IN THE SUPREME COURT
STATE OF FLORIDA

JEFFREY H. ATWATER, in his Capacity as Chief Financial Officer of the State of Florida, and head of the Department of Financial Services,

Appellant,

Case No.: SC11-133
L.T. No.: 1D10-2459

vs.

FREDERICK W. KORTUM, JR.,

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

On Discretionary Review from the
First District Court of Appeal

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PRELIMINARY STATEMENT

In this Answer Brief, the following terms and abbreviations will be utilized: Appellant, JEFFREY H. ATWATER, in his Capacity as Chief Financial Officer of the State of Florida, the Department of Financial Services, will be referred to as "the Department."

Appellee, FREDERICK W. KORTUM, JR., will be referred to as "Mr. Kortum" or "Appellee."

The First District Court of Appeal will be referred to as "the District Court" or "the First District."

The Record on Appeal will be cited as "R:" followed by the appropriate page number(s). The Exhibits introduced into evidence by the parties will be cited by the Exhibit number, followed by "p." and the appropriate page number(s). The transcript of the hearing will be cited as "Tr:" followed by the appropriate page number(s). The appendix will be cited as "Appendix" followed by the appropriate tab number and document reference.

STATEMENT OF THE CASE AND FACTS

The Appellee, Frederick W. Kortum, Jr., challenged the statute because it restricted his commercial speech rights as a licensed Florida public insurance adjuster.

Mr. Kortum is part of a small and little-known profession which can sort out for the policyholders the benefits which are due to property insurance policyholders in the aftermath of a fire, a storm, or other damaging event. In essence, the public insurance adjuster ("public adjuster" or "PA") serves as a knowledgeable advocate for policyholders, helping them prepare, file, and adjust insurance claims so they can receive fair settlements from insurance companies after trouble strikes. [Appendix - Stipulations - at #24 - 28.]

Businesses and other commercial interests may have ongoing contracts with public insurance adjusters, but residential policyholders typically hire a public adjuster only after a claim-producing event. [Tr: 181, 191.] Frequently, policyholders are unaware that such help exists until they are solicited by a public adjuster. [*Id*.] Because most residential policyholders rarely, if ever, have to file a property insurance claim, they are also usually inexperienced in handling the vast array of details necessary to comply with their policies, such as inventorying lost items, preserving evidence of damage, estimating damages, providing appropriate

temporary repairs or damage mitigation, and filling out forms. [Appendix 3 - Stipulations - at #21-22.] If they fail to make correct and timely decisions, or to understand the language of insurance documents, policyholders may not receive the full settlements to which their paid insurance premiums would otherwise entitle them. [Tr: 61-69, 166-68.]

Public adjusters are trained to handle such responsibilities in order that claimants can receive fair settlements. [Appendix 3 - Stipulations - at #25-29, #31-32.] The State of Florida requires public adjusters to be educated in relevant fields, to successfully pass a written licensing exam, and to receive twenty-four (24) hours of continuing education every two (2) years. [*Id*. at #49.] Public adjusters are also subject to a number of regulations designed specifically to protect their clients: public adjusters are bonded; their contracts must include anti-fraud provisions; their fees are capped at ten percent (10%) of the insurance settlement for claims arising from declared state-of-emergency events and at twenty percent (20%) for all other settlements; and they are subject to unfair-and-deceptive-trade practices laws. [*Id*. at #38-40, and #49.] Additionally, public adjusters are barred from negotiating with policyholders who are suffering from shock or other trauma associated with their loss, and PAs may not act as contractors for their clients or hold any financial interests in other firms that do business with those clients. [*Id*.

at #49 and #52.] Florida Statutes also allow consumers to cancel contracts with public adjusters within five (5) business days after signing during a state of emergency and within three (3) business days during non-emergencies. [*Id*. at #49.]

In short, public adjusters are advocates for the consumer and significant regulations exist to protect clients if a PA should fail to do so. The Appellant has stipulated that public adjusters are the only licensed, bonded, and trained advocates who work exclusively for the policyholder and who owe the policyholder a fiduciary duty.[1] [*Id.* at #35-36.] The same cannot be said of insurance company adjusters, or of the various contractors, roofers, and restoration/mitigation providers who may contact and work with claimants. [*Id*. at #37.]

The Legislature's Office of Program Policy Analysis & Government Accountability (hereinafter "OPPAGA") has found that, although the number of licensed Florida public adjusters has grown "significantly" in recent years,[2] the

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[1] A number of the factual issues were settled before trial through a series of sixty-three (63) stipulations between Mr. Kortum and the Chief Financial Officer. [*See* Appendix 3 - "Stipulations."]

[2] OPPAGA found that the number of licensed public adjusters in Florida grew from 678 in fiscal year 2003-04, to 2,914 in fiscal year 2008-09. [Appendix 2 - OPPAGA - at 3.] Before trial, Mr. Kortum stipulated to numbers provided by the Chief Financial Officer, showing that the number of PAs statewide had reached as

incidence of complaints, regulatory actions, and allegations of fraud against them has remained "generally low."[3] [Appendix 2 - OPPAGA - at 1.] In addition, the Appellant (who stipulates to diligently enforcing the laws governing public adjusters [Appendix 3 - Stipulations - at #54]) has stipulated that most disciplinary actions against public adjusters have been for administrative and technical violations. [Appendix 3 - Stipulations - at # 47.]

The value of a public adjuster's assistance can be considerable. OPPAGA found that, in claims related to the 2005 hurricanes filed by policyholders of the state-run Citizens Property Insurance, Inc. ("Citizens"), settlements *averaged 747 percent higher* for policyholders who hired a public adjuster than for those who negotiated alone with Citizens. [Appendix 2 - OPPAGA - at 7.] The same legislative report found a smaller but still significant increase – 574 percent – in settlements when public adjusters represented Citizens' policyholders in non-catastrophic claims. [*Id*. at 8.] As the report noted, an insured's net settlement is lower after paying a public adjuster's fees. [*Id*. at 7.] But the Appellant has stipulated that these increased settlements were so great that, even if public

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high as 3,274 in 2008, and was 2,784 in April, 2010. [Appendix 3 - Stipulation - at #15.]

[3] The trial court took judicial notice of the January 2010 OPPAGA report.

adjusters charged the maximum fee allowed by statute, policyholders still received higher net recoveries. [Appendix 3 - Stipulations - at #43.]

The earlier a policyholder contracts with a public adjuster, the more valuable the public adjuster's help can be. The Department has stipulated that a policyholder "frequently has important decisions to make within the first 48 hours" after a loss, [*Id*. at #20] and evidence at trial demonstrated that a well-intentioned but inadequately informed policyholder can make financially ruinous decisions in that same time frame (i.e., forty-eight (48) hours). For example, policyholders may throw away badly damaged property before an insurance company adjuster can see it, or may agree to costly but ineffective or unnecessary mitigation or restoration efforts. [Tr: 61-69.] Such inappropriate decisions can significantly diminish the amount an insurance company must pay the injured policyholder – even if the policy premium would have covered the entire loss. [*Id*.]

Thus, the first forty-eight (48) hours after a loss may be the most critical time for a policyholder to have the assistance of a public adjuster. Policyholders typically contact their insurance companies during that time, and they frequently are solicited by – or referred to – contractors, roofers, and restoration/mitigation providers in the first forty-eight (48) hours (which the Department terms "the period of repose" [Initial Brief]). [Appendix 3 - Stipulations - at #12 and #63.]

But because public adjusting is a small profession and because most policyholders rarely have to file a claim with their insurance carriers, many, if not most, policyholders do not know how or whether to contact a public adjuster for assistance. [Tr: 81, 191.] Thus, the first forty-eight (48) hours after a fire, storm, or other claim-producing event is also a critical time for public adjusters to be communicating with policyholders.

Mr. Kortum, who has kept meticulously detailed business notebooks since he began work as a licensed public adjuster in 2002, [Tr: 124-127] found that during the first six (6) years, his practice consisted primarily of work with clients he had solicited during the first forty-eight (48) hours. He found also that it is often harder even to locate potential clients after those first two (2) days, much less ever to contract with them, because policyholders who have suffered such grievous losses that their property is uninhabitable will have relocated. Therefore, Mr. Kortum's records demonstrate that he gets far fewer jobs when he first attempts to contact policyholders after forty-eight (48) hours have elapsed. [Tr: 127-139, 184-85, 187-90.]

It is precisely that first forty-eight (48) hours which can be so economically critical to policyholders and public adjusters – and to insurance companies – that Section 626.854(6), Florida Statutes (2008), put off limits for truthful commercial

solicitation by this licensed Florida profession with its remarkable history of consumer assistance and its unremarkable history of consumer complaints or regulatory discipline.

The ban originated in a task force established by the Legislature in 2007 to study problems with Citizens. [Appendix 3 - Stipulations - at #59.] During thirteen (13) meetings and workshops, the task force heard from numerous policyholders who were aggrieved with the way Citizens had handled and delayed their claims, but – as the Department has stipulated – "no testimony or other evidence was presented to that task force demonstrating a statewide pattern of solicitation abuses by public insurance adjusters." [*Id*.] The Department also has stipulated that less than two percent (2%) of the complaints it received about public adjusters during the five (5) years before Mr. Kortum's lawsuit even mentioned early solicitation. [*Id*. at #46.] Similarly, there is no record evidence that testimony was presented to the task force complaining that public adjusters solicited policyholders too soon after their losses.

However, rather than producing proposals to address problems with Citizens, the state-run insurance company, the task force primarily recommended

legislative proposals to tighten restrictions on public adjusters,[4] including the following recommendation for a seventy-two (72) hour ban on solicitation:

> A public adjuster shall not directly or indirectly through any other person 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.

Legislative committees considered the task force recommendations before the 2008 regular session. Once again, there is no record evidence that the task force heard consumer testimony supporting any time restraints on public adjuster solicitation. The Legislature altered the recommendation by shortening the time of restricted speech to forty-eight (48) hours and inserting the phrase "initiate contact or."

Thus, the statute, as passed, imposes three (3) specific prohibitions on public adjusters. They may not, directly or indirectly, through any other person or entity: 1) initiate contact, 2) engage in face-to-face or telephonic solicitation, or 3) enter

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[4] The task force did hear testimony from the Department staff that there were "constitutional issues on prohibiting legitimate businesses from soliciting." The staff suggested that allowing public adjusters to send letters or leave flyers on policyholders' doorsteps might make a solicitation ban constitutional. (*See*, November 16, 2007, task force hearing on-line at http://www.taskforceoncitizensclaimshandling.org/Video.htm, "Video," Part I.)

into a contract with any insured or claimant, unless the policyholder initiates contact.

The statute took effect on October 1, 2008. Since that time, Mr. Kortum has not attempted to solicit policyholders until after forty-eight (48) hours have elapsed from the time their property was damaged or destroyed. [Appendix 3 - Stipulations - at #6.] Mr. Kortum's notebooks show that this delay led to a dramatic decline in his business. During the twelve (12) months before the statute took effect, he visited 158 residential loss sites and signed fifteen (15) contracts; but during the twelve (12) months after the statute became law, he visited 173 sites and signed only nine (9) contracts. The ban also made it harder for him even to find policyholders to solicit: during the year before the ban, he was unable to make contact with any policyholders for sixty-four (64) out of the 158 residential loss sites he visited; during the year after the ban, he was unable to make any contact for 118 of the 173 sites he visited. [Tr: 127-139, 184-85, 187-90.] Thus, a reciprocal number of policyholders also were unable to receive information about the services he might have provided them in settling their insurance claims.

Mr. Kortum filed suit against Section 626.854(6), Florida Statutes (2008), on October 6, 2009, alleging that the statute violated his right to truthful commercial speech, his right to equal protection, and his right to be rewarded for his industry.

At trial, Mr. Kortum argued that a plain reading of the statute under traditional principles of statutory construction demonstrates that it effectively prohibits him from initiating any contact with policyholders during the forty-eight (48) hour period. He urged the trial court to interpret the statute under the commercial speech test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). The Department cited *U.S. v. O'Brien*, 391 U.S. 367 (1968), as authority that the statute barred behavior, not speech; the Department also argued that, despite the language "directly or indirectly," the statute permitted written solicitation. Mr. Kortum demonstrated that – even if the statute could somehow be construed that way – written solicitation, without speech, could lead to absurd results. Nevertheless, the trial judge rejected Mr. Kortum's suit.

Although he found that the statute was ambiguous and that it "limits the public adjuster's ability to speak," the trial judge concluded that the agency's interpretation was entitled to deference and that the statute was a narrowly-drawn prohibition of conduct designed to protect traumatized policyholders in the immediate aftermath of loss. [Appendix Tab 4.] The trial court also rejected the equal protection claim, and did not reach the claim that Mr. Kortum's right to be rewarded for his industry had been violated. [*Id*. at 5.]

Mr. Kortum filed a timely appeal of the trial decision, once again arguing that the statute violates his commercial speech rights established under both the U.S. and the Florida Constitutions. The Department has continued to assert that the statute prohibited conduct rather than speech. But the First District Court of Appeal applied a commercial speech analysis and found that the statute deprives public adjusters of their commercial speech rights by banning all solicitation of lawful public adjusting business for the first forty-eight (48) hours after a claim-producing event. [Appendix Tab 1.] The Department filed this appeal.

SUMMARY OF THE ARGUMENT

The District Court properly invalidated Section 626.854(6), Florida Statutes (the "Statute"), as unconstitutionally infringing on the First Amendment rights of public adjusters to engage in lawful commercial speech by prohibiting direct or indirect public adjuster-initiated contact to solicit business and, thus, all solicitation for forty-eight (48) hours after the occurrence of a calamity. The Statute clearly and unambiguously restricts all public adjuster-initiated conduct for the specified time period without any stated exceptions. Contrary to the Department's request for this Court to find that Section 626.854(6), Florida Statutes, does not prohibit written communications, since, under the well-established rules of statutory

construction, it is impermissible for a court to add words not used by the Legislature to the statute or to ignore words used.

Because the Statute operates as a complete ban on otherwise lawful commercial speech, the burden was on the Department to show that the Statute directly advances the substantial government interest, and/or whether the regulation is not more extensive than is necessary to serve an established governmental purpose. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). The Department failed to meet its burden. The Statute is not tailored to protecting the privacy of people who have just suffered a calamity, but rather, it is tailored to excluding public adjusters from contacting or exchanging information with such people at a time when information is most critical. The Statute is an unconstitutional restriction on commercial free speech under the First Amendment. The District Court's decision must be affirmed and the Statute invalidated.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS READING OF THE STATUTE.

A. Standard of Review

The standard of review for statutory construction is *de novo*. *See BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003).

B. Statutory Construction

The statute at issue in the instant case is Section 626.854(6), Florida Statutes (2008) (the "Statute"), which provides as follows:

> (6) 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 subject of a claim under an insurance policy unless contact is initiated by the insured or claimant.

When construing the meaning of a statute, a court must first look at its plain language. *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1208 (Fla. 2006). Legislative intent must be derived primarily from the words expressed in the statute. If the language of the statute is clear and unambiguous, courts enforce the law according to its terms and there is no need to resort to rules of statutory construction. *Montgomery v. State*, 897 So. 2d 1282, 1285 (Fla. 2005); *Fla. Dept. of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320 (Fla. 2001); *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982); *see also Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (holding "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the

language which is free from ambiguity.") (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694-95 (Fla. 1918)).

As the First District Court of Appeal found, the Statute is clear and unambiguous. Under the plain meaning of the Statute, a public adjuster may not (for forty-eight (48) hours after the occurrence of an insurance event) directly or indirectly though another person or entity:

1. Initiate contact with any insured or claimant; or

2. Engage in face-to-face or telephonic solicitation with any insured or claimant; or

3. Enter into a contract with any insured or claimant.

Contrary to the Department's assertion that the Statute prohibits only face-to-face or telephonic solicitation but permits written and email solicitation, the rules of statutory construction dictate that the Statute contains a complete ban on direct or indirect public adjuster-initiated contact and, thus, on all solicitation for forty-eight (48) hours.

In support of its construction of the Statute, the Department argues that:

> By reading the statute as a complete ban on all communication, the district court gave no meaning, force, or effect to the exception for communications not made through any other person or entity, and thereby disallowed the exception for written communications clearly intended by the task force the legislature commissioned to promulgate statutory language on that very subject.

[Initial Brief, p. 5.] However, there are several problems with the Department's argument.

First, the plain language of the Statute does not expressly grant an "exception for written communications." In fact, the Statute clearly prohibits, without differentiating between oral or written, all public-adjuster initiated "contact." The Department's convoluted argument that written communications "are made through their own format and content, and are not other persons or entities," so that such communications are "not made through any other person or entity," not only ignores the plain language of the Statute that such "contact" may not be made by a public adjuster "directly or indirectly," but also defies logic and reason. All written communication is ultimately created by people and disseminated to people whether through personal delivery, mail, or electronic media, and can be accomplished either directly by a public adjuster or by a public adjuster indirectly through another person or entity. Written communications do not spontaneously generate and materialize in the possession of a claimant or insured.

The adverbial phrase, "directly or indirectly through any other person or entity," modifies all three (3) of the Statute's prohibitions (initiate contact or engaging in face-to-face or telephonic solicitation or entering into a contract). *See*

State v. Bodden, 877 So. 2d 680, 685 (Fla. 2004) ("[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of the act but to the manner in which it is punctuated." (quoting *Florida State Racing Comm'n v. Bourquardez,* 42 So. 2d 87, 88 (Fla. 1949)). An examination of the plain language of Section 626.854(6), Florida Statutes, prohibits all public adjuster-initiated contact, regardless of the form or nature. The Statute mandates that "[a] public adjuster may not directly or indirectly through any other person or entity initiate contact . . . with any insured or claimant under an insurance policy. . . ." The Department's argument that the Statute either (1) provides an exception for or (2) does not prohibit written contact or communications ignores the plain, natural meaning of the Statute.

Second, the 2007 Task Force on Citizens Property and Insurance Claims Handling and Resolution ("Task Force") was not commissioned by the Legislature to promulgate statutory language regarding public adjusters. Further, passing statutes is constitutionality delegated to the Legislature, and only the Legislature.

Finally, the intention of the Task Force regarding the verbiage it recommended to the Legislature, while interesting, is not evidence of the Legislature's intent in adopting the Statute in the form it ultimately did. There has

been no showing in this case that the Legislature adopted the findings and recommendations of the Task Force in enacting Section 626.854(6), Florida Statutes, because it did not. In enacting Section 626.854(6), Florida Statutes, the Legislature made no express findings of fact or expressions of intent, and apart from the language of the Statute itself, the Statute is devoid of any evidence of legislative intent.

Reading the Statute as the Department urges would require this Court to disregard the phrase "initiate contact or" which was inserted by the Legislature. "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of New York,* 840 So. 2d 993, 996 (Fla. 2003). The Department's argument is similar to the state's argument in *State v. Cronin*, 774 So. 2d 512, 518 (Fla. 1st DCA 2000), that an anti-solicitation statute should be construed as applying to in-person or telephonic solicitations only. However, as in the instant case, the District Court rejected the state's construction as not supported by the plain language of the Statute, as the District Court explained:

> Such construction, however, must be consistent with the legislative intent ascertainable from the statute itself or its common sense application. *See State v. Globe Communications Corp.*, 648 So. 2d 110, 113 (Fla. 1994); *Long v. State*, 622 So. 2d 536, 537-38 (Fla. 1st

> DCA 1993). "It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include." *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999).

Kortum at *5. Similarly, the plain language of the Statute does not support the Department's assertion that the Statute bans only in-person or telephonic solicitations during the forty-eight (48) hour period. By its plain language, and common sense application, Section 646.854(6), Florida Statutes, unambiguously bans all public adjuster-initiated contact, and therefore, all solicitation by licensed public adjusters for forty-eight (48) hours.

II. THE COURT CORRECTLY APPLIED THE *CENTRAL HUDSON* TEST TO THE STATUTE.

A. Solicitation Is Protected Commercial Speech

The direct effect of the Statute is to restrict public adjusters' speech. The express terms of the Statute provide that a public adjuster may not initiate contact **or** engage in face-to-face or telephonic solicitation **or** enter into a contract with any insured or claimant during the Statute's forty-eight (48) hour blackout period. The very thing that is prohibited is the commercial speech of a public adjuster.

The U.S. Supreme Court's analysis in *Edenfield v. Fane*, 507 U.S. 761 (1993), establishes beyond any doubt that the Statute must be evaluated as a speech restriction rather than as a regulation of conduct. *Edenfield* involves a challenge to a ban on in-person and telephonic solicitation by CPAs. The Supreme Court began

its analysis: "Whatever ambiguities may exist at the margins of the category of commercial speech, it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply." *Id.* at 765. The Court then proceeded to evaluate the solicitation restriction under the standards set out in *Central Hudson*. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson*, 447 U.S. at 561.

The Department and the amicus together cite exactly two (2) cases applying the *O'Brien* test, neither of which involve anything close to the Statute or the issues presented here.[5] In *State v. Conforti*, 688 So. 2d 350 (Fla. 4th DCA 1997), two (2) erotic dancers claimed that a statute prohibiting lewdness infringed upon their First Amendment right to "communicate the message of eroticism" through their dancing and sexual acts. *Id.* at 353. And in *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010), the plaintiffs claimed that an

[5] Amicus cites to a footnote in *Comite de Joraleros de Redondo Beach v. City of Redondo Beach*, 607 F. 3d 1178, 1184-1185 (9th Cir. 2010) citing *O'Brien*, and then stating expressive conduct was not at issue in the case. However, *Comite de Joraleros de Redondo Beach v. City of Redondo Beach*, *supra*, is currently under rehearing *en banc*, and is thus not final, and it has been ordered that the opinion shall not be cited as precedent to any court in the 9th circuit. *Comite de Joraleros de Redondo Beach v. City of Redondo Beach*, 623 F.3d 1054 (9th Cir. 2010).

ordinance regulating "large group feedings" unconstitutionally restricted their ability to hold "food sharing events" and thereby to "convey the message that society can and should provide food to all of its members." *Id.* at 1283.[6] However, neither case involves solicitations.

Courts uniformly treat restrictions on solicitation as commercial speech restrictions and assess their constitutionality under the *Central Hudson* test. *Central Hudson* applies even if (as in *Edenfield*) the law under review restricts only face-to-face or telephonic solicitation. *See, e.g., Beckwith v. Dept. of Bus. and Prof. Reg.*, 667 So. 2d 450 (Fla. 1st DCA 1996) (striking solicitation restriction aimed at hearing aid specialists); *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403 (5th Cir. 2007) (striking twenty-four (24) hour solicitation restriction aimed at bail bondsmen.). *Central Hudson* also applies when the law under review restricts both written and in-person solicitation as the Statute does in the instant case. *See, e.g., State v. Bradford*, 787 So. 2d 811 (Fla. 2001) (striking down

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[6] The Department's argument that the Statute is not content based and therefore regulates conduct only because public adjuster witnesses admitted that they "had not changed their speech regarding their solicitation of contracts because of the statute," [Initial Brief, 13] misses the point. No commercial expression from a public adjuster is permitted within the forty-eight (48) hours period under the Statute; therefore public adjusters' (and only public adjusters') commercial speech has been muzzled during such time frame. That is a dramatic change in public adjuster behavior since the Statute's enactment. [Tr: 127-139, 184-85, 187-90.]

regulation aimed at solicitation involving PIP insurance benefits); *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down the law which restricted written communications in the form of advertisements by pharmacists regarding prescription drug prices). The Court in *Ins. Adjustment Bur. v. Ins. Commr. for Commw. of Pa.*, 542 A. 2d 1317, 1320 (Pa. 1988) (citing *Va. Bd. of Pharm.* and striking down a similar twenty-four (24) hour prohibition period for public adjusters on First Amendment grounds), stated:

> Speech which does no more than propose a commercial transaction "is not so removed from any 'exposition of ideas' and from truth, science, morality and arts in general . . ." that it lacks all protection from the First Amendment. [*Id.*] This is so because the free flow of commercial information "is indispensible to the proper allocation of resources in a free enterprise system." *Id*. at 765, 96 S. Ct. at 1827, 48 L. Ed. 2d at 360.

Thus, the instant case falls squarely within the definition of commercial speech.

B. The Restriction in the Statute Is <u>not</u> Content Neutral

Florida courts begin their scrutiny of speech restrictions with the premise that they are "presumptively unconstitutional." *N. Fla. Women's Health Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003). The U. S. Supreme Court in *Virginia Board of Pharmacy* explained that commercial speech may be subject to time, place, and manner restrictions, provided that they are imposed without reference to the content of the speech, that they serve significant

governmental interests, and that "they leave open ample alternative channels for communication of the information." *Id.* at 771. Not only does the Statute here fail to leave open ample channels for communication of information, but the time-place-manner framework is not applicable, because it is reserved for laws that are content neutral. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Commn. of N.Y.*, 447 U.S. 530, 536 (1980).

The Statute here is content based because, on its face, it treats the commercial speech of public adjusters differently from the commercial speech of all the other commercial actors who might want to solicit a claimant in the first forty-eight (48) hours after a claim-producing event. The Department has stipulated that "[t]here are no time restrictions on insurance company adjusters, cleaning services, contractors, roofers, smoke-mitigation or water damage experts, etc., who all may freely approach policyholders in the immediate aftermath of claim producing events." [R4-752] Under the Statute, it is legal to say, "I am a mitigation specialist, hire me." But it is illegal to say (or write), "I am a public adjuster, hire me." *Cf. Resort Devel. Intl., Inc. v. City of Panama City Beach*, 636 F. Supp. 1078, 1083 n. 4 (N.D. Fla. 1986) ("Ordinance No. 297 does not further differentiate or discriminate among forms of regulated commercial solicitation and, therefore, is content neutral.).

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Supreme Court struck down a city ordinance that prohibited news racks that distributed "commercial handbills," but allowed news racks that distributed ordinary newspapers. The city argued that its regulation was content neutral "because the interests in safety and esthetics it serves are entirely unrelated to the content of [the regulated publications]. Thus, the argument goes, the justification for the regulation is content neutral." *Id.* at 429. The Court rejected the city's argument, noting that "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." It was irrelevant that the city had not acted with "animus toward the ideas" in the regulated publications: "[J]ust last Term we expressly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.* To the extent the Statute bans all commercial expression of ***only*** public adjusters for a forty-eight (48) hour period and not other expressions of commercial speech, the Statute necessarily addresses content, i.e., the public adjuster's commercial information, and therefore, necessarily restricts commercial speech. *Id.; see also Café Erotica v. Fla. Dept. of Transp.*, 830 So. 2d 181 (Fla. 1st DCA 2002) (holding "a regulation of speech which distinguishes favored speech from disfavored speech on the basis of ideas or viewpoints is generally

content based."). Not only is the Statute content based, it fails to "leave open ample alternative channels for communication of the information" as required by *Va. Bd. of Pharm.*, *supra*. In fact, it leaves no alternative channels for communication of the information by public adjusters for forty-eight (48) hours.

Regardless of whether the Statute is considered content based or content neutral, the Statute bans all solicitation and, therefore, infringes on the commercial free expression of public adjusters and is subject to the immediate scrutiny test as set forth in *Central Hudson.*[7] *See Berg v. Merchants Assn. Collection Div., Inc.*, 586 Supp. 1336, 1344-45 (SD Fla. 2008) (analyzing law under the intermediate scrutiny test adopted by *Central Hudson* and holding that the law was constitutional under the First Amendment because it was narrowly tailored because the debt collector had several alternative channels of communication including in-person, telephone and mail.).

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[7] Neither the Department nor the amicus have identified a single case in which a court has applied *O'Brien* to evaluate a statute that facially restricts solicitation. The reason is that the *O'Brien* test is reserved for laws that do not facially restrict speech but might, in application, affect "expressive conduct" (e.g., burning a draft card or nude dancing). As the Supreme Court stated in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001): "To qualify as a regulation of communicative action governed by the scrutiny outlined in *O'Brien*, the State's regulation must be unrelated to expression." *Id.* at 567; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (applying *O'Brien* to evaluate nudity ordinance that "[by] its terms . . . regulates conduct alone").

Therefore, the District Court properly applied the intermediate scrutiny test in *Central Hudson* to determine that the Statute unconstitutionally violates the First Amendment protections of commercial speech.

C. The Statute Is an Unconstitutional Restriction on Commercial Speech under *Central Hudson*

The four-part test under *Central Hudson* is as follows:

> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. Once it is determined that the speech concerns a lawful activity and is not misleading, the government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("It is well established that the 'party seeking to uphold a restriction on commercial speech carries the burden of justifying it.") (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)).

Because the Statute governs contact and solicitations by a Florida licensed public adjuster, the speech at issue concerns a lawful activity[8] which is extensively regulated by the Department in existing statutes so as not to be misleading. [Appendix Tab 3 – Stipulations #47-57.] Therefore, at the trial level, the burden was on the Department to identify a substantial interest and justify the challenged Statute. [*Id.*] The Department did not meet this burden.

As correctly acknowledged by the District Court, the Statute bans all licensed public adjuster-initiated contact, whether electronic, written, or oral, for forty-eight (48) hours [*Kortum,* at 13], and the Department failed to prove that the Statute was narrowly tailored to meet a substantial government interest. As acknowledged by the First District Court, the parts of the *Central Hudson* test are not entirely discreet and are to some extent, interrelated. *Kortum* at 8; *see also Greater New Orleans Broadcasting Ass'n v. U.S.,* 527 U.S. 173, 183 (1999). Appellee asserts that the Department failed to meet its burden of proving that the Statute directly advances the substantial government interest, and/or whether the

[8] *See Larson v. Lesser,* 106 So. 2d 188, 192 (Fla. 1958) ("[W]e fail to find any reasonable basis whatsoever . . . that justifies the imposition of a restriction which . . . would have the practical effect of prohibiting the [public adjuster] from actually engaging in the business which the Legislature itself recognizes as being perfectly legitimate.").

regulation is not more extensive than is necessary to serve an established governmental purpose.

While the District Court and the Appellee conceded "that the interest purportedly served[9] by the Statute (to seek to ensure more ethical behavior on the part of public adjusters generally and to ensure the privacy of people who have suffered a calamity) are substantial," Appellee's position is that the Statute neither directly advances such purpose, nor justifies the restriction in the Statute. As acknowledged in *Beckwith*, 667 So. 2d at 452 (invalidating a restriction on in-person and telephone solicitation by hearing aid specialists because of failure to satisfy the third prong of *Central Hudson*), there is nothing inherently wrong with solicitation, and the mere speculation that harm can occur is not enough to justify suppressing truthful speech. *See also Edenfield v. Fane, supra* (striking down a restriction on solicitation by CPAs on the grounds, among others, that Florida had not offered studies or anecdotal evidence showing that the restriction addressed a real problem.).

[9] The government interest purportedly served by the Statute may be substantial. However, as the Legislature did not adopt the Task Force findings and made no expression of legislative intent regarding the Statute, any need for the Statute is purely speculative and is not supported by the OPPAGA report or by the Department's own stipulations.

Further, the Statute bans only licensed public adjusters from contacting or soliciting consumers who have suffered a calamity, but does not similarly ban or restrict other individuals or entities from contact or solicitation. Therefore, the restriction is not tailored to protect privacy of people who have just suffered a calamity, but rather, it is tailored to exclude public adjusters from contacting or exchanging information with such people at a time when information is most critical. *Pruett v. Harris County Bail Bondsman Bd.*, 449 F. 3d at 415 (holding that "a restriction, which prevents speech when it is the most valuable for the speaker and the potential customer, should be viewed with some skepticism."). The First Amendment protection is "afforded to the communication, to its source and to its recipient both." *Va. Bd. of Pharm.* at 1823. The United States Supreme Court has acknowledged "a First Amendment Right to 'receive information and ideas' and that freedom of speech 'necessarily protects the right to receive.'" *Id.*

The District Court cited *Insurance Adjustment Bureau*, 518 Pa. 210, 542 A.2d 1317 (Pa. 1988), as persuasive authority. In that case, the Pennsylvania Supreme Court struck down a law prohibiting public adjusters from soliciting business for twenty-four (24) hours after a claim-inducing event. The court rejected the argument that the twenty-four (24) hour ban was merely a reasonable time, place, and manner restriction, noting that "the period of time immediately

following the disaster may be the only time during which the property owner can be located before moving to an unknown address because of the disaster which has affected his property." *Id.* at 1323. As in *Insurance Adjustment Bureau*, the value of information provided to consumers by Florida public adjusters has been documented, and is a matter of record in the instant case. An OPPAGA report found that policyholders who hired public adjusters in claims against Citizens Property Insurance received dramatically higher average settlements than policyholders who did not have such assistance,[10] and that the net recoveries were higher even after subtracting the maximum fees public adjusters are allowed to charge under Statute. [Appendix 2 - OPPAGA at 7-8.] The trial court took judicial notice of the OPPAGA report, and the Department stipulated to the above OPPAGA findings. [Appendix 3 – Stipulation #42 and 43.]

Consumers suffer from bans on truthful commercial speech which block them from receiving important information at critical times. *See, Central Hudson* ("Commercial expression . . . assists consumers and furthers the societal interest. . . ."); *Va. Bd. of Pharm.* (striking down a statute that barred pharmacists from advertising prescription drug prices). At trial, Mr. Kortum presented

[10] For claims related to the 2005 hurricanes, for example, the settlements where the policyholder was assisted by a public adjuster were 747% higher than those in claims where the policyholder did not use a public adjuster.

evidence of significant economic harm to consumers within the first forty-eight (48) hours when they do not have access to public adjusters, and the Department stipulated that the first forty-eight (48) hours were the most crucial for the consumer. [Appendix 3 – Stipulation #20.]

As shown, the Department based its defense of the Statute on "the possibility that some public adjuster [could] engage in unethical or unprofessional behavior." [Appendix 1 - *Kortum v. Sink,* at *8.] Mere speculation that harm could occur is not sufficient grounds to strip away constitutional rights. [*Id*. at 4, citing *Beckwith*.] The speculation in the instant case is unfounded. The Florida Legislature's research arm has shown that "the incidence of complaints, regulatory actions, and allegations of fraud involving public adjusters is generally low." [Appendix 2 -OPPAGA Rpt. 10-06 at 1.] And the Department stipulated at trial that most disciplinary actions taken against public adjusters are for administrative and technical violations. [Appendix 3 – Stipulation #46 and 47.]

Both this Court and the First District have been unreceptive to arguments like the one advanced below by the Department: that a restriction on speech is necessary to prevent possible harm. The Department must prove that "the harms it recites are real [*and* that the] restrictions will in fact alleviate them to a material degree." *Bradford*, 787 So. 2d at 821, citing *Fla. Bar v. Went For It, Inc.*, 515 U.S.

618, 626 (1995). The Department has failed to do so. The First District correctly concluded that the forty-eight (48) hour ban on all solicitation was not justified by "the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical or unprofessional behavior" and was not narrowly tailored to meet the government's interest. [Appendix 1 - *Kortum v. Sink*, 2010 WL 5381934 at *8.] Thus, the Statute fails to satisfy the *Central Hudson* test, and unconstitutionally restricts commercial free speech under the First Amendment.

The amicus curiae erroneously argue that the Statute is constitutional under the rationale of a prophylactic ban on attorney solicitation employed in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 449 (1978) (holding that a state "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the state has a right to prevent."). [11] Both *Ohralik* and *Went for It* allow a prophylactic ban on lawyer solicitation. However, neither case is applicable to the Court's review of this Statute. Like amicus curiae here, the board in *Edenfield* argued that *Ohralik* supported its ban on solicitation

[11] Amicus cites *Bergman v. District of Columbia*, 986 A. 2d 1208 (DC 2010), in support of its position; although the law in question in that case impacted other professions, the analysis and holding there are necessarily limited to attorney solicitation of accident victims, as the challenge to the law in question related only to its impact on attorneys. Therefore, *Bergman* does not support an extension of *Ohralik* to other occupations or professions.

by CPAs. The U. S. Supreme Court rejected the board's reliance on *Ohralik*, explaining:

> *Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances. Because "the distinctions, historical and functional, between professions, may require consideration of quite different factors," *Virginia State Bd. of Pharmacy, supra,* 425 U.S., at 773, n. 25, 96 S.Ct., at 1831, n. 25, the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases have made this clear, explaining that *Ohralik's* holding was narrow and depended upon certain "unique features of in-person solicitation by lawyers" that were present in the circumstances of that case.

507 U.S. at 774, 113 S. Ct. at 1802 (internal citations omitted). Public adjusters represent the interests of claimants, as did the CPAs in *Edenfield*; however, they do not have the advocacy training and persuasive skills of attorneys. *Kortum*, at 15. The United States Supreme Court has expressly limited its approval of a prophylactic ban on all solicitation to the attorney-client relationship which was present in *Ohralik.*[12] *Edenfield* , *supra*.

[12] In *Tennessee Secondary Ass'n v. Brentwood Academy*, 551 U.S. 291, 305 (2007), a majority of the court joined in the concurring opinion of Justice Kennedy in which Justice Kennedy concluded that *Brentwood* should be decided solely on the basis that the school had entered a voluntary contract with the state sponsored association in order to promote a code of conduct affecting solicitation, not under *Ohralik.* Justice Kennedy addressed the reliance on *Ohralik* in Justice Stevens' opinion, as follows:

As such the District Court correctly held:

> . . . the Department has failed to prove that section 626.854(6) is narrowly tailored to meet the state's objectives. "While a statute regulating commercial speech need not be the least restrictive means of achieving the state's asserted goal objective, it must be narrowly tailored to achieve the desired objective." *Cronin*, 774 So. 2d at 875. The Department has not demonstrated that prohibiting property owners from receiving any information from public adjusters for a period of 48 hours is justified by the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical or unprofessional behavior. Nor has the Department demonstrated that the other provisions of section 626.854 and the Rules of Professional Conduct and Ethics governing the Florida Association of Public Adjusters are insufficient to regulate unduly coercive or misleading solicitation.

Thus, the Statute is an unconstitutional restriction on commercial free speech under the First Amendment.

> . . . I do not agree with the principal opinion's reliance on *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). *Ohralik*, as the principal opinion notes, involved communications between attorney and client, or, more to the point, the in-person solicitation by an attorney of an accident victim as a potential client. *Ohralik* was later extended to attorney solicitation of accident victims through direct mail, though the court was closely divided as to the constitutionality of that extension. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). But the court has declined to extend the *Ohralik* rule beyond the attorney-client relationship.

551 U.S. at 304-05.

III. THE DISTRICT COURT DID NOT ERR IN REJECTING THE DEPARTMENT'S CONSTRUCTION OF THE STATUTE.

The Department argues that the District Court should have afforded deference to the "agency's interpretation" of Section 626.854(6), Florida Statutes. While the Department states a correct rule of law, such a rule is inapplicable in the instant case because it requires a contemporaneous interpretation by executive officials; --in other words, by the agency. *King v. Seamon*, 59 So. 2d 859 (Fla. 1952); *ABC Liquors, Inc. v. Dept. of Bus. Reg.*, 397 So. 2d 696, 697 (Fla. 1st DCA 1981). A more specific principle in the case law requires the appellate courts to show greater deference to an administrative agency <u>if the agency has interpreted a statute within its jurisdiction</u>. In such a case, the interpretation may have been based on a history that is best known by the agency or special expertise the agency has in applying the statute. *See Brown v. State, Comm'n on Ethics*, 969 So. 2d 553, 557 (Fla. 1st DCA 2007) (emphasis added); *see also Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n*, 427 So. 2d 716 (Fla. 1983); *Arza v. Fla. Elections Comm'n*, 907 So. 2d 604 (Fla. 3d DCA 2005).

The Courts are not required to, and do not defer to an agency's construction or application of a law or ordinance, where the Court is equally capable of reading the law. *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("[A] court need not defer to an agency's construction or

application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute."). S*ee also, Cohn v. Dept. of Prof. Reg.*, 477 So. 2d 1039, n. 11 1046 (Fla. 3d DCA 1985) (holding that in a case "in which the issues are ones of constitutional magnitude and are otherwise so obviously within the competence of courts alone to decide, we consider that the rule which affords respect to an agency's interpretation of the statute it is charged with administering [citation omitted] is of little moment.").

In the instant case, the Statute was just a year old, and prior to Mr. Kortum's suit, the Department had not interpreted or applied the Statute. The construction of the Statute was occasioned by the instant litigation, and the record reflects that it is the Department trial attorney, not the Department officials, who construed the Statute. Even if it can be said that the Department has now "interpreted" the Statute, there is no special expertise needed by the Department to construe the Statute, as the words used in the Statute are common words. Further, the Department has not argued that special agency expertise is required to construe the Statute, and the construction set forth by the Department does not rely on special agency expertise. Therefore, because this Court is equally capable of reading the law, it not required to defer to the Department's interpretation of the Statute.

Because the Statute is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation and construction, and the Statute must be given its plain and obvious meaning. *Holly v. Auld,* 450 So. 2d 217, 219 (Fla.1984); *City of Coral Gables Code Enforcement Bd. v. Tien,* 967 So. 2d 963, 964 (Fla. 3d DCA 2007). Because the Department's construction of the Statute to allow written communications ignores key phrases in the Statute, and is contrary to the plain meaning of the Statute, it is, therefore, unreasonable and contrary to the legislative intent. As such, the Courts are not required to and should not defer to the Department's erroneous construction of Section 626.854(6), Florida Statutes.

CONCLUSION

Based on the foregoing, Appellee respectfully requests that the Court AFFIRM the First District Court of Appeal's holding that Section 626.854(6), Florida Statutes (2008), bars all public adjuster-initiated contact of claimants or insureds for forty-eight (48) hours following a claim-inducing event and therefore, under *Central Hudson, supra,* the Statute is an unconstitutional restriction on commercial free speech.

Respectfully submitted this 19th day of April, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail delivery to the following parties this 19th day of April, 2011:

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CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this ANSWER BRIEF has been typed using the 14 point Times New Roman font as required by Rules 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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