historically unprotected." *Id.* at 1586. Yet the Eleventh Circuit declared all "direct, personalized speech with clients" exempt from First Amendment protection without undertaking this historical analysis. Pet. App. 7a. There is no evidence in this case that "direct, personalized speech with clients" generally—or interior-design-related speech specifically—has historically been considered an unprotected category of speech.

A. The Practice of Interior Design Is Artistic Expression, and Thus Not "Historically Unprotected."

"[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," a court may not declare a category of speech unprotected by the First Amendment. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (quoting *Stevens*, 130 S. Ct. at 1585). As only three States, including Florida, regulate the practice of interior design, it cannot be said that this area of expression has a long tradition of proscription or has been historically unprotected.

See Fla. Stat. § 481.223(b); La. Rev. Stat. Ann. § 37:3176(A)(1); Nev. Rev. Stat. § 623.360(1)(c).

Interior design, as a form of artistic expression, is historically protected by the First Amendment. Interior designers are measured primarily on the value of their aesthetic expression, not for any technical knowledge or expertise. The practice of interior design consists almost entirely of making drawings and speaking to clients about how they might wish to arrange and furnish the spaces they occupy. Laws restricting the practice of interior design suppress protected expression, not only because they prevent designers from communicating with their clients, but because they suppress the artistic end-product that designers and clients together create. The purpose behind interior design is to create something expressive and artistic: a room that communicates a message. That distinguishes interior design from other occupations where communication is simply a means to a non-expressive end. With interior design, expression is the end itself.

Artistic expression is a field that this Court has long held protected by the First Amendment. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) ("It goes without saying that artistic expression lies within this First Amendment protection."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection[.]"). "[A]rt is entitled to full [First Amendment] protection because our 'cultural life,' just like our native politics, 'rest[s] upon [the] ideal' of governmental viewpoint neutrality." *Nat'l Endowment for the Arts*, 524 U.S. at 603 (quoting

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)); *see also Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 569 (1995) (First Amendment "unquestionably" applies not only to precisely articulable messages, but also to general aesthetic experiences like "[the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.").

Directly contradicting this Court's decisions protecting artistic expression, the Eleventh Circuit concluded that all expression between interior designers and their clients—no matter how purely creative or aesthetic—is categorically unprotected by the First Amendment.

B. There Is No Historical Basis For Exempting "Direct, Personalized Speech With Clients" From First Amendment Scrutiny.

The Eleventh Circuit created a new, broad, and categorical First Amendment exemption for "direct, personalized speech with clients" without performing anything approaching the requisite historical analysis articulated by this Court in *Stevens*. Pet. App. 7a. As this Court explained, "From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *Stevens*, 130 S. Ct. at 1584 (internal citations and quotation marks omitted). "These historic and traditional categories long familiar to the bar . . . are well-

defined and narrowly limited classes of speech[.]"[2] *Id.* (internal quotation marks omitted). This Court has not carved out a new category of unprotected speech in nearly 30 years. *Id.* at 1586 (noting child pornography found unprotected in 1982).

Instead of performing the historical analysis *Stevens* required, the lower court stripped away all First Amendment protection of "direct, personalized speech with clients" by relying upon Justice White's non-binding concurring opinion in *Lowe v. SEC*, 472 U.S. 181 (1985). Pet. App. 7a. But Justice White did not conclude that such speech has no First Amendment protection. Instead, he outlined a test "to locate the point where regulation of a profession leaves off and prohibitions on speech begin." *Lowe*, 472 U.S. at 232 (White, J., concurring). Under Justice White's "personal nexus" test, "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." *Id.* But, Justice White continued,

> 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 a legitimate regulation of professional practice with only

[2] These categories include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Stevens*, 130 S. Ct. at 1584.

> incidental impact on speech; it becomes a regulation of speaking or publishing as such, subject to [First Amendment scrutiny].

Id. Even under Justice White's non-binding "personal nexus" test,[3] the expression regulated by the Florida statute is protected because there is no "personal nexus" between an interior designer and his client. No fiduciary relationship exists, and the designer does not "purport[] to exercise judgment on behalf of the client." Though an interior designer may offer advice, he ordinarily does not substitute his judgment for his client's. In contrast, a lawyer's clients cannot reasonably be said to exercise independent judgment about the advice they receive; they rely on the lawyer's judgment in place of their own. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."). The same is true of accountants. *See, e.g.*, *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 618 (7th Cir. 2001) ("[A]n accountant must make his own decisions regarding many significant matters, and the final decision he makes is not necessarily contingent on the contract he executes with his client.").

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[3] First Amendment scrutiny has been applied in several cases involving a "personal nexus" between the speaker and his or her client. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010) (attorneys); *Edenfield v. Fane*, 507 U.S. 761 (1993) (accountants); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (charitable fundraisers); *Meyer v. Grant*, 486 U.S. 414 (1988) (professional petition circulators); *In re Primus*, 436 U.S. 412 (1978) (attorneys).

Unlike a lawyer or accountant, an interior designer's ideas for a project relate primarily to matters of taste and aesthetics that clients are perfectly capable of evaluating on their own. And 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 aesthetic recommendations that their clients may accept or reject.

The interior designer statute is therefore akin to a law requiring biographers, portraitists, or other commissioned artists to obtain licenses before creating their works. Like commissioned artists, interior designers work with individual clients toward an artistic and expressive end. But under the lower court's reasoning, an onerous licensing requirement imposed on commissioned artists would be altogether immune from First Amendment scrutiny; it would be a regulation of "occupational conduct" with only an "incidental effect" on speech or expression. Pet. App. 7a.

Vocational regulations are not immune from First Amendment scrutiny. *See, e.g.*, *Riley*, 487 U.S. at 798 (professional fundraiser regulation); *Meyer*, 486 U.S. at 420-21 (paid petition-signature gatherers regulation); *Thomas v. Collins*, 323 U.S. 516, 530-31 (1945) (union organizer regulation); *In re Primus*, 436 U.S. at 434-35 (attorney regulation); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (medical doctor regulation). Yet, the Eleventh Circuit dismissed petitioners' First Amendment arguments because the Florida statute allegedly governs only "occupational conduct, and not a substantial amount of protected speech[.]" Pet. App. 7a. That result is contrary to this Court's holdings regarding licensing

of expression. This Court has historically rejected the view that a statute which "merely licenses a profession" is "devoid of all First Amendment implication." *Riley*, 487 U.S. at 801 n.13 (citation omitted); *see also NAACP v. Button*, 371 U.S. 415, 428-29 (1963). Review is warranted to address the conflict between this Court's precedents and the decision below.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENTS BY PERMITTING OVERBROAD, CONTENT-BASED PRIOR RESTRAINTS ON SPEECH WITHOUT ANY FIRST AMENDMENT SCRUTINY.

Contrary to this Court's decisions preserving the highest protections against prior restraints on speech, the Eleventh Circuit upheld Florida's statute without applying any First Amendment scrutiny. "[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). Yet, the court failed to engage in any analysis to determine whether the Florida statute is an unconstitutional prior restraint on speech.

Further, the Eleventh Circuit held that the Florida statute was not overbroad because it regulated "direct, personalized speech with clients" which has "a merely incidental effect on protected speech." Pet. App. 8-9a. Through its holding, the Eleventh Circuit has permitted censorship of expression merely because it "relat[es] to" the "interior elements of a building or structure." Fla. Stat. § 481.203(8). This law censors vast amounts of speech that the State has no legitimate authority—or interest—to regulate. Therefore, it fails the

requirement that speech restrictions, to have a chance to survive judicial scrutiny, be narrowly tailored to advance the State's interests.

A. The Decision Below Violates This Court's Requirement of Narrowly Tailored Restrictions of Expression.

Whether analyzed under strict scrutiny or intermediate scrutiny, this Court has held that the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate government interest. *Brown*, 131 S. Ct. at 2738; *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985); *In re R. M. J.*, 455 U.S. 191, 203 (1982). Even for lesser-protected commercial speech, "the State bears the burden of justifying its restrictions." *Fox*, 492 U.S. at 480. This Court has consistently rejected the proposition that restrictions on speech may be justified by the mere possibility of fraud or other violation of the law. *See, e.g.*, *Riley*, 487 U.S. at 795; *Schneider v. State*, 308 U.S. 147, 164 (1939). "If [a restriction] is not the most efficient means of preventing [a violation of law] . . . the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

The State's purported interest in protecting the public against violations of building codes "cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Even if one were to accept the State's proffered interest—ensuring that fixture placements did not violate building codes—requiring six years of

higher education and a licensing exam bears no demonstrable relationship to that goal of avoiding the mere possibility that building codes may be violated by the client and its contractor or architect. In this case, providing constitutional protection for interior designers does not "deprive" the State of "all power to prevent" violations of building codes. *See Schneider*, 308 U.S. at 162. "There are obvious methods of preventing" such violations; "[a]mongst these is the punishment of those who actually" violate building codes. *Id*. A building permit evaluating the actual implementation of a design, consultation, or other specification by an interior designer would be far less burdensome and would not deprive a designer of his or her freedom of expression.

B. By Failing to Apply Any Scrutiny, the Eleventh Circuit Violated This Court's Protection Against Content-Based, Prior Restraints.

This Court has held that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties."[4] *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, n.13 (1980). "[A] free society prefers to punish

[4] Practicing interior design without a license in Florida is a first degree misdemeanor punishable by up to one year in jail. Fla. Stat. § 481.223(2). The Board may also impose an administrative penalty of up to $5,000 per incident, and may seek up to $5,000 in civil penalties. Fla. Stat. § 455.228.

the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* (emphasis in original). The Florida law imposes a prior restraint well beyond the functional aspects of interior design that could conceivably be subject to a valid licensing requirement. The law criminalizes the kind of "expression about . . . artistic . . . matters" that is "entitled to full First Amendment protection." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977).

Florida's interior design law is a content-based regulation of speech in that it specifically targets speech, such as "designs, consultations, studies, [and] drawings," "relating to nonstructural interior elements of a building or structure." Fla. Stat. § 481.203(8). Yet, the Eleventh Circuit failed to apply any scrutiny to this content-based regulation. By requiring a license to speak and by criminally punishing unlicensed speech, Florida has placed too heavy a burden on the First Amendment rights of unlicensed interior designers. Fla. Stat. §§ 481.223(2), 775.082(4)(a); *see also Citizens United v. FEC*, 130 S. Ct. 876, 896-97 (2010) (noting that both permitting processes and the threat of criminal sanctions burden speech). And because Florida's interior design law burdens speech based on its content, the court must apply strict scrutiny. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). Under this standard of review, courts "must ensure that a compelling interest supports *each application* of a statute restricting speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (emphasis in original). The fact interior designers are paid for their speech does not affect the First Amendment analysis. *Riley*, 487 U.S. at 801 ("It is well settled that a speaker's rights are not lost

merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

Strict scrutiny requires the government to demonstrate with actual evidence that the harms it recites "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995) (internal quotation marks and citation omitted). First, though the aim of the Florida law is to protect public safety, the State has presented no evidence of any bona fide public welfare concerns if the practice of interior design were unregulated. Pet. App. 89a.[5] Second, the Florida law is not a narrowly tailored to its aim: to punish particular instances of misconduct that threaten safety. *See* Fla. Stat. § 481.201. Rather, it is an unjustified licensing statute—a law that requires interior designers to obtain the government's permission before expressing themselves, with no evidence that a license will lead to greater public safety.

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[5] Similarly, in *State v. Lupo*, 984 So. 2d 395 (Ala. 2007), the Alabama Supreme Court struck down that State's interior design practice act as unconstitutional under the state constitution. 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).

C. The Eleventh Circuit's Overbreadth Analysis Conflicts With the Framework Outlined By This Court.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 130 S. Ct. at 1587 (internal citations omitted). A law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citation and quotation marks omitted).

The Eleventh Circuit's overbreadth analysis of the Florida statute fails to construe the statute as required by this Court's prior decisions. The court reasoned that the "license requirement is a professional regulation with a merely incidental effect on protected speech" and "conclude[d] that Florida's license requirement is constitutional under the First Amendment." Pet. App. 8-9a. Moreover, the court held that the statute's "impermissible applications" were not "substantial relative to its plainly legitimate sweep." *Id.* But the court never construed the statute to examine its impermissible applications. By not undertaking this analysis, the Eleventh Circuit's decision effectively holds that all licensing schemes have only an incidental effect on speech and therefore can never be overbroad. Alternatively, had the court properly construed the statute, it would have found that the Florida law "create[s] a criminal prohibition of alarming breadth." *Stevens*, 130 S. Ct. at 1577.

The challenged law here largely regulates expression wholly unconnected to any concern for public safety or professional competence. The law forbids even the creation of "preliminary space layouts" by non-licensed interior designers. Fla. Stat. § 481.203(12). "Preliminary space layouts" are not used as actual design or construction documents, but instead as a "communication tool" by the designer and client to express their purely conceptual ideas to one another. Pet. App. 89a. In other words, this so-called "conduct" regulated by the statute is simply an exchange of ideas, without any direct implications for public health or safety. The plain language of Florida's interior design law sweeps broadly to cover all aspects of the practice of interior design, including the expression of purely aesthetic ideas about the selection or placement of furniture and art. Indeed, the law is worded broadly enough to prohibit activity that most people would not consider "interior design" at all. *See infra Section IIIA*.

In conflict with this Court's precedents, the Eleventh Circuit failed to construe the statute, unjustifiably stripping interior designers and others of their First Amendment rights with no basis in any state interest.

III. THE DECISION BELOW HAS FAR-REACHING IMPLICATIONS FOR CONTEMPORARY OCCUPATIONAL LICENSING SCHEMES.

By upholding the Florida statute, the Eleventh Circuit has reinforced the burdens that the statute imposes upon those who practice interior design within the meaning of the statute, including those who would not identify themselves as interior designers. That is, the statute is so broadly written

that individuals working in numerous occupations having nothing to do with interior design nonetheless perform activities that fall within the statute's plain language, with potentially criminal consequences.

By creating a new category of unprotected speech, the Eleventh Circuit has exponentially widened the breadth of occupations affected by its opinion beyond the context of Florida's interior design licensing scheme.

A. The Florida Law Regulates Expressive Conduct of Non-Interior Designers.

Florida's interior design law is so broad, it sweeps in many expressive occupations and activities the State has no interest in regulating. This includes wedding planners, caterers, branding consultants, sellers of retail display racks, retail business consultants, corporate art consultants, and even theater-set designers. In fact, the State has taken enforcement actions against a wide spectrum of people who are not interior designers, 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* Florida Interior Design FOIA Index, *available at* http://www.idpcinfo.org/FL_Disciplinary_Actions.pdf (listing actions).

The statutory definition of "interior design" covers many other occupations that routinely involve drawings and other speech "relating to nonstructural interior elements of a building or structure," but that

are not remotely the practice of interior design. *See* Fla. Stat. § 481.203(8). Under the statute, "interior design" means "designs, consultations, studies, drawings, specifications . . . relating to nonstructural elements of a building or structure." *Id.* This includes "space planning, furnishings . . . [and] specification of fixtures and their location within interior spaces." *Id.* But wedding planners and caterers consult with clients and make drawings relating to the placement of tables, chairs, and portable dance floors for wedding receptions. Sellers of retail display equipment routinely make drawings for their customers, as do office-furniture dealers and furniture manufacturers to show how their products might fit into a given space and what they would look like. Florida's interior design statute, in short, covers any "consultations" and "specifications" regarding *purely aesthetic items*, like the placement of a sculpture on a coffee table.

Due to the lower court's failure to construe the statute for overbreadth, expressive activities that clearly do not implicate public safety concerns are vulnerable to the State's control, imposing burdens on the speech of unsuspecting persons who do not identify themselves as interior designers. For example, consultations about the selection and placement of artwork or the use of color schemes in commercial spaces are plainly covered by the challenged law, as are many routine business consulting services such as the placement and composition of product displays in stores, the configuration of check-out, shelving and storage areas, and the selection and location of furniture in business offices. The State has no valid interest in suppressing speech about purely aesthetic subjects and other harmless matters simply because they

happen to pertain to the interior of a building, but if the decision below is allowed to stand, States will not need one to infringe on traditionally protected expression.

B. The New Category of Unprotected Speech Eliminates the First Amendment Rights of Service Providers in Numerous Industries.

The Eleventh Circuit's holding (Pet. App. 7a) that the regulation of "direct, personalized speech with clients"—in any occupation—is categorically excluded from First Amendment scrutiny goes far beyond what any federal court has ever authorized. And, if allowed to remain, would strip First Amendment protection from a myriad of occupations that involve "direct, personalized speech with clients"—from political consultants to executive dating services to vendors that provide advice along with their products. That rule of law poses a grave threat to the First Amendment interests of a wide variety of responsible professionals who deserve constitutional protection against protectionist barriers. This is true not only of professionals who engage in essentially aesthetic advising—like petitioners here—but of many others who professionally advise, consult, or make recommendations to clients.

The decision below would give States unfettered power to require a license to enter any occupation involving "direct, personalized speech with clients," no matter how burdensome or overly broad the barrier to entry may be, so long as the occupation is somehow related to other laws that actually *do* protect the public against harm, such as building codes. Countless occupations—from computer

salesman, to tennis coach, to guidance counselor—involve the giving of individualized advice. Under the lower court's new unprotected occupational category, government may freely regulate any speech it defines as falling within the "practice" of those vocations, simply because there is "direct, personalized speech" between practitioners and their clients. No court in the country has ever applied the professional-speech doctrine so broadly.

Life coaching, for example, is an increasingly popular means by which individuals improve their personal and social lives by consulting professionals whose judgment and advice they trust. *See* Institute for Life Coach Training, *What is Coaching?*, a*vailable at* http://lifecoachtraining.com/index.php/about/what_is_ coaching/ (last visited Oct. 14, 2011). Life coaches do not administer drugs, diagnose illnesses, prescribe treatment for clinical conditions, or enjoy legally enforceable confidentiality privileges. They liken themselves to trainers or philosophical tutors who "help their clients design the life they want, [and] bring out their clients' own brilliance and resources." *Id.*; *see also* Patrick Williams and Sharon K. Anderson, *Law and Ethics in Coaching* 5 (2006) ("One could argue that Socrates is the earliest recorded model of life and business coaching."). Coaches approach their task from a variety of perspectives, from religious to secular and everywhere in between. These coaches have formed several professional associations that offer training and certification, thereby self-regulating their profession.[6]

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[6] *See, e.g.*, Institute for Life Coach Training website, http://www.lifecoachtraining.com (last visited Oct. 14,

Nevertheless, the professional therapy establishment has expressed concern about the possibility of competition from life coaches. A 2005 article, for example, warned licensed social workers that "if social work does not attend to this trend, coaching could supplant a variety of social work activities, such as couples and family counseling and parent training." Jonathan Caspi, *Coaching and Social Work: Challenges and Concerns,* Social Work, Oct. 2005. Even though advising persons on these activities presents no significant public health or safety concern, Caspi warned that coaches were already providing "services such as family coaching, parent coaching, and relationship coaching." And, he continued, unless anticompetitive regulations were implemented, "[p]eople with relational difficulties may prefer to seek out 'coaches' rather than social workers or therapists because they feel it is less stigmatizing and can avoid insurance concerns." *Id.* The potential use of licensing to exclude life coaches from offering their helping services to people currently served by social workers is one example of the way established industries can exploit laws to restrict the expressive conduct of their competition. If the Eleventh Circuit decision stands, occupations involving speech will be vulnerable to government restriction whenever established firms seek to bar potential competitors from expressing themselves professionally.

2011); International Coach Federation, http://www.coachfederation.org/ (last visited Oct. 14, 2011).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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