**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

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| **RESTORATION ASSOCIATION OF FLORIDA, INC.;** and, **APEX ROOFING & RECONSTRUCTION, LLC,** | **Case No.** 21-cv-00263 |
| 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,* | **THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF** |
| Defendants. | |

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
**CHALLENGING CONSTITUTIONALITY OF STATE LAW**

Plaintiffs Restoration Association of Florida, Inc. ("RAF") and Apex Roofing & Reconstruction, LLC ("Apex Roofing"), by and through counsel, for their Third Amended Complaint against Defendants Melanie S. Griffin ("Secretary Griffin") and Donald Shaw ("Executive Director Shaw"),[1] in their official capacities, as displayed in the case caption above (collectively, "Defendants"), state as follows:

[1] The prior complaints named Julie I. Brown and Daniel Biggins, the predecessor officeholders of the currently named defendants. Pursuant to Fed. R. Civ. P. 25(d), upon taking office, Secretary Griffin and Executive Director Shaw were "automatically substituted" as party defendants.

## SUMMARY OF THE CASE

1. Florida, due to its geographic position, significant coastal areas, sea-level elevations, and warm climate, is more prone than most states to the ravages of hurricanes and tropical storms that bring high winds, rains, and flood surges that generate significant property damage to its residents' homes.

2. In 2018, for example, Hurricane Michael, a Category 5 hurricane with maximum sustained wind speeds of 161 mph and a 15-foot storm surge,[2] struck Florida and resulted in a catastrophic loss of life and property damage.[3]

3. As of the time of this Third Amended Complaint's filing, the State of Florida is still operating its program in partnership with the U.S. Department of Housing and Urban Development, to help rebuild and repair homes destroyed or damaged by Hurricane Michael in twelve panhandle counties,[4] demonstrating the lengthy amount of time that remediation can take after extreme weather damage, even with government assistance.

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[2] NOAA National Centers for Environmental Information, "Billion-Dollar Weather and Climate Disasters: Events," available at https://www.ncdc.noaa.gov/billions/events.

[3] NOAA National Weather Service, "Catastrophic Hurricane Michael Strikes Florida Panhandle October 10, 2018," available at https://www.weather.gov/tae/HurricaneMichael2018.

[4] *See* https://michael.rebuildflorida.gov/.

4. This year, on January 16, 2022, tornadoes ripped through Lee County, Florida, totally destroying twenty-eight homes and leaving another sixty-two homes "unlivable," while about 7,000 homes were left without power.[5]

5. In recent years, Florida has experienced an increase in extreme weather events that are a threat to residential properties.[6]

6. Studies suggest that the types of storms Florida has experienced will continue to become "more frequent and intense."[7]

7. Home repair after a storm is a high priority, because damage to a home, which may be the residents' largest lifetime investment, can grow worse with neglect affecting the building's structural integrity, permitting the development and growth of dangerous, health-threatening mold, carcinogens, or spores, and increasing the vulnerability of the structure to milder weather events.

8. Homeowners usually purchase and pay premiums for insurance that is designed to "provide[] financial protection against loss due to disasters, theft and accidents" and that "pays to repair or rebuild your home if it is damaged or destroyed

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[5] Cecil Pendergrass, Chair, Lee County Board of Commissioners Press Conference, Jan. 16, 2022, available at https://www.youtube.com/watch?v=s5VrZnVIqCc (last visited Jan. 17, 2022).

[6] The Climate Reality Project, "Climate Change and Florida: What You Need to Know" (Oct. 16, 2018), available at https://www.climaterealityproject.org/blog/how-climate-change-affecting-florida.

[7] Environmental Protection Agency, "Climate Change Indicators: Weather and Climate," available at https://www.epa.gov/climate-indicators/weather-climate.

by fire, hurricane, hail, lightning or other disasters listed in your policy."[8] Homeowners are advised by both insurers and by the State to "[p]urchase enough coverage to rebuild your home."[9]

9. After a home is damaged, homeowners are often advised to document the damage as soon as possible, which is especially important if the homeowners insurance only covers certain types of damage.

10. To do so, the Florida Department of Financial Services advises consumers to first "obtain[] a repair estimate from a licensed contractor" to determine if "the damage exceeds your deductible by an amount that you believe to be sufficient to justify filing a claim with your insurance company, [and] then do so as soon as possible."[10]

11. Once homeowners contact their insurers to begin the claims-making process, the insurer will assign a claims representative to work with the homeowner.

12. Still, particularly if a storm has damaged a large number of homes, inspections by a claims representative or other person representing the insurer can be delayed.

13. Storms can remove shingles from roofs, damage walls or siding, and break windows.

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[8] Insurance Information Institute, "What is covered by standard homeowners insurance?," available at https://www.iii.org/article/what-covered-standard-homeowners-policy.

[9] *Id*. *See also* Florida Dep't of Financial Services, "Homeowners' Insurance: A Toolkit for Consumers," at 3 (available at https://www.myfloridacfo.com/division/consumers/understandingcoverage/guides/documents/homeownerstoolkit.pdf).

[10] *Id*. at 29.

14. When damage occurs, it will often require immediate remediation to protect against further storms, water leakage, or other types of damage and allow a homeowner to continue to reside on the property while preventing further serious damage to the home.

15. If water comes inside the home, it requires immediate removal to keep excess damage to a minimum and a repair of the cause of the water damage, which often cannot await the inspection or estimate that the insurer might provide.

16. Homeowners also typically utilize their assignment of benefit rights under their insurance contracts so that they neither have to pay beyond any deductible for the repairs that their insurance covers nor have to fill out the myriad claims forms and deal with claims representatives, a process with which they often have little familiarity or experience, at a time of great stress and conflicting priorities.

17. Homeowners with insurance typically do not want to front the costs of repair and remediation, but look for contractors who will accept assignments of benefits and offer additional benefits to their customers, while becoming the interested party in pursuing compensation through the insurance policy.

18. Licensed contractors with experience in remediating homes and effecting repairs also often have familiarity that homeowners lack with insurance policy terms, practices, and personnel because they interact professionally with insurers on a regular basis.

19. The advice of licensed contractors can help homeowners navigate the complicated insurance process or direct homeowners to experts who are licensed to provide further assistance.

20. To find the immediate contractor assistance they often need, homeowners typically rely on advertising, other forms of marketing, referrals, rating services, and word of mouth to identify contractors that can address the most immediate problems that their storm-damaged homes face and that offer, through an assignment of benefits, to undertake the process of dealing directly with the homeowner's insurer.

21. When damage is widespread in an area, homeowners contacting a contractor may find that the contractor has already reached its capacity to undertake work and may ask for a referral to another contractor capable of handling the job. The recipients of those referrals, at least prior to the Act's effective date, will often compensate the referring contractor out of their own pocket and without consequence to the cost of the job.

22. This Third Amended Complaint discusses various forms of advertising or marketing that discharge an informational function in making the Plaintiffs' services available to customers and assists those potential customers in understanding their options and possible expenses.

23. Solicitation of clients through advertising "serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). It "may often carry information of import to

significant issues of the day" and "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Id*.

24. This action for injunctive and declaratory relief, brought under 42 U.S.C. § 1983, challenges the constitutionality of S.B. 76 (the "Act"), approved by the Florida Legislature on March 29, 2021 and signed by the Governor on June 11, 2021, both facially and as applied. The Act goes into effect on July 1, 2021, absent the relief sought here.[11] A copy of the enrolled Act is attached as Exhibit A.

25. The Act prohibits certain advertising and marketing practices used by contractors and effectively keeps consumers from receiving accurate information about roof and other repairs and their insurance rights in a competitive environment where contractors will often offer discounts and other incentives or things of value to utilize their companies for roofing repairs or replacements that will be paid for, at least in part, through homeowners insurance.

26. This action seeks declaratory and injunctive relief for injuries caused by and likely to be caused by the Act, because they impinge on protected free speech where the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

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[11] Subsequent to the filing of the original complaint in this matter, the Act's provision prohibiting certain statements in advertising was preliminarily enjoined by Judge Walker of this Court in *Gale Force Roofing & Restoration, LLC v. Brown*, No. 4:21-cv-00246, Doc. No. 28 (Jul. 11, 2021) (slip op.).

27. It also challenges provisions of the Act that implicate due process, the prohibition on impairment of contract, and the Commerce Clause.

**PARTIES**

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

29. Its approximately 300 members in the state of Florida own emergency restoration companies, mold remediation, fire restoration, general contractors, roofing contractors, pack-out companies and other independent contractors licensed to repair roofs and restore homes suffering from damage due to water, fire, and mold throughout the state, whether the damage is due to age, natural disasters, or the malicious acts of others, as well as other home repairs and remediation.

30. As part of its mission, RAF seeks to support or oppose legislation and other government actions that adversely affect the businesses of its members.

31. Its members advertise and solicit business in ways that are directly and adversely affected by the limitations and requirements of S. 76, including through company websites and other written and electronic means used to solicit business.

32. The advertising of some RAF members offer, among other things, free roof inspections, financing options, and discounts on roofing repairs that entail repair estimates above a certain amount of money and the cost of those repairs are often covered, at least in part, by homeowners insurance.

33. The advertising and marketing of some RAF members also often indicate that they have significant insurance-claims experience and utilize assignments of benefits under which the contractor will send all required forms to the homeowner's insurance company to make an insurance claim.

34. Plaintiff Apex Roofing is an RAF member and licensed Florida contractor with business locations throughout Florida, including Longwood, Boca Raton, Cocoa Beach, Destin, Fort Myers, Jacksonville, Panama City, Tampa, and West Palm Beach. In addition, it has other locations in Alabama, where it is also licensed and has its principal place of business.

35. Apex Roofing is the largest roofing contractor in the Southeastern United States, performing work in Alabama, Florida, Mississippi, and Tennessee and has been in business since 2010.

36. Apex Roofing advertises, makes use of assignments of benefits, has offered to help potential customers understand their insurance policies, accepts and pays for referrals, operates a website (https://apexroofs.com/) and engages in other forms of advertising and solicitation of customers that are directly and adversely affected by the limitations and requirements of S. 76.

37. Defendant Secretary Griffin is sued in her official capacity as Secretary of the Florida Department of Business and Professional Regulation and is located in Tallahassee, Florida.

38. Pursuant to state law, Secretary Griffin oversees the Department of Business and Professional Regulation, which is responsible for licensing and regulating more than 1.4 million businesses and professionals in the State of Florida, including contractors covered by S. 76.

39. The department under Secretary Griffin's direction accepts and investigates complaints about law or consumer violations by licensees, including those that are the result of S. 76's new enactments. *See* https://www.myfloridalicense.com/entercomplaint.asp?SID.

40. Roofing contractors who are members of RAF, including Apex Roofing, are licensees subject to the regulations and disciplinary actions of Secretary Griffin's department.

41. Defendant Executive Director Shaw is sued in his official capacity as executive director of the Construction Industry Licensing Board (CILB) and is located in Tallahassee, Florida.

42. Pursuant to state law, Executive Director Shaw oversees the CILB, which has rulemaking authority to implement Chapter 489, including provisions added by S. 76. Section 489.108, Fla. Stat.

43. The CILB, a part of the Department of Business and Professional Regulation, has the authority to conduct disciplinary proceedings on licensed contractors like the contractor plaintiffs here for violations of Florida law and implements those disciplinary actions through Executive Director Shaw and his staff. Section 489.129, Fla. Stat.

44. S. 76 assigns violations of its provisions for disciplinary proceedings to the CILB under the authority of Executive Director Shaw by making the Act's provisions subject to § 489.129, Fla. Stat.

**Jurisdiction and Venue**

45. This is an action for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 against enforcement of certain provisions enacted as S. 76, which action is grounded in the First and Fourteenth Amendments, the impairment of contract clause in the United States Constitution, and the Commerce Clause. Jurisdiction exists pursuant to 28 U.S.C. § 1331 and 1343, based on 42 U.S.C. § 1983 and questions of federal constitutional law. Jurisdiction also exists under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202. This is both a facial and as-applied constitutional challenge to the statute.

46. This Court has personal jurisdiction over the parties because plaintiffs are largely located in Florida or do business in Florida and submit to personal jurisdiction, while all defendants are located in Florida, and the relevant acts occurred or will occur in Florida.

47. Venue is proper in this district pursuant to 28 U.S.C. § 1391, as a substantial part of the events or omissions that give rise to an enforcement action under the challenged Act and any enforcement itself against Plaintiffs would occur in this district.

**PROVISIONS OF THE ACT**

48. S. 76 adds a new provision to § 489.147, Fla. Stat., which delineates what is deemed to be prohibited property insurance practices.

49. Among its provisions are prohibited advertisements, which it defines as any written or electronic communication that "encourages, instructs, or induces a consumer to contact a contractor or public adjuster" to make an insurance claim for roof damages. S. 76, § 1, codified at § 489.147(1)(a).

50. The Act further prohibits in-person, electronic, or third-person solicitations through prohibited advertisements. S. 76, § 1, codified at § 489.147(1)(b).

51. The Act further prohibits the use of rebates, gifts, gift cards, cash, coupons, deductible waivers, or "anything of value" in exchange for (a) allowing the contractor to inspect a residential property owner's roof, or (b) making an insurance claim for roof damage. S. 76, § 1, codified at § 489.147(2)(b).

52. The Act further prohibits paid referrals when insurance proceeds are payable for the contracted work. S. 76, § 1, codified at § 489.147(2)(c).

53. The Act further prohibits contractors from interpreting insurance policies or advising the insured regarding coverage or the insurer's duties unless the contractor holds a public adjuster license. S. 76, § 1, codified at § 489.147(2)(d).

54. The Act further imputes the actions of anyone compensated by the contractor for soliciting work for the contractor, including violations of S. 76 by a third party. S. 76, § 1, codified at § 489.147(4)(a).

55. The Act requires that the contractor provide potential customers with a notice of the practices prohibited in § 489.147(2)(b), which concern providing something of value such as a discount for engaging the contractor, or be subject to the voiding of the contract within 10 days of its execution. S. 76, § 1, codified at § 489.147(5).

56. Violations of the above provisions of S. 76 puts a contractor in jeopardy of disciplinary proceedings that could include the loss of the contractor's license, pursuant to § 489.129, Fla. Stat., and to a $10,000 fine per violation. S. 76, § 1, codified at § 489.147(3).

57. On May 26, 2022, Governor DeSantis signed a new bill into law that, among other things, amended the prohibited advertisements portion of S. 76. The new provision changed the definition of "prohibited advertisement" to permit what S. 76 declared unlawful on the condition that three disclaimers were added to the advertising; otherwise the original prohibition remains in effect.

## GENERAL ALLEGATIONS

### PROHIBITED ADVERTISEMENTS

58. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 57 above as if fully set forth herein.

59. The Act prohibits roofing contractors from an in-person, written, electronic, or third-person communication that "encourages, instructs, or induces a consumer to contact a contractor or public adjuster for the purpose of making an insurance claim for roof damage." §§ 489.147(1)(a) & (b).[12]

60. Many homeowners have insurance that covers damage to their roofs.

61. Homeowners who have insurance coverage for roof damage or replacement have an expectation based on obtaining that insurance and paying the premiums that insurers will honor their obligations to provide contracted coverage.

62. Homeowners may also prefer hiring a roofing contractor who has experience with insurers and even with their specific insurer.

63. The Act's prohibition on certain advertising clearly seeks to restrict certain commercial speech by a contractor or public adjuster that implicates making a legally appropriate insurance claim for roof damage.

64. Plaintiff roofing contractors engage in advertising within the Act's definition of prohibited advertisements.

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[12] This provision is subject to an existing preliminary injunction issued in another case subsequent to the filing of the original complaint in this matter. At this writing, the effect of the subsequent amendment to that provision on the preliminary injunction is unknown. Plaintiffs press the issue because of the amendment and in order to preserve the issue, notwithstanding ECF No. 13, in which this Court indicated that it would not address that issue "at this time" when the prohibition was in its original form. Plaintiffs respectfully submit that the prohibition continues to inform the purpose and reach of all provisions of the Act and has sufficiently changed to warrant the relief sought here.

65. For example, Apex Roofing advertises through cold calls, door-to-door marketing in storm-riddled neighborhoods to offer free inspections for those who may have damage to their homes, print and digital advertisements, mail, and its website.

66. Apex Roofing's website reaches potential customers in Alabama and other Southeastern states, as well as Florida.

67. On its website, Apex Roofing advises potential customers that "[o]ne part of handling roofing repairs and replacements is dealing with your insurance company," pledges that it will provide "as much assistance as we can" to help with insurance claims, and that "as a roofing contractor, we have years of experience [in dealing with insurance companies]."

68. The Apex Roofing website further states that "[w]e'll provide your insurance company with everything they need to process the claim. If you have any questions, we'll either have the answer for it or help you get an answer." *See also* Grant Rockett Affidavit, Ex. 3.

69. This information plainly encourages or induces a consumer to contact Apex Roofing for the purpose of having a roof repaired that will result in an insurance claim and would, absent the current injunction, be deemed a prohibited advertisement under the Act.

70. If not for the current preliminary injunction holding that the Plaintiff is likely to prevail on its First Amendment claim against enforcement of this provision and subject to a further declaration of unconstitutionality, Apex Roofing would refrain from telling its Florida customers this information, even if they tell customers

in other states the same information, because they would be subject to a credible and imminent threat of prosecution by Defendants.

71. Because the Act only can and does restrict roofing contractors in Florida but cannot extend its prohibition extraterritorially to Apex Roofing's business in other states, the Act violates "principles of state sovereignty and comity, which hold "that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

72. The practical extraterritorial effect of this and other provisions of the Act on Apex and other Plaintiffs who operate outside of Florida also contravenes the Commerce Clause, which "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (citation omitted).

73. Under the Act, if implemented, Plaintiffs cannot continue to tell potential customers through advertising that their roofing repairs may be covered by their homeowners insurance policy, a truthful and non-misleading statement, without the imminent and credible threat of Defendants' imposition of a penalty that includes the loss of their contractor's licenses and fines of $ 10,000 per violation.

74. When Plaintiffs advertise in a manner that may induce a lawful insurance claim, Plaintiffs do not act as a public adjuster or file or adjust claims on behalf of homeowners.

75. When Plaintiffs receive a lawful assignment of benefits from homeowners based on their advertising, directly or indirectly, Plaintiffs do not act as a public adjuster or file or adjust claims on behalf of homeowners but on their own behalf.

76. Advertising and solicitation of the type prohibited by the Act constitutes a form of commercial speech entitled to First Amendment protection from unwarranted government regulation. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (citation omitted).

77. The Act prohibits various truthful, non-misleading forms of commercial speech for activities that are lawful to undertake, such as informing consumers that their roofing repairs may be covered by their homeowners insurance policies and cannot be reconciled with the requirements of the First Amendment.

78. As amended by S.B. 2-D, signed into law on May 26, 2022, the prohibition on advertising that directly or indirectly encourages, instructs, or induces an insurance claim is waived by the State provided that the advertisements states "in a font size of at least 12 points and at least half as large as the largest font size used in the communication that:

> 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 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.

S.B. 2-D, § 5, amending § 489.147(1)(a), Fla. Stat.

79. The amended provision is unconstitutional independently and in combination with the prior provision.

80. In combination with the preexisting provision, the new provision imposes an unconstitutional condition by compelling certain speech as a prerequisite to the exercise of constitutionally protected commercial speech.

81. Further, the disclaimers, which must appear on all advertising, including "door hangers, business cards, magnets, flyers, pamphlets, and e-mails," § 489.147(1)(a), Fla. Stat., violate the First Amendment, as unduly burdensome, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377 (2018), because of their potential to discourage constitutionally protected speech, *see Ibanez v. Florida Dep't of Bus. and Prof. Reg.*, 512 U.S. 136, 146-47 (1994), and "chill[] protected commercial speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

82. Besides taking up an undue proportion of a door hanger, business card, magnet, or flyer and thus constituting an undue burden, the disclaimers cannot be shown, as is the State's burden to do so, to be "narrowly tailored" to alleviate the State's concerns about fraudulent claims "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

83. In addition, the disclaimers seek to impose speech upon roof contractors such as Plaintiffs to explain obligations the law imposes on consumers, not on the contractors for the services they are offering. In such instances, the First Amendment requires the State to speak with its own voice through mechanisms such as "educational campaigns focused on the problems," rather than impose its message on commercial speakers. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

84. Finally, the disclaimers also constitute forbidden content discrimination under the First Amendment because it imposes, solely on a small set of commercial speakers – roofing contractors – compelled speech that, if otherwise valid, is equally applicable to a wide range of commercial actors, including doctors, automobile repair shops, and other property repair and remediation companies, about payments of insurance deductibles and fraudulent insurance claims. Absent the relief sought here, Defendants will continue to violate Plaintiffs' rights.

**PROHIBITION ON INTERPRETATION OR ADVISING CONCERNING INSURANCE COVERAGE**

85. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 84 above as if fully set forth herein.

86. The Act also prohibits roofing contractors from "[i]nterpreting policy provisions or advising an insured regarding coverages or duties under the insured's property insurance policy." § 489.147(2)(d).

87. The prohibition is so comprehensive that, by its terms, a roofing contractor may not advise an insured that its roof damage is *probably* covered by their policy and that they should call their insurer to check on that or that the policy

permits the homeowner to assign benefits to the roofing contractor, a mechanism that allows the roofing contractor to step into the shoes of the insured and make the claim directly to the insurer for the covered repair.

88. Plaintiffs regularly perform remedial and repair work on homeowners' roofs in exchange for insurance benefits owed to homeowners by their residential insurance policies.

89. Plaintiffs like Apex Roofing must, as part of their businesses, have sufficient familiarity with insurance contracts to have a fundamentally reliable understanding of whether insurance coverage will provide their compensation for the roofing repairs or replacements for which they may be hired, or whether that compensation will come from the homeowner.

90. As previously alleged, Apex Roofing, for example, tells customers on its website that part of handling roofing repairs and replacements is dealing with your insurance company," pledges that it will provide "as much assistance as we can" to help with insurance claims, indicates it has "years of experience [in dealing with insurance companies]," promises to "provide your insurance company with everything they need to process the claim," and indicates it will help a homeowner get answers to their insurance questions.

91. These statements do not contravene any law where Apex Roofing is licensed, except for Florida, because of the prohibition on direct or indirect interpretation or advise about coverage contained the Act.

92. The statements, however, do not suggest that Plaintiffs will act as a public adjuster or file or adjust claims on behalf of homeowners.

93. Moreover, Plaintiffs have regularly informed potential customers that their insurance policies permit them to make an assignment of benefits, which is an aspect of a homeowners insurance that cannot be divested by policy language. *See, e.g., Sec. First Ins. Co. v. State, Off. of Ins. Regul.*, 177 So. 3d 627, 628 (Fla. 1st DCA 2015) (citing cases in support of an "unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent.").

94. Under the explicit text of the Act, informing a homeowner that their insurance policy permits he or she to assign benefits to their roofing contractor so that the roofing contractor can make an insurance claim constitutes a form of interpreting or advising customers and potential customers concerning the insurance coverage that is now prohibited.

95. Similarly, the text of the Act prohibits a licensed roofing contractor, like Plaintiffs, from telling a homeowner that an assignment of benefits, as one of the mandatory provisions in their insurance contract, means that the homeowner does not have to finance the repairs or remediation other than to pay any applicable deductible.

96. The prohibition on interpretation and advising with respect to the availability of assignment-of-benefits process conflicts with § 627.7152, Fla. Stat., which defines the requirements of an assignment agreement, including that it be in writing and

that the assignee provide a copy within three days to the insurer.

97. The requirements of § 627.7152, Fla. Stat., plainly require a roofing contractor to facilitate an insurance claim, even though provisions of the challenged Act that prohibit interpretation, advisement, and other actions are intended to prevent roofing contractors from, directly or indirectly, making a claim more likely.

98. The First Amendment, which operates on the States through the Fourteenth Amendment, protects this type of commercial speech "based on the informational function of advertising." *Cent. Hudson*, 447 U.S. at 563.

99. Undue restrictions on providing this type of truthful communication "reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." *Id*. at 567.

100. The provision further deprives consumers of the contractor's experience with identical policies or the specific insurer, even though a disclaimer, rather than a prohibition, could effectuate any interest that the State purports to advance on the authoritativeness of any advice or its purported anti-fraud purposes. (*E.g.*, "Based on my experience with ABC Insurance, they will cover X & Y, but not Z, but I am not a public adjuster who can make that determination, and you should check directly with ABC Insurance or a public adjuster to get an opinion you can rely upon.").

101. The Act thus has the effect of seeking to discourage consumer knowledge of a roofing contractor's experience with policies of their insurer or their right to assign insurance benefits only when that information is conveyed by a licensed roofing contractor, even when time is of the essence and when the same information

may be conveyed by others, including general contractors or laypeople, without running afoul of the Act.

102. No similar prohibition on interpretation or advising on the policy as Plaintiffs have done in the past and are now prohibited from doing by the Act are placed on other repair and remediation contractors licensed by Defendants, or even laypeople with no particular experience or expertise about homeowners' policies, in contravention of the Florida Constitution's prohibition on special laws in the regulation of a regulated profession. Fla. Const. art. III, § 11(a)(20).

103. The provision's flat prohibition on interpretation or advising concerning insurance coverage, directly or indirectly, also cannot be reconciled with the First Amendment.

104. By prohibiting roofing contractors from "directly or indirectly" interpreting an insurance policy or advising about coverage, even if what is said is truthful and nondeceptive and has appropriate disclaimers, the State neither advances its purported anti-fraud objective nor does so in a constitutionally sufficient way to comport with the requirement that any restriction on commercial speech "must be designed carefully to achieve the State's goal," *Cent. Hudson*, 447 U.S. at 561, and "no broader than reasonably necessary to prevent the deception." *In re R.M.J.,* 455 U.S. 191, 203 (1982).

105. The prohibition also runs afoul of the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, and considerations of state sovereignty and comity because Plaintiff companies, like Apex Roofing, operate in other states, where they are permitted to

continue their practices of advising customers about their experience with insurance claims and with specific insurers.

106. Plaintiffs, in providing the information they have in the past and expressed the desire to continue to do so in accordance with constitutional protections, face a credible threat of prosecution from Defendants under the Act and have adjusted their practices to avoid running afoul of the Act that includes the possible loss of its contracting license as well as up to a $10,000 fine per violation should it continue its current business practices and this Court not enjoin enforcement of the Act.

107. The Act and its unconstitutional restrictions are intended for immediate enforcement against licensees under Chapter 489 like Plaintiffs. Plaintiff has suffered and will continue to suffer irreparable harm to its First Amendment rights until the Court invalidates the provision against interpretation and advice about insurance policies.

108. Without a declaration and injunction of this provision of the Act, Plaintiff will be forced to cease its prior practices, available to customers in other jurisdictions, and suffer having its First Amendment rights chilled.

109. Plaintiffs lack an adequate remedy at law for the deprivation of its rights, and injunctive relief would serve the public interest by vindicating a right protected by the U.S. Constitution.

**PROHIBITION ON OFFERS OF "ANYTHING OF VALUE" FOR A FREE ROOF INSPECTION OR MAKING AN INSURANCE CLAIM**

110. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 109 above as if fully set forth herein.

111. The Act forbids a roofing contractor from offering "anything of value" in exchange for conducting a free roofing inspection or making an insurance claim, "directly or indirectly." § 489.147(2)(b). The prohibition includes coupons or discounts on repairs and waivers of deductibles, all common practices among Plaintiffs in the past.

112. The prohibition has caused them to cease these marketing practices which are part of how they solicit business, even though they are ready and willing to resume doing so if the prohibition is declared unconstitutional or otherwise invalid.

113. Offering something of value in exchange for business is a conventional marketing technique, employed by a wide variety of industries, because doing so can drive customers to your business, draw customers away from competitors, and generate new revenue for a business.

114. Offering something of value to potential customers is neither inherently fraudulent nor likely to produce a fraudulent transaction.

115. Offering something of value to potential customers is not acting as a as a public adjuster or filing or adjusting claims on behalf of homeowners.

116. Plaintiffs in the past regularly encouraged homeowners to allow them to provide a free inspection of the homeowners' roofs to determine the nature and extent of storm damage the property may have suffered in exchange for something of value, including discounts or coupons for any repairs needed.

117. Based on that inspection, and in accordance with the advice that the Florida Department of Financial Services provides to homeowners,[13] Plaintiffs have in the past provided potential customers with as accurate an assessment of the nature and extent of any damage as can be determined by inspection and, by that, at least indirectly encourage homeowners to contact their insurance company to make a claim if they have an appropriate residential insurance policy.

118. The prohibition on offering "anything of value" in exchange for making an insurance claim also interferes with a customary practice among Plaintiff roofing contractors of offering discounts or coupons, for example, and suggesting the homeowner execute an assignment of benefits by which the contractor will make the insurance claim for any repairs that must be undertaken under the homeowner insurance policy.

[13] Florida Dep't of Financial Services, "Homeowners' Insurance: A Toolkit for Consumers," at 29 (available at https://www.myfloridacfo.com/division/consumers/understandingcoverage/guides/documents/homeownerstoolkit.pdf).

119. Plaintiffs have advertised things of value in exchange for free roof inspections in the past or for roof remediation where the work would be paid, at least in part, by insurance and are ready and willing to continue to do so again, if this Court grants an injunction and a declaration that the prohibition is unconstitutional.

120. Plaintiffs have ceased offering things of value as prohibited by the Act because they are uncertain of their rights until an authoritative disposition of the provision's constitutionality is reached and in light of the Act's creation of a credible threat of immediate and devastating prosecution.

**PROHIBITION ON COMPENSATION FOR REFERRALS WHEN INSURANCE PAYS FOR THE REPAIR**

121. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 120 above as if fully set forth herein.

122. The Act prohibits compensation paid referrals concerning roof repair or replacement for which property insurance proceeds are payable. § 489.147(2)(c).

123. Referrals in cases where insurance proceeds are payable have been a customary practice in the roof repair and remediation industry, including among Plaintiffs.

124. Plaintiffs have received referrals for which they pay compensation from other contractors licensed under Chapter 489, including general contractors, from previous clients, from independent parties, and from referring websites such as Angie's list, HomeAdvisor, Yelp, and certain search engines.

125. Referring websites, such as Angie's List (now "Angi"), HomeAdvisor, and Yelp, charge specific fees for an actual referral.

126. For example, HomeAdvisor, which now operates off a platform from Angi, charges for each referral a contractor receives, whether or not the contractor ultimately wins the job and regardless of whether the customer hires anyone for the job. It charges between $500 to $1,000 for a direct lead. Higher fees are charged when a contractor wants to be the exclusive referral for a job within a geographic area. Angi has a similar charging scale.

127. When a potential customer goes to one of these websites seeking a free referral to a contractor, they are asked to fill out a detailed questionnaire that includes the nature of the job, its location, and whether the job is covered by insurance.

128. The use of paid referrals when as a marketing technique practiced by Plaintiffs and described in this Count as paid for by insurance are prohibited by the Act and has caused Plaintiffs to refrain from doing so in violation of the Act, although they are willing and ready to resume those practices should the prohibition be enjoined and declared unconstitutional.

129. Paying for referrals covered by insurance is neither inherently fraudulent – the Act permits the practice when anyone other than an insurer will pay for the roofing repair or remediation coverage and permits other contractors licensed pursuant to Chapter 489 to continue to pay for referrals covered by insurance – nor does it cause a roofing contractor to act as a public adjuster or to make an insurance claim on behalf of the homeowner.

130. Paying for referrals is a form of soliciting a business transaction and thus constitutes a form of commercial speech that enables other marketing protected by the First Amendment so that the prohibition cannot be reconciled with the First Amendment.

131. 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. U.S. Const. art. I, § 10, cl. 1.

132. Continuing the practice of paid referrals where insurance will pay for the roofing repair would subject Plaintiffs to a credible threat of sanctions by virtue of the plain text of the Act if they continue to pay for referrals where insurance covers the work as they have taken in the past, but no longer engage in because of fear of prosecution under the Act.

**IMPUTING VIOLATIONS ACTIONS OF THIRD PARTIES TO THE ROOFING CONTRACTOR**

133. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 132 above as if fully set forth herein.

134. The Act further imputes the actions of anyone compensated by the contractor for soliciting work for the contractor, including violations of S. 76 by a third party. § 489.147(4)(a), Fla. Stat.

135. Plaintiffs do not challenge this provision of the Act as it applies to their own employees, over which they have control and can provide training.

136. Plaintiffs challenge this provision as it applies to third parties over whom they have no control and who may falsely represent to Plaintiffs that they have complied with all provisions of the Act and even sign a contract that requires their compliance and that they hold the roofing contractor harmless for any violation.

137. As previously pleaded, Plaintiffs have made use of paid referrals as part of their marketing and solicitation practices, and these referrals have come from nonemployees who are compensated for soliciting, including other contractors licensed under Chapter 489, previous clients, and referring websites.

138. Plaintiffs have not inquired of these referring parties about their compliance with Florida law in the past, and these referrals often do not translate into paid work.

139. Even if Plaintiffs undertake their best efforts at requiring compliance by third parties and interrogating the referring party about the specific prohibitions of the Act, Plaintiffs cannot act as a guarantor of compliance without jeopardizing their professional license or subjecting themselves to potentially crippling fines. As such, Plaintiffs have a credible fear of imminent prosecution by Defendants should no injunction issue and no determination made that the provision is unconstitutional.

140. To avoid potential prosecution, absent injunctive relief, Plaintiffs have changed their practices concerning paid referrals for which the actions by third parties may be imputed to Plaintiffs.

141. Accepting and paying for referrals from third parties without perfect knowledge of their compliance with the Act is not inherently fraudulent and does not constitute acting as public adjuster or making an insurance claim, particularly because a referral is not the same thing as being hired on the basis of the third-party solicitation.

142. The treatment of this type of marketing as one that warrants the Act's sanctions chills the solicitation of business and cannot be reconciled with the First Amendment.

143. The imputation of the actions of third parties who are compensated for soliciting business for the contractor subject to the Act, which, by its plain language, does not allow for a good-faith defense or other measures Plaintiffs can take to assure compliance or insulate themselves from liability, violates due process.

**PROVIDING A NOTICE ABOUT THE PROHIBITION ON GIVING ANYTHING OF VALUE**

144. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 143 above as if fully set forth herein.

145. The Act also requires roofing contractors to provide customers with a notice of the prohibition on things of value in exchange for a free roof inspection or making an insurance claim. § 489.147(5), Fla. Stat.

146. Plaintiffs challenge this provision as a form of compelled speech contrary to the First Amendment to the extent that the prohibition more fully described and challenged in Count III is enjoined.

147. Prior to enactment of the Act, Plaintiffs have not provided such notice.

148. Today, in light of a credible threat of imminent prosecution that includes significant penalties, Plaintiffs now provide this notice.

149. This provision further burdens Plaintiffs by permitting the voiding of one of Plaintiffs' roofing-repair contracts if no notice is provided within 10 days of its execution.

150. If the prohibition on anything of value is invalid, then this notice cannot be reconciled with the First Amendment and is null and void.

**COUNT I – INJUNCTIVE RELIEF**

151. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 150 above as if fully set forth herein.

152. Plaintiffs want to continue the use of advertising and resume the use of traditional marketing and promotional techniques prohibited by the Act and not incorporate the disclaimers imposed by amendment of the Act to indicate potential insurance coverage in its advertising. Plaintiffs seek to inform potential customers in need of roofing repair and remediation of the full array of services that they can legally and properly offer, including the value of assignments of benefits or other steps they need to take to protect their insurance claims.

153. Plaintiffs want to be able to resume offering discounts, rebates, waivers of deductibles, and other benefits to their customers and potential customers where the Act prohibits that practice.

154. Plaintiffs want to be able to resume utilizing referral websites or pay others for referrals when a job is covered by an insurance policy.

155. Plaintiffs do not want to be subject to imminent prosecution for violations of the Act committed by others to whom they would pay referral fees, as in the past, where they cannot otherwise control the third party and they have taken every reasonable precaution to guard against a violation.

156. Plaintiffs do not want to have to continue to put potential customers on notice of the prohibition against anything of value if the prohibition itself is null and void.

157. Plaintiff Apex Roofing does not want to modify its website to comport to S.B. 76's restrictions in order to continue to do business in Florida so that it will then be at a disadvantage in the other states in which it operates by being unable to convey to consumers the full array of services it offers and that are not prohibited advertising practices in those states.

158. Plaintiffs' fear of being targeted with enforcement actions is well-founded as the Act clearly applies, its text makes its prohibitions and obligations mandatory, and its enactment was intended to target contractors (like Plaintiffs) who are licensed under Chapter 489.

159. The provisions of the Act hamper the receipt of information to consumers from licensed and experienced contractors that is both truthful and non-deceptive, while burdening those communications with unnecessary and unjustified disclosures.

160. Here, the prohibitions and disclosure requirements are unjustified by the State's purported interest in preventing fraud, fail the First Amendment's

narrowly tailored requirement because the State's interests are achievable by more speech-friendly means.

161. The Act prohibits the communication of truthful, non-deceptive information, and its requirements and prohibitions unreasonably burden protected commercial speech in unjustifiable and discriminatory ways.

162. Instead of protecting consumers from unfair practices, the provisions seek to keep homeowners in the dark about the availability of insurance coverage for roof damage they have suffered, the role of assignment of benefits, and other information that a roof contractor may have about insurance.

163. Plaintiff has suffered and will continue to suffer irreparable harm as its First Amendment rights have been violated and will continue to be violated, forcing them to refrain from practices they have engaged in and are ready and willing to resume, which are also practices others in the repair and remediation industry are permitted to continue, at least until the Court invalidates the Act and enjoins its unlawful pronouncements.

164. Plaintiff lacks an adequate remedy at law for the deprivation of its rights. Injunctive relief would serve the public interest by promoting free speech and the defending the rights protected by the First Amendment.

165. Both the likelihood of enforcement and the threat of enforcement unconstitutionally chill the exercise of protected free speech rights, including Plaintiff RAF's members and Plaintiff Apex Roofing's plans to engage in truthful and nondeceptive marketing and warrants injunctive relief.

166. A federal court may enjoin a state officer from taking future actions that violate federal law and may take prospective actions to assure compliance with constitutional requirements. *Ex Parte Young*, 209 U.S. 123 (1908).

**COUNT II - Declaratory Relief**

167. Plaintiff realleges and incorporates by reference Paragraphs 1 through 150 above as if fully set forth herein.

168. Under the facts alleged herein, a bona fide, actual, justiciable, and substantial controversy exists between Plaintiffs and Defendants, who are adverse in legal interests with respect to Plaintiffs constitutional rights.

169. Plaintiffs are uncertain about their rights to advertise and otherwise solicit business as they have and wish to resume their past practices because of their belief that the State was without authority, consistent with constitutional requirements to enact the prohibitions contained in the Act.

170. These past practices include advertising and soliciting business by informing potential customers of possible insurance coverage without disclosures that warn customers about having to pay insurance deductibles and against customers engaging in insurance fraud, offering to deal with insurance through an assignment of benefits, describing their past experience with insurers, or engage in other standard practices in this and other industries without suffering from disciplinary actions or monetary fines pursuant to the Act.

171. Plaintiffs are also uncertain about their rights with respect to paid referrals, including the utilization of referral websites or paying referral fees to fellow contractors or previous clients in light of the Act.

172. Plaintiffs also are uncertain about their rights not to provide notice about the Act's prohibited advertising practices that they believe are unconstitutional and their rights to avoid imputation of violative acts by third persons that they may pay for one service or another.

173. Plaintiffs are uncertain about what the Act permits them to say and prohibits them from saying about insurance and insurance policies and procedures.

174. Plaintiff Apex Roofing is uncertain about what adjustments must be made to its website that covers its interstate offer of services where prohibitions required by S.B. 76 are not prohibitions in the other states where it operates.

175. The uncertainty, discrimination against the subject matter and content of their plans for and existing advertising, and the burdens that the Act imposes violate Plaintiffs' First and Fourteenth Amendment rights, as well as their rights against impairment of contract. It further oversteps state authority under the Commerce Clause.

176. Plaintiffs are contractors who have advertised and solicited business in ways now prohibited by the Act, have ceased or changed their practices in light of the Act's prohibitions, and are subject to the credible threat of imminent disciplinary measures and fines authorized by the Act should they resume practices they believe are protected by the Constitution.

177. Plaintiffs seek declaratory relief based on the specific and live grievance alleged—namely, the deprivation of constitutionally guaranteed rights and other constitutional limitations on state authority.

178. The controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment so that the above doubts can be removed.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs RAF and Apex Roofing respectfully request that the Court enter judgment in their favor and against Defendants in their official capacities, as follows:

1. Declare that the Act is invalid and unenforceable in the provisions challenged herein because it violates the First Amendment and/or Fourteenth Amendment, as well as the impairment of contracts prohibition and Commerce Clause, in the United States Constitution;

2. Declare that the Act constitutes a special law in violation of the Florida Constitution bar on such laws that pertain to the "regulation of occupations which are regulated by a state agency;"

3. Issue an Order permanently enjoining Defendants from enforcing the challenged provisions of the Act and ordering Defendants' compliance with the United States and Florida Constitutions;

4. Award Plaintiff all costs and fees incurred in bringing this action to the extent permitted under applicable laws; and,

5. Award all other relief as deemed just and proper.

DATED: June 27, 2022

Respectfully submitted,

*/s/ Robert S. Peck*
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**CERTIFICATE OF SERVICE**

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF portal, which automatically sends notice and a copy of the filing to all counsel of record.

June 27, 2022 */s/ Robert S. Peck*