No. _____

In the Supreme Court of the United States

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, aka CURE, *et al.*,
Petitioners,

v.

ANDY BESHEAR, Attorney General, Commonwealth of Kentucky, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Kentucky's Anti-solicitation statute precludes only healthcare providers from contacting recent automobile accident victims to solicit the provision of medical treatment covered by "no-fault" insurance benefits as set forth in Kentucky's Motor Vehicle Reparations Act, but allows insurance company adjusters to solicit releases from the same victims for those same potential claims.

The question presented is whether this content-based and speaker-based restriction on commercial speech is subject to strict scrutiny analysis under Reed v. Town of Gilbert, 576 U.S. ___ , 135 S. Ct. 2218 (2015) and Sorrell v. IMS Health, Inc., 564 U.S. 552, 131 S. Ct. 2653 (2011).

PARTIES TO THE PROCEEDINGS

Petitioners are: 1) Chiropractors United for Research and Education, LLC ("**CURE**"), an advocacy group funded by participating chiropractors whose mission is to conduct research identifying recent accident victims and to educate them within the first thirty days after an accident as to their statutory rights to no-fault benefits for medical needs resulting from the accident; and 2) individual chiropractors and their practices (David Seastedt, Commerce Chiropractic, Robert Kleinfeld, Louisville Sports and Injury Chiropractic & Rehab Center, David Romano, and E-Town Injury Center) ("the **Providers**"), who are members of and fund CURE. Petitioners were the appellants in the court below.

Respondent Andy Beshear, Attorney General, Commonwealth of Kentucky, was the appellee in the court below. (Andy Beshear replaced Jack Conway as the Kentucky Attorney General during the pendency of this action.)

Respondents Kentucky Board of Chiropractic Examiners, Mark Woodward, D.C., Frank Hedig, D.C. Teri, Beyers-Abston, D.C., Michael Seibert, D.C., and Rodeny Casada, D.C., were named as Defendants in the District Court. On September 1, 2015, prior to the filing of the Motion giving rise to this appeal and petition for Writ of Certiorari, counsel for the Kentucky Board of Chiropractic Examiners (which is comprised of the above identified individuals) advised the District Court that the Board of Chiropractic Examiners had voted to rescind the Board's regulation pertaining to the statute at issue. Accordingly, all subsequent rulings have considered the matter moot as to those Defendants.

CORPORATE DISCLOSURE STATEMENT

CURE does not have any parent companies and no entity has any ownership interest in it. The members of CURE are the other Appellants/Petitioners below.

No publicly held corporation or other public entity owns 10% or more of the stock of Petitioner Commerce Chiropractic and Rehab, and it has no parent company.

No publicly held corporation or other public entity owns 10% or more of the stock of Petitioner Louisville Sports and Injury Chiropractic & Rehab Center and it has no parent company.

No publicly held corporation or other public entity owns 10% or more of the stock of Petitioner E-Town Injury Center, Inc. and it has no parent company.

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CURE and the Providers respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

Under its Motor Vehicle Reparations Act, KRS 304.39, Kentucky requires that auto insurance policies provide "Personal Injury Protection," or "PIP", which is essentially $10,000 in insurance benefits available to pedestrians and passengers involved in automobile accidents for medical expenses, lost wages, and similar "out-of-pocket" costs incurred due to the accident, regardless of fault. Kentucky's Anti-solicitation statute, KRS 367.4081-4083, prohibits healthcare workers (a group defined in the statute to include chiropractors, nurses, physical and occupational therapists, and massage therapists) from contacting recent automobile accident victims for thirty days after an accident to solicit the provision of services that would be paid by PIP. The Anti-solicitation statute similarly silences accident victim advocacy groups such as CURE from advising recent accident victims of their potential right to PIP's no-fault benefits because of the potential financial benefit to healthcare providers. Yet the Anti-solicitation statute permits insurance companies and their adjusters to communicate with those same recent automobile accident victims within thirty days of the accident in order to solicit and negotiate releases on potential claims for those same no-fault PIP benefits.

In the competition between medical care providers and the insurance industry for the no-fault dollars that are available to accident victims in the first thirty days after an automobile accident, speech that encourages claims for no-fault PIP benefits is illegal under the Anti-solicitation statute, but speech that discourages claims for no-fault PIP benefits claims is not. Thus, the statute bans commercial speech containing certain content. This differing impact on directly competing speech is a result of the Anti-solicitation statute being facially content based.

Petitioners challenge the constitutionality of Kentucky's Anti-solicitation statute. On appeal from a district court's denial of petitioner's motion for a preliminary injunction, the Sixth Circuit Court of Appeals held that the statute was to be reviewed under an intermediate standard of constitutional scrutiny rather than under a strict scrutiny analysis and affirmed the denial of Petitioners' motion. The Sixth Circuit specifically concluded that this Court's recent decisions on speech regulations, Reed v. Town of Gilbert, 576 U.S. ___, 135 S. Ct. 2218 (2015) and Sorrell v. IMS Health Inc., 564 U.S. 552, (2011), *did not apply* because neither decision applied to commercial speech. Consequently, the Sixth Circuit: 1) ignored the holding of Reed and Sorrell that courts should *initially* determine whether any speech regulations, commercial or not, are content-based and if so subject them to heightened scrutiny; and 2) joined a multi-faceted circuit split on the issue of whether and how Reed and Sorrell apply to content-based regulations of commercial speech.

The need for this Court to revisit Reed and Sorrell is manifest: either the Court did or did not mean it when it first held in Sorrell that commercial speech is no exception to the First Amendment's requirement that content-based restrictions on speech be reviewed under heightened scrutiny and then held in Reed (citing Sorrell) that courts reviewing speech regulations should *first* determine whether they are content-based. If the Court did not intend Sorrell and Reed to require courts to consider content when evaluating restrictions on commercial speech, then the Sixth Circuit decision below should stand and the Circuit Court split should be resolved accordingly. If, however, the Court did intend Reed and Sorrell to be a refinement of the First Amendment's free speech doctrine, to the effect that content restrictions matter in commercial speech cases, then the Court here has an ideal opportunity to explain how and why.

It must be noted that this Court recently granted a Writ of Certiorari in Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2015), which may be relevant to the issues here to the extent the Court's opinion applies Reed or Sorrell. In Expressions Hair Design, this Court will address a circuit split on the issue of content-based "no-surcharge" statutes banning speech disadvantageous to credit card companies that invoke constitutional concerns similar to those raised by Kentucky's Anti-solicitation statute.

DECISIONS BELOW

The Opinion of the District Court for the Western District of Kentucky, filed October 1, 2015, denying Petitioner's Motion for a preliminary injunction from which Petitioners appealed is reproduced at Appendix

C. The Sixth Circuit Court of Appeals' order denying the interlocutory appeal of CURE and the Providers from the District Court, filed July 1, 2016, was not recommended for full text publication and is reproduced at Appendix A.

JURISDICTION

The order of the Sixth Circuit denying *en banc* review of the Sixth Circuit's order denying interlocutory relief was filed on September 12, 2016 and is reproduced at Appendix D. Pursuant to U.S. Supreme Court Rule 13, the time for filing this Petition for a writ of certiorari on this matter expires on December 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First and Fourteenth Amendments to the United States Constitution is set forth at Appendix E, App. 42 and App. 43. A copy of KRS 367.4081-4083, Kentucky's Anti-solicitation statute, is set forth at Appendix E, App. 56-60. A copy of KRS 304.39, Kentucky's Motor Vehicle Reparations Act, is set forth at Appendix E, App. 45-55.

STATEMENT OF THE CASE

A. Factual Background

No material facts are disputed in this case.

KRS 367.4081-4083, the "Anti-solicitation statute," contains a facially content- and speaker-based restriction on commercial speech. The Anti-solicitation statute references the no-fault insurance benefits

provisions of Kentucky's Motor Vehicle Reparations Act, KRS 304.39, and bans speech from healthcare providers to recent accident victims only if it might encourage medical treatment for injuries resulting from automobile accidents that may be covered by those no-fault insurance benefits.

1. Kentucky's statutory no-fault insurance benefits under KRS 304.39

Pursuant to KRS 304.39, Kentucky citizens are entitled to Basic Reparation Benefits, which are commonly known as "Personal Injury Protection" or "PIP." PIP is essentially $10,000 in insurance benefits available to pedestrians and passengers involved in automobile accidents as follows:

> **K.R.S. § 304.39-020 Definitions for subtitle.**
>
> As used in this subtitle:
> …
>
> (2) "Basic reparation benefits" mean benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle. The maximum amount of basic reparation benefits payable for all economic loss resulting from injury to any one (1) person as the result of one (1) accident shall be ten thousand dollars ($10,000), regardless of the number of persons entitled to such benefits or the number of providers of security obligated to pay such

benefits. Basic reparation benefits consist of one (1) or more of the elements defined as "loss."

K.R.S. § 304.39-030 Right to basic reparation benefits.

(1) If the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits, unless he has rejected the limitation upon his tort rights as provided in KRS 304.39-060(4).

Many healthcare professionals, including the Providers, derive significant income from providing healthcare services to recent accident victims, the bills for which are submitted to automobile insurance carriers as claims against this no-fault PIP coverage. (See Declaration of Petitioner Robert Kleinfeld, D.C., Appendix F). Not surprisingly, automobile insurance company adjusters routinely seek quick releases from pedestrians and passengers involved in automobile accidents in order to limit or preclude claims made on no-fault PIP coverage. (See e.g. Coomer v. Phelps, 172 S.W.3d 389 (Ky. 2005)).

2. Kentucky's Anti-solicitation statute, KRS 367.4081-4083

In relevant part, KRS 367.4082 provides:

(1) During the first thirty (30) days following a motor vehicle accident a healthcare provider or an intermediary, at the request or direction of a healthcare provider, shall not solicit or knowingly permit another individual to solicit a

> person involved in a motor vehicle accident for the provision of reparation benefits, as defined by KRS 304.39-020(2).
>
> (2) A healthcare provider shall not:
>
> (a) Pay or receive compensation for the referral or solicitation of reparation benefits for a person involved in a motor vehicle accident;
>
> (b) Provide monetary compensation or other consideration to any individual for the purpose of inducing, enticing, or directing the provision of reparation benefits for a person involved in a motor vehicle accident; or
>
> (c) Contact, request, or direct an intermediary to contact, for the purpose of solicitation, a person involved in a motor vehicle accident during the first thirty (30) days following a motor vehicle accident.
>
> …
>
> (5) An individual licensed or certified as a healthcare provider, who violates this section, shall be subject to the disciplinary process of the respective licensing or regulatory authority.

KRS 367.4081 defines "healthcare provider" as an individual licensed by Kentucky's chiropractic, nursing, physical therapy, occupational therapy and massage therapy boards of licensure. Under KRS 367.4081, "solicit" means the initiation of communication with a person involved in a motor vehicle accident, including but not limited to any face-to-face contact with the

person, in writing, electronically, or by any form of telephonic communication, in anticipation of financial gain or remuneration for the communication itself or for prospective charges for healthcare services.

KRS 367.4083 then provides:

> (1) Any charges owed by, or on behalf of, a person involved in a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be void.
>
> (2) Any charges billed and paid by, or on behalf of, a person of a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be returned to the reparations obligor or other payor. The healthcare provider who violates KRS 367.4082 shall not pursue collection from the person.

Because the Anti-solicitation statute establishes that a healthcare provider shall not "provide monetary compensation or other consideration to any individual for the purpose of inducing, enticing or directing the provision of reparation benefits for a person involved in a motor vehicle accident," (KRS 367.4082(2)(b)) and because CURE is an "intermediary" acting at least in part "at the request or direction of" healthcare providers (KRS 367.4082(1)), the statute even prevents advocacy groups such as CURE from providing to recent accident victims information regarding their rights to PIP because that interaction is a communication *in anticipation* of PIP charges for healthcare services.

The statute makes it illegal for Petitioners to contact accident victims for thirty days after the accident to advise them of their potential legal rights to PIP benefits or to offer treatment that might be paid for by PIP pursuant to those legal rights. The Anti-solicitation statute thus prohibits Petitioners from (a) communicating with recent accident victims regarding an accident victim's legal right to no-cost, no-fault, PIP covered medical treatment; and (b) from suggesting that they might be able to treat any resulting injuries at no cost. Any bills for treatment resulting from a violation of this statute are deemed void.

3. The Solicitations of CURE and the Providers

A sizeable percentage of the Providers' business originates from providing treatment to victims of motor vehicle accidents immediately following their accident. Appendix F, App. 59, 62. These services are often paid for by PIP coverage. Id. The Providers derive a significant percentage of income from patients who often do not have health insurance and are unaware of their entitlement to PIP benefits. Id.

CURE seeks to communicate with victims of automobile accidents as soon as possible after an accident to advise them of the existence of PIP medical coverage and their right to receive medical care at no out-of-pocket cost. Nothing about the communications at issue is misleading or untrue. CURE invites recent accident victims to contact CURE members for further information. CURE has sent and intends to continue to send the following letter to individuals identified by its research:

Dear Recent Accident Victim:

CURE is an association of chiropractors in the Louisville area. We believe that research and education about accident victim rights are important to the well-being of the citizens of Kentucky, and in particular recent accident victims. We believe it is important for you to know your rights as you deal with any injuries or pain you experienced in your accident.

Kentucky has what is commonly referred to as a "no-fault" system for providing health care to accident victims which provides that all accident victims, regardless of fault, with basic reparations benefits or "personal injury protection (PIP)" to pay for certain expenses including medical bills as described in KRS 304.39. For your convenience, we have attached the information page from the Kentucky Department of Insurance describing this statute and the statute itself. Of particular importance is the excerpt from the information page emphasized below:

> *Personal Injury Protection (PIP) Coverage*
>
> *Kentucky requires basic PIP coverage on all motor vehicles except motorcycles. Basic PIP is to be paid by the insurer of the vehicle in which the injured person is riding at the time of an accident, or the vehicle which strikes a pedestrian, regardless of who was at fault in the accident.* ***Basic PIP provides up to $10,000 per person per accident for***

> ***medical expenses, lost wages and similar "out of pocket" costs due to an injury.*** *Higher benefits and deductibles are optional.*
>
> Because of PIP, many medical providers, including chiropractors, are able to treat your injuries without you incurring any out of pocket costs or settling any potential claim. Please consult an attorney for legal advice or your local healthcare provider, including any of CURE's member chiropractors on the enclosed list, for diagnosis or treatment.
>
> We wish you a speedy recovery!
>
> CURE
> Chiropractors United for Research and Education, LLC

Appendix F, App. 64-65. The CURE letter then encloses a list of chiropractors, including the Providers.

B. Procedural Background

Petitioners challenged the constitutionality of the Anti-solicitation statute in the United States District Court for the Western District of Kentucky.[1] Petitioners moved for a preliminary injunction, on the grounds that it was substantially likely that the Anti-

[1] One of the same Providers had previously successfully challenged the constitutionality of a *prior* Anti-solicitation statute, which sought to ban all communications to recent accident victims *except* those by a defined class of entities that included insurance company representatives. State Farm Mut. Auto. Ins. Co. v. Conway, 2014 WL 2618579 (W.D. Ky. June 12, 2014).

solicitation statute would not pass constitutional muster.

This Court's opinion in Reed v. Town of Gilbert, 576 U.S. __, 135 S. Ct. 2218 (2015) was issued while Petitioner's motion was pending in the District Court, was briefed in Petitioner's Reply in support of its motion, and was argued at the hearing on the matter. Appendix C, App. 21.

On October 1, 2015, the District Court issued a Memorandum Opinion and Order denying Petitioners' Motion for Preliminary Injunction. The District Court distinguished Sorrell v. IMS Health, Inc., 564 U.S. 552, 131 S. Ct. 2653 (2011) and Reed, stating that "[b]ecause [the Anti-solicitation statute] constrains only commercial speech, the strict scrutiny analysis of Reed is inapposite" and instead held Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) to be the only relevant and controlling precedent. Appendix C, App. 22-23 p. 11. The District Court thus simply rejected the strict scrutiny constitutional review standard that Petitioners asserted was mandated by Reed and Sorrell, and applied an intermediate scrutiny standard to the restrictions on commercial speech set forth in KRS 367.4081-4083, despite the obvious viewpoint based restrictions of the statute.

Petitioners sought expedited review in the Sixth Circuit Court of Appeals, and to further accelerate a ruling, waived oral arguments. The Sixth Circuit affirmed the District Court's interlocutory order denying the motion for temporary injunction. Appendix A, App. 7. In so doing, the Sixth Circuit panel also incorrectly identified the constitutional

standard of review by holding that neither Sorrell nor Reed had any bearing on the matter because the Circuit Court asserted that neither case held that content-based regulations of commercial speech should be subject to anything other than the intermediate scrutiny set forth in Central Hudson. Appendix A, App. 4-5.

Petitioners seek this Writ of Certiorari on the grounds that the Sixth Circuit's ruling: 1) is based upon an incorrect statement of the applicable standard; 2) conflicts with the decisions of other United States Courts of Appeal on the same important matter; and 3) conflicts with the relevant decisions of this Court.

REASONS FOR GRANTING THE WRIT

In Reed v. Town of Gilbert, this Court provided guidance on the issue of how courts should analyze restrictions on speech. Reed held that whether a law was content neutral on its face was a consideration that came *before* an examination of the law's justification or purpose. Reed at 2228. Reed also held that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." Id. As an example of government regulations being content based due to an application to particular speech because of its topic, idea, or message, Reed cited Sorrell v. IMS Health, Inc., 564 U.S. 552, 563-64 (2011). Reed, 135 S. Ct. at 2227. Sorrell held that the First Amendment requires heightened scrutiny when the government regulates speech based upon a disagreement with the message it conveys and held that "commercial speech is no exception" to that

requirement. Sorrell, 564 U.S. at 566. Reed thus effectively held that content-based regulations of commercial speech are subject to strict scrutiny. Reed, 135 S. Ct. at 2227. In this regard, Reed is consistent with Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) which the majority opinion relied upon.

In practice, however, lower courts have differed wildly in their interpretation and application of Reed. The Sixth Circuit here took a third course, finding Reed and Sorrell inapplicable to commercial speech restrictions. Appendix A, App. 4-5. In so doing, the Sixth Circuit has weighed in on a split between the Second and Fifth Circuits on one side and the Eleventh and Seventh Circuits on the other, with a third position that effectively precludes *any* examination of content as a relevant factor in the constitutional analysis of commercial speech regulations.

This Court has recently granted Certiorari in Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2015), where the Second Circuit upheld the constitutionality of a "no-surcharge" law making it legal for stores to offer a "cash discount," but illegal to assess a "surcharge" for credit card purchases. The Court's opinion may address the issue raised here when it resolves the question presented there: whether no-surcharge laws restricting speech conveying price information are subject to strict scrutiny or whether they merely regulate economic conduct and are therefore subject to less scrutiny. As discussed below, the Eleventh and Seventh Circuits see it one way and the Second and Fifth Circuits see it another. But unless this Court passes judgment on the Sixth Circuit's position in the context of its decision in

Expressions Hair Design, the Sixth Circuit will remain in conflict with whichever position prevails in the anti-surcharge arena because the Sixth Circuit would *always and only* apply intermediate scrutiny to commercial speech under Central Hudson.

Like the Sixth Circuit, the Second Circuit circumvents subjecting all content-based restrictions on commercial speech to strict scrutiny. But unlike the Sixth Circuit, which simply channels *all* commercial speech restrictions to the Central Hudson test on the grounds that neither Reed nor Sorrell advanced commercial speech jurisprudence (Appendix A, App. 5), the Second Circuit distinguishes Reed's strict scrutiny by finding it does not apply to economic conduct. Expressions Hair Design, 808 F.3d at 132. In effect, this makes the issue of whether the statute is content-based a secondary consideration. The Fifth Circuit also has weighed in, holding in Rowell v. Pettijohn, 816 F.3d 73, 78 (5th Cir. 2016) that the Second Circuit's reasoning was persuasive on a review of the constitutionality of Texas' "no-surcharge" statute.

By contrast, in the Eleventh Circuit, (Dana's R.R. Supply v. Attorney General, Florida, 807 F.3d 1235, 1247 (11th Cir. 2015) (concerning an anti-surcharge statue)) and in the Seventh Circuit (Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (concerning an anti-panhandling statute)), the threshold question is whether a regulation on commercial speech is content-based and if so, strict scrutiny is applied per Reed. In short, the different sequence of the analysis obtains an opposite result.

As a result, there is a three-way Circuit fracture on the analytical steps courts should take when reviewing

regulations on commercial speech. In the Sixth Circuit, if a regulation concerns commercial speech (e.g. solicitations by panhandlers for cash, solicitations for the provision of healthcare after an automobile accident, communications regarding the possibility of no-cost healthcare after an automobile accident, or communications from shopkeepers regarding pricing), it will be subject to intermediate scrutiny. In the Second and Fifth Circuits, however, those same regulations will be subject to intermediate scrutiny if they are deemed to involve "conduct." In the Eleventh and Seventh Circuits, those regulations would be subjected to strict scrutiny because they are content-based.

The Court's review is needed to both 1) resolve the Circuit split and 2) to reverse the incorrect ruling of the Sixth Circuit. As discussed in detail below, this Court should revisit the issue of how to constitutionally evaluate content-based commercial speech regulations and should clarify the extent to which Sorrell and Reed have modified the framework laid down in Central Hudson.

A. The Petition Should be Granted to Resolve the Circuit Split that Arose after Sorrell and Reed.

1. The Regulation of Commercial Speech prior to *Reed*

This Court has defined commercial speech as a narrow category of necessarily expressive communication that is "related solely to the economic interests of the speaker and its audience," Central Hudson, 447 U.S. at 561, or that "does 'no more than

propose a commercial transaction.'" Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, 425 U.S. 748, 762 (1976) quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973). In Central Hudson, this Court set forth a four-part test for determining when restrictions on commercial speech violate the free speech protections of the First Amendment. In order for commercial speech to warrant First Amendment protection under this standard, it must (1) concern lawful activity and not be misleading. If the speech meets this threshold, it may be regulated only if (2) the asserted government interest is substantial; (3) the regulation directly advances the asserted government interest; and (4) the regulation is no more extensive than necessary to serve that interest. Central Hudson, 447 U.S. at 566. The regulation must satisfy each of these four prongs in order to be constitutionally valid. Id. Previously, this intermediate standard, commonly referred to as the Central Hudson balancing test, provided a consistent analytical framework for lower courts to apply when reviewing legislation intended to promote important societal policies by restricting commercial speech.

Then, in Sorrell v. IMS Health Inc., 564 U.S. 552, (2011), the Court invoked First Amendment freedom of speech protections to strike down a Vermont statute which required that pharmacy records containing a doctor's prescribing practices not be sold or used for marketing purposes unless the doctor consented. Data mining companies and pharmaceutical manufactures contended that the law violated their First Amendment rights and sought declaratory and injunctive relief against Vermont officials. Justice Anthony Kennedy delivered the opinion of the Court which found that

Vermont's law contained content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. Id. at 563-564. Citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418, (1993), the Court held that Vermont's law was "designed to impose a specific, content-based burden on protected expression" and that therefore "heightened judicial scrutiny" was warranted. Sorrell, 564 U.S. at 565. Although Sorrell was ultimately decided by finding that the regulation failed Central Hudson's intermediate analysis, and therefore a discussion of what "heightened judicial scrutiny" required was not necessary, the opinion foreshadowed a shift in the way commercial speech regulations were to be evaluated. "The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.' … *Commercial speech is no exception*." Sorrell, at 566, quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (emphasis added). Commercial speech is thus not exempt from "heightened" scrutiny pursuant to Sorrell.

By leaving undefined what "heightened scrutiny" might require in Sorrell, however, it was not immediately apparent whether this Court meant strict scrutiny or some theretofore undefined, hybrid level of analysis above that set forth in Central Hudson. Indeed, after Sorrell, several lower courts, unable to identify what "heightened scrutiny" should be, simply noted that since the regulation at issue failed the presumably lower Central Hudson test, they need not

even consider what the "heightened scrutiny" referenced in Sorrell required.[2]

2. Regulation of commercial speech in *Reed*

Reed v. Town of Gilbert, 576 U.S. ___, 135 S. Ct. 2218 (2015) picked up where this Court left off in Sorrell, citing Sorrell as an example of the simple proposition that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 2227. Justice Thomas delivered the opinion of the court in which Chief Justice Roberts, Justice Antonin Scalia, Justice Samuel Alito, and Justice Sonia Sotomayer joined.

In 2005, the town of Gilbert, Arizona adopted a municipal sign ordinance that regulated the manner in which signs could be displayed in public areas. Although the ordinance banned the display of most outdoor signs without a permit, twenty-three categories of signs were exempt from the permit requirement,

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[2] If a commercial speech restriction is content- or speaker-based, then it is subject to "heightened scrutiny." *Sorrell,* 131 S. Ct. at 2664. *Sorrell,* however, did not define what "heightened scrutiny" means. Instead, after concluding that the restrictions in the case were both content- and speaker-based, the Court proceeded to analyze them under the *Central Hudson* factors, noting the outcome would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. *Sorrell,"* 131 S. Ct. at 2667.

1-800-411-PAIN Referral Service, LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014).

including "ideological signs", "political signs", and "temporary directional signs relating to a qualifying event." Id. at 2224-25. Each of these three categories also had differing size and place restrictions. Clyde Reed, a pastor of Good News Community Church, whose signs were illegal under the code, challenged the code's constitutionality. Writing for the majority, Justice Thomas held that a town's sign ordinance imposed content-based restrictions, which compelled a strict scrutiny that it did not survive because the ordinance was not narrowly tailored to further a compelling government interest. Id. at 2231-32. Reed held that because the sign code on its face was a content-based regulation of speech, there was no need to consider the government's asserted neutral justifications as purposes for enacting the sign code. Id. at 2227.

The majority opinion held that the town's sign ordinance was content-based on its face in light of the fact that the restrictions depended "entirely on the communicative content of the sign." Id. at 2227. Because the church's signs were treated differently from signs conveying other types of ideas, there was "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny". Id. Justice Thomas' majority opinion also rejected the claims that the ordinance was content-neutral and that the reasons for regulating the various categories of signs were unrelated to the content. Id. at 2231-32. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." Id. at 2228,

citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429, (1993). Justice Thomas explained that innocent motives do not eliminate the danger of censorship, because governments may one day use content-based laws to regulate "disfavored speech." Id. at 2229. Justice Thomas held that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." Id. at 2230 (internal quotation marks and citations omitted).

Reed held that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Id. at 2226. Reed's reference to Sorrell is telling: "[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. *See, e.g.* Sorrell . . . (statute was content-based on its face; and there was also evidence of an impermissible legislative motive)." Reed 135 S. Ct. at 2228 (emphasis in original). Thus, Reed specifically cited to a commercial speech case — Sorrell — as an example of how courts should *first* look to whether a statute is content-based and thus subject to strict scrutiny *before* deciding whether the regulation concerns commercial speech.

Reed thus teaches that government regulation of any commercial speech that is content or speaker-based is always subject to strict constitutional scrutiny.

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or

> message expressed. *E.g., Sorrell v. IMS Health, Inc.,* 564 U.S. [552], 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra,* at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra,* at —, 131 S.Ct. at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227 (emphasis added).

At a minimum, Reed thus stands for the proposition that where a regulation of commercial speech depends upon its content, the analysis does not begin and end with the application of intermediate constitutional scrutiny as set forth in Central Hudson. Where, as here, the application of a regulatory gag depends entirely upon what is being said and by whom, the State cannot simply assert that because the regulation concerns commerce, it need never demonstrate a compelling governmental interest and a narrowly tailored restriction.

3. The regulation of commercial speech since *Reed*

Since Reed was decided, lower courts have routinely distinguished the case in numerous and contradictory ways. The result has been a fracturing of the Circuits, that the Court should address here and in its ruling on Expressions Hair Design.

The Sixth Circuit considers neither Reed nor Sorrell to be applicable to commercial speech despite the statement in Reed that cites Sorrell for the proposition that "the commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation, on its face, draws distinctions based on the message a speaker conveys." Reed at 2227 (emphasis added). The Sixth Circuit's analysis of the Anti-solicitation statute began not with a determination of whether the speech at issue was restricted based on its content, but rather from the perspective that commercial speech jurisprudence has remained essentially unchanged since Central Hudson and that therefore Central Hudson controls. In support of this proposition, the Sixth Circuit panel below cited Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001), a case that predates Sorrell by ten years, stating, "In fact, the Supreme Court has rejected the use of strict scrutiny in challenges to commercial speech regulations, noting that there was 'no need to break new ground. *Central Hudson*, as applied … provides an adequate basis for decision." Appendix A, App. 5. Simply put, the Sixth Circuit literally rejected Petitioners' assertion that "Reed and Sorrell clarified that the Central Hudson intermediate scrutiny standard does not apply if the challenged statute is a

content-based restriction on commercial speech." Appendix A, App. 4-5.

The Second Circuit has also eviscerated Reed, albeit more subtly. In Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2015) (cert. petition granted), the Second Circuit held that Reed did not apply in a challenge to New York's anti-surcharge regulation because it considered Reed's content analysis to be "of no relevance whatsoever with respect to *the threshold question* whether the restriction at issue regulates speech or, instead, conduct." Id. at 132 (emphasis added). Essentially, the Second Circuit focused on the difference between the words used in New York's surcharge pricing scheme and the actual relationship between prices that the New York statute sought to regulate. Id. at 132. In so doing, the Second Circuit implicitly rejected Reed's clearly stated analytical sequence. In Reed, Justice Thomas said, "we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose." Reed, 135 S. Ct. at 2228 (emphasis in original). But instead of first considering whether the rule was content based, the Second Circuit declared that whether the regulation restricts speech or conduct –i.e. its purpose – was itself the "threshold" consideration. Because New York's no-surcharge law (making it legal to refer to a cash price as having a "discount" but illegal to refer to a credit card purchase as having a "surcharge") was found "merely" to regulate prices (i.e. conduct), the Second Circuit held that the statute did not implicate the First Amendment. Expressions Hair Designs, 808 F.3d at 134.

Accordingly, in the Sixth and Second Circuits, the initial or threshold question is not whether the regulation is content-based but instead whether it involves commercial speech. In the Sixth Circuit, if the regulation concerns commercial speech, then Reed does not apply. Indeed, there should never be an instance where a commercial speech restriction is subjected to strict scrutiny in the Sixth Circuit, even if it is clearly content based, because the analysis will automatically default to the Central Hudson balancing test. In the Second Circuit, (and in the Fifth Circuit, which found the reasoning of the Second Circuit persuasive in Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016)), it would be theoretically possible to have a content-based regulation on commercial speech that concerned only "speech" but not "conduct," but that possibility is vanishingly small, and most likely would also result in a reversion to the Central Hudson test, as occurred in Expressions Hair Design.

This is the exact opposite of the rule as formulated in the Eleventh Circuit, where the question of whether the commercial speech regulation was content-based is addressed *as a threshold matter*. In Dana's R.R. Supply v. Attorney General, Florida, 807 F.3d 1235, 1247 (11th Cir. 2015), the question of whether the regulation concerned commercial speech was a secondary consideration that neither trumped nor negated the fact that the law at issue attempted to regulate "the rhetorical toolkit" of merchants, which was itself sufficient to call for an analysis consistent with Reed and Sorrell. Dana's R.R. Supply concerned a Florida law that on its face touched on economic activity because it "appears to regulate businesses engaged in dual-pricing, applies to '[a] sellor [sic] or lessor in a

sales or lease transaction,' turns on the method of payment used, and defines the offense as occurring 'at the time of a sale or lease transaction.'" Id. at 1247. The Eleventh Circuit recognized that the law had the "flavor of commercial speech" but noted that:

> the law's taste is muddled by less savory notes of plain old-fashioned speech suppression. The statute goes to great length to avoid direct regulation of any actual conduct—that is, it fails to limit at all merchants' discretion to engage in dual-pricing—in favor of limiting speech alone. And the speech it limits contains elements of core political speech. By effectively purging from merchants' vocabularies the doubleplusungood *surcharge* and replacing it with the State's preferred term, *discount,* the constituency most impacted by the no-surcharge law has been deprived of its full rhetorical toolkit. *See Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) "([W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.)." In turn, Florida's no-surcharge law deprives the marketplace of ideas of the full range of public sentiment.

Id.

Dana's recognized that its extraordinary breadth suggested that the no-surcharge law was more than a

mere regulation of commercial speech. Id. The court observed that:

> [a] law enacted for the sole purpose of forbidding a price difference to be labelled a *surcharge,* while allowing the same to be called a *discount,* does not impose an "incidental burden" on speech. *Sorrell,* 564 U.S. at ——, 131 S.Ct. at 2664–65. On the contrary, imposing a direct and substantial burden on disfavored speech—by silencing it—is the whole point. The no-surcharge law is content based: it applies only to how a merchant may frame the price difference between cash and credit-card payments. *See Reed,* 576 U.S. at ——, 135 S.Ct. at 2227. The no-surcharge law is speaker based: it applies only to those merchants who accept payment by both cash and credit card and engage in dual-pricing. *See Turner Broad. Sys., Inc. v. Fed. Commc'ns Cmm'n,* 512 U.S. 622, 657–58, 114 S.Ct. 2445, 2466–67, 129 L.Ed.2d 497 (1994). And the no-surcharge law is viewpoint based: it denies the expression of one equally accurate account of reality in favor of the State's own. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 391, 112 S.Ct. 2538, 2547–48, 120 L.Ed.2d 305 (1992).

Id. at 1247-1248. The court went on to reject any notion that merely because *some* modicum of economic conduct is implicated, a law therefore cannot also unconstitutionally restrict speech, observing that:

> [t]he First Amendment is not so easily circumvented. And, in any event, the no-surcharge law does not sweep up only speech that is incidental and necessary to the

> enforcement of another important state interest; speech is the only behavior being targeted. *Cf. Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 690, 93 L.Ed. 834 (1949) ('But [speech] used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control').

Id. at 1248. Accordingly, the Eleventh Circuit is in direct opposition to the Sixth and Second Circuits as to the standard that applies to content-based commercial speech regulations because it sets forth a different order of analytical inquiry – one in which commercial speech c*an* be subjected to a strict scrutiny analysis because the question of whether it is content-based is the first issue to be analyzed.

In the Seventh Circuit, anti-panhandling statutes have been struck down pursuant to Reed on the grounds that a city ordinance prohibiting oral requests for money was content-based and thus subject to strict scrutiny. After its original anti-panhandling statute had been found to be content-based and thus subject to strict scrutiny, the city of Springfield revised its statute to mirror a Colorado statute providing for floating buffer zones around individuals visiting abortion clinics upheld by the Supreme Court in Hill v. Colorado, 530 U.S. 703, 707 (2000). The revised Springfield ordinance was again challenged as content-based under Reed. In Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) the Seventh Circuit held that the City's anti-panhandling ordinance was not content neutral as required by Reed, and thus violated free speech rights under the First Amendment. Noting that Reed rejected

town of Gilbert's contention that the sign-ordinance was "neutral with respect to ideas and viewpoints" insufficient and, given that Springfield's ordinance "regulates 'because of the topic discussed,'" the Norton court found Springfield's anti-panhandling statute to be content-based. Id. at 412, quoting Reed, 135 S. Ct. at 2227. Concluding that "Reed effectively abolishes any distinction between content regulation and subject-matter regulation" (Id.), the Second Circuit held that "any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." Id. Since the anti-panhandling statute was content-based, it was subject to strict scrutiny, which it failed to meet. Id. at 413.

The anti-panhandling solicitations in the Seventh Circuit are the functional equivalent of healthcare provider solicitations after automobile accidents in the Sixth Circuit. Accordingly, the Sixth and Seventh Circuits are in direct contrast as to their understanding of the rule set forth in Reed. Under the reasoning of Norton v. City of Springfield, Kentucky's Anti-solicitation statute would be considered content-based and therefore subject to strict scrutiny. Indeed, if Kentucky's Anti-solicitation statute were cast in the language of the anti-panhandling statute at issue in Norton v. City of Springfield, it would be unconstitutional not only as a result of content discrimination, but also because of the identity of the speaker, since it would ban oral requests for money by panhandlers *except* those made by insurance company panhandlers. By contrast, in the Sixth Circuit, following the opinion of the Court of Appeals below, Reed simply would not apply to the anti-panhandling statue in Norton since panhandling solicitation is just

as "commercial" as a medical services solicitation. Ergo, the same statute would be subject to diametrically opposed constitutional analysis depending on which circuit reviewed the restriction.

While there are numerous ways to categorize the various Circuits' rationales for either applying or distinguishing Reed, it must be recognized that Reed has left a choppy wake. Special interest legislation from the credit card industry (i.e. no-surcharge laws) and the insurance industry (i.e. anti-solicitation statutes) are subject to differing standards of constitutional analysis depending on which Circuit is doing the review. This Supreme Court should grant this Petition for a Writ of Certiorari and calm the waters.

B. The Petition Should be Granted Because the Sixth Circuit Failed to Correctly State the Law as Set Forth in Sorrell and Reed.

Petitioners argued below that they were entitled to a preliminary injunction because the Anti-solicitation statute was a blatant perquisite to the insurance industry that clearly banned speech based solely on its content. As such, it required a strict constitutional analysis that it clearly could not pass. As Judge Simpson recognized while finding the *prior* Anti-solicitation statute unconstitutional, insurers are just as likely to abuse the citizens of Kentucky by soliciting releases for PIP claims as medical providers are likely to abuse them with solicitations for provision of treatment and accordingly, the Attorney General's justifications for banning one but not the other were unavailing. State Farm Mut. Auto. Ins. Co. v. Conway, 2014 WL 2618579 *13 (W.D. June 12, 2014).

Nevertheless, both the District Court and the Sixth Circuit Court of Appeals applied the wrong constitutional standard when determining whether CURE and the Providers are likely to succeed on their constitutional challenge of KRS 367.4081. "A court abuses its discretion when it commits *a clear error of judgment, such as applying the incorrect legal standard*, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." In re Ferro Corp. Derivative Litigation, 511 F.3d 611, 623 (6th Cir. 2008) (emphasis added, citations omitted).

Applying Reed to KRS 367.4081-4083, there is no legitimate way to avoid strict constitutional scrutiny, as it is a near perfect example of exactly what Reed and Sorrell held to be an improper regulation of speech. First, the Anti-solicitation statute applies only to particular speech because of the topic discussed or the idea or message expressed (Reed, 135 S. Ct. at 2227) and second, it draws distinctions only against particular speakers conveying the message. Reed, 135 S.Ct. at 2227, citing Sorrell, 1311 S. Ct. at 2653. Thus, this case puts the issue squarely before the Court: is a facially content-based restriction on commercial speech subject to strict scrutiny?

On its face, Kentucky's Anti-solicitation statute does exactly what Reed says must trigger a strict scrutiny analysis: it is a law that favors some speakers (insurance company adjusters) over others (healthcare providers) because the insurance company message reflects the preferred content. Reed, 135 S. Ct. at 2230. The Sixth Circuit's assertion that Reed has nothing to do with commercial speech is belied by the fact that Reed cited Sorrell as an example of a content-based

restriction. Indeed, a Reed concurrence even points out that in Sorrell, the Court "applied the heightened 'strict scrutiny' standard where the less stringent 'commercial speech' standard was appropriate." Reed at 2235 (Breyer concurring).

KRS 367.4081-4083 precludes only speech on a particular topic, a specific set of ideas and the expression of one specific message. The only speech that is proscribed is speech that encourages PIP claims. It is impossible to read the Ant-solicitation statute's prohibition of the speech of CURE and the Providers as anything other than a distinction drawn based on the message conveyed: If the message is, "I can give you $10,000 worth of treatment for no out-of-pocket cost under PIP," it is illegal. If the message is, "I will pay you $500 to release your PIP claims," the message is legal. The simple fact that the latter but not the former is permitted means that it is content-based. A massage therapist who, at a cocktail party, meets a recent accident victim complaining of a sore neck, could not legally suggest that the accident victim schedule a massage. An organization such as CURE is specifically prohibited by the statute from telling recent accident victims about their rights to PIP benefits and violates the law by suggesting that recent accident victims seek legal or medical advice to determine what their rights might actually be. The CURE letter specifically exposes precisely the facially content-based restriction imposed by the Anti-solicitation statute. Reed and Sorrell must mean that a state's attempt to regulate speech that literally does nothing more than advise citizens of their rights and encourages them to follow up with other entities who might have a pecuniary

interest in the matter for further consultation must be reviewed under strict scrutiny.

CONCLUSION

Recent Supreme Court jurisprudence makes clear that where a restriction on commercial speech is *based on the content of the speech*, the restriction is to be reviewed under a strict scrutiny analysis and commercial speech regulation is no exception. The statute in question is a textbook example of a content- and speaker-based restriction on commercial speech and should be subject to a strict constitutional analysis, which the Sixth Circuit Court of Appeals failed to apply, thereby incorrectly stating the law and widening a Circuit split that this Court may address when it resolves the constitutional questions raised in Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2015).

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15-6103

[Filed July 1, 2016]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, aka CURE, et al., Plaintiffs-Appellants,	)
v.	)
JACK CONWAY, et al., Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

O R D E R

Before: NORRIS, COOK, and GRIFFIN, Circuit Judges.

In this interlocutory appeal, Chiropractors United For Research and Education, LLC; Commerce Chiropractic and Rehab, PSC; David Seastedt, D.C.; Louisville Sports and Injury Chiropractic & Rehab

Center; Robert Kleinfeld, D.C.; E-Town Injury Center, Inc. d/b/a Metro Pain Relief Center-Rechter Chiropractic/Radiology Group; and David Romano, D.C., (collectively the "plaintiff chiropractors"), appeal the order of the district court denying their motion for a preliminary injunction in their civil action seeking to bar the enforcement of 201 Kentucky Administrative Regulation ("KAR") § 21:015 and Kentucky Revised Statute ("KRS") § 367.4081-83 as unconstitutional. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In March 2015, the "New Solicitation Statute" was signed into law. KRS § 367.4081-83. It provided that for thirty days immediately "following a motor vehicle accident a healthcare provider or an intermediary, at the request or direction of a healthcare provider, shall not solicit or knowingly permit another individual to solicit a person involved in a motor vehicle accident for the provision of reparation benefits, as defined by [Kentucky law]." KRS § 367.4082(1). A corresponding administrative regulation, amended by the Board of Chiropractic Examiners in 2006, provided that a "chiropractor shall not contact or cause an accident victim to be contacted by the chiropractor's employee, agent, contractor, telemarketer, or anyone acting in concert with the chiropractor." *See* 201 KAR § 21:015(1)(6)(b) (2014).

In June 2015, the plaintiff chiropractors filed this action pursuant to 42 U.S.C. § 1983, requesting a declaratory judgment that 201 KAR § 21:015 and KRS § 367.4081-83 are unconstitutional. The plaintiffs alleged violations of the First Amendment and the

Equal Protection Clause and argued that the statutes and regulation in question were an unconstitutional prior restraint on speech. The plaintiff chiropractors also moved for a preliminary injunction. Following a hearing, the district court declared the plaintiffs' motion moot as to 201 KAR § 21:015 because the regulation had been rescinded during the pendency of the current action. The court further determined that the plaintiff chiropractors did not have a strong likelihood of success on the merits of their claims and denied their request for a preliminary injunction.

On appeal, the plaintiff chiropractors argue that the district court applied the improper level of scrutiny to determine whether there was a substantial likelihood of success on the merits. In any event, the plaintiffs assert that the "New Solicitation Statute" cannot be upheld on the basis of the evidence submitted by the state, which was irrelevant and incorrect. Because the plaintiffs do not dispute the denial of their injunction as moot with respect to now-rescinded 201 KAR § 21:015 or challenge the district court's findings with respect to their equal-protection and prior-restraint claims, we consider those claims to be abandoned. *See United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006).

> In considering whether preliminary injunctive relief should be granted, a court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to

> others; and (4) whether the public interest would be served by issuance of the injunction."

Jolivette v. Husted, 694 F.3d 760, 765 (6th Cir. 2012) (quoting *Chabad of S. Ohio v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004)). In First Amendment cases, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits." *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (internal citation omitted). Accordingly, in these cases, we review de novo the district court's legal conclusions—including its First Amendment ruling—and review its ultimate decision whether to grant the preliminary injunction for abuse of discretion. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 867 (2005).

The plaintiff chiropractors first assert that the district court failed to apply the correct legal standard to evaluate their First Amendment challenge. Specifically, the plaintiffs argue that the "New Solicitation Statute" is a content-based restriction that requires strict scrutiny review and not intermediate review as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and applied by the district court. Simply because the statute regulates commercial speech, they argue, does not change this result. In fact, they assert that the decisions of the Supreme Court in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), clarified that the *Central Hudson* intermediate scrutiny standard does not apply if the challenged statute is a content-based restriction on commercial speech.

Despite the plaintiff chiropractors' arguments, the district court did not err in applying the *Central Hudson* intermediate scrutiny review to the "New Solicitation Statute." The *Sorrell* Court did not hold that strict scrutiny applied to content-based regulation of commercial speech, but specifically applied the test outlined in *Central Hudson*, stating: "[t]o sustain the targeted, content-based burden [the challenged statute] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 131 S. Ct. at 2667-68 (citing *Bd. of Trs. v. Fox*, 492 U.S. 469, 480-481 (1989), and *Cent. Hudson*, 447 U.S. at 566). In fact, the Supreme Court has rejected the use of strict scrutiny in challenges to commercial speech regulations, noting that there was "no need to break new ground. *Central Hudson*, as applied . . . provides an adequate basis for decision." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001). *Reed* also did not break that "new ground," failing to even cite *Central Hudson* in the majority opinion. Because the district court correctly determined that the "New Solicitation Statute" regulates commercial speech, it did not err in analyzing the plaintiffs' First Amendment claim under the *Central Hudson* standard.

Pursuant to that standard, a court first determines whether the speech concerned is entitled to First Amendment protection. *Cent. Hudson*, 447 U.S. at 566. If so, the court then must determine: (1) whether the asserted governmental interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is more

extensive than necessary to serve the asserted interest. *Id*.

The district court did not err in determining that the plaintiff chiropractors did not have a substantial likelihood of success on the merits of their First Amendment challenge to the "New Solicitation Statute." First, the solicitations that the plaintiff chiropractors seek to send motor-vehicle-accident victims are entitled to First Amendment protection. *See Bates v. State Bar of Ariz*., 433 U.S. 350, 363 (1977). Nevertheless, the state also has a substantial interest in preventing fraud in general, *Dent v. West Virginia*, 129 U.S. 114, 122 (1889), and the abuse of the Personal Injury Protection ("PIP") benefits system in particular. In this case, the state presented sufficient data for the district court to determine that the "New Solicitation Statute" advances the state's interest, including congressional committee hearing testimony, complaints and orders in which medical licensing boards had sanctioned their members for the behavior that the "New Solicitation Statute" is designed to prevent, and a report from the National Insurance Crime Bureau which tracked "questionable claim" referrals and which indicated that PIP claims ranked in the top three loss types for 2012-2014 in Kentucky. Finally, the "New Solicitation Statute" is not more extensive than necessary to achieve its interest. The statute prevents healthcare providers from soliciting motor-vehicle-accident victims "for the provision of reparation benefits," KRS § 367.4082(1), but does not restrict the victims of motor vehicle accidents from contacting a provider to seek treatment during the thirty days following an accident. Also, the statute provides an

exemption for providers and patients who have a pre-existing relationship. *See* KRS § 367.4081(4)(b)(3).

Because the district court did not improperly apply the law, use an erroneous legal standard, or rely upon clearly erroneous findings of fact, it did not abuse its discretion in denying the plaintiff chiropractors' motion for a preliminary injunction. The district court's interlocutory order denying the motion is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:15-CV-00556-GNS

[Filed November 30, 2015]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, et al.
PLAINTIFFS

v.

JACK CONWAY, et al.
DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Plaintiffs' Motion for Injunctive Relief Pending Appeal. (Pls.' Mot. for Injunctive Relief Pending Appeal, DN 34 [hereinafter Pls.' Mot. for Injunctive Relief]). The motion is fully briefed and ripe for adjudication. For the reasons stated below, the Court **DENIES** Plaintiffs' motion.

I. DISCUSSION

The facts of this case are discussed at length in the Court's Memorandum Opinion and Order of September 3, 2015, and there is no reason to repeat them at length

here. In short, Plaintiffs filed this action on June 19, 2015, seeking a declaratory judgment that 201 KAR Section 21:015 and KRS 367.4081-83 are unconstitutional and a preliminary injunction barring the enforcement of same. (Compl. 18, DN 1; Mem. in Supp. of Pls.' Mot. for Prelim. Inj. & Req. for an Expedited Hr'g Date & Briefing Schedule 1, DN 3-1).

On September 3, 2015, this Court entered its Memorandum Opinion and Order denying Plaintiffs' motion for a preliminary injunction on the basis that Plaintiffs did not show they were likely to succeed on the merits. (Mem. Op. & Order 24, DN 32). Plaintiffs have appealed that Memorandum Opinion and Order (Notice of Appeal, DN 33), and now seek injunctive relief pending the outcome of their appeal. (Pls.' Mot. for Injunctive Relief).

Federal Rule of Civil Procedure 62(c) allows the Court to "suspend, modify, restore, or grant an injunction" while an appeal of an interlocutory order is pending. Fed. R. Civ. P. 62(c). The consideration for such an injunction is the same as that for a preliminary injunction. *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). Those factors are: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005)).

Plaintiffs make no new arguments in their motion for an injunction pending appeal. The Court has already determined that the arguments upon which Plaintiffs rely do not establish that Plaintiffs have a strong likelihood of success on the merits. As Plaintiffs' arguments have not changed, neither has the Court's analysis of the arguments. Accordingly, the Court must deny Plaintiffs' motion.

II. CONCLUSION

For the reasons detailed above, none of Plaintiffs' claims are likely to establish Plaintiffs' entitlement to the relief requested. Because Plaintiffs have not shown that they are likely to succeed on the merits of this case, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Injunctive Relief Pending Appeal (DN 34) is **DENIED**.

Greg N. Stivers, Judge
United States District Court
November 30, 2015

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:15-CV-00556-GNS

[Filed October 1, 2015]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, et al. PLAINTIFFS	)
v.	)
JACK CONWAY, et al. DEFENDANTS	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Plaintiffs' Motion for Preliminary Injunction and Request for an Expedited Hearing Date and Briefing Schedule. (Pls.' Mot. for Prelim. Inj. & Req. for an Expedited Hr'g Date & Briefing Schedule, DN 3 [hereinafter Pls.' Mot. for Prelim. Inj.]). The motion is fully briefed and ripe for adjudication. For the reasons stated below, the Court **DENIES** Plaintiffs' motion.

I. STATEMENT OF FACTS AND CLAIMS

In 2006, the Board of Chiropractic Examiners amended 201 KAR Section 21:015 ("the Solicitation

Regulation"). (Defs.' Resp. to Pls.' Mot. for Prelim. Inj. 2, DN 24). It provides, *inter alia*, that "[a] chiropractor shall not contact or cause an accident victim to be contacted by the chiropractor's employee, agent, contractor, telemarketer, or anyone acting in concert with the chiropractor." 201 KAR § 21:015(1)(6)(b).

On June 11, 2014, this Court held KRS 367.409(1) unconstitutional. *State Farm Mut. Auto. Ins. Co. v. Conway*, No. 3:13-CV-00229-CRS, 2014 WL 2618579, at *14 (W.D. Ky. June 12, 2014). KRS 367.409(1) (the "Prior Solicitation Statute") provided that for a period of 30 days immediately "following a motor vehicle accident, a person . . . shall not directly solicit or knowingly permit another person to directly solicit an individual, or a relative of an individual, involved in a motor vehicle accident for the provision of any service related to a motor vehicle accident." KRS 367.409(1), *repealed by* Act of Mar. 23, 2015, 2015 Ky. Acts ch. 46, § 5. Exempt from this provision were "[c]ommunications by an insurer . . . or a [licensed] adjustor . . . or an employee of an insurer or agent." KRS 367.409(2)(b)(3).

In *State Farm*, the Court analyzed KRS 367.409(1) pursuant to *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which governs the validity of restrictions on commercial speech. *State Farm*, 2014 WL 2618579, at *4. The Court concluded that the Prior Solicitation Statute did not advance a substantial government interest, and even if it did, the Prior Solicitation Statute was both underinclusive and overinclusive. *Id.* at *5-13. The Court found that the Prior Solicitation

Statute was overinclusive because State Farm did not explain "why the state's interest in protecting the privacy and tranquility of motor vehicle accident victims cannot be equally well protected by the less burdensome alternative of a statute which prohibits solicitation only by those professions or license holders that have been shown to actually engage in abusive solicitation." *Id.* at *13.

The Court also found the Prior Solicitation Statute underinclusive because it exempted all insurers, not just the victim's own insurer, meaning that insurers of the other parties involved were "given free rein to initiate settlement discussions or other communications within the same thirty day period following an accident during which all other commercial entities are prohibited from doing so." *Id.* The Court further found the Prior Solicitation Statute underinclusive because "the statute exempt[ed] the . . . victim's own insurer despite the fact that it might be just as likely as an opposing party's insurer to engage in abusive solicitation." *Id.* The Court concluded that the Prior Solicitation Statute thus violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at *13-14.

On March 23, 2015, Governor Steve Beshear signed House Bill No. 153 (the "New Solicitation Statute") into law. (Pls.' Mot. for Prelim. Inj. Ex. C, DN 3-4). It is now codified at KRS 367.4081 to .4083. The New Solicitation Statute provides that for the 30 days immediately "following a motor vehicle accident, a healthcare provider or an intermediary, at the request or direction of a healthcare provider, shall not solicit or knowingly permit another individual to solicit a person

involved in a motor vehicle accident for the provision of reparation benefits, as defined by KRS 304.39-020(2)." KRS 367.4082(1). Unlike KRS 367.409, it contains no exemptions and does not mention insurers.

On June 19, 2015, Plaintiffs filed this action requesting a declaratory judgment that 201 KAR Section 21:015 and KRS 367.4081-83 are unconstitutional and seeking relief pursuant to 42 U.S.C. § 1983. (Compl. 18-20). On the same day, Plaintiffs moved for a preliminary injunction. (Pls.' Mot. for Prelim. Inj.). Defendant Attorney General Jack Conway ("Conway") has responded (Def.'s Resp. to Pls.' Mot. for Prelim. Inj., DN 25), as have the remaining Defendants (Defs.' Resp. to Pls.' Mot. for Prelim. Inj., DN 24). Plaintiffs have filed their reply, and the Court has held a hearing on the motion. (Pls.' Joint Reply in Supp. of Mot. for Prelim. Inj., DN 28 [hereinafter Pls.' Reply]; Mem. of Hr'g, DN 31). The motion is thus ripe for review.

II. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy that is generally used to preserve the status quo between the parties pending a final decision of the merits of the action." *IP, LLC v. Interstate Vape, Inc.*, No. 1:14CV-00133-JHM, 2014 WL 5791353, at *2 (W.D. Ky. Nov. 6, 2014). In determining whether to issue a preliminary injunction, the Court will consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the

injunction." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005)). The Court analyzes the same four factors when determining whether to issue a temporary restraining order. *See Ne. Ohio Coal. for Homeless & Serv. Emp. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). The Court will make specific findings concerning each factor, "unless fewer are dispositive of the issue." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985) (citing *United States v. Sch. Dist. of Ferndale*, 577 F.2d 1339, 1352 (6th Cir. 1978)).

III. DISCUSSION

A. The Solicitation Regulation

During the hearing in this matter on September 1, 2015, counsel for Defendants other than Conway reported to the Court that the Board of Chiropractic Examiners had voted to rescind the Solicitation Regulation. Accordingly, Plaintiffs' motion is moot as to the Solicitation Regulation.

B. The New Solicitation Statute

The Court need only address one factor in order to resolve this motion: whether Plaintiffs have a strong likelihood of success on the merits. Plaintiffs argue that there is a strong likelihood that they will prevail on the merits because: (1) the New Solicitation Statute is subject to heightened scrutiny; (2) the New Solicitation Statute cannot be upheld under the intermediate level of scrutiny dictated by *Central Hudson* because it prohibits lawful and non-misleading activity, does not address a substantial governmental interest, the stated

government interest is not directly advanced by the New Solicitation Statute, and it is more extensive than necessary; (3) the New Solicitation Statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and equal protection provisions of the Kentucky Constitution; and (4) the New Solicitation Statute is a prior restraint. (Pls.' Mot. for Prelim. Inj. 20-37).

1. *Standard of Review*

Plaintiffs argue that, because it is a content-based restriction on commercial speech, the New Solicitation Statute is subject to heightened scrutiny. (Pls.' Mot. for Prelim. Inj. 20-23). The Court found in *State Farm* that the Prior Solicitation Statute regulated commercial speech, and was thus subject to *Central Hudson*'s intermediate scrutiny standard. *State Farm*, No. 3:13-CV-00229-CRS, 2014 WL 2618579, at *3-4. This Court is persuaded by the analysis provided in *State Farm*, but nonetheless revisits Plaintiffs' argument regarding the level of scrutiny applicable to the New Solicitation Statute.

In support of their argument that heightened scrutiny applies, Plaintiffs first cite *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1331 (M.D. Fla. Nov. 15, 2011). *Occupy Fort Myers* correctly recites the "law with respect to content based restrictions on commercial speech." (Pls.' Mot. for Prelim. Inj. 20). To that extent, it is on point. The factual scenario in that case, however, revolved around ordinances establishing a Special Events Advisory Board, requiring a permit prior to holding a parade or procession on any city street, setting business hours for parks, and prohibiting living in a movable structure in a park

beyond closing hours, and prohibiting loitering or boisterousness in public parks. *Occupy Fort Myers*, 882 F. Supp. 2d at 1331-38. The ordinances in *Occupy Fort Myers* bear no relation to the substance of the New Solicitation Statute, and thus the case is inapplicable except as noted above.

Plaintiffs primarily rely on two other cases to establish the need for heightened scrutiny, the first of which is *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). In *Sorrell*, the Vermont legislature passed a law that "prohibit[ed] pharmacies, health insurers, and similar entities from selling prescriber-identifying information,"[1] except to certain groups such as "private or academic researchers," but not "to pharmaceutical marketers." *Sorrell*, 131 S. Ct. at 2662. It also prohibited the same entities from "disclosing or otherwise allowing prescriber-identifying information to be used for marketing. And it bar[red] pharmaceutical manufacturers and detailers from using the information for marketing." *Id.* at 2662-63.

The Supreme Court found that the law was content-based as it disfavored marketing, and it also was speaker-based as it disfavored pharmaceutical manufacturers. *Id.* at 2663. The result of the law was that it left "detailers no means of purchasing, acquiring, or using prescriber-identifying information."

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[1] Prescriber-identifying information is described in *Sorrell* as "[k]knowledge of a physician's prescription practices," and it is useful to pharmaceutical companies in order to send "detailers," whose job it is to bring drug samples to physicians armed with the knowledge of whether or not the physician is likely to be interested in prescribing the medicine and "how best to present a particular sales message." *Sorrell*, 131 S. Ct. at 2659-60.

Id. The state argued that, content- and speaker-based restrictions notwithstanding, the law was "a mere commercial regulation," and therefore did not warrant heightened scrutiny. *Id.* at 2664.

"[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* The Supreme Court held, however, that Vermont's law "impose[d] more than an incidental burden on protected expression." *Id.* at 2665. The Supreme Court did *not* apply a form of heightened scrutiny to Vermont's law. Instead, it held that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. For the same reason there is no need to determine whether all speech hampered by [the law] is commercial . . . ." *Id.* at 2667 (citations omitted). The Supreme Court assumed that the statutory restrictions constrained commercial speech, and struck down the law as unconstitutional because it did not meet the necessary *Central Hudson* factors. *Id.* at 2667-72.

Of interest in this matter, the Court stated that "[i]t is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech." *Id.* at 2672. The Court also noted that it has previously held that "a state may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992)). It found fault with Vermont because it did "not show[ ] that its law ha[d] a neutral justification," and that "[t]he State's interest in burdening the speech of detailers instead

turn[ed] on nothing more than a difference of opinion." *Id.*

The distinctions between the New Solicitation Statute and the Vermont law at issue in *Sorrell* are legion. First, the Vermont law resulted in the complete denial of certain information, *i.e.*, prescriber-identifying information, to of a specific group of people, *i.e.*, pharmaceutical manufacturers and their detailers. The New Solicitation Statute, by contrast, both does not deny any group of people information and does not contain a complete denial of any kind. Healthcare providers are still able to acquire information that allows them to identify individuals who have been involved in motor vehicle accidents.

Second, the Vermont law constituted a flat, eternal ban on pharmaceutical manufacturer and detailers' access to prescriber-identifying information. The New Solicitation Statute limits solicitation for a period of only 30 days from the date of the injury. Healthcare providers may contact motor vehicle accident victims after 30 days and invite them to their clinics for treatment courtesy of PIP benefits.

Third, the Vermont law had no neutral justification. By contrast the New Solicitation Statute is designed, according to its legislative history, to prevent healthcare providers from fraudulently "taking up money that could go to things that the insured needs a lot more than . . . someone trying to get them to run up a lot of medical bills." (Pls.' Mot. for Prelim. Inj. Ex. E at 4). Testimony was given indicating that motor vehicle accident victims were being solicited at the scene of the accident by runners or intermediaries for healthcare providers seeking "to snag those PIP dollars

before somebody else gets them." (Pls.' Mot. for Prelim. Inj. Ex. E at 9). The General Assembly's distinction between healthcare providers and insurance providers was based upon reported abuses by healthcare providers, not insurance companies.[2] (Pls.' Mot. for Prelim Inj. 26-28).

Finally, the New Solicitation Statute does not bar all access as the Vermont law did. The Vermont law prohibited all use of prescriber-identifying information for marketing purposes. The New Solicitation Statute does not bar all contact between healthcare providers and motor vehicle accident victims; rather, it bars only solicitation, which is narrowly defined to require "anticipation of financial gain or remuneration for the communication itself or for prospective charges for healthcare services." KRS 367.4081(4)(a). Northing in the statute would affect a healthcare provider's communication with an accident victim for the purpose of explaining PIP benefits. Moreover, advertising to the general public is excepted from the definition of solicitation, as is non-targeted telemarketing and contact between healthcare providers and individuals "with whom the healthcare provider had a preexisting provider-patient relationship." KRS 367.4081(4)(b). The New Solicitation Statute is thus far more narrowly tailored than the Vermont law discussed in *Sorrell*.

In sum, the New Solicitation Statute does not approach the level of restraint compared to the law struck down in *Sorrell*. The state's interest in the

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[2] Abusive settlement practices by insurance companies are proscribed by Kentucky's Unfair Claims Settlement Practices Act. *See* KRS 304.12-010 *et seq.*

burden imposed by the New Solicitation Statute also does not turn on a mere "difference of opinion." *Sorrell*, 131 S. Ct. at 2672 (citations omitted). As the Supreme Court reiterated in *Sorrell*, a state may choose to regulate one industry but not others "because the risk of fraud . . . is in its view greater there." *Id.* (internal quotation marks omitted) (quoting *R.A.V.*, 505 U.S. at 388-89). Kentucky views the risk of PIP fraud to be greater among healthcare providers than other groups, as evidenced by the legislative history, and is thus permitted to regulate healthcare providers as a group with regard to PIP benefits. The differences between the New Solicitation Statute and the law at issue in *Sorrell* render that decision inapplicable to the facts of this case.

The second case cited by Plaintiffs in support of a heightened standard of scrutiny is *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which addressed a code governing the placement of signs in the town of Gilbert, Arizona. *Id.* at 2224. The Court in *Reed* clarified that the "heightened scrutiny" applied to content-based speech is strict scrutiny. *Id.* at 2227. This is not groundbreaking doctrine. Clearly, the issue here hinges upon the categorization of the affected speech as content-based versus commercial. Conway argues that the speech burdened by the New Solicitation Statute is commercial speech, and therefore subject to analysis pursuant to the four-factor test enunciated in *Central Hudson*. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 6-8). It is extremely persuasive that this Court found in *State Farm* that the Prior Solicitation Statute burdened commercial speech and applied *Central Hudson*. *State Farm*, 2014 WL 2618579, at *4. For much the same reasons, this Court finds that the

speech burdened by the New Solicitation Statute is likewise commercial speech.

"[I]n determining whether speech may be characterized as commercial, the Supreme Court has considered the following factors: (1) whether the speech concerns a proposal to engage in commercial transactions; (2) whether the speech references a specific product; and (3) whether the speaker has an economic motivation." *Id.* at *4 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)). The New Solicitation Statute bars solicitation, which consists of communications made in "anticipation of financial gain or remuneration . . . ." KRS 367.4081(4)(a). As with the Prior Solicitation Statute, "[b]ased on this definition, the vast majority of the speech covered by the statute will consist of, or at least ultimately result in, proposals to engage in commercial transactions." *State Farm*, 2014 WL 2618579, at *4. As with the Prior Solicitation Statute, the New Solicitation Statute does not reference a specific product, but it does apply to a particular service, *i.e.*, medical care "for the provision of reparation benefits," "and therefore is likewise inherently restricted to commercial activity." KRS 367.4082(1); *State Farm*, 2014 WL 2618579, at *4. Finally, it is clear from the definition of "solicit" that the speaker must have an economic motivation in order to solicit. *See* KRS 367.4081(4)(a). Accordingly, as with the Prior Solicitation Statute, "[b]ecause all three factors indicate that [the New Solicitation Statute] extends only to commercial speech, the Court concludes that *Central Hudson*'s intermediate scrutiny standard provides the correct framework for analyzing the constitutionality of [the New Solicitation Statute]." *State Farm*, 2014 WL 2618579, at *4. Because the New

Solicitation Statute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite.

2. Central Hudson *Analysis*

Having determined that intermediate scrutiny applies, the New Solicitation Statute will be analyzed per *Central Hudson*'s four-factor test for regulation of commercial speech. "At the outset, [a court] must determine whether the expression is protected by the First Amendment." *Central Hudson*, 447 U.S. at 566. This requires, at least, that the speech "concern lawful activity and not be misleading." *Id.* "Next, [a court] ask[s] whether the asserted governmental interest is substantial." *Id.* If both of those factors are met, then a court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

a. Constitutionally Protected

Conway does not argue that the solicitations that Plaintiffs seek to send to motor vehicle accident victims are not protected the First Amendment. Accordingly, the Court assumes that the speech burdened by the New Solicitation Statute is constitutionally protected.

b. Substantial Governmental Interest

Plaintiffs argue that the governmental interest that the New Solicitation Statute seeks to advance is "identical to the purpose of the prior Solicitation Statute." (Pls.' Mot. for Prelim. Inj. 25). Plaintiffs believe that the governmental interest intended to be advanced by the New Solicitation Statute is not the stated purpose of limiting PIP fraud, but rather it is "to

rig the PIP system in the insurance industry's favor." (Pls.' Mot. for Prelim. Inj. 29). Conway points to the transcript of the House Labor and Industry Committee Hearing on February 23, 2015, in order to show that the substantial governmental interests advanced are "protecting the public from personal injury protection ("PIP") fraud and protecting the privacy interests of accident victims." (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 8).

The testimony at the February 23, 2015, hearing clearly reflects that the interests the New Solicitation Statute was designed to advance were those stated by Conway. Representative Gooch testified:

> And, so what we've done is, now we have a situation where there are some other providers that are soliciting people, they are actually using runners to actually, you know, if somebody has an accident they will have these people contact folks and then they, they are trying to work around the system that way. . . . [W]hat happens is when these people fraudulently, you know, abuse [PIP benefits], they are taking up money that could go to things that the insured needs a lot more than, you know, someone trying to get them to run up a lot of medical bills.

(Pls.' Mot. for Prelim. Inj. Ex. E at 3-4). While not strictly indicative of the intent of the legislators, Mr. Bush, a practicing attorney in Kentucky, also addressed the Committee:

> I practice in this area every day. Every day. And I see abuses of the [PIP] system. . . . I do see appropriate, you know, expenses and treatment

> that are provided and I see payments being made for those. But I see abuses of the system where these limited PIP medical benefits that are available to those involved in accidents are consumed by those who shouldn't be, who are over-charging, who are providing services, sometimes they charge for services that they've never provided. All that kind of thing. And all of this is exacerbated by the solicitation that goes on sometimes at accident scenes, sometimes immediately after an accident when people are most vulnerable, and they get solicited by runners or by intermediaries as the act defines them on behalf of those who want to snag those PIP dollars before somebody else gets them.

(Pls.' Mot. for Prelim. Inj. Ex. E. at 8-9). Finally, Representative Greer testified briefly in response to Plaintiffs' counsel's testimony in opposition:

> Mr. Cox, I do dispute one thing you said and for the record I want to speak up. I've been in the insurance industry for 25 years. We encourage our adjusters to get in touch with a person that's been in an accident as quickly as possible. Now if an offer is made then that's up to the person. They're not out to cheat anybody. And I want to make sure you understand that because I've seen many an accident and many a vic- many an injured person, but the insurance industry is doing their job when they get in touch with a person right away after an accident.

(Pls.' Mot. for Prelim. Inj. Ex. E at 10). Insurance and insurance companies were not addressed by the legislators at all until Plaintiffs' counsel raised the

issue in his testimony. (Pls.' Mot. for Prelim. Inj. Ex. E. at 5-7). It is clear from the legislative record that the concerns intended to be addressed by the statute were abusive practices by healthcare provides, not insurance companies. The Court finds, therefore, that the interests that the state seeks to advance through the New Solicitation Statute is to curb the abuse of the PIP system by healthcare providers and protect the privacy of motor vehicle accident victims. *See* KRS 304.12-010 *et seq*.

Rejecting the premise that the government interests sought to be advanced are as stated, Plaintiffs did not directly address whether such interests are substantial. Conway argues that "[t]he interest[ ] of preventing fraud . . . [has] been repeatedly recognized as [a] substantial state interest[]." (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 10). States have a compelling "interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978) (internal quotation marks omitted). The state also "bears a special responsibility for maintaining standards among members of the licensed professions," *Id.* at 460, and "has a substantial interest in 'preventing overreaching by chiropractors and their agents and regulating the profession.'" *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir. 2004) (quoting *Silverman v. Summers*, 28 F. App'x 370, 374 (6th Cir. 2001)). *See also Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("Likewise, the protection of potential clients' privacy is a substantial state interest. Even solicitation that is neither fraudulent nor deceptive may be pressed

with such frequency or vehemence as to intimidate, vex, or harass the recipient.").

In this case, the Commonwealth of Kentucky has a substantial interest in regulating licensed healthcare providers, including chiropractors, and ensuring that they do not overreach and abuse the PIP system. It also has a substantial interest in protecting the privacy of motor vehicle accident victims from intimidating, vexatious, or harassing solicitations.

c. Directly Advances

Plaintiffs again argue from the premise that the Kentucky legislature's interest was to allow insurance providers first crack at PIP benefits before healthcare providers, and thus do not address whether the New Solicitation Statute directly advances the substantial government interests that this Court has found. Conway argues that the New Solicitation Statute addresses a real harm, and bolsters his argument with several examples of the harm the New Solicitation Statute seeks to address. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 11-14).

"[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. The link between the harm and the restriction is "insufficient if it is irrational, contrary to specific data, or rooted in speculation or conjecture." *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 589 (4th Cir. 2010) (citation omitted).

Conway attached several complaints and orders in which the Kentucky Board of Chiropractic Examiners sanctioned member chiropractors for precisely the behavior cited by legislators when discussing the New Solicitation Statute. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3). One complaint involved a patient named Sandra Nelson ("Nelson") who was solicited within days of her accident by either one of the plaintiffs or someone acting on its behalf solicited her and told her she "needed" to get evaluated by E-town Injury Center, Inc. ("E-town Injury Center")—one of the Plaintiffs in the case at bar. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 2). Nelson was also told that an attorney would be provided to sue the tortfeasor. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 2). She declined, but was called again a week later and this time she acquiesced. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 2). E-town Injury Center treated Nelson for "a month and a half," at which point she began seeing a provider closer to her home. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 2). She then learned that E-town Injury Center had charged her twice as much as her subsequent provider, and that while her sons were examined at E-town Injury Center and charged "an outrageous amount," x-rays were never taken. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 2). The Kentucky Board of Chiropractic Examiners sanctioned the owner of E-town Injury Center for this behavior with a $1,000.00 fine and a reprimand. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 3-8).

The Kentucky Board of Chiropractic Examiners also sanctioned Michael Richter ("Richter") for three instances of improper telemarketing with much the

same approach related by Nelson. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 9-14). Richter was also fined and reprimanded. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 12). One of the chiropractors employed at E-town Injury Center—John B. Cole—was similarly fined and sanctioned for one of the instances of telemarketing for which Richter was fined and reprimanded. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 16-22).

Amy Sims, an ex-employee of Crash Cash (for whom Plaintiffs Robert Kleinfeld and David Romano worked at the time) detailed a scheme in which the wife of the owner of Crash Cash masqueraded as an online journalist in order to receive police reports. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 24). These reports were then given to "representatives" who were paid according to the number of patients they convinced to seek treatment at the clinic. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 24). Some patients were seen for treatment only, and others were given loans as well as treatment. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 24).

In addition, attorney T.J. Smith ("Smith") filed a complaint with the Kentucky Board of Chiropractic Examiners after learning that a client whom he represented had been contacted by Plaintiff Commerce Chiropractic and Rehab, PSC, ("Commerce Chiropractic") and told that Smith gave them her name and number. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 29-30). Smith did not give Commerce Chiropractic his client's name and number, and notes that, because she was not injured, had she chosen to seek treatment it could have constituted insurance

fraud. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 29-30). Conway's exhibit also includes orders from the Kentucky Board of Physical Therapy reflecting that at least one member has engaged in the same kind of pay-for-patients and other unethical behavior. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3 at 35-53). These examples show that the type of behavior that the New Solicitation Statute seeks to restrict—invasions of the privacy of individuals recently involved in motor vehicle accidents—is a real harm. There is no evidence that healthcare providers are contacting these individuals for any reason other than to solicit them.[3] By restricting healthcare providers from soliciting such individuals for 30 days, Kentucky is directly advancing its interest in protecting the privacy of such individuals.

Conway also attached a report from the National Insurance Crime Bureau ("NICB") concerning Questionable Claim referrals ("QCs") in Kentucky for

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[3] Plaintiff Chiropractors United for Research and Education, LLC ("CURE") states that its purpose is to "educate [recent accident victims] within the first 30 days after an accident as to their rights to PIP benefits for any medical needs they have as a result of the accident." (Pls.' Mot. for Prelim. Inj. 13-14). While CURE's example letter is arguably educational in part, the final paragraph contains a solicitation. (Compl. Ex. D ("Because of PIP, many medical providers, *including chiropractors*, are able to treat your injuries without you incurring any out of pocket costs or settling any potential claim. Please consult an attorney for legal advice *or your local healthcare provider, including any of CURE's member chiropractors on the enclosed list*, for diagnosis or treatment." (emphasis added))). Thus, no evidence has been provided that Plaintiffs or healthcare providers in general are contacting victims of recent motor vehicle accidents for any other purpose than solicitation.

the years 2012-2014. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2, DN 25-2). Plaintiffs point out that the report shows that such claims have decreased from 2012-2014. (Pls.' Reply 11-12).[4] This is true even for the subcategory of "personal auto." (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2 at 4). In the relevant category of "personal auto," 1,241 QCs were received in 2012 contrasted with 1,079 QCs received in 2014, which represents a decrease of roughly 13%. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2 at 4). The next most populous category, however, is that of "personal property – homeowners," in with the NCIB received a total of 141 claims in 2014. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2 at 4). Personal auto QCs eclipse the next most populous group of QCs by almost eight times. PIP claims ranked in the top three loss types for all three years analyzed. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2 at 5). "Excessive treatment" was the top referral reason for QCs in 2014. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 2 at 7). These statistics certainly support the notion that abuse of PIP benefits is a real, not imagined, problem.

Finally, Conway includes an article that discusses the NCIB report and explains how PIP fraud occurs. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 1).

> Unscrupulous providers learn of an accident and contact people involved, who may or may not be truly injured, with a promise of a cash payment. This is then followed by a series of treatments

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[4] Plaintiffs do not address the possibility that QC claims decreased from 2012 levels because of the enactment of KRS 367.409.

> until [PIP] benefits, usually $10,000, are used up, at which time the patient is cut loose.

(Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 1 at 2 (internal quotation marks omitted)). The article explains that "[f]requently the care is inadequate or may be totally unrelated to the injuries sustained, and patients who truly are injured may be unable to get treatment later because their PIP benefits would have already been exhausted." (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 1 at 2). Such fraud not only increases automobile insurance premiums for other Kentucky residents (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. Ex. 1 at 2), it also defeats the purpose for which PIP benefits were established.

These sources show that the type of behavior that the New Solicitation Statute seeks to restrict—abuse of PIP benefits—is a real harm. The New Solicitation Statute directly advances the substantial governmental interest of curbing abuse of the PIP system by healthcare providers by disallowing healthcare providers to solicit utilization of PIP benefits, potentially fraudulently, for 30 days following an accident. Unscrupulous healthcare providers are more easily able to convince or coerce motor vehicle accident victims shortly after the accident when they are more likely to be injured, in need of money, and overwhelmed. Thirty days allows time for an individual to take full stock of his or her injuries, research available options, and choose the best course of treatment and provider. By restricting healthcare providers from soliciting such individuals for 30 days, Kentucky is directly advancing its interest in curbing abuse of the PIP system.

d. No More Extensive than Necessary

Plaintiffs argue that the New Solicitation Statute is more extensive than necessary, and that the Kentucky General Assembly could have more closely tailored the New Solicitation Statute around this Court's comment in *State Farm* that:

> State Farm has failed to explain why the state's interest in protecting the privacy and tranquility of motor vehicle accident victims cannot be equally well protected by the less burdensome alternative of a statute which prohibits solicitation only by those professions or license holders that have been shown to actually engage in abusive solicitation.

State Farm, 2014 WL 2618579, at *13; (Pls.' Mot. for Prelim. Inj. 30). The New Solicitation Statute has done exactly that: it has identified certain professions and license holders that have been shown to actually engage in abusive solicitation.[5] KRS 367.4081(1). The New Solicitation Statute thus addresses the problem of overinclusiveness that plagued the Prior Solicitation Statute.

Plaintiffs also argue that banning all solicitation, rather than simply abusive solicitation, renders the New Solicitation Statute overinclusive. (Pls.' Mot. for Prelim. Inj. 30-31). Plaintiffs, in essence, would require the Commonwealth of Kentucky to define what level and kind of solicitation is abusive for every citizen.

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[5] Defendants have cited to complaints of abuses by other professions, not just chiropractors. (Defs.' Resp. to Pls.' Mot. for Prelim. Inj. Ex. 3, DN 25-3).

Whether or not a solicitation rises to the level of abuse is a subjective inquiry, and any attempt to define it for all would necessarily lead to some definition that would result in a certain amount of citizens suffering from abusive solicitation by healthcare providers. Simply put, the ban on all solicitation as opposed to abusive solicitation is not overinclusive because to provide otherwise would be *underinclusive* by allowing solicitation that would be intrusive to some citizens.

In addition, the standard for this factor is not "the least restrictive means"; rather, it is whether or not "the speech restriction at issue is 'more extensive than is necessary to serve [the asserted] interests.'" *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (alteration in original) (quoting *Thompson v. W. States Med. Ctr.*, 525 U.S. 357, 367 (2002)). "[T]here must be a 'reasonable fit between the legislature's ends and the means chosen to accomplish those ends . . . ." *Id.* (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001)).

Applying this standard, Conway argues that the New Solicitation Statute is a "reasonable fit" because it regulates only the healthcare providers, *not* the motor vehicle accident victims who are free to seek out such providers during the 30 day period. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 15). Conway also argues that the new statute's exemption of preexisting provider-patient relationships also creates a reasonable fit between statute and goal. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 15). Conway's most persuasive argument, however, is the comparison between the New Solicitation Statute and other such regulations that have been upheld by other courts.

Conway first cites *Capobianco v. Summers*. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 16 (citing *Capobianco*, 377 F.3d 559)). *Capobianco* discussed a regulation propounded by the Tennessee Board of Chiropractic Examiners, the pertinent portion of which provided that "[t]elemarketing or telephonic solicitation by licensees, their employees, or agents to victims of accidents or disaster shall be considered unethical if carried out within thirty (30) days of the accident or disaster, and subject the licensee to disciplinary action . . . ." *Capobianco*, 377 F.3d at 561. The Sixth Circuit denied a preliminary injunction to Capobianco after finding that the regulation was constitutional under the *Central Hudson* test, and thus that Capobianco "ha[d] demonstrated little likelihood of succeeding on the merits . . . ." *Id.* at 564.

Conway then cites *McKinley v. Abbott*, 643 F.3d 403 (5th Cir. 2011). At issue in *McKinley* was a provision of the Texas Penal Code that regulated "solicitation of professional employment by an attorney, chiropractor, physician, surgeon, or private investigator licensed to practice in the state or any person licensed, certified, or registered by a health care regulatory agency of the state." *McKinley*, 643 F.3d at 404 (internal quotation marks and alterations omitted). It likewise contained a 30-day ban on a communication or solicitation concerning "an action for personal injury or wrongful death or otherwise relat[ing] to an accident or disaster involving the person to whom the communication or solicitation is provided or a relative of that person . . . ." *Id.* at 405. The Fifth Circuit found that the statute met the requirements of *Central Hudson* and was therefore constitutional. *Id.* at 409.

Finally, Conway cites *Walraven v. N.C. Board of Chiropractic Examiners*, 273 F. App'x 220 (4th Cir. 2008). The statutes at issue in *Walraven* "preclude[d] Walraven [a chiropractor] and/or anyone acting on her behalf from soliciting, either in person or telephonically, prospective patients who may need chiropractic treatment as a result of a motor vehicle accident for a period of 90 days following the accident." *Walraven*, 273 F. App'x at 222-23. The Fourth Circuit held that the statutes were constitutional pursuant to *Central Hudson*. *Id.* at 226.

From these cases, it is clear that the New Solicitation Statute is no more extensive than necessary, particularly in light of the fact that a time period 3 times longer than the 30-day ban dictated by the New Solicitation Statute has been upheld. Because the New Solicitation Statute meets all of the requirements of the *Central Hudson* test, Plaintiffs have not shown a substantial likelihood of success as to their First Amendment claim.

3. <u>Equal Protection</u>

Plaintiffs next argue that the New Solicitation Statute violates the Equal Protection Clause of the United States Constitution and the equal protection provisions of the Kentucky Constitution. (Pls.' Mot. for Prelim. Inj. 31-33). Section 1 of the Fourteenth Amendment to the United States Constitution states, in relevant part, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. In considering challenges pursuant to the Equal Protection Clause, the threshold question is which level of scrutiny to apply, as courts "apply different levels of scrutiny to

difference classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

"Because regulation of commercial speech is subject to intermediate scrutiny in a First Amendment challenge, it follows that equal protection claims involving commercial speech also are subject to the same level of review." *Chambers v. Stengel*, 256 F.3d 397, 401 (6th Cir. 2001) (citation omitted). *See also State Farm*, 2014 WL 2618579, at *14 (quoting *Chambers*, 256 F.3d at 401). The Court has already determined that the New Solicitation Statute passes intermediate scrutiny under *Central Hudson*. Accordingly, it also passes intermediate scrutiny for the purposes of the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution.

"The Kentucky Constitution's equal protection provisions, Sections 1, 2, and 3, are much more detailed and specific than the Equal Protection Clause of the United States Constitution . . . ." *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 418 (Ky. 2005) (citation omitted). Instead of rational basis review, Kentucky courts "have construed [the Kentucky] Constitution as requiring a 'reasonable basis' or a 'substantial and justifiable reason' for discriminatory legislation in the areas of social and economic policy." *Id.* The second categorization, "substantial and justifiable reason," correlates on its face with the *Central Hudson* test for commercial speech, which requires a substantial government interest and requires the law in question to directly advance the interest in a way that is no more extensive than necessary. *Central Hudson*, 447 U.S. at 566.

Other Kentucky case law suggests that "substantial and justifiable reason" may simply mean "rational basis." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 466 (Ky. 2011); *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 43 (Ky. 2009) ("We discern no *rational or reasonable basis* for such discrimination . . ." (emphasis added)). In any case, it appears that the standard under Kentucky's equal protection provisions is no higher than the intermediate scrutiny required by the United States Constitution. Accordingly, the New Solicitation Statute does not violate the equal protection granted by the United States or Kentucky Constitution.

4. Prior Restraint

Finally, Plaintiffs argue that the New Solicitation Statute is an unconstitutional prior restraint on speech. (Pls.' Mot. for Prelim. Inj. 33-37). "The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (citation omitted). "Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001) (citation omitted). "[T]raditional prior restraint principles do not fully apply to commercial speech . . . ." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 668 n.13 (1985).

The New Solicitation Statute constitutes a subsequent punishment rather than prior restraint, as

it does not require the advance approval of governmental officials. (Def.'s Resp. to Pls.' Mot. for Prelim. Inj. 21). "The First Amendment . . . accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976). It does not "prevent the subsequent punishment of [communications] as may be deemed contrary to the public welfare." *Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 714 (1931) (citations omitted).

The New Solicitation Statute is not a prior restraint. Healthcare providers are not required to petition a governmental official or group of governmental officials for permission to solicit motor vehicle accident victims. Instead, the New Solicitation Statute subsequently punishes those who engage in a particular form of a speech at a particular time. Accordingly, the New Solicitation Statute does not improperly impose any prior restraint on speech.

IV. CONCLUSION

For the reasons detailed above, none of Plaintiffs' claims are likely to establish Plaintiffs' entitlement to the relief requested. Because Plaintiffs have not shown that they are likely to succeed on the merits of this case, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Preliminary Injunction and Request for an Expedited Hearing Date and Briefing Schedule (DN 3) is **DENIED**.

Greg N. Stivers, Judge
United States District Court
October 1, 2015

cc: counsel of record

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-6103

[Filed September 12, 2016]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, ALSO KNOWN AS CURE, ET AL., Plaintiffs-Appellants,	)
v.	)
JACK CONWAY, ET AL., Defendants-Appellees.	)

O R D E R

BEFORE: NORRIS, COOK, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

Relevant Constitutional and Statutory Provisions

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or

hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

K. R. S. § 304.39-010 Policy and purpose.

The toll of about 20,000,000 motor vehicle accidents nationally and comparable experience in Kentucky upon the interests of victims, the public, policyholders and others require that improvements in the reparations provided for herein be adopted to effect the following purposes:

(1) To require owners, registrants and operators of motor vehicles in the Commonwealth to procure insurance covering basic reparation benefits and legal liability arising out of ownership, operation or use of such motor vehicles;

(2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created;

(3) To encourage prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation;

(4) To permit more liberal wage loss and medical benefits by allowing claims for intangible loss only when their determination is reasonable and appropriate;

(5) To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system;

(6) To help guarantee the continued availability of motor vehicle insurance at reasonable prices by a more efficient, economical and equitable system of motor vehicle accident reparations;

(7) To create an insurance system which can more adequately be regulated; and

(8) To correct the inadequacies of the present reparation system, recognizing that it was devised and our present Constitution adopted prior to the development of the internal combustion motor vehicle.

K. R. S. § 304.39-020 Definitions for subtitle.

As used in this subtitle:

(1) "Added reparation benefits" mean benefits provided by optional added reparation insurance.

(2) "Basic reparation benefits" mean benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle. The maximum amount of basic reparation benefits payable for all economic loss resulting from injury to any one (1) person as the result of one (1) accident shall be ten thousand dollars ($10,000), regardless of the number of persons entitled to such benefits or the number of providers of security obligated to pay such benefits. Basic reparation benefits consist of one (1) or more of the elements defined as "loss."

(3) "Basic reparation insured" means:

(a) A person identified by name as an insured in a contract of basic reparation insurance complying with this subtitle; and

(b) While residing in the same household with a named insured, the following persons not identified by name as an insured in any other contract of basic reparation insurance complying with this subtitle: a spouse or other relative of a

named insured; and a minor in the custody of a named insured or of a relative residing in the same household with the named insured if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

(4) "Injury" and "injury to person" mean bodily harm, sickness, disease, or death.

(5) "Loss" means accrued economic loss consisting only of medical expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss. Noneconomic detriment is not loss. However, economic loss is loss although caused by pain and suffering or physical impairment.

(a) "Medical expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, physical rehabilitation, rehabilitative occupational training, licensed ambulance services, and other remedial treatment and care. "Medical expense" may include non-medical remedial treatment rendered in accordance with a recognized religious method of healing. The term includes a total charge not in excess of one thousand dollars ($1,000) per person for expenses in any way related to funeral, cremation, and burial. It does not include that portion of a charge for a room in a

hospital, clinic, convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless intensive care is medically required. Medical expense shall include all healing arts professions licensed by the Commonwealth of Kentucky. There shall be a presumption that any medical bill submitted is reasonable.

(b) "Work loss" means loss of income from work the injured person would probably have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him.

(c) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

(d) "Survivor's economic loss" means loss after decedent's death of contributions of things of economic value to his survivors, not including services they would have received from the decedent if he had not

suffered the fatal injury, less expenses of the survivors avoided by reason of decedent's death.

(e) "Survivor's replacement services loss" means expenses reasonably incurred by survivors after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of the decedent's death and not subtracted in calculating survivor's economic loss.

(6) "Use of a motor vehicle" means any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include:

(a) Conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or

(b) Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

(7) "Motor vehicle" means any vehicle which transports persons or property upon the public highways of the Commonwealth, propelled by other than muscular power except road rollers, road graders, farm tractors, vehicles on which power shovels are mounted, such other

construction equipment customarily used only on the site of construction and which is not practical for the transportation of persons or property upon the highways, such vehicles as travel exclusively upon rails, and such vehicles as are propelled by electrical power obtained from overhead wires while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the said limits of any municipality. Motor vehicle shall not mean moped as defined in this section.

(8) "Moped" means either a motorized bicycle whose frame design may include one (1) or more horizontal crossbars supporting a fuel tank so long as it also has pedals, or a motorized bicycle with a step-through type frame which may or may not have pedals rated no more than two (2) brake horsepower, a cylinder capacity not exceeding fifty (50) cubic centimeters, an automatic transmission not requiring clutching or shifting by the operator after the drive system is engaged, and capable of a maximum speed of not more than thirty (30) miles per hour.

(9) "Public roadway" means a way open to the use of the public for purposes of motor vehicle travel.

(10) "Net loss" means loss less benefits or advantages, from sources other than basic and added reparation insurance, required to be subtracted from loss in calculating net loss.

(11) "Noneconomic detriment" means pain, suffering, inconvenience, physical impairment, and other nonpecuniary damages recoverable under the

tort law of this Commonwealth. The term does not include punitive or exemplary damages.

(12) "Owner" means a person, other than a lienholder or secured party, who owns or has title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another person. The term does not include a lessee under a lease not intended as security.

(13) "Reparation obligor" means an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this subtitle.

(14) "Survivor" means a person identified in KRS 411.130 as one entitled to receive benefits by reason of the death of another person.

(15) A "user" means a person who resides in a household in which any person owns or maintains a motor vehicle.

(16) "Maintaining a motor vehicle" means having legal custody, possession or responsibility for a motor vehicle by one other than an owner or operator.

(17) "Security" means any continuing undertaking complying with this subtitle, for payment of tort liabilities, basic reparation benefits, and all other obligations imposed by this subtitle.

K. R. S. § 304.39-030 Right to basic reparation benefits.

(1) If the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits, unless he has rejected the limitation upon his tort rights as provided in KRS 304.39-060(4).

(2) If the accident causing injury occurs outside this Commonwealth but within the United States, its territories and possessions, or Canada, the following persons and their survivors suffering loss from injury arising out of maintenance or use of a motor vehicle have a right to basic reparation benefits:

(a) Basic reparation insureds;

(b) The driver and other occupants of a secured vehicle who have not rejected the limitation upon their tort rights, other than:

1. A vehicle, except for a vehicle as provided in paragraph (c) of this subsection, which is regularly used in the course of the business of transporting persons or property and which is one (1) of five (5) or more vehicles under common ownership; or

2. A vehicle owned by an obligated government other than this Commonwealth, its political

subdivisions, municipal corporations, or public agencies; and

(c) The driver and other occupants of a bus, who have not rejected the limitation upon their tort rights, are Kentucky residents, and boarded a bus in Kentucky, if the bus is:

1. A secured vehicle;

2. Registered in Kentucky;

3. Regularly used in the course of the business of transporting persons or property; and

4. One (1) of five (5) or more vehicles under common ownership.

K. R. S. § 304.39-040 Obligation to pay basic reparation benefits -- Requirement of option for motorcycle coverage in liability contracts -- Exclusion of motorcycle operator or passenger who has not purchased optional coverage.

(1) Basic reparation benefits shall be paid without regard to fault.

(2) Basic reparation obligors and the assigned claims plan shall pay basic reparation benefits, under the terms and conditions stated in this subtitle, for loss from injury arising out of maintenance or use of a motor vehicle. This obligation exists without regard to immunity from liability or suit which might otherwise be applicable.

(3) Every insurer writing liability insurance coverage for motorcycles in this Commonwealth shall make available for purchase as a part of every policy of insurance covering the ownership, use, and operation of motorcycles the option of basic reparations benefits, added reparations benefits, uninsured motorist, and underinsured motorist coverages.

(4) Notwithstanding any other provisions of this subtitle, no operator or passenger on a motorcycle is entitled to basic reparation benefits from any source for injuries arising out of the maintenance or use of such a motorcycle unless such reparation benefits have been purchased as optional coverage for the motorcycle or by the individual so injured.

K. R. S. § 367.4081 Definitions for KRS 367.4081 to 367.4083.

As used in KRS 367.4081 to 367.4083:

(1) "Healthcare provider" means an individual licensed by any of the following:

(a) The Kentucky Board of Medical Licensure, pursuant to KRS Chapter 311;

(b) The Kentucky Board of Chiropractic Examiners, pursuant to KRS Chapter 312;

(c) The Kentucky Board of Nursing, pursuant to KRS Chapter 314;

(d) The Kentucky Board of Physical Therapy, pursuant to KRS Chapter 327;

(e) The Kentucky Board of Occupational Therapy, pursuant to KRS Chapter 319A; or

(f) The Kentucky Board for Massage Therapy, pursuant to KRS 309.350 to 309.364;

(2) "Intermediary" means an individual, including but not limited to a telemarketer, agent, employee, or contractor, who solicits a person, on behalf of a healthcare provider, for the provision of reparation benefits, as defined by KRS 304.39-020(2);

(3) "Person" means an individual who was involved in an automobile accident; and

(4) (a) "Solicit" means the initiation of communication with a person involved in a motor vehicle accident, including but not limited to any face-to-face contact with the person, in writing, electronically, or by any form of telephonic communication, in anticipation of financial gain or remuneration for the communication itself or for prospective charges for healthcare services.

(b) "Solicit" does not mean:

1. Advertising directed to the general public;

2. Telemarketing, which is;

   a. Taken from a general list of phone numbers;

   b. Not targeted at motor vehicle accident victims; and

   c. Not in violation of the state's prohibition on telephone solicitation under KRS 367.46951 to 367.46999 and 367.990; or

3. Contact between a healthcare provider and an individual with whom the healthcare provider had a preexisting provider-patient relationship.

K. R. S. § 367.4082 Prohibited solicitation of person involved in motor vehicle accident by a healthcare provider or intermediary.

(1) During the first thirty (30) days following a motor vehicle accident a healthcare provider or an intermediary, at the request or direction of a healthcare provider, shall not solicit or knowingly permit another individual to solicit a person involved in a motor vehicle accident for the provision of reparation benefits, as defined by KRS 304.39-020(2).

(2) A healthcare provider shall not:

(a) Pay or receive compensation for the referral or solicitation of reparation benefits for a person involved in a motor vehicle accident;

(b) Provide monetary compensation or other consideration to any individual for the purpose of inducing, enticing, or directing the provision of reparation benefits for a person involved in a motor vehicle accident; or

(c) Contact, request, or direct an intermediary to contact, for the purpose of solicitation, a person involved in a motor vehicle accident during the first thirty (30) days following a motor vehicle accident.

(3) A healthcare provider shall be responsible for the content of any contact, made at the direction or request of the healthcare provider, by an

intermediary with a person involved in a motor vehicle accident within the first thirty (30) days following the motor vehicle accident involving a person.

(4) Any healthcare provider having knowledge of facts, actual or direct, of a violation of this section by another healthcare provider, an intermediary, or on behalf of the healthcare provider within their scope of practice, shall report the suspected violation to the appropriate board listed in KRS 367.4081(1).

(5) An individual licensed or certified as a healthcare provider, who violates this section, shall be subject to the disciplinary process of the respective licensing or regulatory authority.

K. R. S. § 367.4083 Voiding of charges billed for health services rendered by health care provider in violation of KRS 367.4082.

(1) Any charges owed by, or on behalf of, a person involved in a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be void.

(2) Any charges billed and paid by, or on behalf of, a person of a motor vehicle accident for health services rendered by a healthcare provider to the person, in violation of KRS 367.4082, shall be returned to the reparations obligor or other payor. The healthcare provider who violates KRS 367.4082 shall not pursue collection from the person.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO: _____

[Filed June 8, 2015]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC ("CURE"), et al.	)
Plaintiffs,	)
v.	)
JACK CONWAY, et al.	)
Defendants	)

Electronically Filed

DECLARATION OF
ROBERT KLEINFELD, D.C.

1. I, Robert Kleinfeld, am a chiropractor licensed to practice in Kentucky by the Board of Chiropractic Examiners. I am the sole officer and shareholder of Plaintiff Louisville Sports and Injury Chiropractic & Rehab Center ("**LSIC**"), which has an office located at 4227 Poplar Level Road, Louisville, Kentucky 40213. I am over the age of 18 and qualified to give this Declaration based on my personal knowledge.

2. On March 23, 2015, the Governor of Kentucky signed into law HB 153 which prohibits truthful, non-misleading information from being conveyed to accident victims by medical providers during the first 30 days after an accident. However, the statute does not forbid all communications, it is only communications directed toward the provision of basic reparations benefits. This means that LSIC is prohibited from reaching out to accident victims during the first thirty (30) days after an accident to advise them of their rights to PIP benefits.

3. Treating recent accident victims is a significant and substantial source of business for LSIC. We have learned over the years that many recent accident victims in and around the area of our business have no knowledge of their rights to PIP. Many insurance companies in the days and even hours after an accident solicit these very people for settlements. I am aware of the Coomer decision by the Kentucky Supreme Court which is a classic example of the lengths insurance companies will go to obtain releases for all benefits, including PIP. In that case, the accident victim thought they had a bruised leg and within 24 hours of the accident reached a $500 settlement with Progressive. However, the injury turned out to be a broken bone, and because of the release there were no PIP benefits available to pay for additional treatment.

4. Recently, LSIC along with other chiropractic practices that advertise to recent accident victims formed CURE, LLC, which stands for "Chiropractors United for Research and Education." The purpose of CURE is to educate the general public regarding their

PIP benefits. CURE has begun sending the letter attached as **Attachment 1** to recent accident victims, whose names and contact information have been obtained through research regarding recent accidents.

5. Because CURE is comprised of medical providers who are the same medical providers identified in HB 153, and because the letter (**Attachment 1**) is sent to recent accident victims not only to advise them of their PIP rights but also with the belief they will seek treatment at one of the listed businesses, CURE's letter is banned by HB 153.

6. Over the last few years, many insurance companies, and specifically State Farm, have targeted chiropractors who advertise to recent accident victims in an effort to educate them regarding their PIP benefits. It is no secret that if the insurance companies reach a quick settlement with the accident victims to avoid any further payments at all of PIP benefits, then they will save all of the money that they would have otherwise been forced to pay to medical providers for treatment. It is my experience that even some accident victims that have health insurance do not seek treatment because of the high co-pays and high deductibles. Many are shocked to learn that PIP benefits provide treatment with no out-of-pocket costs.

7. The most critical time for treatment of injuries sustained in an accident is in the days and hours immediately after an accident. If accident victims are not treated after sustaining injuries in the neck, back and head areas, there is the potential for permanent and even deadly consequences to the accident victim. Therefore, it is vital that accident victims be advised as soon as possible after an accident

of their rights to receive up to $10,000 in no cost medical coverage.

8. While we are certainly aware that there are a very small handful of insurance companies that have now adopted a deductible model for PIP, it is something that has not caught on and the overwhelming majority of insurance providers do not have PIP deductible policies. In fact, some insureds have added reparations benefits which increase that amount to up to $30,000.

9. I am also very concerned that if enforcement of HB 153 is not stopped, the Kentucky Board of Chiropractic Examiners will take disciplinary action against me if I, or any other Plaintiffs obtain a patient through solicitation during the first thirty days after an accident or through someone acting on our behalf.

10. I also am concerned that given the regulation that is in place, which provides that "a chiropractor shall not contact or cause an accident victim to be contacted by the chiropractor's employee, agent, contractor, telemarketer or anyone acting in conceit with the chiropractor," the Board of Chiropractic Examiners will prevent LSIC from having any communications with accident victims. While this has previously not been enforced that I am aware of, the level of involvement of the insurance industry and the Board of Chiropractic Examiners has never been so active and significant.

11. It is my belief that the Board of Chiropractic Examiners is becoming more involved in the enforcement aspect of this statute and the regulation due to the desire to keep new chiropractic businesses from establishing a foothold in and around Kentucky

through the use of advertisement to accident victims. These advertisements and solicitation of recent accident victims would be prohibited by both HB 153 and the regulation.

12. I closely followed the prior case which State Farm filed against Metro Pain Relief Center in Jefferson County, which was eventually decided by Judge Simpson in State Farm Mut. Auto Ins. Co. v. Conway, 2014 WL 2618579 (W.D. Ky. June 12, 2014). In the course of that litigation, State Farm sought to avoid paying PIP benefits to Metro Pain Relief Center as a result of solicitations to accident victims during the first thirty days after an accident. After the Court found the prior statute unconstitutional, State Farm did not appeal but instead went back to the General Assembly and sought to pass a new statute which again was targeted at Metro Pain Relief Center and other chiropractors who in some form communicate with or solicit accident victims in the 30-days after an accident. I am aware that State Farm was behind this because it sent its representative to Frankfort to testify in favor of its passage.

13. Given State Farm's involvement in the passage of HB 153, I believe they will attempt to enforce it immediately. In fact, given the language that indicates that any medical bills for accident victims solicited in violation of the statute are void and any payments that have previously been made to medical providers for such patients must be returned, I fear that insurers such as State Farm will attempt to apply this retroactively.

14. If LSIC was forced to return all monies it received from patients it solicited during the first thirty

days after an accident for their business, either indirectly or directly, LSIC would likely be forced out of business, as would many other chiropractors that rely on treating accident victims as a significant and substantial portion of their business.

I declare under penalty of perjury under the laws of the United States of America that the preceding Declaration is true and correct.

/s/ Robert Kleinfeld
Robert Kleinfeld, D.C.

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me this 18 day of June, 2015 by Robert Kleinfeld, D.C.

My commission expires: 1/31/20

/s/
NOTARY PUBLIC, STATE AT LARGE
KENTUCKY

CURE

Chiropractors United for Research and Education, LLC

Dear Recent Accident Victim:

CURE is an association of chiropractors in the Louisville area. We believe that research and education about accident victim rights are important to the well-being of the citizens of Kentucky, and in particular recent accident victims. We believe it is important for you to know your rights as you deal with any injuries or pain you experienced in your accident.

Kentucky has what is commonly referred to as a "no-fault" system for providing health care to accident victims which provides that all accident victims, regardless of fault, with basic reparations benefits or "personal injury protection (PIP)" to pay for certain expenses including medical bills as described in KRS 304.39. For your convenience, we have attached the information page from the Kentucky Department of Insurance describing this statute and the statute itself. Of particular importance is the excerpt from the information page emphasized below:

> *Personal Injury Protection (PIP) Coverage*
> *Kentucky requires basic PIP coverage on all motor vehicles except motorcycles. Basic PIP is to be paid by the insurer of the vehicle in which the injured person is riding at the time of an accident, or the vehicle which strikes a pedestrian, regardless of who was at fault in the accident.* ***Basic PIP provides up to $10,000 per person per accident for medical expenses, lost wages and similar "out of***

pocket" costs due to an injury. *Higher benefits and deductibles are optional.*

Because of PIP, many medical providers, including chiropractors, are able to treat your injuries without you incurring any out of pocket costs or settling any potential claim. Please consult an attorney for legal advice or your local healthcare provider, including any of CURE's member chiropractors on the enclosed list, for diagnosis or treatment.

We wish you a speedy recovery!

CURE

Chiropractors United for Research and Education, LLC

MEMBER CHIROPRACTORS

Commerce Chiropractic and Rehab, PSC
Phone: (502) 447-6103

Louisville Sports and Injury Chiropractic & Rehab Center
Phone: (502) 451-5959

E-Town Injury Center d/b/a
Metro Pain Relief Center
Phone: (502) 775-1511

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO: 3:15-CV-556-GSN

[Filed October 7, 2015]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC ("CURE"), et al; Plaintiffs,	)
v.	)
JACK CONWAY, et al., Defendants.	)

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MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

The Plaintiffs, Chiropractors United for Research and Education, LLC ("**CURE**"); Commerce Chiropractic and Rehab, PSC; David Seastedt, D.C.; Louisville Sports and Injury Chiropractic & Rehab Center; Robert Kleinfeld, D.C.; E-Town Injury Center, Inc. d/b/a Metro Pain Relief Center-Rechter Chiropractic/ Radiology Group, and David Romano, D.C., (collectively "**the Plaintiffs**"), by counsel and for their Motion for Injunctive Relief Pending Appeal, state the following:

Pursuant to Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8(a)(1), the Plaintiffs hereby respectfully request that this Court enjoin the enforcement of KRS 367-4081-4083 ("**The New Solicitation Statute**") and this Court's Opinion and Order (RE 32) ("**Order**"), pending resolution of Plaintiffs' appeal to the Sixth Circuit Court of Appeals. In support of this motion, the Plaintiffs state as follows:

I. INTRODUCTION

This Court should enter an injunction pending resolution of an Appeal filed in this action precluding enforcement of the New Solicitation Statute and the Order because it is likely that the Court of Appeals will conclude that the Court's Order employs the incorrect standard for determining whether the New Solicitation Statute passes constitutional muster.

II. FACTS

1. On June 19, 2015, the Plaintiffs filed a Verified Complaint challenging the constitutionality of the New Solicitation Statute that was to become effective on June 22, 2015. The Plaintiffs also simultaneously filed a Motion for Preliminary Injunction requesting that the enforcement of the New Solicitation Statute be enjoined during the pendency of this action (RE 1).

2. On October 1, 2015, this Court entered a Memorandum Opinion and Order denying the Plaintiffs' Motion for Preliminary Injunction (RE 32).

3. On October 7, 2015, concurrent with this Motion, the Plaintiffs filed a Notice of Appeal of the October 1, 2015 Order.

III. ARGUMENT

Fed.R.Civ.P. 62(c) provides "while an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the Court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Furthermore, Rule 8(a)(1) of the Federal Rules of Appellate Procedure provide that "a party must ordinarily move first in the District Court for ... (c) an Order ... granting an injunction while an appeal is pending."

The standard for granting an injunction pending appeal is the same as for granting a preliminary injunction. The moving party must show that: (1) the applicant has made a strong showing that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent an injunction; (3) the issuance of the injunction will not substantially injure the other parties interested in the proceeding; and (4) an injunction is in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Plaintiffs believe they meet all four elements needed for injunctive relief and as noted by this Court (see Opinion at p. 4), the dispositive issue is whether Plaintiffs are likely to succeed on the merits.

Plaintiffs are likely to succeed on the merits because "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys[]' ... Commercial speech is no exception." Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011)(internal quotation marks and citation omitted). The U.S. Supreme Court in Reed v.

Town of Gilbert, Ariz., 135 S. Ct. 2218, (2015) discussed Sorrell v. IMS Health and held that:

> a) Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.
>
> b) This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys.
>
> c) Facial distinctions defining regulated speech by particular subject matter or defining regulated speech by its function or purpose are distinctions drawn based on the message a speaker conveys, and **are subject to strict scrutiny.**

Id. at 2227 (emphasis added). Thus, it is the law of the land that strict scrutiny is applied where a restriction on commercial speech is content based. In other words, the standard of scrutiny to be applied to restrictions on commercial speech has been clarified such that (a) the intermediate scrutiny analysis set forth in Central Hudson Gas & Elec. Corp., 447 U.S. 557 *does not apply if the statute is content based and* (b) *heightened scrutiny means strict scrutiny.*

While this Court determined: a) that the statute regulated commercial speech; and b) that the regulation was content based; it nevertheless applied the intermediate scrutiny test of Central Hudson. This was an incorrect application of the standard under Sorrell and Reed v. City of Gilbert.

Prior to Reed v. City of Gilbert, which clarified that the reference to "heightened scrutiny" for content based commercial speech restrictions in Sorrell actually meant strict scrutiny, courts would at times default to the intermediate scrutiny standard set forth in Central Hudson, essentially concluding that since intermediate scrutiny must be lower than heightened scrutiny, a failure to meet the Central Hudson standard would necessarily be unconstitutional under "heightened scrutiny." See, e. g.: 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014)[1] and Educational Media Co. at Virginia Tech, Inc. v. Insley, 731 F.3d 291, 297-98 (4th Cir. 2013). Now that Reed v. City Of Gilbert has eliminated the confusion, it is clear that the Court applied the incorrect standard here.

Under the correct standard, the New Solicitation Statute is "presumptively unconstitutional" and can only be upheld if the state shows (a) a compelling state

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[1] In 1-800-411-Pain Referral Service. LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) the 8th Circuit summarized the status of the test post-*Sorrell* of content based regulations of commercial speech as follows:

> If a commercial speech restriction is content- or speaker-based, then it is subject to "heightened scrutiny." *Sorrell,* 131 S.Ct. at 2664. *Sorrell,* however, did not define what "heightened scrutiny" means. Instead, after concluding that the restrictions in the case were both content- and speaker-based, the Court proceeded to analyze them under the *Central Hudson* factors, noting the outcome would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell,* 131 S.Ct. at 2667.

Since this decision, the Reed opinion clarified heightened scrutiny as being the same as strict scrutiny.

interest, and (b) that the statute is narrowly tailored to serve that compelling interest. Reed, 135 S.Ct. at 2226. The New Solicitation Statute cannot be upheld because there has been no evidence overcoming this presumption.

This Court may continue to believe that the Plaintiffs are unlikely to succeed on the merits such that it cannot grant the Plaintiffs the requested relief. If so, however, this Court should promptly dispose of the instant motion so as to allow the Plaintiffs to fully pursue the relief in the Court of Appeals under Rule 8 of the Federal Rules of Appellate Procedure.

WHEREFORE, the Plaintiffs respectfully move this Court to grant their Motion for Injunction pending appeal.

Respectfully submitted,

/s/ John D. Cox
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[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO: 3:15-CV-556-GSN

[Filed November 12, 2015]

CHIROPRACTORS UNITED FOR RESEARCH AND EDUCATION, LLC, et al. Plaintiffs,	)
v.	)
JACK CONWAY, et al. Defendants	)

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REPLY IN FURTHER SUPPORT OF MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

Plaintiffs Chiropractors United for Research and Education, LLC, and Commerce Chiropractic and Rehab, P.S.C., David Seastedt, D.C., Louisville Sports and Injury Center, P.S.C., Robert Kleinfeld, D.C., E-Town Injury Center, Inc. d/b/a Metro Pain Relief Center, and David Romano, D.C., by counsel, for their Reply in Further Support of their Motion for Injunctive Relief Pending Appeal, state that this matter stands submitted and no further argument is necessary in support of their Motion.

Respectfully submitted,

/s/ John D. Cox
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Petersen S. Thomas
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[*Certificate of Service Omitted in Printing of this Appendix.*]