UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GALE FORCE ROOFING AND RESTORATION, LLC,

Plaintiff,

v.

JULIE I. BROWN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation,

Defendant.

PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF

CHIEF JUDGE MARK WALKER, PRESIDING
Case No.: 21-cv-00246-MW-MAF

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INTRODUCTION

Plaintiff, Gale Force Roofing and Restoration, LLC ("Gale Force"), by and through its undersigned attorneys, moves this Court for summary judgment against Defendant, Julie I. Brown, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, to declare unconstitutional Chapter 2021-77, Laws of Florida (hereinafter, the "Act"), which infringes on the right to freedom of speech protected by the First Amendment to the U.S. Constitution.

Because the Act violates Plaintiff's constitutional rights, it should be declared unconstitutional and permanently enjoined.

STATEMENT OF FACTS

The Florida Legislature passed the Act, which (among other things) prohibits a contractor from "contacting" a "residential property owner" in a manner that "encourages," "instructs," or "induces" that homeowner to contact the contractor "for the purpose of making an insurance claim for roof damage." Act, § 1. Specifically, it threatens licensure suspension/revocation and enormous fines up to $10,000 ***per*** violation of the Act. *Id.* The Act went into effect July 1, 2021. *Id.* at § 15. However, this Court entered its Preliminary Injunction on July 11, 2021, preventing the enforcement of "§§ 489.147, (2)(a), (3), and 4(b)," which were each sections of Florida law newly created by the Act. *See* ECF 28.

The Act prohibits communication (Defendant suggests this only applies to

a written medium) by a contractor that in any manner directs a homeowner to contact the contractor if the purpose of the communication is to make an insurance claim for roof damage. § 489.147(2)(a). The Act goes beyond just regulating contractors licensed under Chapter 489 and creates a catch-all provision that penalizes anyone that "encourages," "instructs," or "induces" a homeowner to contact a contractor or public adjuster "for the purpose of making an insurance claim for roof damage." Any person that does so is "guilty of unlicensed contracting and is subject to the penalties set forth in s. 489.13." *See* § 489.13(3),(7) (authorizing criminal penalties against an unlicensed contractor and fines up to $10,000 per violation).

The Act is an unconscionable attack on the right for homeowners to receive truthful information from licensed contractors about damage homeowners may have to their property, and a thinly-veiled attempt to prevent homeowners from making valid claims to repair and rebuild their homes. The state of Florida lacks any compelling interest in its infringement on Plaintiff's fundamental constitutional rights. And even if it could show a compelling interest, the Act is not narrowly tailored. Plaintiff requests this Court enter judgment declaring §§ 489.147, (2)(a), (3), and 4(b) unconstitutional and permanently enjoining their enforcement.

I. PLAINTIFF'S SPEECH IMPACTED BY THE ACT

Plaintiff regularly performs remedial and repair work in exchange for

insurance benefits owed to homeowners under their residential insurance policies. ECF 61-1 at ¶ 4. Plaintiff regularly advertises to homeowners who may have suffered storm damage, inviting them to contact Plaintiff for inspection of their property (including the roof system) to determine the nature and extent of storm damage the property may have suffered. ECF 61-1 at ¶ 5.

Plaintiff then truthfully conveys to homeowners the nature and extent of the damage (if any such damage is found) and encourages homeowners to contact their insurance company to make a claim under their residential insurance policy to determine whether the damage is covered and if the insurer will provide policy benefits to assist in paying for the repairs. ECF 61-1 at ¶¶ 4—6. The Act will necessarily (indeed, by design) outlaw Plaintiff's advertising techniques (specifically, that Plaintiff will assist homeowners in safeguarding their real property and assist in their recovery from life-interrupting damage caused by Mother Nature). ECF 61-1 at ¶¶ 7—8. This Court has previously discussed an example of Plaintiff's advertising included in its complaint and relied upon in its Motion for Preliminary Injunction. ECF 28 at p. 10. Gale

Force regularly shares with homeowners the following advertisement:

(ECF 61-2 at Exhibit B).

As Mr. Dewey explains, a contractor cannot opine from a distance (in most circumstances) that a roof needs to be repaired or replaced– an inspection must be done first. ECF 61-1 at ¶ 6. It is at this point, after Gale Force has determined there is damage, it can then inform the homeowner about the possibility of making a claim for insurance benefits. It is then the state of Florida seeks to jump in and silence Gale Force's speech. Under the new Florida Law, Gale Force is prevented from giving its professional advice to a homeowner regarding as to an alternative funding source (rightly available to

the homeowner since that the homeowner has paid thousands of dollars in insurance premiums) that may be able to pay for work needed to their home. ECF 61-1 at ¶ 8.

II. LEGISLATURE'S ATTEMPT TO BAN DISFAVORED SPEECH

The plain text of the Act targets and seeks to prohibit speech the Legislature has determined is disfavored. It is also apparent from the Act's short legislative history that the Legislature was seeking to ban speech. When considering the House companion version of what ultimately became the Act (HB 305), the Legislature reviewed advertisements by contractors that discuss storm damage to Florida homes. ECF 61-3 at p. 12. It was this advertisement (and others like it) the Legislature used as a reason to pass new legislation outlawing speech by contractors regarding property insurance claims. ECF 61-3 at p. 12. The advertisement reviewed by the House Civil Justice & Property Rights Subcommittee merely provided truthful information that the individual's home "has a high probability of needing repair" and that insurance coverage may be available to complete the necessary repairs to or replacement of the roof system. *Id.* at p. 12.[1] Since the goal was to make unlawful that

[1] This language from the House companion bill was added to the Act by a strike-all amendment (Amendment 334081 to CS/CS/CS/SB 76 (2021)) that was approved by the House on April 27, 2021. The Act returned to the Senate where it concurred in Amendment 334081 on April 30, 2021, in the final minutes of the legislative session.

speech by a contractor (or anyone else), it is clear the Legislature was openly seeking to ban disfavored speech.

III. LEGAL STANDARD

Summary Judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Sheckells v. AGV-USA Corp.*, 987 F.2d 1532, 1534 (11th Cir. 1993). A fact is "material" if, under substantive law, it is essential to a claim's disposition. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if there is enough evidence on each side so that a rational trier of fact could resolve the issue either way. *Id.* Summary judgment is not a disfavored procedural shortcut but an important procedural tool designed to secure the just speedy and inexpensive determination of an action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The party moving for summary judgment has the burden of establishing that there is no issue as to any material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the moving party has met its burden, the adverse party must respond, by affidavits or otherwise, to set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

LEGAL ARGUMENT

IV. THE ACT IS A VIOLATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS

The First Amendment, which is applicable to the States through the Fourteenth Amendment, prohibits laws "abridging the freedom of speech." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). A government entity "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (*citing Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (internal quotations omitted). There are two ways this Court may determine the Act is unconstitutional.

First, determine the Act attempts to regulate speech based on its communicative content and is therefore subject to strict scrutiny. Laws that regulate speech based on their communicative content are presumptively unconstitutional, and may be justified only if the government can establish the laws are narrowly tailored to serve compelling state interests. *Id.* Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the message expressed. *Reed*, 576 U.S. 155. In evaluating the constitutionality of government regulation of speech, a court must consider whether the statute "on its face" draws distinctions based on the message a conveyed. *Id.*

Second, determine the Act regulates commercial speech and is therefore

subject to intermediate scrutiny. When a state "entirely prohibits the dissemination of truthful, nonmisleading commercial messages" this Court must undertake the "rigorous review that the First Amendment generally demands." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

Under either test, Defendant bears the burden of proving the constitutionality of its regulation of free speech. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The Act at issue in this case cannot withstand such "rigorous review."

A. The Act cannot Survive Strict Scrutiny[2]

Before beginning this analysis it is important to understand the two types of communications that are infringed upon should this Act remain in effect: (1) the professional advice from Gale Force to a homeowner, advising their roof is in need of replacement and explaining that the cost of the work may be covered by an insurance policy, and suggesting that the consumer contact and hire Gale Force for the work to be performed; and (2) communications telling homeowners to contact Gale Force as their roof system may have damage that their insurance policy will cover and to contact Gale

[2] Plaintiff recognizes this Court has rejected application of strict scrutiny to the Act and merely presents this portion of the argument to preserve the issue if there are future proceedings.

Force for that work to be performed. As to the first category, such is properly considered professional speech and is not Commercial Speech.[3]

As Judge Wilson explained in his concurrence to the Eleventh Circuit's *Wollschlaeger* en banc opinion (reiterating the position he took in the three prior panel decisions), when a statute imposes content-based restrictions on speech, it is automatically subject to strict scrutiny. *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1324 (11th Cir. 2017) (Wilson, J. concurring). Judge Wilson noted the shift in First Amendment jurisprudence brought about by *Reed* and the impact it would have, ultimately solidifying protections for First Amendment rights. *Id.* at 1325. Only when courts consistently apply strict scrutiny will courts prevent "official suppression of ideas" and government "hostility–or favoritism" to the ideas being conveyed. *Id.*; see also *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1043 (N.D. Cal. 2017) (applying *Reed* to determine if the telephone consumer protection act was an unconstitutional content-based restriction on Facebook's speech– sending text message advertisements to consumers).

The Sixth Circuit has the most detailed analysis of post-*Reed* implications on commercial speech. *Int'l Outdoor, Inc. v. City of Troy,*

[3] Section IV(B) below will discuss the second category of speech, which this Court has previously described as Commercial Speech subject to intermediate scrutiny.

Michigan, 974 F.3d 690, 703 (6th Cir. 2020). In its analysis of each circuit and district court opinion addressing this issue, the Circuit Court noted there was seemingly a reticence to confront the issue head-on. *Id.* In fact, many courts passed over the question of whether strict scrutiny applied preferring to apply intermediate scrutiny first and then, once finding a statute or regulation could not satisfy intermediate scrutiny, determining it would also fail more exacting review.

But the Sixth Circuit dove head on into the inquiry. It left nothing uncertain. It explained that post-*Reed*, all content-based restrictions on speech, even those involving commercial speech, are subject to strict scrutiny. *Id.* Focusing on the plain language of *Reed* and the Supreme Court's decisions post-*Reed*, the Circuit Court determined intermediate scrutiny is only applicable to "a speech regulation that is content-neutral on its face." *Id.* Not only does the plain text of *Reed* compel this analysis, but the post-*Reed* Supreme Court, in *Barr v. American Association of Political Consultants*, "repudiated the approach taken earlier by some of the circuit courts" and instructed lower courts that "strict scrutiny applies to content-based restrictions." *Id.* at 706. The Sixth Circuit used no uncertain terms: "[t]he Supreme Court has flatly confirmed the requirement to apply *Reed*'s strict-scrutiny standard . . . ." *Id.* The Supreme Court's decision in *Reed* and its post-*Reed* decisions (including *Barr*) display strict scrutiny is the standard this

Court should apply when the statutory restriction in question is content-based.

It is well known that, "it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory," because such laws are "'presumptively invalid.'" *Id.* at 2668 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992)). The Eleventh Circuit recently considered two similar attempts by the state of Florida to regulate (ban) speech. In *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1308 (11th Cir. 2017), the Eleventh Circuit considered the state of Florida's attempt to prohibit doctors from asking patients about firearms in the home (and other similar requirements). The Eleventh Circuit considered it "not a hard case" to determine that such regulation was content-based and subject to strict scrutiny:

> The record-keeping and inquiry provisions expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message. As a result, there can be no doubt that these provisions trigger First Amendment scrutiny. "[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment.

Id. at 1307 (quoting *King v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014)).

The test for whether a statute is a content-based restriction is simple– if the state has to look at the words being said in order to determine whether there is a violation, it is a content-based restriction. The statute analyzed in

Wollschlaeger prohibited doctors from speaking about firearms in the home– the state had to listen to what the doctors said in order to determine whether the statute was violated. Plainly, this was a content-based restriction on speech. The Court also rejected Florida's attempt to characterize the speech as part and parcel of the regulation of professional conduct. *Id.* at 1308. Since the statute impermissibly told doctors what they could and could not say about firearm ownership, the Eleventh Circuit determined it violated the First Amendment and prohibited its enforcement.

Likewise, even more recently, the Eleventh Circuit considered an attempt to ban speech by therapists under a city's authority to protect minor children as well as regulate professional conduct. *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 861 (11th Cir. 2020). The Court reviewed a local ordinance prohibiting "the practice of seeking to change an individual's sexual orientation or gender identity." *Id.* at 859. Relying on *Wollschlaeger*, the Court found the regulation to be a content-based restriction, subject to strict scrutiny, since the application of the regulation depended on what was being said. *Id.* at 861. The Court also reiterated the oft-repeated refrain:

> Strict scrutiny . . . means we must consider whether the ordinances are narrowly tailored to serve compelling state interests. Laws or regulations almost never survive this demanding test . . . . Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee.

Id. at 861–62 (internal citations and quotations removed).

Turning to the Act before this Court. The Act prohibits a contractor from sending any "communication" that "encourages," "instructs," or "induces" a homeowner to contact a contractor or public adjuster for the purpose of making an insurance claim for roof damage, regardless of whether the homeowner in fact suffered roof damage and is entitled to file a claim for insurance coverage. The Act clearly only applies to certain speech: speech regarding making a roof insurance claim. The Act targets speech the Legislature disagreed with based on the idea and message expressed. The Supreme Court and the Eleventh Circuit have made clear the Legislature cannot attempt to tip the scales and forbid speech it does not agree with. The Legislature cannot dictate what may be said in the marketplace of ideas.

On its face, the state of Florida has set forth a content-based restriction on truthful speech and cannot provide any legitimate justification in its defense. The state of Florida (or perhaps the insurance companies and their lobby) may not like contractors telling homeowners that they can or should file an insurance claim for damage to their homes to assist with the cost of repairs, but it cannot tilt the scales against contractors by prohibiting this communication of truthful information. The Act regulates what a professional may say (content-based) based on who is saying it (a contractor). This content-based and speaker-based discrimination subjects the Act to strict scrutiny.

The communication by Gale Force to a homeowner providing its professional opinion regarding the status of the property and its need for a roof replacement is squarely professional speech and outside the realm of the commercial speech doctrine. The state can no more come between a contractor and a homeowner than it could come between a doctor and a patient, CPA and client, or the like. The Eleventh Circuit in *Wollschlaeger* and *Otto* resolved this precise issue. Gale Force's professional speech to homeowners, conveying its advice (following an inspection) that a home needs a roof repair/replacement, and that a homeowner may be entitled to insurance proceeds to help cover the cost of work performed by Gale Force is precisely the kind of speech analyzed in these cases.

The state of Florida attempts to come between a contractor and his or her customers in order to limit what information the contractor can truthfully convey to homeowners. Simply describing this Act as "commercial speech" in order to obtain a more forgiving level of review is not enough. *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1248 (11th Cir. 2015) (holding that the State of Florida "merely wrap[ed] a law in the cloak of 'commercial speech' . . . [to] immunize it from the highest form of scrutiny."). Labeling every communication that comes from a contractor mentioning an insurance claim an "advertisement" in order to subject it to a lower level of scrutiny is a wolf in sheep's clothing.

As set forth above, The Act is a content-based restriction on Plaintiff's speech that is entitled to full First Amendment protection. Not only is the statute presumptively unconstitutional, but Defendant must come forward with evidence the statute serves a compelling governmental interest and that it is narrowly tailored to support that interest. *Thompson*, 535 U.S. at 373; *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). Neither factor can be met in this case.

Even presuming the Act was designed to target "insurance fraud," Defendant has not presented any evidence that the Act's provisions are narrowly tailored. The Act is not limited to restricting communication regarding the filing of ***false*** claims (which is already prohibited under Florida law). *See* § 817.234 ("Any person who knowingly and with intent to injure, defraud, or deceive any insurer files a statement of claim or an application containing any false, incomplete, or misleading information is guilty of a felony of the third degree."). Instead, the Act encompasses all speech that "encourages," "instructs," or "induces" a homeowner to contact a contractor for the purposes of making an insurance claim. In other words, the Act prohibits truthful advertisements by licensed contractors (or their agents) regarding valid insurance claims. Such across-the-board prohibition, without any exception, is not narrowly tailored and falls far short of the Supreme Court's First Amendment jurisprudence.

Plaintiff easily satisfies its burden to show that the Act (specifically,

Section 1's creation of § 489.147) is a violation of our Constitution's First Amendment.

B. The Act cannot Satisfy Intermediate Scrutiny

This Court should apply "heightened judicial security" when reviewing a statute that imposes a "specific, content-based burden on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). Even for commercial speech, "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

A complete prohibition on "truthful, nonmisleading commercial speech" rarely survives judicial scrutiny because the state's interest in protecting consumers almost never applies to truthful speech that is not otherwise misleading, harassing, or the like. *44 Liquormart, Inc.*, 517 U.S. at 502. These bans are typically disguised attempts to enforce some particular government policy that should be done without infringing on protected speech. The Supreme Court explained:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies

> equally to state attempts to deprive consumers of accurate information about their chosen products[.]

Id. at 503 (internal citations omitted).

For instance, in 564 U.S. at 557. The statute prohibited pharmacies from "disseminating prescriber-identifying information for marketing." *Id.* at 562. In other words, pharmacies could not "communicate" to pharmaceutical manufacturers information about local doctors and the medicines they prescribe– including frequency, dosage, generic v. non-generic, etc. Since the law prohibited pharmacies from communicating truthful information to assist drug manufacturers in marketing their products more effectively, it plainly imposed content-based restrictions and was subject to "heightened judicial scrutiny" or strict scrutiny. *Id.* at 564–65. Since the "creation and dissemination of information are speech within the meaning of the First Amendment," Vermont had a steep hill to climb to save its statute. *Id.* at 570. It failed to make that climb, and rightfully so.

Vermont's reasoning for enforcing its prohibitions (protecting medical privacy, avoiding harassing speech, and protecting the doctor-patient relationship) fell short. *Id.* at 572. At bottom, Vermont essentially was unhappy with the pharmacists' speech and passed a law to stop it. The Court concluded:

> Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name

> drugs. The State can express that view through its own speech. ***But a State's failure to persuade does not allow it to hamstring the opposition***. The State may not burden the speech of others in order to tilt public debate in a preferred direction. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that ***the speaker and the audience, not the government, assess the value of the information presented***.

Id. at 578–79 (cleaned up) (emphasis added).

Since Defendant seemingly agrees there is nothing "unlawful" or misleading" about Gale Force's speech, it only remains whether Defendant's restrictions are "narrowly drawn" to "directly and materially advance" a "substantial interest." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)). Looking at each in turn.

1. The Act Lacks any "Substantial State Interest"

Defendant asserts one "interest" the state of Florida has in pursuing this legislation– reducing fraudulent insurance claims. Of course, preventing insurance fraud is a compelling interest. But, there is evidence, though, through public statements made by authors of the Act, of an alternative aim– preventing insurance claims for roof damage from being filed. Such would not be a substantial *state* interest. While it is likely high on the priority list for Florida's insurance carriers, the state of Florida has no interest in determining whether homeowners file valid claims.

Laws targeting so-called "cottage industries" are nothing new and their constitutionality remains suspect. For instance, Texas targeted chiropractors and prohibited soliciting consumers that had pre-existing conditions or were involved in an accident, *Bailey v. Morales*, 190 F.3d 320, 321 (5th Cir. 1999); but that statute (unlike the Act before this Court) exempted communication by a friend or family member, advice from an attorney, or recommendation from a qualified nonprofit. *Id.* Accepting Texas's "strong interests" of protecting vulnerable consumers and upholding the reputations of the profession, the Fifth Circuit turned to whether the statute "materially and directly" advanced those goals. *Id.* at 323. It did not. Texas argued it was "common sense" that its speech-restraint advanced its interests, but the Fifth Circuit determined that was simply not enough. *Id.* at 324.

The broad ban on chiropractor's speech was not supported by self-serving declarations by legislators, nor was it supported by claims that chiropractors conduct was likely to cause overreaching and "other misconduct." *Id.* The ban was simply too broad and swept up too much protected speech without showing how exactly it would accomplish its goals. The Fifth Circuit held the restraint on speech was not justified and declared the statute unconstitutional. *Id.* at 326.

Reducing the number of valid insurance claims was the Legislature's goal for the Act and it is simply insufficient to satisfy its requirement to show

a "substantial interest." But, even if this Court accepts the state of Florida's interest at face value, Defendant cannot show how the Act directly advances the state's goal in a manner that is not more extensive than necessary.

2. The Act does not "Directly Advance" a Legitimate Government Interest

This *Central Hudson* prong "requires that the speech restriction directly and materially advance the asserted governmental interest." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). As discussed above, Defendant begins with an entirely unsupported premise– nearly 10% of property insurance claims contain some sort of fraud – and then suggests the state of Florida acted reasonably by making it more difficult for consumers to file *any* claim in order to prevent those 10% (if it is really that high) of claims. Of course, the flip side is also true – 90% of residential property claims filed are valid claims that involve no fraud, and it will now be unlawful for a contractor to assist that 90% of Florida homeowners with filing their legitimate claims for covered damage. The Act's overbreadth sweeps up these valid claims to target the alleged 10% of "fraud" claims.

Suppose a farmer had a field of carrots constantly being eaten by the local rabbits, and she desperately sought to stop the rabbits from destroying her crops. Would the farmer be directly advancing that goal if she were to place out elaborate squirrel traps? No, of course not. In fact, not only would that

unfairly target the squirrels, but it would also do nothing to fix the actual problem (rabbits eating the carrots). Such is precisely a fatal flaw in the Act.

Defendant suggests it is common sense that preventing contractors from communicating to insureds will stop insurance fraud in its tracks, but there is no data given to support its analysis. Indeed that "common sense" approach was the rationale rejected by the Fifth Circuit in *Bailey*. Defendant must show some evidence that its substantial interest will be materially aided by its restrictions. The sum total of evidence on this point for Defendant is the presentation by the consumer advocate and the analysis provided to the Legislature by OIR (relied upon by Defendant at the preliminary injunction stage).

In this Court's preliminary injunction, it noted, "the challenged provision targets speech that is at least one step removed from the State's asserted interests." ECF 28 at p. 28. This Court explained:

> There is a difference between targeting disfavored conduct or practices (contractors acting as public adjusters, exploiting consumers, filing fraudulent claims, etc.) and targeting anything that may lead to that conduct— including truthful information that a consumer may have storm damage, and that storm damage may be covered by insurance. But this is the fallacy that the Defendant advances under the guise of satisfying Central Hudson.

ECF 28 at p. 28.

Even taking the Consumer Advocate's analysis at face value, the Act does nothing to address the scenario described. ECF 13-2. Defendant explains there are multiple steps in this scenario:

1. Homeowner approached at home by a contractor and offered a free roof inspection and apprised of any damage that exists.
2. Contractor tells homeowner (presumably verbally while at the home) the roof needs to be replaced.
3. Contractor advises insurance proceeds may be available to pay for work that needs to be performed.
4. Contractor asks homeowner to sign an assignment of benefits and presents one for the homeowner to sign.
5. Contractor then is able to file the insurance claim and receive payment directly from the insurance carrier.
6. The contractor ***may*** charge the insurance company for unnecessary items or ***may*** charge more than the insurance company thinks is reasonable.
7. The contractor ***may*** never complete the work but still ***may*** receive payment from the insurance company.

ECF 13-2.

Taking each in turn. Defendant has repeatedly suggested the statute does not apply to in person, oral communications or mass marketing not directed to a specific individual. See ECF 13 at p. 2; ECF 25 at p. 11. And this Court agreed that is an appropriate way to construe the Act. ECF 28 at p. 7. But even taking the Consumer Advocate's analysis as true, there is no evidence before this Court the Act does anything to "disrupt" the scenario. Each of the steps above either occur in person, verbally (steps 1-4) or they occur after the contractual relationship is formed between the homeowner and contractor

(steps 5-7). Since Defendant has repeatedly suggested the Act does not apply to verbal communications, the Act does nothing to "disrupt" steps 1-4, and since Defendant has suggested the Act does not apply to communications ***after*** the initial contact with the homeowner (ECF 13 at pp. 10—11), the Act does nothing to "disrupt" steps 5-7.

Defendant's remaining evidence similarly falls short. Defendant points to broad declarations of $40 billion in insurance fraud in the state of Florida. ECF 61-4 at p. 41. But provides no evidence as to which portion of that $40 billion involves fraudulent **roofing claims involving contractors**. *Id.* Indeed, its own evidence indicated the Florida Department of Insurance Regulation had specific recommendations for the Legislature to combat rising insurance premiums (implementing a pre-suit requirement for claimants; restricting prevailing party attorney's fees; and addressing the Florida Supreme Court's decision in *Sebo*). ECF 61-5 at pp. 4—5. None of these suggestions indicated a restriction on speech would fix the insurance market ills complained of by Florida's Insurance Commissioner. Yet, the Act (in provisions not challenged here) addressed only two of those three specific suggestions.

Simply stated, there is no evidence the Act does anything to "directly advance" stopping insurance fraud. Insurance companies remain free to deny any invalid or fraudulent claim that is submitted. Nothing about this Act will

meaningfully stop a fraudulent claim. The Act does not even speak to the difference between a valid claim or a fraudulent one. Even taking Defendant's cramped reading of the Act as true, the Act will purportedly prevent insurance fraud by not permitting contractors to communicate in writing to specific homeowners. Incredibly, this rampant fraud will somehow still be squashed despite contractor's (again, assuming Defendant's reading is true) being able to communicate the exact same message verbally, on the radio, on television, billboards, and the like.

It stretches reason to imagine how such a restriction on speech will do anything to accomplish its stated goal.

3. The Act is Far More Extensive Than Necessary

"[I]f the First Amendment means anything, it means that regulating speech must be a last--not first--resort." *Thompson*, 535 U.S. at 373. "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371–72 (striking down a restriction on prescription drug advertising); *44 Liquormart, Inc.*, 517 U.S. at 507 (striking down restriction on advertising the price of alcoholic beverages partly because "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal"); *Greater New Orleans Broadcasting Ass'n, Inc.*, 527 U.S. at 192 ("There surely are practical and nonspeech-related forms of

regulation . . . that could more directly and effectively alleviate . . . the social costs of casino gambling.").

The Eleventh Circuit addressed a similar restriction on advertising–the use of the phrase "skim milk"–that was prohibited unless the milk had the same vitamin content as whole milk. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1233 (11th Cir. 2017). The Eleventh Circuit assumed (without deciding) the state had a legitimate interest in preventing milk fraud but determined the statute still failed since the state had other less burdensome alternatives. *Id.* at 1240. The Court noted in free speech cases– more speech is better, not less. *Id.* (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). The state could have simply required truthful disclosures about the vitamin content in the milk. *Id.* Or other similar means to get the information to consumers the state felt was necessary to prevent fraud. In addition, the state could not show its restriction was "not more extensive than necessary to serve its interest" since it plainly had other avenues to accomplish its goals as opposed to a complete ban on truthful speech. *Id.*

At the preliminary injunction stage, this Court determined the Act "is not a 'reasonable fit' to directly advancing the State's interest." ECF 28 at p. 34 (citing *Sciarrino v. City of Key W., Fla.*, 83 F.3d 364, 370 (11th Cir. 1996)). At bottom, the Act prohibits "contractors advertising their roofing repair services to homeowners and informing homeowners that they may have storm damage that

may be covered by insurance," which does nothing to cure the "insurance fraud" identified as the interest Defendant seeks to redress. ECF 28 at p. 35. There also remains a significant gap between "stopping insurance fraud" and prohibiting contractor's speech– a gap the Defendant will not be able to bridge since its own analysis of the "fraud scenario" is completely untouched by the Act's prohibitions.

Turning again to our farmer and rabbit analogy. Would it be any more reasonable to expect the farmer to line her field with explosive devices ready to destroy anything that sets foot in the field? Indeed not. Everyone would agree that was far too extreme of a measure likely intended to hurt innocent bystanders. The same is the case with the Act.

The state of Florida could more aggressively prohibit insurance fraud and impose licensure penalties for any contractor engaged in such. The state of Florida could require disclosures (as it presently does in many instances) of consumer's rights and legal protections (e.g., § 627.7152 describing the 18-point font disclosures that must be provided to consumers in an assignment of post-loss insurance benefits). The state of Florida could also more aggressively pursue insurance fraud prosecutions and assist insurance companies in denying invalid claims. But this Act does none of that. It targets actors the Legislature disfavored and singles them out for special treatment, silencing their speech. Such is plainly "more extensive than necessary to serve its interest."

CONCLUSION

The Act is unconstitutional on its face because it restricts speech based on a disagreement with the content of that speech, in violation of the First Amendment. Whether evaluated under strict or intermediate scrutiny, Defendant simply cannot justify the draconian ban on Plaintiff's speech. Accordingly, Summary Judgment must be granted.

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.1, I hereby certify that this Motion for Summary Judgment, relying on the word-processor system calculation, contains 5,999 words and therefore does not exceed 8,000 words, excluding the case style, signature block, certificate of word count, and certificate of service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2021, a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF portal, which will serve all counsel of record.

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