

2016

**Zen Healing Arts, LLC., D/B/a Beaches Bodyworks, Jeff Stucki,  
and Leisa Metcalf Plaintiffs/Appellants vs. Utah Department of  
Commerce, Division of Occupational and Professional Licensing  
Defendant/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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Zen Healing Arts, L.L.C., d/b/a  
Beaches Bodyworks, Jeff Stucki,  
and Lisa Metcalf,

*Plaintiffs-Appellants,*

v.

Utah Department of Commerce,  
Division of Occupational and  
Professional Licensing,

*Defendant-Appellee.*

No. 20160241

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BRIEF OF APPELLEE UTAH DEPARTMENT OF COMMERCE,  
DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

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On appeal from the Third Judicial District Court  
The Honorable Barry Lawrence  
No. 120900860

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## STATEMENT OF JURISDICTION

The Supreme Court transferred this matter to the Court of Appeals, which has appellate jurisdiction to review the district court's judgment under Utah Code § 78A-4-103(2)(j).

## ISSUES PRESENTED

1. Did the district court err in concluding that Utah law does not require an agency to transcribe any audio recordings that are part of the administrative rule-making record?

Statutory interpretation is a legal question reviewed for correctness. *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 12, 267 P.3d 863. The issue was preserved below. R. 383-86, 732-34.

2. Is the district court's final judgment dismissing Plaintiffs' claims inconsistent with prior rulings in this case (and does that matter)?

Interpreting court orders is a legal question reviewed for correctness. *Stevensen v. Goodson*, 924 P.2d 339, 346 (Utah 1996). The issue was preserved below. R. 1300-04, 1491-93.

3. Does the challenged administrative rule go beyond the scope of the Massage Therapy Practice Act or violate the United States Constitution?

The validity of an administrative rule presents a legal question reviewed for correctness. *Newspaper Agency Corp. v. Dep't of Workforce Servs.*, 1999 UT App 222, ¶¶ 8, 10, 984 P.2d 399. Plaintiffs arguably



preserved at least some of the arguments they make related to this issue.

*See, e.g.*, R. 255-72, 365-66.

## **DETERMINATIVE PROVISIONS**

Utah Code § 58-47b-102(6):

Relevant versions of this statute defining “practice of massage therapy” are quoted and discussed in the brief.

Utah Admin. Code R.156-47b-102(10):

“Manipulation’, as used in Subsection 58-47b-102(6)(b), means contact with movement, involving touching the clothed or unclothed body.”

## **STATEMENT OF THE CASE AND FACTS**

This case originally arises from citations the Division of Occupational and Professional Licensing (DOPL) issued to the individual Plaintiffs Jeff Stucki and Leisa Metcalf for violating the Massage Therapy Practice Act (Act). But the appeal now focuses on a challenge to an administrative rule—promulgated after the citations were issued—that defines manipulation for purposes of the practice of massage therapy. Given the narrowed focus on appeal, relatively few facts need to be rehearsed to assist the Court in resolving the matter.

### **Legal background**

DOPL enforces the Act. Utah Code §§ 58-47b-101 *et seq.* The Act requires a person to be licensed before she can charge or receive payment “for

providing a service that is within the practice of massage therapy.” Utah Code § 58-47b-301(2)(c). In 2011, when Plaintiffs were cited, the Act defined the “practice of massage therapy” in relevant part as:

(b) the systematic manual or mechanical manipulation of the soft tissue of the body for the purpose of:

- (i) promoting the health and well-being of a client;
- (ii) enhancing the circulation of the blood and lymph;
- (iii) relaxing and lengthening muscles;
- (iv) relieving pain;
- (v) restoring metabolic balance;
- (vi) achieving homeostasis; and
- (vii) recreational or other purposes;

. . . .

(f) oil rubs, heat lamps, salt glows, hot and cold packs, or tub, shower, steam, and cabinet baths.

Utah Code § 58-47b-102(6) (Westlaw 2011).

The Act exempts various other professionals (health care providers, athletic trainers, therapists, etc.) and gratuitous massages from the licensing requirement. Utah Code § 58-47b-304. More generally, the Utah Code allows licensees in an occupation lawfully to practice their profession without having to obtain licensure for other occupations. Utah Code § 58-1-307(3).

DOPL, with input from the Board of Massage Therapy, has rulemaking authority. Utah Code §§ 58-1-202(1)(a), -203(1)(c); *id* § 63G-3-201. In 2012, DOPL promulgated a rule (Rule) defining “manipulation” for purposes of the “practice of massage therapy” in subsection 58-47b-102(6)(b), as “contact with

movement, involving touching the clothed or unclothed body.” Utah Admin. Code R.156-47b-102(10).<sup>1</sup>

### **The DOPL citations**

DOPL received a complaint in August 2011 that Zen Healing Arts, LLC, dba Beaches Bodyworks, was giving massages without licensed massage therapists. Plaintiff's Exh. 1, Sept. 14, 2014 Exh. List. The complaint prompted an investigation. After investigating and discussing the situation with Plaintiffs, DOPL issued a cease and desist citation to Plaintiff Leisa Metcalf, a Zen Healing Arts, LLC, employee, for practicing massage therapy without a license. Plaintiff's Exh. 2-4, Sept. 14, 2014 Exh. List. DOPL also issued a cease and desist citation to Plaintiff Jeff Stucki, Zen Healing Art, LLC's owner, for hiring unlicensed massage therapists. Plaintiff's Exh. 2, Jan. 25, 2016 Exh. List. Both citations were issued in September 2011, before DOPL enacted the Rule.

### **Administrative and judicial proceedings**

Plaintiffs challenged the citations administratively. An administrative hearing officer upheld the citations in October 2011, as did the Department of Commerce in March 2012. R. 138-49. The Department's ruling found the

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<sup>1</sup> DOPL gives the current citation for the Rule. When first enacted, the Rule was located in R.156-47b-102(8). The Rule has not changed.



citations were justified by the Act alone without reference to the Rule. R. 146.

Plaintiffs then sought judicial review of the Department's decision by filing a complaint in the district court. R. 1-13. Plaintiffs later amended the complaint to include a challenge to the Rule. R. 122-152. After receiving testimony from various witnesses at trial, and based on the applicable law, the district court upheld the individual Plaintiffs' citations for violating the Act's licensing requirements. R. 1272-89. The court found ample evidence proving that Ms. Metcalf had practiced massage therapy without a license and that Mr. Stucki had hired persons practicing massage therapy without a license. R. 1277-86.

Turning to the Rule, the district court first determined Plaintiffs had standing to challenge the Rule even though it was enacted after they received their citations. R. 1289-90, ¶¶ 64-66. On the merits, the court concluded that the Rule was valid: the definition of manipulation merely clarified the Act rather than enlarging it. R. 1292, ¶¶ 72-73. The Court reviewed the evidence supporting the Rule and rejected Plaintiffs' arguments that the Rule swept too broadly and would be used to regulate sexually oriented businesses or innocuous, incidental human touching. R. 1293-94, ¶¶ 75-80. The Court emphasized that the Act limited massage therapy to the payment for

systematic manipulation of soft tissue for a statutorily enumerated purpose.

R. 1294, ¶¶ 81-82.

The district court issued its Findings of Fact and Conclusions of Law on November 13, 2015. R. 1270. Plaintiffs filed several post-trial motions, which the court denied on February 18, 2016. R. 1489-1500. The district court entered final judgment that same day. R. 1501. Plaintiffs timely appealed. R. 1503-04.

### SUMMARY OF THE ARGUMENT

Plaintiffs fail to show that the district court erred in upholding the Rule and dismissing their claims. First, Plaintiffs seemingly argue that the Rule is not supported by substantial evidence as a matter of law. Their argument hinges on the notion that DOPL had the burden to prove substantial evidence existed but failed to do so because DOPL did not transcribe several audio recordings that were part of the administrative record, all of which prevented the district court from reviewing the entire record. This argument is wrong in every respect.

Plaintiffs, not DOPL, bear the burden of proof on a substantial evidence challenge. They must marshal all of the facts in support of the Rule and show the Rule still lacks substantial evidence. The applicable law required DOPL only to produce the Rule's administrative record, which includes audio recordings. DOPL did this. Nothing demands that DOPL then transcribe

audio recordings for Plaintiffs' use. Likewise, the district court need only review the relevant findings to determine if they are reasonable and rational. It has no duty to, and cannot, independently assess and reweigh the evidence from the entire record. Plaintiffs cannot foist its burdens onto DOPL and the district court in hopes of winning a substantial evidence challenge by default.

Here, the district court highlighted the substantial evidence supporting the Rule. Plaintiffs do not marshal the evidence, nor show that the supporting evidence is not substantial. Their substantial evidence challenge should be rejected on the law and the facts.

Second, Plaintiffs argue the district court's final judgment dismissing their claims is inconsistent with prior partial summary judgment orders and/or the court's determination about the conduct to which the Act applies. This argument also lacks merit. As an initial matter, no district court is bound by its prior orders. Plaintiffs' inconsistency arguments, even if factually accurate, are legally irrelevant.

Moreover, the final judgment dismissing Plaintiffs' claims is wholly consistent with the court's prior rulings or findings. In relevant part, Plaintiffs requested a declaratory judgment that the Rule was invalid. The court interpreted the prior orders on partial summary judgment to mean that the Rule could not allow DOPL to expand the scope of the Act. The court subsequently found that the Rule did not do so, and that the Act—regardless



of the Rule—prohibited the Plaintiffs’ cited conduct. The court also outlined the type of conduct to which the licensing requirements for the practice of massage therapy applied—receiving payment for systematic manipulation of soft tissue for a statutorily enumerated purpose. That’s the conduct for which Plaintiffs’ were cited. Dismissing Plaintiffs’ claims for declaratory relief is consistent with these rulings. The final judgment does not negate the court’s determinations. Rather those determinations lead directly to the final judgment. Plaintiffs are not entitled to some other declaratory judgment relief.

Finally, Plaintiffs allege various reasons the Rule is invalid: it’s arbitrary and capricious, beyond the Act’s scope, unconstitutionally vague or overbroad. But for the most part, Plaintiffs do not adequately brief these arguments. The Court could reject them for this reason alone. Even addressing the merits, however, Plaintiffs fail to show the Rule is invalid.

The Rule fits well within the scope of the Act. The Rule defines manipulation as “contact with movement, involving touching the clothed or unclothed body.” That definition is consistent with the plain meaning of the term and with massage therapy practices, which recognize light touch massage as an accepted modality called effleurage. It is also consistent with the Act’s provisions outlining the practice of message therapy for various

purposes. Nothing in the Act suggests the Rule's definition of manipulation goes too far.

The Rule is not arbitrary or capricious, to the extent that's even a valid argument in this context. The district court found that the Rule was intended to "broadly define massage therapy to reflect the generally accepted notions of massage therapy," including effleurage, and to exclude Reiki, which involves touching but no movement. The Rule was further intended to protect the integrity of the massage industry and to distinguish that industry from sexually oriented businesses. Plaintiffs have not contradicted these findings. These purposes are reasonable and rationally related to the express language and purposes of the Act, and the legislature's purposes in regulating the massage therapy industry.

The Rule is not overbroad under the First Amendment. As an initial matter, it seems doubtful that massages invoke First Amendment protections. The overbreadth doctrine does not apply to commercial speech. Regardless, the Rule satisfies any potentially applicable test. It satisfies the *O'Brien* overbreadth test, when "speech and nonspeech elements are combined in the same course of conduct," because the Rule (1) is within the constitutional power of the State; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged

First Amendment freedoms is no greater than is essential to the furtherance of that interest. The Rule also satisfies the more general overbreadth test because it (1) does not reach a substantial amount of constitutionally protected conduct, and (2) the statute is not readily subject to a narrowing construction.

The Rule is not unconstitutionally vague. Plaintiffs lack standing to make this argument because their conduct was clearly proscribed by the Act (indeed, Plaintiffs no longer challenge their citations). Regardless, the Rule is not vague because it gives appropriate notice to those who must be licensed and it does not encourage arbitrary enforcement.

For all of these reasons, the district court's judgment should be affirmed.

## ARGUMENT

The district court properly upheld the Plaintiffs' administrative citations and the validity of the Rule. On appeal, the Plaintiffs no longer appear to challenge their citations. Instead, their arguments largely focus on challenging the Rule.<sup>2</sup> None of Plaintiffs' arguments undermines the district court's decisions.

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<sup>2</sup>The district court held that Plaintiffs had standing to challenge the Rule even though it was promulgated after, and played no role in, their administrative citations. R. 1289-90, ¶¶ 64-66. Only persons "aggrieved" by a rule may seek judicial review thereof. Utah Code § 63G-3-602(1)(a). To be



**I. Plaintiffs Failed To Prove The Rule Is Not Supported By Substantial Evidence Based on DOPL's Production of Audio Recordings as Part of the Administrative Record.**

Plaintiffs first argue that the Rule is not supported by substantial evidence. But it is more of a legal argument than evidentiary. They claim DOPL failed its burden to prove the Rule was supported by substantial evidence because DOPL never produced a written transcript of the audio recordings from the administrative record under Utah Code § 63G-3-602(3) thereby preventing the district court from fulfilling its obligation to review the entire record under subsection 602(4). *See* Aplt. Br. at 28-29. The conclusion and each premise of this argument are wrong.

As an initial matter, subsection 602(4) doesn't support Plaintiffs' argument. The section says merely that the district court "may" declare a rule void if the court finds "the rule is not supported by substantial evidence when viewed in light of the whole administrative record." Utah Code § 63G-3-602(4)(a)(ii). This provision does not allow (much less compel) the district court to independently review and reweigh the entire record. "[I]n

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"aggrieved" means that Plaintiffs must show they have "suffered some distinct and palpable injury that gives [them] a personal stake in the outcome of the legal dispute." *Salt Lake City Corp. v. Property Tax Div. of Utah State Tax Comm'n*, 979 P.2d 346, 351 (Utah 1999). DOPL doubts whether the Rule has caused or will cause the Plaintiffs any distinct or palpable injury considering they were cited before the Rule was enacted and Zen Healing Arts is not currently operating. In other words, it remains unclear what services Plaintiffs believe they could legally provide before the Rule was enacted that the Rule now prohibits.

determining whether a rule is supported by substantial evidence, courts must decide if the relevant findings were reasonable and rational, although such an assessment does not constitute a de novo review or a reweighing of the evidence.” *Associated Gen. Contractors v. Bd. of Oil, Gas and Mining*, 2001 UT 112, ¶ 21, 38 P.3d 291 (internal quotation marks omitted). And, per the section’s plain language, only a finding of no substantial evidence must be made in light of the whole record. The district court was able to find substantial evidence with the record presented to it.

Contrary to Plaintiffs’ arguments, the party challenging a rule on substantial evidence grounds “must marshal all of the evidence supporting the findings and show that despite the supporting facts, the . . . findings are not supported by substantial evidence.” *Id.* (internal quotation marks omitted). In short, Plaintiffs bear the burden of proving the Rule lacked substantial evidence in light of the entire record. Neither DOPL nor the district court had any duty to do Plaintiffs’ job.

Similarly, DOPL had no duty to create written transcripts of relevant audio recordings. To be sure, DOPL must “file the administrative record of the rule, if any, with its” pleading responding to Plaintiffs’ rule challenge. Utah Code § 63G-3-602(3)(b)(iii). But that doesn’t require DOPL to create and file transcripts of any Rule-related audio recordings. Indeed, the Rulemaking Act defines the “administrative record” as including “the public

comment received and *recorded* by the agency.” *Id.* § 63G-3-102(1)(b) (emphasis added). The statute expressly contemplates that recordings may be part of the administrative record provided by the agency. Plaintiffs acknowledge that DOPL produced the relevant audio recordings. *Aplt. Br.* at 25. The statutes require nothing more. R. 732-34.

In analogous circumstances, the rules of appellate procedure put the burden on the appellant to include the transcript in the record when challenging the sufficiency of the evidence. Utah R. App. P. 11(e)(2). The rules emphasize that “[n]either the court nor the appellee is obligated to correct appellant’s deficiencies in providing the relevant portions of the transcript.” *Id.* So too here. If Plaintiffs wanted to use the audio recordings as part of their substantial evidence argument, it was Plaintiffs’ duty to transcribe the recordings and point the district court to any parts of the transcript Plaintiffs believed supported their argument.

The Court should reject Plaintiffs’ attempt to reverse the burdens of proof and prevail by default on substantial evidence grounds. The argument lacks any legal basis.

And it’s also clear that Plaintiffs could not prevail on a more traditional fact-based substantial evidence challenge. Here, both the district court’s opinion and the Plaintiffs’ brief highlight substantial evidence supporting the Rule. R. 1273, ¶¶ 3-4; *id.* 1291, ¶ 69; *Aplt. Br.* at 26-27. Plaintiffs—not



DOPL or the district court—had the burden to marshal all of the evidence supporting the Rule and prove it still lacks substantial evidence. *Associated Gen. Contractors*, 2001 UT 112, ¶¶ 21, 32. The Plaintiffs failed to do so below or on appeal.<sup>3</sup> They do not marshal all of the supporting facts, much less show how DOPL's or the district court's findings lack substantial evidence. *See id.* ¶¶ 33-34. Accordingly, the Plaintiffs' substantial evidence argument must be rejected. *Id.* ¶ 32 ("If a party fail[s] to satisfy [its] burden of marshaling the evidence and showing that the [agency]'s finding[s][are] not supported by substantial evidence, we [will] affirm the [agency]'s findings." (internal quotation marks omitted)).

## **II. The District Court's Judgment Is Not Inconsistent, and Plaintiffs Are Not Entitled to Any Relief.**

Plaintiffs appear to argue that the district court's final judgment dismissing Plaintiffs' claims contradicts certain prior rulings from the court. *Aplt. Br.* at 41-42. Specifically, Plaintiffs assert the final judgment rejects prior partial summary judgment rulings about the Rule's scope and findings about what constitutes the practice of massage therapy. *Id.* at 39-42. Plaintiffs insist they are entitled to a declaratory judgment endorsing those rulings. *Id.* at 42. These arguments lack merit.

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<sup>3</sup> Plaintiffs mention a motion to strike some expert testimony. *Aplt. Br.* at 27-28. But they haven't raised the presumed denial of that motion as an issue on appeal, nor have they substantively argued the point in their brief. *Id.* The argument is therefore waived.

First, the premise of Plaintiffs' argument—that the district court is bound by its prior interlocutory orders—is wrong. The rules of civil procedure expressly state that interlocutory orders “may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Utah R. Civ. P. 54(b). “As long as the case has not been appealed and remanded, reconsideration of an issue before a final judgment is within the sound discretion of the district court.” *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588. Thus, final judgments do not have to be consistent with prior non-final rulings. And arguing inconsistency on that ground, as Plaintiffs do, is legally irrelevant and does not warrant reversal.

Second, even if it mattered, the final judgment is consistent with the court's prior rulings. As Plaintiffs (and the district court) explained, the court entered an order granting partial summary judgment that it later clarified. Aplt. Br. at 32-34; R. 741-45, 971-72, 1292, 1492-93. In relevant part, the orders as amended determined that the Rule's definition of manipulation did not run afoul of the Massage Therapy Practice Act and that DOPL “may, within the scope of the Act, define the range of activities that a therapist is allowed to do or is prohibited from doing.” R. 744, 972, 1493. The orders also stated, “the Division may not define the scope of activities, including manipulation, of individuals that are not licensed massage therapists or

holding themselves out, by word or act, as massage therapists.” R. 972, 1493. The court later explained that these orders simply meant that “a rule may not empower DOPL to regulate people or conduct that the legislature has not permitted,” R. 1292, ¶ 72, and that the Rule “could not be interpreted in a manner which would expand the scope of the” Act. R. 1493.

Both the district court’s Findings and Conclusions and its Post-Trial Order held that the Rule did not expand the Act; the Rule clarified the Act by emphasizing that it may properly be applied to persons “offering light touch massage services for a fee.” R. 1293; *see also id.* 1292, ¶ 73. These conclusions are entirely consistent with the partial summary judgment orders and lead inexorably to the court’s final judgment dismissing Plaintiffs’ declaratory judgment challenging the Rule.

Likewise, the court’s ruling outlining the elements of massage therapy requiring a license does not contradict the final judgment or require affirmative relief. Consistent with the Act, the court explained that the practice of message therapy requires (1) payment for (2) systematic (3) manipulation of soft tissue (4) for one of the purposes identified in the Act. R. 1294, ¶ 82. Plaintiffs appear to argue that the final judgment dismissing their claims negates or otherwise reduces to dicta the district court’s findings about the elements of message therapy. Aplt. Br. at 40-42. But that is not true.

The judgment dismissing Plaintiffs' claims does not undermine the court's findings and conclusions supporting the judgment. Those determinations apply to the parties unless altered on appeal or by amending the statute. The judgment of dismissal merely reflects the fact that Plaintiffs failed to show any available grounds for declaratory relief under the applicable statute.

By law, the district court may "grant relief to" someone challenging a rule by "declaring the rule invalid, if the court finds" that: (1) "the rule violates constitutional or statutory law or the agency does not have legal authority to make the rule"; (2) "the rule is not supported by substantial evidence when viewed in light of the whole administrative record"; or (3) "the agency did not follow proper rulemaking procedure." Utah Code § 63G-3-602(4)(a).<sup>4</sup> Plaintiffs' amended complaint requested, in relevant part, "declaratory relief specifically finding that the Rule [is] arbitrary, capricious, discriminatory and burdensome and . . . unconstitutional." R. 131, ¶ 25. For the reasons explained more fully below, the district court did not find that the Rule was unconstitutional or otherwise invalid. The court therefore had no other choice under the governing statute but to dismiss Plaintiffs' claim requesting a declaratory judgment that the Rule was invalid.

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<sup>4</sup> Section 602(4) authorizes other forms of relief but they are not relevant here because Plaintiffs argue only that the district court should have granted them some type of declaratory judgment. Aplt. Br. at 42.



Plaintiffs invoke the more general Declaratory Judgment Act to argue that they are still entitled to a judgment declaring their rights and responsibilities. Aplt. Br. at 42. Even assuming that statute applies,<sup>5</sup> it does not compel the district court to issue a declaratory judgment here. Rather, the Declaratory Judgment Act says a “district court has the power to issue declaratory judgments determining rights, status, and other legal relations.” Utah Code § 78B-6-401(1). But the power to issue a declaratory judgment does not compel that the power be used whenever requested.<sup>6</sup> That’s especially true here because the Plaintiffs’ did not prove their entitlement to their requested relief—a declaration that the Rule was unconstitutional or otherwise invalid. Indeed, the district court rejected that argument in its conclusions of law: “The Rule promulgated by DOPL defining ‘manipulation’ . . . is a valid exercise of DOPL’s rulemaking authority and is upheld.” R. 1296. In effect, Plaintiffs got a declaration of their rights vis-à-vis the Rule,

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<sup>5</sup> The Administrative Rulemaking Act, and section 63G-3-602(4) in particular, is the more specific provision governing declaratory relief in the context of administrative rule challenges. It therefore applies here and prevails over the more general Declaratory Judgment Act. *See, e.g., Williams v. Pub. Serv. Comm’n*, 754 P.2d 41, 48 (Utah 1988).

<sup>6</sup> For example, the statute expressly states that the court may refuse to enter declaratory relief if a judgment would not terminate the parties’ dispute. *Id.* § 78B-6-404; *see also Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 882 (Utah 1996) (“The statute gives a trial court discretion to either grant or deny a party’s declaratory judgment action by virtue of the statute’s use of the word ‘may.’”).

they just don't like it. But that doesn't mean they are entitled to a more palatable judgment.

In sum, the final judgment is not inconsistent with prior interlocutory orders and the Plaintiffs are not entitled to a declaratory judgment.

### **III. The Rule Is Valid And Plaintiffs Have Not Shown Otherwise.**

Plaintiffs' next argument section alleges the Rule is invalid for various reasons: it's arbitrary and capricious, beyond the Act's scope, or violates the First Amendment as overbroad or unconstitutionally vague. (Plaintiffs do not appear to challenge DOPL's authority to make, or procedures in adopting, the Rule). Although Plaintiffs' arguments encompass fifteen pages, they are not clearly defined or briefed. Plaintiffs do not cite to any authorities on rulemaking or their burdens to challenge successfully a rule. They do not articulate whether they bring an as-applied or a facial constitutional challenge.

Moreover, throughout their argument, Plaintiffs misstate their burden. They assert, without citation to authority, that it is the State's burden to show that the Rule was not arbitrary or capricious and that it is constitutional. But the opposite is true. As the parties challenging the Rule, Plaintiffs had the burden to show that the Rule is arbitrary, capricious, outside statutory authority, or unconstitutional. *State v. MacGuire*, 2004 UT 4, ¶ 8, 84 P.3d 1171 (“[T]hose who challenge a statute . . . as unconstitutional

bear a heavy burden demonstrating its unconstitutionality.” (internal quotations omitted)); *Associated Gen. Contractors*, 2001 UT 112, ¶ 21 (challenging party has duty to marshal the evidence and show the rule is not supported by substantial evidence).

Plaintiffs have not meaningfully briefed all of their arguments challenging the Rule’s validity and the Court could affirm the district court for that reason alone. But to the extent any of the validity arguments are adequately briefed, they still fail as discussed below. Plaintiffs have not satisfied their burden of proof and persuasion.

**A. The Rule conforms to the Act.**

Plaintiffs fail their burden to show the Rule is outside the scope of the Massage Therapy Practice Act (the “Act”). Agency rules must be consistent with the agency’s governing statutes. *Crossroads Plaza Ass’n v. Pratt*, 912 P.2d 961, 965 (Utah 1996). Courts grant agency rules a presumption of validity in determining whether they are consistent with their governing statutes. *Newspaper Agency Corp. v. Dep’t of Workforce Servs.*, 1999 UT App 222, ¶ 12, 984 P.2d 399. Moreover, “[r]ules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.” *Crossroads Plaza*, 912 P.2d at 965.

When a rule is challenged on the grounds that it violates a statute, courts apply its existing standards of review in the absence of a legislative pronouncement to the contrary. The agency's conclusions of law are reviewed for correctness. *Associated General Contractors*, 2001 UT 112, ¶ 18. Agency conclusions regarding mixed findings of fact and law or ultimate facts are given great deference and will not be set aside unless they are not rationally based or are "imposed arbitrarily and capriciously or are beyond the tolerable limits of reason." *Id.* (quoting *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988)).

The arbitrary and capricious standard also applies when the agency "is otherwise in a better position than the courts to assess the law due to its experience with the relevant subject matter." *Id.* ¶ 18. For example, in *Associated General Contractors*, the Utah Supreme Court deferred to the Board of Oil, Gas, and Mining's definitions of terms like "sand, gravel, and rock aggregate." *Id.* ¶ 19. The terms, which were not defined in the statute, "were scientific and technical in nature" and concerned a subject matter that "courts address only occasionally but that the Board and the Division handled regularly." *Id.* The court recognized that this expertise and authority placed the "Board in a better position than the judiciary" to interpret and define industry-specific terms. The court therefore determined

the appropriate standard of review was whether the adopted definitions were arbitrary or capricious.<sup>7</sup> *Id.*

Here, DOPL has statutory authority to promulgate rules that effectuate the regulation of massage therapy. Utah Code §§ 58-47b-201, 58-1-202, 13-1-6. Pursuant to that authority and in reliance on its expertise in the field of massage therapy, DOPL defined the term “manipulation,” as used in section 58-47-102(6)(b) of the Act, as “contact with movement, involving touching the clothed or unclothed body.” Utah Admin. Code R.156-47b-102(10). That definition includes light touch massage. The district court found that this definition was consistent with the practice of massage therapy because light touch massage is a “recognized modality of massage called ‘effleurage.’” R. 1281, 1292. It is also consistent with the plain meaning of manipulation, which is to treat or operate with or as if with the hands . . . especially in a skillful manner.” *Merriam-Webster*, “manipulate”,

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<sup>7</sup> The Utah Supreme Court’s recent decision in *Ellis-Hall Consultants v. Public Service Comm’n*, 2016 UT 1270, 379 P.3d 1270 does not alter this standard. There, the Court held that it would interpret agency regulations as a matter of law without affording any deference to the agency’s interpretation of its own rules. *Id.* ¶ 31-32. But that holding applied to the agency’s interpretation of its previously adopted rules when it was applying them to the adjudication of a dispute between parties. *Id.* The Court did not address the agency’s authority to determine the best definition of technical terms during the rulemaking process. Those decisions remain, and should remain, subject to deference as the relevant agency is in the best position to determine the appropriate meaning of technical terms during its rulemaking process.



available at <https://www.merriam-webster.com/dictionary/manipulation> (last visited 12/14/16). Plaintiffs have not cited anything to contradict this definition or the district court's findings. In fact, its own expert agreed that light touching could constitute massage. R. 1281.

DOPL's definition should be given deference as it has the expertise and is in the best position to determine what types of manipulation fall within the scope of massage therapy as it is practiced and taught. But under any standard of review, the district court correctly held that DOPL's Rule merely clarified the Act because the Act already included not only deep pressure massages, but also medium pressure massages and light touch massages. R. 1282.

The language of the Act supports DOPL's and the district court's interpretation. The subsection at issue defines "massage therapy" as:

- (b) the systematic manual or mechanical manipulation of the soft tissue of the body" for the purpose of:
  - (i) promoting the therapeutic health or well-being of a client;
  - (ii) enhancing the circulation of the blood and lymph;
  - (iii) relaxing and lengthening muscles;
  - (iv) relieving pain
  - (v) restoring metabolic balance;
  - (vi) achieving homeostasis; or
  - (vii) other purposes.

Utah Code 58-47b-102(6)(b) (West 2012). Moreover, the Act defines "soft tissue" as "the muscle and related connective tissue." The district court found

that in the massage therapy profession that includes skin. R. 1283.

Plaintiffs' own expert's testimony supported this finding, and Plaintiffs do not dispute it.

Nothing in this definition's language suggests that the legislature intended to exclude light touch massage, require the application of a particular amount of pressure, or limit massage therapy to one particular method of massage. And the expansive list of purposes, including the phrase "other purposes," indicates the legislature intended to include manipulation for more purposes than just those that can be achieved through the application of medium to deep pressure.

Further, the definition at issue is only one of the meanings of massage therapy in the Act. The remaining definitions further indicate the legislature did not intend to regulate only a particular type of massage but rather meant to include a number of practices within the scope of the Act. In addition to the definition cited above, "massage therapy" includes evaluating the soft tissues to promote homeostasis, using rehabilitative procedures on the soft tissues, performing oil rubs, using heat lamps and salt glows, performing manual traction and stretching exercises, and counseling and services to reduce incidents of movement dysfunction and pain. It additionally includes "similar or related activities and modality techniques," *id.* § 58-47b-102(6)(j), and providing, offering, or advertising "a paid service using the term massage

or a derivative of the word massage.” *Id.* § 58-47b-102(6)(l). These subsections further indicate a light touch massage falls within the scope of the Act, even without the definition of “manipulation” in the Rule.

Plaintiffs argue that legislative history supports its argument that the definition in the Rule is outside the scope of the Act because the legislature intended to include only massage for “therapeutic purposes.” Plaintiffs do not explain how the term “therapeutic” excludes light touch massages. But, regardless, the legislative history does not support Plaintiffs’ position.

Prior to 2011, the Act required manipulation to be for the “therapeutic purpose” of one of the specifically enumerated items in the statute. *See* H.B. 243 Enrolled Copy, Appt. Br. Addendum D, at R. 276. In 2011, the legislature amended that Act to remove that term. *Id.* At the same time, it inserted the category “recreational or other purposes” as one of the enumerated purposes under section 58-47b-102(6)(b). *Id.* While the term “therapeutic” has since been reinserted, it is not in the same location it once occupied. Appt. Br. Addendum D, at R. 287. It no longer prefaces (and qualifies) the list of statutory purposes, but instead appears only in one enumerated purpose, Utah Code § 58-47b-102(6)(b)(i). This indicates that massage must be therapeutic only if used for the purpose of promoting the “health and well-being of a client” and not for the other purposes on the list. *Id.* Moreover, in that same session, the legislature elected to retain the term “other purposes.”

*Id.* 58-47b-102(6)(b)(vii). It also added another definition to the term “practice of massage therapy,” which states that providing, offering, or advertising “a paid service using the term massage or a derivative of the word massage” fell within the scope of conduct regulated by the Act. *Id.* § 58-47b-102(6)(l). Both changes suggest that the legislature did not intend to limit the Act to therapeutic massage.

Plaintiffs also assert the legislature rejected the Rule because an early draft of the bill with the 2012 amendments included DOPL’s definition, but it was removed before the bill passed. Plaintiffs cite no evidence that this language was rejected because the legislature disagreed with DOPL’s definition. While an earlier version of the bill included a definition of “manipulation,” that language was removed while the bill was still in committee. It was not removed because of a disagreement with the definition or the inclusion of light touch massage, but under pressure from chiropractors who did not like other professions using that term. H.B. 114, House Business and Labor Committee, Feb. 6, 2012, at 1:44 (Rep. T. Cosgrove), *available at* [http://utahlegislature.granicus.com/MediaPlayer.php?view\\_id=25&clip\\_id=618](http://utahlegislature.granicus.com/MediaPlayer.php?view_id=25&clip_id=618). Before the motion passed to remove the language, the Director of DOPL testified that DOPL already had its own rule defining manipulation the same way as had been proposed. *Id.* at 1:53 (M. Steinagel). Neither the committee nor the legislature expressed

concern with this meaning or DOPL's interpretation or enforcement of the Act.

The history of the Act indicates that the legislature wanted to cast a broad net to prevent businesses from performing massage and competing with massage therapists without first becoming licensed. It also wanted to distinguish legitimate massage practitioners from persons using massage as a front for illegal commercial sexual activity. *Id.*; *see also* H.B. 114, Senate Business and Labor Committee, Feb. 14, 2012, at 15:01, available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=879&meta\\_id=33643](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=879&meta_id=33643); HB 114, Massage Therapy Amendments, 2012 General Legislative Session, House Day 19 at 5:17 (R. T. Cosgrove) (bill meant to prevent unlicensed businesses from using loopholes to compete with properly licensed practitioners), *available at* [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=759&meta\\_id=30107](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=759&meta_id=30107); HB 114, Massage Therapy Amendments, 2012 General Legislative Session, Senate Day 29, at 23:50 (S. A. Osmond) (bill meant to protect massage therapy profession and to prevent individuals from opening a business that looked like a massage-type business (but was not licensed) as a front for prostitution or illegal activities), *available at* [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=1044&meta\\_id=39070](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=1044&meta_id=39070).



Plaintiffs have not cited any evidence that the legislature rejected DOPL's definition of manipulation or its interpretation of the Act. If the legislature or committee determined DOPL's definition was beyond the scope of the Act, it could have passed language clarifying that massage therapy excluded light touch massage or otherwise required more than systematic touch with movement for an enumerated purpose. The fact it did not do so supports the district court's determination that DOPL's definition merely clarified the Act and is not beyond the scope of DOPL's authority.

**B. The Rule is not arbitrary and capricious (or irrational).**

Plaintiffs suggest the Rule is arbitrary or capricious. Aplt. Br. at 42. But that is not an expressly recognized ground for declaring the Rule invalid. Utah Code § 63G-3-602(4)(a). DOPL assumes Plaintiffs allege the Rule is irrational for constitutional purposes. Aplt. Br. at 55.

Whatever Plaintiffs precise theory is, they cannot show that the Rule is irrational (or arbitrary and capricious). The district court found that the Rule was intended to "broadly define massage therapy to reflect the generally accepted notions of massage therapy," including effleurage, and to exclude Reiki, which involves touching but no movement. R. 1291. The Rule was further intended to protect the integrity of the massage industry and to distinguish that industry from sexually oriented businesses. R. 1293. Plaintiffs have not contradicted these findings. These purposes are

reasonable and rationally related to the express language and purposes of the Act, and the legislature's purposes in regulating the massage therapy industry. *See supra* discussion of legislative history; *see also* H.B. 243, 2011 Gen. Leg. Sess., House Floor Video Day 19, at 36:20 (Rep. Marley), *available at* [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=17384&meta\\_id=513259](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=17384&meta_id=513259); *id.* at Day 30 (Rep. Marley), at 22:30, *available at* [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=17415&meta\\_id=513967](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=17415&meta_id=513967).

Plaintiffs rely on *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah) and *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Calif. 1999) to assert the Rule requires unnecessary training and is therefore arbitrary. But Plaintiffs are not in the same position as the practitioners of African hair braiding in those cases. Both *Clayton* and *Cornwell* asserted equal protection claims, which have not been raised or briefed by Plaintiffs. Moreover, those cases found cosmetology licensing requirements for African hair braiding to be irrational because the hair braiders did not use heat, coloring, chemical treatments, or cutting, or other tools or methods general employed by cosmetologists, and the cosmetology curriculum and test covered little, if anything, related to African hair braiding. In contrast, light touch massage, or effleurage, is a recognized modality of massage therapy taught in massage therapy schools. R. 1292, 402-403. The relationship and balance of power

between the practitioner and client are similar R. 402. The difference between light touch massage and medium or deep massage, which Plaintiffs admit are included within the scope of the Act, is a matter of the degree. Light touch massage is not something that can be easily carved out and distinguished from a general massage therapy practice in the way that hair braiding can from a cosmetology practice. And, regardless of the amount of pressure, the State has the same interest to require licensing to protect the integrity of the massage therapy profession and prevent it from becoming associated with prohibited commercial sexual activity. R. 1293. Plaintiffs may disagree with the legislature's or DOPL's policies, but they cannot show the Rule is irrational.

The district court correctly found that the Rule has a reasonable and rational relationship to the Act. R. 1294. This Court should affirm the district court's holding that it was a valid exercise of DOPL's rulemaking authority. R. 1296.

**C. The Rule does not violate the First Amendment and is not overbroad.**

Plaintiffs suggest the Rule "sweeps within its ambit much constitutionally protected conduct or speech." Aplt. Br. at 42. While non-verbal, expressive conduct has been accorded First Amendment protection, not all conduct qualifies as protected expression. *Mini Spas, Inc. v. South*

*Salt Lake City Corp.*, 810 F.2d 939, 941 (10<sup>th</sup> Cir. 1987). Here, Plaintiffs admit that massage is not speech under the First Amendment. Apl't. Br. at 42. Even if it were, Plaintiffs' challenge fails because the Rule passes the applicable test and is not overbroad.

**1. The rule survives intermediate scrutiny under *United States v. O'Brien*.**

There is a four-part test for determining the validity of content-neutral limitations on First Amendment freedoms when "speech and nonspeech elements are combined in the same course of conduct." *Mini Spas*, 810 F.2d at 941 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). A regulation is valid

(1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*O'Brien*, 391 U.S. at 377.

Plaintiffs do not even attempt to address this standard in their brief. Even if they did, the Rule easily passes scrutiny under the *O'Brien* test. First, Plaintiffs do not dispute that the state has the authority to impose licensing requirements or regulate the practice of professions. *In re Primus*, 436 U.S. 412, 422 (1978). Here, it has delegated that authority to the Board of Massage Therapy and DOPL through the Act. Utah Code § 58-47b-201.

The state also has the authority to regulate prostitution and prevent businesses from being used as a cover for that purpose. *Mini-Spas*, 810 F.2d at 941.

Second, the Rule furthers important and substantial government interests. The state's interests in protecting massage therapy as a profession and in suppressing illegal sexual conduct are substantial and important. *Mini-Spas*, 810 F.2d at 941. The Rule furthers those interests by requiring those who wish to engage in massage therapy, even if it is light touch, to have a license.

Third, the Rule is unrelated to the suppression of free expression. By its terms, the Rule only regulates conduct. It requires persons who engage in manipulation and meet the other requirements under the Act to first obtain a license, provided they also meet the other requirements under the Act. And it bans all unlicensed massage—not just unlicensed massage at particular establishments. The Rule is not aimed at suppressing or punishing any message conveyed through massage, but rather at protecting the massage therapy profession from unlicensed competition and from being affiliated with illegal commercial sexual activity. This is unrelated to the suppression of protected expression. *See Mini-Spas*, 810 F.2d at 941 (holding that suppressing prostitution is unrelated to inhibiting freedom of expression).

Fourth, the Rule is drawn so that any restriction on alleged First Amendment freedoms is no greater than is essential to further the State's interests. This element does not require that the State choose the least restrictive means available to further its interest. Instead, it requires only that the substantial government interest "would be achieved less effectively absent the regulation." *Bushco v. Utah State Tax Com'n*, 2009 UT 153, ¶ 39, 225 P.3d 153. Here, the state's interests in protecting the massage therapy profession from unlicensed competition and from being used as a front for illegal commercial sexual activity is more effectively achieved with the Rule than without it. And, the Rule's potential impact on the right of private citizens to engage in touching is de minimus. Read in harmony with the Act, the Rule cannot reasonably be construed to encompass incidental or innocuous touching or expression by those outside of the scope of the Act, such as waitresses or romantic partners.

The Rule satisfies the *O'Brien* test. The district court therefore did not err when it rejected Plaintiffs' challenge and upheld the Rule.

## **2. The Rule is not overbroad.**

Plaintiffs also cannot show the Rule is overbroad under the First Amendment. A law is overbroad if (1) it "reaches a substantial amount of constitutionally protected conduct, even if the statute also has a legitimate application", and (2) the statute is not readily subject to a narrowing



construction. *Provo City v. Thompson*, 2004 UT 14, ¶ 11, 86 P.2d 735 (internal quotation omitted). “Invalidation for overbreadth is “strong medicine” that is not to be ‘casually employed.’” *U.S. v. Williams*, 553 U.S. 285, 293 (2008). “[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only ‘real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *State v. Morrison*, 2001 UT 73, ¶ 6, 31 P.3d 547 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112 (1990)).

Plaintiffs’ overbreadth challenge fails. As an initial matter, the overbreadth doctrine does not apply to commercial speech and, as a result, parties cannot assert claims that a statute interferes with the commercial speech rights of others not before the court. *Murphy v. Matheson*, 742 F.2d 564, 569 (10th Cir. 1984). Plaintiffs therefore cannot assert the Rule interferes with the commercial rights of other professionals or workers who may engage in some touching during their jobs.

Moreover, the Rule does not reach a substantial amount of protected conduct. The fact that some unconstitutional or non-commercial applications of the law can be imagined is not sufficient to invalidate a statute on overbreadth grounds, particularly if no constitutional problems are raised in the vast majority of its applications. *Williams*, 553 U.S. at 303; *Murphy*, 742 F.2d at 569. Here, the Rule applies to licensed massage therapists or to those

persons holding themselves out—by word or conduct—as massage practitioners who should be licensed. Plaintiffs’ arguments that the Rule will instill fear of touching upon ordinary citizens ignore the Act. R. 1294, 1498. The arguments are also not supported by any evidence of the Rule being enforced in that manner.

The Rule is also subject to a narrowing construction. Laws are presumed to be constitutional, and any doubts are resolved in favor of constitutionality. *State v. Norris*, 2007 UT 6, ¶ 10, 152 P.3d 293; *see also Morrison*, 2001 UT 73, ¶ 6, (holding courts have a “duty to construe a statute whenever possible so as to . . . save it from constitutional conflicts or infirmities.”). Courts avoid interpretations that would work “a result so absurd that the legislature could not have intended it.” *State v. Jeffries*, 2009 UT 57, ¶ 8, 217 P.3d 265. Plaintiffs’ parade of horrors that the Act will inhibit romantic touching between partners or punish waitresses who may touch the arm of a restaurant patron is an absurd reading of the Rule that is not supported by the language of the Act and was not intended by DOPL or the legislature. It is unlikely that the Rule would ever be used to bring criminal or civil charges against waitresses, romantic partners, or other ordinary citizens not engaged in performing massages for hire. It is even more unlikely that a court would interpret the Rule that way. The Rule is not overbroad, and Plaintiffs’ First Amendment challenge fails.

**D. The Rule is not unconstitutionally vague.**

Plaintiffs have not shown the Rule is unconstitutionally vague. A law “is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited.” *Morrison*, 2001 UT 73, ¶ 13. To succeed on a vagueness challenge, Plaintiffs have the burden to demonstrate either that (1) the statute does not provide the kind of notice that enables ordinary people to understand what conduct is prohibited, or (2) that the statute encourages arbitrary and discriminatory enforcement. *State v. MacGuire*, 2004 UT 4, ¶ 8, 84 P.3d 1171. Plaintiffs have not met, and cannot meet, this burden.

**1. Plaintiffs lack standing to raise a vagueness challenge.**

As an initial matter, Plaintiffs lack standing to raise a vagueness challenge to the Rule because it is constitutional as applied to them. A person who engages in some conduct that is clearly proscribed by law “cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.” *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 820 (Utah 1991) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)). Here, Plaintiffs admit that massage is not speech. Aplt. Br. at 42. Moreover, as both the

district court and the Department of Commerce determined, Plaintiffs' business—giving light touch massages in exchange for payment—clearly falls within the scope of conduct that must be licensed under the Act, with or without the Rule. R. 1291. Plaintiffs are not in the position of an esthetician, trainer, waitress, or romantic partner. Significantly, Plaintiffs no longer challenge their citations, essentially conceding that their conduct violated the Act. Plaintiffs therefore cannot challenge the Rule as vague.

**2. Plaintiffs have not shown the Rule fails to give appropriate notice.**

Moreover, the Rule is not unconstitutionally vague; it gives appropriate notice regarding those who must be licensed. The Rule does not stand on its own, but defines “manipulation” only within the context of the Act. *See* Utah Admin. Code R.156-47b(10) (defining “manipulation’ *as used in*” the Act (emphasis added)). The Act, in turn, requires more than just touching with movement to trigger its licensing requirements. The following must also be shown: (a) payment for the services; (b) the manipulation must be systematic; (c) the manipulation must be to the soft tissues; and (d) the manipulation must be for one of the stated purposes of the Act. Utah Code § 58-47b-102(6)(b).

The district court correctly held that that Rule applies to only those who hold themselves out, by word or act, as engaging in the practice of

massage therapy. R. 781, 971-972, 1294, 1498. It cannot reasonably be construed as applying to estheticians, athletic trainers, or other licensed professionals. While other professionals may engage in some touch in the scope of their work, they are specifically excluded from compliance with the Act provided they stay within the scope of their respective licenses and do not hold themselves out as licensed massage therapists. Utah Code §§ 58-1-307(3) (providing an individual “licensed under a specific chapter of the [Occupations and Professions title] “may engage in the lawful, professional, and competent practice of that occupation or profession without additional licensing under other chapters of this title . . . .); 58-47b-304 (West 2012 & Supp. 2016) (excluding specific professions, including athletic trainers, from licensing under the Act). Gratuitous massages are likewise specifically excluded. Utah Code § 58-47b-304(1)(l).

Despite this limiting language, Plaintiffs assert that the Rule causes people to live in fear that every day touching will trigger the licensing requirements. This is nothing more than an attempt to “inject doubt as to the meaning of words where no doubt would be felt by the normal reader.” *Clearfield City v. Hoyer*, 2008 UT App 226, ¶ 8, 189 P.3d 94. This is not enough to meet their burden. *Id.*

**3. Plaintiffs have not shown the Rule encourages arbitrary enforcement.**

The district court likewise properly rejected Plaintiffs' arbitrary enforcement arguments. Laws must provide "minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

Economic regulations, like the Rule, are subject to less strict vagueness tests both because the subject matter is more narrow and because businesses "can be expected to consult relevant legislation" in advance of action. *Village of Hoffman Estates*, 455 U.S. at 498-99, abrogated on other grounds by *Johnson v. U.S.*, 135 S. Ct. 2551, 2560-61 (2015). Likewise, the penalties in economic regulations are less severe. *Id.* at 499.

The Rule gives DOPL and law enforcement sufficient guidance to prevent arbitrary enforcement. As recognized by the district court, the Rule did not expand DOPL's authority outside of the massage therapy profession. R. 1292. Rather, the Act makes it sufficiently clear that those who engage or hold themselves out as engaging in the systemic manipulation—light or otherwise—of the soft tissues for a fee must have a license. Utah Code § 58-47b-102(6)(b). Gratuitous massages are specifically exempted, as is manipulation or massage provided by other licensed professionals in the scope of their duties. Utah Code 58-47b-304; *id.* § 58-1-307(3). While the Act gives some discretion to DOPL, it does not permit DOPL or law enforcement



to apply the Rule to any touching that occurs in either non-commercial or private settings.

Plaintiffs spend much of their brief alleging, without evidence, that DOPL and its agents may employ the Rule to prosecute incidental touching and innocent acts. Aplt. Br. at 48-49. The district court rejected these arguments, holding the Rule does not prohibit innocuous or incidental touching, R. 1292-94, 1498-99, and there is no evidence that DOPL has ever sought to enforce it in this manner. R. 1293. The district court also found a lack of any evidence that DOPL or its investigator (Alison Pettley) have used the Rule to regulate sexually oriented businesses. R. 1293. To the contrary, the Act is meant to draw a line between massage therapy and those enterprises. R. 1293.

Plaintiffs citation to *State v. Kelso*, a Second District Court criminal case involving parties not before this Court, does not contradict the district court's findings in this case. There, an undercover police officer hired a licensed esthetician to give him a "Nirvana massage" as part of a prostitution sting operation. The defendant did not engage in prostitution, but the district attorney charged her with the unlicensed practice of massage therapy. At the preliminary hearing, the district court refused to bind the defendant over for trial because the district attorney had not presented evidence that her actions exceeded the scope of her master esthetician

license, which permitted her to perform lymphatic massage, and therefore failed to support a reasonable belief that she had practiced massage therapy without a license. *State v. Kelso*, Second Judicial District, Davis County, State of Utah, Case No. 12170518 (J. D.M. Connors).

*Kelso* does not show the enforcement of the Rule is arbitrary. It involves one very narrow overlap between the permissible duties of two different professional licenses—master estheticians and massage therapists. Any ambiguity between massage therapists and estheticians does not exist for most of the population. Moreover, the law expressly permits licensed master estheticians to engage in certain types of massage or touching with movement without being subject to the terms of the Act. *See* Utah Code §§ 58-11a-102(34) (Supp. 2016) (including lymphatic massage within definition of “practice of master-level esthetics); 57-1-307(3) (permitting persons to practice full scope of their license without obtain licensing under other chapters). The fact that massage may be defined differently by other professions is irrelevant because the Act does not apply to them provided they stay within the scope of what their license permits. Likewise, one officer’s failure to understand the difference does not show that the law is unconstitutionally vague or presents a substantial risk of arbitrary enforcement. If anything, *Kelso* shows that the risk or arbitrary enforcement is low—even in this limited circumstance—as the judiciary refused to permit

the charges to proceed absent the state's showing that the defendant had exceed the scope of her practice.

Ironically, Plaintiffs' argument that light touch with movement should be excluded from licensing creates a greater potential for vagueness and arbitrary enforcement than the Rule Plaintiffs challenge. If light touching with movement were permitted without a license, enforcement would be focused on how much pressure was applied by a practitioner in a particular instance, which opens the door for much more discretion and arbitrary enforcement by DOPL or law enforcement. It would be difficult to draft a statute or rule that sufficiently informs practitioners of when light touching crosses the border into massage therapy territory. Under the current rule, those who perform systematic contact with movement of the soft tissue for the purposes outlined in the statute for a fee know they must have a license, and need not worry about the blurry line between "light touching with movement" and medium or deep massage.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision.

Respectfully submitted,

s/ Stanford E. Purser

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(f)(1) because:
  - this brief contains 9,458 words, excluding the parts of the brief exempted by Rule 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:
  - this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point Century Schoolbook font.

s/ Stanford Purser  
Stanford Purser

## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2016, a true, correct and complete copy of the foregoing Brief of Appellee was filed with the court and served via United States mail or electronic mail as follows:

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