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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

corporation; ACA INTERNATIONAL, a Minnesota non-profit corporation; ALLIED COLLECTION SERVICES, INC., a Nevada corporation; ASSETCARE, LLC, a Texas limited liability company; BUSINESS AND PROFESSIONAL COLLECTION SERVICE, INC., a Nevada corporation; CAPIO PARTNERS, LLC, a Texas limited liability company; CF MEDICAL, LLC, a Nevada limited liability company; CLARK COUNTY COLLECTION SERVICE, LLC, a Nevada limited-liability company; COLLECTION SERVICE OF NEVADA, a Nevada corporation; DONNA ARMENTA, an individual; DONNA ARMENTA LAW, a Nevada law firm; NEVADA COLLECTORS ASSOCIATION, a Nevada non-profit corporation; PLUSFOUR, INC., a Nevada corporation; RM GALICIA d/b/a PROGRESSIVE MANAGEMENT, LLC, a Nevada limited-liability company; and THE LAW OFFICES OF MITCHELL D. BLUHM & ASSOCIATES, LLC, a Georgia limited liability company,

Plaintiffs,

v.

SANDY O'LAUGHLIN, in her capacity as Commissioner of State Of Nevada Department Of Business And Industry Financial Institutions Division,

Defendant.

**PLAINTIFFS' RESPONSE TO THE
DIVISION'S NOTICE OF INTENT TO
PROMULGATE REGULATIONS**

NOW COME the plaintiffs, and in response to the Financial Institutions Division's notice of intent to promulgate regulations, and in further support of plaintiff's motion for an immediate issuance of a temporary restraining order and preliminary injunction enjoying S.B. 248, states as

follows:

1. On July 27, 2021, this Court conducted a hearing on plaintiffs’ motion for a temporary restraining order and for a preliminary injunction related to S.B. 248. *ECF 29*.

2. During that hearing, the Court ordered the Financial Institutions Division (FID) to advise the Court: (1) if FID was going to promulgate any clarifying regulations regarding S.B. 248; and, if so, (2) the “timeline with specific deadlines” for issuance of those regulations. *See transcript of hearing attached as Exhibit 1, p. 6*.

3. On August 10, 2021, the FID filed a notice of intent to issue regulations, and offered a general “timeline” for implementation of those regulations. *ECF 31*.

4. Though not clear from the notice, it appears that the FID is contemplating issuing only permanent regulations.¹ And as best as can be discerned from the estimated timeline, the FID does not expect to have regulations finalized and issued until January 2022, at the earliest.

5. A summary of the timeline proposed by the FID follows:

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¹ Nevada law creates 3 types of regulations – permanent, temporary, and emergency. Temporary regulations are not permitted here. *See NRS 233B.063* (“An agency may adopt a temporary regulation between August 1 of an even-numbered year and July 1 of the succeeding odd-numbered year by adopting a temporary regulation...”) The FID’s notice does not reference any proposal to expedite the adoption of emergency regulations or indicate that any request has been submitted to the Governor. *See NRS 233B.0613(1)* (“If an agency determines that an emergency exists, it shall submit to the Governor a written statement of the emergency which sets forth the reasons for the determination.”) The FID apparently does not view the constitutional infirmities of S.B. 248 and the harm caused to Nevada residents, medical providers, and collection agencies to be an emergency.

Action	Estimated Date
Draft of regulations completed	August 24, 2021
Small business impact survey to be sent	September 7, 2021
Deadline to respond small business impact survey	September 17, 2021
FID's completion of small business impact statement	October 8, 2021
FID regulation workshop ²	October 26, 2021
Nevada Legislative Counsel Bureau review ³	November 25, 2021 ⁴
FID publication of public notice of an adoption hearing	December 24, 2021
Nevada Legislative Commission review	No deadline ⁵

ECF 31.

6. In sum, the specific timeline submitted by the FID indicated that regulations will not be finalized until January 2022. This most optimistic of a timeline relies on multiple critical assumptions by the FID:

- There is no need for a second workshop;

² The FID's notice indicates that a second workshop may "be necessary based on changes resulting from the prior workshop" and that the second workshop will be completed by November 24, 2021. *ECF 31*, ¶ 5, p. 2. For purposes of this response, plaintiffs will choose to be optimistic that a second workshop will not be necessary and regulations can be issued without further delay.

³ According to a job posting for the Nevada Legislative Counsel Bureau, the Legal Division "meets biennially beginning on the first Monday in February of odd-numbered years for 120 days." [Deputy Legislative Counsel | Careers in Government](#) (last visited August 11, 2021). The Legislative Counsel Bureau would not be in session to review the proposed regulations until February, 2023.

⁴ The FID has estimated that this review can last from 30 to 60 days. *ECF 31*, ¶ 5 (*second*) (*sic*), p. 2. For purposes of this timeline, plaintiffs are again presuming the regulations can be reviewed in the shortest time estimated.

⁵ According to its website, the Nevada Legislative Commission "meets *every few months* between sessions to provide guidance to staff of the Legislative Counsel Bureau and to deal with other interim matters." (emphasis added.) See [Legislative Commission \(state.nv.us\)](#) (last visited August 11, 2021). The Legislative Commission currently has no meeting scheduled through 2022. <https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2021>. (last visited August 11, 2021). Regular meetings do not appear to be the norm, as the Legislative Committee has conducted only 3 meetings in 2021, with the last meeting have taken place on May 28, 2021. <https://www.leg.state.nv.us/App/InterimCommittee/REL/Interim2019/Committee/1431/Meetings> (last visited August 11, 2021).

- that the Legislative Counsel Bureau is meeting at the time of the submission for review;
- that the Legislative Counsel Bureau then completes its review in the shortest time period estimated;
- that the Nevada Legislative Commission is meeting at the time of the requested review and has a meeting scheduled at or near that time; and
- that the Nevada Legislative Commission completes its review within 30 days.

7. In other words, based on upon the review and approval required, the multiples levels of agency review and approval of the proposed regulations and the meeting history of these reviewers, at best it can only be assumed that January 2022 is not a likely date for issuance of necessary clarifying regulations. In fact, history suggests that these regulations may not be completed until 2023.

8. Plaintiffs and the collection agency industry should not be compelled to wait for a minimum of 6 months – let alone potentially 2 years or more - to be given sufficient notice and direction on how to comply with the Fair Debt Collection Practices Act and SB 248.

9. Plaintiffs have already demonstrated that S.B. 248 is unconstitutional due to the numerous conflicts with and interference with the purposes and intent of the Fair Debt Collection Practices Act and the Fair Credit Reporting Act, along with First Amendment violations of free speech. *ECF 4, ECF 5, ECF 25. See also Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2307 (2016) (“if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforce is proper.”)

10. With this proposed regulatory schedule, the Court should immediately grant plaintiffs’ motions and enter a temporary restraining order and preliminary injunction enjoining S.B. 248.

11. This Court should not wait to enjoin S.B. 248 because the analysis of whether a statute is constitutional focuses on the statue at the time enacted, and not how it could be modified or

corrected through regulatory revisions. *Dombrowski v. Pfister*, 380 U.S. 479, ___ (1965).

12. In *Dombrowski*, the Supreme Court reviewed a district court's denial of plaintiffs' request for declaratory relief and an injunction precluding a prosecution under Louisiana's Subversive Activities and Communist Control Law. In finding that the district court erred, the Supreme Court found that enjoining the statute immediately was appropriate, rather than waiting for an "acceptable narrowing construction" potentially offered by the State. In reaching this conclusion, the Supreme Court noted that "[i]n considering whether injunctive relief should be granted, a federal district court should consider a statute as of the time its jurisdiction is involved, rather than some hypothetical future date." *Id.*, 380 U.S. at 490.

13. When faced with a constitutionally flawed statute, the role of the Court is to enjoin the unconstitutional application of that statute. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). Courts should not "nullify more of a legislature's work than is necessary, for we know that 'a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Id.*, quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). However, "in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

14. SB 248 must be enjoined in full as the entirety of the Act is related to and dependent on other provisions of the law. This is shown first because "if any provision be unconstitutional, the presumption is that the remaining provisions fall with it." *Carter*, 298 U.S. at 312. Second, there is no severability clause in S.B. 248. *Ayotte*, 546 U.S. at 331 (presence of severability clause suggests that legislature intended a remedy of partially invalidating portions of an unconstitutional statute); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286

U.S. 210, 234 (1932) (presence of severability clause “discloses an intention to make the act divisible”). *Board of Natural Resources of St., of Wash. v. Brown*, 992 F.2d 937, 948 (9th Cir.1993) (the absence of a severability clause “does suggest an intent to have all components operate together or not at all.”

15. This result does not prejudice the State. If the State can issue clarifying regulations that can correct the constitutional defects in S.B. 248 – and plaintiffs are interested to see how – then the temporary restraining order and preliminary injunction can be lifted by this Court when completed. But Nevada residents and collection agencies should not be left in limbo for months and potentially years waiting for the FID to fix a bill that is constitutionally infirm.

WHEREFORE, plaintiffs respectfully request this Court immediately issue a preliminary injunction and temporary restraining order enjoining S.B. 248.

DATED this ____ day of August, 2021.

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DATED this ____ day of August, 2021.

/s/ David Israel

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **Plaintiffs' Response to the Division's Notice of Intent to Promulgate Regulations** was served via electronic service on the this ____ day of August, 2021., to the addresses shown below:

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