IN THE SUPREME COURT OF FLORIDA

FREDERICK W. KORTUM,

Appellant,

v. CASE NO. 11-133

JEFF ATWATER, in his capacity as Chief Financial Officer of the State of Florida, and head of the Department of Financial Services,

Appellee.
_____/

BRIEF OF *AMICI CURIAE* PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

CYNTHIA S. TUNNICLIFF (FBN 0134939)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street , Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS continued

PAGE

CITATION OF AUTHORITIES

CASES **PAGE**

CITATION OF AUTHORITIES continued

CASE **PAGE**

OTHER AUTHORITIES

FLORIDA STATUTES

OTHER STATUTES

CITATION OF AUTHORITIES continued

OTHER STATUTES **PAGE**

LEGISLATION & ANALYSES

ARTICLES/PERIODICALS

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Property Casualty Insurers Association of America ("PCI") and the National Association of Mutual Insurance Companies ("NAMIC") are both national trade organizations, the members of which are comprised of many of Florida's residential property insurance carriers. Accordingly, both share a strong interest in preserving the enforceability of Section 626.854(6), Florida Statutes, which serves the legitimate and important governmental purposes of promoting ethical standards within the public adjusting profession, in turn preserving consumer protection and privacy, preventing unnecessary costs for consumers, and safeguarding against abuses within the insurance industry.

SUMMARY OF ARGUMENT

The District Court erred in overturning the decision of the trial court upholding the constitutionality of § 626.854(6), Fla. Stat. Section 626.854(6) governs conduct, not speech and should be analyzed under the rationale espoused in *United States v. O'Brien*, 391 U.S. 367 (1968). Regulation of the solicitation conduct was justified by a significant governmental interest which was supported by an extensive study.

The District Court erred in determining that the statute regulated commercial speech and was governed by the rationale in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Even assuming

that is the applicable standard, the statute should be upheld as constitutional. The District Court found that the first three prongs of the *Central Hudson* test were met. In particular, the District Court found that had a substantial interest in regulating the activity, but the statute was more extensive than necessary to serve the government's interest. This finding ignores the extensive report and legislative history which supports a narrow reading of the statute. This case should be controlled by *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), which upheld a 30-day ban on solicitation of accident victims by Florida laws. The statute under review here proposes a 48-hour ban on door-to-door or telephonic solicitation after a hurricane, fire, or natural disaster. This was a reasonable response to the extensive findings of the Legislative Task Force.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT *CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION OF NEW* YORK, 447 U.S. 557 (1980), GOVERNS THE ANALYSIS OF THIS CASE.

A. The challenged law unambiguously regulates conduct, not the suppression of free expression.

The plain text of subsection (6) of section 626.854, Florida Statutes, focuses on specific kinds of solicitation. It reads:

> "A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in *face-to-face or telephonic solicitation* or enter into a

> contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant." (Emphasis added)

The Merriam-Webster dictionary defines solicitation as "the *practice* or *act* of soliciting." Likewise, "soliciting" is defined as "*to approach* with a request or plea," "*to urge* strongly," and "*to try to obtain* by usually urgent requests or pleas." (Emphasis added). Solicitation, by any definition, constitutes conduct. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F. 3d 1178, 1183 (C.A. 9 2010) (writing that commercial solicitation "consists of both expressive content and associated conduct or acts," the "acts" component of which "includes the conduct of the person soliciting"…); *see also Bergman v. District of Columbia*, 986 A. 2d 1208, 1220 (2009) (upholding the constitutionality of a statute restricting in-person and telephone solicitation as an appropriate regulation of conduct).

Conduct may be proscribed if "a sufficiently important governmental interest in regulating [a] nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968), *accord First Vagabonds Church of God v. City of Orlando*, 2010 WL 2652474, 3-4 (C.A.11 2010) (reiterating the viability of the *O'Brien* doctrine to expressive conduct). In other words, a statute regulating conduct is proper if such

regulation is within the constitutional powers of the government, if it furthers an important or substantial governmental interest, if it is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest. *Id.*

As Appellant argues in detail, the only way to construe the challenged law as unduly suppressing all speech is by deleting the words "through any other person or entity." As such, the trial court properly applied the *O'Brien* test, *supra*, and upheld the statute's constitutionality.

The regulation of a nonspeech element— solicitation conduct—was justified by a significant governmental interest: consumer privacy and protection. *See Berg v. Merchants Ass'n Collection Div.*, 586 F. Supp. 2d 1336, 1345 (S.D. Fla. 2008) (upholding the constitutionality of the Fair Debt Collection Practices Act and writing that the government has a significant interest in protecting consumers' privacy). While erroneously analyzing the statute under the *Central Hudson* four-prong test, the District Court did, however, hold that the challenged statute advanced a legitimate governmental interest. The District Court found that the challenged statute meets the third prong of the *Central Hudson* test, i.e., that the statute directly advances the governmental interest asserted. The District Court based its decision that the statute furthers the governmental interest in that "protecting citizens that have suffered a traumatizing loss from intrusive

unsolicited contact by public adjusters by granting them a brief period of breathing room furthers the governmental interest asserted." The Court continued, "Further, the statute was supported by a legislative study, statistical data and anecdotal evidence."

Indeed, the Task Force on Citizens Property Insurance Claims Handling & Resolution concluded that consumers were in need of protection from unethical public adjusters, and suggested legislation similar to that now contained within the challenged statute, noting in its Final Report dated June 11, 2008:

> "The Task Force held an informal workshop on November 16, 2007, and proposed legislation was drafted *to protect consumers from unqualified or unscrupulous Public Adjusters and to ensure that homeowners receive and maintain adequate funds in order to re-build their homes after a loss*. The proposed legislation was sponsored by Senator Mike Fasano and Representative Julio Robaina. The Task Force's recommendations were adopted by the Florida Legislature as part of a package of insurance amendments adopted in CS/CS/SB 2012. This legislation places a limit on contingency fees charged by adjusters; *prohibits intrusive solicitation practices*; and requires that a person work as an apprentice under the supervision of a licensed public adjuster for one year before being eligible to be licensed as a public adjuster." Task Force of Citizens Claims Handling & Resolution, *Third and Final Report*, http://tinyurl.com/2ahbnrx. (Emphasis added).

The Legislature appropriately utilized its constitutional powers to further a substantial government interest, regulating conduct in a way that was unrelated to the suppression of free expression. The scope of the statute's plain language

serves the government's interests of consumer protection and privacy, and goes no further, limiting itself to a short temporal span and only the most intrusive methods of communication. Accordingly, the plain language of the challenged law is entirely constitutional.

B. The District Court's interpretation of the statute is contrary to legislative intent.

The District Court rejected the trial court's finding that the statute only applied to the conduct of soliciting in-person or by telephone. The trial court had determined that the statute was ambiguous and that deference should be given to the state's interpretation. The District Court found that the plain language of the statute bans all solicitation for 48 hours.

Courts must endeavor to construe statutes in a way that preserves constitutionality. *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004). Specifically, every statute must be presumed constitutional, every doubt as to its constitutionality must be resolved in its favor, and if two reasonable interpretations exist, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted. *Id. citing Gray v. Central Florida Lumber Co.*, 140 So. 320 (Fla. 1932).

The District Court's opinion erroneously finds that the phrase "initiate contact" was inserted by the Legislature and must be given effect; that the Department's interpretation writes that prohibition out of the statute. The

legislative history indicates, however, that the legislative task force was aware that there might be a constitutional issue if it imposed a complete ban. The phrase "through any other person or entity" was added by the task force so as to allow written communication between a public adjuster and an insured. The District Court completely ignored this evidence and found that the phrase "directly or indirectly through any other person or entity" modifies all three of the statute's prohibitions and not just "initiate contact." The District Court found that interpretation was required by the plain meaning of the statute without regard to the legislative intent demonstrated by the legislative history.

Legislative history supports the Department's interpretation of section 626.854(6), Florida Statutes, as regulating conduct. Committee Substitute for Committee Substitute for Senate Bill 2012 (2008) (CS/CS/SB 2012), which effectuated section 626.854(6), Florida Statutes, did not always contain the public adjuster reforms throughout its legislative lifespan. Rather, the challenged subsection was only added to CS/CS/SB 2012 on April 28, 2008, a mere handful of days before the end of that legislative session. Before it became an amendment to CS/CS/SB 2012, section 626.854(6), Florida Statutes, was present in two stand-alone public adjuster bills: Senate Bill 1098 (2008) and House Bill 661 (2008), sponsored by Senator Fasano and Representative Robaina, as reflected in the Task

Force's Final Report, *supra*. The Senate version mirrored the Task Force's language, which provided:

> "A public adjuster may not directly or indirectly through any other individual or entity engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 72 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant."

The House Bill contained identical language when it was introduced in advance of the 2008 Regular Session. However, in its first committee of reference, Representative Robaina offered an amendment intended to "[shorten] the time period during which a public adjuster cannot *solicit* after a hurricane." House of Representatives, *Staff Analysis: Jobs & Entrepreneurship Council*, CS/HB 661, April 18, 2008 (emphasis added). The language in this amendment is what became law vis a vis CS/CS/SB 2012, presently section 626.854(6), Florida Statutes. Amendment 262647 CS/CS/SB 2012 (2008). Most importantly, however, is that nothing in the staff analysis reflects an intention to restrict anything other than solicitation; moreover, every indication leads to the conclusion that the amendment only served to constrict the challenged law even more.

The challenged law's legislative history supports a constitutional construction by illuminating the government's interest in protecting consumers from the most intrusive conduct: telephonic and face-to-face solicitation during the

first 48 hours following an event. The amendment which shortened the window of proscribed conduct provides further support that the Legislature sought to go no further than was necessary to serve its interest in "remedy[ing] concerns about abuses by some public adjusters." *Id*. Accordingly, this constitutional construction should take precedence over any competing interpretations.

C. The challenged law is akin to that of many other states which share the common goal of preventing consumers from becoming victims of unscrupulous conduct in the public adjusting profession.

Many states have enacted statutes targeted at inappropriate public adjuster solicitation, and prohibit such solicitation within a certain time frame after a claim-inducing event. These are all in full force and effect, and pass the *O'Brien* test for constitutionality by targeting solicitation conduct.

Public adjusters in New Hampshire, North Carolina, Louisiana, Idaho, Kansas, the District of Columbia, and Delaware may not solicit or attempt to solicit clients during the progress of a loss-producing occurrence. *N.H. Rev. Stat.* § 402-D:17; *N.C.G.S.A.* § 58-33A-80; *LSA-R.S.* 22:1210.106; *I.C.* § 41-5818; *K.S.A.* 40-5516; *DC ST* § 31-1631.08; 18 *Del. C.* § 1756. Texas public adjusters may not solicit during the progress of a loss-producing natural disaster occurrence. *V.T.C.A., Insurance Code* § 4102.151.

Other states have even more specific temporal limitations. Tennessee prohibits public adjusters from soliciting insureds for two days after any loss, and California restricts solicitation for a full seven calendar days after a disaster's occurrence. *T.C.A.* § 56-6-917; *Cal. Ins. Code* § 15027.1.

Insurance Adjustment Bureau v. Insurance Commissioner for the Commonwealth of Pennsylvania, 542 A.2d 1317, 1323 (Pa. 1988), applied the *Central Hudson* test and held that the affected speech was commercial and concerned commercial activity, that government interest in consumer protection was substantial, but that the statute was more restrictive than it needed to be. The District Court found this case to be persuasive. The Pennsylvania statute overturned in that case, however, prohibited *all* methods of solicitation whereas section 626.854(6), Florida Statutes, provides only limited restrictions on public adjuster solicitation. In this way, the Florida and Pennsylvania statutes are distinguishable, as section 626.854(6), F.S., reaches only telephonic and face-to-face solicitation during a 48-hour period.

Additionally, the Pennsylvania Court failed to account for the effect of the United States Supreme Court's *O'Brien* decision, and the conduct jurisprudence that has followed. The ability to regulate conduct is not considered in the *Insurance Adjustment Bureau* opinion, and the exclusion of such may very well have been the death knell for the Pennsylvania's statute's constitutionality. *Id.*

II. EVEN UNDER THE *CENTRAL HUDSON* TEST, SECTION 626.854(6), FLORIDA STATUTES, PASSES CONSTITUTIONAL MUSTER.

To survive a constitutional challenge under *Central Hudson*, a statute must concern lawful activity, the government must have a substantial interest in regulating this activity, the relationship between the interest and the statute must be strong, and the statute may not be any more extensive than necessary to serve the government's interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. at 564. The District Court found that the first three prongs of the *Central Hudson* test were met, but that the statute was more extensive than necessary to serve the government interest. By creating a 48-hour post-event ban on telephonic and in-person solicitations, Florida directly targeted its substantial interest in consumer protection and privacy, and appropriately designed its regulation to only prevent the perceived harm and nothing more. *Central Hudson*, 447 U.S. at 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal."); *see also Bergman v. District of Columbia*, 986 A. 2d 1208, 1220 (2009) (upholding the constitutionality of a statute restricting in-person and telephone solicitation as an appropriate regulation of commercial speech).

A. Any infringement on commercial speech is justified by the government's substantial interest in protecting consumers and their privacy and advanced by the same.

The government need only show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). In *Edenfield*, a ban on solicitation by certified public accountants was invalidated because it was not designed to further the prevention of consumer fraud or other evils, as it was not based on evidence of harm, anecdotal or otherwise. *Id.* In contrast, in the instant case, the Task Force heard experts, studied reports, gathered empirical data, and included testimonial and anecdotal evidence to justify its actions. Task Force on Citizens Property Insurance Claims Handling & Resolution, *Agenda*, http://tinyurl.com/27au7dl. The Legislature, in turn, based its conclusion of harm on the Task Force's report, and enacted section 626.854(6), Florida Statutes, to address its suggestions.

The OPPAGA Report introduced at trial found that public adjusters prolonged claims settlements and targeted consumers during emotionally vulnerable times, a detail supported by the Appellant's own advertising materials. OPPAGA, *Public Adjuster Representation in Citizens Property Insurance Corporation Claims Extends the Time to Reach a Settlement and Also Increases Payments to Citizens' Policyholders*, Report No. 10-06 at 5 (January 2010); (Defendant's Exhibits 2, 3: "It is impossible to comprehend the emotional

devastation that follows a loss such as yours"). The OPPAGA Report noted that the Division of Insurance Fraud had initiated 269 cases and made 31 arrests in public adjuster cases. *Id.* The District Court ignored this evidence and attempts to distinguish *Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978); and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), by simply asserting that lawyers are different.

The government's substantial interest in protecting consumers and their privacy, the evidence and data supporting that interest, and the state's direct attempt to curb abuses by enacting section 626.854(6), Florida Statutes, makes this law distinctly different than those based on imaginary and unjustified harms. *Contra Edenfield*, 507 U.S. at 772-73 (the record contained no "studies to suggest personal solicitation of business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence," no "anecdotal evidence either from Florida or another State that validates the Board's suppositions," no "prospect or harassment or overreaching by CPA's," nor any "'persuasive evidence that direct uninvited solicitation by CPAs is likely to lead to false or misleading claims or oppressive conduct.'").

Contrary to the District Court's opinion, this case is analogous to *Florida Bar v. Went For It, Inc., supra*. The 30-day restriction on attorney direct mail solicitation of accident victims was upheld. The Court relied in part on the fact

that the Bar regulation was supported by a two-year study, statistical data, and anecdotal evidence. Likewise, section 626.854(6), Florida Statues, was based on careful study by the Task Force, which was created by the Legislature in 2007 and issued its final report over a year later, and holding no less than twelve meetings to study the issues and present recommendations. Task Force on Citizens Property Insurance Claims Handling & Resolution, *Meeting Schedule*, http://tinyurl.com/26vn6ly. The Supreme Court also held that the Bar has a substantial interest in protecting injured Floridians; the harm it targets is not illusory and the 30-day ban addressing these harms is narrow both in scope and duration. The 48-hour ban on telephonic and face-to-face solicitation here is also narrow in scope and duration and directed to address the very real harms set out in the Task Force findings. The careful study of issues plaguing insurance consumers and companies, and the crafting of legislation to directly address these issues, satisfies requirements of *Central Hudson*.

B. The statute is precise in scope and reaches no further than necessary to advance the Government's interest.

Section 626.854(6), Florida Statutes, is distinguishable from others that have not been as narrowly drawn. In *State v. Cronin*, 774 So. 2d 871 (Fla. 1st DCA 2000), all solicitation, through any medium, with the intent of receiving payment by making a motor vehicle tort claim constituted a third degree felony. *Cronin*,

774 So. 2d at 872. Although the state urged a construction that would prohibit only in-person or telephonic solicitations, the statute's plain text made no reference to either limitation. *Cronin*, 774 So. 2d at 875. Thus, the District Court in *Cronin* found that statute to be unconstitutional. In this way, section 626.854(6), Florida Statutes, is materially distinct, as its plain text and legislative intent support an interpretation which includes face-to-face and telephonic solicitation as limitations on its reach.

In *Cronin*, the Court cited to *Bailey v. Morales*, 190 F. 3d 320 (5th Cir. 1999), to demonstrate that statutes less restrictive than the one regarding PIP solicitations have also been held unconstitutionally expansive. *Cronin*, 774 So. 2d at 875. This case is also distinguishable. In *Bailey*, the Texas Legislature attempted to address "ambulance-chasing chiropractors," by prohibiting chiropractors from soliciting employment, in person or over the telephone, from individuals who had a special need for chiropractic services or a pre-existing condition. *Bailey*, 190 F. 3d at 321.

In addition to the Texas Legislature's failure to reference any studies or anecdotes to support the advancement of its interest other than "common sense," it failed to satisfy *Central Hudson's* narrow tailoring requirement. This is because "the plain language…proscribe[d] such activities as speaking to seniors at a senior citizen center about the benefits of chiropractic treatment." *Id*. at 323-24. The

Texas Legislature lacked data to support evidence of a problem or interest to be served by the legislation, and failed to place sufficient limitations on the proscribed activity.

Section 626.854(6), Florida Statutes, addresses the very real and personal crisis of a homeowner, who, after suffering a tremendous loss, is bombarded with telephonic and in-person solicitation in the 48 critical hours that follow. The Texas statute in *Bailey* prevented all solicitation—even when it was outside a person's window of extreme vulnerability—and provided no real justification for doing so. The interests of consumer protection and privacy demand that a period of time elapse before a public adjuster can engage in intrusive solicitation, so that the consumer can reasonably analyze the situation and make a well-informed decision.

Consequently, the regulation of public adjuster solicitation, in-person or via phone within the 48 hour window after a claim-inducing event, is harmonious with the First Amendment, and passes the *Central Hudson* test for constitutionality.

CONCLUSION

Because section 626.854(6), Florida Statutes satisfies either the *O'Brien* test for constitutionality or the *Central Hudson* test for constitutionality, this Court should reverse the decision of the District Court of Appeal.

Respectfully submitted,

CYNTHIA S. TUNNICLIFF (FBN 0134939)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street – 2nd Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: (850) 222-3533
Facsimile: (850) 222-2126

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Amended Motion for Leave to File a Brief as Amicus Curiae In Support of Appellant was furnished, by U.S. Mail, to MICHAEL H. DAVIDSON, ESQUIRE, Department of Financial Services, 200 East Gaines Street, 612 Larson Building, Tallahassee, Florida 32399 WILBUR E. BREWTON, ESQUIRE, KELLY PLANTE, ESQUIRE, and TANA STOREY, ESQUIRE, of Brewton Plante, P.A., Post Office Box 10369, Tallahassee, Florida 32302-2369; and TALBOT D'ALEMBERTE, ESQUIRE, and PATSY PALMER, ESQUIRE, of D'Alemberte & Palmer, PLLC, Post Office Box 10029, Tallahassee, Florida 32302-2029, this, _____ day of March, 2011.

_____

CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

g:\barbaras\cynthia\amicus-kortum\amicusbrief03-24-11final.docx