UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

RESTORATION ASSOCIATION OF FLORIDA, INC., et al., Plaintiffs, v. JULIE I. BROWN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, et al., Defendants.	CASE NO. 4:21-cv-00263-AW-MAF

DEFENDANTS' CORRECTED[1] MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Property insurance premiums have skyrocketed in Florida in recent years, leaving many homeowners unable to afford coverage and others unable even to obtain coverage as insurers pull out of some neighborhoods entirely. Recent evidence points to a surge in contested and fraudulent roofing claims as a catalyst for this development. According to a report from Florida's Office of Insurance Regulation, Florida is experiencing a significant increase in roof claims and roof-related litigation.

In the face of this crisis, the Florida Legislature and industry professionals

[1] This memorandum corrects a small number of typographical, syntactic, and citation formatting errors discovered after filing the State's original memorandum on September 3, 2021 (ECF 19). It is submitted with Plaintiffs' consent.

increasingly received reports and otherwise became aware of several related, emerging trends in Florida's roofing industry. Contractors and their surrogates were canvassing neighborhoods and flooding the Internet with advertisements for "free" roof replacement; seemingly offering to provide services that Florida law reserves exclusively to licensed (and trained) public adjusters (or attorneys); offering to "waive" insurance deductibles or otherwise provide financial incentives (such as substantial gift cards) to inspect roofs and induce the filing of roof-related insurance claims; and more. Reasonably surmising that these developments were not coincidental, the Legislature set about finding a solution. That solution took the form of Chapter 2021-77, Laws of Florida ("the Act").

Designed to reduce the prevalence of inflated or otherwise fraudulent roof claims and to prevent contractors from holding themselves out as public adjusters, the Act imposes several reasonable restrictions and requirements on contractors. Among other things, it prohibits contractors from offering to pay homeowners in exchange for allowing a roof inspection or filing an insurance claim for roof damage; prohibits the payment and acceptance of referral fees when insurance proceeds are payable; and prohibits contractors not holding a public adjuster's license from engaging in certain services such as interpreting policy provisions and

providing advice regarding coverage.[2] The Act also subjects contractors to penalties for violations committed by persons acting on their behalf. Finally, as pertinent to this litigation, the Act requires that contractors include in their contracts with residential property owners a notice advising the property owner that the contractor may not offer the property owner something of value to allow the roof inspection or to file an insurance claim for roof damage. Plaintiffs challenge each of the foregoing provisions, asserting claims under the First Amendment, Dormant Commerce Clause, and Due Process Clause of the United States Constitution.[3]

BACKGROUND

A. The state of the homeowners insurance market in Florida

On February 3, 2021, Florida's Insurance Consumer Advocate, Tasha Carter, delivered a presentation to the House Insurance and Banking Subcommittee. Titled "Consumer Impact and Trends in Property and Automobile

[2] In accordance with this Court's Order Regarding Schedule (ECF 13), Defendants (hereafter referred to as "the State") do not address in this brief Plaintiffs' challenge to the "prohibited advertisement" provisions of the Act, which have been preliminarily enjoined in a related litigation. *See Gale Force Roofing and Restoration, LLC v. Brown*, No. 4:21-cv-00246-MW-MAF, ECF 28 (N.D. Fla. Jul. 11, 2021).

[3] In their Complaint, Plaintiffs also suggest without elaboration that the Act "appears to violate the impairment of contracts clause." ECF 1, ¶ 94. Assuming that Plaintiffs actually intended to plead such a claim, the State does not address it here because it forms no part of Plaintiffs' motion for preliminary injunction.

Insurance," the report estimated that insurance fraud occurs in approximately ten percent of property-casualty claims and costs the average Florida family between $400 and $700 annually in increased premiums. **Exhibit 1**, at 5. The report noted that the average property insurance premium in Florida is now the nation's third-highest, and that insurers were "retreating from high-risk areas." *Id.* at 7. Among other examples of recent incidents, the report cited examples of a 420% increase in roofing permits (apparently attributed to door-to-door solicitations) in The Villages, and an "organized contractor scheme" in Southwest Florida. *Id.* at 8.

As Florida's Insurance Commissioner explained in a letter to the Chair of the House Commerce Committee that same month, one of the "primary cost drivers for property insurance rates in Florida" was the "increase in claims with costly litigation, even with the passage of HB 7065 to curtail litigation abuse."[4] **Exhibit 2**, at 1. In his accompanying report, the Insurance Commissioner explained that "property insurers in Florida are reducing their footprint in certain geographic areas of the state or ceasing to write new business in Florida altogether." *Id.* at 2.[5] He explained further that although Florida passed legislation in 2019 to curb the abuse of assignments of benefits, the reduction in litigation

[4] "HB 7065" refers to the 2019 bill that implemented assignment-of-benefits reform.

[5] The page numbers cited here, and when citing Plaintiffs' motion, refer to the ECF page numbers.

involving assignments of benefits from 2019 to 2020 was more than offset by an increase in litigation not involving assignments of benefits. *Id.* at 5.

In his report to the House, the Insurance Commissioner relayed that insurers were "increasingly reporting an uptick in roof-related claims" and that "[o]ne of the trends that has emerged following the passage of AOB reform in 2019 is roof solicitation, with the promise of a new roof at no cost to the policyholder." *Id.* at 8. The Insurance Commissioner concluded that "[t]hese kinds of solicitations provide insight into why litigation and claim costs may still be increasing, which will lead to increased premium costs for consumers." *Id.*

B. Contractors and public adjusters

Contractors and public adjusters are regulated professionals under Florida law. Whereas the former are regulated by the Department of Business and Professional Regulation under Chapter 489, Florida Statutes, the latter are regulated by the Department of Financial Services under Chapter 626, Florida Statutes. As would be expected of such disparate professions, each is subject to its own licensure and other requirements and regulations, and practitioners of each profession provide entirely distinct types of services to the public. The distinction is reflected in the following statutory definition of a "public adjuster":

> any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, ***directly or indirectly prepares, completes, or files an insurance claim for an insured*** or third-party claimant or who, for money,

> commission, or any other thing of value, acts on behalf of, ***or aids an insured*** or third-party claimant ***in negotiating for or effecting the settlement of a claim*** or claims for loss or damage covered by an insurance contract ***or who advertises for employment as an adjuster of such claims***. The term also includes any person who, for money, commission, or any other thing of value, ***directly or indirectly solicits, investigates, or adjusts such claims on behalf of*** a public adjuster, ***an insured***, or a third-party claimant. The term does not include a person who photographs or inventories damaged personal property or business personal property or a person performing duties under another professional license, if such person does not otherwise solicit, adjust, investigate, or negotiate for or attempt to effect the settlement of a claim.

§ 626.854(1), Fla. Stat. (2021) (emphasis added). *Compare* § 489.105(3), Fla. Stat. (2021) (definition of "[c]ontractor").

The insurance-adjuster business is heavily regulated.[6] For example, Florida law imposes licensing, continuing education, and ethics requirements on adjusters, and even regulates the form and content of all contracts for public adjuster services. *See* §§ 626.864(1), 626.865, 626.869, 626.878, 626.8796, Fla. Stat. (2021). Florida law also prohibits public adjusters from making certain statements in their advertisements or solicitations—among them, "[a] statement or representation that invites an insured policyholder to submit a claim" (1) "when the policyholder does not have covered damage to insured property" (2) "by offering

[6] Indeed, it is illegal in Florida to hold oneself out as a public adjuster without a license issued by the Department of Financial Services. § 626.8738, Fla. Stat. (2021).

monetary or other valuable inducement"; and (3) "by stating that there is 'no risk' to the policyholder by submitting such claim." § 626.854(7)(a), Fla. Stat. (2021).

Moreover, except as otherwise provided in Chapter 626, no person other than an attorney or a public adjuster may directly or indirectly, for money or any other thing of value,

> (a) Prepare, complete, or file an insurance claim for an insured or a third-party claimant;
> (b) Act on behalf of or aid an insured or a third-party claimant in negotiating for or effecting the settlement of a claim for loss or damage covered by an insurance contract;
> (c) Offer to initiate or negotiate a claim on behalf of an insured;
> (d) Advertise services that require a license as a public adjuster; or
> (e) Solicit, investigate, or adjust a claim on behalf of a public adjuster, an insured, or a third-party claimant.

§ 626.854(19), Fla. Stat. (2021).

C. The Act

With its growing awareness of the emerging, dual threats of increased roof-related insurance litigation and insurance-related solicitation practices in the roofing industry, the Legislature deemed it necessary to supplement Chapter 489. Specifically, the Legislature deemed it necessary to establish administrative penalties for contractors engaging in certain activities without a public adjuster license—which Chapter 626 has long prohibited for all persons who are not licensed adjusters or attorneys—and for contractors engaging in conduct that

would be expected to engender fraudulent insurance claims (and to which an increase in such claims has been attributed).

Accordingly, the Act now prohibits contractors from engaging in the following activities pertinent to this litigation:[7]

- "Offering to a residential property owner a rebate, gift, gift card, cash, coupon, waiver of any insurance deductible, or any other thing of value in exchange for:

  1. Allowing the contractor to conduct an inspection of the residential property owner's roof; or

  2. Making an insurance claim for damage to the residential property owner's roof." § 489.147(2)(b), Fla. Stat. (2021);

- "Offering, delivering, receiving, or accepting any compensation, inducement, or reward, for the referral of any services for which property insurance proceeds are payable." § 489.147(2)(c), Fla. Stat. (2021); and

- "Interpreting policy provisions or advising an insured regarding coverages or duties under the insured's property insurance policy or adjusting a property insurance claim on behalf of the insured, unless the contractor holds a

[7] As noted *supra*, Plaintiffs also challenge the "prohibited advertisement" provision of the Act, but that provision is the subject of an existing preliminary injunction and therefore is not addressed here.

license as a public adjuster pursuant to part VI of chapter 626." § 489.147(2)(d), Fla. Stat. (2021).

In addition to the foregoing provisions of the Act, Plaintiffs also challenge subsection (4)(a), which provides that "[t]he acts of any person on behalf of a contractor, including, but not limited to, the acts of a compensated employee or a nonemployee who is compensated for soliciting, shall be considered the actions of the contractor." § 489.147(4)(a), Fla. Stat. (2021). Finally, Plaintiffs challenge subsection (5), which provides in pertinent part that "[a] contractor may not execute a contract with a residential property owner to repair or replace a roof without including a notice that the contractor may not engage in the practices set forth in paragraph (2)(b)" of the Act. § 489.147(5), Fla. Stat. (2021).

ARGUMENT

I. PLAINTIFFS' BURDENS AS THE PARTIES SEEKING A PRELIMINARY INJUCTION

As the parties seeking preliminary injunctive relief, Plaintiffs have the burden of establishing that (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs the damage the proposed injunction may cause the State; 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). A preliminary injunction "is an extraordinary and drastic remedy not to be granted unless the

movant clearly established the 'burden of persuasion' as to each of the four prerequisites." *Id.*

In seeking to invalidate the Act in its entirety, Plaintiffs appear to assert a facial challenge to the Act's constitutionality. *See Am. Fed'n of State, County and Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) ("A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself."); *see also* ECF 1 at 23 (seeking a declaration "that the Act is invalid and unenforceable in its entirety" and seeking to enjoin the enforcement of "the challenged provisions of the Act" in their entirety).[8]

The Supreme Court has recognized a "type of facial challenge" in the First Amendment context by which "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional" in light of "the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 (2010). However, "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Therefore, "it is irrelevant" whether the challenged law "encompass[es] protected commercial speech of other persons." *Id.* at 496–97. *See also FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1302 (11th Cir. 2017) ("overbreadth doctrine does

[8] It is less clear in their motion whether Plaintiffs are challenging the Act on its face or as applied.

not apply where the *entire* scope of the statute restricts only commercial speech") (quoting *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1571 (11th Cir. 1993)). To the extent that some of the challenged provisions restrict speech, Plaintiffs do not dispute that it is commercial speech only.

Accordingly, the overbreadth doctrine has no application here, and Plaintiffs can prevail on a facial challenge only by establishing that the challenged provisions are "unconstitutional in all of [their] applications." *Washington State Grange*, 552 U.S. at 449 (2010) (citation omitted).

II. PLAINTIFFS FAIL TO ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

A. Plaintiffs are not substantially likely to succeed on the merits of their First Amendment claims.

"States have a compelling interest[9] in the practice of professions within their boundaries, and . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Locke v. Shore*, 634 F.3d 1185, 1196 (11th Cir. 2011) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). States also have a compelling interest in preventing insurance fraud and, as Plaintiffs acknowledge, at least a substantial interest "in assuring that homeowners insurance rates are reasonable." ECF 5 at 25.

[9] As explained below, a compelling interest is not required to justify any of the provisions of the Act.

Instead, to the extent that the challenged provisions constitute restrictions on commercial speech that concerns lawful activity and that is truthful and not misleading, those are analyzed under the *Central Hudson* standard. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). The *Central Hudson* standard provides that "a restriction on commercial speech is valid under the First Amendment if (1) the speech is not misleading and does not concern unlawful activity, (2) the government has a substantial interest in restricting the speech, (3) the regulation directly advances the asserted government interest, and (4) the regulation 'is not more extensive than is necessary to serve that interest.'" *FF Cosmetics*, 866 F.3d at 1298 (quoting *Central Hudson*, 447 U.S. at 566).

Otherwise, "States may regulate professional conduct, even though that conduct incidentally involves speech." *Nat. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."). As explained below, each of the provisions subject to Plaintiffs' First Amendment challenge either regulates professional conduct while imposing only incidental (if any) burdens on speech, or satisfies the *Central Hudson* test for regulations of commercial speech.

1. The "things of value" provision does not violate the First Amendment.

Under Florida law, even licensed public adjusters are prohibited from "invit[ing] an insured policyholder to submit a claim by offering monetary or other valuable inducement." § 626.854(7)(a)2., Fla. Stat. (2021). Apparently believing that contractors should have greater leeway to operate in the insurance space, Plaintiffs assert that subsection (2)(b) of the Act violates the First Amendment by prohibiting contractors from offering payment or other "things of value" to a homeowner in exchange for allowing the contractor to conduct a roof inspection or submitting an insurance claim for roof damage. ECF 5 at 19.

Even if this prohibition is categorized as a regulation of commercial speech, it passes muster under intermediate scrutiny. It cannot reasonably be disputed that the government interests underlying the Act are at least substantial. And this regulation directly advances those interests because there is a self-evident, common-sense connection between contractors *paying* homeowners (with cash or otherwise) to inspect their roofs and to file insurance claims, and the reported increases in inflated or fictitious claims for roof damage and in roof-related litigation. *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (recognizing that speech restrictions sometimes can be upheld on the basis of studies and anecdotes "or even . . . solely on history, consensus, and 'simple

common sense.'"). The Legislature did not rely on "mere speculation or conjecture" to draw this connection. *Id.* at 626 (quotation omitted).

Indeed, Florida's courts have recognized the obvious—that monetary incentives and disincentives affect the insured's decision whether to submit a claim. *See*, *e.g.*, *Gen. Star Indem. Co. v. West Florida Village Inn, Inc.*, 874 So. 2d 26 (Fla. Dist. Ct. App. 2004). Thus, in the context of discussing insurance deductibles, the Second District Court of Appeal has explained that the following "worthy social goals" "are promoted" by the fact that "a deductible *requires* the insured to share in the risk of loss." *Id.* at 33 (emphasis added).[10] "The insured is given a monetary incentive to fulfill his or her duty to protect and to adequately maintain his or her property *as well as a monetary disincentive to file relatively trivial claims, thereby contributing to the reduction of administrative costs and overall costs of insurance*." *Id.* at 34 (emphasis added).

It hardly requires elaboration that an obligation to pay a deductible likewise provides a monetary disincentive to file fraudulent claims, and that such claims impact the administrative and overall costs of insurance. When a contractor offers

[10] "Generally, the functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." *Gen. Star*, 874 So. 2d at 33 (quoting *Int'l Bankers Ins. Co. v. Arnone*, 552 So. 2d 908, 911 (Fla. 1989)). *See also Progressive Am. Ins. Co. v. SHL Enterprises, LLC*, 264 So. 3d 1013, 1017 (Fla. Dist. Ct. App. 2018) (citing Black's Law Dictionary definition of "deductible" as "the portion of the loss to be borne by the insured before the insurer becomes liable for payment.").

to "waive" that deductible—or offers cash, gift cards, and the like—it removes that disincentive. This inevitably will lead to an increase in trivial, inflated, and outright fictitious claims—and in turn, to increased litigation that increases the cost of insurance.[11] Accordingly, the prohibition of this practice will advance the substantial state interest "in a direct and material way," and the Legislature did not need to engage in novel theorizing or speculation to draw this connection. *Florida Bar*, 515 U.S. at 625 (quotation omitted). And the pervasiveness of this practice is underscored by Plaintiff Apex Roofing's own affidavit, in which it describes itself as "the largest roofing contractor in the Southeastern United States" and then admits that it offers to waive deductibles. ECF 5-2, ¶¶ 4, 26.

Plaintiffs sidestep this obvious justification for the prohibition and instead argue merely that a "thing of value" would "apparently" include "an offered discount if the homeowner hires the roofer when the contractor is already working on neighboring homes." ECF 5 at 19. *See also id.* at 26 (describing the offer of a discount as an "utterly appropriate marketing practice[]" that does "not even hint at fraudulent conduct"). Plaintiffs' argument is unavailing.

[11] As one Representative explained to his colleagues during the House Insurance & Banking Subcommittee hearing, a gift card provided to a homeowner with a deductible has the same effect as waiving or otherwise improperly reducing the deductible and also is an indicator of fraud because the resulting insurance claim will be inflated. Statement of Rep. Beltran, https://thefloridachannel.org/videos/3-23-21-house-insurance-banking-subcommittee/ (Mar. 23, 2021) (beginning at 1:32:00).

Nothing in the Act prohibits the hypothetical offer that Plaintiffs describe. Indeed, nothing in the Act prohibits an offer of discounts—or even an offer of a free roof inspection—generally. Instead, the text of subsection (2)(b) demonstrates that its scope is to prohibit a contractor from *paying* or *offering to pay* a homeowner, in whatever form such a payment might take—a narrow prohibition that directly advances the State's interest in preventing inflated and fictitious insurance claims.

A roof inspection is not a "thing of value" within the meaning of the Act,[12] and therefore a contractor's decision not to charge a fee for providing that service likewise is not tantamount to offering or giving something of value. Indeed, the items enumerated in subsection (2)(b)—a "rebate, gift, gift card, cash, coupon, [or] waiver of any insurance deductible"—are all forms of providing something of value separate from the provision of services itself. "[U]nder the established interpretive canons of *noscitur a sociis* and *ejusdem generis*, 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City*

[12] If a roof inspection itself is a "thing of value" within the meaning of the Act, then subsection (2)(b) would prohibit a contractor from offering a roof inspection in exchange for the homeowner's permission to conduct a roof inspection. This construction of subsection (2)(b) would be nonsensical.

Stores, Inc. v. Adams, 532 U.S. 105, 114–115 (2001)). A roof inspection itself, discounted or otherwise, is not similar in nature to the enumerated objects. Accordingly, the Act does not prohibit it.

Similarly, the prohibited "thing of value" must be offered "in exchange for" the inspection or insurance claim. § 489.147(2)(b), Fla. Stat. A discounted inspection that is not tied to the filing of an insurance claim—i.e., the only type of discount that Plaintiffs reference—is neither offered in exchange for the inspection itself, nor is it offered in exchange for the filing of an insurance claim. For this reason as well, the Act does not prohibit this type of offer. *See also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld.") (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)).

Finally, this prohibition is not more extensive than necessary to serve the state interest. As explained above, deductibles are recognized as a fundamental component of the proper functioning of the insurance market precisely because they reduce the incidence of non-meritorious insurance claims. The reduction in non-meritorious insurance claims is the very interest the Legislature sought to advance by way of this prohibition, and a narrower "solution" that allows contractors to continue distorting the normal relationship between insurer and

insured would not serve this interest. Nor would a "public information" campaign, which is the only purportedly narrower alternative that Plaintiffs propose. ECF 5 at 28.

2. The referral-fee provision does not violate the First Amendment.

Plaintiffs also claim that "the Act's provision prohibiting payment or reward for a referral when an insurance claim is being made" also violates the First Amendment because it "targets protected speech." ECF 5 at 22. To the contrary, subsection (2)(c) does nothing to prohibit referrals of business—it prohibits only *compensation* in exchange for referrals, and even then it does so only when property insurance proceeds are payable.

"A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Locke*, 634 F.3d at 1191 (quotation omitted). The occupational regulation at issue here does not restrict contractors from referring work to each other, notwithstanding Plaintiffs' suggestion to the contrary.[13] Instead of targeting protected speech, this provision targets the conduct of paying referral fees. Any

[13] While Plaintiffs argue that "[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" (ECF 5 at 22), Plaintiffs' purported concern is moot if all contractors are prohibited from paying referral fees to each other.

burden on speech that might result from this provision is merely incidental.[14] *Cf. U.S. v. Mathur*, No. 2:11–cr–00312–MMD–PAL, 2012 WL 4742833, at *10 (D. Nev. Sept. 13, 2012) (Anti-Kickback Act "does not regulate speech protected by the First Amendment" but instead "regulates the *conduct* of paying or offering to pay remuneration in return for Medicare or Medicaid referrals" even though it prohibits offers to pay).

Perhaps cognizant that this provision is a regulation of occupational conduct that does not implicate the First Amendment, Plaintiffs attempt to reframe the referral-fee prohibition as an advertising prohibition by referencing three websites[15] that "take money from contractors to promote their businesses and then provide consumers with referrals." ECF 5 at 23. As a preliminary matter, Plaintiffs fail to establish that they actually pay any of these three websites. The inquiry could end there, whether Plaintiffs intend to assert that the referral-fee provision is invalid as applied to their own utilization of these websites or invalid on its face based on some non-party's use of these websites.[16]

[14] Referral-fee prohibitions and restrictions are commonplace in the context of occupational regulation.

[15] Plaintiffs refer to homeadvisor.com, angi.com, and yelp.com. ECF 5 at 23.

[16] As noted above, a facial challenge based on overbreadth is unavailable when the challenged provisions involve nothing more than commercial speech.

Even if Plaintiffs established that they pay for referral services on these websites, however, the Act would not prohibit such payments. Plaintiffs' supposition that the referral-fee provision "appears to" ban payments to these websites rests on the assumption that it extends to payments for advertising to the general public that in turn might generate leads. ECF 5 at 23. But while the purpose of an advertisement undoubtedly is to generate business, a payment made for an advertisement does not constitute a payment for a referral. The Legislature plainly was concerned only with the latter, and therefore it addressed only the latter.

Additionally, the Act prohibits referral fees only for "services for which property insurance proceeds are payable." At the time a contractor pays for services from a website such as HomeAdvisor, it cannot know what sort of lead (if any) might result—let alone whether that future lead will involve a homeowner with an insurance policy or a covered loss. *See* ECF 5 at 23 (describing that a contractor "purchases a subscription" and "[t]hen, based on requests the websites receive from homeowners . . . it [sic] will make matches to qualified contractors"). This is not the sort of quid pro quo arrangement—the exchange of payment for a potentially lucrative insurance claim—that the challenged provision addresses.

Finally, this "paid-referral ban" is nothing like the one at issue in *Meyer v. Grant*, where the law burdened "the dissemination of a message," as Plaintiffs

describe it. ECF 5 at 22 (citing *Meyer v. Grant*, 486 U.S. 414 (1988)). The statute at issue in *Meyer* burdened "core political speech" by prohibiting payments to those who circulate petitions for citizen initiatives. *Meyer*, 486 U.S. at 421–22. *Meyer* is entirely inapposite to a prohibition such as the one here, which merely burdens the underlying commercial *conduct* of paying referral fees for potential insurance claims. Contractors remain free to communicate with each other regarding referrals. The Act does not affect their ability to do so, and it does not burden protected speech.

3. The public-adjuster provision does not violate the First Amendment.

Florida law has long required licensure to engage in public adjuster activities, and long prohibited unlicensed public adjusting. Plaintiffs, who do not possess such a license, nonetheless extoll the virtues of their insurance-related services while attempting to shoehorn a First Amendment claim into a run-of-the-mill occupational licensing framework. Although subsection (2)(d) of the Act indeed prohibits certain speech under certain conditions, it does not implicate the First Amendment.

"If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech . . . subject to First Amendment scrutiny." *Locke*, 634 F.3d at 1191 (quotation omitted). In *Locke*, the Eleventh

Circuit upheld a Florida statute requiring interior designers to obtain a license to practice in commercial settings. *Id.* at 1189. Noting that the license requirement regulated only professionals' "direct, personalized speech with clients" rather than "speech to the public at large[,]" the court concluded that it governed "occupational conduct, and not a substantial amount of protected speech," and therefore that "it [did] not implicate constitutionally protected activity under the First Amendment." *Id.* at 1191.

Under longstanding Florida law, the public-adjusting occupation requires licensure. *See* §§ 626.864(1), 626.8738, Fla. Stat. In the commercial realm, activities reserved to licensed public adjusters (and attorneys) include aiding an insured in negotiating for or effecting the settlement of a claim, and soliciting, investigating, adjusting, or preparing a claim (directly or indirectly). *See* §§ 626.864(1), 626.854(19), Fla. Stat.

Notably, Chapter 626 expressly contemplates its interaction with Chapter 489, which governs the regulation of contractors. It provides that "[a] licensed contractor under part I of Chapter 489, or a subcontractor, may not adjust a claim on behalf of an insured unless licensed and compliant as a public adjuster under this chapter." § 626.854(15), Fla. Stat. (2021). This provision has been effective since 2011, demonstrating that the line between contractors and insurance adjusters has long since been drawn. *See* 2011-39, Laws of Florida.

Ultimately, Plaintiffs' reading of subsection (2)(d) goes too far. Nothing in the text of the Act supports Plaintiffs' interpretation that it imposes a blanket prohibition on telling a homeowner about their experience with a specific insurer, for example. And nothing prohibits or hinders the execution of an assignment-of-benefits agreement that is otherwise compliant with Florida law, notwithstanding Plaintiffs' protestations that subsection (2)(d) does just that. *Cf. Bioscience West, Inc. v. Gulfstream Property and Cas. Ins. Co.*, 185 So. 3d 638, 641–42 (Fla. Dist. Ct. App. 2016) (acceptance of an assignment of benefits does not constitute unlicensed public adjusting).

4. The mandatory-notice provision does not violate the First Amendment.

Subsection (5) of the Act requires that a contract between a contractor and a residential property owner include a notice "that the contractor may not engage in the practices set forth in paragraph (2)(b)." In other words, the Act requires contractors to inform homeowners that the former may not offer to waive an insurance deductible, or provide cash, gift cards, or the like, in exchange for allowing a roof inspection or filing a claim. Plaintiffs argue that this disclosure requirement is a form of compelled speech and that it is unconstitutional because it would require them "to provide information skewed to the State's preferred message." ECF 5 at 25.

Plaintiffs rely on the *NIFLA* decision, in which the Supreme Court invalidated a requirement that certain licensed facilities providing family planning or pregnancy-related services "disseminate a government-drafted notice"[17] advising that the state provided free or low-cost abortion and other services. *NIFLA*, 138 S. Ct. at 2369. The Court took care to note in *NIFLA* that the notice requirement was "not an informed-consent requirement *or any other regulation of professional conduct*." *Id.* at 2373 (emphasis added).

With regard to the latter, the Court reasoned that the notice requirement "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure [was] ever sought, offered, or performed." *Id.* at 2373; *see also id.* at 2372 (explaining that the required notice "in no way relate[d] to the services that licensed clinics provide" and instead required the disclosure of "information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic"). Here, in contrast, the notice requirement applies only when the contractor and homeowner are executing a contract for the provision of the contractor's own services and therefore relates directly to the contractor's occupational conduct. As the required notice consists of "factual, noncontroversial information" that is part of Plaintiffs' commercial speech, it is subject to "more

[17] In contrast, the Act requires no specific form of notice, and the required notice is not government-drafted.

deferential review." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (2018)).

To be sure, Plaintiffs' apparent distaste for the Act does not itself render the subject matter of the required disclosure "controversial" for the purpose of First Amendment review. *See*, *e.g.*, *CTIA – The Wireless Association v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019) ("We do not read the Court [in *NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial."). As the court explained in *CTIA*:

> The dispute in *NIFLA* was whether the state could require a clinic whose primary purpose was to oppose abortion to provide information about 'state-sponsored services,' including abortion. While factual, the compelled statement took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission. Under these circumstances, the compelled notice was deemed controversial within the meaning of *Zauderer* and *NIFLA*.

Id. at 845. Here, the scope of a contractor's proper "mission" under Florida's statutes does not include engaging in activities designed to manufacture insurance claims.

Under the governing *Zauderer* standard, "compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial governmental interest and is purely factual and uncontroversial." *Id.* The substantial government interest served by

prohibiting waivers of deductibles (in whatever form) is described in detail above, as is the manner in which that provision directly furthers that government interest. A notice requirement likewise is at least "reasonably related" to that interest, as the information to be provided to homeowners will inform them of the prohibition against waiving insurance deductibles and can be expected to reduce the occurrences of homeowners accepting payments that enable the drastic increase in contested roof claims.

Finally, the court in *CTIA* also rejected the plaintiff's argument that the compelled disclosure was "unduly burdensome" under *Zauderer*, reasoning that the ordinance could be satisfied by a small notice that would not "threaten to drown out messaging" by those subject to the requirement. *Id.* at 849. Here, the Act does not require any particular form of the required notice at all, and cannot be said to "drown out" Plaintiffs' messaging (even assuming *arguendo* that any "messaging" exists in the context of a written contract). And Plaintiffs do not even attempt to identify an undue burden—nothing in their affidavits suggests, let alone establishes, that adding the required disclosure to their contracts would be unduly burdensome. Accordingly, Plaintiffs have not shown that they are substantially likely to prevail on this claim.

B. The Act does not violate the Dormant Commerce Clause.

"The party challenging legislation on dormant Commerce Clause grounds bears the initial burden of showing discrimination." *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 448 (9th Cir. 2019). Plaintiffs assert that the Act violates the Dormant Commerce Clause not only because of its "prohibited advertisement provision," but also because of its "bar on things of value, and the limits on explaining insurance coverage." ECF 5 at 32. Plaintiffs make no effort to explain how the "bar on things of value" and the "limits on explaining insurance coverage" violate the Dormant Commerce Clause.[18]

In reviewing state statutes under the Dormant Commerce Clause, a court "must first determine whether the state law discriminates against out-of-state residents on its face." *Locke*, 634 F.3d at 1192. The Act plainly does no such thing, and Plaintiffs make no real effort to argue otherwise. Instead, Plaintiffs focus on the second "level[] of analysis": "state laws that do not facially discriminate against out-of-state residents are struck down only if 'the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (second alteration in original) (quoting *Pike v. Bruce Church, Inc.*,

[18] Indeed, Plaintiffs' argument in support of this claim appears to relate exclusively to the "prohibited advertisement" provision of the Act because it is based solely on the purported impact that the Act will have on Plaintiff Apex Roofing's ability to advertise on its website as a multi-state company. ECF 5 at 28–32. The State does not address the advertising prohibition in this brief but, needless to say, disagrees with Plaintiffs' analysis.

397 U.S. 137, 142 (1970)); *see also* ECF 5 at 29–30. But even this second level of analysis requires the existence of some interstate reach for its application.

Plaintiffs' analysis (to the extent that it even relates to the foregoing two provisions of the Act at all) is based primarily on the fallacy that the Act applies to commerce that "takes place wholly outside of [Florida's] borders." ECF 5 at 30. But there is no credible reading of the Act that authorizes the State to penalize a Florida-licensed contractor for offering something of value to an Alabama homeowner in exchange for allowing the contractor to inspect that person's property in Alabama, or for making an insurance claim in Alabama. Similarly, nothing in the Act suggests that it authorizes the State to penalize a Florida-licensed contractor for advising an Alabama homeowner regarding insurance coverage for an Alabama property.

Instead, the Act plainly regulates Florida-licensed contractors in their transactions with Florida homeowners as part of a regulatory effort to address the crisis in the Florida property insurance market. A company "[can]not escape state regulation merely because it is also engaged in interstate commerce." *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961); *see also Alliant Energy Corp. v. Bie*, 330 F.3d 904, 915 (7th Cir. 2003) ("the fact that an entity is involved both in intra- and interstate commerce does not exempt that entity from compliance with the intrastate regulations"). The challenged provisions here are a far cry from

the statute at issue in *Edgar v. MITE Corp.*, which "directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois[,]" by "allowing the Illinois Secretary of State to block a nationwide tender offer." 457 U.S. 624, 641–43 (1982) (plurality op.).

The *Healy* decision on which Plaintiffs rely is similarly inaopposite. *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). There, the Court invalidated a Connecticut law that *necessarily* affected out-of-state markets and wholly out-of-state transactions because it had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" by requiring out-of-state shippers of beer to set prices by reference to their prices in other states. *Id.* at 337–40.

Here, by contrast, nothing in the Act *necessarily* has extraterritorial effect even under Plaintiffs' tortured reading of the Act. In sum, Plaintiffs' fanciful construction of the scope of the challenged provisions does not suffice to meet its initial burden of showing discrimination against interstate commerce.

C. The Act does not violate the Due Process Clause.

Along the lines of its Dormant Commerce Clause claim, Plaintiffs' assertion of a due process violation turns on words that do not appear in the Act. According to Plaintiffs, subsection (4)(a) of the Act creates an "irrebuttable presumption of responsibility for acts of a third-party" even though it provides simply that a

contractor is responsible for the acts that a person performs "on behalf of" the contractor. Whether irrebuttable presumptions are disfavored or not, the Act does not create one, and the Court should reject this claim summarily.

D. Plaintiffs have not shown that they will suffer irreparable injury unless the requested injunction issues.

"A showing of irreparable injury is 'the sine qua non of injunctive relief.'" *Siegel*, 234 F.3d at 1176 (quotation omitted). "Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*

Plaintiffs point only to the general principle that a First Amendment violation constitutes irreparable injury. ECF 5 at 34. Having failed to establish a First Amendment violation, they fail to establish the threat of irreparable injury as well. And Plaintiffs submit no evidence of irreparable harm with regard to the non-speech prohibitions of the Act, with Plaintiff Apex Roofing asserting only that it "do[es] not want" to comply. ECF 5-2 ¶¶ 22–28. This is plainly insufficient. Finally, as noted above, contractors have been prohibited from engaging in public adjuster work for a decade. § 626.854(15), Fla. Stat. (2021); 2011-39, Laws of Florida. Accordingly, subsection (2)(d) of the Act does not create a new threat to Plaintiffs that requires the extraordinary remedy of a preliminary injunction. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay

in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.").

E. Plaintiffs' threatened injury does not outweigh the harm that might result to the State, and the requested injunction would not serve the public interest.

When the government is the party opposing a preliminary injunction, the Court "may consider the third and fourth factors" of the preliminary injunction inquiry together because the government's "interest and harm merge with the public interest[.]" *Brown v. Sec., U.S. Dept. of Health and Human Servs.*, 4 F.4th 1220, 1224 (11th Cir. 2021). As detailed above, Plaintiffs' threatened injury is minimal, whereas the challenged provisions here serve the public interest by discouraging fraudulent insurance claims and promoting a healthy insurance market. Accordingly, the third and fourth factors do not favor the issuance of a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), I hereby certify that the foregoing memorandum contains 7,150 words, excluding the case style, signature block, and this certification.

/s/ David Axelman