IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA COLLECTORS ASSOCIATION, a Nevada non-profit corporation,

Appellant,

v.

SANDY O'LAUGHLIN, in her official capacity as Commissioner of the State of Nevada Department of Business and Industry and Financial Institution Division; STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION; JUSTICE COURT OF LAS VEGAS TOWNSHIP; DOE DEFENDANTS 1 through 20; and ROE ENTITY DEFENDANTS 1 through 20,

Respondents.

Supreme Court Case No.: 81930

District Court Case No.: A-19-805334-C

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Nancy L. Alff, District Judge

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Nevada Collectors Association ("NCA") is a non-profit cooperative corporation with no parent companies and no public companies own 10% or more of its stock.

NCA been represented by Patrick J. Reilly, Eric D. Walther, Marckia L. Hayes, Emily A. Ellis, and Troy P. Domina, of Brownstein Hyatt Farber Schreck, for the entire duration of this case.

DATED this 23rd day of September, 2021.

/s/ Patrick J. Reilly
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JURISDICTION

Nevada Collectors Association ("NCA") (plaintiff below) appeals from an order granting motions to dismiss its amended complaint and denying its motion for preliminary injunction or, in the alternative, for a writ of mandamus or prohibition ("Lower Court Order"). NRAP 3A(b)(1), (3). Respondents (defendants below) served notice of entry of the Lower Court Order on September 10, 2020, and NCA filed a timely notice of appeal on October 8, 2020.

ROUTING STATEMENT

This Court should retain this appeal because it involves a constitutional challenge to recently enacted legislation and a local court rule. NRAP 17(a)(11)-(12). These issues involve constitutional questions, important questions of public policy, and are substantial issues of first-impressions. *Id.*

ISSUES PRESENTED

1. Whether the combined effect of A.B. 477 and JCR 16 frustrates reasonable access to Nevada's justice courts in violation of the Due Process Clause.

2. Whether A.B. 477 irrationally and arbitrarily treats small businesses and debt collectors less favorably than banks and payday lenders in violation of the Equal Protection Clause.

3. Whether the lower court committed legal error by concluding that it was prohibited from considering matters outside of the pleadings when ruling on

Respondents' NRCP 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.

4. Whether the lower court erred by finding that NCA lacks standing to challenge the constitutionality of A.B. 477 and JCR 16.

5. Whether the lower court erred by finding that the case is not ripe for judicial review when NCA presented substantial and **undisputed** evidence establishing that an injury has already occurred.

6. Whether Respondent Las Vegas Township ("Justice Court") has "absolute immunity" in a lawsuit challenging the constitutionality of its local rules.

7. Whether the lower court erred by ruling on the merits of NCA's motion for a preliminary injunction when it already determined that it lacked subject matter jurisdiction.

8. Whether the lower court erred by denying NCA's motion for a preliminary injunction when the undisputed evidence demonstrates that NCA satisfies all of the preliminary injunction elements.

STATEMENT OF THE CASE

This is an appeal from an order granting motions to dismiss NCA's amended complaint and denying NCA's motion for a preliminary injunction and alternative

motion for a writ of mandamus or prohibition, the Honorable Nancy Alff, District Judge of the Eighth Judicial District Court, Clark County, presiding.

STATEMENT OF FACTS

I. NCA promotes lawful consumer debt collection for its members.

Appellant NCA is a non-profit cooperative corporation whose members consist of small businesses such as collection agencies, law firms, and asset buying companies which engage in the business of collecting unpaid debt on consumer accounts that are past due or in default. 4 JA 594-95, 607-08. NCA's members collect monies on behalf of, for the account of, or as assignees of businesses that sell goods and/or services to consumers which are primarily for personal, family, or household purposes. *Id.* Those debts vary in kind, including, but not limiting to, the following:

a. Medical debt (including doctors, dentists, and labs);

b. Utilities;

c. Rent;

d. Credit card and revolving debt;

e. Cell phone debt;

f. Automobile loans;

g. Professional services provided on credit; and

h. Installment loans governed by NRS Chapter 675.

4 JA 595.

Nearly all of NCA members' accounts receivable consist of unpaid small dollar consumer debts in amounts of $5,000.00 or less ("Small Dollar Debts"). 4 JA 595, 608. NCA serves its members by, *inter alia*, acting as a voice in business, legal, regulatory and legislative matters. *Id.*

II. The legal obligations of NCA members and the mandatory venue provision of the FDCPA.

Many of NCA's members are debt collection companies licensed pursuant to NRS Chapter 649 by the State of Nevada Department of Business and Industry Financial Institutions Division (the "FID"). 4 JA 595, 608. The FID regulates and oversees the collection activities of its licensees, which include many of NCA's members, namely, collection agencies. *Id.*

In Nevada, any entity that recovers funds that are past due, or from accounts that are in default, is governed by NRS Chapter 649 and NAC Chapter 649. *See* NRS 649.020 (defining "collection agency" as "all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another."). NRS Chapter 649's stated purpose is to: "(a) [b]ring licensed collection agencies and their personnel under more stringent public supervision; (b) [e]stablish a system of regulation to ensure that persons using the services of a collection agency are properly represented; and (c)

[d]iscourage improper and abusive collection methods." NRS 649.045(2)(a)-(c). To that end, NRS Chapter 649 established a broad regulatory scheme that covers all aspects of collections practices.

The Nevada Legislature granted the FID and its Commissioner primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. *See generally* NRS Chapter 649. Indeed, in order to operate as a collection agency in the State of the Nevada, a collection agency must first submit an application and obtain a license from the Commissioner. NRS 649.075(1). And just as the Commissioner is empowered to grant a collection agency license to operate in the State of Nevada, the Commissioner can also administer fines to a collection agency and/or suspend or revoke such license, if it is found that a collection agency has violated a law prescribed to it. *See e.g.*, NRS 649.395. One of those laws is the Fair Debt Collection Practices Act (the "FDCPA")—the main federal law that governs debt collection practices. 15 U.S.C. § 1692 *et seq*.

In general, the FDCPA prohibits debt collection companies from using abusive, unfair, or deceptive practices to collect consumer debts. *See id*. The stated purposes of the FCDPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. §

1692(e). Many of NCA's members are "debt collectors" within the meaning of the FDCPA and are therefore subject to its legal requirements. *See* 15 U.S.C. § 1692a(6); 4 JA 595-96, 609. The FDCPA subjects debt collectors to civil liability for violations of the FDCPA. *Id.*; 15 U.S.C. § 1692k. Debt collectors are also subject to federal administrative enforcement for violations of the FDCPA. *Id.*; 15 U.S.C. § 1692l. In addition, the Nevada Legislature granted the FID and its Commissioner authority to regulate collection agencies for violations of the FDCPA. *See* NRS 649.370. NRS 649.370 provides that "[a] violation of any provision of the federal [FDCPA], 15 U.S.C. §§ 1682 et seq., or any regulation adopted pursuant thereto, **shall be deemed to be a violation of this chapter**." In other words, when a debt collector violates the FDCPA, it also violates NRS Chapter 649, and therefore falls within the jurisdiction of the FID.

Relevant here, the FDCPA broadly prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes "litigation activity" and FDCPA violations may be found based on false allegations and requests contained in a complaint. *McCollough v. Johnson, Rodenburg & Lauinger*, LLC, 637 F.3d 939, 951 (9th Cir. 2011) ("[T]he FDCPA applies to the litigating activities of lawyers."); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) ("To limit the litigation activities that may form the basis of FDCPA liability to

exclude complaints served personally on consumers to facilitate debt collection, the very act that formally commences such a litigation, would require a nonsensical narrowing of the common understanding of the word 'litigation' that we decline to adopt."). Accordingly, by simply requesting attorney's fees in a complaint that are not authorized by law, collection agencies may be violating the FDCPA. *See id.* NAC 649.320 then empowers the Commissioner of the FID to suspend or revoke a license for such violations.

The FDCPA also has a mandatory venue provision (the "Mandatory Venue Provision") requiring a debt collector to commence a civil action for the repayment of a consumer debt in the judicial district or similar legal entity where: (a) the consumer signed the contract; or (b) the consumer resides at the time the suit is filed. 15 U.S.C. § 1692i(a)(2). NRS 4.370 confers jurisdiction upon justice courts to entertain any civil causes of action in matters in which the amount in controversy does not exceed $15,000.00. Because NCA members' accounts receivable generally consist of unpaid Small Dollar Debts, NCA members must file lawsuits in justice courts to collect on unpaid debts. 4 JA 596, 609. To the extent a consumer debt falls within the Mandatory Venue Provision of the FDCPA and requires the commencement of a civil action in Las Vegas, Nevada, a debt collector is legally required to commence a civil debt collection action in the Justice Court of Las Vegas Township (the "Justice Court"). 4 JA 596, 609.

III. NCA's members are required to hire an attorney to prosecute their claims in Justice Court.

NCA's members are not individuals, but rather are entities that are expressly prohibited from appearing in Justice Court without representation by an attorney that is licensed to practice law in Nevada. Justice Court of Las Vegas Township Rule ("JCR") 16; 4 JA 596, 609-10. Specifically, JCR 16 states:

> **Appearances in proper person**. Unless appearing by an attorney regularly admitted to practice law in Nevada and in good standing, no entry of appearance or subsequent document purporting to be signed by any party to an action shall be recognized or given any force or effect unless the same shall be notarized, or signed with an unsworn declaration pursuant to NTS 53.045, by the party signing the same. Corporations and limited liability corporations (LLC) shall be represented by an attorney.

As such, any time an NCA member commences a civil action to recover a debt, it is forced to retain an attorney to file, litigate, and recover monies in a collection action in Justice Court. 4 JA 596-97, 610. Because NCA's members are forced to retain counsel, they are forced to incur significant attorney's fees to: (a) prepare and file the complaint, (b) litigate the case to judgment, and (c) attempt to collect upon that judgment. 4 JA 597, 610. Notably, JCR 16 does not merely apply to licensed debt collectors, but to **any** entity (including a primary creditor) seeking redress in Justice Court, no matter how large or small. *See* JCR 16.

IV. The ability to collect reasonable attorney's fees is imperative in Small Dollar Debt cases because the amount of attorney's fees incurred is almost always more than the debt being collected.

Generally speaking, Nevada follows the "American Rule," under which each party is responsible for paying its own attorney's fees. However, attorney's fees may be awarded to a prevailing party if allowed by contract, statute, or other rule of law. *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). Nevada courts have always served as a trusted "gatekeeper" for requests for attorney's fees by prevailing parties and have dutifully exercised their inherent judicial authority when assessing the reasonableness of attorney's fees awarded in civil cases. Indeed, it cannot reasonably be disputed that the Justice Court has traditionally been extremely diligent, careful, and prudent in its role adjudicating claims for attorney's fees in civil cases. 4 JA 597, 610. Moreover, Nevada has expressly recognized the importance of awarding reasonable attorney's fees in Small Dollar Debt cases. For example, NRS 18.010(2)(a) allows prevailing parties to recover reasonable attorney's fees in **all** cases in which the amount recovered is less than $20,000.00. NRS Chapter 69, which governs justice courts in Nevada, expressly authorizes an award of reasonable attorney's fees—taxed as costs—to prevailing parties. NRS 69.030. Nevada has numerous other fee shifting rules, including offers of judgment under Justice Court Rule of Civil Procedure 68

("JCRCP"), and statutory liens, such as mechanic's liens and attorney's liens, including the following:

a. Offers of Judgment—JCRCP 68

b. Mechanic's Liens—NRS 108.237(1) and NRS 108.239(9)(b);

c. Attorney's Liens—NRS 18.015(1);

d. Homeowner's Associations—NRS 116.4117(4);

e. Justice Court Actions—NRS 69.030;

f. Appeals from Justice Court—NRS 69.050;

g. Arbitrations—NRS 38.243(3);

h. Fees governed by agreement, express or implied—NRS 18.010(1);

i. Actions when the prevailing party has recovered less than $20,000—NRS 18.010(2); and

j. Landlord/Tenant—NRS 118A.515.

The reason for these rules is obvious—Nevada has a long standing and time-honored policy of awarding attorney's fees in certain cases, including Justice Court collection matters, **because Small Dollar Debt cases are cost prohibitive if prevailing parties are unable to recover their reasonable attorney's fees**. In the lower court, NCA specifically argued that A.B. 477 conflicts with these other fee-shifting rules and statutes. 1 JA 78-79; 5 JA 729; 7 JA 1074-75, 1092; 8 JA 1301. For example, A.B. 477 effectively prohibits creditors from using an offer of

judgment under JCRCP 68 as a settlement tool because the creditor is still capped at 15% of fees regardless. Unfortunately, however, the lower court refused to address these conflicts in any way. *See* 8 JA 1335-50.

As this Court is also well aware, the practice of law is a specialized profession, worthy of appropriate compensation. According to a U.S. Consumer Law Attorney Fee Survey Report, the average hourly rate for a consumer attorney in Las Vegas **in 2015** was $420.00, and the average hourly rate for a paralegal in Las Vegas **in 2015** was $144.00. 3 JA 399. According to the December 2017 issue of *Communique*, the publication of the Clark County Bar Association, rates for Nevada attorneys have been approved by courts as high as $750.00 per hour, including rates as high as $350.00 per hour for senior associates. 4 JA 424-532. Given these high hourly rates in the market, the attorney's fees that accrue in Small Dollar Debt consumer cases will often exceed the amount of the unpaid debt. 4 JA 597, 610. That being said, NCA's members are aware that, when seeking an award of attorney's fees in a civil action, the attorney's fees sought must be reasonable and must also satisfy the so-called "Brunzell factors" articulated in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).[1] 4 JA 597, 610. In addition, when seeking an award of fees, counsel for NCA's members are bound by Nevada Rule of Professional

[1] Technically, in Justice Courts, claims for attorney's fees are not awarded as fees. Rather, they are taxed as "costs" against the losing party. *See* NRS 69.030. As such, A.B. 477 should not even be applied to limit fees in justice courts.

Conduct 1.5, which prohibits the charging of unreasonable fees. 4 JA 597, 610. Therefore, in addition to the Justice Court acting as a gatekeeper for reviewing claims for attorney's fees, counsel who submit those applications are ethically bound to act reasonably and by binding Nevada Supreme Court precedent that controls the methodology for an award of fees.

V. A.B. 477 significantly (and arbitrarily) caps recoverable attorney's fees in debt collection cases, thereby making Small Dollar Debt cases cost prohibitive.

In the 2019 legislative session, the Nevada State Legislature enacted A.B. 477, which was designed principally to govern the accrual of interest in consumer form contracts and consumer debts. 4 JA 598-99, 611-12. A.B. 477 was codified in Title 8 of the NRS and was titled the Consumer Protection from the Accrual of Predatory Interest After Default Act.[2] *See id.* The stated purpose of A.B. 477 is to protect consumers and "must be construed as a consumer protection statute for all purposes." 4 JA 534; NRS 97B.020.

Relevant here, A.B. 477 arbitrarily limits the recovery of attorney's fees in any action involving the collection of any consumer debt to no more than fifteen percent (15%) of the unpaid principal amount of the debt, and only if there is an express written agreement for the recovery of attorney's fees. NRS 97B.160. Specifically, Section 18 of A.B. 477 provides:

[2] A.B. 477 has now been codified as NRS Chapter 97B.

> If the plaintiff is the prevailing party in any action to collect a consumer debt, the plaintiff is entitled to collect attorney's fees only if the consumer form contract or other document evidencing the indebtedness sets forth an obligation of the consumer to pay such attorney's fee[s] and subject to the following conditions:
>
> a. If a consumer form contract or other document evidencing indebtedness provides for attorney's fees in some specific percentage, such provision and obligation is valid and enforceable **for an amount not to exceed 15 percent of the amount of the debt**, excluding attorney's fees and collection costs.
>
> b. If a consumer form contract or other document evidencing indebtedness provides for the payment of reasonable attorney's fees by the debtor, without specifying any specific percentage, such provision must be construed to mean **the lesser of 15 percent of the amount of the debt**, excluding attorney's fees and collection rate for such cases multiplied by the amount of time reasonably expended to obtain the judgment.

4 JA 537; NRS 97B.160 (emphasis added). Rather than scale the attorney's fees to the amount of the unpaid debt, or even to an amount that is "reasonable," A.B. 477 imposes an arbitrary 15% cap regardless of the amount of the unpaid principal. *Id.* This cap also purports to apply regardless of the amount of work expended by a prevailing plaintiff to obtain a judgment, including, drafting a complaint, litigating and obtaining a judgment (by default judgment, summary judgment, or trial), and then collecting on that judgment. A.B. 477 imposes a fee cap of 15% on the amount of the debt even when a party wishes to invoke its right to a jury trial under the Seventh Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution. 4 JA 599, 611-12.

In stark contrast, Section 19 of A.B. 477 expressly provides that a **debtor** in an action involving the collection of consumer debt may receive any attorney fees that are considered reasonable, **without any cap, restriction, or limitation**. Specifically, Section 19 provides:

> If the debtor is the prevailing party in any action to collect a consumer debt, the debtor is entitled to an award of reasonable attorney's fees. The amount of the debt that the creditor sought may not be a factor in determining the reasonableness of the award.

4 JA 538; NRS 97B.170.

Sections 18 and 19 of A.B. 477 were enacted with **zero** evidentiary support. 4 JA 684. In support of the bill, Peter Goatz offered written testimony containing his own anecdotal description of **only two instances** in which the attorney's fees sought by creditors were, in his subjective opinion, excessive.[3] 4 JA 684. Importantly, Mr. Goatz did not specifically identify those cases or offer any details from those cases. *Id.* There was no empirical data or objective proof as to whether unreasonable fees were being sought or awarded by the Justice Court on a regular basis. *Id.* There was no attempt to even demonstrate the existence of an actual problem that needed to be resolved by the Legislature. *Id.* No thought was given as to how Sections 18 and 19 would effectively deprive creditors and debt collectors from access to justice courts. *Id.* And, significantly, there was no discussion

[3] Mr. Goatz is an attorney for the Legal Aid Center of Southern Nevada. 4 JA 684.

whatsoever as to why the attorney's fee cap was set at the arbitrary amount of 15%, as opposed to some other percentage. *Id.* It is literally a number grabbed out of thin air, making the amount of the cap hopelessly random.

Equally arbitrary are the exemptions from A.B. 477. Remarkably, banks and other financial institutions, including **payday lenders**, are completely exempt from the attorney's fee cap.[4] 4 JA 537-38; NRS 97B.090. In other words, while small businesses and debt collectors have their attorney's fees capped when collecting a consumer debt, banks and payday lenders have no such limitation. These arbitrary exemptions highlight the absurdities created by A.B. 477. For example, consider the following hypothetical:

A consumer receives $1,000 worth of catering services pursuant to an extension of credit from ABC Catering, a small catering company. The consumer defaults and ABC Catering hires an attorney and sues on the unpaid debt.	ABC Catering is limited to recovery of attorney's fees at 15% on the amount of the debt (only $150).
A consumer borrows $1,000 from a Chapter 604A "payday" lender at a 650% APR to pay ABC Catering for catering services. The consumer defaults on the loan and the payday lender sues on the unpaid debt.	The payday lender is unlimited in its recovery of attorney's fees.

These absurdities underscore just how arbitrary A.B. 477 is. The foregoing example of a loan issued by a payday lender is clearly a "consumer" loan for

[4] According to the Center for Responsible Lending, the average APR for a Chapter 604A loan in Nevada is 652%. *See* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-payday-rate-cap-map-feb2019.pdf.

"consumer" purposes. Yet, the payday lender (at 650% APR) has no limitation on the fees it can recover in Justice Court. But a small business like the fictional "ABC Catering," like any landscaper or contractor, has no such recourse. As a result, A.B. 477—sponsored by Legal Aid of Southern Nevada—actually favors payday lenders over ordinary small businesses when it comes to recovery in Justice Court.

VI. The combined effect of A.B. 477 and JCR 16 makes bringing Small Dollar Debt cases in Justice Court effectively impossible.

As Mr. Goatz expressly stated in his testimony on two separate occasions, Sections 18 and 19 were designed specifically to block debt collectors and small businesses from obtaining access to Justice Court. 4 JA 688, 693. On April 3, 2019, Mr. Goatz offered written testimony stating that the intent of Sections 18 and 19 of A.B. 477 was to push debt collection cases into small claims court "where attorney's fees are unavailable." 4 JA 688. On May 8, 2019, Mr. Goatz testified that the purpose of the attorney fee cap in A.B. 477 was to effectively eliminate access to courts for small businesses "because there would not be an incentive for an attorney to take on a small dollar debt case…." 4 JA 693.

Because the attorney's fee limitation in A.B. 477 is so severe, NCA's members will be unable to retain counsel to represent them in Small Dollar Debt cases for contracts entered into after October 1, 2019. 4 JA 599, 612. As designed, Section 18 of A.B. 477, in conjunction with JCR 16, effectively bars NCA's members and other creditors from accessing the Justice Court because: (a) they are

required to retain counsel; (b) they are limited in their ability to recover fees to such an extreme that it is cost prohibitive to retain counsel; and (c) A.B. 477 discourages attorneys from even taking such cases in the first place. 4 JA 599, 612-13.

Since October 1, 2019, the date A.B. 477 became effective, NCA members have received unpaid accounts for services that were performed but not yet paid by the consumers. 4 JA 600, 613. These accounts receivable include unpaid medical debt and utilities, including doctor's offices and even NV Energy. 4 JA 600, 613, 696-713. Yet, NCA's members cannot move forward on these cases in Justice Court because, under A.B. 477, the attorney's fees are capped so low. For example, in recent instances of unpaid debts assigned to one NCA member, that member has been unable to proceed in Justice Court because A.B. 477 and JCR 16 make it cost prohibitive to do so. 4 JA 600, 613. In these specific concrete cases, which were detailed by NCA and not disputed at the lower court, the following accounts are effectively uncollectible in Justice Court:

Unpaid Debt Amount	Attorney's Fees Capped Amount
$232.78	$34.92[5]
$245.00	$36.75
$384.67	$57.70
$426.03	$63.90
$706.65	$106.00

[5] The filing fee alone charged by the Justice Court for commencing a civil action is $74.00 for an action when the sum claimed does not exceed $2,500.00. http://www.lasvegasjusticecourt.us/faq/fee_schedule.php.

4 JA 613, 696-705. In cases involving the foregoing amounts, the amount of attorney's fees incurred by NCA's members will not compensate for the attorney's fees actually incurred and expended. *Id.* In other words, debt collectors will actually **lose money** in many Small Dollar Debt cases, even if they prevail on the merits. 4 JA 600, 613. As a result, the attorney fee cap in Section 18 of A.B. 477 will effectively stop debt collectors and creditors like NCA's members from filing suit in Small Dollar Debt cases because it is cost prohibitive to do so. *Id.* Meanwhile, A.B. 477 provides that in an action involving the collection of consumer debt, the **debtor** may receive any attorney's fees that are considered reasonable, without any other restriction or limitation. 4 JA 537-38; NRS 97B.170.

Section 19 places an obvious double standard in favor of debtors solely because they are consumer debtors. 4 JA 538; NRS 97B.170. Section 19 offers a remedy to debtors (an award of fees regardless of the amount of the debt sought) while depriving creditors and debt collectors of that same remedy solely because of who they are. *Id.* It too is designed to discourage debt collectors from suing in Justice Court, as Section 19 provides a blunt invidious instrument for any debtor to discourage lawful and genuine Small Dollar Debt claims. *Id.* Notably, Sections 18 and 19 do not just apply to debt collectors. They apply to all businesses, big and small, from landscapers to utility companies, to medical providers, to construction companies. These businesses that provide goods and services to consumers in

advance of payment will effectively have no recourse if they do not get paid because: (1) they are required to have an attorney to pursue Small Dollar Debts in Justice Court; and (2) they will not be able to hire an attorney given the 15% cap of Section 18 and the patently unfair hammer of Section 19. As stated by attorneys Michael Aisen and Adam Gill of Aisen, Gill & Associates, LLP:

> In the current market, it would not be economically feasible for Aisen Gill to represent CCCS or any other client in a debt collection action involving a Small Dollar Debt lawsuit if its fees were limited to fifteen per cent (15%) of the unpaid amount of the debt.

4 JA 617, 621. Caleb Langsdale of The Langsdale Law Firm added:

> Under A.B. 477, The Langsdale Law Firm will be unable [to] accept new referrals that fall within the statutes[‘] purview because the cap on attorney’s fees makes the time and work required to bring for a lawsuit, regardless of the amount in controversy, cost prohibitive and economically unfeasible.

4 JA 624.[6] These declarations were similarly undisputed.

VII. A.B. 477 actually injured debt collectors and small businesses alike.

Since A.B. 477 took effect on October 1, 2019, NCA members have been given defaulted debts arising from contracts entered into after the effective date of the new law. 4 JA 696-713. However, because of the combined effect of A.B. 477

[6] The public’s reasonable access to counsel is an extremely important issue. For example, Nevada Rule of Professional Conduct 5.6 prohibits attorneys from entering into restrictive covenants or non-compete agreements that would limit the public’s access to legal representation. Thus, a statute that limits the public’s access to legal representation—like A.B. 477—should also be deemed invalid as against public policy.

and JCR 16, these members have been unable to pursue debt collections efforts in Justice Court. *Id.*

Moreover, A.B. 477 and JCR 16 do not merely affect debt collection agencies, debt purchasers, and attorneys. Rather, these rules affect all businesses that work for and extend credit to consumers. The lower court record is replete with small business owners attesting as to the nonsensical and devastating effects of A.B. 477. 4 JA 625-3. They included medical providers, dental clinics, accountants, therapists, property managers, childcare providers, dry cleaners, bakers, security providers, and landscapers. *Id.* These small business owners attested to the "double whammy" where: (1) JCR 16 requires them to hire an attorney to access Justice Court; and then (2) A.B. 477 makes it effectively impossible for them to hire an attorney in Small Dollar Debt cases. *Id.*

Ironically, A.B. 477 actually hurts consumers as a whole because it will force businesses to tighten the credit they extend. 4 JA 601, 614. Because Sections 18 and 19 of A.B. 477 effectively prohibit debt collectors from commencing civil actions in Small Dollar Debt cases, many debts will go unpaid, leaving many creditors unwilling to provide services without advance payment. *Id.* This will tighten access to credit for all consumers and will effectively punish consumers who pay their debts in full and on time. *Id.*

VIII. NCA challenged the validity of A.B. 477 and JCR 16 in the lower court.

On November 13, 2019, NCA, on behalf of its members, filed a complaint in the Eighth Judicial District Court naming the FID and the Justice Court as defendants. 1 JA 1-14. NCA's complaint alleged that the combined effect of A.B. 477 and JCR 16 violates the Due Process and Equal Protection Clauses of the Nevada and United States Constitutions by, among other things, denying access to Justice Court in Small Dollar Debt cases. *Id.* Based on these constitutional violations, NCA's complaint requested: (1) a declaration that A.B. 477 vis-a-vis JCR 16 is unconstitutional, and (2) an injunction prohibiting A.B. 477's enforcement in Justice Court. 1 JA 14.

On January 2, 2020, the Justice Court removed the case to the U.S. District Court for the District of Nevada based on federal question jurisdiction. 1 JA 15. While the case was pending in federal court, NCA obtained leave to amend its complaint to, among other things, add FID's Commissioner as a defendant in her official capacity. 5 JA 752-66.

On April 13, 2020, the U.S. District Court *sua sponte* applied abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and remanded the case back to the Eighth Judicial District Court. 1 JA 40, 44-50. In its remand order, the U.S. District Court found that it would be "intervening in Nevada's efforts to establish a coherent policy if it were to adjudicate the instant action." 1 JA 50.

IX. Despite significant undisputed evidence establishing the actual harm caused by A.B. 477 and JCR 16, the lower court dismissed NCA's amended complaint.

Following remand, NCA filed a motion for a preliminary injunction or, alternatively, for a writ of mandamus or prohibition ("Motion for Preliminary Injunction"). 1 JA 67. NCA's Motion for Preliminary Injunction attached **dozens** of sworn declarations from debt collectors and small business owners who had been actually harmed by the combined effect of A.B. 477 and JCR 16. 4 JA 594-601, 607-83. Importantly, in opposing NCA's Motion for Preliminary Injunction, the Respondents did not even attempt to contest **any** of NCA's evidence.

Following remand, both Respondents also filed motions to dismiss NCA's amended complaint based on, among other things, standing and ripeness arguments (collectively, the "Motions to Dismiss"). 1 JA 51-66; 5 JA 907-928. The Motion for Preliminary Injunction and Motions to Dismiss were both heard on July 1, 2020. 8 JA 1292-1318. Following the hearing, the lower court granted the Motions to Dismiss and denied the Motion for Preliminary Injunction. 8 JA 1337-46.

In granting the Motions to Dismiss, the lower court concluded that: (1) it lacked subject matter jurisdiction because NCA lacked standing and the case is not ripe for judicial review; (2) the Justice Court had absolute immunity because it was simply following a facially valid law; and (3) NCA's members have not been substantially denied access to Justice Court or had an attorney fee award reduced

because of A.B. 477.[7] 8 JA 1337-46. Importantly, in reaching that decision, the lower court specifically excluded **any** consideration of the **undisputed** evidence that NCA presented establishing that its members had already been injured by the combined effect of A.B. 477 and JCR 16. 8 JA 1342-43.

Despite determining that it lacked subject matter jurisdiction, the lower court ruled on the merits of NCA's Motion for Preliminary Injunction anyways. In denying the Motion for Preliminary Injunction, the lower court found that NCA did not have a likelihood of success on the merits and would not suffer irreparable harm. 8 JA 1345-46.

This appeal followed.

SUMMARY OF THE ARGUMENT

The lower court erred in granting Respondents' Motions to Dismiss for four reasons. First, NCA asserted a valid due process claim under Section 1983 because the combined effect of A.B. 477 and JCR 16 prevents reasonable access to Justice Court in Small Dollar Debt cases. Specifically, NCA's members are effectively prohibited from bringing Small Dollar Debt cases in Justice Court because: (1) JCR 16 requires NCA's members to appear with counsel; and (2) A.B. 477's 15% cap on attorney's fees makes hiring an attorney cost prohibitive in Small Dollar Debt cases.

[7] This last finding is particularly troubling because it completely misses the point that A.B. 477 and JCR 16 make hiring an attorney **in the first place** completely cost prohibitive.

Second, NCA asserted a valid equal protection claim under Section 1983 because A.B. 477 irrationally and arbitrarily treats small businesses and debt collectors less favorably than banks and payday lenders. Indeed, Respondents have never articulated a single rational, non-arbitrary basis for treating banks and payday lenders (who charge up to 650% annual interest) more favorably than small business and debt collectors in a supposed "consumer protection" statute. Indeed, no conceivable rationale can be articulated.

Third, the lower court erred by finding that it lacked subject matter jurisdiction based on "standing" and "ripeness." As an initial matter, the lower court committed legal error by concluding it was prohibited from considering matters outside of the pleadings when deciding jurisdiction under NRCP 12(b)(1). Because lower courts are expressly authorized to consider matters outside of the pleadings when ruling on jurisdiction, the lower court should have considered NCA's substantial and **undisputed** evidence establishing subject matter jurisdiction in this case. Indeed, that **undisputed** evidence clearly demonstrated that NCA has standing because: (1) NCA's members have suffered an "injury in fact;" (2) FID is the only appropriate state agency to name as a defendant; and (3) NCA's injuries can be redressed through a favorable ruling on the unconstitutionality of A.B. 477. Similarly, the **undisputed** evidence established that this case is ripe for judicial review because the injury caused by A.B. 477 and JCR 16 is concrete and imminent, not speculative and

hypothetical. As such, the lower court erred in finding that it lacked subject matter jurisdiction.

Finally, the lower court erred by concluding that the Justice Court had "absolute immunity." As an initial matter, the case law that the lower court relied on in finding "absolute immunity" has nothing to do with constitutional challenges to a court's local rules. As such, the lower court's legal authority is completely inapposite. Moreover, there are numerous examples where a court was properly named as a defendant in a constitutional challenge to the court's local rules. This even includes a case where this Court was named as a defendant in a constitutional challenge to a Nevada Supreme Court Rule. *See Riley v. Nevada Supreme Court*, 763 F. Supp. 446, 462 (D. Nev. 1991). As such, the lower court erred in finding that the Justice Court had "absolute immunity" in a constitutional challenge to JCR 16. For these reasons, the lower court's order granting the Respondents' Motions to Dismiss should be reversed.

The lower court also erred by denying NCA's Motion for a Preliminary Injunction. As an initial matter, the lower court committed legal error by reaching the merits of NCA's motion when it had already determined that it lacked subject matter jurisdiction. Yet, setting aside this blatant legal contradiction, the lower court should have granted NCA's Motion for a Preliminary Injunction because the **undisputed** evidence establishes that: (1) NCA was likely to succeed on the merits,

(2) NCA's members are suffering irreparable harm, and (3) the balance of harms weighs in favor of an injunction. For these reasons, the lower court's order denying NCA's Motion for a Preliminary Injunction should be reversed.

STANDARD OF REVIEW

A lower court order granting a motion to dismiss is reviewed de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). A lower court order denying a motion for a preliminary injunction is reviewed for an abuse of discretion. *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). An abuse of discretion occurs when the lower court makes factual findings that are clearly erroneous or not supported by substantial evidence. *Id.* The lower court also abuses its discretion when it applies an erroneous legal standard. *Id.* Finally, this appeal involves constitutional issues and issues of statutory construction, both of which are reviewed de novo. *Zohar*, 130 Nev. at 737, 334 P.3d at 405; *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007).

LEGAL ARGUMENT

I. The lower court erred by granting the Respondents' Motions to Dismiss.

When resolving a motion to dismiss, the Court must "accept all factual allegations in the complaint as true" and "draw every fair inference in favor of the non-moving party." *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev.

1213, 1217, 14 P.3d 1275, 1278 (2000). "Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). Accordingly, the complaint need only set forth sufficient facts that when taken in the light most favorable to the plaintiff establishes the elements of the claim for relief. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In other words, a motion to dismiss should **only** be granted when "it appears beyond a doubt that [the plaintiff] **could prove no set of facts**, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008) (emphasis added).

Here, the lower court erred by granting the Respondents' Motions to Dismiss because: (A) NCA had a valid due process claim under Section 1983; (B) NCA had a valid equal protection claim under Section 1983; (C) the lower court had subject matter jurisdiction to decide this case; and (D) Justice Court did not have absolute immunity.

A. NCA had a valid due process claim.

The Due Process Clause of the Fourteenth Amendment guarantees reasonable access to the courts. *See Hatfield v. Bailleaux*, 290 F.2d 632, 636 (9th Cir. 1961) ("Reasonable access to the courts is such a right, being guaranteed as against state action by the due process clause of the fourteenth amendment"); *Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 433 (1982). ("As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."); *Vance v. Judas Priest*, 1990 WL 130920, at *2 (Nev. Dist. Aug. 24, 1990) ("The Supreme Court has held that 'the right to be heard' is 'one of the most fundamental requisites of due process.'"); *see also Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens."). Specifically, reasonable access to the courts requires:

> the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.

Hatfield, 290 F.2d at 637.

To demonstrate a denial of reasonable access to the courts, the plaintiff must show: (1) the loss of a 'nonfrivolous' or 'arguable' underlying claim; (2) the official acts frustrating the litigation; and (3) a remedy that may be awarded as recompense

but that is not otherwise available in a future suit. *Christopher v. Harbury*, 122 S. Ct. 2179, 2187 (2002).

Here, it is undisputed that NCA's members have "nonfrivolous" or "arguable" Small Dollar Debt claims that fall under the Justice Court's statutory jurisdiction. *See* NRS 4.370(1)(a) (justice courts have jurisdiction in "actions arising on contract for the recovery of money only, if the sum claimed, exclusive of interest, does not exceed $15,000"). Instead, the **only** issue is whether the combined effect of A.B. 477 and JCR 16 unreasonably frustrates their ability to bring those claims in Justice Court. As discussed below, NCA's amended complaint set forth a valid due process claim because: (1) the combined effect of A.B. 477 and JCR 477 makes it effectively impossible to bring Small Dollar Debt cases in Justice Court; and (2) small claims court is not an adequate or appropriate alternative.

1. The combined effect of A.B. 477 and JCR 16 makes it effectively impossible to bring Small Dollar Debt cases in Justice Court.

As discussed above, JCR 16 expressly prohibits NCA's members from appearing in Justice Court without counsel. Simultaneously, however, A.B. 477 makes it effectively impossible for NCA's members to retain counsel in Small Dollar Debt cases. Specifically, Section 18 caps the amount a small business or debt collector can obtain in a consumer debt lawsuit at 15%. The undisputed evidence presented to the lower court demonstrated that it is cost prohibitive for small

businesses and debt collectors to commence civil actions in Justice Court in Small Dollar Debt cases. Under a regime where Section 18 is enforced, creditors and debt collectors either cannot retain an attorney on contingency in Small Dollar Debt cases, or will **lose money** if charged on an hourly basis, even when they are the prevailing party. As such, to avoid a debt in Nevada, a consumer now need only decide to refuse to pay a lawful Small Dollar Debt. With A.B. 477 firmly choking the ability of creditors to recover, most will simply throw up their hands and not file a lawsuit in the first place. If a creditor actually were to file a lawsuit, a consumer need only dispute the debt in court to ensure that the lawsuit is dragged out and thus force a money-losing proposition for a creditor. **Again, Respondents do not dispute this proposition**.

As such, not only does the arbitrary 15% cap limit NCA members' ability to recover attorney's fees to such an extreme that is it cost prohibitive to retain counsel, it is undisputed that the cap also discourages attorneys from taking such cases in the first place. 4 JA 619-624. Since the 15% cap only affects small businesses and debt collectors in consumer debt lawsuits, attorneys may avoid these problems by refusing to represent entities such as NCA members or their creditor clients.

Further, and perhaps the most concerning aspect of A.B. 477, it is undisputed that A.B. 477 was **specifically designed** to tilt the scales of justice and keep a certain class of litigant out of Justice Court. As the principal proponent of A.B. 477, Peter

Goatz openly testified that Sections 18 and 19 **were written to block debt collectors from obtaining access to Justice Court**. Indeed, Mr. Goatz stated that the purpose of the attorney fee cap in A.B. 477 was to effectively eliminate debt collector's access to Justice Court "because there would not be an incentive for an attorney to take on a small dollar debt case. . . . " 4 JA 688, 693.

"The general rule in our legal system is that each party must pay its own attorney's fees…." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). But Nevada law contains multiple applicable fee-shifting provisions, one of which provides that "[t]he prevailing party in any civil action at law in the justice courts of this State shall receive, in addition to the costs of court as now allowed by law, a reasonable attorney fee." NRS 69.030. With the exception of debt collectors pursuing unpaid debts, **all other** prevailing litigants in Justice Court are entitled to reasonable attorney fees. This contradiction is simply irreconcilable.

In short, NCA asserted a valid due process claim under Section 1983 because: (1) JCR 16 expressly prohibits NCA's members from appearing in Justice Court without counsel; and (2) A.B. 477 makes it effectively impossible for NCA's members to retain counsel in Small Dollar Debt cases. Because NCA asserted a valid due process claim, the lower court erred in granting the Respondents' Motions to Dismiss.

2. Small claims court is not an adequate or appropriate alternative.

This Court has noted that "[h]istorically, there is a distinct difference between justice court and small claims court, and this difference is found in the sole reason for small claim courts' existence: to provide an avenue for speedy and effective remedies in civil actions involving minimal sums." *Cheung v. Eighth Judicial Dist. Ct.*, 121 Nev. 867, 874, 124 P.3d 550, 556 (2005). However, the differences between justice court and small claims court are significant and material to one collecting a debt. One major difference is that there is a right to a jury trial in Justice Court, while there is no such right in small claims court. *Id.*; JCRCP 38(a). Furthermore, unlike Justice Court, "in small claims court a party is not permitted to conduct depositions or other discovery; neither party may obtain attorney fees; the plaintiff may not seek any prejudgment collection; the proceedings are summary, excusing strict rules; **and the collection of any judgment may be deferred and otherwise determined by the justice of the peace**." *Cheung*, 121 Nev. at 872, 124 P.3d at 554 (emphasis added).

Here, Respondents will likely argue that NCA's claims fail because its members can bring Small Dollar Debt cases in small claims court without an attorney. That argument fails, however, for at least two reasons. First, NRS 4.370(1)(a) expressly gives the Justice Court jurisdiction in Small Dollar Debt cases. As such, NCA members have a statutory right to bring their Small Dollar Debt cases

in Justice Court, and that right is being unconstitutionally usurped by the combined effect of A.B. 477 and JCR 16.

Second, it defies logic that a statute could properly block access to a court with statutory jurisdiction simply because the claims could theoretically be brought elsewhere. In other words, a federal district court could not enact a local rule that effectively prevents litigants from bringing 42 U.S.C. § 1988 civil rights cases, and then justify that restriction by telling civil rights victims, "go sue in state court." Simply put, small claims court is not a solution, either as a practical matter or as a constitutional one, particularly because justices of the peace possess the arbitrary authority to delay or stay collection remedies. Because A.B. 477 and JCR 16 prevent reasonable access to Justice Court in Small Dollar Debt cases, the lower court erred in granting Respondents' Motions to Dismiss.

B. NCA also had valid equal protection claims.

"The Equal Protection Clause of the Fourteenth Amendment provides that '[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.'" *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015) (quoting U.S. CONST. amend. XIV, § 1). When a law creates classifications that are not inherently suspect (such as race, sex, or national origin), courts apply rational basis review. *Crawford v. Antonio B. Won Pat Intl. Airport Auth.*, 917 F.3d 1081, 1095 (9th Cir. 2019). Under rational basis review, there must be a "rational

relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* (internal quotations omitted). A law that is subject to rational basis review is:

> constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to **render the distinction arbitrary or irrational**.

Armour v. City of Indianapolis, Ind., 566 U.S. 673, 681 (2012) (internal quotations omitted) (emphasis added). The burden is on the plaintiff to establish that the law fails under rational basis review. *Doe v. State ex rel. Legislature of 77th Session*, 133 Nev. 763, 768, 406 P.3d 482, 486 (2017).

Here, the lower court found that A.B. 477 furthers the legitimate state interest of "consumer protection." 8 JA 1343-44. However, if the state interest behind A.B. 477 is really "consumer protection," then there is no conceivable rational basis for treating banks and payday lenders more favorably than small businesses and debt collectors. In other words, if the goal is "consumer protection," then NCA has met its burden of establishing that it is both irrational and arbitrary on its face for A.B. 477 to expressly allow banks and payday lenders (who charge consumers up to 650% interest) to recover 100% of attorney fees, while capping the amount of recoverable fees for other creditors to such an extent that bringing Small Dollar Debt cases in

Justice Court is effectively impossible. Importantly, throughout the lengthy lower court proceedings in federal and state court, Respondents **never** responded to this argument and **never** articulated a single rational, non-arbitrary basis for treating banks and payday lenders more favorably than small businesses when it comes to recovering attorney's fees on consumer debts. Because A.B. 477 creates an irrational and arbitrary distinction between financial institutions and other creditors, it violates the Equal Protection Clause, even under rational basis review. As such, the lower court erred in granting the Respondents' Motions to Dismiss.

C. The lower court had subject matter jurisdiction to decide this case.

The lower court dismissed NCA's complaint under NRCP 12(b)(1) after concluding that it lacked subject matter jurisdiction. 8 JA 1341-45. In support of this conclusion, the lower court found that: (1) NCA lacked standing to challenge the constitutionality of A.B. 477 and JCR 16; and (2) this case is not ripe for judicial review. *Id.* As discussed below, both of these findings are legally and factually erroneous.

1. NCA had standing to challenge the constitutionality of A.B. 477 and JCR 16.

To establish standing, the plaintiff must show that it has: (1) suffered an injury in fact, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v.*

Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). As discussed below, NCA satisfies all three of these elements.

2. NCA's members have suffered an injury in fact.

An injury in fact is an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (internal citation and quotation omitted).

Here, the lower court erred by finding that NCA's members have not suffered an injury in fact for two reasons. First, the lower court committed legal error by concluding that it was prohibited from considering matters outside the pleadings when ruling on jurisdiction under NRCP 12(b)(1). Second, the undisputed evidence clearly demonstrates that NCA's members have suffered an injury in fact, especially under NRCP 12(b)'s difficult standard.

a. The lower court committed legal error by concluding that it was prohibited from considering matters outside the pleadings under NRCP 12(b)(1).

When considering subject matter jurisdiction under NRCP 12(b)(1), the lower court is allowed to consider matters outside the pleadings **without** converting the motion to one for summary judgment. *See* NRCP 12(d) (permitting the lower court to consider matters outside the pleadings in evaluating requests for relief under NRCP 12(b)(1)); *see also Sattari v. Citimortgage*, 2009 WL 10693920, at *1 (D.

Nev. Oct. 27, 2009) ("a district court may consider evidence outside the pleadings when ruling on a Rule 12(b)(1) motion"); *Farr v. U.S.*, 990 F.2d 451, 454 (9th Cir. 1993) ("[under Rule 12(b)(1),] it *is* proper for the district court to consider evidence outside of the pleadings for the purpose of deciding a jurisdictional issue.").

Here, NCA provided the lower court with **dozens** of sworn declarations establishing that the combined effect of A.B. 477 and JCR 16 has caused an injury in fact.[8] 4 JA 594-601, 607-683, 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. The Respondents did not dispute these sworn declarations in any way. Importantly, however, the lower court committed legal err by concluding that it was **prohibited** from considering this substantial and **undisputed** evidence in deciding the issue of subject matter jurisdiction.[9] *See* Order Granting Motions to Dismiss, 8 JA 1342-43 ("Judicial notice of facts outside of the complaint is only applicable to facts not subject to reasonable dispute or facts that are capable of verification from a reliable source…. Plaintiffs declarations do not fit the criteria for judicial notice."). This

[8] Some of these sworn declarations were provided in opposition to the Respondents' Motions to Dismiss, while others were provided in support of NCA's Motion for Preliminary Injunction. 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. The Motions to Dismiss and Motion for Preliminary Injunction were decided at the same time and were disposed of in the same lower court order. 4 JA 594-601, 607-83.

[9] The lower court likely confused NRCP 12(b)(1) (which allows the lower court to consider matters outside the pleadings) with NRCP 12(b)(5) (which does not allow the lower court to consider matters outside the pleadings). *See* NRCP 12(d) ("If, on a motion under **Rule 12(b)(5)** or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56") (emphasis added).

legal error constitutes an abuse of discretion that warrants reversal. *See Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (the lower court abuses its discretion when it applies the wrong legal standard). Indeed, the lower court would have likely found that NCA's members have suffered an injury in fact if it had considered NCA's substantial and **undisputed** evidence. For this reason alone, the lower court's order dismissing NCA's amended complaint should be reversed and remanded.

b. The undisputed evidence clearly demonstrated that NCA's members have suffered an injury in fact, especially under NRCP 12(b)'s difficult standard.

The **undisputed** evidence before the lower court clearly demonstrated that the combined effect of A.B. 477 and JCR 16 is causing "actual or imminent" injury. *See Lujan*, 112 S. Ct. at 2136. This included dozens of sworn declarations from: (1) lawyers who cannot take Small Dollar Debt cases because doing so would be cost prohibitive, and (2) NCA members who currently have unpaid accounts that cannot be brought in Justice Court because the cost of hiring an attorney would exceed the amount of the judgment even if they succeed 100% on their claims. 4 JA 594-601, 607-83; 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. When this case was before him, United States District Court Judge James C. Mahan acknowledged that "the complaint arguably shows that NCA will suffer immediate and irreparable injury." Case No. 2:20-cv-0007-JCM-EJY, ECF No. 13. This is not be surprising,

however, given that A.B. 477's legislative history specifically states that the **purpose** of Section 18 is to prevent debt collectors from bringing cases in Justice Court. *See* 4 JA 688, 693 (Mr. Goatz testifying that the purpose of Section 18 is to eliminate access to Justice Court for debt collectors "because there would not be an incentive for an attorney to take on a small dollar debt case…."). In other words, the injury to NCA's members occurred as soon as A.B. 477 was passed because they could no longer pursue Small Dollar Debt claims in Justice Court. Indeed, the lower court was presented with sworn declarations setting forth the following real delinquent accounts that are effectively uncollectable in Justice Court. This included actual accounts referred for collection for which access to Justice Court had been made cost prohibitive by A.B. 477:

Unpaid Debt Amount	Attorney's Fees Capped Amount
$232.78	$34.92
$245.00	$36.75
$384.67	$57.70
$426.03	$63.90
$706.65	$106.00

4 JA 613, 696-713.

Because significant **undisputed** evidence demonstrated that NCA's members have suffered an injury in fact, the lower court erred in dismissing NCA's amended complaint for lack of subject matter jurisdiction, especially under NRCP 12(b)'s difficult standard. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228

(2008) (a motion to dismiss should **only** be granted when "it appears **beyond a doubt** that [the plaintiff] could prove **no set of facts**, which, if true, would entitle [the plaintiff] to relief") (emphasis added). As such, the lower court's order dismissing NCA's amended complaint should be reversed.

i. FID was the appropriate state agency to name as a defendant.

The lower court concluded that it lacked subject matter jurisdiction, in part, because FID and its Commissioner were not properly named defendants. 8 JA 1342-43. Again, however, this finding is both legally and factually erroneous.

Under NRS 41.031, NCA was **required** to name a state agency as a defendant when challenging the constitutionality of A.B. 477 and JCR 16. *See* NRS 41.031(2) ("In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit."). Importantly, **FID was the only appropriate state agency to name as a defendant in this case**.

The Nevada Legislature granted the FID and its Commissioner primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. *See* generally NRS Chapter 649. Indeed, in order to operate as a collection agency in the State of the Nevada, a collection agency must first submit an application and obtain a license from the Commissioner. NRS 649.075(1). And just as the Commissioner is empowered to grant a collection agency license to

operate in the State of Nevada, the Commissioner can also administer fines to a collection agency and/or suspend or revoke such license, if it is found that a collection agency has violated a law prescribed to it. *See e.g.*, NRS 649.395.

Collection agencies are also heavily regulated by federal law. The FDCPA is the main federal law that governs debt collection practices. 15 U.S.C. § 1692 *et seq.* In general, the FDCPA prohibits debt collection companies from using abusive, unfair, or deceptive practices to collect debts from consumers. *See id.* The Nevada Legislature granted the FID and its Commissioner authority to regulate collection agency violations of the FDCPA. *See* NRS 649.370. In particular, NRS 649.370 provides that "[a] violation of any provision of the federal [FDCPA], 15 U.S.C. §§ 1682 *et seq.*, or any regulation adopted pursuant thereto, shall be deemed to be a violation of this chapter."

Relevant here, the FDCPA broadly prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes the "false representation of the character, amount, or legal status of any debt; or any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." 15 U.S.C. § 1692e(2)(A)-(B). As a general matter, there is no dispute that "litigation activity is subject to the FDCPA." *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007); *see also McCollough v. Johnson,*

Rodenburg & Lauinger, LLC, 637 F.3d 939, 951 (9th Cir. 2011) ("[T]he FDCPA applies to the litigating activities of lawyers.") (quotation marks omitted)). FDCPA violations may even be found based on false allegations and requests contained in a complaint. *See Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) ("To limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection, the very act that formally commences such a litigation, would require a nonsensical narrowing of the common understanding of the word 'litigation' that we decline to adopt."). In other words, by simply requesting attorney fees above and beyond the 15 percent allowed under A.B. 477 subjects collection agencies to possible discipline and potential civil liability under NRS Chapter 649. Accordingly, the FID cannot credibly deny that it has the regulatory authority to regulate the conduct of collection agencies under A.B. 477.

Here, NCA members consist of licensed collection agencies that are subject to the provisions of NRS Chapter 649. Specifically, NCA members consist of small businesses such as collection agencies, law firms, and asset buying companies that engage in the business of collecting unpaid debt on consumer contracts that are past due or in default. Accordingly, the FID and its Commissioner regulate the conduct of many NCA members. For these reasons, FID is the only appropriate state agency to name as a defendant in challenging the constitutionality of A.B. 477.

Tellingly, neither the lower court nor the FID ever articulated which state agency would have been more appropriate to name as a defendant in place of the FID under NRS 41.031(2). And the lower court never allowed the NCA the opportunity to name the State of Nevada as a stand-alone defendant in the FID's place, despite the mandate of NRS 41.031(2). NCA should not be penalized because the Legislature failed to specify what state agency regulates NRS Chapter 97B. Because the FID is a proper defendant in this case, the lower court erred in granting FID's Motion to Dismiss.

ii. The injury caused to NCA's members will be redressed by a favorable decision.

The final "standing" element requires a showing that the plaintiffs' injury can be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). To demonstrate redressability, the plaintiff must show "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (citation omitted).

Here, there should be no doubt that a favorable decision would redress the injury caused by the combined effect of A.B. 477 and JCR 16. Indeed, NCA's amended complaint sought the following straightforward relief: (1) a declaration that the combined effect of A.B. 477 and JCR 16 is unconstitutional; and (2) an injunction prohibiting the enforcement of A.B. 477 in Justice Court. This relief

would completely resolve the injury caused by A.B. 477 and JCR 16, and the lower court has full authority to grant it. *See* Nev. Const., Art. 6, § 6 (setting forth the scope of the lower court's jurisdiction); NRS Chapter 30 (allowing the lower court to grant declaratory relief); NRS Chapter 33 (allowing the lower court to grant injunctive relief). As such, the final "standing" element is satisfied. Because NCA had standing to bring this case, the lower court erred in granting the Respondents' Motions to Dismiss for lack of standing.

3. This case was ripe for judicial review.

The ripeness doctrine is "a question of timing designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for [district] court action." *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010). For that reason, "ripeness overlaps with the 'injury in fact' analysis for Article III standing." *Id.* "[A] claim is not ripe for judicial resolution if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 1064. Importantly, however, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143 (1974) (quotation marks and citation omitted); *see also Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (a plaintiff need not expose himself to prosecution in order to challenge the constitutionality of a statute "that he claims

deters the exercise of his constitutional rights."). Instead, a claim is ripe if the plaintiff simply demonstrates a "*genuine* threat of *imminent* prosecution." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996).

Here, the lower court found that NCA's claims are not "ripe" because they are "based on [a] speculative or hypothetical prospect of a future harm." 8 JA 1340. This finding was erroneous, however, for the same two reasons as the lower court's "injury in fact" finding. First, the lower court committed legal error by concluding that it was **prohibited** from considering NCA's substantial and undisputed evidence establishing injury. 8 JA 1342-43; *see also* NRC 12(d) (allowing the lower court to consider matters outside the pleadings when ruling on a NRCP 12(b)(1) motion).

Second, the **undisputed** evidence clearly demonstrated that NCA's members have suffered actual harm as a result of the combined effect of A.B. 477 and JCR 16. Indeed, NCA provided the lower court with **dozens** of sworn declarations detailing the devastating combined effect that A.B. 477 and JCR 16 has already caused. 4 JA 594-601, 607-683, 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. As such, the lower court erred in concluding that any harm to NCA's members was "speculative or hypothetical." Because this case was ripe for judicial review, the lower court's order granting the Respondents' Motion to Dismiss should be reversed.

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D. The Justice Court did not have absolute immunity.

The lower court dismissed NCA's amended complaint, in part, after concluding that the Justice Court had "absolute immunity." 8 JA 1344-45. As support for this legal conclusion, the lower court concluded that "[a] defendant that is charged with the duty of executing a facially valid **court order** enjoys absolute immunity from liability for a suit challenging the propriety of that **court order**." 8 JA 1344 (emphasis added) (citing *Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990)). Based on the *Turney* decision, the lower court determined that the Justice Court could not be named as a defendant because "Justice Court appropriately followed [the] law when enacting and publishing LVJC 16 in accordance with controlling law from the Nevada Supreme Court." 8 JA 1344. This finding was erroneous for two primary reasons.

First, NCA was challenging the constitutionality of a **statute** (A.B. 477) and a **local court rule** (JCR 16), not a "court order." As such, the case law that the lower court relied on in finding absolute immunity—which deals exclusively with obeying facially valid "court orders"—is completely inapposite. 8 JA 1344; *see also Turney*, 898 F.2d at 1472.

Second, and more importantly, courts are clearly the proper defendants in cases challenging the constitutionality of their local court rules. *See Riley v. Nevada Supreme Court*, 763 F. Supp. 446, 462 (D. Nev. 1991) (deciding the merits of a

constitutional challenge to a court rule that named this Court as a defendant); *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990) (deciding the merits of a constitutional challenge to a local court rule that named the California Supreme Court and California District Courts as defendants); *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 1988 WL 134182 (C.D. Cal. 1988) (deciding the merits of a constitutional challenge to a local court rule that named the United States District Court for the Central District of California and all of the Central District judges as defendants); *Tashima v. Admin. Office of the U.S. Courts*, 1989 WL 94828 (C.D. Cal. 1989) ("Petitioner [a district court judge] has been named a defendant in two actions challenging the constitutionality of Local Rule 2.2.1"); *Nat'l Ass'n for the Advancement of MultiJurisdiction Practice v. Roberts*, 180 F. Supp. 3d 46, 55 (D.D.C. 2015) (deciding the merits of a constitutional challenge to a local court rule that named several judges from the United States District Court for the District of Columbia as defendants).

And there is no doubt that local court rules can be struck down on constitutional grounds. *See Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1436-37 (9th Cir. 1995) (Local Rule 2.5.2 in Central District of California prohibiting criticism of federal judges held unconstitutional); *Hebert v. Harn*, 184 Cal. Rptr. 83, 86 (Ct. App. 1982) (striking down a local court rule on due process/access to the court grounds); *see also Frazier v. Heebe*, 107 S. Ct. 2607,

2611 (1987) ("A district court's discretion in promulgating local rules is not, however, without limits. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with the principles of right and justice") (internal quotation omitted). Accordingly, the lower court erred by concluding that the Justice Court had "absolute immunity" in a suit challenging the constitutionality of its local rules.

In sum, the lower court erred by dismissing NCA's amended complaint because: (1) NCA had valid constitutional claims, (2) the lower court had subject matter jurisdiction, and (3) the Justice Court did not absolute immunity. As such, the lower court's order granting the Respondents' Motions to Dismiss should be reversed.

II. The lower court erred by denying NCA's Motion for a Preliminary Injunction.

As discussed below, the lower court erred by denying NCA's Motion for Preliminary Injunction for two reasons. First, the lower court improperly ruled on the merits of NCA's Motion for a Preliminary Injunction despite finding that it lacked subject matter jurisdiction. Second, NCA satisfied all of the preliminary injunction elements with **undisputed** evidence.

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A. The lower court improperly ruled on the merits of NCA's motion despite finding that it lacked subject matter jurisdiction.

"[A] judge who concludes that subject matter jurisdiction is lacking has no power to rule alternatively on the merits of a case." *Wages v. I.R.S.*, 88-3650, 1990 WL 80990, at *2 (9th Cir. 1990); *see also Gettings v. Philippine Airlines*, 2015 WL 3609718, at *3 (D. Nev. June 9, 2015) ("A court's jurisdiction to resolve a case on its merits requires a showing that the plaintiff has both subject matter and personal jurisdiction.").

Here, the lower court concluded that it did not have subject matter jurisdiction based on a lack of "standing" and "ripeness." 8 JA 1338-1346. Despite that finding, however, the lower court proceeded to rule on the merits of NCA's Motion for a Preliminary Injunction. 8 JA 1345. This constitutes a clear abuse of discretion that warrants reversal. In other words, the fact that the lower court reached the merits of NCA's Preliminary Injunction Motion highlights the fact that NCA always had standing and the issues have always been ripe for judicial review. . As such, NCA is entitled to a ruling on the merits of its factually undisputed Motion for a Preliminary Injunction in this appeal. And, as discussed below, a preliminary injunction is appropriate because NCA satisfies all of the preliminary injunction elements.

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B. NCA satisfies all of the preliminary injunction elements.

"A preliminary injunction is available if an applicant can show a likelihood of success on the merits and a reasonable probability the non-moving party's conduct, if allowed to continue, will cause irreparable harm." *Clark County Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). "The district court may also weigh the public interest and the relative hardships of the parties in deciding whether to grant a preliminary injunction." *Id.* Here, the lower court erred in denying NCA's motion for a preliminary injunction because NCA satisfied all of the preliminary injunction elements.

1. NCA was likely to succeed on the merits.

As discussed previously, NCA was likely to succeed on the merits because the combined effect of A.B. 477 and JCR 16 unreasonably frustrates its members' access to Justice Court in violation of the Due Process Clause. Importantly, NCA presented substantial (**and completely uncontroverted**) evidence supporting this argument, including **dozens** of sworn declarations that the lower court ignored. 4 JA 594-601, 607-683, 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. Because the **undisputed** evidence established that the combined effect of A.B. 477 and JCR 16 unconstitutionally impedes on NCA members' reasonable access to Justice Court, NCA was likely to succeed on the merits of its due process claims.

NCA was also likely to succeed on the merits of its equal protection claims. Again, neither Respondents nor the lower court have ever articulated a single rational, non-arbitrary basis for treating small businesses and debt collectors less favorably than banks and payday lenders when it comes to the recovery of consumer debts. This is because no rational basis exists. In other words, if "consumer protection" was A.B. 477's goal, it is completely arbitrary to cap attorney's fees at 15% for small businesses, when banks and payday lenders (who charge consumers up to 650% APR in interest) are expressly allowed to recover 100% of attorney's fees in the same cases. Because there is no rational, non-arbitrary basis for treating small businesses differently than banks and payday lenders, NCA is likely to succeed on the merits of its equal protection claims.

2. NCA will suffer irreparable harm without an injunction.

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted).

Here, as discussed above, NCA's members are being deprived constitutional rights under the Due Process and Equal Protection Clauses of the United States and Nevada Constitutions. As such, NCA satisfied the "irreparable harm" element for a preliminary injunction.

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3. The interests of NCA and the public would be best served if a preliminary injunction is issued.

With regard to the Court's final consideration, the relative interests of the parties and the public weigh in favor of the issuance of injunctive relief on the terms requested. A.B. 477's broad sweeping language essentially applies to every single consumer contract. Thus, A.B. 477 also affects doctors, electricians, car dealers, and any other company that sells a products or services for a profit. Similar to NCA, those companies have an interest that involves being able to collect on unpaid debt by way of the courts. As detailed in great length above, A.B. 477 and JCR 16 effectively bar creditors and debt collectors from suing on Small Dollar Debts in Justice Court. The obvious effect of this law will be to impact the consumer credit market in Nevada, as creditors will be effectively unable to proceed in Justice Court. In other words, because A.B. 477 effectively prohibits debt collectors from commencing civil actions in Small Dollar Debt cases, many debts will go unpaid, leaving many creditors unwilling to provide services without advance payment. This will tighten access to credit for all consumers and will effectively punish consumers who pay their debts in full and on time. As such, the balance of harms weighs in favor of the requested injunction.

In sum, because NCA satisfies all of the preliminary injunction elements, this Court should enjoin the Respondents from enforcing A.B. 477 in Justice Court.

CONCLUSION

Based on the foregoing, the lower court's order granting the Respondents' Motions to Dismiss should be reversed. Moreover, because NCA satisfies all of the preliminary injunction elements, this Court should issue a preliminary injunction prohibiting Respondents from enforcing A.B. 477 in Justice Court.

DATED this 23rd day of September, 2021.

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ATTORNEY CERTIFICATION

1. I hereby certify that Appellant's Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Times New Roman typeface.

2. I further certify that Appellant's Opening Brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,352 words.

3. Finally, I hereby certify that I have read Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of September, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(b), I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **APPELLANT'S OPENING BRIEF** was served by submitting electronically for filing and/or service with Supreme Court of Nevada's EFlex Filing system and serving all parties with an email address on record, as indicated below, pursuant to Rule 8 of the N.E.F.C.R. on the 23rd day of September, 2021, to the addresses shown below:

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