UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RESTORATION ASSOCIATION OF FLORIDA, INC.; APEX ROOFING & RECONSTRUCTION LLC; and, **JOHN CASPERSON,**

Plaintiffs,

v.

JULIE I. BROWN, *in her official capacity as Secretary of the Florida Department of Business and Professional Regulation;* and, **DANIEL BIGGINS**, *in his official capacity as executive director of the Construction Industry Licensing Board,*

Defendants.

Case No. 4:21-cv-00263

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

COME NOW Plaintiffs, by and through Counsel, and move this Court pursuant to Federal Rule Civil Procedure 65(a) to issue a Preliminary Injunction restraining and enjoining Defendants and all persons acting at Defendants' direction from enforcing or implementing the newly enacted provisions challenged in their Complaint now found in Chapter 489, added by S. 76, as Section 489.147, Fla. Stat. In support of this motion, Plaintiffs rely upon the incorporated memorandum of points and authorities. Counsel will be available oral argument as the Court deems fit.

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MEMORANDUM OF POINTS AND AUTHORITY

I. INTRODUCTION

In Florida, it is perfectly legal and appropriate for a homeowner to make a claim under their homeowner's insurance policy for covered roofing damage. It is also perfectly legal for a homeowner to assign the benefits of that policy to a roofing contractor so that the contractor deals directly with the insurer and collects for the work done from that insurer, taking the burden of the claiming process off the homeowner's shoulder. In fact, Florida law so prizes assignments of benefits, post-loss, that an "unbroken string of Florida cases over the past century hold[] that policyholders have the right to assign such claims without insurer consent" and that insurers cannot add language to their policies that deny the right to assign these benefits to a contractor. *Sec. First Ins. Co. v. State, Off. of Ins. Regul.*, 177 So. 3d 627, 628 (Fla. 1st D.C.A. 2015). Based on the common use of assignments of benefits for housing repairs, discussions of insurance claims and coverage are standard practice between homeowners and roofing contractors.

Moreover, the Florida Department of Financial Services, which carries out the responsibilities of the state insurance code, *see* § 624.307, Fla. Stat., advises consumers to first "obtain[] a repair estimate from a licensed contractor" to determine if "the damage exceeds your deductible by an amount that you believe to be sufficient to justify filing a claim with your insurance company, [and] then do so as soon as possible." Fla. Dep't of Financial Services, "Homeowners' Insurance: A Toolkit for Consumers," at 29 (available at https://www.myfloridacfo.com/division/consumers/understandingcoverage/guides/doc

uments/homeownerstoolkit.pdf).[1] Thus, contacting a contractor first is a frequently taken and state-endorsed process for obtaining a roofing repair.

Concerned about fraudulent insurance claiming by some licensed and unlicensed contractors, the Florida legislature enacted S. 76, codified as Ch. 2021-77 [hereinafter, the "Act"]. However, rather than address fraudulent claiming or deceptive activities by licensees,[2] the legislation banned certain advertising practices only by roofing contractors that accurately inform homeowners about potential eligibility to make a claim for the repair under their homeowner's insurance or encourage them to do so. It thus targets truthful and accurate speech, rather than conduct that may be made illicit. The prohibition, then, is a classic version of an unconstitutional restriction on speech, which, even in the commercial realm, "protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996). Curiously, the legislation does not prohibit the same statements encouraging insurance claiming when made orally in-person, thereby suggesting an utter disconnect between the State's purposes and the statements targeted. The provision defining certain statements as prohibited advertising was recently the subject of a preliminary injunction issued by Judge Walker of this Court in *Gale Force*

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[1] The Department of Financial Services publication, available on its website, is subject to judicial notice pursuant to Fed. R. Evid. 201(b)(2). *See Coastal Wellness Centers, Inc. v. Progressive Am. Ins. Co.*, 309 F. Supp. 3d 1216, 1220 n.4 (S.D. Fla. 2018) ("Court may take judicial notice of government publications and website materials.").

[2]

Roofing & Restoration, LLC v. Brown, No. 4:21-cv-00246, Doc. No. 28 (Jul. 11, 2021) (slip op.).

The Act does not however, stop there. Beyond prohibiting certain statements delivered through electronic or printed advertising, it strikes at a variety of marketing techniques, censors information from a contractor about its experience with insurance companies and the assignment of benefits, and penalizes violations in extreme fashion, even though the prohibited acts encompassed in the Act are legally utilized in a variety of related and unrelated industries and have no inherent connection to the fraud the Act purports to address.

Indeed, the proffered justification, fraudulent claiming with resultant increases in premiums, *see Gale Force*, Doc. 28, at 3, 25, is neither prevented by the prohibitions of the Act nor even loosely tailored to address fraud. It instead operates to restrict the flow of accurate consumer information to homeowners with insurance policies, perhaps to limit the filing of legitimate claims in order to hold down payments that must be made pursuant to paid insurance policies. The Act's means of addressing fraudulent claiming is primarily furthered by imposing content- and speaker-based restrictions on contractors who advertise about using insurance policies for roofing repairs, despite being truthful and not deceptive. As was true of another state's statute that placed restrictions on pharmaceutical marketing, "[b]oth on its face and in its practical operation, [the Act] imposes a burden based on the content of speech and the identity of the speaker" and is thus unconstitutional. *Sorrell*

v. IMS Health Inc., 564 U.S. 552, 567 (2011). The provisions challenged here cannot be reconciled with constitutional requirements.

II. THE ACT.

The Act adds a new provision to § 489.147, Fla. Stat., that delineates what is deemed to be prohibited property insurance practices. Among its most prominent provisions, challenged here and preliminarily enjoined in *Gale Force*, are prohibited advertisements, which it defines as any written or electronic communication that "encourages, instructs, or induces a consumer to contact a contractor or public adjuster" to make an insurance claim for roof damages. § 489.147(1)(a). The Act further prohibits in-person, electronic, or third-person solicitations through prohibited advertisements. § 489.147(1)(b).

In addition, the Act prohibits an *offer* of rebates, gifts, gift cards, cash, coupons, deductible waivers, or *anything of value* in exchange for (a) allowing the contractor to inspect a residential property owner's roof, or (b) making an insurance claim for roof damage. § 489.147(2)(b). The Act further prohibits paid referrals when insurance proceeds are payable for the contracted work. § 489.147(2)(c). It bans contractors from interpreting insurance policies or advising the insured regarding coverage or the insurer's duties unless the contractor holds a public adjuster license. § 489.147(2)(d).

Moreover, the Act further imputes the actions of anyone compensated by the contractor for soliciting work for the contractor, including any violations of the Act committed by the third party. § 489.147(4)(a). Finally, the Act requires that the contractor provide potential customers with a notice of the practices prohibited in § 489.147(2)(b), which relate to providing something of value such as a discount for

engaging the contractor, or be subject to the voiding of the contract within 10 days of its execution. § 489.147(5).

Violations of the above provisions of the Act place a contractor in jeopardy of being subjected to disciplinary proceedings that could include the loss of the contractor's license, pursuant to § 489.129, as well as to a $10,000 fine per violation. § 489.147(3).

III. THE PARTIES.

A. Plaintiffs.

Plaintiff Restoration Association of Florida, Inc. (RAF) is a non-profit restoration contractors association, located in Altamonte Springs, Florida, whose mission is to serve as an advocate for independent contractors that specialize in water, fire, and mold restoration throughout the State of Florida and seeks, as an organization, to protect those members' rights. Exh. 1 (Lee Jacobson Aff.), ¶ 2.

Its approximately 300 members in the state of Florida own emergency restoration companies, mold remediation, fire restoration, general contractors, roofing contractors, pack-out companies and other independent contractors licensed to repair roofs and restore homes suffering from damage due to water, fire, and mold throughout the state, whether the damage resulted from age, natural disasters, or the malicious acts of others, while also preforming other home repairs and remediation. Exh. 1, ¶¶ 2-4. As part of its mission, RAF seeks to support or oppose legislation and other government actions that adversely affect the businesses of its members. Exh. 1, ¶ 5.

RAF members advertise and solicit business in ways that are directly and adversely affected by the limitations and requirements of the Act, including through company websites and other written and electronic means used to solicit business and are now regulated by the Act. Exh. 1, ¶ 6. The advertising of some RAF members, for example, offer free roof inspections, financing options, and discounts on roofing repairs that entail repair estimates above a certain amount of money. Exh. 1, ¶ 11. Some RAF members also indicate that they have significant insurance claims experience and that the contractor will send all required forms to the homeowner's insurance company to help expedite the processing of an insurance claim. Exh. 1, ¶¶ 6-10.

Plaintiff Apex Roofing and Reconstruction LLC is an RAF member and licensed Florida contractor with business locations throughout Florida, including Longwood, Boca Raton, Cocoa Beach, Destin, Fort Myers, Jacksonville, Panama City, Tampa, and West Palm Beach. Exh. 2 (Grant Rockett Aff.), ¶¶ 2-3. In addition, it has other locations in Alabama, where it is also licensed and has its principal place of business. Exh. 2, ¶ 2.

Apex Roofing is the largest roofing contractor in the Southeastern United States, performing work in Alabama, Florida, Mississippi, and Tennessee and has been in business since 2010. Exh. 2, ¶ 4. It operates a website (https://apexroofs.com/) and engages in other forms of advertising and solicitation of customers that are directly and adversely affected by the limitations and requirements of the Act. Exh.

2, ¶¶ 5, 10.. Apex Roofing's website reaches potential customers in Alabama and other Southeastern states, as well as Florida. Exh. 2, ¶ 5.

On its website, it advises potential customers that "[o]ne part of handling roofing repairs and replacements is dealing with your insurance company," pledges that it will provide "as much assistance as we can" to help with insurance claims, and that "as a roofing contractor, we have years of experience [in dealing with insurance companies]." Exh. 2, ¶¶ 6-7. The website further states that "[w]e'll provide your insurance company with everything they need to process the claim. If you have any questions, we'll either have the answer for it or help you get an answer." Exh. 2, ¶ 8.

Apex Roofing advertises through cold calls, print and digital advertisements, mail, and its website. Exh. 2, ¶ 10. Apex Roofing receives some business through referrals and has paid for referrals in the past and would like to continue that practice. Exh. 2, ¶ 11. Each year, it performs approximately 3,000 unique jobs for which there is coverage through insurance carriers. Exh. 2, ¶ 13. It wants to continue to advertise and solicit business as it has in the past and continues to do so now. Exh. 2, ¶¶ 22-27.

Plaintiff John Casperson lives in Fort Myers, Florida and has had occasion to use a roofing contractor. Exh. 2, ¶ 14. After his home suffered substantial roof damage, but was denied coverage by his insurer, even though the adjuster on the file agreed that there was considerable damage to the home, Mr. Casperson hired Apex Roofing, using an assignment of benefit from his homeowners insurance policy. Exh. 2, ¶ 15-16.

Significant amounts of mold had built up in Mr. Casperson's home, potentially compromising the health of this senior citizen. Exh. 2, ¶ 17. Apex Roofing replaced the entire roof on his home and assisted with the remediation. Exh. 2, ¶ 18. Although litigation over the insurer's full responsibility is ongoing, the carrier paid for a partial roof repair, though not for other aspects of the remediation. Exh. 2, ¶ 20.

Mr. Casperson was connected to Apex Roofing through another customer. Exh. 2, ¶ 16. Apex Roofing acted quickly at cost to itself of more the $100,000, otherwise the home would have been lost due to extraordinary microbial growth. Exh. 2, ¶ 16.

B. Defendants.

Defendant Julie I. Brown is sued in her official capacity as Secretary of the Florida Department of Business and Professional Regulation and is located in Tallahassee, Florida. http://www.myfloridalicense.com/DBPR/about-us/departments-secretary/. Pursuant to state law, Secretary Brown oversees the Department of Business and Professional Regulation, which is responsible for licensing and regulating more than 1.4 million businesses and professionals in the State of Florida, including contractors covered by the Act. *Id.*; http://www.myfloridalicense.com/DBPR/about-us/department-overview/. The department under Secretary Brown's direction accepts and investigates complaints about law or consumer violations by licensees, including those that are the result of the Act's new enactments. *Id. See also* https://www.myfloridalicense.com/entercomplaint.asp?SID.

Home contractors who are members of RAF and home contractors such as Apex Roofing are licensees subject to the regulations and disciplinary actions of Secretary Brown's department. § 455.225.

Defendant Daniel Biggins is sued in his official capacity as executive director of the Construction Industry Licensing Board (CILB) and is located in Tallahassee, Florida. http://www.myfloridalicense.com/DBPR/construction-industry/. Pursuant to state law, Executive Director Biggins oversees the CILB, which has rulemaking authority to implement Chapter 489, including provisions added by the Act. *Id.*; § 489.108.

The CILB, a board within the Department of Business and Professional Regulation, also has the authority to conduct disciplinary proceedings on licensed contractors like the contractor plaintiffs here for violations of Florida law and implements those disciplinary actions through Executive Director Biggins and his staff. § 489.129. The Act assigns violations of its provisions to the CILB disciplinary proceedings by making its provisions subject to § 489.129. § 489.147(3).

III. INJUNCTIVE RELIEF IS WARRANTED.

A well-established test governs eligibility for preliminary injunctive relief. The movant must demonstrate:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000). This action fully qualifies for injunctive relief because it satisfies all four elements. In a recent decision, this Court found a challenge to the prohibited advertising provision by another plaintiff warranted a preliminary injunction. *Gale Force*, No. 4:21-cv-00246, Doc. No. 28 (Jul. 11, 2021) (slip op.) Plaintiffs submit that the decision was correct, and a similar ruling should be issued in this case as to this provision, as well as the other provisions challenged here.

A. There Is a Likelihood that the Statute's Advertising and Marketing Prohibitions Violate the First Amendment.

1. The First Amendment protects advertising, including marketing that offers something of value.

Advertising discharges a constitutionally protected "informational function." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). Solicitation of clients through advertising, as a form of "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-62. Although commercial speech receives a lesser level of First Amendment protection than some other forms of speech, government restrictions or burdens on commercial speech must be justified by at least a substantial interest when the "communication is neither misleading nor related to unlawful activity." *Id.* at 563, 564.

Undue advertising restrictions "reduce[] the information available for consumer decisions and thereby defeat[] the purpose of the First Amendment." *Id.* at

567. Protecting commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking" and "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). The right infringed, then, is not just the right of the speaker to communicate, but the right of consumers and the general public to receive the information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) ("If there is right to advertise, there is a reciprocal right to receive the advertising.").

The First Amendment's commercial speech protections extend not only to the prevention of prior restraints, but also "unwarranted governmental regulation." *Cent. Hudson*, 447 U.S. at 561 (citation omitted). The regulation of truthful, non-deceptive advertising requires justification by at least a substantial interest, but the applicable "regulatory technique must be in proportion to that interest." *Id.* In other words, "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Id. See also In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.").

In commercial speech cases, a "four-part analysis" governs and asks "whether the expression is protected by the First Amendment," "whether the asserted governmental interest is substantial;" "whether the regulation directly advances the

governmental interest asserted," and "whether [the regulation] is not more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 563. The last requirement is not the equivalent of a "least restrictive means" test, but one that requires that the State bear the burden of "justifying its restrictions" by "affirmatively establish[ing] the reasonable fit" between the State's objective and the restrictions it imposes. *State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

The Eleventh Circuit utilizes the *Central Hudson* test. *FF Cosms. FL, Inc. v. City of Miami Beach,* 866 F.3d 1290, 1298 (11th Cir. 2017). Still, where, as here, the law "impose[s] a specific, content-based burden on protected expression . . . heightened judicial scrutiny is warranted." *Sorrell*, 564 U.S. at 565 (striking a Vermont statute that prohibited the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors as an unconstitutional restriction on commercial speech in aid of pharmaceutical marketing, finding it met neither strict nor intermediate scrutiny).[3]

The *Central Hudson* test, then, becomes part of the analysis for the present motion. To "obtain a preliminary injunction, 'the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to

[3] The Eleventh Circuit has similarly held that it is unnecessary to choose which level of scrutiny, strict or intermediate, applies when the statute "collapses under any level of heightened scrutiny." *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1246 (11th Cir. 2015). Even so, *Sorrell* said that content-based regulations, even of commercial speech, "'are presumptively invalid'" *Sorrell*, 564 U.S. at 571 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)), and subject to heightened scrutiny. *Id*. at 565.

the government to justify the restriction.'" *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1280 (S.D. Fla. 2012) (citations omitted). *See also Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

2. The Act restricts protected commercial speech in five distinct ways.

Inarguably, the Act restricts commercial speech unconstitutionally. ***First***, it prohibits printed or electronic communications that "encourages, instructs, or induces a consumer to contact a contractor or public adjuster for the purpose of making an insurance claim for roof damage," § 489.147(1)(a), even though making an insurance claim for roof damage and assigning that benefit of an insurance policy to a contractor is entirely legal. *See, e.g., Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 817 (Fla. 3d DCA 2000), *approved and remanded sub nom. Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002) (recognizing an insurance claim and holding that "[w]hether the claim is covered by the policy is a judicial question, not a question for the appraisers."); *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So.3d 190, 195 (Fla. 3d DCA 2012) ("Post-loss insurance claims are freely assignable without the consent of the insurer.").

Moreover, by the terms of the statute, a contractor or public adjuster may engage in speech that "encourages, instructs, or induces" such a claim in person without penalty, even if they cannot in printed or electronic form. *Gale Force*, 4:21-cv-00246, Doc. 28, at 7. Plainly, then, the Act forbids speech in certain forms, not because the activity it encourages is illegal or that the speech is in any way deceptive, but as a clumsy attempt to withhold an effective way to convey certain information

to consumers, in order to discourage insurance claiming that is entirely proper, as well as that which it deems fraudulent.

Second, the Act eliminates from marketing efforts any *offer* of a thing of value in exchange for a roofing inspection or making an insurance claim for roof damage. Among those things the statute specifies as impermissible are offers of a “rebate, gift, gift card, cash, coupon, waiver of any insurance deductible, or any other thing of value,” § 489.147(2)(b), which apparently would include an offered discount if the homeowner hires the roofer when the contractor is already working on neighboring homes. Notably, the Act does not make rebates, gifts, deductible waivers, or things of value illegal to give, only *offers* of things of value. It therefore plainly and directly targets protected speech. Such an offer is obviously a form of protected commercial speech that neither proposes an illegal transaction or is misleading.

Third, the Act prohibits contractors from interpreting insurance policies or advising the insured regarding coverage or the insurer’s duties, unless the contractor holds a public adjuster license. § 489.147(2)(d). It does not ban others who are not public adjusters from interpreting or advising on insurance coverage, only contractors, even though those contractors may have decades of experience with insurance coverage and processing assignments of benefits. Thus, for example, it prohibits a contractor from advising an insured homeowner that the insurance contract includes a right to assign benefits so that the homeowner will not have to deal with the insurance company while the contractor will take care of all requirements of the policy. Assignment of benefits is a right the homeowner retains

and that the insurance contract cannot alienate through policy language. policy language. *See, e.g., Sec. First Ins. Co.*, 177 So. 3d at 628 (citing cases in support of an "unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent.").

The prohibition on contractors telling policyholders about how homeowner insurance generally works or experience with a specific insurer not only unconstitutionally deprives a consumer of useful information in selecting a contractor but also conveys knowledge to the homeowner about questions that might helpfully be posed to the insurer. That deprivation of information strikes at the heart of why commercial speech receives First Amendment protection. *See Va. St. Bd. of Pharmacy*, 425 U.S. at 763 (a particular "consumer's interest [in commercial information] may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

Indeed, both the consumer educated about his insurance policy and one at sea about its contents may well prefer to hire a contractor with a firm grasp of what those policies typically or specifically contain. Indeed, on its website, Plaintiff Apex Roofing tells potential customers that it has broad experience with insurers and promises to answer insurance questions or, if it does not know the answer, find someone who does for the homeowner. Exh. 2, § 8. When Plaintiff Casperson found his claim turned away by his insurer, he was referred to Apex Roofing because it was willing to effectuate a repair to Casperson's roof and take its chances with the insurer, who did eventually partially pay for the roofing repair. Exh. 2, § 20. It is thus apparent that

a contractor's experience with and understandings of the insurance policy is a critically important consideration when a homeowner wants to select a contractor for roofing repairs.

The prohibition on contractor advice on insurance is also utterly unrelated to the Act's purported interest in deterring fraudulent claiming, as is prohibiting offers of discounts serve as a tool to defraud insurers, who surely understand the terms of their policies' coverage.

It also lacks the necessary fit to the State's purported interest. Under this requirement, the State bears a burden to demonstrate significant justification, clearly advanced, and reasonably tailored to overcome the presumption of unconstitutionality that accompanies a content-based restriction, regardless of whether strict or intermediate scrutiny applies. *See Sorrell*, 564 U.S. at 571-72, 565. *See also Abramson v. Gonzalez*, 949 F.2d 1567, 1575 (11th Cir. 1992). The State's "burden is not satisfied by mere speculation or conjecture," but by a demonstration that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. The State cannot satisfy that obligation here.

Even if the connection between the State's goals and this provision were not as attenuated as it quite obviously is, there is no reason why the State could not have required contractors to utilize a disclaimer to the effect that the contractor is not a public adjuster, that its advice is not authoritative, and that the homeowner may want to check with the insurer to confirm the coverage questions addressed.

Disclaimers, such as this hypothetical one, "are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks." *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002). The availability of a required disclaimer adds further weight to the fact that the insurance-interpretation provision fails the reasonable-fit test.

Fourth, the Act's provision prohibiting payment or reward for a referral when an insurance claim is being made, § 489.147(2)(c), also targets protected speech and violates the First Amendment. It is commonplace in the industry for contractors to refer jobs to other contractors when they either are overcommitted with other jobs or lack the expertise needed for a particular job, such as a plumber explaining that the water damage affected the roof and providing a referral to a roofing contractor. Exh. 2, ¶ 12. A contractor is more likely to refer a job to a contractor who compensates the first contractor for lining up the job than one who does not.

The paid-referral ban is akin to the Colorado law that made it a crime to pay circulators of petition initiatives, which the Supreme Court held violated the First Amendment in *Meyer v. Grant*, 486 U.S. 414 (1988). Colorado sought to justify the law as assuring that any initiative be the product of a true grassroots movement and that prohibiting payments prevented fraud. Both justifications were rejected. Instead, the restriction on paying signature gatherers constituted a burden on the dissemination of a message, which was as much a part of protected speech as the speech itself. *Cf. Sorrell*, 564 U.S. at 568 (holding that restrictions on how information

is disseminated, including access to the information in the first place, is protected by the First Amendment).

Moreover, the payment-for-referral prohibition also appears to prohibit the use of websites that refer consumers to contractors. These websites are unquestionably forms of marketing within the protection of the commercial speech doctrine. Websites like homeadvisor.com, anji.com, and yelp.com take money from contractors to promote their businesses and then provide consumers with referrals. With respect to the first two websites, for example, a contractor purchases a subscription. Then, based on requests the websites receive from homeowners, consumers, and property managers, it will make matches to qualified contractors and both refer potential customers to the contractor and provide a lead to contractor about the customer's requirements. *See, e.g.,* Angi Leads Pro Legal Center, "Pro Terms & Conditions," (Jun. 20, 2021), at "https://legal.homeadvisorpros.com/#pro-terms-and-conditions (homeadvisor.com terms).

Yelp.com, on the other hand, suggests that word-of-mouth referrals from satisfied customers work best if the customers are offered an incentive to promote the business by urging contractors to offer rebates and discounts, while it also sells enhanced promotional listings and advertising that help businesses get noticed by consumers searching the yelp.com website. *See* Yelp for Business, "How to attract more customers to your business," https://business.yelp.com/grow/how-to-attract-more-customers-small-business/.

The restriction on paid referrals operates to limit the number of voices who might promote the contractor, and it makes it less likely that this form of marketing through referrals will succeed. *Cf. Meyer,* 486 U.S. at 422-23.

Fifth, the Act requires a contractor to provide its prospective customer prior to executing a repair contract with a notice that explains the Act's prohibition on rebates, gift cards and other things of value in exchange for permitting a roof inspection or making an insurance claim for roof damage. § 489.147(2)(b). Such a notice is a form of compelled speech, governed by the First Amendment. *See Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (The First Amendment protects "the decision of both what to say and what *not* to say.").

A disclosure requirement, like this one, "cannot be 'unjustified or unduly burdensome.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 626 (1985)). The burden is on the State to prove that the harm it seeks to remedy is "potentially real not purely hypothetical" and "extend[s] 'no broader than reasonably necessary,'" to avoid the "risk [of] 'chilling' protected speech." *Id*. (citations omitted). The required disclosure also must be purely factual and noncontroversial. *Id*. at 2372.

The Act's notice requirement fails on two grounds. First, to the extent that the anti-rebate or thing-of-value provision directly violates the First Amendment, the required notice is also unconstitutional. Second, a proper notice will tell the homeowner that a contractor may only offer a thing of value if no insurance claim is made on the roofing repair. However, the Act prohibits the same written notice from

also informing the homeowner of the benefits of making an insurance claim or agreeing to an assignment of benefits, which would constitute a prohibited advertisement. The one-side nature of the disclosure requirement constitutes a controversial and not purely factual matter because it legally requires the contractor to provide information skewed to the State's preferred message.

These five provisions, then, plainly burden constitutionally protected commercial speech and satisfy the first *Central Hudson* requirement.

3. The government interest in preventing fraudulent claiming is substantial, but not directly advanced by the provisions challenged.

Having demonstrated that the first part of the *Central Hudson* test, showing that the Act burdens protected expression, is met, the second element asks "whether the asserted governmental interest is substantial." 447 U.S. at 563. To be sure, government has a substantial interest in preventing fraudulent commercial transactions and fraudulent commercial speech, *Edenfield*, 507 U.S. at 768, as well as in assuring that homeowners insurance rates are reasonable. *See German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914). However, even laudable goals cannot justify restrictions on commercial speech when the restriction does not directly advance the asserted interest. *Cent. Hudson*, 447 U.S. at 566.

The facts in *Central Hudson* demonstrate the tenuous nature of the State's asserted interests and the challenged provisions of the Act. In that case, New York prohibited advertising to promote the use of electricity by regulated electric utilities as a conservation measure intended to prevent outages. While the Court found the

State's interest in electrical conservation substantial, it found too great a disconnect with the means adopted because it "reaches all promotional advertising, regardless of the impact of the touted service on overall energy use." *Id.* at 570. Indeed, the Court noted that it has repeatedly "declined to uphold regulations that only indirectly advance the state interest involved." *Id.* at 564.

Plainly, the Act's speech restrictions cover a variety of expressive activities that are commonplace marketing strategies that have nothing to do with the State's anti-fraud objectives. Nothing about inducing an insurance claim, providing a discount, explaining the process of assignment of benefits, or paying for a referral necessarily leads to fraudulent claiming, but instead are utterly appropriate marketing practices. These are promotional activities undertaken by others within the restoration industry such as electrical companies, plumbers, and mold abatement contractors, as well as a variety of other insurance-related industries, such as automobile body shops. As standard practices that do not even hint at fraudulent conduct, it cannot be said that the measures directly advance Florida's interests in preventing insurance fraud. Moreover, "States may not place an absolute prohibition on certain types of potentially misleading information, …, if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203.

Instead, as with the electric utilities in *Central Hudson*, the State's objective of reducing usage through the suppression of speech fails to strike directly at the problem of fraud and fails to instead utilize its own expressive channels to alert

consumers on how they can prevent fraudulent claiming and reduce future rises in premiums, as the First Amendment anticipates.

In *Edenfield*, the Court invalidated a prohibition on in-person solicitation of accounting clients that Florida attempted to justify, in part, as preventing fraud or overreaching. 507 U.S. at 768. Yet, the connection of the measure to preventing fraud was neither apparent nor justifiable as a prophylactic rule. *Id.* at 774. The Court distinguished in-person solicitation by accountants from that of lawyers, who are trained in the art of persuasion, and raise different concerns about overreaching. *Id.* at 775. Here, however, the ban is on electronic or printed communications, which leave homeowners time for research and reflection, rather than pressured decision-making. Other parts of the Act's prohibitions or provisions similarly find no purchase in preventing fraud.

4. The Act's restrictions are more extensive than necessary.

Because the Act's restrictions reach significant expressive activities with only the most speculative connection to fraudulent claiming, the provisions described above are self-evidently more extensive than necessary. As the Eleventh Circuit held, the "First Amendment does not, however, allow the Government to directly restrict speech in an attempt to control conduct in response to that speech." *Dana's R.R. Supply*, 807 F.3d at 1251. Rather than deal with the conduct of fraudulent claiming, the Act targets expressive activities. *See id.* at 1250 ("the asserted interests—preventing bait-and-switch tactics, providing advance notice to customers, and levelling the playing field among merchants—would be better served by direct and focused regulation").

In fact, the Supreme Court has recognized that a State's own public-information efforts are an appropriate narrower approach to a problem because it can accomplish the State's objective without burdening speech. *Becerra*, 138 S. Ct. at 2361. Even a "'tepid response' [to that campaign" does not prove that an advertising campaign is not a sufficient alternative." *Id*. *See also 44 Liquormart*, 517 U.S. at 507 (suggesting "educational campaigns focused on the problems"); *Centro Tepeyac v. Montgomery Cty*., 722 F.3d 184, 190 (4th Cir. 2013) (suggesting the government "speak with its own voice" by "undertak[ing] public education campaigns … or, more generally, promoting consultations with physicians" rather than burden commercial speech).

B. The Act's Restrictions Also Transgress the Dormant Commerce Clause.

Apex Roofing operates and is licensed to provide roofing repairs and replacements in a number of states throughout the southeastern United States, including Florida, and is headquartered in Alabama. Exh. 2, §§ 2-4. It operates a website, apexroofs.com, that serves all of its customers and potential customers. Exh. 2, § 5. Among other things, as is proper and legitimate in every state other than Florida since the Act's passage, the website offers free roof inspections and has a tab entitled "Insurance Claims." Under that tab, readers are told that "[o]ne part of handling roofing repairs and replacements is dealing with your insurance company." https://apexroofs.com/insurance-claims/. Exh. 2, § 6. Making such an offer is often welcomed by consumers and can make the difference for a consumer choosing among the many qualified roofing contractors available.

It further tells readers that "we provide as much assistance as we can. Dealing with insurance claims does get easier the more you do it, and as a roofing contractor, we have years of experience here." Exh. 2, §§ 6-7; Exh. 3 (Apex Roofing website), at 1. On the website, Apex Roofing promises to "provide your insurance company with everything they need to process the claim. If you have any questions, we'll either have the answer for it or help you get an answer." Exh. 3, at 1. An offer of this kind is obviously a selling point for many homeowners with legitimate insurance claims who want to avoid the extra work that goes with dealing with an insurer's claims department. It accurately describes a service roofing contractors can provide their customers, even in Florida, but the Act renders it a violation of law as an electronic communication to potential Florida customers that can "encourage[], instruct[], or induce[]" the making of an insurance claim or provide advice on insurance coverage. Thus, separate and apart from the evident First Amendment violation, these provisions unconstitutionally regulate commerce in other states in violation of the Dormant Commerce Clause.

Under that clause, state regulations "may not discriminate against interstate commerce" and "may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). Even when state laws "regulat[e] even-handedly to effectuate a legitimate local public interest . . . [courts examine whether] the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Plainly, the Act runs afoul of this metric because it has the practical effect of

requiring that out-of-state commerce be conducted in accordance with Florida's regulatory directions and alters the marketing of legal products in other states, fostering an impermissible extraterritorial effect. While Florida may regulate insurance claiming within the state, it may not do so in other states.

The Supreme Court has expressed the following longstanding principles. First, the "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality op.). Second, a statute that directly controls commerce occurring wholly outside state boundaries is "invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Third, the "practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* The Commerce Clause then stands as a bulwark against the "projection" of one state's "regulatory regime into the jurisdiction of another State." *Id.* at 336-37. Finally, no State may force an out-of-state merchant to comport with its regulatory scheme when undertaking a transaction wholly within another State. *Id.*

The Act violates each of these principles because "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they

may possess' based on the conditions of the local market." *Id.* at 339. Florida imposes silence about insurance for marketing in other states where the ability to speak about insurance claiming and provide services related to insurance claiming is a clear marketing advantage. Yet, the violation of the Dormant Commerce Clause is evident because "the burden of state regulation falls on interests outside the state, [where] it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 345 (2007) (internal quotation marks omitted)).

Plainly, the Act prohibits what Apex Roofing and similarly situated Florida roofing contractors may put on its website, even though Apex's home jurisdiction has no issue with it and may well find it useful to consumers. Apex Roofing cannot limit viewers of its website to those living outside of Florida. It also cannot satisfy the prohibitions of the Act by putting on a disclaimer applicable to Florida residents, indicating, for example, that Florida homeowners should ignore what it *says* about homeowners insurance and its expertise in insurance coverage, even though none of what it says about insurance is inaccurate. No sensible disclaimer could be drafted to make the website comply with Florida's requirements and prevent Florida from regulating contractor-homeowner communications outside the state.

Another way to determine whether a violation has occurred is to consider the "extent of the burden" based on the "nature of the local interest involved, and on

whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

Applying these principles, the Second Circuit held that a Vermont law that limited access to sexually explicit material to minors constituted a *per se* violation of the Dormant Commerce Clause, even if not discriminatory, because it projected Vermont's regulations beyond its borders by regulating the geographically unlimited Internet. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003). *See also PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (reaching the same conclusion and noting that "[o]ne state simply cannot block a constellation from the view of its own citizens without blocking or affecting the view of the citizens of other states."); *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999) (holding burden on internet postings outweighed local benefit).

Here, the Act, intentionally or not, regulates commerce outside the State of Florida and the burden it places on interstate commerce plainly exceeds the ephemeral benefit it sought to accomplish of stopping insurance-claiming fraud for the same reasons it fails to satisfy the reasonable fit requirement of the First Amendment. Accordingly, the prohibited advertisement provision, the bar on things of value, and the limits on explaining insurance coverage also violate the Dormant Commerce Clause.

C. There Is a Likelihood that the Statute's Imputation Provision Violates the Fourteenth Amendment's Due Process Clause.

The Act also automatically imputes any improper activity that a paid referring third party commits to the contractor. § 489.147(4)(a). Lack of knowledge of the offending practice, instructions given to the third-party to comply with all relevant legal requirements, even made as a contractual obligation, and assurances from the third-party that no violation would occur count for naught under the categorical imputation provision challenged here. The imputation provision, thus, forces a contractor to become a guarantor of third-party compliance regardless of any and all steps undertaken to assure compliance and even if the relationship struck between the two takes place subsequent to the offending acts.

The imputation provision, then, amounts to an irrebuttable presumption of responsibility for the acts of a third-party. Statutes creating permanent irrebuttable presumptions have long been disfavored as violative of due process. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). The irrebuttable presumption established here is utterly arbitrary and unreasonable for it deprives a contractor of a fair opportunity to rebut the assumption that the contractor participated in or acquiesced in the violation when it took every possible step within its power to assure that no violation occurred. Because a contractor may only rely on assurances of conformity by the third-party, the provision causes the contractor to suffer the potential cancellation of a contract and possible penalties from the Defendants without control over the third-party, or avoid use of third-parties altogether. Due process does not tolerate that result.

D. The Remaining Criteria for a Preliminary Injunction Are Plainly Satisfied.

1. *Plaintiffs would suffer irreparable harm absent injunctive relief.*

Having established a likelihood of success on the merits, the remaining criteria for a preliminary injunction are also easily met here. The second criterion, irreparable injury, is met by the free-speech violation. The Eleventh Circuit has held that an "ongoing violation of the First Amendment constitutes an irreparable injury." *FF Cosms.*, 866 F.3d at 1298. Indeed, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Irreparable injury is also satisfied with respect to the impermissible extraterritorial effect of the prohibitions on advertising about the availability of insurance coverage and the willingness to explain that coverage. Complying with the provision would put contractors like Apex Roofing, which operates in multiple states, at a competitive disadvantage in those other states where competitor websites are free to "advertise" about insurance information or explain insurance coverage to potential customers. Noncompliance, however, would force licensed contractors who operate in multiple states to withdraw from the Florida market. Either way, the effect is a "rule putting [multi-state contractor]s at a competitive disadvantage[, which] constitutes irreparable harm." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015).

Finally, the irrebuttable presumption created by the imputation provision also constitutes irreparable harm because it also places contractors at a competitive

disadvantage that occurs from foregoing professional third-party identifications of potential customers or facing sanctions that include the suspension of their contractor license.

2. *The harm to the plaintiffs easily outweighs the attenuated connection the challenged provision has to the State's asserted anti-fraud interests.*

As demonstrated in the discussion on the merits, the prohibitions and requirements of the Act make speaking about activities that are not illegal sanctionable. At best, they have a tenuous relationship to the anti-fraud interests that the State purports to advance. Because none of the provisions directly advance these anti-fraud interests, the State will suffer no harm if an injunction issues. That absence of harm contrasts with the Plaintiffs' irreparable injuries so as to satisfy the third criterion for a preliminary injunction.

3. *An injunction would serve the public interest.*

The "public interest always is served when constitutional rights, especially those involving free speech, are vindicated." *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298, 1319 (S.D. Fla. 2014). *See also League of Women Voters of Fla. v. Browning,* 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights . . . serve[s] the public interest almost by definition."). As a result, an injunction that "prevents the state from enforcing restrictions likely to be found unconstitutional," if it accomplishes anything, improves the system and "surely serves the public interest." *Centro Tepeyac*, 722 F.3d at 191 (citation omitted). In fact, "neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 870 (11th Cir. 2020).

IV. CONCLUSION.

The speech the Act prohibits or otherwise regulates is neither false nor misleading within the meaning of First Amendment precedents. There is also no legitimate argument that the provisions challenged here will prevent false or misleading speech. The State's interest in burdening the speech of roofing contractors instead turns on nothing more than a paternalistic desire to prevent consumers from having useful information and the inhibition of legitimate insurance claims, along with those deemed illegitimate. That justification cannot pass constitutional muster.

For the foregoing reasons, the Act's restrictions and requirements challenged here should be preliminarily enjoined.

July 22, 2021

Respectfully submitted,

/s/ Robert S. Peck

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), the attached Plaintiffs' Motion for a Preliminary Injunction and Incorporated Memorandum of Law contains 7,773 words, excluding the motion of less than 500 words, case style, signature block, and any certificate of service.

/s/ Robert S. Peck

Robert S. Peck

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on Defendants and the Attorney General of Florida via U.S. Postal Service priority overnight mail on July 22, 2021, as no counsel for Defendants has entered an appearance in the case.

/s/ Robert S. Peck

Robert S. Peck