[Cite as *In re Henneke*, 2012-Ohio-996.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN RE:	:	
SUITABILITY OF DEBRA HENNEKE to be Licensed as an Insurance Agent in the State of of Ohio	:	CASE NO. CA2011-05-039
	:	O P I N I O N
	:	3/12/2012
	:	
	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CVF 01469

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HENDRICKSON, P.J.

{¶ 1} Appellant, Debra Henneke, appeals a decision of the Clermont County Court of Common Pleas, affirming the decision of the Ohio Department of Insurance (ODI) revoking her surety bail bond license and imposing a $105,000 fine. For the reasons that follow, we affirm the common pleas court's decision.

I. Introduction

{¶ 2} The matter commenced on December 14, 2009, when the ODI issued a "Notice

of Opportunity for Hearing," notifying appellant that the Superintendent of Insurance intended to suspend, revoke, or refuse to renew her license as a bail bondsman. Appellant was alleged to have violated R.C. 3905.932 and the related administrative code provisions that prohibit solicitation by bail bond agents or unlicensed individuals on the grounds of a detention facility or any court. *Id.*; Ohio Adm.Code 3901-1-66(I)(1).

{¶ 3} Appellant requested a hearing, which was held on March 11, 2010, and continued on March 22, 2010. At the conclusion of the hearing, the ODI hearing officer issued a report, recommending that the Superintendent revoke appellant's bond license and impose a fine of $100,000, plus $5,000 in administrative costs. The Superintendent subsequently adopted the report, thereby revoking appellant's license and imposing the recommended fine. Appellant appealed the Superintendent's decision to the Clermont County Court of Common Pleas pursuant to R.C. 119.12. On May 10, 2011, the common pleas court upheld the Superintendent's decision.

{¶ 4} Appellant timely appeals, raising seven assignments of error for review. For ease of discussion, we will address appellant's assignments of error out of order.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE LOWER COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY R.C. 3905.923 WHERE IT MADE NO FINDING THAT THE STATUTE WAS NARROWLY DRAWN AND NO MORE EXTENSIVE THAN NECESSARY TO SERVE THE ASSERTED STATE INTERESTS, NOR WOULD THE RECORD SUPPORT ANY SUCH FINDING [sic.]

{¶ 7} In her first assignment of error, appellant argues R.C. 3905.932 is an unconstitutional prohibition on commercial free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

{¶ 8} A brief history of the statute is helpful to our analysis. In early 2001, the ODI partnered with various agencies, including the Ohio Bail Agents Association, the Ohio

Judicial College, the Clerk of Courts Association, and court administrators to address their concerns regarding the solicitation of bail bonds on courthouse and detention facility grounds. After multiple hearings on the issue, the ODI drafted legislation that was subsequently adopted and codified under R.C. 3905.932, which currently provides:

> A surety bail bond agent or insurer shall not do any of the following:
>
> * * *
>
> (B) Solicit business in, or on the property or grounds of, a detention facility, as defined in section 2921.01 of the Revised Code, or in, or on the property or grounds of, any court. For purposes of this division, "solicit" includes, but is not limited to, the distribution of business cards, print advertising, or any other written information directed to prisoners or potential indemnitors, unless a request is initiated by the prisoner or potential indemnitor. Permissible print advertising in a detention facility is strictly limited to a listing in a telephone directory and the posting of the surety bail bond agent's name, address, and telephone number in a designated location within the detention facility.

{¶ 9} The ODI also drafted Ohio Adm.Code 3901-1-66 to demonstrate additional prohibited solicitation activities, which under subsection (I)(1), includes:

> (a) Approaching a person not currently a client and in any way initiating communication concerning bail bond services * * * (f) Distributing a business card, pen, or any other item, that identifies an individual or business entity as providing surety bail bond services * * * (h) Engaging or hiring any person, directly or indirectly, to perform any acts listed in (a) through (g) of this paragraph.

{¶ 10} Subsection (I)(2) then lists activities not considered illegal solicitation in courthouses or detention centers, including: (1) accompanying or meeting an already-retained client; (2) posting a bond with the clerk; (3) attending to personal business; and (4) being retained to write and post a bond.

{¶ 11} Appellant argues the statute and regulations are an unconstitutional restriction on commercial free speech.

{¶ 12} As an initial matter, we note the undisputed fact that bail bond solicitation

constitutes commercial speech because it "does no more than propose a commercial transaction." (Citation omitted.) *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875 (1983). As such, the speech is accorded a measure of First Amendment protection. *See, e.g., Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 472, 108 S.Ct. 1916 (1988). Such First Amendment protection, however, is not absolute. The Supreme Court of the United States is careful to distinguish commercial speech from "speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371 (1995). Commercial speech enjoys a limited measure of protection, "'commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Id.*, quoting *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028 (1989).

II. Analysis

{¶ 13} Mindful of these concerns, we must engage in "intermediate" scrutiny of commercial speech restrictions, analyzing them under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that is misleading or concerns unlawful activity. *Id.* at 563-564. Commercial speech that falls into neither of those categories, like the speech here, may only be regulated if the government satisfies a three-pronged test: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction directly and materially advances that interest; and third, the regulation must be "narrowly drawn." *Id.* at 564-565.

{¶ 14} The parties do not dispute that the commercial speech herein concerns lawful activity and is not misleading. Thus, we proceed directly to whether the government has

satisfied its burden under the remaining three prongs of the *Central Hudson* test.

A. Does the State Have a Substantial Interest in Regulating Bail Bond Solicitation in Courthouses and Detention Centers?

{¶ 15} Under the *Central Hudson* framework, the government bears the responsibility of building a record that adequately articulates its interest. *See Edn. Media Co. at Virginia Tech v. Swecker*, 602 F.3d 583, 588 (4th Cir.2010). "[T]he *Central Hudson* standard does not permit [this court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S.Ct. 1792 (1993). Here, the state presents two separate interests in support of its regulation. While a single substantial interest is sufficient to satisfy the first prong of *Central Hudson*, we will address each of the state's interests in turn. *See Went for It*, 515 U.S. at fn. 1.

1. Protection of the Judicial Process

{¶ 16} The state first contends it has a substantial interest in maintaining the integrity of the judiciary and in protecting the judicial process from interruption.

{¶ 17} On various occasions, the Supreme Court of the United States has recognized the importance of maintaining the integrity of the judiciary and its ability to effectively administer justice. *See, e.g., Went for It* at 624 ("paramount" interest in "curbing activities that negatively affect the administration of justice"); *Cox v. Louisiana*, 379 U.S. 559, 565, 85 S.Ct. 476 (1965) (judges have interest in protecting judicial process from influence by demonstrations in or near courtrooms). *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528 (2002) (Kennedy, J. concurring) ("[j]udicial integrity is, in consequence, a state interest of the highest order"); *Jackson v. Beavers*, 156 Ga.71 (1923) ("business [of professional bail bondsmen] may be so conducted as to seriously interfere with the fair and proper administration of the criminal laws").

{¶ 18} Thus, we have little trouble finding that the state's interest in an effective,

uninterrupted judicial process is a substantial one.

2. Protection of the Public

{¶ 19} The state next argues that because arraignments are often a source of anxiety and distress for citizens, it has a substantial interest in protecting those who are emotionally vulnerable from the undue influence of bondsmen.

{¶ 20} As with judicial integrity, the United States Supreme Court has recognized the state's substantial interest in protecting citizens from undue influence, intimidation, and other offensive facets of solicitation. *See Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462, 98 S.Ct. 1912 (1978); *Went for It*, 515 U.S. at 624-625; *Speaks v. Kruse*, 445 F.3d 396 (5th Cir.2006), fn. 13 ("[p]rivacy and the protection of citizens against undue influence are valid substantial state interests"); *Fane*, 507 U.S. at 770 ("solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient").

{¶ 21} In light of these considerations, we find the state has successfully asserted a second substantial interest in protecting the public from the unwanted intrusions associated with solicitation.[1]

B. Does the Regulation Directly and Materially Advance the State's Interests?

{¶ 22} Under *Central Hudson's* second prong, the state must demonstrate that the challenged regulation "advances the [g]overnment's interest in a direct and material way." *Went for It*, 515 U.S. at 625-626, quoting *Fane*, 507 U.S. at 767. "This burden is not satisfied by mere speculation or conjecture[.]" *Fane* at 770. Instead, a governmental body seeking to sustain a restriction on commercial speech must present data, by way of studies or anecdotal

1. At prior stages of this litigation, the state asserted a different interest, in addition to those urged now, in preserving courtroom order and decorum. Because the state does not press this interest before us, we do not consider it.

evidence, demonstrating that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-771; *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir.2004).

{¶ 23} In *Fane*, the Supreme Court invalidated a Florida ban on in-person solicitation by certified public accountants because the state presented no evidence – anecdotal or empirical – that the solicitation created the dangers of "fraud, overreaching, or compromised independence" that it sought to prevent. *Fox* at 771. *See also Went For It* at 626.

{¶ 24} The solicitation restriction before us does not suffer from such infirmities. Here, a diverse array of witnesses, including eight bail bondsmen, six ODI investigators, two court clerks, and a municipal court judge provided detailed anecdotal evidence of the coercive and disruptive nature of solicitation in courthouses and detention facilities.

{¶ 25} For example, Mary Smith, a founding member of the Ohio Bail Agents Association, testified the organization opposed courthouse solicitation, as it was "very unethical," and disrupted court operations. Along those lines, Judge James Green of the Franklin County Municipal Court testified that in-court solicitation was troubling because of its tendency to disrupt arraignments. In an effort to "stop the madness," the judge asked multiple bondsmen to stop soliciting so that he could maintain "courthouse etiquette" and "decorum * * *." However, despite his warnings, the bondsmen continued to disrupt later arraignments.

{¶ 26} Keith Blosser of the ODI testified that prior to the statute, he observed "rowdiness [and] fighting" in court hallways, which interfered with court business. Blosser indicated that after the statute, this behavior became less frequent. Woodrow Fox, a bondsman for 18 years, further testified that prior to the statute, bondsmen would solicit people "12, 13 times before they [went] to the arraignment court * * * [and] it was pretty hectic." Fox also witnessed fights, including an instance when a bondsman grabbed a

woman exiting the courtroom by the arm, which lead to a physical altercation. Fox testified that after the statute was enacted, this type of activity decreased significantly. Based on this evidence, it is clear the statute advances the state's interests in avoiding disruption and upholding the integrity of the judicial process.

{¶ 27} There was also evidence that competition amongst bondsmen on court grounds added to citizens' anxiety and vulnerability. For example, Wanda Shepard, owner of Professional Bail Bond Group in Franklin County, Ohio, once witnessed a citizen crying after being approached by several bondsmen who were offering competing bids. Thus, the statute provides an important buffer between citizens and bail agents by allowing individuals to exit the courtroom, collect themselves, and depart courthouse or detention center grounds before engaging the services of a bail bondsman.

{¶ 28} After scouring the record, we are satisfied that the ban on bail bond solicitation in courts and detention centers targets several concrete, nonspeculative harms, and that the restriction alleviates these harms to a material degree. In light of this showing, we conclude the state has satisfied *Central Hudson's* second prong.

3. Are the Regulations Narrowly Tailored?

{¶ 29} Moving to *Central Hudson*'s third prong, we must examine the relationship between the state's interests and the means chosen to serve them. *See Fox*, 492 U.S. at 480. "With respect to this prong, the differences between commercial speech and noncommercial speech are manifest." *Went for It*, 515 U.S. at 632. The Supreme Court has made it abundantly clear that the "least restrictive means" test has no role in the commercial speech context. *Fox* at 480. In order for a regulation to satisfy this final prong, there must be a fit between the legislature's means and its desired objective – "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served * * *." *Went for It* at 632. That said, the

existence of numerous and obvious less-burdensome alternatives is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, 113 S.Ct. 1505 (1993), fn. 13.

{¶ 30} In addressing the "fit," appellant argues this case is controlled squarely by *Pruett v. Harris Cty. Bail Bond Bd.*, 499 F.3d 403 (5th Cir.2007). In *Pruett*, the United States District Court for the Southern District of Texas invalidated a statute that prohibited bondsmen from soliciting people with unexecuted arrest warrants, unless they were a previous customer. The Fifth Circuit Court of Appeals upheld that portion of the decision, finding the state's interests in officer safety and reducing flight risks could be served by less-burdensome means, including carving out a 72-96 hour window prior to solicitation that would give police officers time to act.

{¶ 31} Appellant argues that like *Pruett*, there are less-burdensome alternatives that would achieve the state's interests, including: (1) contempt proceedings, (2) court orders to cease disruptive activity, (3) revocation of bail bond licenses, (4) rescinding and refunding unfair bonds, and (5) law enforcement and/or court security presence.

{¶ 32} We are not persuaded by appellant's argument. As an initial matter, we find the powers of contempt and court orders do not sufficiently achieve the state's objectives. Judge James Green specifically testified that addressing disruptive bondsmen in his chambers only temporarily alleviated the problem. Moreover, the judge explained that the court could not possibly witness all disruptive behavior by bondsmen, which rendered the power of contempt practically useless.

{¶ 33} Rescinding and/or refunding an existing bond is also not a reasonable alternative means to achieve the state's interests, particularly the interest in protecting consumers from undue influence. *Cf. Ohralik*, 436 U.S. at 462. In suggesting refunds as a remedy, appellant misconstrues the nature of the state's interest. The rules prohibiting

solicitation on court and detention center grounds are prophylactic measures whose objective is to prevent harm *before* it occurs. While refunds may minimize later financial woes, it does little to prevent the targeted harm, namely, the irritation and distress caused by solicitation that occurs shortly after arraignment proceedings. *See Went for It*, 515 U.S. at 630 (confronting strangers "while wounds are still open," is an invasive, distressing manner of soliciting business).

{¶ 34} We also reject appellant's argument that revoking bail licenses or employing additional security could accomplish the state's objectives. As just discussed, the targeted harm cannot be eliminated by intervention after the fact. The purpose of the regulation is to forestall disruption from solicitations whose timing and location are a recognized source of distress. By barring solicitation in the designated areas, the regulation prevents the detrimental effects of the activity, rather than mitigating them afterwards.

{¶ 35} Upon review, we find there are no "obvious less-burdensome alternatives" relevant to our analysis. *See Discovery Network*, 507 U.S. at fn. 13.

{¶ 36} We also find the regulation is narrowly drawn and achieves the state's objectives without burdening "substantially more" speech than is necessary. *See Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 100 F.3d 175, 189 (1st Cir.1996). Moreover, contrary to appellant's opinion, the lower court did, in fact, make findings of fact on this issue that provide a solid basis for our conclusion. Specifically, the common pleas court found, and we agree, that the regulation is a "very limited ban" on solicitation, especially in light of its narrow geographic parameters. *Cf. Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir.1996).

{¶ 37} The regulation does not burden any truthful off-court solicitation, including the use of advertising via television, radio, newspaper, and other media. It does not prevent bondsmen from standing inches from the courthouse or detention facility, where they may

distribute business cards and converse with anyone they choose, make announcements, wear sandwich boards, and so on. They may rent space on billboards and public benches. The Ohio Yellow Pages are filled with sections devoted to surety bail bonds. The public can even access a list of registered bondsmen, which the courts and detention centers go so far as to provide. *See* R.C. 3905.932(B).

{¶ 38} Given the ample alternative channels for solicitation, it is hard to imagine a more narrowly-tailored way to achieve the state's substantial goals. Other than engaging in deceitful or misleading behavior, bondsmen have a seemingly endless array of solicitation tactics from which to choose. They simply may not employ those tactics within a relatively small locale that is proven to invoke strong emotions and confusion, as well as disruptive behavior by bondsmen.

{¶ 39} In a final related matter, the fact that some in-court solicitation is not disruptive does not mean the regulation is not narrowly-tailored. In framing its rule, the legislature was not required to account for the relative offensiveness of particular bondsmen. *Cf. Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612-613, 55 S.Ct. 570 (1935).

{¶ 40} Under these circumstances, we conclude the regulation is reasonably well tailored to achieve its desired objectives. Having found the state has carried its burden on all three *Central Hudson* prongs, we overrule appellant's first assignment of error.

{¶ 41} Assignment of Error No. 2:

{¶ 42} THE LOWER COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF R.C. 3905.923 ON ITS FACE WHERE THE STATUTE IS IMPERMISSIBLY VAGUE AND IN GIVING THE STATUTE AN EVEN NARROWER INTERPRETATION WHICH PROHIBITS BAIL BOND AGENTS FROM BEING IN A PUBLIC PLACE UNLESS THEY ARE ABLE TO SHOW THEY ARE THERE FOR A BUSINESS REASON [sic.]

{¶ 43} In her second assignment of error, appellant argues the definition of "solicit" is

unconstitutionally vague, thus the statute and related regulations violate the Due Process Clause of the Fourteenth Amendment. We disagree.

{¶ 44} A statute can be impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480 (2000). Thus, all vagueness challenges require us to answer two separate questions: whether the statute gives adequate notice, and whether it creates a threat of arbitrary enforcement. *Evergreen Assn., Inc. v. New York*, 801 F.Supp.2d 197, 210 (S.D.N.Y.2011).

{¶ 45} A statute is not void for vagueness simply because it could have been worded more precisely or with additional certainty, but, instead, the "critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law * * *." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 86; *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830 (2008). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186 (1982).

{¶ 46} Appellant argues R.C. 3905.932 does not provide fair notice and sufficient definition of the prohibited conduct. In support of her argument, appellant poses a variety of "close call" hypothetical situations in which the definition of "solicit" may or may not apply. For example, appellant wonders whether a bondsman engages in unlawful solicitation if a citizen asks whether he is a bondsman, at which time he responds "bingo, I am a bail agent, and I can help you get a bond."

{¶ 47} "[T]he mere fact that close cases can be envisioned [does not render] a statute vague." *Williams*, 553 U.S. at 305. Close cases can be imagined under virtually any statute. *Id.* at 306. While there is little doubt that the imagination can conjure up hypothetical cases

to test the meaning of "solicit," "such speculative musings do not render this term unconstitutionally vague." *Schleifer by Schleifer v. Charlottesville*, 159 F.3d 843, 855 (4th Cir.1998). What renders a statute unconstitutionally vague "is not the possibility that it will sometimes be difficult to determine whether the prohibited behavior has been proved; but rather the indeterminacy of precisely what [the behavior] is." *See Williams* at 306.

{¶ 48} We find R.C. 3905.932(B) gives a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited. Webster's International Dictionary defines "solicit" as: "to approach with a request or plea (as in *selling* or begging); * * * to move to action; serve as an urger or incentive * * * to endeavor to obtain by asking or pleading * * *." (Emphasis added.) *Webster's Third New International Dictionary* 2169 (1986). Black's Law Dictionary further defines "solicit" as: "[a]n attempt or effort to gain business * * * direct solicitation of potential clients * * *." *Black's Law Dictionary* 1427 (8th Ed.2004). Thus, as applied to R.C. 3905.932(B), the common and ordinary meaning of "solicit" is to attempt to "gain business," or to "approach" an individual with a "request or plea" to "sell" a bail bond.

{¶ 49} The definition becomes even clearer when viewed in conjunction with Ohio Adm.Code 3901-1-66(I)(1), which provides additional examples of prohibited solicitation on courthouse and detention facility grounds, namely:

> (a) Approaching a person not currently a client and in any way initiating communication concerning bail bond services.
> (b) Writing bonds for an individual without their direct knowledge and consent.
> (c) Communicating as, or holding oneself out to be, a court appointed surety bail bond agent or suggesting in any manner that one has been appointed by a court or other public agency to write a bond for a particular defendant, or on a particular case.
> (d) Wearing clothing that indicates a person is in the bail bond industry unless otherwise directed by the court or detention facility, except the wearing of the issued department of insurance ID card.
> (e) Conducting business in a loud and conspicuous manner.
> (f) Distributing a business card, pen, or any other item, that identifies an individual or business entity as providing surety bail

> bond services.
> (g) Physically impeding, blocking, or hindering the public from viewing or obtaining the docket or other information needed to ascertain the status or procedure of any court process including all court bonding processes.
> (h) Engaging or hiring any person, directly or indirectly, to perform any acts listed in (a) through (g) of this paragraph.

{¶ 50} The Supreme Court has held that administrative regulations may "sufficiently narrow potentially vague or arbitrary interpretations of the ordinance * * * [and] will often suffice to clarify a standard with an otherwise uncertain scope." *Flipside*, 455 U.S. at 500. Here, not only does the administrative code specify additional prohibited behavior, but section (I)(2) also lists activities that remain *permissible* on court grounds. *See also* R.C. 3905.932(B) (defining permissible print advertising in detention centers). Thus, if, on the off chance a bondsman remains confused as to the proscribed conduct, he may simply refer to section (I)(2) and act accordingly. This is not a case where the regulation fails to "draw reasonably clear lines" between innocent and prohibited conduct. *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242 (1974). *Compare Chicago v. Morales*, 527 U.S. 41, 58, 119 S.Ct. 1849 (1999).

{¶ 51} In sum, we find R.C. 3905.932 affords men of ordinary intelligence fair notice and sufficient guidance to conform their conduct to the law, and that the statute is not unconstitutionally vague for failing to provide a more precise definition of the term "solicit." *See Williams*, 553 U.S. at 304; *State v. Gaines*, 64 Ohio App.3d 230, 234 (12th Dist.1990) (on void for vagueness challenges, all doubts are resolved in favor of statute's constitutionality). As to the threat of arbitrary enforcement, appellant does not specifically argue, nor would we find, that the statute encourages such behavior, given its sufficiently clear standards.

{¶ 52} We also reject appellant's contention that the common pleas court impermissibly "rewrote" the statute to cure the alleged constitutional infirmity. Appellant

challenges the court's interpretation that the "rules and the law make it clear that a bail bond agent is only to be at the courthouse accompanying or meeting an already retained client, posting a bond with the clerk, or on personal business."

{¶ 53} We admit that while courts may generally construe legislation to avoid "serious questions as to its constitutionality," it must not ignore the statute's plain terms or "insert a provision not incorporated therein by the Legislature." *State ex rel. Defiance Spark Plug Corp. v. Brown*, 121 Ohio St. 329, 331-332 (1929); *Akron v. Rowland*, 67 Ohio St.3d 374, 380 (1993). Here, the common pleas court did not incorporate any provisions or interpretations not already put in place by the legislature in Ohio Adm.Code 3901-1-66(I)(1)(a) and (I)(2)(a), (b), (e). *See also* R.C. 3905.932(B). While the court's stated reasons do not encompass all permissible activities under Ohio Adm.Code 3901-1-66(I)(2), its statutory construction is not an erroneous one.

{¶ 54} Thus, we do not find error in the court's statutory construction.

{¶ 55} Appellant's second assignment of error is overruled.

{¶ 56} Assignment of Error No. 3:

{¶ 57} THE LOWER COURT ERRED IN FINDING THAT HENNEKE HAD NOT MET HER BURDEN IN ESTABLISHING THAT DOI HAD SELECTIVELY ENFORCED R.C. 3905.923 WHEN HENNEKE WAS PRECLUDED FROM INTRODUCING EVIDENCE OF SELECTIVE ENFORCEMENT BOTH AT THE ADMINISTRATIVE HEARING AND IN THE COURSE OF THE COMMON PLEAS APPEAL [sic.]

{¶ 58} Next, appellant challenges the lower court's decision overruling her selective enforcement claim. Appellant's argument stems from the court's decision denying her motion to admit additional evidence on the issue during the course of her administrative appeal.

{¶ 59} While cross-examining the state's last witness during the ODI hearing, counsel for appellant indicated he would be filing a written motion to dismiss, challenging the

constitutionality of the solicitation restrictions. Counsel indicated that one of his arguments would relate to selective enforcement. Over the state's objection, the hearing officer permitted counsel to question the witnesses on the constitutional matters. After asking only several questions as to whether other bondsmen were cited for soliciting, appellant's counsel moved on to different issues.

{¶ 60} Five months after the ODI hearing, appellant moved to present additional evidence, namely, reports that other bondsmen had engaged in illegal solicitation on court property, but were not cited for their behavior. According to appellant, the fact that the ODI did not cite these bondsmen for illegal solicitation was evidence that R.C. 3905.932 was selectively enforced against her.

{¶ 61} On September 30, 2010, the common pleas court denied appellant's motion pursuant to R.C. 119.12, which states:

> Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

{¶ 62} The lower court first determined that the evidence in the reports existed prior to the ODI hearing in March 2010, as a majority of the incidents occurred in January and February of that year. The court also found no explanation as to why appellant could not have obtained this evidence prior to the hearing with due diligence. Concluding the evidence was not "newly discovered" for the purposes of R.C. 119.12, the court denied appellant's motion. *See Leak v. State Med. Bd. of Ohio*, 10th Dist. No. 09AP-1215, 2011-Ohio-2483, ¶ 24 (newly discovered evidence "is evidence that was in existence at the time of the administrative hearing but that could not have been discovered with the exercise of due diligence prior to the hearing").

{¶ 63} On administrative appeal, appellant again argued she was the victim of selective enforcement. The common pleas court overruled her argument, finding appellant failed to submit evidence sufficient to satisfy her "heavy burden" of establishing a prima facie case of selective enforcement. *See State v. Flynt*, 63 Ohio St.2d 132, 134 (1980).

{¶ 64} Appellant now argues that because her reports were never admitted into the record, the common pleas court lacked any factual basis to determine whether she met her "heavy burden" of proof. Appellant believes the court must have therefore considered matters outside the scope of the record in violation of basic due process principles. We find appellant did not suffer a violation of due process, where any deficiency in the factual record resulted from her own mistakes.

{¶ 65} As previously discussed, R.C. 119.12 precludes a reviewing court from accepting additional evidence unless it is newly discovered and "could not with reasonable diligence have been ascertained prior to the hearing before the agency." *Id. See also Leak*, 2011-Ohio-2483 at ¶ 24. During the ODI hearing, the hearing officer expressly allowed appellant to argue selective enforcement, yet she inexplicably withheld her reports, even though a majority of the information contained therein existed before the hearing began. R.C. 119.12. *See also State ex rel. Kingsley v. State Emp. Relations Bd.*, 130 Ohio St.3d 333, 2011-Ohio-5519, ¶ 18; *Oiler v. Ohio Bur. of Motor Vehicles*, 109 Ohio App.3d 865, 868 (4th Dist.1996). The simple fact that appellant did not seek the information until after the hearing is hardly evidence that it was not ascertainable beforehand with due diligence. R.C. 119.12. *See Lluberes, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 02AP-1326, 2003-Ohio-5943, ¶ 9 ("newly discovered evidence does not refer to newly created evidence"). Thus, there was no basis to permit additional evidence on the selective enforcement issue, and the lower court properly denied appellant's request.

{¶ 66} In closing, we note that it was neither the hearing officer's nor the lower court's

responsibility to see to it that appellant developed the record to satisfy her burden of proof on selective enforcement. It was, however, the common pleas court's responsibility to review the administrative record and determine whether the issues raised below were supported by the evidence. R.C. 119.12; *Katz v. Ohio Dept. of Ins.*, 8th Dist. No. 80802, 2002-Ohio-3905, ¶ 11. Contrary to appellant's opinion, there is no indication that the court looked beyond the record in making its decision. Instead, the court reviewed what little evidence appellant properly presented below, and found it insufficient to support her claim. We fail to see the error in this holding.

{¶ 67} Appellant's third assignment of error is overruled.

{¶ 68} Assignment of Error No. 4:

{¶ 69} THE LOWER COURT ERRED IN DENYING HENNEKE'S MOTION AT TRIAL TO CLOSE THE RECORD AND NOT TAKE FURTHER EVIDENCE ON THE GROUNDS THAT THE DEPARTMENT OF INSURANCE AT NO TIME MADE A REQUEST FOR THE ADMISSION OF ADDITIONAL EVIDENCE AS REQUIRED BY R.C. 119.12[.]

{¶ 70} Assignment of Error No. 5:

{¶ 71} THE LOWER COURT ERRED IN DENYING HENNEKE'S MOTION FOR A RECONSIDERATION OF THE COURT'S ORDER OF DECEMBER 23, 2010 ALLOWING THE DOI TO INTRODUCE EVIDENCE IN SUPPORT OF THE CONSTITUTIONALITY OF R.C. 3905.923 AND THE COMPANION REGULATIONS ON THE GROUNDS THAT DOI WAIVED THE ISSUE OF THE PROPOSED EVIDENCE [sic.]

{¶ 72} Because these assignments of error are related, we will discuss them together.

{¶ 73} In her fourth assignment of error, appellant argues the lower court erroneously denied her motion to close the record to prevent the state from introducing additional evidence to rebut her First Amendment challenge. We disagree.

{¶ 74} As previously discussed, during the ODI hearing, appellant's counsel expressed

his intent to file a motion to dismiss on constitutional grounds. In addition to the selective enforcement argument, counsel intended to argue that R.C. 3905.932 violated appellant's right to free speech as guaranteed by the First Amendment. The hearing officer permitted appellant to question the witnesses on these issues, but subsequently denied appellant's motion on the grounds that an administrative agency was without jurisdiction to decide the constitutionality of a statute. *See Kingsley*, 2011-Ohio-5519 at ¶ 18.

{¶ 75} A month later, appellant filed her administrative appeal to the common pleas court. Upon reviewing the record, the court found a "complete dearth" of evidence from the state to support the constitutionality of the regulation. The court explained that the timing of appellant's motion precluded the state from gathering evidence to respond to her argument. As a result, the court deferred its ruling and ordered an evidentiary hearing so that both parties could present evidence as to whether the statute was an unconstitutional restriction on commercial speech. Prior to the hearing, appellant filed a motion for reconsideration, arguing the state waived its opportunity to present evidence to support its position. The court denied the motion and the hearing proceeded as scheduled.

{¶ 76} At the start of the hearing, appellant moved to close the record to prevent the state from submitting its evidence. She argued the state failed to properly request admission of the evidence in accordance with R.C. 119.12, thus the record should remain closed. The lower court overruled the motion, and the parties argued their cases. Based on the evidence presented, the court upheld the statute as a constitutional restriction on commercial speech.

{¶ 77} Appellant now claims the common pleas court was required to close the record because the state failed to properly request admission of additional evidence pursuant to R.C. 119.12. For the following reasons, we reject appellant's argument.

{¶ 78} First, pursuant to *Central Hudson*, the state bears the burden of upholding a commercial speech restriction on First Amendment grounds. *Id.*, 447 U.S. at 564-565; *Edn.*

Media, 602 F.3d at 588. Upon review, we find the state lacked any cognizable opportunity to address its burden as a direct result of appellant's strategy.

{¶ 79} As the lower court noted, appellant first raised her First Amendment challenge in the midst of the second day of a two-day administrative hearing. Specifically, appellant waited until the state presented its very last witness to announce her new argument. Thus, even if the evidence favoring the state's position existed prior to the hearing, surely the state could not have discovered it on such short notice, no matter its diligence. *See* R.C. 119.12.

{¶ 80} As to whether the common pleas court erred in accepting this evidence without a formal "request" by the state, we find appellant invited any alleged error, where her conscious decision to raise her challenge at the end of the state's case induced the court to make its decision. R.C. 119.12; *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 472 (1998) ("under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make"). Lastly, we fail to see the harm to appellant, where the court permitted both parties to present evidence on the First Amendment issue, which gave appellant the opportunity to rebut the state's evidence with her own additional evidence.

{¶ 81} Accordingly, appellant's fourth assignment of error is overruled.

{¶ 82} We also overrule appellant's fifth assignment of error, as it involves essentially the same argument. Now, instead of relying on R.C. 119.12, appellant couches her argument in terms of "waiver." According to appellant, the state had notice of her First Amendment challenge as of the ODI hearing, and by failing to subsequently submit its evidence, the state waived the issue for purposes of appeal.

{¶ 83} As previously discussed, appellant waited until the state was practically finished with its case to present her challenge, which denied the state any conceivable chance to satisfy its burden. Conveniently, though, appellant still had ample time to present evidence

favorable to her position, as she had not yet begun her case. By overruling appellant's reconsideration motion, the court once again prevented appellant from reaping the benefits of a predicament she strategically created.

{¶ 84} Appellant's fifth assignment of error is overruled.

{¶ 85} Assignment of Error No. 7:

{¶ 86} THE LOWER COURT ERRED IN FINDING THAT THERE WAS RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE IN SUPPORT OF DOI'S FINDING THAT HENNEKE HAD VIOLATED 3905.923 AND THE ACCOMPANYING REGULATION [sic.]

{¶ 87} Here, appellant argues the common pleas court erred in finding there was sufficient, reliable, and probative evidence to support the Superintendent's findings. This argument lacks merit.

{¶ 88} When reviewing an order of an administrative agency pursuant to an R.C. 119.12 appeal, the common pleas court is limited to a determination of whether the order is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Katz*, 2002-Ohio-3905 at ¶ 11; *A-I Natl. Agency Group, L.L.C. No. 1167 v. Ohio Dept. of Ins.*, 8th Dist. No. 15-04-01, 2004-Ohio-3553. However, when reviewing the common pleas court's decision, the appellate court determines only whether the lower court abused its discretion in upholding the administrative order. *A-I Natl.* at ¶ 13; *Bd. of Edn. of the Rossford Exempted School Dist. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). We find no such abuse of discretion here.

{¶ 89} As an initial matter, the Superintendent's decision was based on abundant testimony that appellant engaged in illegal solicitation in the Hamilton County Courthouse and Justice Center. This included testimony from five ODI agents, who witnessed appellant

engage in illegal solicitation on at least four occasions during a three-month investigation.

{¶ 90} First, agent Mark Harville testified that on August 5, 2009, he witnessed appellant initiate a conversation with a woman exiting arraignment court and hand over a business card. Harville testified that pursuant to his investigative training, appellant's conduct looked like uninvited solicitation because the woman did not appear to recognize appellant during their conversation.

{¶ 91} Next, agent Lindsey Pullen testified that on August 26, 2009, appellant approached her in the court hallway and asked whether she "had someone locked up." When Pullen indicated she was there on behalf of a friend, appellant explained she could "help bail him out of jail[.]". Unbeknownst to Pullen, appellant had also placed a business card on her purse. After the arraignment was finished, appellant approached Pullen again, this time indicating she would need $120 up front to post her friend's bail.

{¶ 92} On November 13, 2009, appellant approached agent Nicole Lawrence in the court hallway, asking "are you here for yoursel[f] or for somebody else?" When Lawrence indicated she was a student researching the justice system, appellant gave her a business card and walked away. The same day, agent Jana Jarrett saw appellant initiate a conversation with a man watching arraignments from the court hallway. Appellant tapped the man on the shoulder and gave him a business card after a brief conversation. Jarrett indicated the man did not appear to know appellant, based on his body language and the way he studied appellant's business card as she spoke.

{¶ 93} On November 23, 2009, agent David Barney observed a man distributing appellant's business cards in the court hallway. When Barney confronted the man, he admitted he was not a licensed bondsman and that he worked for appellant.

{¶ 94} Along with these firsthand accounts, the ODI received weekly reports from other bondsmen that appellant's unlicensed employees were "aggressively intercepting"

people at court who were "very clearly not familiar to [appellant.]" For example, bail bondsman Allen Dunn witnessed "swarms" of appellant's employees distributing business cards to people exiting the courtroom. Two other bondsmen regularly overheard appellant's employees offering discounted bond prices inside the courthouse. Another bondsman testified that appellant's illegal solicitations reduced his business by 50 percent stating "I can't compete with somebody that doesn't play by the same rules." Keith Blosser of the ODI confirmed the bondsman's plight, testifying that appellant "has been extremely unjustly enriched from her illegal business model," citing extreme disparities in appellant's income and market share compared to all other bondsmen.

{¶ 95} Appellant argues there was no definitive proof that the people she approached in court were not already her clients. However, several ODI investigators testified that, in observing the interaction between appellant and those people, it did not appear that they knew each other prior to the encounter. It is not our position to determine the weight and credibility of that testimony. The sole question before us is whether the trial court abused its discretion in upholding the Superintendent's order. *Katz*, 2002-Ohio-3905 at ¶ 11.

{¶ 96} Given the overwhelming amount of evidence before the Superintendent, we find the common pleas court did not abuse its discretion in finding that the Superintendent's order was supported by reliable, probative, and substantial evidence. *Id*.

{¶ 97} Appellant's seventh assignment of error is overruled.

{¶ 98} Assignment of Error No. 6:

{¶ 99} THE LOWER COURT ERRED IN FAILING TO FIND THE PENALTY ASSESSED TO MS. HENNEKE A VIOLATION OF THE DUE PROCESS CLAUSE FOR THE REASON THAT R.C. 3905.14 ALLOWING FOR PENALTIES OF LICENSEES DOES NOT HAVE ANY STANDARDS THAT TAKE INTO ACCOUNT THE RELATIVE GRAVITY OF THE

CONDUCT, THE INJURY OR LACK THEREOF TO THIRD PARTIES OR THE VIOLATIONS HISTORY OF THE LICENSEE[.]

{¶ 100} Finally, appellant argues the common pleas court erred in finding the penalty imposed pursuant to R.C. 3905.14 did not violate her due process rights because the statute lacks standards that take into account various mitigating factors.

{¶ 101} Appellant likens this situation to cases finding that a lack of criteria for imposing punitive damages violates the due process clause. Appellant correctly notes that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589 (1996). We find R.C. 3905.14 comports with the necessary due process standards.

{¶ 102} First, we find R.C. 3905.14 and the related administrative regulations give fair warning of the prohibited conduct that is subject to punishment. R.C. 3905.14(B)(1)-(39) constitutes a detailed list of conduct punishable under the statute. As previously discussed, Ohio Adm.Code 3901-1-66(I)(1) enumerates additional punishable activities. *See Flipside*, 455 U.S. at 500. Under these circumstances, we find that a bondsman reading R.C. 3905.14 can ascertain with reasonable certainty the conduct that will be penalized.

{¶ 103} We also find the statute gives notice of the penalties associated with a violation, which include license suspension, revocation, and the assessment of a civil fine. Contrary to appellant's assertion, the simple fact that R.C. 3905.14 does not specify which penalties apply to each form of conduct does not mean that a person lacks adequate notice of the possible punishments. Instead, bondsmen are clearly notified that the Superintendent may impose *any* of the enumerated penalties for engaging in the listed conduct. Nor is the severity of each penalty in question, where the permissible extent of a license revocation,

suspension, or refusal to renew is defined in R.C. 3905.14(A)(2)-(5). Likewise, R.C. 3905.14(D)(1) provides a maximum civil penalty in the amount of $25,000 per violation. *See also* R.C. 3905.14(D)(2)-(9) (defining remaining approved penalties).

{¶ 104} Despite these conclusions, appellant argues the Superintendent has "unbridled discretion" to impose penalties because the statute lacks mitigating factors to be considered prior to rendering a decision.

{¶ 105} It appears appellant did not read the statute in its entirety. R.C. 3905.14(E) lists 11 factors relevant to the severity of the punishment, which the Superintendent may consider prior to sentencing. In fact, subsections (3), (5), and (6) coincide with the criteria appellant claims do not exist, namely, the harm to others and whether the individual has a history of violations. The statute also establishes a fixed monetary limit on civil fines. R.C. 3905.14(D)(1). Such factors act as meaningful constraints on the Superintendent's discretion, while at the same time allowing the Superintendent to render individualized penalties.

{¶ 106} Further, simply because the Superintendent did not recite which mitigating factors she considered in her decision does not mean she was acting with unbridled discretion. First, the penalty was within the permissible statutory range, which indicates the Superintendent operated within her discretionary boundaries.[2] Moreover, appellant does not cite any controlling authority, nor are we aware of any, that would require an insurance administrator to give findings of fact on a sentence.

{¶ 107} While appellant's penalties are undoubtedly high, there is no indication that they were grossly excessive or arbitrarily imposed, given appellant's abhorrent behavior and the constraints on the Superintendent's discretion.

2. The Superintendent imposed the maximum $25,000 fine for each of appellant's four statutory violations. R.C. 3905.14(D)(1).

{¶ 108} Under these circumstances, we find R.C. 3905.14 does not violate the due process clause.

{¶ 109} Appellant's sixth assignment of error is overruled.

{¶ 110} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.