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

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I.

LEGAL ARGUMENT

A. The Commissioner's Vagueness Analysis Is Without Merit.

1. The Commissioner Misstates the Holding in Schwarzmiller and Other Cases.

The Commissioner does not dispute that a law is constitutionally unsound when it imposes arbitrary action of the government through the enforcement of an unduly vague law. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). From there, however, the Commissioner's legal analysis goes awry. The Commissioner contends an as-applied vagueness challenge becomes "moot" if a court concludes that a statute survives a facial challenge, citing to *Schwarzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984). *See* Answering Brief ("AB") 10.

The Commissioner misstates this holding.

Schwarzmiller holds that if a statute is facially unconstitutional, it may not be saved in an "as applied" challenge. 752 P.2d at 1346 ("The doctrine does not permit a court to conclude that a statute is facially vague and therefore void, yet not void because it is sufficiently definite as applied."). *Schwarzmiller* does **not** hold that if a statute survives a facial challenge, it may then avoid an "as applied" challenge as moot.

The *Schwarzmiller* "standard" also does not apply. That case involved a conviction for performing lewd and lascivious acts on a child, and did not involve "constitutionally protected conduct." 752 P.2d at 1346-48. When protected speech is at issue, a different standard applies. "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." *Nunez*, 114 F.3d at 940, citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). 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. When criminal penalties are imposed, as they are here (Nev. Rev. Stat. § 649.435), or when it implicates constitutionally protected rights as opposed to mere economic regulation, as it also does here, "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).

The Commissioner's references to *Bucklew* and *Salerno* are similarly without merit. In *Bucklew v. Precythe*, — U.S. —, 139 S. Ct. 1112, 1127 (2019), the Court generically described that a facial challenge "is really just a claim that the law or policy at issue in unconstitutional in all its applications." The Court did not in any way overrule the *Nunez* standard that a statute need not be vague "in all of its applications" when constitutionally protected speech is at issue. *Nunez*, 114 F.3d at

940. In short, "label is not what matters'" when it comes to "the meaning of the Constitution." *Bucklew* at 1128, quoting *Doe v. Reed*, 561 U.S. 186, 194 (2010). Meanwhile, in *United States v. Salerno*, the Court held that **except in First Amendment cases**, a law may be facially unconstitutional only when no set of circumstances exists under which the law would be valid. *See A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002).

Neither *Bucklew* or *Salerno* involved constitutionally protected First Amendment speech. This case does.

2. S.B. 248 Does Not Provide Standards for Compliance When a Consumer Contacts a Collector.

After applying the wrong legal standard, the Commissioner speculates that Collectors "perfectly understand" S.B. 248, and contends that the scenarios offered in their Opening Brief are "hypothetical." AB at p. 11-15. The Commissioner has obviously never been hounded by a regulator or sued under the FDCPA. Her denigrations of the Collectors and their legitimate concerns overlook the Catch-22 into which S.B. 248 places debt collectors.

S.B. 248 prohibits any attempt to collect a debt other than sending a Section 7 Notice and waiting for the sixty (60) day Notice Period to expire. The only exception is Section 7.5, where Collectors may accept a voluntary payment if they disclose that (1) payment is not demanded or due; and (2) the debt will not be reported to any consumer reporting agency within the Notice Period. 5-ER-819 to

5-ER-820. Nothing else is authorized in Section 7.5. A plain reading of S.B. 248—and Nevada case law applying the maxim *expressio unius est exclusio alterius*—directs that Collectors engage in no other communications beyond what is allowed by Section 7.5. *See Horizons at Seven Hills Homeowners Ass'n*, 132 Nev. 362, 373 P.3d 66 (Nev. 2016), citing 2A Norman J. Singer & J.D. Shambie Singer, STATUTES & STATUTORY CONSTR. § 47:23 (7th ed. 2014); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (Nev. 1967).

Recognizing that a proper statutory interpretation of S.B. 248 prohibits **all** communications by medical debt collectors other than the narrow one permitted under Section 7.5, and appreciating the First Amendment consequences of such a sweeping and chilling prohibition on speech (*see infra* Section I.B.), the Commissioner lashes out at the "insincere" Collectors, speculating they "perfectly understand" what Section 7.5 allows. AB at p. 11. Yet no evidence in the record supports these aspersions. Instead, the Commissioner did not dispute a single declaration or contradict any sworn testimony. The Commissioner's claim of easy comprehension therefore ignores the Catch-22 into which Collectors are placed when trying to comply with both S.B. 248 and the FDCPA.

The Commissioner instead makes the dizzying statement that an action to collect a medical debt" means communications that are not **designed** to induce payment from a debtor. 4-ER-705:11-13. The Commissioner does not explain how

Collectors are supposed to fathom what is and is not "designed" to induce payment. Nor does S.B. 248 articulate any standards for making such a determination.

The Answering Brief itself demonstrates the vagueness in S.B. 248 and its undefined "action to collect a medical debt." On page 14, the Commissioner offers examples of what can and cannot be said when a medical debtor initiates contact with a debt collector. None of these arbitrary examples are found anywhere in the statute. They are simply fabricated from whole cloth. They include:

- A debt collector may say "that the medical debt has been placed with a collection agency."
- A debt collector may "tell the debtors they have 60 days to verify if the medical debt is in fact "due and owing" to the medical provider.
- A debt collector may tell the debtor that "collection efforts will not begin until the 60 days expire."
- A debt collector may not say "you owe us money."
- A debt collector may discuss insurance coverage, so long as "the conversation does not . . . turn into an argument or effort to collect a debt…."

AB 14. Collectors urge this Court to consider the regulatory minefield of trying to determine when or how a discussion with a debtor over insurance coverage "turn[s] into an argument" or "effort to collect a debt," let alone trying to train collection agents to ascertain when a conversation has crossed that vague, indefinite line.

3. Collectors' Undisputed Evidence Offers Real Scenarios, Not "Hypothetical" Ones.

To avoid the constitutional infirmity of S.B. 248, the Commissioner contends the Collectors have offered only "hypothetical scenarios." However, the Commissioner did not dispute **any** of the Collectors' sworn declarations, particularly where Collectors attested that they did not know whether responding to an inquiry initiated by a medical debtor, and to what extent, constituted an "action to collect a medical debt." *See* 5-ER-717, 724, 731, 738, 745, 752, 759, 766, 773, 780-781, 787-788, 793-794, 800-801, and 807-808.

Sworn testimony at the evidentiary hearing added specifics. That testimony was—and remains—undisputed. Mr. Feeney gave detailed testimony based upon his 30-year experience in the collection industry about the very real scenarios that occur with the collection of medical debt. *See* 4-ER-480:7 and 4-ER-491:6 to 4-ER-496:9. Nearly all scenarios involved providing a balance due and answering questions the debtor has about the debt. 4-ER-491:24 to 4-ER491:1. Many involved facilitating insurance payments when a patient does not understand what insurance covers. 4-ER-492:15-17. Collectors get involved when coverage has been denied because the Medical Service Provider has filed a late claim. 4-ER-492:25 to 4-ER-493:2. For Aargon, such cases happen up to 500 times per month. 4-ER-494:17-18. As a "path of least resistance," debt collectors start collection by

facilitating insurance payments, even when claims are untimely, to avoid seeking payment directly from a debtor. 4-ER-495:13-18.

Throughout this process, consumer medical debtors have many questions about the debt, coinsurance, deductibles, and benefits. 4-ER-533:14-25. Many do not understand the process and become frustrated when they cannot receive answers. *Id.* One particularly sticky scenario is when a debtor has multiple debts, some of which are medical debt, and some of which are not. 4-ER-496:22 to 4-ER-497:2. Here Collectors are placed in a "quandary" as to how to separate those debts, with no guidance from the statue at all. *Id.*

The Commissioner thus cannot escape unconstitutional vagueness by claiming Collectors' scenarios are "hypothetical." The risks of trying to comply with the competing requirements of S.B. 248 and federal law are so concrete that it caused an industry-wide shutdown. Collectors, wanting to engage in their chosen work, are unable to comply with the statute without setting themselves up for administrative discipline, civil suit, and potentially criminal prosecution. *See* 4-ER-50316 to 4-ER-504:1. This shutdown was not casual and not "voluntary."

B. S.B. 248 Violates the First Amendment.

1. Strict Scrutiny—Or At Least "Heightened Scrutiny"—Applies Here.

The Commissioner argues against application of the prior restraint doctrine. AB 17-18. Yet, the government generally "has no power to restrict

expression because of its message, its ideas, its subject matter, or its content." *Barr v. American Ass'n of Pol. Consultants, Inc.*, — U.S. —, 140 S. Ct. 2335, 2341 (2020) (quotation omitted). "[C]ontent-based laws are subject to strict scrutiny." *Id.* at 2341 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). At a minimum, "heightened scrutiny" applies to content-based restrictions on speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"). Plainly, S.B. 248 constitutes a content-specific restriction on speech—it does not even pretend to be content-neutral.[1] *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (content-neutral laws are "those that are justified without reference to the content of the regulated speech") (internal quotation marks omitted).

As to the scrutiny to be applied in the face of a content-based restriction on speech, the bar has been set so high that the Supreme Court holds that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). That remains true even in the context of "commercial speech." The Supreme Court has stated:

> A government bent on frustrating an impending demonstration might pass a law demanding two years'

[1] The Commissioner focuses only on the impact of prohibiting communications with consumers, and ignores the First Amendment impact on prohibiting communications between debt collectors and consumer reporting agencies ("CRAs").

> notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. **Commercial speech is no exception**.

Sorrell, 564 U.S. at 566 (internal citations omitted; emphasis added)). *See also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993) (commercial speech restriction lacking a "neutral justification" was not content neutral).

These precedents refute the Commissioner's assertion that "no precedent" supports heightened review of restrictions on commercial speech. *Sorrell* not only supports heightened scrutiny, it requires it. In that case, Vermont prohibited the sale, disclosure, and use of pharmacy records revealing the prescribing practices of doctors—a practice described as "detailing." 564 U.S. at 563-64. Much like S.B. 248, the law burdened "disfavor[ed] speech by disfavored speakers." *Id.* at 564. When the Court concluded the Vermont law imposed "a specific, content-based burden on protected expression," it applied "heightened judicial scrutiny." *Id.* at 565.

S.B. 248 is not only content based, it is **viewpoint discriminatory**. *See Sorrell*, 564 U.S. at 571. S.B. 248 shackles the hands of one speaker while allowing the other to speak without restriction. The Commissioner does not cite to any case, and Collectors are unaware of such authority, holding that a viewpoint-based

restriction on speech is salvageable under the First Amendment. It certainly was not in *Sorrell*, and it is not here.

2. Application of the Central Hudson Test.

To the extent *Central Hudson* applies, the lower court misapplied it. Under *Central Hudson*, 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 must demonstrate (1) it has a substantial interest; (2) S.B. 248's speech restriction directly advances that interest; and (3) the restriction is not more extensive than necessary to serve the interest. *Id.*

Here, the prohibition on speech in the Section 7 Notice and during the Notice Period encompass *all* communications between a debt collector and a medical debtor regarding a medical debt. The restricted speech—debt collection—has long been permitted by law. *See* Nev. Rev. Stat Chapter 649. Although perhaps disfavored by some, debt collection speech is not inherently misleading. Thus, the initial question under *Central Hudson* is whether the speech at issue is inherently false, deceptive, or misleading, or whether it has only the "potential" to mislead. *In re R.M.J.*, 455 U.S. 191, 203 (1982). Because debt collection speech in its normal application falls into the latter category, the Court must turn to the remaining three prongs of the *Central Hudson* test.

3. S.B. 248 Is Not Tied to a Substantial Government Interest.

The lower court found "little question that Nevada has a substantial interest in protecting its citizens from the financial ruin that may accompany crushing medical debt." 1-ER-30. But at no point did the Commissioner offer **evidence** to support that interest. The Commissioner states only that "[o]ver twenty percent of Nevadans have medical debt and more than 40 percent are not covered by an employee-sponsored insurance plan." AB 19.

Yet, in a given year, only about 0.031% of the U.S. population faces bankruptcy (one measure of "financial ruin") as the result of a hospitalization. *See* "Myth and Measurement: The Case of Medical Bankruptcies," Carlos Dobkin, Ph.D., Amy Finkelstein, Ph.D., Raymond Kluender, B.S., and Matthew J. Notowidigdo, Ph.D.[2] Though the CFPB estimates the number of Americans who owe medical debts range between 17.8% and 35%, most "medical debt tradelines were *less than $500*." *See* MEDICAL DEBT BURDEN IN THE UNITED STATES, CONSUMER FINANCIAL PROTECTION BUREAU (Mar. 1, 2022) at 2, 13 (emphasis added).[3] And 75% of all civil case judgments for medical debt were for less than $5,200 total. *Id.* These amounts hardly raise the specter of "financial ruin," and

[2] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5865642/ (accessed May 18, 2022).

[3] Available at https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf (accessed May 18, 2022).

reflect debt levels that can be resolved with the help of a professional debt collector working closely with a cooperative medical debtor through a free exchange of speech and information.

Because the Commissioner failed to document the "substantial interest" that supposedly underlies the speech restrictions imposed under S.B. 248, this Court should not imagine one; the burden on this issue belongs to the Commissioner. *Sorrell*, 564 U.S. at 552, 571–72 ((("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."). S.B. 248 does little to nothing to help medical debtors resolve their debts; rather, it prolongs an already protracted medical collections process and creates barriers to constructive and productive communications between medical debtors and debt collectors.

The Commissioner takes issue with citations to *Metro Lights* and *Greater New Orleans* and objects that the issue of under-inclusivity was not raised before the lower court. AB 22-23. However, it is the Commissioner's burden to demonstrate that S.B. 248 furthers its stated interest—not the other way around. Regardless, while *Metro Lights* and *Greater New Orleans* were not specifically cited below, Collectors plainly raised the *Central Hudson* test to the lower court and repeatedly complained that S.B. 248 was impermissibly underinclusive. SER 20-21 and 80-81. And, while an issue raised for the first time on appeal is usually waived,

it will be allowed if it is "purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Bolker v. Commissioner of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). Plainly, the issue of under-inclusivity falls into this exception.[4]

The Commissioner does not meaningfully address the problem of under-inclusivity created by S.B. 248, offering no substantive response to *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009). In response to the equally binding *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), the Commissioner suggests only that the case is inapplicable because S.B. 248 does not distinguish between *private* and *tribal* debt collectors. AB 23. This misses the point entirely. S.B. 248 prohibits debt collectors from engaging in certain speech, while allowing Medical Service Providers to engage in the same speech. This means that the law "merely channel[s]" debt collection from one person to another. When a content-based restriction on speech such as this targets a specific individual or group but allows others to engage in the same speech, that "redistribution" or "channeling" of speech creates a "fatal inefficacy" for that law. *Metro Lights*, 551 F.3d at 906; *Greater New Orleans*, 527 U.S. at 189. *See also*

[4] For the same reason, Collectors do not object to the Commissioner's citations to *Schwarzmiller, Bucklew, Salerno, and Spokeo*, and their attendant arguments, even though they are being referenced for the first time on appeal. Cf. 4-ER-689 to 4-ER-708.

National Institute of Family and Life Advocates v. Becerra, — U.S. —, 138 S. Ct. 2361, 2371-72 (2018); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.").

Instead of addressing the merits, the Commissioner takes a gratuitous swipe at debt collectors, citing to a single case where a debt collector misstated the amount of a debt. In an egregious misrepresentation, the Commissioner argues that even the Collectors "admit that they frequently receive a debt that was never billed to the patient." AB 20. The cited text, at 4-ER-495:4-25, **says no such thing**. It is one of many points where the Commissioner urges this Court to impose a "debt collector exception" to constitutional rights. It is a mindset where basic rights and privileges are offered only to those who are favored. Consumers can speak. Medical providers can speak. Debt collectors cannot speak. Why not?

4. S.B. 248 Is More Extensive Than Necessary.

S.B. 248 fails the next prong of the *Central* Hudson test—the requirement that a law not be more extensive than necessary to serve the government's purported interest. The Commissioner barely responds, offering a mere two sentences to argue, without support, that lesser alternatives would not further the goal of S.B. 248. *See* AB 22. The Commissioner disregards the lesser

alternative of allowing a debtor to request a "breather" when she needs one (rather than granting one automatically regardless of need) would also serve the purpose of slowing down the medical debt collection process without infringing upon speech. *See* 4-ER-641.

Likewise, the Commissioner shrugs off the suggestion that offering a repayment plan would satisfy the stated purpose of "slowing down" the debt collection process. Presenting a repayment plan does just that. It allows medical debtors to pay their debts over time without adverse consequence. Remarkably, the Commissioner suggests offering a repayment plan would "intimidate" debtors into acknowledging their debt. AB 22. Yet the Commissioner enforces an identical statute for payday lenders who are trying to collect their unpaid debts. *Cf.* Nev. Rev. Stat. § 604A.5055 (**requiring** a lender to offer a repayment plan). If offering a repayment plan inherently "intimidates" consumers, Nevada law would not specifically require payday lenders to offer one to their customers.

This fourth prong of the *Central Hudson* test, like the "narrowly tailored" prong of the time, place, and manner test, is always the most difficult to satisfy for a government seeking to enforce laws that restrict speech. *Compare Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (articulating time, place, and manner test), with *Central Hudson*, 477 U.S. at 565 (adopting similar "narrowly drawn" language). This is so because, even when a law prohibiting speech serves

and furthers a significant government purpose, governments must avoid restricting protected speech whenever "narrower restrictions on expression would serve its interest as well." *Id.* S.B. 248 fails this test, regardless of whether heightened scrutiny is applied or not.

C. The FCRA Preempts S.B. 248.

1. S.B. 248 "Relates To" a Furnisher's Duties.

The Commissioner does not dispute that the FCRA's preemption is broader than mere a conflict provision. However, the Commissioner seeks to avoid FCRA preemption by contending that credit reporting is not a "responsibility" of furnishers.

It is a clever but misleading wordplay. For a state law to be preempted under the FCRA, the restriction need not **impact** a furnisher's duties, it must merely **relate** to its duties. *Peters v. Discover Bank*, 649 Fed. Appx. 405, 408 (9th Cir. 2016) (unpublished) (preempting California's Rosenthal Act as to credit reporting). The "relating to" language in 15 U.S.C. § 1681t(b)(1)(F) is notably identical to the "relates to" language in the ERISA's preemption provision. *Cf.* 29 U.S.C. § 1144 (preempting any state laws that "relate to" any employee health benefit plan).

Therefore, 15 U.S.C. § 1681t(b)(1)(F) is a field preemption statute superseding any state law "relating to" credit reporting, regardless of whether credit reporting is actually required. Under federal law, a state statute "relates to" the

ERISA if it merely touches upon uniform procedures. *See, e.g., Gobielle v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320-21 (2016). In that case, the Court specifically noted that ERISA preemption applied because the state law imposed duties that were "inconsistent with the central design of ERISA." *Id.* at 326. Even state provisions that were "parallel" to those in the ERISA were preempted. *Id.* at 326-27.

In this case, the Commissioner **does not dispute** that the FCRA is a detailed and uniform statutory framework allowing CRAs to gather information in consumer reports for assessing a consumer's credit worthiness, credit standing, and credit capacity. *See* 15 U.S.C. §§ 1681a(d) and 1681s-2. The Commissioner also **takes no issue** with the notion that 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. Finally, the Commissioner **does not dispute** that without such reporting, credit worthiness cannot be accurately assessed, and that 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).

Instead, the Commissioner argues the FCRA does not have a "temporal" requirement. AB 26. This assertion does not help the Commissioner's

cause because there is conversely no "temporal" limitation on the FCRA's preemption provision. Collectors have an undisputed **right** to report credit accounts to CRAs **at any time**. The Commissioner's hyperbolic characterization that timely reporting of debt is "hasty" is irrelevant in a field preemption analysis.[5]

2. Implied Preemption Bars S.B. 248.

The lower court completely failed to engage in an implied preemption analysis in its Order. The Commissioner barely discusses it in her brief. The reason is not difficult to understand. The FCRA's express intent, as stated by Congress, was to promote "accurate" credit reporting. *See* 15 U.S.C. § 1681(a). A state law that hides accurate information from CRAs necessarily causes CRAs to report *inaccurate* information and obscures material credit history from creditors. There is no way to avoid the conclusion that prohibiting debt collectors from accurately reporting unpaid debts undermines the purpose and intent of the FCRA.

In *Arellano*, this Court impliedly preempted Nevada law with a far more tenuous connection to the FDCPA than S.B. 248 has to the FCRA. The generic Nevada statutes merely allowed for execution against personal property, and defined "personal property" to include choses in action. 875 F.3d at 1215-16. Notably, the

[5] The lower court's conclusion that there was "no evidence" that any of the Collectors reported medical debt to a CRA within 60 days of receiving an account is similarly irrelevant in a field preemption inquiry. *See* AB 27. That being said, Collectors object to the conclusion, as the issue was never raised or contested in briefing, and Collectors were never allowed to present evidence on that point.

FDCPA did not "speak directly" to the issue of state collection laws and did not expressly preempt them. *Id.* at 1218. The state procedure did not even touch upon the FDCPA's stated Congressional Findings and Purpose as described in 15 U.S.C. 1692. However, because execution against an FDCPA chose in action would interfere with the overall *policy* of encouraging FDCPA plaintiffs to have their rights vindicated, this Court implied preemption. *Id.* at 1218.

In this case, S.B. 248 **directly** undermines Congress's desire to promote "accuracy" in credit reporting by compelling debt collectors to hide accurate information from CRAs. *See* 15 U.S.C. § 1681(a)(1). That connection, for purposes of implied preemption, is direct and far more intimate than the connection in *Arellano*. Intellectual consistency therefore demands that this Court apply implied preemption as it did in *Arellano*.

D. The FDCPA Preempts S.B. 248.

The parties generally agree on the standard for FDCPA preemption. 15 U.S.C. § 1692n is a conflict provision, and thus preempts state laws to the extent they are inconsistent with the FDCPA. A state law is deemed to be consistent with the FDCPA if it offers greater protection than federal law. The disagreement is whether there is a conflict between S.B. 248 and the FDCPA, and whether those conflicts provide greater or lesser protection to consumers.

1. S.B. 248 and the FDCPA Cannot Exist In Separate Worlds.

The Commissioner must recognize that S.B. 248 and the FDCPA stand in conflict. FDCPA requirements, such as the mini-Miranda warning, the validation notice, and responding to verification requests, as well as the right to collect a debt after responding to such requests, all conflict with S.B. 248. In fact, the Commissioner has never argued that these laws exist in harmony with one another. Instead, the Commissioner has constructed a legal fiction to avoid their conflicts, positing that the Section 7 Notice is not a communication within the meaning of the FDCPA, and thus the FDCPA and S.B. 248 exist in separate worlds with no overlap between the two. Or, as the lower court below stated it, "the FDCPA simply is not applicable during SB 248's 60-day notice period…." 1-ER-20:3-4.

The argument misunderstands the FDCPA. To borrow a phrase from the Commissioner, the FDCPA includes no "temporal limitation." If a debtor contacts a debt collector by telephone, that debt collector may never misrepresent the amount or character of a debt, abuse or harass a debtor, or engage in unfair practices, regardless of whether an initial communication has been sent. *See* 15 U.S.C. §§ 1692d, 1692e, and 1692f. An initial communication only triggers the mini-Miranda warning and validation notice requirements of 15 U.S.C. §§ 1692e(11) and 1692g. Otherwise, the FDCPA applies to debt collectors at all times, and the FDCPA cannot be segregated from S.B. 248.

2. The Section 7 Notice Is an FDCPA "Communication."

That being said, the Section 7 Notice is a communication under the FDCPA, and therefore carries certain concomitant federal burdens. The FDCPA defines "communication" as merely the **conveying of information regarding a debt**. 15 U.S.C. § 1692a(2). The definition is broad and straightforward, as the Eleventh Circuit made clear in *Hart v. Credit Control, LLC*, 871 F.3d 1255 (11th Cir. 2017). The principal case cited by the Commissioner, *Parker v. Midland Credit Mgmt., Inc.*, 874 F. Supp. 2d 1353 (M.D. Fla. 2012), involves no analysis, but rather stated a desire for a circuit court to set a "bright-line rule for determining whether a communication from a debt collector was made in connection with the collection of any debt." *Id.* at 1356. Its own circuit court did so, five years later, in the *Hart* case.[6] *Hart* directs that courts ask merely whether a communication **conveys** information **regarding** a debt. 871 F.3d at 1257-58. If the communication fits within that "broad" definition, and just references the existence of a debt, it constitutes a communication under 15 U.S.C. § 1692a(2).[7] *See also Lavalle v. Med-1 Solutions,*

[6] The Middle District of Florida is located within the Eleventh Circuit. The Commissioner's citation to *Parker*, therefore, is puzzling.

[7] The Commissioner misstates the holding of *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068 (9th Cir. 2016). *Hernandez* merely holds that a subsequent debt collector must send a Section 1692g(a) validation notice after a previous debt collector had already sent one. 829 F.3d at 1070. *Hernandez* in no way addressed whether the type of communication mandated by S.B. 248 qualifies as a "communication" under the FDCPA's broad definition, and did not test the outer boundaries of that definition.

LLC, 932 F.3d 1049, 1051 (7th Cir. 2019) (message is a communication under FDCPA simply when it implies the existence of a debt); *Brown v. Van Ru Credit Corp*., 804 F.3d 740, 742 (6th Cir. 2015) (same); *Marx v. General Revenue Corp*., 668 F.3f 1174, 1177 (10th Cir. 2011) (same); *Fontana v. HOVG LLC*, 989 F.3d. 338, 342 (5th Cir. 2021).

The Section 7 Notice undeniably goes further than implying the existence of a debt. The Notice must include detailed information about the debt, including the provider's name, date of service, and amount. This direct discussion of the debt establishes the Section 7 Notice as an FDCPA communication, triggering the debt collector's duty to provide disclosures *required* by the FDCPA but *prohibited* by S.B. 248.

Collectors ask this Court to hold the Commissioner to her actions, not what she argues here. After S.B. 248 was enacted, the Commissioner approved dozens of machine-derived form letters submitted by debt collectors trying to comply with the new statute. The letters included mini-Miranda warnings, validation notices, payment stubs, and other devices for payment. 2-ER-42 to 2-ER-160. One letter was described as "Collection Notice" (2-ER-75). Another described the debt as "past due" (2-ER-66). And on and on.

Collectors do not cite to these letters to "estop" the Commissioner from arguing that the FDCPA and S.B. 248 exist in separate worlds. But the approved form letters demonstrate that, whether one follows the plain statutory definition or limits it to instances in which a debt collector "tries to collect a given debt," the Section 7 Notice constitutes an FDCPA "communication." In short, these letters—and their regulatory approvals—demonstrate that the Commissioner's position before this Court is wrong, and she knows it.

3. S.B. 248 Robs Consumers of FDCPA Protections.

The Commissioner contends that S.B. 248 does not conflict with the FDCPA because it offers greater protections than the FDCPA. This is wrong. As this Court can see from the many machine-derived form letters approved by the Commissioner, S.B. 248 is an overshadowing nightmare for the FDCPA's "least sophisticated consumer." Letters approved by the Commissioner simultaneously state that payment is "not demanded or due" while the sender is a debt collector "attempting to collect a debt. *See, e.g.*, 2-ER-62. Other approved letters state they are not attempting to collect a debt, but provide paystubs and direct that any payment constitutes an acknowledgement of the debt and a waiver of the statute of limitations. *See, e.g.*, 2-ER-71 and 2-ER-75.

The Commissioner again ignores the undisputed record. By the time debts are assigned to debt collectors, months have passed, the debt is already due

and owing and, in fact, are past due. 4-ER-520:17-24; *see also* 4-ER-674:3-9, 4-ER-494:13 to 4-ER-496:9. Yet S.B. 248(7.5) **requires** debt collectors to tell medical debtors that their debt "is not demanded or due." S.B. 248 therefore compels debt collectors to lie to medical debtors, and the contradictions compelled by S.B. 248 are a consumer protection attorney's dream. *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).

The Commissioner's argument that S.B. 248 and the FDCPA exist in two separate worlds directs that S.B. 248 offers **fewer** consumer protections than the FDCPA. If the Section 7 Notice is not a "communication" and the FDCPA is not yet triggered, that means **there are no enforceable FDCPA protections for consumers in the Section 7 Notice and during the 60-day Notice Period**. Debt collectors may violate the FDCPA at their whim without risk of being sued in a civil action because the FDCPA's protections presumably do not exist at that time. Nevada debt collectors could harass and abuse debtors, direct profane or obscene language at them, and misrepresent the character, amount, or legal status of the debt without violating federal law because the Section 7 Notice is not a "communication" under the FDCPA. While the foregoing conduct might be prohibited by NRS Chapter 649 and subject a licensee to state discipline, a consumer—the direct victim of such abusive conduct—would have no recourse because the FDCPA has not yet

been triggered and ***NRS Chapter 649 offers no private right of action to a consumer***. *See* Nev. Rev. Stat. §§ 649.385-649.440. Therefore, following the Commissioner's reasoning, S.B. 248 robs consumers of the right they would ordinarily have to sue for an FDCPA violation.

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

The Commissioner must concede if this Court concludes that the compelled Section 7 Notice is an FDCPA "communication," then federal law preempts S.B. 248 because of the many conflicts referenced in this matter. In addition, one must simply compare the machine-derived form letters approved by the Commissioner against the CFPB's Model Notice to determine that they conflict. And there is no dispute that, failure to comply with the Model Regulation F Notice results in a loss of the compliance safe harbor. Here again, the Commissioner clings only to the fictional (and incorrect) time separation between S.B. 248 and the FDCPA. For this reason, federal law preempts S.B. 248 because of its interference with the CFPB's Model Notice.

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

One would think even the Commissioner would concede that the deprivation of First Amendment rights creates irreparable harm and that it is in the public interest to prevent such a deprivation. Wrong. The Commissioner ignores binding precedent

that 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).[8] With regard to preemption, if this Court concludes that the FCRA or FDCPA preempt S.B. 248, the state statute is not enforceable as a matter of law, per Collectors' claim for declaratory relief. SER 21 and 82.

The Commissioner instead makes the most circular of arguments, contending there was no evidence that Collectors had been sued or threatened with suit because of the new law. AB at p. 40. That is a neat trick, as it was undisputed that S.B. 248 had caused an industry-wide shutdown in the collection of medical debt. 4-ER-477:23-478:2 and 4-ER-563:14-17.[9] Obviously, if Collectors stopped collecting medical debt once S.B. 248 took effect, how would they possibly be sued over the law? The Commissioner's circular use of the chilling effect that S.B. 248 had on the Collectors to argue they were not harmed is Machiavellian, to say the least.

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[8] The Commissioner also ignores *National Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 853-54 (E.D. Cal. 2018) (enjoining constitutional violation is in the public interest) and *Lone Star Sec. and Video, Inc. v. City of Los Angeles*, 2012 WL 2529404, at *3 (C.D. Cal. July 2, 2012) (irreparable harm arises from unconstitutional business regulations).

[9] The Commissioner characterizes Collectors' sworn declarations as "cookie-cutter." That the debt collectors are placed in the same quandary by an unconstitutional law does not render their declarations to be "cookie cutter." Also, the testimony presented at the evidentiary hearing can hardly be described as "cookie cutter." Mr. Feeney gave specific undisputed testimony that he had stopped collecting medical debt solely because of S.B. 248. The issue was so overwhelming that the lower court stopped taking evidence on the matter. 4-ER-563:14-17 ("I think that there's been enough evidence as it relates to the fact that there's been a standstill in the industry."

The Commissioner is therefore relegated to arguing that this challenge is all about money, and that "monetary injuries" do not justify an injunction. AB at 38. Yet, the Commissioner is not suggesting she intends to reimburse Collectors for the losses imposed by S.B. 248. In fact, Collectors seek no monetary damages in this case. SER 23-24 and SER 84-85. Rather, this case is about the deprivation of constitutional rights and the interplay between state and federal law. Collectors are trying to engage in a lawful business in a lawful manner, without the burden of an unduly vague statute that muzzles their speech and demands they choose between complying with federal or state law, when they cannot do both.

Finally, the Commissioner states that PlusFour "offered no facts to support" its assertion that S.B. 248 had "all but shut down" its business. AB 41. Collectors suggest this Court review Mr. Bennett's Declarations, because the Commissioner apparently did not. When S.B. 248 took effect, PlusFour's business consisted nearly exclusively of medical debt collection in Nevada. 2-ER-162 to 2-ER-163. When S.B. 248 caused PlusFour to stop collecting medical debt, it was forced to lay off its entire staff of 12 employees 3-ER-450. As of December 28, 2021, PlusFour had reached the verge of bankruptcy, struggling to avoid closure after 24 years of continuous operation. 2-ER-163. This—Mr. Bennett's lived experience in the shadow of S.B. 248 after so many years of work—reflects the true effect of a law

that targets disfavored speech and creates so much uncertain in the disconnect between state and federal law.

II.

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 24th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with the type-volume limitation set forth in Circuit Rule 28.2-1 and Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,494 words.

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