**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. Allf, District Judge

# APPELLANT'S REPLY BRIEF

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## LEGAL ARGUMENT

### I. The lower court erred in dismissing NCA's due process claims.

As discussed herein, the lower court erred by dismissing NCA's due process claims because the combined effect of A.B. 477 and JCR 16 unconstitutionally restricts NCA members' access to Justice Court.

#### A. Strict scrutiny applies to government action that restricts reasonable access to the courts.

Respondents argue that the deferential "rational basis review" applies to NCA's "access to the courts" claims under the Due Process Clause. As discussed below, however, this is simply incorrect.[1]

"The right of access to the courts is a fundamental right protected by the Constitution." *Ringgold-Lockhart v. City of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014) (internal quotations omitted); *see also Bradley v. PNK* (Lake Charles), L.L.C., 2018 WL 3025981, 134 Nev. 916, 420 P.3d 559, No. 72937 (Nev. Jun. 15, 2018) (unpublished disposition) (holding that access to the courts is a "fundamental right" that is "constitutionally protected."). As such, government action that restricts this "fundamental right" is reviewed under a strict scrutiny standard.[2] *See Green v.*

[1] For clarity's sake, NCA's opening brief discussed the lesser "rational basis review" standard in the context of its **equal protection** claims because there is no inherently suspect classification, such as one based on race or sex. NCA's **due process** "access to the courts" claims, on the other hand, receive the heightened "strict scrutiny" standard because they implicate a fundamental right.

[2] Only in the ultra-specific factual context of cases brought by prisoners do "access

*City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) (strict scrutiny applies "where the statute in question substantially burdens fundamental rights."). As the California Court of Appeals explained:

> Access to courts, however, has been recognized by the Supreme Court as one of the 'basic constitutional guarantees, infringements of which are subject to more searching judicial review'—meaning, it is a fundamental right, **triggering strict scrutiny**….

*People v. Son*, 262 Cal. Rptr. 3d 824, 840 (Cal. Ct. App. 2020) (quoting *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (emphasis added)).

In fact, this Court has already acknowledged that government action restricting access to the courts receives strict scrutiny. *See Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). In *Jordan*, this Court reviewed the constitutionality of a lower court order restricting a vexatious litigant from filing future lawsuits. *Id.* at 54, 110 P.3d at 39. In doing so, this Court recognized that access to the courts is a basic constitutional right. *Id.* at 60, 110 P.3d at 42. As such, this Court ruled that any rule restricting an individual's access to the courts needs to be "**narrowly tailored**." *See id.* ("because restrictive orders implicate an individual's

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to the court" cases receive a more deferential review. *See Lewis v. Casey*, 518 U.S. 343, 361 (1996) (explaining the policy reasons for applying a lesser standard to prisoner cases).

constitutional right to access the courts, such orders must be **narrowly tailored**") (emphasis added). This Court's "narrowly tailored" language was taken verbatim from the strict scrutiny test. *See Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (Nev. 2000) ("Under the strict scrutiny approach, legislation should be sustained only if it is **narrowly tailored** and necessary to advance a compelling state interest") (emphasis added).

Here, strict scrutiny applies because the combined effect of A.B. 477 and JCR 16 restricts the fundamental right of access to the courts. This fact is undisputed. Indeed, the **explicit** purpose and design of A.B. 477 is to restrict creditors from filing Small Dollar Debt 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, NCA members are restricted from accessing Justice Court because: (1) JCR 16 expressly prohibits NCA's members from appearing in Justice Court without counsel; and (2) A.B. 477 makes it impossibly cost prohibitive for NCA's members to retain counsel in Small Dollar Debt cases. Because the stated purpose of A.B. 477 is to restrict access to Justice Court in Small Dollar Debt cases, strict scrutiny applies.

### B. The combined effect of A.B. 477 and JCR 16 is unconstitutional under the strict scrutiny standard.

"Under strict scrutiny, legislation should only be upheld if it is necessary to advance a compelling state interest, and it is narrowly tailored to achieve that interest." *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 454, 25 P.3d 175, 182 (Nev. 2001). To be considered "compelling," a state interest must be extremely grave and serious. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (Compelling state interests are "interests of the highest order."). Next, "a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (internal quotations omitted). Lastly, the challenged law must constitute "the least restrictive means available" to address the compelling state interest. *Bernal v. Fainter*, 467 U.S. 216 (1984). Importantly, the *government* has the burden of demonstrating all of the foregoing elements. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009).

Here, the combined effect of A.B. 477 and JCR 16 is unconstitutional under strict scrutiny. First, Respondents fail to identify a *compelling* state interest. The lower court broadly defined the state interest at issue as "consumer protection." 8 JA 1343-44. As an initial matter, however, the phrase "consumer protection" is far too broad and nebulous to constitute a compelling state interest under strict scrutiny. *See Redeemed Christian Church of God, v. Prince George's Cty.*, 17 F.4th 497 (4th

Cir. 2021) ("A 'compelling interest' is not a general interest but must be particular to the specific case") (internal quotations omitted).

Moreover, there is absolutely no evidence that the actual issue—attorney's fees in Small Dollar Debt cases—constitutes the type of "evil" that is necessary to be a "compelling" state interest under strict scrutiny. Indeed, Mr. Goatz's only factual support for the bill was his own anecdotal description of **only two instances** in which the attorney's fees sought by creditors were, in his subjective opinion, excessive. 4 JA 684. 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.* In other words, there was no attempt to even demonstrate the existence of an actual problem that needed to be resolved by the Legislature. Because Respondents cannot identify a "compelling" state interest, much less support one, A.B. 477 fails under strict scrutiny.

Second, even if there were a compelling state interest, there is no evidence that A.B. 477 is narrowly tailored or the least restrictive alternative. When A.B. 477 was passed, there was absolutely no discussion on why attorney's fees should be capped at 15% as opposed to some other number. 4 JA 684. It was literally a number grabbed out of thin air. As such, some alternative solution could have been used to further the stated goal of "consumer protection" without chilling any incentive to

file Small Dollar Debt claims in Justice Court. The Legislature failed to undertake any such fact finding, opting instead to rubber stamp the proposed legislation. Because Respondents have not met their burden of demonstrating that A.B. 477 is narrowly tailored or the least restrictive alternative to accomplish the goal of "consumer protection," the statute fails under strict scrutiny.

### C. Respondents fail to address the <u>combined</u> effect of A.B. 477 and JCR 16.

Respondents make every effort to have this Court to analyze the constitutionality of A.B. 477 and JCR 16 **<u>separately</u>**. In other words, Respondents argue at length that a statute limiting attorney fees, by itself, is not unconstitutional. Respondents then argue that a rule requiring corporations to appear with counsel, by itself, is not unconstitutional. These arguments are inapposite, however, because the issue before this Court is whether the **<u>combined</u>** effect of A.B. 477 and JCR 16 is unconstitutional. In other words, this Court must decide whether it is unconstitutional to **<u>simultaneously</u>** require a party to retain counsel (JCR 16) *and* restrict attorney fees so severely that retaining counsel becomes cost prohibitive (A.B. 477). None of the Respondents' cited cases deal with this specific issue.

#### 1. The *Walters* case is inapposite.

Justice Court cites a United States Supreme Court case upholding the constitutionality of "a civil war era $10 limit" on attorney's fees in the Veterans Benefits Act. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333

(1985). Importantly, however, the *Walters* Court only upheld the $10 fee cap because the benefit claims process at issue in that case was "not designed to operate adversarially" and could easily be completed **without** an attorney. *Id.* In fact, the *Walters* Court specifically distinguished the non-adversarial claims process in that case from "trial-type proceedings" where "counsel may well be needed." *Id.* In other words, by its own express language, *Walters* only applies to "proceedings that do not approximate trials, but instead are more informal and non-adversary." *Id.* at 334.

The *Walters* decision is inapposite for two reasons. First, unlike in *Walters*, where the benefit claims process could easily be completed without an attorney, NCA's members are literally **required** to hire an attorney under JCR 16. Second, unlike in *Walters*, where the benefit claims process was "informal and non-adversary," A.B. 477 and JCR 16 deal directly with full-blown litigation that must be pursued in a court of law. As such, the *Walters* decision is not helpful to this Court's constitutional analysis of the **combined** effect of A.B. 477 and JCR 16.

**2. Justice Courts' prisoner cases are inapposite.**

Justice Court next cites numerous cases upholding the constitutionality of an attorney's fee cap in the Prisoner Litigation Reform Act ("PLRA"). Those cases are also inapposite, however, because nothing prevents individual prisoners from filing

lawsuits *pro se* **without** an attorney. Indeed, a case cited by Justice Court makes this exact point when evaluating the constitutionality of the PLRA:[3]

> First and foremost, the suggestion that prisoners who proceed *pro s*e do not have a meaningful opportunity to prosecute their claims is highly debatable. While *pro se* litigants are not exempt from procedural rules, courts are solicitous of the obstacles that they face. Consequently, courts hold *pro se* pleadings to less demanding standards than those drafted by lawyers. By the same token, courts endeavor, within reasonable limits, to guard against the loss of *pro se* claims due to technical defects. The net result is that *pro se* litigants sometimes enjoy stunning success.

*Boivin v. Black*, 225 F.3d 36, 43 (1st Cir. 2000) (internal citation omitted). In other words, the attorney's fees cap in the PLRA does not unconstitutionally restrict access

[3] Most of the cases cited by Justice Court interpreted the awkwardly worded PLRA as capping attorney fees at **150%** of the money judgment, which is obviously much more reasonable than the nominal **15%** cap in A.B. 477. *See e.g. Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001) ("We believe that § 1997e(d)(2) must be read to limit defendants' liability for attorney fees to 150 percent of the money judgment"); *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006) (concluding that the PLRA caps the "recovery of attorney fees from the defendant to 150% of the damage award"); *Parker v. Conway*, 581 F.3d 198, 203 (3d Cir. 2009) (concluding that the PLRA "limit[s] an attorney's fee award to 150 percent of the judgment."). It was not until 2018 that the United States Supreme Court clarified that the PLRA actually caps fees at 25%, not 150%. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Nevertheless, most of the cases cited by Justice Court were evaluating the constitutionality of the PLRA's attorney's fee cap in the context of a much higher 150% limit. This further directs that these cases are not helpful to this Court's analysis of A.B. 477.

to the courts because prisoners are free to pursue their claims *pro se* without an attorney.

Once again, these prisoner cases are inapposite to the issue before this Court. Unlike the PLRA, which does not prevent prisoners from pursuing claims *pro se*, JCR 16 literally **requires** NCA members to retain counsel, and then A.B. 477 restricts recoverable attorney fees to the point that hiring an attorney renders an action to collect a debt unprofitable in nearly all instances. Without a doubt, if the PLRA simultaneously **required** prisoners to retain counsel and then severely limited recoverable attorney fees, those cases would have been decided differently. Because nothing in the PLRA requires prisoners to have counsel, those cases are not helpful to this Court's constitutional analysis of the **combined** effect of A.B. 477 and JCR 16.

**3. The UCCPA is inapposite.**

Amicus Curia Legal Aid Center of Southern Nevada ("LACSN")[4] points out that A.B. 477's 15% cap is modeled after the Uniformed Credit Protection Act (the "UCCPA"). Importantly, however, LACSN only identifies a handful of states that

[4] At the time of this filing, this Court had not yet ruled on LACSN's Motion for Leave to File Amicus Brief. The NCA hopes this Court appreciates the irony here in which an organization purportedly dedicated to *greater* access to courts is openly advocating in support of a rule *restricting* access to courts for a select class of persons. *See* https://www.lacsn.org/who-we-are/staff-and-board ("Mission: The preservation of access to justice and the provision of quality legal counsel, advice and representation for individuals who are unable to protect their rights because they cannot afford an attorney.").

have actually adopted the UCCPA.[5] Moreover, and even more importantly, absolutely no case law can be located evaluating the constitutionality of the UCCPA's proposed 15% cap when combined with a court rule **requiring creditors to appear in court with counsel**. As such, the mere existence of these statutes in a small number of foreign jurisdictions does nothing to aid this Court in its constitutional analysis of the **combined** effect of A.B. 477 and JCR 16.

In short, the combined effect of A.B. 477 and JCR 16 unconstitutionally restricts access to Justice Court because: (1) NCA's members are required to appear in court with counsel; and (2) the 15% attorney's fee cap makes retaining an attorney impossibly cost prohibitive in these debt collection matters. As such, the lower court erred in dismissing NCA's "access to the courts" claims under the Due Process Clause.

**D. NCA has demonstrated an injury in fact.**

As discussed herein, the lower court's "injury in fact" finding was erroneous because: (1) the lower court committed legal error by refusing to consider NCA's undisputed evidence of injury; and (2) NCA was not required to file a lawsuit and move for fees before challenging the constitutionality of A.B. 477.

[5] According to LACSN, a total of **43** states have **not** adopted the 15% cap in the UCCPA. Instead, LACSN only identifies the following states as having adopted the UCCPA's 15% cap: Alabama, Alaska, Kansas, Maryland, Maine, Missouri, and South Carolina. Amicus Brief, p. 15.

### 1. Respondents do not dispute that the lower court committed legal error by refusing to consider NCA's undisputed evidence of injury.

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); *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").

Here, NCA provided the lower court with dozens of undisputed sworn declarations establishing that the combined effect of A.B. 477 and JCR 16 has caused an injury in fact.[6] 4 JA 594-601, 607-683, 5 JA 768-94, 830-36; 7 JA 1112-1139, 1176-1181. Importantly, however, the lower court committed legal error by concluding that it was prohibited from considering this substantial and undisputed evidence in deciding the issue of subject matter jurisdiction. *See* 8 JA 1342-43 (the lower court concluding that it could only consider outside evidence if "judicial

[6] The FID points out that *some* of NCA's declarations were from small business owners that are not NCA members. *See* FID Answering Brief, pp. 8-10. At the same time, however, FID acknowledges some of the declarations *were* from current NCA members, and from attorneys that would normally handle NCA members' Small Dollar Debt cases but cannot as a result of A.B. 477. *Id.*; *see also* 4 JA 594, 607, 615-24. In other words, it is undisputed that NCA presented significant evidence of the actual harm that A.B. 477 is causing to **its members** *and* the small business community *and* Nevada lawyers as a whole. Thus, it was clear legal error for the lower court to exclude this evidence from consideration.

notice" applied). This unquestionably constitutes legal error by the lower court. Had the lower court considered NCA's substantial and undisputed evidence, it would have been required to conclude that NCA's members have suffered an injury in fact. Thus, the lower court's legal error warrants reversal.

Significantly, **the Respondents do not address this clear legal error in any way in their briefs**. As such, the Respondents' silence should be construed as a concession that the argument has merit. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the respondents' failure to respond to appellant's argument in their answering brief as a confession of error). Because the lower court committed legal error by refusing to consider NCA's evidence of injury, the lower court's order dismissing the case should be reversed.

**2. NCA was not required to file a lawsuit and move for fees before challenging the constitutionality of A.B. 477.**

Justice Court argues that NCA can only show an "injury in fact" if its members actually won a lawsuit and then were denied fees under A.B. 477. This argument fails for two reasons.

First, Justice Court's case law could not be more factually or legally inapposite. *See* Justice Court's Answering Brief, pp. 38-39 (citing *Swekel v. City of River Rouge*, 119 F.3d 1259, 1260 (6th Cir. 1997) and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1988)). Both *Swekel* and *Delew* deal with pre-litigation police coverups in criminal investigations. *Swekel*, 119 F.3d at 1260; *Delew*, 143 F.3d at

1221. In both cases, the plaintiff argued that by covering up evidence, the police prevented the plaintiff from bringing a meaningful civil lawsuit, thereby restricting access to the courts. *Id*. In that specific factual context, both courts suggested that the plaintiffs needed to first file their underlying civil lawsuits so that it could be determined if the police coverup would have made a difference. *Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222. Those courts did not, however, create a sweeping rule that a lawsuit must always be filed before an "injury in fact" can arise. In fact, the *Swekel* Court specifically acknowledged that filing a lawsuit would be unnecessary if doing so would be "futile." *Swekel*, 119 F.3d at 1264 n.2.

Here, filing a lawsuit and moving for fees would be futile because A.B. 477 *always* caps attorney fees at 15% in Small Dollar Debt cases. *See* NRS 97B.150. In other words, unlike in *Swekel* and *Delew*, where it was unclear what impact the police coverups would have had on the plaintiffs' cases, here it is **undisputed** that A.B. 477 would prevent NCA's members from receiving more than 15% of any judgment in attorney's fees. Thus, NCA's members do not to have to file a lawsuit and move for fees to know that their attorney's fees are statutorily capped at 15%. Because A.B. 477's impact is already known and undisputed, the legal rationale for requiring the filing of a lawsuit and moving for fees first does not exist. *See Reg'l Rail Reorg. Act Cases*, 419 U.S. 102,143 (1974) ("One does not have to await the

consummation of threatened injury to obtain preventative relief") (quotations omitted).

Second, Justice Court's argument ignores the chilling effect of A.B. 477 and JCR 16. Specifically, these rules prevent NCA members from filing Small Dollar Debt cases **in the first place**, and were specifically designed to do so. Indeed, NCA presented the lower court with dozens of undisputed declarations and records of **actual delinquent accounts** that cannot be pursued in Justice Court as a result of the combined effect of A.B. 477 and JCR 16, including the following accounts:

| 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; 5 JA 768-94, 830-36; 7 JA 1112-1139. In other words, the combined effect of A.B. 477 and JCR 16 has already caused an injury by effectively barring NCA members from filing Small Dollar Debt cases in Justice Court. Because NCA presented evidence of a concrete and imminent injury, the lower court erred by dismissing NCA's complaint for lack of subject matter jurisdiction.

### E. Respondents do not address the conflicts between A.B. 477 and Nevada's other fee-shifting rules and statutes.

A.B. 477 directly conflicts with other fee-shifting rules and statutes that are intended to prevent small dollar cases from being cost prohibitive. First, A.B. 477 conflicts with NRS 18.010(2)(a), which allows prevailing parties to recover reasonable attorney's fees in **all** cases in which the amount recovered is less than $20,000.00. As this Court noted, "the legislative intent behind the enactment of NRS 18.010 was to aid litigants who might forego suit because the costs of litigation would outweigh their potential recovery." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830, n. 2, 712 P.2d 786, 788, n.2 (1985); *see also Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 286, 890 P.2d 769, 774 (1995) ("From the outset, the legislature intended NRS 18.010(2)(a) and its predecessors to afford litigants **in small civil suits** the opportunity to be made whole") (emphasis added). Second, A.B. 477 conflicts with NRS 69.030, which expressly authorizes an award of reasonable attorney's fees in "**any civil action**" in Justice Court—taxed as costs—to prevailing parties. Finally, A.B. 477 conflicts with numerous other fee shifting rules, 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. Appeals from Justice Court—NRS 69.050;

f. Arbitrations—NRS 38.243(3);

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

h. Landlord/Tenant—NRS 118A.515.

In fact, these clear conflicts are one of the reasons that the federal district court remanded this case back to state court. 1 JA 48-49 (finding that the federal district court would be "treading dangerous waters" by ruling on the validity of a Nevada statute that has so many apparent conflicts with numerous other Nevada rules and statutes). And though NCA specifically asked the lower court to resolve these conflicts, the lower court refused to do so.

Importantly, **Respondents do not address these clear conflicts in any way**. As such, the Respondents' silence should be construed as a concession that these conflicts render A.B. 477 invalid subject to the conflicting rules referenced above. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the respondents' failure to respond to appellant's argument in their answering brief as a confession of error). Because A.B. 477 directly conflicts with numerous other fee shifting rules and statutes—and Nevada's policy of ensuring that small dollar cases are not cost prohibitive—A.B. 477 should be deemed invalid.

## II. NCA had valid equal protection claims.

Under rational basis review, a statute violates the Equal Protection Clause if it creates classifications that are "arbitrary or irrational." *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (internal quotations omitted).

Here, Justice Court argues that the Equal Protection Clause has not been violated because A.B. 477 does not treat NCA's members differently than other "similarly situated parties." This is completely untrue, however, as A.B. 477 expressly treats NCA's members less favorably than other debt collectors, such as banks and payday lenders. *See* NRS 97B.090 (creating exemptions for most financial institutions). That irrational distinction is precisely why A.B. 477 violates the Equal Protection Clause. Indeed, if the state interest supporting A.B. 477 is really "consumer protection," then there is no conceivable rational basis to treat banks and payday lenders (who charge consumers up to 650% interest) more favorably than small businesses and debt collectors. Indeed, through two years of litigation before the lower court, the United States District Court for the District of Nevada, back to the lower court, and now this Court, Respondents still have not 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 dismissing NCA's Equal Protection Claims.

## III. The FID was the appropriate state agency to name as a defendant.

NRS 41.031 **required** NCA 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.").

FID argues it was not the appropriate state agency because: (1) A.B. 477 does not apply to entities that are regulated by the FID; and (2) FID is not actively pursuing disciplinary action against NCA's members related to A.B. 477. As discussed below, however, both arguments fail.

### A. A.B. 477 applies to entities that are regulated by the FID.

The FID regulates "collection agencies," which are entities that are engaged in the business of collecting debts on behalf of another. NRS 649.020(1). The FID argues that A.B. 477 does not apply to "collection agencies," and thus, it was not a properly named defendant. The FID's argument, however, is completely contradicted by the plain language of A.B. 477.

A.B. 477 defines a "consumer debt" as:

> **any obligation or alleged obligation** of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

NRS 97B.060 (emphasis added). Moreover, A.B. 477's attorney's fee cap applies "[i]f the **plaintiff** is the prevailing party **in any action** to collect a consumer debt." NRS 97B150 (emphasis added). Nothing in A.B. 477 excludes plaintiffs that are collecting debts on behalf of another. Instead, A.B. 477's attorney's fee cap applies **anytime** the "**plaintiff**" is the prevailing party in an action to collect a consumer debt, regardless of whether that plaintiff owns the debt or is collecting the debt on behalf of another. *Id.* Thus, A.B. 477 clearly applies to debt collectors that are regulated by the FID, including NCA's members.

### B. The FID has express authority to pursue disciplinary action against NCA's members related to A.B. 477.

The FID has the statutory authority (and obligation) to regulate alleged violations of the Fair Debt Collection Practices Act (the "FDCPA") because NRS Chapter 649 expressly incorporates the FDCPA into its regulatory scheme. NRS 649.370. Moreover, it is a violation of the FDCPA to even **request** attorney's fees that are not allowed by law. *See* 15 U.S.C. § 1692e(2)(A)-(B) (prohibiting debt collectors from making "false representation of the character, amount, or legal status

of any debt…"); *see also McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 949 (9th Cir. 2011) (holding that a debt collection law firm "violated the FDCPA by requesting attorney's fees in its underlying state collection complaint [without a factual or legal basis]"). Thus, if a debt collector violates the FDCPA by requesting attorney's fees in excess of what is allowed under A.B. 477, FID has the statutory authority to investigate and discipline that debt collector under Nevada law.[7] NRS 649.051; NRS 649.370.

Regardless of the foregoing, the FID contends it is not a properly named defendant because it has no current plans to take action against NCA's members related to A.B. 477. Despite this unenforceable promise (which could change on a dime), the FID could pursue disciplinary action if NCA members violated the FDCPA by requesting fees in excess of what is allowed under A.B. 477. *See* NRS 649.051; NRS 649.370. In other words, because the FID has the statutory authority to discipline debt collectors for violations of the FDCPA, the FID is the appropriate state agency to name in this case.

[7] The FID argues that it would not be a violation of A.B. 477 to simply *request* fees in excess of 15% of the judgment. That argument misses the point. If NRS Chapter 649 expressly incorporates the FDCPA, and the FDCPA prohibits even **seeking** attorney's fees to which a debt collector is not entitled, there is nothing to stop the FID from pursuing NCA members for violations of NRS 649.370 ("A violation of any provision of the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1682 *et seq.*, or any regulation adopted pursuant thereto, shall be deemed to be a violation of this chapter.").

Finally, it is worth noting again that the FID has repeatedly refused to identify which state agency would have been appropriate to name as a defendant under NRS 41.031(2).[8] 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 which 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.

### C. FID's "persons" argument is misplaced because NCA is seeking declaratory relief under NRS Chapter 30 and injunctive relief.

The FID argues that NCA cannot maintain Section 1983 claims against it because neither the FID nor its Commissioner (in her official capacity) constitute a "person" under Section 1983. That argument ignores that NCA's primary claim is for declaratory relief under NRS Chapter 30 and NRS 41.031, not Section 1983.[9]

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[8] Instead, the FID suggests that NCA could challenge A.B. 477's constitutionally without naming any state defendants. It is unclear, however, who the defendant would be in such a challenge. It must also be noted that the FID's reliance on NRS 30.130 is misplaced, as that statute only deals with *notifying* the attorney general of a constitutional challenge and has nothing to do with naming the state as a defendant in an action.

[9] Even under 42 U.S.C. § 1983, the Commissioner of the FID, in her official capacity, is a "person" under Section 1983 to the limited extent injunctive and declaratory relief is sought against her. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908); *Arizona Students' Assn v. Arizona Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (under *Young*, a state's sovereign immunity does not apply to "request[s] for prospective injunctive and declaratory relief.").

Specifically, the main purpose of this case is to obtain a declaration from this Court that the combined effect of A.B. 477 and JCR 16 is unconstitutional for the reasons stated herein, and for an injunction thereon. Thus, because NCA sought declaratory and injunctive relief, the district court erred in granting FID's Motion to Dismiss.

## IV. The lower court erred in finding that Justice Court has absolute immunity.

Justice Court argues that it possesses absolute immunity from suit because JCR 16 is based on "well-established law." This argument fails for two reasons. First, Justice Court's "absolute immunity" case law is inapposite because it deals with facially valid **court orders**, not court rules (JCR 16) or statutes (A.B. 477). *See Engebretson v. Mahoney*, 724 F.3d 1034, 1038 (9th Cir. 2013) ("[P]ublic officials who ministerially enforce facially valid **court orders** are entitled to absolute immunity") (emphasis added). Because this case does not involve a challenge to a facially valid "court order," Justice Court's absolute immunity argument is without merit.

Second, Justice Court completely ignores the fact that courts and judges are routinely named as defendants in constitutional challenges to court rules. *See Riley v. Nevada Supreme Ct.*, 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. Ct. 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). Because courts can undoubtedly be named as defendants in actions challenging the constitutionality of a court rule, the lower court erred in finding that Justice Court possesses absolute immunity from suit.

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

Justice Court argues that the lower court correctly denied NCA's Motion for a Preliminary Injunction because: (1) NCA was unlikely to succeed on the merits;

(2) NCA's members have not suffered irreparable harm; and (3) Justice Court would be harmed by a preliminary injunction.[10] All three arguments fail.

**1. NCA is likely to succeed on the merits.**

Justice Court argues that NCA is unlikely to succeed on the merits because it did not demonstrate an injury in fact. As discussed previously, however, this argument fails for two reasons. First, the lower court committed legal error by concluding that it was precluded from considering NCA's substantial and **undisputed** evidence demonstrating that an injury in fact was occurring. This undisputed evidence included the following:

- Dozens of sworn declarations from NCA members and small business owners detailing the devastating effects that A.B. 477 and JCR 16 are having on them. 4 JA 594-607, 625-83.

- Records of actual delinquent accounts that could not be pursued in Justice Court as a result of A.B. 477 and JCR 16. 4 JA 613, 696-705.

- Sworn declarations from three Nevada attorneys who normally handle Small Dollar Debt cases in Justice Court but were prevented from taking those cases due to A.B. 477 and JCR 16. 4 JA 615-624.

Second, the evidence NCA presented in the lower court demonstrated that NCA's members have suffered an injury in fact because A.B. 477 and JCR 16 create a chilling effect that prevents them from filing Small Dollar Debt claims in Justice

[10] The FID does not make any substantive arguments related to NCA's Motion for a Preliminary Injunction.

Court in violation of the constitution. Because NCA is likely to succeed on the merits, the lower court erred by denying NCA's Motion for a Preliminary Injunction.

NCA hopes this Court appreciates the very disturbing precedent Respondents seek to establish in this case. Respondents invite this Court to approve arbitrary barriers to a courtroom against a discrete class of litigants, where others are welcome without restriction. That is a slippery slope with potentially dangerous consequences for our judicial system. Consumer protection, no matter how noble that goal might be, should never prevail over equal access to the same courtroom. And this Court should never allow for the establishment of "preferred club seating" in our judicial system.

**2. NCA's members are suffering irreparable harm.**

Justice Court argues that NCA's members are not suffering "irreparable" harm because they are ultimately seeking the payment of money through attorney fees. This argument is misplaced, however, because the issue in this case involves an overt attempt to restrict a certain class of litigants from filing cases in Justice Court. *See* 4 JA 688, 693 (Mr. Goatz testifying that the express 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…."). Indeed, A.B. 477 was designed to create a chilling effect upon NCA members and small businesses from filing lawsuits in Justice Court, thereby depriving them of a

fundamental constitutional right (access to the courts), which necessarily constitutes irreparable harm. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury."). Because NCA's members are being denied a constitutional right, they are suffering irreparable harm. Thus, the lower court erred by denying NCA's Motion for a Preliminary Injunction.

**3. Justice Court would not be harmed by a preliminary injunction.**

Justice Court argues it would be harmed if corporations are allowed to appear before it without counsel. Again, Justice Court's argument misses the point. No one is suggesting that corporations should be allowed to appear in Justice Court without counsel. Instead, NCA is simply arguing that *because* corporations are required to have counsel in Justice Court, it is unconstitutional to limit attorney fees so severely that hiring an attorney becomes effectively impossible. As such, the requested injunction would simply prohibit the enforcement of the fee cap in A.B. 477. Justice Court has not (and cannot) explain how this would cause it any harm. Because Justice Court would not be harmed if the requested injunction is imposed, the lower court erred by denying NCA's Motion for a Preliminary Injunction.

## 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 9 day of December, 2021.

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## ATTORNEY CERTIFICATION

1. I hereby certify that Appellant's Reply 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 Reply 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 5676 words.

3. Finally, I hereby certify that I have read Appellant's Reply 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 9th day of December, 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 REPLY 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 9th day of December, 2021, to the addresses shown below:

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