TIMOTHY SANDEFUR, Cal. Bar No. 224436*
ANASTASIA P. BODEN, Cal. Bar No. 281911*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org
E-mail: apb@pacificlegal.org
**pro hac vice*

LEE IGLODY, Nev. Bar No. 7757
Iglody Hulet PLLC
7450 Arroyo Crossing Parkway, Suite 270
Las Vegas, Nevada 89113
Telephone: (702) 425-5366
Facsimile: (702) 425-5148
E-mail: lee@iglodyhulet.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TROY CASTILLO, Plaintiff, vs. KEVIN L. INGRAM, et al., Defendants.	No. 2:14-cv-00332-GMN-PAL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** **[ORAL ARGUMENT REQUESTED]** Judge: The Hon. Gloria M. Navarro

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930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

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(916) 419-7111 FAX (916) 419-7747

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Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff Troy Castillo filed suit in this Court on March 4, 2014, to challenge the constitutionality of a Nevada law that sets a licensing requirement for private investigators (PIs). Castillo alleges that the licensing requirement violates the Commerce Clause and the Privileges and Immunities Clause of Article IV of the U.S. Constitution because it requires a PI to keep a physical place of business within the state—and that it violates the First Amendment because it defines "private investigator" so broadly as to require a person to obtain a license before engaging in an enormous array of research and expression. *See* Complaint ¶ 1 [Doc. No. 1]. Defendants moved to dismiss on June 6, 2014. *See* Defendants' Motion to Dismiss [Doc. No. 21]. The Court granted Defendants' motion with leave to amend, reasoning that Castillo had not alleged an intent to violate the law, nor that Defendants were enforcing the challenged statutes. *See* Order Granting Motion to Dismiss [Doc. No. 25, 6-7]. Plaintiff filed a verified amended complaint simultaneously with this motion for preliminary injunction. *See* Plaintiff's Verified First Amended Complaint [VFAC].

Since the challenged licensing requirements went into effect, Defendants have enforced those statutes in violation of the Constitution. On January 21, 2015, Defendants notified Mr. Castillo that his mandatory certificate of liability insurance was deficient because it listed his principal place of business as California, instead of Nevada. *See* VFAC ¶ 36. Although Defendants later allowed Mr. Castillo to use his California address, they did so contrary to state law. They also provided Mr. Castillo with a copy of the February 2014 issue of the *Private Investigator Licensing Board Newsletter*, which states that "all licensees [must] maintain a principal place of business in Nevada," and that "[f]ailure to comply" with this requirement "is grounds for possible suspension, revocation, or denial of an application for licensure." *Id.* ¶ 37. Moreover, minutes from their Board meetings reveal Defendants' intention to enforce the in-state office requirement. *Id.* ¶ 39. Defendants' enforcement of the unconstitutional licensing laws has caused, is now causing, and will continue to cause Mr. Castillo to turn away opportunities for work

in Nevada, unless Defendants are enjoined by this Court. In addition, the licensing requirement operates as a prior restraint and a content-based speech restriction, which, unless enjoined by this Court, will continue to chill protected speech, in violation of the First Amendment.

Castillo meets the legal standards for preliminary injunctive relief. His case has a substantial likelihood of success on the merits, because the licensing requirement is overbroad and unconstitutionally imposes a prior restraint and a content-based restriction on the exercise of Castillo's First Amendment rights, and because that requirement unconstitutionally discriminates against Castillo on the basis of his state of residence without any connection to a valid government interest. If Defendants are not enjoined from enforcing the licensing requirements, Mr. Castillo will suffer irreparable injuries, including being forced to forego business opportunities and to refrain from exercising his First Amendment rights, on pain of financial and non-financial penalties. Because Castillo's business is not a danger to the public, the balance of the hardships tips in his favor. Granting the requested relief would serve the public interest by ensuring a full and uninterrupted resolution of the merits of this lawsuit and upholding First Amendment principles. Finally, Castillo asks that this Court grant the requested injunction without requiring a bond.

FACTUAL AND PROCEDURAL BACKGROUND

Troy Castillo is a PI headquartered in Palm Springs, California. VFAC ¶ 5. For 29 years before he began working as a PI, Castillo was a police officer in Palm Springs; he spent nearly a decade of that time as a detective. *Id.* ¶ 6. He has private investigator licenses in California, Arizona, and Nevada. *Id.* ¶ 7.

Nevada law requires anyone wishing to work as a PI to obtain a license. Nev. Rev. Stat. § 648.060(1). Operating without a license, or any other violation of the licensing laws, is a misdemeanor punishable by a fine of up to $1,000 and imprisonment for up to six months. Nev. Rev. Stat. §§ 648.210, 193.120. Any subsequent violation is considered a gross misdemeanor,

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which carries a penalty of up to $2,000, and up to 364 days of imprisonment. Nev. Rev. Stat. § 193.1605. Licensees must renew their licenses every 12 months. Nev. Rev. Stat. § 648.144.

The licensing laws define "private investigator" broadly, as any person who, among other things, is paid to "investigat[e]" or "furnish" information related to the "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character of any person"; "[t]he location, disposition or recovery of lost or stolen property"; "[t]he cause or responsibility for fires, libels, losses, accidents or damage or injury to persons or to property"; or "[a] crime or tort that has been committed, attempted, threatened or suspected." Nev. Rev. Stat. § 648.012.

There are various statutory exemptions which specify that federal and state police detectives, Nevada-licensed insurance adjusters, repossessors, financial raters, computer repairmen, and some others, do not qualify. Nev. Rev. Stat. §§ 648.012(4), 648.018. But any other person who "accepts employment to furnish . . . information" about the litany of topics covered by the statute is considered a "private investigator," and must be licensed. Nev. Rev. Stat. § 648.012. Defendants have enforced the statute broadly. In 2013, they brought charges against a person who had testified as an expert witness in two trials. *State v. Tatalovich*, 309 P.3d 43 (Nev. 2013).[1]

Applicants for a PI license must provide the Board with, *inter alia*, information about their financial condition, "detailed . . . personal histor[ies]," and "such other facts as may be required by the Board to show good character . . . and integrity." Nev. Rev. Stat. §§ 648.060, 648.080, 648.148. The statute also requires a background check, but the fee for this check is lower for Nevada residents than for out-of-state businesses. Nev. Rev. Stat. § 648.100(2).

[1] The Nevada Supreme Court ruled that expert witnesses are not private investigators, and the statute was later amended to expressly exempt expert witnesses. *See* Nev. Rev. Stat. § 648.012(4). But investigative reporters, biographers, and other persons engaged in research and writing would still qualify. *See* Nev. Rev. Stat. § 648.012(1).

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In 2014, a new statute went into effect which added an in-state location requirement for licensees. Nev. Rev. Stat. § 648.148(1)(a). Under that law, a licensee is required to maintain a "principal place of business" in Nevada. Castillo's principal place of business is in California, and he maintains no offices in Nevada and has no employees in Nevada. VFAC ¶ 27. Because Nevada-based PIs can use their homes as their principal places of business, whereas out-of-state residents must necessarily obtain offices in addition to their homes, the effect of the law is to impose an additional cost of doing business on out-of-state residents like Castillo. *Id.* ¶ 54. The statute therefore treats Castillo differently than Nevada-based business owners. *Id.* ¶¶ 54-56.

Castillo filed suit seeking prospective injunctive relief to challenge the constitutionality of the licensing requirement. *See id.* ¶ 2. He alleges that the requirement violates the First Amendment, because it is overbroad and constitutes a prior restraint and a content-based speech restriction. *Id.* ¶ 77. He also alleges that it violates the Commerce Clause and the Privileges and Immunities Clause, because it discriminates against him and his business on the basis of their state of residence. *Id.* ¶¶ 51-62. Castillo further alleges that imposing burdens on him on the basis of the state where he is located is not rationally related to protecting the general public, but is designed solely to protect Nevada-based PIs against competition from PIs headquartered in other states, and thus violates the Due Process Clause of the Fourteenth Amendment. *Id.*

On June 6, 2014, Defendants moved to dismiss. *See* MTD [Doc. No. 21]. Castillo filed an opposition on June 27, 2014. [Doc. No. 23]. Defendants replied on July 10, 2014. [Doc. No. 24]. That motion was granted on February 5, 2014. [Doc No. 25]. Plaintiff filed an amended complaint and this motion in response.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

This Court's issuance of a preliminary injunction is governed by Federal Rule of Civil Procedure 65 and 28 U.S.C. §§ 1651 and 2283. Pursuant to Rule 65, District Courts consider four factors when choosing whether to grant temporary equitable relief: (1) the likelihood of success on the merits of the underlying complaint; (2) the risk of suffering irreparable harm if preliminary

relief is not granted; (3) the balance of equities; and (4) whether granting preliminary relief would be in the public interest. *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012). As explained below, Castillo easily satisfies all four factors.

ARGUMENT

I

CASTILLO HAS STANDING, AND HIS CASE IS RIPE AND NOT MOOT

A plaintiff has standing to sue if he has suffered a concrete and particularized injury, fairly traceable to the defendant's conduct, which the court can remedy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Castillo is injured because the licensing requirements bar him from exercising his constitutionally protected right to pursue his chosen profession as a private investigator. VFAC ¶ 40; *see also Greene v. McElroy*, 360 U.S. 474, 492 (1959) (Constitution protects "the right to . . . follow a chosen profession free from unreasonable governmental interference."). That injury arises from the Board's enforcement of the challenged law. VFAC ¶¶ 36-41. And the remedy Castillo seeks would redress that injury, since an injunction barring enforcement of the unconstitutional licensing requirements would ensure that he would be able to resume his practice as a private investigator in Nevada. VFAC ¶¶ 6, 45-46.

A plaintiff has standing to sue where he is forced to cease working in his desired profession in order to avoid prosecution for violating an allegedly unconstitutional licensing law. In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the plaintiff was required to obtain a license as a pest control worker in order to engage in his business. He alleged that the licensing requirement was not rationally related to a legitimate government interest, and the Ninth Circuit found that he "[had] standing because he [could not] engage in his trade unless he first satisfie[d] the current licensing requirement." *Id.* at 980 n.1. *See also Toomer v. Witsell*, 334 U.S. 385, 391-92 (1948) (plaintiffs had standing where compliance with allegedly unconstitutional law "would have required payment of large sums of money," "defiance would have carried with it the risk of

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heavy fines and long imprisonment," and "withdrawal" from working resulted in "substantial loss of business."); *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (plaintiff may seek prospective relief when he "finds himself placed 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)).

Nevada's licensing laws for private investigators impose an unconstitutional in-state office requirement on him. VFAC ¶ 1. It is illegal for Castillo to practice the trade of a private investigator without complying with this requirement, and he faces fines, penalties, and potential incarceration if he were to do so. Nev. Rev. Stat. §§ 648.210, 193.120. Because Castillo cannot work in Nevada without subjecting himself to prosecution, he has already forgone numerous job opportunities. VFAC at ¶ 31. Castillo is therefore injured now by the licensing requirements, and has standing to challenge the licensing laws. *Merrifield*, 547 F.3d at 980 n.1.

A. This Case Is Ripe Because Castillo Is Not Required to Await Prosecution Before Seeking Prospective Injunctive Relief

This is a case for prospective relief. VFAC ¶ 1. In such a case, a plaintiff need not expose himself to prosecution under the statute, or wait for the government to take action against him, before bringing suit. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). The Supreme Court has made clear that a case is constitutionally ripe if: 1) the plaintiff has alleged an intention to act in a manner affected with a constitutional interest, but proscribed by the challenged law, and 2) there exists a credible threat of prosecution. *Id.* The VFAC easily passes this test.

In order to demonstrate ripeness, a plaintiff need allege that he desires to engage in conduct that the statute prohibits. *Id.*; *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010). The plaintiff need not actually violate the law. *Steffel*, 415 U.S. at 455. It is sufficient that he alleges a concrete plan to engage in conduct prohibited by the challenged law in the future. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (case ripe where plaintiffs had

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"actively engaged in consumer publicity campaigns [prohibited by law] in the past" and alleged "an intention to continue" those campaigns in the future.).

In *Susan B. Anthony List*, the petitioners were advocacy organizations that challenged a law criminalizing false statements about candidates during political campaigns. 134 S. Ct. at 2339. The Court held that the case was ripe, even though the groups had refrained from making certain statements in order to avoid prosecution, and thus were not engaged in their desired conduct at the time of the lawsuit. *Id.* at 2342. The groups did not need to "'expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute which [they] claim deters the exercise of [their] constitutional rights.'" *Id.* (quoting *Steffel*, 415 U.S. at 459). It was sufficient that the petitioners had "alleged an intention to engage in a course of conduct" in the future that was "arguably . . . proscribed" by the challenged statute. *Id.* at 2344.

Here, Castillo alleged that he has worked as a private investigation in Nevada in the past. VFAC ¶ 28. He further alleged that he would like to engage in private investigation jobs in Nevada in the future. *Id.* ¶ 33. This plan is not hypothetical. Castillo has been offered and continues to receive offers to work in the state, and were it not for the law challenged here, he would have accepted those jobs. *Id.* ¶¶ 30–33. Because Castillo does not maintain a place of business in Nevada, he cannot work as a private investigator in Nevada without risking fines and penalties, and has therefore been forced to reject those offers. Nev. Rev. Stat. § 648.150. He therefore has alleged facts sufficient to satisfy the first ripeness prong.

Castillo has likewise alleged a credible threat of prosecution. On January 22, 2015, Defendants requested that Castillo provide them with a Nevada office address, as required by Nev. Rev. Stat. § 648.148. VFAC ¶ 36. Though they later permitted Castillo to use his California address, Defendants attached to their email the February 2014 *Private Investigator Licensing Board Newsletter*, which states that a violation of the in-state office requirement is grounds for "suspension, revocation, or denial of an application for licensure." *Id.* ¶ 37. Moreover, Defendants have expressed during their public meetings their intention to enforce the challenged requirements.

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Id. ¶ 39. Castillo need not wait to be prosecuted to bring suit. He has sufficiently alleged a credible threat of prosecution sufficient to satisfy the ripeness requirement.

Finally, Castillo satisfies the prudential ripeness requirement. The prudential ripeness inquiry asks whether (1) the dispute is fit for judicial review at this time, or whether further factual development will make the case better suited for judicial review at a later time—and (2) whether withholding judicial consideration for a later time will impose a hardship on the plaintiff. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *S. Cal. Edison Co. v. F.E.R.C.*, 770 F.2d 779, 785 (9th Cir. 1985). Because Castillo's case involves purely legal issues—the constitutionality of the residency requirement and the licensing requirement for speech activities—the case is ripe for review at this time. No further factual development would crystallize these issues or make them better suited for judicial review. The matter is a question of law and the law in question does apply to Castillo—forcing him to cease business operations in Nevada. Thus the claim is not speculative, and additional administrative procedures are not necessary to ripen the case.

B. Castillo's Case Is Not Moot

A case is moot only where the issues are no longer live, or the parties lack a legally cognizable interest in the outcome, or where the court's resolution will not affect the plaintiff. *State of Nev. v. Hobson*, 934 F.2d 324 (9th Cir. 1991). That is not the case here, since Castillo is currently subject to the in-state office requirement, *see* Nev. Rev. Stat. § 648.148 ("all *licensees* shall . . . [m]aintain a principal place of business in this State") (emphasis added), he cannot engage in his constitutional right to earn a living without violating the statute, VFAC ¶ 40, and if the Court grants the requested injunction, the challenged laws will not be enforced against him, and he will be able to resume his practice as a private investigator in Nevada without fear of prosecution, as he wishes to do. *Id.* ¶ 33.

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II

CASTILLO IS LIKELY TO PREVAIL ON HIS CLAIM THAT THE LICENSING REQUIREMENTS VIOLATE THE FIRST AMENDMENT

The challenged statute defines "private investigator" solely by reference to the collection and communication of information. Nev. Rev. Stat. § 648.012 declares that a person is a private investigator if that person is paid to "make . . . any investigation" *or* to "furnish . . . information" about a person's "identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character," or about the location of lost or stolen property, or the cause of fires or accidents, or about a variety of other information.[2]

Any person who does these things must first obtain a license from the state, which requires that the person pass the mandatory background checks, pay the state-based background check fee, and have a principal place of business located in Nevada. Nev. Rev. Stat. §§ 648.100, 648.148. Anyone who does not comply faces penalties up to and including six months of imprisonment. Nev. Rev. Stat. §§ 648.210, 193.120.

But "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2667 (2011). The state may not impose a licensing requirement that forbids a person from investigating and furnishing information without government permission, unless it meets the most stringent standards of First Amendment strict scrutiny.

The licensing requirement here cannot satisfy these standards. Because it forbids a person from speaking unless the person first gets a license, it constitutes a prior restraint on speech, which

[2] The speech at issue is not commercial speech, even if it is furnished in exchange for money. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998). Where, as here, "[t]he speech itself is what the 'client' is paying for," it is entitled to full First Amendment protection.

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is subject to an almost *per se* First Amendment prohibition. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Even if it is not regarded as a prior restraint, however, the licensing requirement is a content-based burden on speech, because the licensing requirement only applies if a person furnishes information about certain topics, for example, about a person's "acts" or "character," but not if he or she furnishes information about another subject, such as the history of a place. *See* Nev. Rev. Stat. § 648.012. Or, the licensing requirement would apply if a person furnishes information about the location of a stolen object, but not if the person furnishes information about an item that is not stolen. *Id.* Finally, the licensing requirement is facially overbroad, because it restricts the protected speech of speakers in professions wholly unrelated to private investigation.

A. The Licensing Requirement Is an Unconstitutional Prior Restraint

A prior restraint is "a content-based restriction on speech prior to its occurrence." *Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 63 (3d Cir. 1991). A law that requires a person to obtain a license before engaging in speech is the archetype of a prior restraint. *See Times Film Corp. v. City of Chicago*, 365 U.S. 43, 81-83 (1961); *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009) (en banc).

Courts apply a "heavy presumption against [the] constitutional validity" of prior restraints. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state bears the burden of justifying them, and it is a "heavy burden." *New York Times*, 403 U.S. at 714. Because "[i]n its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on speech," *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986), what precise showing would suffice remains unclear, but in any event, the Board cannot make that showing here because the in-state location requirement does not even satisfy a lower standard of review. *Cf. Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (where licensing requirement for tour guides failed to satisfy intermediate scrutiny, it was unnecessary to determine whether it survived strict scrutiny).

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On a motion for preliminary injunction, it is the government's burden to justify its restriction on speech. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) ("[I]n the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction."). The government cannot make this showing.

The government may impose licensing requirements on private investigators that protect privacy, or prevent blackmail, fraud, or the dissemination of secret information, or to otherwise protect the public. *See Graham v. Beasley Enterprises, Inc.*, 180 F. Supp. 2d 760, 762 (E.D.N.C. 2001). But the in-state location requirement bears no relationship to such a public purpose. Where a person chooses to maintain his principal place of business has no relationship to his or her competency to research or communicate information, or tendency to keep that information private, or the truthfulness of those communications. There is no connection *at all* between any public harm that might be caused by the investigation or furnishing of information and the statutory requirement of locating a principal place of business in the state.

In their Motion to Dismiss, the only justification Defendants could offer for the location requirement was that they need to monitor and occasionally audit licensees, and imposing the in-state office requirement makes this less expensive because it ensures easier access to the licensees' offices. MTD at 18. [Doc. No. 21]. But the Supreme Court has rejected that argument, because licensees may very well maintain offices in cities that are outside the state, but that are closer to the Board's offices than are cities in more remote parts of Nevada. *See Frazier v. Heebe*, 482 U.S. 641, 645 (1987). For example, Castillo's home in Palm Springs is approximately 233 miles from the Board's Las Vegas headquarters, whereas a licensee with a principal place of business in Elko, Nevada, would be 434 miles away from Las Vegas, and 305 miles from the Board's Carson City

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location. *See* Plaintiff's Opposition to Motion to Dismiss at 21 n.5 [Doc. No. 23].[3] The statute's discrimination against out-of-state PIs cannot therefore be justified on the theory that in-state PIs are closer to the Board's offices.

Defendants also stated that they need to "vet" private investigators before they gain access to private information. MTD at 18. But this statement only makes clear the First Amendment implications of this case. "Vetting" people before they speak is not a valid public purpose—it is an unconstitutional restriction on First Amendment expression. *See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002) ("It is offensive—not only to the values protected by the First Amendment but to the very notion of a free society—that . . . a citizen must inform the government of her desire to speak . . . and then obtain a permit to do so."); *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations inhibits speech.").

Even if "vetting" speakers before they speak were a legitimate government interest, it is unclear how the in-state office requirement is related to that purpose, because having an office in a Nevada does not necessarily make a licensee more trustworthy, or capable of handling sensitive information. VFAC ¶¶ 57-59. Where one keeps an office has nothing to do with his or her fitness to work as a private investigator. *Id.*

In *Berger*, the Ninth Circuit held that a permit requirement for street performers in Seattle was an unconstitutional prior restraint because it was not sufficiently narrowly tailored to advance the city's legitimate interest in preventing disputes between performers, preventing traffic obstruction, and preventing dishonest or dangerous persons from performing for the public. 569 F.3d at 1041-48. First, performers were just as likely to have disputes with the permit system in place as they were without it, so that there was no connection between the permit requirement and

[3] The Court can take judicial notice of this fact under Fed. R. Evid. 201(b)(1).

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the legitimate government interest. *Id.* at 1041. Second, the city had plenty of other ways to prevent dishonest or criminal activity. *Id.* at 1043-44. Third, the requirement was broader than necessary, because it applied to performers who were unlikely to have disputes or to obstruct traffic. *Id.* at 1045-46.

The same conclusion applies here. The state-of-location requirement has no relationship to protecting the public from dangerous or dishonest PIs. The Board has plenty of other ways of protecting consumers or the public—such as enforcing laws against fraudulent or abusive practices, and revoking the licenses of dishonest PIs. Finally, the requirement is broader than necessary because it applies not merely to persons who deal with confidential information such as a person's credit rating or medical history, but to anyone who "furnish[es] . . . information" about the "identity" or "activities" of any "person." Nev. Rev. Stat. § 648.012. The statute is thus so broad as to classify reporters, professors, biographers, and others as PIs subject to the office-location requirement. The licensing requirement "does not meaningfully advance the [state's] asserted interests," but instead "requires single individuals to inform the government of their intent to engage in expressive activity," and "its broad sweep prohibits much more speech than the 'evil[s]' it seeks to remedy require." *Berger*, 569 F.3d at 1048. Thus Castillo will likely prevail in his prior restraint claim.

B. The Licensing Requirement Is an Unconstitutional Content-Based Speech Restriction

Content-based burdens on speech are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). In order to satisfy First Amendment scrutiny, they must be narrowly tailored to advance a compelling state interest. *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988).

The licensing requirement, including the location requirement, is content-based because the statute specifies the particular subjects of speech for which a license is required; thus a person must have a license to "furnish[] . . . information" about the "honesty," "integrity," or "credibility"

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of "any person," Nev. Rev. Stat. § 648.012, but no license is required to furnish information about, say, the integrity of an institution, or the qualities of an item for sale, or of a vacation destination or a restaurant. The licensing requirement therefore hinges on the content of the information that is researched or furnished.

Given its extreme breadth, the restriction is not narrowly tailored. Defendants could adequately protect the public by regulating conduct associated with private investigation, or limit the regulation to prohibiting false or misleading speech. *Cf. Berger*, 569 F.3d at 1043-44. Because the statute applies to a long list of topics, and because it regulates speech without regard to whether that speech is fraudulent or truthful, it burdens vastly more speech than necessary to achieve a valid public purpose. *See Sorrell*, 131 S. Ct. at 2669 ("Rules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech."). Moreover, the statute does not "leave open ample alternatives for communication," *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006), because *any* "furnish[ing]" of information or "investigation for the purpose of obtaining" information, the law requires a license for all "furnishing" of the information in question. Castillo is therefore likely to prevail in his claim that the law is an unconstitutional content-based restriction on his speech.

C. The Licensing Requirement Is Overbroad

A law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The broad definition of "private investigator" in Nev. Rev. Stat. § 648.012 includes a vast swathe of practices and professions, so that on its face it would apply to journalists, political activists, lecturers, genealogists, historians, biographers, and teachers. VFAC ¶ 76. The Board has even tried to enforce the statute by prosecuting persons engaged in such quintessentially First Amendment activities as testifying in a court of law. *Tatalovich*, 309 P.3d at 43-44.

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Given that the statute substantially chills the protected speech of individuals engaged in professions far removed from private investigation, and because the Board cannot constitutionally regulate the speech of these individuals, Castillo is likely to prevail on his claim that the statute is overbroad. *See* VFAC ¶¶ 73-79.

III

CASTILLO IS LIKELY TO PREVAIL IN HIS CLAIM THAT THE LICENSING REQUIREMENTS UNCONSTITUTIONALLY DISCRIMINATE AGAINST HIM AND OTHER OUT-OF-STATE RESIDENTS IN VIOLATION OF THE COMMERCE AND PRIVILEGES AND IMMUNITIES CLAUSES

Laws that on their face discriminate based on residency, or that have a discriminatory effect, are *per se* invalid under the Commerce Clause, unless the state can prove that "it has no other means to advance a legitimate local interest." *C & A Carbone v. City of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). Similarly, the Privileges and Immunities Clause protects the rights of citizens to work in another state on substantially equal terms with that state's residents. *Toomer*, 334 U.S. at 396. Where a law denies someone that privilege, the state must prove that out-of-state residents constitute a "peculiar source of evil," and that the law bears a substantial relationship to preventing this evil. *Id.* at 526. But again, Defendants can offer state interest in its discrimination, let alone demonstrate that there are no other means of achieving that interest. The location of one's office is unrelated to one's competency to practice a given trade. *See Frazier*, 482 U.S. at 649 (calling such a requirement for attorneys "unnecessary and irrational."). Nor does location in-state assist Defendants in performing background checks. *See* above, Section II.A. Nor is there any other valid state interest that this law promotes. *See* VFAC ¶¶ 57-59.

The location requirement discriminates against applicants on the basis of their residency. Specifically, the requirement has a discriminatory effect on out-of-state residents like Castillo because Nevada-based PIs can use their homes as their principal place of business, while out-of-

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state PIs cannot. Thus, out-of-state residents must necessarily maintain a Nevada office in addition to their homes in order to work in the state, which drives up their costs of doing business. *See Schoenefeld v. New York*, 907 F. Supp. 2d 252, 259 (N.D.N.Y 2011).

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In *Schoenefeld*, the District Court held that a New York law similar to the Nevada law at issue here violated the Privileges and Immunities Clause because it discriminated against lawyers who lived and worked in other states. *Id.* at 260. The law in that case required attorneys to maintain an office in New York in order to practice law in that state. *Id.* at 255. The plaintiff resided and worked in New Jersey, but otherwise satisfied all requirements for practice in New York. *Id.* The court found that the law "discriminated against nonresidents by placing an additional cost on conducting business in-state." *Id*. at 259. Specifically, while a New York-based attorney could operate a law office out of his or her home, "a nonresident attorney must maintain, at minimum, both her residence in another state and an office in New York." *Id*. at 259-60. Non-residents would thus be required to pay rent or mortgage, as well as taxes, on both a New York office and a residence in his or her home state, "a financial burden far surpassing that imposed by either the licensing fee disparit[ies] . . . found unconstitutional in *Toomer* or *Ward* [*v. Maryland*, 79 U.S. (12 Wall.) 418 (1870)]." *Id.* As in *Schoenefeld*, the disparate treatment of Nevada-based PIs and PIs located in other states violates the Privileges or Immunities Clause because the former may use their homes as their places of business, whereas Mr. Castillo would be required to maintain both his home and an in-state business location, and this difference in treatment is not justified by any legitimate state interest.

As in this case, the defendants in *Schoenefeld* asserted that the in-state location requirement served the state's interest in monitoring the professional conduct of licensees. *See id.* at 264 ("defendants also cite as a substantial state interest the ability of bar admission authorities to observe and evaluate an applicant's character, and the ability for a court to discipline nonresident attorneys."). The court rejected that argument because other bar rules sufficiently ensured that

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attorney applicants would be made available for character review and would be subjected to necessary discipline. There were plenty of "simple[r] and less restrictive means of ensuring" that attorneys complied with professional responsibility requirements. *Id.* at 265.

Therefore, Castillo is likely to prevail in his claim that any hardships placed on out-of-state residents violate the Privileges and Immunities and Commerce Clauses. VFAC ¶¶ 51-63.

IV

CASTILLO IS LIKELY TO PREVAIL IN HIS CLAIMS THAT THE LICENSING REQUIREMENTS VIOLATE THE FOURTEENTH AMENDMENT

A law that bars persons from entering a trade unless they satisfy certain licensing requirements must be rationally related to "the applicant's fitness or capacity to practice" the profession. *Schware v. Bd. of Bar Examr's of State of N.M.*, 353 U.S. 232, 239 (1957). Protecting a discrete interest group from economic competition is not related to ensuring an applicant's fitness, and therefore is not a legitimate governmental purpose. *Merrifield*, 547 F.3d at 991 n.15; *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013). *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

In *Merrifield*, the Ninth Circuit ruled that a licensing law for pest control workers was unconstitutional because it bore no rational connection to protecting public health, safety, or welfare. Instead, the licensing requirement "was designed to favor economically certain constituents at the expense of others similarly situated," which was not a valid government interest. *Id.* at 991.

In so holding, the court agreed with the Sixth Circuit's decision in *Craigmiles*, which invalidated a licensing law that prohibited any person from selling a coffin without a funeral director's license. 312 F.3d at 222. The court found that this requirement bore no reasonable relationship to protecting public safety, but instead had a "more obvious illegitimate purpose," which was to "impose[] a significant barrier to competition in the casket market." *Id.* at 228. The

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court found that this abuse of licensing laws for private gain violated the Due Process and Equal Protection Clauses.

The immediate effect of the location requirement is to discriminate against out-of-state residents. Yet Defendants' proffered rationales fail; there is no relationship between office location and fitness to work as a PI, and Defendants can offer no other legitimate purpose for this discrimination. The protectionist ends of this law echo other Nevada private investigator licensing laws that discriminate on the basis of state of residence. For example, the licensing laws also impose different fees on applicants for the required background check based on the state where the applicant is located: Nevada PIs are charged less than those located elsewhere. Nev. Rev. Stat. § 648.100(2).

Defendants have essentially conceded that the challenged laws are intended to favor state residents. In their prior Motion to Dismiss, the Board contended that the differential fees for in-state PIs are reasonable because residents live in Nevada and contribute on a daily basis to the state's economy. MTD at 12. But this is not a legitimate basis for discrimination against out-of-state residents and businesses. In *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 876-79 (1985), the Supreme Court found that an Alabama law that differentiated for tax purposes between insurance companies headquartered in the state and those headquartered elsewhere violated the Equal Protection Clause of the Fourteenth Amendment.[4] The state argued—as the Board does here—that its purpose was to "promot[e] the business of its domestic insurers in Alabama," but the Court found that the state could not pursue this purpose "by penalizing foreign insurers who also want to do business in the State." *Id*. at 877. That would be "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id*. at 878; *cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 588-91 (1997) (encouraging in-state charity was not sufficient justification for discriminating against out-of-state businesses).

[4] The Commerce Clause was not applicable to the case because Congress had waived its exclusive authority. *See id.* at 880.

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Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

Here, given that there is "no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which the licensure provision is very well tailored," that is, economic protection. *See Craigmiles*, 312 F.3d at 228. Castillo is therefore likely to prove that the in-state licensing requirement exists not to protect the public, but to prevent out-of-state competition, in violation of the Fourteenth Amendment.

V

CASTILLO IS NOW SUFFERING AND WILL CONTINUE TO SUFFER IRREPARABLE HARM IF DEFENDANTS ARE NOT RESTRAINED FROM ENFORCING THE LICENSING REQUIREMENT

The Supreme Court has made clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because he does not keep an office in Nevada, Castillo must refrain from engaging in work there, and therefore from speaking about the long list of topics contained in Nev. Rev. Stat. § 648.012. VFAC ¶ 41. This denial of his First Amendment rights constitutes irreparable harm.

Moreover, the loss of opportunity to engage in one's chosen occupation is irreparable harm sufficient to require injunctive relief. *See Enyart v. Nat'l Conference of Bar Examr's, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011). Since the law became effective, Castillo has been forced to turn down numerous business opportunities. *See* VFAC ¶¶ 29-33. He regularly receives telephone and email referrals for PI work in Nevada, which he must decline out of fear of prosecution. *Id.* Castillo is therefore suffering, and will continue to suffer, irreparable harm unless the Defendants are enjoined for enforcing the unconstitutional licensing laws against him.

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930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

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Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

VI

GRANTING TEMPORARY EQUITABLE RELIEF WOULD NOT HARM OTHERS AND WOULD SERVE THE PUBLIC INTEREST

The balance of the equities tips in favor of granting the motion. So long as the Defendants continue to enforce the licensing law against him, Castillo will suffer irreparable harm. Yet permitting Castillo to work and speak freely in Nevada without having an office in the state would not harm the public. Maintaining an office in Nevada is wholly unrelated to one's fitness or capacity to practice private investigation, VFAC ¶¶ 56-59, and Castillo satisfies the remaining licensing requirements, which ensure that he does not present a risk of harm. Moreover, any interest the state has in preventing fraudulent or abusive speech can be addressed using existing consumer protection statutes.[5] Thus, neither the state nor the public will be harmed if the injunction is granted because the state will retain adequate power to ensure that PIs are qualified, and do not engage in fraudulent or abusive speech.

Granting this injunction will serve the public interest by ensuring that Castillo has a full and fair opportunity to seek resolution of his constitutional claims. Courts regularly enjoin the enforcement of licensing laws until the constitutional challenge is resolved. *See, e.g.*, *Empire News, Inc. v. Solomon*, 818 F. Supp. 307 (D. Nev. 1993); *Lee v. State*, 869 F. Supp. 1491, 1502 (D. Or. 1994). In *Empire News*, this Court enjoined officials from enforcing regulations against an adult bookstore which the store claimed were unconstitutional. The Court found that "an injunction maintaining the *status quo* while the court resolves the constitutional issues is desirable." 818 F. Supp. at 309. This is particularly true with regard to First Amendment challenges. *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 974 (9th Cir.

[5] Castillo does not challenge the constitutionality of any laws that protect consumers from dishonest or dangerous business practices, and does not seek to enjoin the enforcement of any laws protecting consumers.

2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."), *overruled on other grounds by League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014); s*ee also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *accord*, *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004).

The Ninth Circuit has found it particularly important to enjoin the enforcement of statutes that restrict speech where the statute not only impedes the speech of the plaintiff, but other members of the public. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). As argued above, the challenged statute is so broad as to call into question the First Amendment rights of individuals in professions far afield from private investigation, ranging from journalists to those who would perform a simple Google search of a prospective employee or client at work. This weighs strongly in favor of granting the injunction.

VII

THE BOND REQUIREMENT SHOULD

BE WAIVED OR SET AT A NOMINAL AMOUNT

Federal Rules of Civil Procedure 65(c) requires that the movant for a preliminary injunction post a bond, but allows courts to impose a nominal bond or dispense with the requirement altogether where the risk of harm to the public is low, and the case furthers the public interest. *See Behymer-Smith ex rel. Behymer v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 974 (D. Nev. 2006); *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975); *see also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). As explained above, there is little risk of harm here. There is no evidence that Castillo has harmed any person, nor is he seeking prospective enforcement of any law relating to public safety. He merely wants to speak and work freely in Nevada without having to open up an office there first. Castillo is likely to succeed on the merits,

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930 G Street
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(916) 419-7111 FAX (916) 419-7747

and in any event, Defendants will retain their ability to adequately regulate the PI industry during the injunction.

Moreover this case concerns the constitutionally protected rights of free speech, due process, and privileges and immunities, and was brought in the public interest. To require a bond in this case "would have the effect of discouraging suits to remedy more flagrant abuses" of individual rights by government. *Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis. 1975). Plaintiff therefore respectfully requests that Federal Rule of Civil Procedure 65(c)'s bond requirement be either waived or set at a nominal amount.

CONCLUSION

For the foregoing reasons, the Court should issue the requested preliminary injunction.

DATED: February 20, 2015.

Respectfully submitted,

TIMOTHY SANDEFUR*

ANASTASIA P. BODEN*

Pacific Legal Foundation

LEE IGLODY

Iglody Hulet PLLC

By s/ Anastasia P. Boden
ANASTASIA P. BODEN, Cal. Bar No. 281911*

Attorneys for Plaintiff

**pro hac vice*

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

COLLEEN LELANI PLATT
E-Mail: Cplatt@ag.nv.gov, sgeyer@ag.nv.gov
Counsel for Defendants

TIMOTHY SANDEFUR
E-Mail: tms@pacificlegal.org, IncomingLit@pacificlegal.org, bas@pacificlegal.org

ANASTASIA PAULINNA BODEN
E-Mail: apb@pacificlegal.org, tae@pacificlegal.org, incominglit@pacificlegal.org

LEE I. IGLODY
E-Mail: lee@iglody.com, patty@iglody.com
Counsel for Plaintiff

s/ Anastasia P. Boden
ANASTASIA P. BODEN, Cal. Bar No. 281911*
Attorney for Plaintiff
**pro hac vice*