IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 22-15352

AARGON AGENCY, INC., a Nevada corporation; ALLIED COLLECTION SERVICES, INC., a Nevada corporation; ASSETCARE, LLC, a Texas limited liability company; 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; 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,

Appellants,

vs.

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

Respondent.

Appeal from a Decision of the United States District Court for the District of Nevada
The Honorable Richard F. Boulware
Case No. 2:21-cv-01202-RFB-BNW

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. 26.1, Appellants (hereinafter "Collectors") identify the following persons, parent corporations and publicly held corporations that own 10% or more of the stock of any appellant:

NAMED PARTY	INTERESTED PARTIES
Aargon Agency, Inc.	Duane Christy, Daniel Robinson, and Noa Char. Aargon does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
Allied Collection Services, Inc.	Michael Feeney and Farshid Vahid. Allied does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
AssetCare, LLC	Wholly owned by Capio Management, LLC. No publicly held corporation owns 10% or more of its stock.
Business and Professional Collection Service, Inc.	Jack J. Young and George P. Young. BPCS does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
Capio Partners, LLC	Wholly owned by Capio Management, LLC. No publicly held corporation owns 10% or more of its stock.
CF Medical, LLC	Wholly owned by Capio Acquisitions, LLC. No publicly held corporation owns 10% or more of its stock.
Clark County Collection Service, LLC	Charles Brennan and Keith Berg. CCCS does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Collection Service of Nevada	Wholly owned by Michelle Geil and Carey Geil. CSN does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.
Nevada Collectors Association	None. NCA does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
PlusFour, Inc.	Wholly owned by Richard B. Bennett. PlusFour, Inc. does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
RM Galicia, Inc. d/b/a Progressive Management, LLC	Does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.
The Law Office of Mitchell D. Bluhm & Associates	Does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I.

JURISDICTIONAL STATEMENT

Jurisdiction is based upon 28 U.S.C. § 1331. Collectors sought injunctive relief challenging a Nevada statute referred to as Senate Bill ("S.B.") 248. S.B. 248 is preempted by (1) the Supremacy Clause of the United States Constitution; (2) the Fair Credit Reporting Act ("FCRA"); and (3) the Fair Debt Collection Practices Act ("FDCPA") and 12 C.F.R. § 1006.1 *et seq.* ("Regulation F"). S.B. 248 also violates the First and Fourteenth Amendments because it imposes undue burdens on speech and is unconstitutionally vague.

Jurisdiction for this Court is based upon 28 U.S.C. § 1292(a)(1)." This appeal follows the lower court's order dated February 7, 2022, denying Collectors' Application for Temporary Restraining Order and Motion for Preliminary Injunction (the "Injunction Motion").

II.

STATEMENT OF THE ISSUES

1. Did the lower court err when it concluded that S.B. 248 was not an undue restraint on speech and was not unconstitutionally vague?

2. Did the lower court err when it concluded that the FCRA did not preempt S.B. 248?

3. Did the lower court err when it concluded the FDCPA and Regulation F did not preempt S.B. 248?

4. Did the lower court err when it concluded that the harm suffered by Collectors was not irreparable, and that the balance of equities and public interest did not support the Injunction Motion?

III.

STANDARD OF REVIEW

This Court applies a *de novo* standard when reviewing purely or predominately legal issues. *California First Amend. Coalition v. Calderon*, 150 F.3d 976, 980 (9th Cir. 1998). Matters involving interpretation or application of the U.S. Constitution, as well as federal and state statutes and regulations, fall squarely within this standard. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S. Ct. 1678, 1685 (2001). When applying the *de novo* standard, the Court gives no deference to the lower court's ruling, but independently considers the matter anew, as if no decision had been rendered on the matter below. *Voigt v. Savell*, 70 F.3d 1552, 1564 (9th Cir. 1995). Under this standard, "no form of appellate deference is acceptable." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003).

A moving party is entitled to preliminary injunctive relief if (1) it is likely to succeed on the merits; (2) it will suffer imminent irreparable harm if injunctive relief

is not granted; (3) the balance of equities tips in their favor; and (4) granting the injunction is in the public interest. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009). This Court employs a sliding scale whereby "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

This Court has also instructed that an "injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Id.* at 1134–35.

IV.

STATEMENT OF THE CASE

Collectors commenced the lower court action against Commissioner Sandy O'Laughlin (the "Commissioner") challenging S.B. 248. They applied for a temporary restraining order and moved for a preliminary injunction. Injunctive relief is in order because S.B. 248 constitutes an unlawful restraint on speech, is unconstitutionally vague, and because it is preempted by the FCRA, the FDCPA, and Regulation F.

The lower court denied the emergency motions on February 7, 2022, taking more than seven (7) months to issue its decision. This appeal followed.

/ / /

V.

STATEMENT OF FACTS[1]

A. The Collectors.

This appeal is comprised of numerous parties harmed by S.B. 248, (collectively identified as "Collectors"), including debt collection professionals, a purchaser of medical debt, and a Nevada association comprised of dozens of law firms and licensed debt collectors. *See generally* 2-ER-166-168, 4-ER-667-742. Many of the Collectors are small businesses licensed and heavily regulated under Nev. Rev. Stat. Chapter 649, and are subject to the Commissioner's authority. Nev. Rev. Stat. § 649.051. *Id.*

S.B. 248 directly impacts Collectors. Those who violate Chapter 649 are subject to Commissioner discipline, fines, license suspension, and revocation. *See* Nev. Rev. Stat. §§ 649.395 and 649.440. Licensees are also subject to civil actions for damages and injunctive relief, as well as criminal charges for violating the Chapter. *See* Nev. Rev. Stat. §§ 649.400 and 649.435.

The debt collector parties engage in consumer debt collection and credit reporting on behalf of their respective clients. 3-ER 446-455; 4-ER-644-742. They

[1] The Commissioner offered no evidence in support of its Opposition brief, nor did it dispute any of the evidence submitted by Collectors in the briefing. *See* 4-ER-644-673. Likewise, the Commissioner offered no exhibits and called no witnesses at the evidentiary hearing conducted by the lower court. *See* 4-ER-470-571.

therefore are (1) "debt collectors" subject to the mandatory requirements of the FDCPA and (2) "furnishers of information" subject to the requirements of the FCRA. *Id.* All Collectors directly or indirectly engage in the collection of unpaid medical debt on behalf of medical service providers, including physicians, health care providers, and providers of emergency services. *Id.* Their arrangements with their medical provider clients are structured on a contingency basis. *Id.* In other words, medical providers engaging collection professionals do not get paid unless and until their debt collectors are successful in resolving and actually collecting the accounts they place for collection. *Id*.

B. Medical Service Providers Rely on Debt Collectors to Collect Their Unpaid Accounts.

The debt collector parties collect debts on behalf of medical service providers, such as doctors, specialists, medical offices, laboratories, and hospitals. 2-ER-166-168 and 4-ER-668, 674-75, 688-89, 695-96, 703, 710, 717, 724, 737-738, 744, 751, and 758. These providers retain licensed Nevada debt collectors and attorneys under an arrangement in which they do not get paid on any account sent to collection unless and until the debt collector is successful in collecting the unpaid account. *Id.* Many medical providers lack the skill, knowledge, infrastructure, and resources to engage in debt collection on their own behalf, such that they are unable to collect delinquent

debts without the collection services afforded to them by a licensed debt collector or attorney. *Id.*

By the time unpaid medical debts are referred for collection, many months have passed since medical service was provided. 4-ER-636-639 and *generally* 4-ER-664-762. Prior to referral for collection, the providers exhaust their internal efforts to secure payment for the goods and services they rendered. *See id.* Multiple statements and demands for payment have been made by the medical service provider, and any back and forth with the consumer and the provider regarding the unpaid account has "cooled off." *See* 4-ER-520:3-524:1. Only then, usually **one year after service was provided**, are the accounts referred to Collectors. *Id.*

C. Enactment of S.B. 248.

In 2021, the Nevada Legislature enacted S.B. 248. 1-ER-35-37. S.B. 248 amended Nev. Rev. Stat. Chapter 649, governing licensed debt collectors, effectively placing compliance with its requirements under the auspices of the Commissioner. 1-ER-38. The Commissioner is empowered to enforce Chapter 649 and has the authority to impose discipline against debt collectors for violations of the S.B. 248. *Id.*

Therefore, any violation of S.B. 248 places the Collectors at risk of administrative fines, suspension or revocation of their licenses, civil injunctions, and even criminal penalties. *See* Nev. Rev. Stat. §§ 649.395 649.400, and 649.440. The

criminal penalties can multiply quickly, as "[e]ach day a person operates a collection agency in violation of the provisions of this chapter is a separate violation under this section." Nev. Rev. Stat. § 649.435.

S.B. 248 became effective on July 1, 2021. 1-ER-41. The bill provides, in pertinent part, as follows:

> **Section 7**
>
> 1. Not less than 60 days before taking any action to collect a medical debt, a collection agency shall send by registered or certified mail to the medical debtor written notification that sets forth:
>
> (a) The name of the medical facility, provider of health care or provider of emergency medical services that provided the goods or services for which the medical debt is owed;
>
> (b) The date on which those goods or services were provided; and
>
> (c) The principal amount of the medical debt.
>
> 2. The written notification required by subsection 1 must:
>
> (a) Identify the name of the collection agency; and
>
> (b) Inform the medical debtor that, as applicable:
>
> (1) The medical debt has been assigned to the collection agency for collection; or
>
> (2) The collection agency has otherwise obtained the medical debt for collection.
>
> **Section 7.5**
>
> 1. Nothing in section 7 of this act shall prohibit a collection agency from accepting a voluntary payment from a medical debtor during the 60-day notification period specified in subsection 1 of section 7 of this act provided that:

(a) The medical debtor initiates the contact with the collection agency; and

(b) The collection agency discloses to the medical debtor that:

(1) A payment is not demanded or due; and

(2) The medical debt will not be reported to any credit reporting agency during the 60-day notification period specified in subsection 1 of section 7 of this act.

2. No action by a medical debtor to initiate contact with a collection agency may be construed to allow the collection agency to take action to collect the medical debt before the expiration of the 60-day notification period specified in subsection 1 of section 7 of this act….

1-ER-39-40. Section 8(2) prohibits debt collectors from suing to recover unpaid medical debts in amounts of $10,000 or less during this period. *Id.* (citing to Nevada's jurisdictional limit of $10,000 for small claims court).

S.B. 248 prohibits debt collectors from taking **any** action to collect a medical debt until they send by certified or registered mail a written notice to the debtor detailing all of the information set out in S.B. 248(7) (the "Section 7 Notice"). Debt collectors must then wait sixty (60) days thereafter (the "Notice Period") before undertaking any further collection.

While Section 7.5 allows a debt collector to accept a voluntary payment, it may do so only if the debtor initiates contact with the debt collector and, curiously, if the debt collector expressly informs the debtor that (1) a payment "is not demanded

or due" and (2) the debt "will not be reported to any credit reporting agency during the 60-day notification period."

Meanwhile, the statute also prohibits a debt collector from furnishing or updating information to a consumer reporting agency ("CRA") about the debt. S.B. 248(7.5).

S.B. 248's broad prohibition against taking "any action" to collect a medical debt prevents a debt collector from doing anything other than sending the Section 7 Notice and waiting for the Notice Period to expire. During this period, a debt collector is prohibited from contacting the debtor by telephone, sending any written communication, and bringing a lawsuit, even though such debt is due and owing to the subject healthcare provider, who is still awaiting payment for the services it provided to the consumer/patient approximately one year before. *See* 4-ER-520:3-524:1.

If a medical debtor contacts the debt collector, the prohibition against taking any "action to collect a medical debt" leaves the debt collector unable to do much of anything, and a simple inquiry becomes a compliance minefield. S.B. 248 offers no guidance on whether the following constitutes an "action to collect a medical debt" and, if so, what to do:

- Accepting incoming telephone calls and verifying the debtor's identity (required under the HIPAA) to discuss the account;

- Answering a debtor's questions (and which questions) about the debt or the services that were provided, or amounts owed;

- Assisting the debtor in having health insurance claims processed so the debtor does not have to pay the debt; and

- Engaging in any other discussion of any kind with the debtor that might be deemed an "action to collect a debt."

D. S.B. 248 Effectively Shuts Down Medical Collections In Nevada.

S.B. 248 not only sent shock waves through the medical debt collection industry in Nevada, it stopped medical debt collections entirely. The bill, as enacted, was vague and ambiguous on its face, failing to define critical terms such as "medical debtor" and "action to collect a medical debt." *See* 1-ER-38-40. S.B. 248 first requires a debt collector to interface with a Nevada medical debtor, but then hamstrings that same debt collector from doing anything else. In short, once the medical debtor is alerted to the debt collector's involvement as now required, S.B. 248 then bizarrely bars debt collectors from continuing to contact medical debtors in any way. S.B. 248 acknowledges that medical debtors will contact the debt collector following the sending of the Notice, but then offers no guidance as to what debt collectors can and cannot say to medical debtors who choose to contact them voluntarily.

These defects are in direct conflict with the FDCPA, the FCRA, as well as other state law (*see* Nev. Rev. Stat. § 649.332). Debt collectors therefore are placed in the impossible position of electing which statute to violate. *See generally*, 4-ER-

665-762; and *specifically* 4-ER-672, 679, 693, 700, 707, 714, 721, 728, 734, 740-41, 748, 755, and 762. In other words, S.B. 248 forces debt collectors to choose between complying with S.B. 248 versus complying with the FDCPA and FCRA.

Because S.B. 248 forced debt collectors to pick the poison of violating either federal or state law, the Nevada medical debt collection industry shut down after July 1, 2021. 4-ER-480:23-481:2. The lower court acknowledged this undisputed fact at an evidentiary hearing on August 16, 2021. 4-ER-566:14-17 ("I think that there's been enough evidence as it relates to the fact that there's been a standstill in the industry.").

E. The Lower Court Proceedings.

S.B. 248 was signed into law on June 2, 2021, and took effect on July 1, 2021, less than one month later. After reviewing the law and its devastating impact, Collectors commenced the lower court action on June 25, 2021. On June 28, 2021, **before** the law took effect, Collectors filed an Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction (the "Injunction Motion").

The case was assigned to U.S. District Court Judge Richard Boulware, who deemed the Injunction Motion as not being an "emergency" because he felt "Plaintiffs could have filed their motions earlier had they wanted more expedited treatment." 1-ER-33. The lower court's decision was perplexing, given that the Injunction Motion was filed at the outset of the case, within a few weeks of S.B.

248's enactment, and before the law even took effect. Nevertheless, the lower court concluded, without explanation, that Collectors had somehow delayed commencing their challenge.

The proceedings quickly went downhill from there. At oral argument on July 27, 2021, the lower court openly mocked Collectors' pleading, pejoratively referring to it as "really close" to "kitchen sink litigation." 4-ER-584:7-10. Nonetheless, recognizing the obvious problems with S.B. 248, the court all but directed the Commissioner to begin promulgating regulations to save S.B. 248. 4-ER-582:23-584:5. Although Collectors submitted detailed and undisputed exhibits, including sworn licensee declarations, the lower court inexplicably deemed the Injunction Motion to involve only a "facial" challenge of S.B. 248. 4-ER-634 at 7-8.

The lower court next suggested it was "skeptical" that Collectors' declarations—**sworn under penalty of perjury and undisputed by the Commissioner**—accurately reflected Collectors' ability to navigate the conflicts between S.B. 248 and federal law. 4-ER-624:24-625:10. Though there was no factual dispute on any point, and Collectors' evidence was uncontested, the court nonetheless set an evidentiary hearing for August 16, 2021.

By then, the lower court apparently lost interest in truly assessing Collectors' Injunction Motion. Though it originally scheduled a three hour hearing (4-ER-

631:1-2), the court limited the hearing allowing testimony from only 3 witnesses for 15-20 minutes each. 4-ER-474:1-8.

The hearing was not truly contested. The Commissioner called no witnesses and offered no exhibits. After concluding the evidentiary hearing, the lower court decided to ignore Collectors' as-applied challenge to S.B. 248 and chose to analyze only the facial challenge. 4-ER-564:16-565:8. The court ostensibly did this on the pretext that it was waiting for the Commissioner to promulgate regulations for S.B. 248, fully understanding the Commissioner had no idea at the time if it was going to promulgate regulations at the time, or how long it would take to do so. *See* 4-ER-114:15.

After concluding the proceedings on an emergency motion, **the lower court did nothing for months**. On November 30, 2021, Collectors filed an Emergency Motion to supplement the record based upon the addition of Regulation F to federal law. The silence from the lower court exasperated Collectors. They begged the court to take action, and continued to present evidence of the worsening harm Collectors' small businesses were suffering while the industry-wide standstill remained. The November 30 filing specifically noted that S.B. 248 had caused PlusFour, Inc. to lay off all of its employees except one, and that it was dangerously close to permanent closure. 3-ER-451-464.

Even with information concerning the continued devastating impacts of S.B. 248 on these small businesses, the court failed to act for several more months. Only after service of a letter to chambers in accordance with District Court Rule IA 7-1(a) did the court finally act. 2-ER-46. On February 7, 2022, the court finally ruled on the emergency Injunction Motion, having delayed its decision **more than seven (7) months after it was filed**. 1-ER-1-32. As of the issuance of the lower court's order, the Commissioner still had not implemented regulations relating to S.B. 248, and the industry was still at a standstill.

VI.

SUMMARY OF ARGUMENT

The stated purpose of S.B. 248 is to provide a "cooling off" period for medical debt collection. It does no such thing. While medical service providers are allowed to engage directly with debtors in the collection of medical debts without restriction, S.B. 248 prohibits a debt collector from taking any action to collect a medical debt until it sends the Section 7 Notice and waits sixty (60) days thereafter. The debts, notably, had already "cooled off" by the time they are forwarded for collection, usually one year after medical service has been provided.

S.B. 248 prohibits debt collectors from engaging in truthful communication about lawful activity for lengthy periods of time. Until debt collectors mail a mandatory Section 7 Notice and for 60 days thereafter, they may not contact medical

debtors in any way. They may not engage in credit reporting. They may not commence a civil action to collect the unpaid debt. They may not do or say anything other than send a Section 7 Notice. S.B. 248 therefore violates the Free Speech clause of the First Amendment.

Federal law preempts S.B. 248. The state law forbids credit reporting and prohibits debt collectors from updating credit reports to timely and accurately reflect payments, disputes, and identity theft. S.B. 248 therefore not only runs afoul of the broad "relates to" preemption language set forth in the FCRA, it actually conflicts with FCRA provisions.

Also, because the notice required by S.B. 248(7) constitutes a "communication" as defined under the FDCPA, that Act is also triggered. In particular, the Section 7 Notice triggers multiple disclosure requirements under the FDCPA, including its "mini-Miranda" warning (15 U.S.C. §1692e(11)) and its validation notice disclosure requirements (15 U.S.C. § 1692g). In addition, if a debtor timely requests verification of a debt, under 15 U.S.C. § 1692g, S.B. 248 prohibits a debt collector from providing the required verification. Likewise, S.B. 248 prohibits the debt collector from any attempt to collect thereafter, despite the express FDCPA allowance to continue collecting following verification. *See* 15 U.S.C. § 1692g(b).

S.B. 248 forces debt collectors to lie to debtors. When a debtor contacts a debt collector seeking to pay their debt, S.B. 248 requires the debt collector to instruct the debtor that (1) *the debt is not due*, (2) that *no demand for payment is being made*, and (3) that the debt *will not be reported to a credit reporting agency during the Notice Period*. However, the debt is not only due, it is *overdue* and payment has already been demanded many times over before the debt has been forwarded to a debt collector. S.B. 248 therefore compels debt collectors to violate the FDCPA by misrepresenting "the character, amount, or legal status" of these medical debts under 15 U.S.C. § 1692e(2)(a) and also risks "overshadowing" liability under 15 U.S.C. § 1692g. This state law, presumably enacted to assist consumers, does just the opposite. And it undermines and conflicts with well-settled federal law.

The Section 7 Notice required by S.B. 248 is also inconsistent with the newly-enacted CFPB Model Validation Notice set forth in Regulation F. S.B. 248 prevents collectors from sending the CFPB approved Model Validation Notice. Absent compliance with the Regulation F model validation notice requirement, debt collectors are precluded from utilizing the safe harbor provisions afforded them in Regulation F. This too creates a conflict with federal law.

VII.

ARGUMENT

A. S.B. 248 Violates the First Amendment and Is Unconstitutionally Vague.

S.B. 248(7) mandates that a debt collector is precluded from taking "any action to collect a medical debt" until sixty (60) days after a debt collector sends a Section 7 Notice by certified or registered mail.

Any "action" includes all "communication" between a debt collector and a debtor. Because Section 7 and 7.5 of S.B. 248 expressly limit what a debt collector is allowed to communicate to a debtor – both in the Section 7 Notice itself and during the Notice Period—well-settled canons of statutory construction direct that no other communication may occur between debt collectors and debtors both before and during the Notice Period. *Expressio unius est exclusio alterius*. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (Nev. 1967) ("The maxim 'Expressio Unius Est Exclusio Alterius', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.").

1. S.B. 248 Bans Communication.

The Commissioner attempted to frame S.B. 248 as prohibiting only conduct and not speech. Opposition at 16:18-25. This argument ignored that *communication* between debt collectors and debtors is the *touchstone* of debt collection. Key provisions in the FDCPA's clearly recognize this. *See* 15 U.S.C. §§

1692c, 1692d, 1692e, 1692f(3-4 and 6-8). Even the lower court declined to adopt the ill-founded position that S.B. 248 regulates only conduct and not speech.

S.B. 248 unquestionably restricts speech between debt collectors and medical debtors. Before a Section 7 Notice is sent and during the 60-day Notice Period, S.B. 248 expressly prohibits the following speech:

- Contacting the debtor;
- Returning a voicemail message left by a debtor;
- Responding to a written communication sent by a debtor;
- Answering a debtor's questions about the debt; and
- Assisting the debtor with health insurance claims processing.

Even answering an incoming telephone call from a debtor and engaging in polite conversation about the debt could be construed as an improper attempt to gain the confidence of a debtor rising to the level of an "act to collect a medical debt" under S.B. 248.

S.B. 248 also bans speech between debt collectors and CRAs. Section 7 and 7.5 prohibit all communications relating to credit reporting of unpaid medical debts by debt collectors. Therefore, S.B. 248 bars debt collectors from participating in the credit reporting system relied upon by financial institutions throughout the country.

2. Standards for When S.B. 248 Applies are Missing.

The Due Process Clause of the United States Constitution prohibits the Commissioner from depriving any person "of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "'The touchstone of due process is protection of the individual against arbitrary action of government' . . . whether the fault lies in denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate government objective." *City of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Accordingly, "substantive due process and procedural due process converge on the same broad issue: whether the government's action in depriving an individual of a liberty or property interest was arbitrary." *Zavareh v. Nevada ex. rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:12-cv-02033-APG-PAL, 2013 WL 5781729, at *5 (D. Nev. 2013).

The "void-for-vagueness" doctrine is a critical component of the Due Process Clause and "incorporates several important due process principles." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). "To avoid unconstitutional vagueness, [a law] must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. *Id.*, citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Where a party

challenges a law as vague, the law "need not be vague in all applications if it reaches a 'substantial amount of constitutionally protected conduct.'" *Nunez*, 114 F.3d at 940, quoting *Kolender*, 461 U.S. at 359 n.8. When criminal penalties are imposed for a violation, as they are here (*see* Nev. Rev. Stat. § 649.435), or when it implicates constitutionally protected rights as opposed to mere economic regulation, "the need for definiteness is greater." *Nunez*, 114 F.3d at 940, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

A fundamental flaw in S.B. 248 is that it fails to define the term "action to collect a medical debt." This critical but undefined phrase is the lynchpin for many prohibitions contained in S.B. 248. Strangely, during the proceedings below, the Commissioner was unable to meaningfully define this confounding and vital term. The Commissioner's best attempt at defining the term "action to collect a medical debt" was as follows:

> Communications **that are not designed to induce payment from a debtor** are not actions to collect a medical debt, and therefore, not barred [by] SB 248.

4-ER-660:11-13 (emphasis added). Of course, nearly all communication between a debtor and a debt collector is done to induce payment. That is debt collection "communication" at its core. The notion that the government can determine *ad hoc* which communications are and are not "designed to induce payment" is a prototypical example of arbitrary and capricious enforcement in the making.

Tellingly, even the lower court appreciated and understood the constitutional implications raised by the Commissioner's comments. No doubt this is the reason why one of the court's first questions at oral argument concerned whether the Commissioner intended to promulgate regulations for S.B. 248. 4-er-582:6-8. The court also recognized that debt collectors are already under siege defending against frivolous and hyper-technical FDCPA and FCRA lawsuits. "Well, I get those suits all the time. I'm quite aware of—and there are firms that specialize in those particular suits, in this district even. I -- I have many of those suits myself…." 4-ER-600:22-25.

That recognition, however, failed to manifest into an understanding of how S.B. 248 creates a compliance minefield inviting even more frivolous and hyper-technical litigation risk, on top of disciplinary enforcement actions from the Commissioner for those brave enough to try to comply with S.B. 248 *and* federal law, doomed to get it wrong.

After waiting more than seven months (without any regulations from the Commissioner), the lower court issued a simplistic and frankly unhelpful conclusion that S.B. 248 barred Collectors from taking "*any and all action*" before the Notice Period had lapsed. 1-ER-13:17 (emphasis in original). This conclusion in no way resolved any of the pressing questions raised, particularly in terms of what to do *when a medical debtor contacts a debt collector*. Afterall, S.B. 248 mandates

that the debt collector expressly inform the debtor that the collector "is out there" and the debtor's debt is now with the debt collector. But what does that mean? Unfortunately the "nuance" that the lower court seems to think a layperson debtor will understand ("Yes, we wrote you about your debt, but we really aren't asking you to pay it or even collecting it; we just want you to know we are out . . .") will be lost on the typical debtor.

The Section 7 Notice will induce the debtor to contact the debt collector. Naturally, a debtor will contact the collector asking, "What's this all about?" or "I don't think I owe this much" or "Wasn't insurance supposed to pay this?" and all the myriad of other natural reactions to receiving the Section 7 Notice. Will a debt collector be deemed to be taking an "action to collect a debt" when it simply verifies an incoming caller's identity, answers her questions about the debt, assists her with processing of insurance, or perhaps accepts and responds to disputes? Debt collectors are left to guess. And because the statute requires guessing, this alone dictates that the statute is unconstitutional.

3. S.B. 248 Fails First Amendment Scrutiny.

While the FDCPA and FCRA impose various restrictions on certain speech in connection with certain collection activity, they do not impose total bans on communication. S.B. 248 does. Per S.B. 248, a debt collector **is expressly prohibited from communicating** with a medical debtor until a Section 7 Notice is

sent. For the next sixty (60) days after mailing, it still must wait before collecting on the debt, contrary to the right to otherwise collect per the FDCPA. A debt collector is prohibited from sending another letter, email, or making a phone call to the medical debtor. S.B. 248 also prevents debt collectors from reporting the unpaid medical debt to a CRA, and likewise prevents a debt collector from bringing a civil action.

As enacted, S.B. 248 prevents a debt collector from working with a debtor to resolve their unpaid debt. Instead, when a debtor voluntarily contacts the debt collector, the debt collector is statutorily-precluded from verifying the debt, from asking or answering the debtor's questions about the debt, from assisting the debtor with processing of insurance claims, and from doing anything that could be perceived as an attempt to collect a debt. Even polite small talk could be cynically challenged as rising to the level of an "action to collect a medical debt" because establishing a personal connection could be seen as a "device" to obtain payment from the debtor.

While not *per se* unconstitutional, a prior restraint on speech "comes to [the court] bearing a heavy presumption against its constitutional validity." *Weaver v. City of Montebello*, 370 F. Supp. 3d 1130, 1135 (C.D. Cal. 2019). Such content-based restraints are subject to strict scrutiny, and may only survive if they are narrowly tailored to support compelling state interest. *Twitter, Inc. v. Sessions*, 263

F. Supp.3d 803, 810 (N.D. Cal. 2017). A government regulation may not be based "upon either the content or subject matter of speech." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980).

The lower court applied the *lesser* commercial speech standard without explanation. Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). This Court views this definition not as just a starting point, and instead as a springboard to give effect to "a 'common-sense distinction' between commercial speech and other varieties of speech." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107 (9th Cir. 2021), quoting *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014). "Our commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *First Resort, Inc. v. Herre*ra, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotation marks omitted).

Debt collection does not propose a commercial transaction. The "transaction," an agreement to provide medical services in exchange for payment, takes place between the medical debtor and the service provider long before the debt collection effort begins. Collectors serve as agents to collect lawful amounts already due on behalf of their service provider clients. There is also no advertisement

involved. *See Ariix*, 985 F.3d at 1116. And there is no attempt being made to sell or offered a specific product. *See id.*

Therefore, the only way a commercial speech analysis could be applied in this case is if the lower court made a finding that the speaker, here a debt collector speaking to a debtor or reporting credit to a CRA, had an "adequate economic motivation so that the economic benefit was the primary purpose for speaking." *Id.* at 1117. No such factual finding was ever made.

Setting aside that error and assuming *arguendo* the lower court would have found that a debt collector's motivation in speaking with a medical debtor or a CRA was primarily economic, it nevertheless failed the commercial speech analysis. Under the *Central Hudson* test, this Court must "first evaluate whether the affected speech is misleading or related to unlawful activity." *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013) (internal quotation omitted). If not, "the government bears the burden of showing that it has a substantial interest, that the restriction directly advances that interest and that the restriction is not more extensive than necessary to serve the interest." *Id.*, citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

There was no dispute that the targeted speech, truthful communications attempting to collect lawful debts, satisfied the first prong of the *Central Hudson* test. However, the Commissioner submitted no evidence that S.B. 248 directly

advanced its stated substantial interest. More troubling, the absence of a "fit" between the government's stated interest (a "cooling off" period for medical debt collection) and its remedy (preventing debt collectors from communicating with medical debtors for 60 days) is particularly suspect because **S.B. 248 imposes no restrictions on the medical providers themselves who originated the debt** in the first place. Doctors, hospitals, and medical labs may send as many statements and debt collection letters and demands and make as many telephone calls as they wish to collect the exact same debts impacted by S.B. 248. The medical providers can also report the same unpaid debts to CRAs. They are also free to sue upon the same medical debts without waiting for any so-called "cooling off" period.

One consideration in the "direct advancement inquiry" of the *Central Hudson* test is under-inclusivity. *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 904-05 (9th Cir. 2009). The fact that S.B. 248 allows medical service providers to do all of the collection activity debt collectors are prohibited from doing "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *Id.*, quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51, 52 (1994).

Here, S.B. 248 resembles *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), which overturned a law banning broadcast advertising for most *private* casinos but exempted *tribal* casinos. *Id.* at 195-96. The U.S. Supreme Court held that the law's stated purpose, minimizing

casino gambling and its social costs, failed to match its restriction, as the law "would merely channel gamblers to one casino rather than another." *Id.* at 189. As a result, the law was held unconstitutional, because its "redistribution of gamblers was a fatal inefficacy." *Metro Lights*, 551 F.3d at 906. Here, S.B. 248 possesses this same fatal flaw. It channels medical debt collection away from debt collectors and back to medical service providers which are completely free from the restrictions imposed by S.B. 248.

The lower court also ignored the holding of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), which concluded that the **total suppression** of concededly truthful information about entirely lawful activity is unconstitutional. "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative." *Id.* at 773. Rather than acknowledging that a 60-day ban on speech constituted a total suppression of speech, the court shrugged it off and characterized the ban as a "brief carveout of time." 1-ER-29:26-27.

The temporary restrictions in the FDCPA, such as prohibiting a debt collector from telephoning a debtor from evening to the next morning, may credibly be characterized as a "brief carveout of time." *See* 15 U.S.C. § 1692c(a)(1). Two

months is not "brief."[2] Collectors are unaware of any case law supporting the notion that a total ban on speech for 60 days against a speaker survives constitutional scrutiny.

Using such logic, the state could ban all kinds of commercial speech for months at a time under the pretext of "consumer protection." Appellants ask this Court to consider what would happen to other industries—and the *Central Hudson* test—if the government were allowed such a slippery slope:

- Worried about high calorie content of fast food and impulse purchases by consumers, the government bans fast food restaurants from advertising the sale of their food until patrons have had the opportunity to inspect it for 60 days.

- Worried about residential real estate speculation, the government imposes a "cooling off period" on advertising that a house is "for sale" until 60 days after the sellers have hired a realtor to list the property.

- Worried about the high prices of last minute ticket resales for concerts and sporting events, the government mandates that ticket resellers may not advertise the resale of their tickets for 60 days after purchasing those tickets, even though many events will have already passed by the time the 60-day window passes.

The lower court concluded S.B. 248 supposedly passed constitutional muster because it was "narrowly tailored" to achieve its goals. 1-ER-29:25-26.

[2] The lower court's description of 60 days as a "brief carveout of time" particularly strikes Collectors as a double standard. The court chided Collectors for taking a mere three weeks to file their court challenge after enactment of S.B. 248. 1-ER-33. Then the same court deemed a two month prohibition on protected First Amendment speech to be a "brief carveout of time."

Narrow tailoring is part of the time, place and manner test under First Amendment jurisprudence. *See, e.g., Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009). When courts do mix a "time, place, manner" analysis into the *Central Hudson* test, they apply heightened scrutiny for restrictions that are content based. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-02 (1996). "Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely." *Virginia Bd. of Pharmacy*, 425 U.S. at 771.

Regardless, the fourth prong of the *Central Hudson* test is stricter than the mere "narrow tailoring" prong of the time, place, and manner analysis. *Central Hudson* directs that a law restricting commercial speech will fail if it is "more extensive than necessary" to serve the government's interest. *Central Hudson*, 447 U.S. at 566. At oral argument, Collectors posed this issue directly to the lower court, outlining that less extensive measures could equally serve the government's stated interest without burdening speech:

> [I]f there are other ways to accomplish those three goals, this law fails under the *Central Hudson* test. You already suggested one in oral argument. You suggested, "Well, what if a debtor calls in and asks for a cooling-off period, you could require that debt collector to give them a cooling-off period."
>
> I want to suggest another . . . approach, a repayment plan. I'm not making this up. N.R.S. 604A.5055 requires pay-day lenders when a

> debt goes into default to offer a repayment plan. This . . . would accomplish all three goals: assist the poor, COVID relief, and a cooling-off period without stopping people from talking to one another, without interfering with the First Amendment.
>
> I would ask that the Court consider that fourth prong of *Central Hudson*, and actually I would ask for some additional -- additional briefing just on that issue so the parties can address it.

4-ER-622:9-25. The lower court was not interested in considering less intrusive alternatives or further briefing. 4-ER-623. And though the lower court itself suggested a less restrictive alternative that could have accomplished the same goals of S.B. 248, it erroneously concluded that S.B. 248 satisfied the fourth prong of the *Central Hudson* test.

B. The FCRA Preempts S.B. 248.

Article VI, Paragraph 2 of the United States Constitution establishes that the federal constitution and federal law take precedence over state laws. Federal law preempts state law in the following circumstances:

> [First] Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . . [Third], state law is pre-empted to the extent that it actually conflicts with federal law.

English v. General Elec. Co., 496 U.S. 72, 78–79 (1990) (citations omitted). This Court also applies the implied preemption doctrine where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress" or when it "interferes with the methods by which the federal statute was designed to reach [its] goal." *Arellano v. Clark County Collection Serv., LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017). The touchstone of the preemption analysis is Congress's intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

1. The FCRA's Express Preemption Provision.

S.B. 248 is preempted by the FCRA, which expansively governs credit reporting. The FCRA's express preemption provision, 15 U.S.C. § 1681t, is broader than an ordinary "conflict" provision. It mandates that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s–2 of this title, **relating to** the responsibilities of persons who furnish information to consumer reporting agencies. . . ." 15 U.S.C. § 1681t(b)(1)(F) (emphasis added). In turn, 15 U.S.C. § 1681s-2 governs the duties of furnishers of information under the FCRA. This includes *inter alia* (a) the duty to report accurate information; (b) the duty to correct inaccurate information; (c) the duty to provide notice of a dispute; (d) the duty to notify a consumer reporting agency of a delinquent account; (e) the duty to report identity theft; (f) the duty to notify consumers of negative information; and (g) the duty to respond within 30 days to notice of an dispute by the consumer. *See* 15 U.S.C. § 1681s-2.

Meanwhile, S.B. 248(7) was enacted to expressly prohibit a debt collector from "taking any action" to collect a debt until sixty (60) days after it sends the Section 7 Notice. By the Commissioner's own admission, S.B. 248 prohibits a debt collector from engaging in any credit reporting until 60 days after the Section 7 Notice is mailed. *See* 4-ER-657:14-659:14.

15 U.S.C. § 1681s-2 not only allows debt collectors to furnish information to CRAs, it regulates the duties and responsibilities attendant to such reporting. It contains duties to correct and update information, investigate disputes, provide notice of a dispute, and to correct identity theft. Remarkably, S.B. 248 does just the opposite by prohibiting debt collectors from furnishing any information to consumer reporting agencies, and also from (1) crediting voluntary payments by the debtor; (b) resolving disputed debts in the consumer's favor; and (c) resolving instances of identity theft in the consumer's favor. Not only has S.B. 248 impermissibly invaded ground exclusively occupied by federal law, it has impermissibly interfered with consumers' rights in the credit reporting process because it prevents updating and correcting consumers' credit profiles.

Federal courts hold that the FCRA preempts state laws to the extent they regulate responsibilities of persons who furnish information to credit reporting agencies. *Gorman v. Wolpoff & Abramson*, 370 F. Supp. 2d 1005, 1009 (N.D. Cal. 2005), *reversed in part* on other grounds, 584 F.3d 1147 (9th Cir. 2009). "FCRA

preempts all state law claims, both statutory and common law, relating to a furnisher's credit reporting conduct." *Stephens v. LVNV Funding, LLC*, No. 2:12-CV-01159-GMN, 2013 WL 1069259, at *4 (D. Nev. Mar. 14, 2013) (*citing Roybal v. Equifax*, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2005)). In *Roybal*, the court held "[t]hrough the FCRA, Congress has elected to establish a scheme of uniform requirements regulating the use, collection and sharing of consumer credit information. In order to maintain this uniformity, Congress included express preemption clauses in the FCRA relating to various aspects of consumer credit reporting. **One area Congress has chosen to preempt is the regulation of furnishers of credit information**. . . ." 405 F. Supp. 2d at 1181 (emphasis added). Moreover, "furnishers of information cannot provide inaccurate information, but if they do, any state statutory and common law causes of action brought as a result of this conduct are preempted by the FCRA." *Id.* (*quoting Trout v. BMW of N. Am.*, 2007 U.S. Dist. LEXIS 12000, *6, 2007 WL 602230 (D. Nev. February 20, 2007) (holding that section 1681 t(b)(1)(F) preempts all state statutory and common law claims relating to conduct of furnishers).

The Commissioner contends that S.B. 248 does not interfere with 15 U.S.C. § 1682s-2 because furnishers of information are not *required* to report information to CRAs. This assertion—that the government can prevent someone from speaking because the speaker is not required to speak—would be comical if it

were not so offensive. The comprehensive statutory framework of the FCRA confirms that a furnisher of information has a **right** to report unpaid debts. To say that S.B. 248 does not "relate to" 15 U.S.C. § 1682s-2 merely because credit reporting is not mandatory demonstrates a fundamental failure to understand the FCRA and its purposes.

The Commissioner also blurs the FCRA's broad preemption statute with conflict preemption. Any state law **relating to** a furnisher's duties is preempted. 15 U.S.C. § 1681t(b)(1)(f). The FCRA is a detailed and uniform statutory framework that allows CRAs to gather information in consumer reports for, among other purposes, assessing a consumer's credit worthiness, credit standing, and credit capacity, all of which is contingent on "furnishers" providing that information. *See* 15 U.S.C. §§ 1681a(d) and 1681s-2. The FCRA in general, and the economic use of credit reports in making credit determinations in particular, are based entirely upon information supplied by furnishers such as debt collectors. Without such reporting, credit worthiness cannot be accurately assessed. Placing artificial and lengthy holds on the ability of a furnisher to participate in the credit reporting process (as Section 7 is designed to do) directly interferes with the efficiency and accuracy of the "elaborate mechanism" developed upon which the banking system relies for investigating the credit worthiness of consumers. 15 U.S.C. § 1681(a).

2. Conflict and Implied Preemption.

Setting aside the express "related to" preemption provision of the FCRA, S.B. 248 is also preempted because it actually conflicts with the FCRA, and because the FCRA impliedly preempts it. Again, S.B. 248 prevents debt collectors not only from engaging in credit reporting, but also from updating trade lines that have been reported previously by medical service providers. Debt collectors who have received accounts that were previously reported are barred from updating those accounts, or advising the furnisher of updates to correct mistakes, crediting medical debtors for payments made, identifying disputes, and addressing identity fraud claims. Therefore, S.B. 248 does not merely "relate to" a furnisher's duties under federal law, it affirmatively interferes with those duties. *See, e.g.*, 15 U.S.C. § 1681s-2(a)(1), (a)(2), (a)(3), and (a)(6).

This Court has also recognized that federal law may impliedly preempt a state statute if that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or when it "interferes with the methods by which the federal statute was designed to reach [its] goal." *Arellano*, 875 F.3d at 1216. In *Arellano*, this Court preempted a state law allowing for the execution of a chose in action as personal property. After a judgment creditor executed on Arellano's FDCPA claim and the lower court dismissed her FDCPA lawsuit, this Court reversed, even though there was nothing stated in the FDCPA

preempting state collection laws. This Court held that implied preemption applied because execution of that FDCPA chose in action would "thwart enforcement of the FDCPA and undermine its purpose." *Id.* at 1218.

Here, Congress stated the following express purposes when it enacted the FCRA.

> 1. The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> 2. An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> 3. Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> 4. There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a). It goes without saying that artificially delaying credit reporting, including delaying the ability to correct mistakes, credit payments that are made, identify, note and resolve disputes, and resolve identity fraud all interfere with the express Congressional purpose of the FCRA—to ensure fair and accurate credit reporting upon with the nation's banking system can rely.

The lower court never addressed the doctrine of implied preemption, and ignored common sense in the process. Understandably it was forced to acknowledge that S.B. 248 did not prohibit medical providers and hospitals themselves from reporting debts to CRAs. 1-ER-27:3-5. S.B. 248 therefore did not target medical debt; it targeted debt collectors.

The credit reporting system is not merely about whether a debtor has actually paid a debt, but whether that debtor has paid it **timely and in full**. The lower court's characterization of S.B. 248 as imposing a harmless "temporary freeze" demonstrates a misunderstanding of how lenders and the banking system assess credit risk. Freezing the process of credit reporting for 60 days impermissibly blurs the clear credit picture envisioned by Congress when it enacted the FCRA.[3] *See* 15 U.S.C. § 1681(a). Lenders are unable to make accurate lending decisions with stale and incomplete information. It is that simple.

As such, the FCRA impliedly preempts S.B. 248 because it "interferes with the methods by which the federal statute was designed to reach [its] goal." *Arellano*, 875 F.3d at 1218.

[3] From a lending perspective, there is a significant difference when a debtor is consistently on time paying a debt, versus being 30 days late, 60 days late, or longer. Because S.B. 248 freezes credit reporting for 60 days, there is no dispute that it distorts the true credit picture of a debtor.

C. The FDCPA and Regulation F Preempt S.B. 248.

The FDCPA contains its own preemption provision, which provides as follows:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, *except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency*. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

15 U.S.C. §1692n (emphasis added).

1. S.B. 248 Takes Away Consumer Protections Afforded Under the FDCPA.

S.B. 248 conflicts with the FDCPA in critical respects. For example, Section 7 prevents collection agencies from "taking any action to collect a medical debt" until sixty (60) days after first mailing a required Section 7 Notice to a medical debtor. Unfortunately for consumers, this prohibition effectively prevents debt collectors from complying with provisions set out in the FDCPA designed to protect the consumer, including advising the consumer of her rights under federal law.

There is no dispute that Section 7 mandates certain (and frankly bland) disclosures be made to a consumer that in turn directly conflict with required (and

frankly, more robust and protective) disclosures pursuant to the FDCPA. A debt collector cannot comply with both the FDCPA and S.B. 248. Accordingly, a debt collector is forced to essentially make false statements to debtors and fail to provide required federal disclosures, all of which overshadow the consumer's mandated federal rights, and thereby placing the debt collectors caught in this Catch-22 at a heightened risk of civil liability for failure to comply with the FDCPA.

The FDCPA is decades old, and its path to compliance is relatively well worn:

- In its "initial communication" with the debtor, a debt collector must disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose…" (the "Mini-Miranda Warning"). 15 U.S.C. § 1692e(11).

- At the time of or within five days of the "initial communication," the debt collector is required by 15 U.S.C. § 1692g(a)(3-5) to send a written validation notice to the debtor containing;

    a. A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

    b. A statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

    c. A statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different

from the current creditor.

- During the 30-day validation period, if a debtor sends a written verification request to the debt collector, the debt collector must cease collection of that debt until it provides verification of the debt. 15 U.S.C. § 1692g(b). Section 1692g(b) allows debt collectors to respond and provide verification immediately.

- After verification is provided, "[c]ollection activities and communications that do not otherwise violate this subchapter **may continue** during the 30-day period referred to in subsection (a)…." 15 U.S.C. § 1692g(b).

- When communicating with a debtor, debt collectors may not make misrepresentations to debtors regarding the character, amount, or legal status of a debt, and may not make statements that overshadow one another. 15 U.S.C. §§ 1692e(2)(a) and 1692g.

S.B. 248 upends these long-standing FDCPA mandates. For example, Section 7 **prevents** debt collectors from providing the required warning informing the debtor that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose (the "Mini-Miranda Warning"). 15 U.S.C. § 1692e(11). Section 7 also prohibits debt collectors from providing debtor with notice of their validation rights, as required by 15 U.S.C. § 1692g(a). Frankly, it is odd that S.B. 248 would prohibit a federal disclosure that is designed to alert the debtor to the role of the debt collector.

It does not end there. The S.B. 248 60-day freeze also prevents debt collectors from responding to debtor verification requests, as required under 15 U.S.C. § 1692g(b). S.B. 248 also directly conflicts with the FDCPA when it prevents

the ability to **continue** debt collection following verification of the debt. 15 U.S.C. § 1692g(b).

S.B. 248 even compels debt collectors to lie to debtors. Section 7.5 requires debt collectors to tell medical debtors that their debt "is not demanded or due" when the debt is in fact due and has already been demanded. The record is undisputed that medical providers only forward debts to debt collectors once they are months in arrears. By the time a debt is assigned to a collection agent, the services have been provided, payment has not been made, the service provider has billed the debtor and demanded payment, and it remains unpaid. Therefore, the debt is not only due, it is *overdue* and payment *has already been demanded*. That is why the debt has been sent to a debt collector. S.B. 248 therefore forces debt collectors to violate the FDCPA because compliance with S.B. 248 requires a misrepresentation of "the character, amount, or legal status" of the medical debt. 15 U.S.C. § 1692e(2)(a) and creates a risk of overshadowing under 15 U.S.C. § 1692g.

The Commissioner understood that any one of these conflicts would be fatal to S.B. 248. To circumvent these conflicts, the Commissioner asserts only that the Section 7 Notice is not a "communication" within the meaning of the FDCPA. The Commissioner posits that if the Section 7 Notice is not an FDCPA "communication," the FDCPA's protections are not triggered, there is no conflict between the two laws, and therefore no preemption. 4-ER-656:14-21. This legal

fiction is without merit, is based upon wild leaps of logic, and was squarely contradicted by the undisputed court record below.

The affirmative disclosure requirements mandated by the FDCPA *are* triggered when an "initial communication" occurs between a debt collector and debtor. 15 U.S.C. § 1692e(11). A "communication" is defined under the FDCPA as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. 1692a(2). The definition of "communication" is purposefully broad, and is regularly applied as such by federal courts ever since the FDCPA was enacted in 1977.

Notably, in *Hart v. Credit Control, LLC*, 871 F.3d 1255 (11th Cir. 2017), the Eleventh Circuit held that even a voicemail message left by a debt collector fell "squarely within the FDCPA's definition of a communication" even though it simply requested a return call. *Id.* at 1257. The voicemail did not mention **any** information at all about the underlying debt. Yet, the court stated:

> As in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose. The FDCPA defines "communication" as "the conveying of information regarding a debt [either] directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). We need not look any further than the statutory language of the FDCPA to decide that the voicemail is a "communication." Credit Control's first voicemail to Hart falls squarely within the FDCPA's broad definition of communication. The voicemail, although short, conveyed information directly to Hart—

> by letting her know that a debt collector sought to speak with her and by providing her with instructions and contact information to return the call. The voicemail also indicated that a debt collector was seeking to speak to her as a part of its efforts to collect a debt. Credit Control argues that because the voicemail "essentially reveals no more than a hang-up call," it cannot be a "communication." However, adopting that view would cause us to ignore the broad statutory language. The statute broadly defines "communication" as a conveying of information "regarding a debt." **In order to be considered a communication, the only requirement of the information that is to be conveyed is that it must be regarding a debt**.

871 F.3d at 1257-58 (emphasis added) (citations and quotations omitted).

The lower court chose to ignore the actual definition of Section 1692a as interpreted by countless courts as being very expansive, and instead looked to *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068 (9th Cir. 2016). Based on *Hernandez*, the lower court concluded that the Section 7 Notice was not a "communication" as that term is defined in Section 1692a(2) of the FDCPA.

The *Hernandez* case, however, is off-point. *Hernandez* addressed the question of whether a *subsequent* debt collector must also send a Section 1692g(a) validation notice after a previous debt collector had already sent one. 829 F.3d at 1068. *Hernandez* in no way addressed whether the type of communication mandated by S.B. 248 qualifies as a "communication" under the FDCPA. The lower court's reliance upon *Hernandez* was entirely misplaced.

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The lower court's preemption analysis also notably contradicted its own First Amendment analysis. The court concluded that actions to collect a medical debt under S.B. 248 "plainly include efforts to communicate with debtors." 1-ER-29:6. At the same time, the court concluded S.B. 248 does not conflict with the FDCPA because the Section 7 Notice "is not a 'communication *made in connection with* the collection of any debt'" and is sent "*before* any steps to initiate the debt collection process have occurred." 1-ER-19:24-20:20 (emphasis in original). Which is it? If an "action to collect a medical debt is "plainly" a "communication" with a debtor for First Amendment purposes, why is it not also a "communication" within the meaning of the FDCPA?

It is also contradictory, and intellectually dishonest, to conclude that a debt collector is not "trying" to collect a debt when it mails the Section 7 Notice. Its sole role and motivation in sending the Section 7 Notice is not to please the state that has told it to do so, but because **it seeks to collect a debt owed to its credit client, which in turn allows it to be compensated for doing so.**

The lower court also failed to address the follow up question of whether the debtor's *response* to a Section 7 Notice—which is expressly contemplated by S.B. 248(7.5)—constitutes its own "communication" with the debtor triggering the FDCPA. Communications such as an incoming telephone call from a debtor, asking questions about a debt and how to pay it, or disputing that debt, plainly relate to that

debt, therefore triggering compliance with the FDCPA. If such communications are not "communications" under the FDCPA, debt collectors could presumably violate the FDCPA with impunity by engaging in abusive conduct, making false representations, etc., under the fiction that the FDCPA's protections have not yet been triggered. Is that really the kind of precedent this Court wants to set?

Here, S.B. 248 serves as a complete bar to a debt collector (1) providing the FDCPA mini-Miranda warning, (2) sending out a validation notice, (3) verifying the debt under Section 1692g, and (4) collecting after responding to the verification request. Without question, S.B. 248 conflicts with the FDCPA and therefore is preempted.

Separately, the undisputed factual record demonstrates that the Section 7 Notice, **as applied in practice by the Commissioner**, was a "communication" within the meaning of the FDCPA. After S.B. 248 became effective, numerous debt collectors submitted draft letters—in the form of "machine-derived form letters" under Nev. Rev. Stat § 649.059 and Nev. Admin. Code § 649.280—to the Commissioner seeking guidance and approval before re-starting collections.[4] The Commissioner approved numerous Section 7 Notices under these rules.[5]

[4] Nev. Admin. Code § 649.280(1) mandates that all debt collectors submit for the Commissioner's approval machine-derived form letters "before their actual use by the collection agency."

[5] These approvals serve as admissions that the required Section 7 Notices were "communications" within the meaning of the FDCPA. The enabling statute for Nev.

The letters themselves tell a much more vivid story. The Commissioner's post-enactment of S.B. 248 approval of these letters, found at 2-ER-47 to 2-ER-119 are indisputably "communications" under the FDCPA. For example:

DELINQUENCY NOTIFICATION

Dear XXXXX:

Please be advised that your **past due account(s)** in the total principal amount of $370.94 has/have been assigned to our agency for collection….

Although you may voluntarily pay these account(s) at this time if you wish, **payment is not demanded or due within sixty (60) days from the date of this letter**. We report some accounts unpaid accounts to the credit bureaus but Nevada medical debt will never be reported to any credit reporting agency until at least sixty (60) days from the date of our first letter regarding your account(s). As such, **we will take no other action to collect this debt until 60 days from the date of this letter**. Various payment options are available for your convenience if you do chose to make a voluntary payment….

This is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector. Harris & Harris, Ltd. is a collection agency….

Please Detach And Return In The Enclosed Envelope With Your Payment

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Admin. Code § 649.280 expressly authorizes the Commissioner to "require collection agencies to submit any printed form of agreements, listing sheets, acknowledgments, **communications** or other documents used in its business for the Commissioner's approval or disapproval." Nev. Rev. Stat § 649.059 (emphasis added).

2-ER-71 (emphasis added where underlined). These approved Section 7 Notices without question convey "information regarding a debt directly or indirectly" to the debtor, and thus fall within the definition of a "communication" under Section 1692a(2).

These approvals also directly conflict with FDCPA requirements for such letters. Debt collectors are forced to state *in the same letter* (1) there is a debt that **is** due; (2) the debt **is not** due; (3) the letter **is** an attempt to collect a debt; and (2) the letter **is not** an attempt to collect a debt. In the foregoing example, the letter begins by alerting the consumer in large bold lettering that there is a "**DELINQUENCY**" but then notes payment is "not . . . due." 2-ER-71. Then the approved letter declares it is an "attempt to collect a debt" but goes on to state payment is not "demanded." *Id.* The confusion for the debtor continues as she reads the Commissioner's approved letter. *Id.* And despite the prohibition against taking any action to collect a debt, the approved letter asks the consumer to "detach and return" the payment stub "with your payment." *Id.*

If that were not perplexing enough, many Commissioner-approved letters combine the Section 7 Notice of S.B. 248 with the FDCPA mini-Miranda and its Validation Notice. *See, e.g.*, 2-ER-80. Under federal law, once the Validation Notice is sent, the FDCPA expressly allows a debt collector to collect undisputed debt. 15 U.S.C. § 1692g(b) ("Collection activities and communications that do not

otherwise violate this subchapter **may continue during the 30-day period referred to in subsection (a)** unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor."). S.B. 248 squarely conflicts with this rule as it prevents all collection activity.

That the lower court and the Commissioner were confused by the many conflicts in the approved letters confirms that the FDCPA's so-called "least sophisticated consumer" will be absolutely baffled. The "least sophisticated consumer" will wonder if the debt is owed or not owed, whether it is delinquent or not, whether the debt collector is attempting to collect a debt or not, and whether the debtor may actually pay the debt or not. This reality confirms that S.B. 248 does not help medical debtors in Nevada. It actually harms them.

Beyond harm to the debtors, the Commissioner's approved letters which conflict with the FDCPA, and thereby invite FDCPA lawsuits for misrepresentations and overshadowing, serve to harm the debt collectors and their clients. *See* 15 U.S.C. §§ 1692e and 1692g; *Terran v. Kaplan*, 109 F.3d 1428, 1432-33 (9th Cir. 1997) (letters that are likely to "confuse or mislead" the "least sophisticated debtor" violate the FDCPA).

2. S.B. 248 Robs Debt Collectors of the Regulation F Safe Harbor Provision.

None of the approved letters in the record come anywhere close to the CFPB's Model Form Initial Demand Letter, the use of which grants a safe harbor for FDCPA compliance under 15 U.S.C. § 1692g. *See* 3-ER-266-271. Regulation F requires a debt collector to "provide a consumer with the validation information required by paragraph (c) of this section either" in the initial communication with the debtor, or "within five days of that communication." 12 C.F.R. § 1006.34(a)(1). Importantly, whether a debt collector chooses to utilize the CFPB's model notice (and its safe harbor) or not, the debt collector per Regulation F (and the FDCPA that underpins it) must still provide all of the required consumer rights disclosures in the initial written communication with the debtor.

The CFPB recently reiterated that the validation notice requirement "is an important component of the FDCPA" and not a mere "check the box" requirement for debt collectors. 2-ER-189. Rather, it is designed to improve the collection process by requiring the debt collector to provide specific information in its initial communication with the debtor or within five days thereafter. 2-ER-190. The CFPB expressly noted that "validation notices in use today [prior to the CFPB's creation of its "safe harbor" Model Validation Notice] frequently lack sufficient information about the debt and the parties related to that debt, and this lack of information

undermines the ability of consumers to determine whether they owe an alleged debt." 2-ER-202.

The CFPB created the Model Form so that debtors will be provided notice of their rights and instructed on how to exercise them. *See* 3-ER-266-271. The Model Form "was developed and validated over multiple rounds of consumer testing that support its efficacy and comprehensibility." 2-ER-225. The Model Form provides a "safe harbor" which the CFPB deemed "appropriate because the model validation notice will effectively disclose information required by § 1006.34(c), and the safe harbor will incentivize debt collectors to use the model notice." 2-ER-223. On the other hand, debt collectors who send validation notices that do not substantially comply with the Model Form lose that regulatory safe harbor. 2-ER-189-190.

A quick comparison of the Model Form (3-ER-266-271) to the required Section 7 Notice confirms the myriad of conflicts the Section 7 Notice creates, including the following:

- The Model Form requires the debt collector to state it is "trying to collect a debt."
    - S.B. 248(7) does not allow a debt collector to demand payment. Moreover, if a debtor calls a debt collector in response to receiving a Section 7 Notice, Section 7.5(1)(b)(1) compels the debt collector to tell the debtor the debt "is not demanded or due."
- The Model Form states that the debt collector "will use any

information" given by the debtor to collect the debt.

  - S.B. 248 does not allow for such a statement.

- The Model Form gives the debtor a firm deadline to dispute the debt.

  - S.B. 248 does not allow the debt collector to impose such a deadline.

- The Model Form directs that the debt collector must "stop collection an any amount you dispute until we send you information that shows you owe the debt."

  - S.B. 248 prohibits all debt collection efforts, regardless of whether a debtor disputes the debt in writing, for 60 days after sending the Section 7 Notice.

- The Model Form expressly invites the debtor to "[c]ontact us about your payment options."

  - S.B. 248(7)(1) prohibits any such invitation for 60 days after sending the Section 7 Notice as an "action to collect a medical debt" in violation of the statute.

- The Model Form provides a box that can be checked for a debtor to make payment, directing the debtor to "[m]ake your check payable to" the debt collector.

  - S.B. 248(7)(1) prohibits any such invitation as an "action to collect a medical debt" for 60 days after sending the Section 7 Notice.

It is impossible to square S.B. 248 with the Model Form. To satisfy S.B. 248, debt collectors must not only abandon the safe harbor protection of the Model Form, they must forego providing mandatory FDCPA disclosures to debtors. Compliance with the less-stringent S.B. 248 therefore conflicts directly with Regulation F and

the FDCPA. *See In re Nine West LBO Sec. Litig.*, 482 F. Supp. 3d 187, 207-08 (S.D.N.Y. 2020) (state laws that interfere with federal safe harbor provisions are preempted by federal law).

The CFPB went to great lengths when promulgating Regulation F and creating the Model Form. Its efforts included soliciting public comment, obtaining "feedback from Federal and State government commenters, including the FTC and a group of State Attorneys General," and testing over the course of several years. 2-ER-202.

And without question, implied preemption also applies here because S.B. 248 "interferes with the methods by which the federal statute was designed to reach [its] goal." *Arellano*, 875 F.3d at 1216. S.B. 248 directly interferes with Regulation F because it prevents debt collectors from utilizing the Model Form to provide debtors with notice of their federal rights (and therefore also deprives debt collectors from receiving the safe harbor enacted by the CFPB). This conflict alone dooms S.B. 248 from a preemption standpoint.

D. Collectors Have Been Irreparably Harmed, and Balance of Equities and Public Interest Is Sharply in Their Favor.

A party seeking injunctive relief is entitled to preserve the *status quo ante* when they are subject to "irreparable harm" if an injunction is not issued. *Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011). The deprivation of a

constitutional right has no adequate legal remedy and thus "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Irreparable harm similarly arises in the context of unconstitutional business regulations. *See, e.g., Lone Star Sec. and Video, Inc. v. City of Los Angeles*, 2012 WL 2529404, at *3 (C.D. Cal. July 2, 2012). This Court applies a "sliding scale approach," such that "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Arc of California v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014).

Undisputed evidence confirms irreparable harm. S.B. 248 deprives Collectors of their basic constitutional rights and interferes with their obligation to comply with the mandatory requirements of the FDCPA and the FCRA. This has forced them to choose which law they will comply with and which they will not. It has also forced them to mispresent facts to debtors. If Collectors comply with S.B. 248, they will be deemed to violate the FDCPA and FCRA. Conversely, if Collectors comply with their obligations under the FDCPA and the FCRA, they will be deemed to violate S.B. 248. Either way, Collectors are subject to discipline, penalties, or litigation for merely attempting to follow the law.

Despite these irreconcilable conflicts, the lower court undertook a dubious approach to considering the irreparable harm, one that randomly and improperly disregarded sworn declarations. The lower court similarly took a cavalier approach to the very real impact of S.B. 248 is having on small businesses in Nevada.

The court concluded that Collectors sworn declarations were "conclusory" with regard to the threat imposed by S.B. 248 on their businesses. 1-ER-30. This conclusion was directly at odds with the lower court's acknowledgement that S.B. 248 had **caused an "industry standstill" in collection of medical debt in Nevada**. 4-ER-566:14-16. That standstill, triggered by the insurmountable and irreconcilable conflicts between S.B. 248 and federal law, coupled with the very real financial risks to Appellants' businesses very survival, were somehow not enough suffering for the lower court. Instead, the lower court's order ultimately characterized the harm to Collectors as solely pecuniary, somehow believing that this ended the inquiry. The court's cursory analysis of the actual harms being suffered by the Collectors is perplexing.

The lower court's treatment of PlusFour bordered on heartless. PlusFour was only collecting Nevada medical debt when S.B. 248 took effect. At that time, it had twelve employees and was a successful small business. Solely because of S.B. 248, PlusFour was forced to lay off all of its other employees, and the company was on the verge of permanent closure. 3-ER-454-455. But the lower court simply did not

care. Instead, it delayed for many months in ruling. In what can only be described as a callous comment, the lower court concluded that PlusFour "preemptively" stopped collecting. According to the lower court, it was as though losing the ability to continue conducting one's business because it was being forced to choose between violating federal law or state law was a voluntary "choice."

The lower court seemed to believe there was no irreparable harm because PlusFour had not been "threatened with suit under the FDCPA or SB 248" and that Collectors' challenge involved "hypothetical enforcement scenarios." 1-ER-22:13 and 1-ER-31:2-6. These conclusions are astonishing in light of the lower court's own assessment of the impact of S.B. 248. The lower court acknowledged that S.B. 248 had caused an "industry standstill" stopping collection of all medical debt in Nevada. Why was collection stopped? Because Collectors could not comply with S.B. 248 without violating federal laws, and vice versa. Regardless, if any of the substantive claims succeed here, reversal is warranted. And all of the bases for reversal set forth by Collectors in this appeal independently warrant reversal.

Finally, the deprivation of constitutional rights, including First Amendment rights, constitutes a "significant public interest" that outweighs the state's interest in protecting its citizens. *National Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 853-54 (E.D. Cal. 2018). Because of the multiple preemption issues and conflicts it creates with the FDCPA and FCRA, S.B. 248 pits Collectors with the

real risk of terminal regulatory discipline under NRS Chapter 649. *See* Nev. Rev. Stat. § 649.395. Conversely, if Collectors fail to comply with the mandatory provision of the FDCPA and FCRA and instead follow S.B. 248, they will face a tidal wave of civil lawsuits for failure to comply with federal consumer protection laws. This Court can already see that, because of the undisputed industry standstill, doctors and hospitals are not being paid for their work.

Under either consideration, the preemption analysis balances the equities in Appellant's favor. *See, e.g., Compass Airlines, LLC v. Montana Dept. of Labor and Indus*., 914 F. Supp. 2d 1170, 1178-79 (D. Mont. 2012).

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VIII.

CONCLUSION AND SUMMARY OF REQUESTED RELIEF

Collectors respectfully seek reversal the lower court's order and request that this Court issue an order directing the lower court to issue an injunction enjoining the enforcement of S.B. 248 in all respects from the date of its enactment and in perpetuity.

DATED this 5th day of April, 2022.

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STATEMENT OF RELATED CASES

There are no related cases before this Court.

CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 12,976 words.

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