UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

CASE NO. 4:21-cv-00263-AW-MAF

RESTORATION ASSOCIATION OF FLORIDA, INC., et al.,

Plaintiffs,

v.

MELANIE S. GRIFFIN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, and DONALD SHAW, in his official capacity as Executive Director of the Construction Industry Licensing Board,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS
THIRD AMENDED COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants (hereafter referred to as "the State") hereby move to dismiss the Third Amended Complaint ("complaint") (ECF 55).

BACKGROUND

In 2021, Florida's Legislature enacted Section 489.147, Florida Statutes, to address and remediate Florida's property insurance crisis which has left many homeowners unable to afford coverage and others unable even to obtain coverage

as some insurers pull out of certain neighborhoods entirely and other insurers become insolvent. The Legislature was particularly concerned with certain business practices that have become increasingly prevalent in the roofing industry and to which the Legislature attributed a sharp increase in roof-related insurance litigation and in inflated or otherwise fraudulent roof claims. The Legislature's solution took the form of Section 489.147, Florida Statutes (the "Statute"), which prohibits certain property insurance-related practices by contractors.

A year later, Florida's property insurance market remains in crisis—so much so that the Governor called a special legislative session to address it.[1] The Legislature convened for a special session during the week of May 23, 2022 and passed CS/SB 2-D, which the Governor signed into law on May 26.[2] Pertinent to this litigation, that bill amended the definition of "prohibited advertisement" set forth in section 487.147(1)(a) to allow such advertisements as long as they include specified disclosures.[3]

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[1] The Governor's Proclamation is available at https://www.flgov.com/wp-content/uploads/2022/04/SKM_C750i22042614070.pdf.

[2] Ch. 2022-268, § 5, Laws of Fla.

[3] These disclosures are:

1. The consumer is responsible for payment of any insurance deductible;
2. It is insurance fraud punishable as a felony of the third degree for a contractor to knowingly or willfully, and with intent to injure, defraud, or deceive, pay, waive, or rebate all or part of an insurance deductible

Plaintiffs (a roofing contractor and a Florida trade association that purports to represent roofing contractors) challenge nearly every provision of the Statute in their complaint. As a preliminary matter, Plaintiffs persist in their impermissible pleading practices, and their complaint is an even more egregious example of a shotgun pleading than were the prior complaints. Moreover, their allegations suffer many of the same infirmities that previously led this Court to question their standing and whether their claims are ripe. Plaintiffs also continue to base many of their claims on vague, speculative allegations and on misinterpretations of the Statute. For the following reasons, the complaint should be dismissed.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

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applicable to payment to the contractor for repairs to a property covered by a property insurance policy; and

3. It is insurance fraud punishable as a felony of the third degree to intentionally file an insurance claim containing any false, incomplete, or misleading information.

inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

In order "[t]o allege a justiciable cause of action, a plaintiff must plead facts that are sufficient to confer standing and demonstrate that the claim is ripe for determination." *Dermer v. Miami-Dade Cnty.*, 599 F.3d 1217, 1220 (11th Cir. 2010). Given that Plaintiffs seek only prospective relief, they must allege facts "from which it appears there is a substantial likelihood" of future injury, and "that future injury must be real, immediate, and definite." *Mack v. USAA Cas. Ins. Co.*, 994 F.3d 1353, 1357 (11th Cir. 2021) (quotations omitted). Moreover, Plaintiffs are not relieved of the burden to establish standing merely because they seek declaratory relief. *DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008). And even under the looser standard applicable to a First Amendment claim, "an injury must be imminent" to establish standing when a plaintiff seeks prospective relief. *Dermer*, 599 F.3d at 1220. Similarly, a claim is not ripe where the allegations fail to "demonstrate a credible threat of prosecution." *Id.* at 1221.

II. THE COMPLAINT IS AN IMPERMISSIBLE SHOTGUN PLEADING.

"Courts in the Eleventh Circuit have little tolerance for shotgun pleadings." *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018) (affirming dismissal with prejudice after plaintiff failed to cure shotgun pleading in second amended complaint). "A shotgun pleading is a complaint that violates either Federal Rule of Civil Procedure 8(a)(2) or Rule 10(b), or both." *Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021). The complaint is an impermissible shotgun pleading for multiple reasons: It "contain[s] multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint";[4] and it "does not separate 'each cause of action or claim for relief' into a different count." *Id.* at 1324–25 (citation omitted). The Eleventh Circuit has "repeatedly held that a District Court retains authority to dismiss a shotgun pleading on that basis alone." *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1357

[4] The complaint does even less than that because the only counts are for injunctive and declaratory relief. An injunction, of course, is not a cause of action. *See*, *e.g.*, *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir. 2005) (A suit for injunctive relief "must be based upon a cause of action" because "[t]here is no such thing as a suit for a traditional injunction in the abstract.") (citation omitted). Similarly, the Declaratory Judgment Act "does not create a cause of action." *Rebuild Northwest Fla., Inc. v. Fed. Emergency Mgmt. Agency*, No. 3:17-cv-441-MCR-CJK, 2018 WL 7351690, at *1 (N.D. Fla. July 12, 2018) (citing *Musselman v. Blue Cross and Blue Shield of Ala.*, 684 F. App'x 824, 829 (11th Cir. 2017)).

(11th Cir. 2018) (citing *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015)).

Six months ago, this Court allowed Plaintiffs to file a second amended complaint in order to "add factual specificity" to their claims, but with an important caveat that they "separate their claims to the different subsections [of the Statute] into separate counts." ECF 36 at 18. Two iterations of the complaint later, they have still failed to do so. Worse yet, this fourth version of the complaint is even more objectionable than the last.

In their prior complaint (the second amended complaint), Plaintiffs seemingly made at least a cursory effort to comply with this Court's directive by delineating a separate count for each challenged subsection of the Statute. *See* ECF 39. Even then, they impermissibly combined multiple purported causes of action into a single count and thereby engaged in shotgun pleading. The State explained why this was improper, cited an Eleventh Circuit decision for that proposition, and identified multiple portions of the second amended complaint that fell short of this Circuit's pleading requirements.[5] *See*, *e.g.*, ECF 43 at 5 n.4 ("Other than Count V, Plaintiffs do not actually delineate which of their claims are intended to be facial,

[5] The State's motion to dismiss was denied as moot when the Court authorized Plaintiffs to file a third amended complaint. ECF 54.

as-applied, or both,[6] instead apparently suggesting that all of their claims are both facial and as applied."); *id.* at 6 n.6 (complaining that Plaintiffs purported to assert claims under the First Amendment, Commerce Clause, and Florida Constitution within a single count, and citing the Eleventh Circuit's *Novak* decision for the proposition that this is improper); *id.* at 10 n.9 (noting that Count IV improperly combined a First Amendment claim and a Contract Clause claim).

Despite the Court's earlier directive and the State having brought this Circuit's pleading standards to their attention, Plaintiffs now have reverted to their initial practice of combining *all* of their numerous claims and then simply asserting one count for "injunctive relief" and a second count for "declaratory relief." *See* ECF 1 at 19, 21; ECF 26 at 19–20. This is precisely what the Court directed them not to do. ECF 36 at 18. As the Eleventh Circuit has explained:

> What matters is function, not form: the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them. If that chance is afforded and the plaintiff fails to remedy the defects, the

[6] This issue has serious implications not only for purposes of formulating a responsive pleading, but also for the State's ability to conduct discovery. As the Eleventh Circuit has recognized, "discovery disputes are inevitable" when shotgun pleadings are allowed. *Byrne v. Nezhat*, 261 F.3d 1075, 1129 (11th Cir. 2001), *abrogated on other grounds as recognized by Jackson*, 898 F.3d at 1357 n.10. Indeed, this has already led to an ongoing discovery dispute in which the State has sought to identify each purportedly "as-applied" claim through document requests and Plaintiffs have refused to definitively identify each as-applied claim. A properly pled complaint would have prevented this dispute. Instead, the complaint simply purports to challenge numerous provisions of the Statute "both facially and as applied" and without delineating which claims fall within each category. ECF 55 at 7, ¶ 24; at 11, ¶ 45.

> district court does not abuse its discretion in dismissing the case with prejudice on shotgun pleading grounds.

Jackson, 898 F.3d at 1358. Accordingly, Plaintiffs should not be given a fifth chance to comply with basic pleading requirements, and dismissal with prejudice is now appropriate. *See*, *e.g.*, *Vibe Micro*, 878 F.3d at 1297 ("The district court sua sponte gave [the plaintiff] an opportunity to correct the shotgun pleading issues in his complaint, and provided him with specific instructions on how to properly do so. He did not fix it.").

III. THE COURT SHOULD DISMISS ANY PURPORTEDLY FACIAL CHALLENGES TO THE STATUTE.

Plaintiffs assert that their complaint "is both a facial and as-applied constitutional challenge to the statute." ECF 55 at 11, ¶ 45. But the Court is not bound by Plaintiffs' characterization of their claims as facial or as-applied, and instead can make its own determination from the allegations. *Harrell v. The Florida Bar*, 608 F.3d 1241, 1259 (11th Cir. 2010) ("Although Harrell characterizes this challenge as a facial one as well, we are not bound by Harrell's designation of his claims, and we look to the complaint to determine what claims, if any, his allegations support. . . . We read this challenge to be an as-applied one."). Plaintiffs' claims are as-applied because they seek to vindicate their own rights and now allege (albeit vaguely) that they would engage in certain allegedly

prohibited conduct but for the Statute. *Id.* (citing *Jacobs v. The Florida Bar*, 50 F.3d 901, 906 (11th Cir. 1995)).

Generally, a facial challenge requires a plaintiff to demonstrate that the statute "is unconstitutional in all applications[.]" *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012). Plaintiffs have not made even a cursory allegation to that effect.

In the First Amendment context, the Supreme Court has recognized "a second type of facial challenge" in 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). But Plaintiffs have not alleged that much, either, instead focusing (albeit vaguely) on their own alleged business practices. Thus, the Court should dismiss any purportedly facial claims rather than construct Plaintiffs' claims for them. *See*, *e.g.*, *Barmapov*, 986 F.3d at 1328 (Tjoflat, J., concurring) ("district courts are flatly forbidden from scouring shotgun complaints to craft a potentially viable claim for a plaintiff[,]" and "[l]awyers simply cannot delegate the responsibility of making their case to the district courts"). And the general disfavor with which facial challenges are viewed is all the more reason to do so. As the Supreme Court has explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." . . . Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" . . . Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

Washington State Grange, 552 U.S. at 450–51 (internal citations omitted).[7]

IV. THE COURT SHOULD DISMISS THE SUBSECTION 2(a) CLAIMS (Prohibited advertisements)[8]

Section 489.147(2)(a) prohibits "[s]oliciting a residential property owner by means of a prohibited advertisement." Plaintiffs allege that this prohibition, even with the 2022 amendment, violates their First Amendment rights.

A. Plaintiffs fail to plead a concrete or imminent injury in fact.

"To establish Article III standing," Plaintiffs must "clearly allege facts demonstrating each element"—the first of which is that they have suffered an

[7] As in *Washington State Grange*, the State's courts "have had no occasion to construe the law in the context of actual disputes . . . or to accord the law a limiting construction to avoid constitutional questions." *Id.* at 450.

[8] The State cannot identify the claims by their corresponding counts because, as explained above, the only "counts" in the complaint are for injunctive relief and declaratory relief.

injury in fact. *Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1336 (11th Cir. 2019) (citations omitted). It is "not enough that a complaint 'sets forth facts from which [the court] could *imagine* an injury sufficient to satisfy Article III's standing requirements" because courts "should not speculate concerning the existence of standing." *Id.* (citation omitted). Moreover, Plaintiffs were previously admonished to "ensure sufficient factual allegations to establish standing." ECF 36 at 11 n.7.

Plaintiffs' amended allegations are deficient in at least two ways. First, their allegation of self-censorship is premised on a preliminary injunction that was dissolved more than two weeks before they filed the complaint. Specifically, Plaintiffs allege that they would "refrain" from certain advertising practices "if not for the current preliminary injunction" in the related *Gale Force* case. ECF 55 at 15–16, ¶ 70; *see also id.* at 7 n. 11 (referring to the *Gale Force* preliminary injunction). But Judge Walker dissolved that injunction on June 10, after the parties in that litigation agreed that the legislative amendment requiring disclosures mooted the case. *See Gale Force Roofing & Restoration, LLC v. Griffin*, No. 4:21-cv-246-MW/MAF, ECF 91 (N.D. Fla. June 10, 2022). Thus, at the time of filing their third amended complaint on June 27, Plaintiffs alleged only what they might do in a hypothetical scenario in which the injunction is dissolved—not what they

have *actually* been doing since the injunction was dissolved more than two weeks earlier.

Second, when they address the 2022 amendment to the Statute, Plaintiffs only make the conclusory allegation that the required disclosures are "unduly burdensome" because they "tak[e] up an undue proportion of a door hanger, business card, magnet, or flyer." ECF 55 at 18, ¶ 82. But Plaintiffs fail to allege that they actually *use* door hangers, business cards, magnets, or flyers—let alone that their door hangers, business cards, magnets, or flyers fall within the definition of "prohibited advertisements" in the first place (and that adding the disclosures to those specific materials would be unduly burdensome). And they do not allege that the required disclosures are unduly burdensome to add to other forms of advertising. Accordingly, they have not alleged an injury in fact as required to establish standing for their conclusory "undue burden" claim.

B. Plaintiffs fail to state a claim.

Having been allowed to amend their complaint yet again to account for the recent legislative amendment to the Statute's advertising provision, Plaintiffs seemingly now attempt to challenge that amendment by asserting (or referencing) as many as five independent claims or theories—all under a single heading that is simply titled "Prohibited Advertisements." *Id.* at 13; *id.* at 18–19, ¶¶ 80–84. Plaintiffs refer to "unconstitutional conditions" (¶80); "undue burden" (¶81);

failure to satisfy intermediate scrutiny (¶82); mandatory disclosures that allegedly do not relate to contractors' own legal obligations (¶83); and compelled speech that allegedly constitutes content discrimination (¶84). Putting aside the obvious shotgun-pleading problems with this kitchen-sink approach, Plaintiffs do not state a claim.

The entirety of the purported "unconstitutional conditions" claim is that the legislative amendment "imposes an unconstitutional condition by compelling certain speech as a prerequisite to the exercise of constitutionally protected commercial speech." *Id.* at 18, ¶80. As a preliminary matter, this is a legal conclusion, and therefore the truth of this allegation need not be accepted when considering the instant motion. Without that legal conclusion, nothing remains of this purported claim. Moreover, the "unconstitutional conditions" doctrine has no application here. It provides that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to [the right]." *Lebron v. Sec., Fla. Dept. of Children and Families*, 710 F.3d 1202, 1217 (11th Cir. 2013) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). Plaintiffs fail to identify any government benefit, let alone a benefit that is unrelated to their constitutional rights. In sum, Plaintiffs fail to allege how the "unconstitutional

conditions" doctrine is even relevant, let alone how it renders the Statute unconstitutional.

Turning to the "undue burden" claim, Plaintiffs have failed to establish standing for the reasons explained above. Additionally, they do not allege anything about any particular door hangers, business cards, magnets, or flyers that would suggest that the mandatory disclosures would be unduly burdensome if incorporated into those written materials. Accordingly, they also fail to state a compelled-speech claim on the basis of undue burden.

Next, the "claims" that the required disclaimers fail intermediate scrutiny (¶82)[9] and "constitute forbidden content discrimination" (¶84) can be disposed of for the same reason: they are premised on a standard that does not govern compelled-speech claims. As the Eleventh Circuit recently reaffirmed, "[w]hile 'restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny,' when 'the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech . . . the less exacting scrutiny described in *Zauderer* governs our review.'" *NetChoice, LLC v.*

[9] The entirety of the claim in Paragraph 82 is that "the disclaimers cannot be shown, as is the State's burden to do so [sic], to be 'narrowly tailored' to alleviate the State's concerns about fraudulent claims 'to a material degree.'" Plainly, this is a mere legal conclusion unsupported by any fact pleading. The same is true at least of Paragraph 83, which purports to describe merely how the disclaimer provision operates. More fundamentally, the State cannot discern whether these are even intended to be causes of action in the first place.

Att'y Gen., Fla., 34 F.4th 1196, 1227 (11th Cir. 2022) (alterations in original) (quotation omitted); *see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (holding "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").[10]

Put simply, intermediate scrutiny does not apply to disclosure requirements. Plaintiffs purport to challenge the new disclosure requirements. It follows that they cannot assert a viable "intermediate scrutiny" claim (or a seemingly related "content discrimination" claim).

Finally, Plaintiffs allege in Paragraph 83 that the disclaimer requirements "seek to impose speech upon roof contractors . . . to explain obligations the law imposes on consumers, not on contractors for the services they are offering." Again, the State cannot discern whether this is even intended to constitute a cause of action, but in any event it is not cognizable. Plaintiffs base this "claim" on the allegation that the disclosure requirements violate the First Amendment because they require Plaintiffs "to explain obligations the law imposes on consumers" rather than explaining Plaintiffs' own legal obligations. ECF 55 at 19, ¶ 83. In support of this allegation, Plaintiffs cite *44 Liquormart, Inc. v. Rhode Island*, 517

[10] Courts have since clarified that *Zauderer*'s application is not confined to preventing consumer deception. *See*, *e.g.*, *Am. Meat Inst. v. U.S. Dep't of Ag.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (citing cases).

U.S. 484, 507 (1996), for the proposition that the State must resort to "educational campaigns" rather than requiring disclosures. ECF 55 at 19, ¶ 83. This purported claim fails for a similar reason that the "intermediate scrutiny" and "content discrimination" claims fail: *44 Liquormart* did not involve, and does not govern, disclosure requirements. Instead, *44 Liquormart* addressed an advertising *ban*. 517 U.S. at 489.

Moreover, the Statute and Plaintiffs' other allegations themselves demonstrate that the foundational allegation of this "claim" is incorrect.[11] With regard to the disclaimers that address waivers of deductibles, Plaintiffs allege that they offer to waive deductibles. *See*, *e.g.*, ECF 55 at 25, ¶ 111 (alleging that it has been Plaintiffs' "common practice" to waive deductibles). It follows that a disclaimer that homeowners are responsible for paying deductibles relates directly to the services that Plaintiffs offer, and to Plaintiffs' own obligations (for example, their obligation not to "waive" deductibles). Similarly, Plaintiffs allege repeatedly that they not only repair roofs, but also assist their customers in "dealing with [their] insurance company." *See*, *e.g.*, ECF 55 at 20, ¶ 90. It follows that disclaimers relating to contractors' dealings with insurance companies likewise

[11] Again, the Court need not credit this allegation because it is both a mere legal conclusion and internally inconsistent. *See*, *e.g.*, *Smith v. City of Fort Pierce*, No. 2:18-CV-14147-ROSENBERG/REINHART, 2018 WL 5787269, at *6 (S.D. Fla. Nov. 5, 2018 ("A court ruling on a motion to dismiss . . . 'need not accept factual claims that are internally inconsistent.'") (citation omitted).

relate to Plaintiffs' own services and legal obligations (specifically, their obligation not to file fraudulent insurance claims). In sum, Plaintiffs have not pled a cognizable claim.

V. THE COURT SHOULD DISMISS THE SUBSECTION 2(d) CLAIMS.[12]
(Prohibitions on interpreting or advising as to insurance policies)

Plaintiffs challenge subsection (2)(d) of the Statute, which prohibits contractors from "[i]nterpreting 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 license as a public adjuster . . . ." Fla. Stat. § 489.147(2)(d). Plaintiffs allege that this violates the First Amendment[13] because it would prevent them from informing homeowners that they are entitled to assign the benefits of their policies to Plaintiffs. ECF 55 at 21–22, ¶¶ 93–96; ECF 55-2 at 4–5, ¶¶ 11–12. Plaintiffs offer

[12] Defendants respond to allegations concerning the provisions of § 489.147 in the order in which they are addressed in the complaint.

[13] Plaintiffs also continue to attempt to assert Commerce Clause claims under the same heading (which is no longer even identified as "Count II"). *See* ECF 55 at 23, ¶ 105. They do this even after the State argued in a prior motion to dismiss (ECF 43) that this was improper. In addition, the fact that Plaintiffs also maintained their allegations that the Statute violates the Florida Constitution after conceding during the last round of briefing that this Court lacks jurisdiction to consider state constitutional claims simply underscores the extent of their ongoing pleading failures. *See id.* at 23, ¶ 102 (alleging violation of Florida Constitution's prohibition against special laws); ECF 45 at 16 (conceding that state constitutional claim should be dismissed, as the State had argued).

no other concrete allegations of the manner in which they interpret policy provisions or advise, or intend to advise, their customers.[14]

Plaintiffs' theory rests on a misreading of subsection (2)(d). They contend that the "explicit text of the Act" means that "informing a homeowner that their [sic] insurance policy permits he or she to assign benefits to their roofing contractor . . . constitutes a form of interpreting or advising customers and potential customers" about insurance coverage. ECF 55 at 21, ¶ 94. The Court need not accept the truth of this legal conclusion, particularly where it finds no support in the text of the Statute. The existence of a right to assign benefits plainly is not a matter of insurance *coverage*, the latter of which involves a determination whether a particular loss is covered under a policy.

Nor does the information that Plaintiffs allegedly provide constitute the "interpretation" of a policy. As Plaintiffs recognize, longstanding Florida law provides that the right to assign benefits "cannot be divested by policy language." ECF 55 at 21, ¶ 93. Accordingly, one does not "interpret" a policy by pointing out

[14] Plaintiffs reiterate their allegations that they tell homeowners that "part of handling roofing repairs and replacements is dealing with your insurance company" and that they can answer insurance-related questions. ECF 55 at 20, ¶ 90; ECF 55-3 at 3, ¶¶ 6, 8. The Court has already recognized that these allegations are too general to establish a credible threat of enforcement and a cognizable injury. ECF 36 at 13. Similarly, RAF again asserts that its members respond to homeowner questions about insurance in the same manner that the Court previously found insufficient to establish even a *likelihood* of concrete injury. ECF 55-2 at 5, ¶ 13; ECF 36 at 14.

the existence of a right that exists regardless of the policy (and that the policy cannot divest). It follows that Plaintiffs have not alleged that their conduct falls within the scope of subsection (2)(d) as required to establish standing. Relatedly, Plaintiffs' allegations do not establish a credible threat that the State would interpret subsection (2)(d) in that manner, so their claims are not ripe.[15]

VI. THE COURT SHOULD DISMISS THE SUBSECTION 2(b) CLAIMS (Offering "things of value")

Plaintiffs challenge subsection (2)(b) of the Statute, which prohibits contractors from "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" allowing the contractor to conduct a roof inspection or in exchange for making an insurance claim for roof damage. Fla. Stat. § 489.147(2)(b). In denying Plaintiffs' motion for preliminary injunction, this Court concluded that Plaintiffs' allegations regarding their provision of "things of

[15] Plaintiffs also allege that subsection (2)(d) would prohibit them from telling homeowners to contact their insurance companies to find out whether their policies cover their roof damage. ECF 55 at 19, ¶ 87. But Florida's insurance laws explicitly provide that "except as it relates to *solicitation* prohibited in [the Statute]"—i.e., except for violations of subsection *(2)(a)* of the Statute—the general prohibition against contractors acting as unlicensed public adjusters "does *not* preclude a contractor from suggesting or otherwise recommending to a consumer that the consumer consider contacting his or her insurer to determine if the proposed repair is covered under the consumer's insurance policy[.]" Fla. Stat. § 626.854(15) (2021) (emphasis added).

value" were too vague to demonstrate even a *likelihood* of establishing standing. ECF 36 at 10–11. Their allegations are at least as vague this time around.

Plaintiffs allege that they "have advertised things of value in exchange for free roof inspections in the past" and that they have now "ceased offering things of value." ECF 55 at 27, ¶¶ 119–120. The only detail they provide is that they have previously offered "discounts or coupons for any repairs needed" in exchange for the homeowners' permission to conduct a roof inspection. *Id.* at 26, ¶¶ 116, 118. In other words, they allege that they will offer discounted repairs to homeowners who allow roof inspections. But the Statute does not prohibit discounts generally.

Instead, the items enumerated in subsection (2)(b)—a "rebate, gift, gift card, cash, coupon, [or] waiver of any insurance deductible"—are all forms of value separate from the provision of services itself. Thus, while the phrase "or any other thing of value" may otherwise seem open-ended, "under the established interpretive canons of *noscitur a sociis* and *ejusdem generis*" it is "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 Stores, Inc. v. Adams*, 532 U.S. 105, 114–115 (2001)); *see also League of Women Voters of Fla., Inc. v. Fla. Sec. of State*, 32 F.4th 1363, 1374 (11th Cir. 2022) ("[A] word is given more precise content by the neighboring words with which it is

associated.") (alteration in original) (quoting *U.S. v. Williams*, 553 U.S. 285, 294 (2008)). In other words, the "things of value" provision is not a blanket prohibition against offering a discounted repair to a homeowner who allows a roof inspection. Plaintiffs must allege something more to demonstrate that they engage in conduct that the Statute prohibits and that they face a credible threat of enforcement. They fail to do so.

Plaintiffs also restate—in what the Court previously described as "vague terms" (*see* ECF 36 at 8)—that they "have and wish to continue to offer free roof inspections, rebates or discounts on large jobs, or waivers of deductibles[.]" ECF 55-3 at 6, ¶ 26. But just as before, "they have not set out in definite and concrete terms what they intend to do or say but have avoided because of the law." ECF 36 at 9 n.6. Accordingly, the Court should dismiss these claims. The Court should also dismiss Plaintiffs' challenge to the mandatory-notice provision of subsection (5) of the Statute because Plaintiffs expressly allege that the claim is contingent on their subsection (2)(b) claim. ECF 55 at 31, ¶ 146.

VII. THE COURT SHOULD DISMISS THE CONTRACT CLAUSE CLAIM.

Plaintiffs also attempt to plead a claim for impairment of contract in violation of the Contract Clause. ECF 55 at 29, ¶ 131. The entirety of this purported cause of action consists of a single sentence: "The prohibition on paying for referrals also has the effect of preventing the homeowner, who has a valid

contract for insurance and has paid premiums on time, from being able to use its policy to receive services from its preferred roofing contractor, in violation of the constitutional bar against impairment of contract."[16] *Id.*

"The Contract Clause of the United States Constitution provides that no state shall 'pass any Law impairing the Obligation of Contracts.'" *Am. Fed. of State, County and Municipal Employees v. City of Benton, Ark.*, 513 F.3d 874, 879 (8th Cir. 2008) (quoting U.S. CONST. art. I, § 10, cl. 1). "A three-part test determines whether state action violates the Contract Clause." *Id.* The first part of that test is whether "the state law has, in fact, operated as a substantial impairment on pre-existing contractual relationships." *Id.* (citation omitted). "This first prong involves a three-part inquiry: '[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.'" *Id.* (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

This claim is even more flawed than the one this Court previously recognized was insufficiently pled to establish standing. ECF 36 at 5. There, at least, Plaintiffs speculated that the imputation of liability established in subsection (4)(a) of the Statute might impair *their own* unidentified contracts with unidentified

[16] Subsection 2(c) of the Statute prohibits "[o]ffering, delivering, receiving, or accepting any compensation, inducement, or reward, for the referral of any services for which property insurance proceeds are payable."

third parties. ECF 26 at 18, ¶ 87.[17] Here, by contrast, the unidentified contract that they claim the Statute impairs is an insurance policy—i.e., a contract between an insurer and a homeowner. Plaintiffs obviously lack standing to assert a claim for impairment of a contract to which they are not parties.

Moreover, even if Plaintiffs had alleged that their claim is limited to a scenario in which they have received an assignment of benefits (and that such an assignment allows them to stand in the homeowner's shoes and assert the homeowner's rights), their claim would still fail. In that scenario, they would be claiming that the prohibition of referral fees prevents them from using *their own* services (or *their own* preferred roofing contractor, which undoubtedly would be themselves). That claim would be utterly implausible and incoherent because a contractor that receives an assignment of benefits is the same contractor that is providing the services. It follows that a contractor that receives an assignment of benefits cannot be prevented from using its *own* services, and that the prohibition against referral fees cannot impair a contractor's right "to use its policy to receive services from its preferred roofing contractor." ECF 55 at 29, ¶ 131. Accordingly, the Court should dismiss the Contract Clause claim.

[17] Plaintiffs have since abandoned that claim.

VIII. THE COURT SHOULD DISMISS THE DUE PROCESS CLAIM.

Plaintiffs allege that the Statute violates the Due Process Clause because it creates an irrebuttable presumption by virtue of the following language: "[t]he acts of any person *on behalf of* a contractor . . . shall be considered the actions of the contractor." Fla. Stat. § 489.147(4)(a) (emphasis added). The Court previously dismissed Plaintiffs' due process challenge to this provision because they failed to allege concrete facts to support standing. ECF 36 at 4. In doing so, the Court explained that Plaintiffs alleged only a "hypothetical injury" based on their "alleged inability to prove—in some hypothetical enforcement action" that some unidentified third party acting on their behalf violated the Statute without Plaintiffs' approval or authorization. *Id.* This is equally true of their renewed allegations. The Court would still have to "imagine factual circumstances where Defendants would apply provision (4)(a) in an unconstitutional way." ECF 36 at 4.

Plaintiffs' theory of how the Statute violates the Due Process Clause is confusing, to say the least, given that they improperly challenge subsection (4)(a) on that basis within the same count that they seem to challenge it on First Amendment grounds. ECF 55 at 31, ¶¶ 142–43. From what the State can derive, Plaintiffs' theory is that the Statute's prohibition against the payment of referral fees might lead to a disciplinary proceeding in which Plaintiffs are disciplined for the acts of some third party that referred business to Plaintiffs, and in which

Plaintiffs will not be allowed to defend on the basis that the third party's violation of the Statute was done without Plaintiffs' approval. ECF 55 at 30, ¶¶ 137–40.

The premise of Plaintiffs' theory seems to be that the acts of a referring third party somehow would be deemed acts "on behalf of" Plaintiffs themselves, as required for liability under subsection (4)(a). *See*, *e.g.*, *id.* at 30, ¶ 140 (attempting to establish standing by alleging that "Plaintiffs have changed their practices concerning paid referrals for which the actions by third parties may be imputed to Plaintiffs"). But if a third party violates the Statute *before* referring business to Plaintiffs,[18] it is difficult to see how such violations could have been done "on behalf of" Plaintiffs—let alone how such violations could be *irrebuttably* attributed to them. The complaint is devoid of non-speculative allegations that the State would attempt to would enforce the Act in that manner. Accordingly, Plaintiffs still fail to establish standing or otherwise to state a claim.

More fundamentally, this claim is too speculative to be ripe. Plaintiffs still do not offer any basis for their speculation that they will someday be subject to a disciplinary proceeding in which they will be deprived of the opportunity to rebut a presumption that the acts of a third party actually were done on their behalf.

[18] Presumably, the hypothetical, referring third party would be out of the picture *after* referring the business to Plaintiffs and therefore could not continue to act "on behalf of" Plaintiffs after making the referral.

Certainly, nothing in the language of the Statute compels that conclusion. Accordingly, their challenges to subsection 4(a) of the Statute should be dismissed.

IX. THE COURT SHOULD DISMISS THE COMMERCE CLAUSE CLAIMS.

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"). Plaintiff Apex Roofing alleges that it is a member of RAF and that it is "the largest roofing contractor in the Southeastern United States, performing work in Alabama, Florida," and elsewhere. ECF 55 at 9, ¶ 34–35. Plaintiff RAF, on the other hand, describes itself as an association of Florida contractors. *Id.* at 8, ¶ 28. It does not allege that it does business outside of Florida, or that its members (other than Apex Roofing) do business outside of Florida. Accordingly, to the extent that Apex Roofing lacks standing or fails to state a claim under the Commerce Clause, the same is true of RAF.

Plaintiffs seemingly allege that the Statute violates the Commerce Clause in two ways. First, they allege that "the practical extraterritorial effect" of the advertising prohibition violates the Commerce Clause. ECF 55 at 16, ¶ 72. Second, they allege that the Statute violates the Commerce Clause by prohibiting

contractors from advising policyholders about insurance coverage, apparently because Apex Roofing "operate[s] in other states." *Id.* at 23, ¶ 105. Given that nothing in the Statute supports Plaintiffs' allegations regarding extraterritorial scope, Plaintiffs fail to state a plausible claim under the Commerce Clause. And at the very least, these claims are not ripe, and Plaintiffs lack standing to assert them, because the claims are wildly speculative.

Even under the looser standard applicable to a First Amendment claim, "an injury must be imminent" to establish standing when a plaintiff seeks prospective relief (as Plaintiffs do here). *Dermer*, 599 F.3d at 1220. Similarly, a claim is not ripe where the allegations fail to "demonstrate a credible threat of prosecution." *Id.* at 1221. Here, nothing in the language of the challenged provisions supports Plaintiffs' purported concern that the State will prosecute them (or their members) for extraterritorial conduct, let alone that the State will do so imminently. Certainly, nothing on the face of the Statute extends its reach beyond Florida's borders. *See Locke v. Shore*, 634 F.3d 1185, 1192 (11th Cir. 2011) (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."). Thus, the Statute could violate the Commerce Clause only if the burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.*

Plaintiffs do not allege any plausible burden on interstate commerce, much less one that is clearly excessive in light of the State's interests in regulating contractor activities in Florida and in curbing the proliferation of fraudulent and inflated insurance claims that drive up the cost of insurance for Florida homeowners. For example, Plaintiffs' allegations do not establish a credible threat that the State will seek to discipline Apex Roofing (or any other contractor) for advising an Alabama homeowner regarding insurance coverage for an Alabama property. The State plainly has no interest in regulating the provision of contractor services in Alabama, and nothing in the Act authorizes it to do so. Accordingly, the Commerce Clause claims should be dismissed.

WHEREFORE, the State respectfully requests that the Court dismiss the Third Amended Complaint with prejudice.

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 6,737 words, excluding the case style, signature block, and this certification.

/s/ David Axelman