

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

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

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

10 Attorneys for Plaintiff

11
12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15 TROY CASTILLO,)

16 Plaintiff,)

17 vs.)

18 KEVIN L. INGRAM, et al.,)

19 Defendants.)

No. 2:14-cv-00332-GMN-PAL

**REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

[ORAL ARGUMENT REQUESTED]

20 Judge: The Hon. Gloria M. Navarro
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS

| | Page |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| I. THE BOARD’S OPPOSITION FAILS TO ADDRESS CASTILLO’S FACIAL FIRST AMENDMENT CHALLENGE TO THE LICENSING REQUIREMENT | 3 |
| A. The Board Fails to Address Castillo’s Facial Prior Restraint and Content-Based Restriction Challenges to the Licensing Requirement | 3 |
| B. The Board Fails to Address Castillo’s Overbreadth Claim | 6 |
| C. Castillo Satisfies All Other Requirements for Injunctive Relief on His First Amendment Claims | 6 |
| II. THE BOARD’S ARGUMENTS AGAINST ENJOINING THE IN-STATE OFFICE REQUIREMENT ALSO FAIL | 8 |
| A. Castillo Has Alleged a Credible Threat of Enforcement of the In-State Office Requirement | 8 |
| B. This Court Cannot Credit the Board’s Unsubstantiated Assertion That It Will Disregard the In-State Office Requirement | 9 |
| C. The Board Concedes It Intends to Enforce Some Form of the In-State Office Requirement Against Castillo, and That Violates the Constitution | 12 |
| D. Castillo’s Content-Based Speech Restriction and Prior Restraint Claims Are Ripe, and Castillo Is Likely to Succeed on the Merits | 13 |
| E. Castillo Is Likely to Prevail in His Claims That the Licensing Requirements Violate the Fourteenth Amendment | 14 |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 17 |

TABLE OF AUTHORITIES

| | Page |
|---|-------------|
| Cases | |
| 1 <i>Alrawashdeh v. Holder</i> , 474 F. App'x 710 (9th Cir. 2012) | 4 |
| 2 <i>Already, LLC v. Nike, Inc.</i> , 133 S. Ct. 721 (2013) | 11 |
| 3 <i>Babbitt v. United Farm Workers Nat'l Union</i> , 442 U.S. 289 (1979) | 8-9 |
| 4 <i>Bell v. Boise</i> , 709 F.3d 890 (9th Cir. 2013) | 3, 11 |
| 5 <i>Condit v. Nat'l Enquirer, Inc.</i> , 289 F. Supp. 2d 1175 (E.D. Cal. 2003) | 4 |
| 6 <i>Craigsmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002) | 15 |
| 7 <i>Elrod v. Burns</i> , 427 U.S. 347 (1976) | 7 |
| 8 <i>Enyart v. Nat'l Conference of Bar Examr's, Inc.</i> , | |
| 9 630 F.3d 1153 (9th Cir. 2011) | 7 |
| 10 <i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i> , | |
| 11 528 U.S. 167 (2000) | 11 |
| 12 <i>Grosjean v. American Press Co., Inc.</i> , 297 U.S. 233 (1936) | 4-5 |
| 13 <i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993) | 10 |
| 14 <i>Martinez-Serrano v. INS</i> , 94 F.3d 1256 (9th Cir. 1996) | 4 |
| 15 <i>Merrifield v. Lockyer</i> , 547 F.3d 978 (9th Cir. 2008) | 14-15 |
| 16 <i>Near v. Minnesota ex rel. Olson</i> , 283 U.S. 697 (1931) | 4 |
| 17 <i>Protectmarriage.com—Yes on 8 v. Bowen</i> , 752 F.3d 827 (9th Cir. 2014), | |
| 18 <i>cert. denied</i> , No. 14–434, 2015 WL 852423 (U.S. Mar. 2, 2015) | 13 |
| 19 <i>R.A.V. v. City of St. Paul, Minn.</i> , 505 U.S. 377 (1992) | 5 |
| 20 <i>Sammartano v. First Judicial Dist. Court</i> , 303 F.3d 959 (9th Cir. 2002) | 7 |
| 21 <i>Schoenefeld v. New York</i> , 907 F. Supp. 2d 252 (N.D.N.Y 2011) | 12 |
| 22 <i>Schware v. Bd. of Bar Examr's of N.M.</i> , 353 U.S. 232 (1957) | 14 |
| 23 | |
| 24 | |
| 25 | |
| 26 | |

| | Page |
|----|---|
| 1 | <i>St. Joseph Abbey v. Castille</i> , 712 F.3d 215 (5th Cir. 2013) 15 |
| 2 | <i>State v. Tatalovich</i> , 309 P.3d 43 (Nev. 2013) 5-6 |
| 3 | <i>Steffel v. Thompson</i> , 415 U.S. 452 (1974) 9 |
| 4 | <i>Susan B. Anthony List v. Driehaus</i> , 134 S. Ct. 2334 (2014) 8-9 |
| 5 | <i>Thalheimer v. City of San Diego</i> , 645 F.3d 1109 (9th Cir. 2011) 14 |
| 6 | <i>Times Film Corp. v. City of Chicago</i> , 365 U.S. 43 (1961) 5 |
| 7 | <i>Torres-Valdivias v. Holder</i> , 766 F.3d 1106 (9th Cir. 2014) 10 |
| 8 | <i>United States v. Stevens</i> , 559 U.S. 460 (2010) 6 |
| 9 | State Statutes |
| 10 | Nev. Rev. Stat. § 193.140 7 |
| 11 | § 193.150 7 |
| 12 | § 648.012 1, 4-6, 9 |
| 13 | § 648.060 1, 4-6 |
| 14 | § 648.060(1) 10 |
| 15 | § 648.060(2) 10 |
| 16 | § 648.060(3) 10 |
| 17 | § 648.100(2) 15 |
| 18 | § 648.144 7 |
| 19 | § 648.148 10, 14 |
| 20 | § 648.148(1)(a) 1, 4, 12 |
| 21 | § 648.148(1)(b) 12 |
| 22 | § 648.210 7 |
| 23 | |
| 24 | |
| 25 | |
| 26 | |

Miscellaneous

1

2 Hearings on Assembly Bill 306 (1st Reprint) (BDR 54-677) before the Senate Committee

3 on Commerce, Labor and Energy, 77th Sess. 4 (Apr. 29, 2013) (statement of Kevin

4 Ingram, Executive Director, Private Investigator Licensing Board), *available at*

5 <http://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/CL/Final/993.pdf> 2

6 Nietzsche, Friedrich, *Thus Spoke Zarathustra*

7 (Walter Kaufmann trans., Penguin 1978) (1883) 1

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

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

1 **INTRODUCTION**

2 “[Poets] muddy their waters to make them appear deep.”¹ Defendants’ (the Board’s)
3 amusing literary citations are meant to distract this Court from the essential, inescapable facts:
4 Nevada law—specifically, Nev. Rev. Stat. §§ 648.060 and 648.012—makes it a *crime* for any
5 person to “furnish” certain types of “information” without first obtaining a private investigator (PI)
6 license. But to have a license, a person must, among other things, maintain a physical “principal
7 place of business” inside Nevada. Nev. Rev. Stat. § 648.148(1)(a).

8 Plaintiff Troy Castillo does not have a physical place of business in Nevada, *see* Plaintiff’s
9 Verified First Amended Complaint (VFAC) ¶ 8 [Doc. No. 29], and it would be expensive and
10 burdensome for him to acquire one. Therefore, as a consequence of the challenged laws, he has
11 been forced to turn away possible business as a PI in Nevada, and has been forced to refrain from
12 “furnish[ing] . . . information.” *Id.* at ¶¶ 40, 41.

13 Castillo has accordingly moved for a preliminary injunction on two separate grounds:
14 *First*, because the licensing requirement on its face is a prior restraint, a content-based speech
15 restriction, and is overly broad in violation of the First Amendment, and *second*, because the in-
16 state office requirement discriminates against PIs headquartered in other states, in violation of the
17 Commerce Clause, the Privileges and Immunities Clause, the Fourteenth Amendment, and the First
18 Amendment. If the Board is not enjoined from enforcing the challenged requirements—both the
19 license requirement itself and the in-state office requirement—he will suffer irreparable injuries,
20 including being forced to forego employment opportunities and to refrain from exercising his First
21 Amendment rights. *Id.* ¶¶ 40, 41. He is likely to prevail on the merits as explained in his motion
22 and below, and because Castillo’s business is not a danger to the public, the balance of the
23 hardships tips in his favor. Granting the requested relief would serve the public interest by
24

25 _____
26 ¹ Friedrich Nietzsche, *Thus Spoke Zarathustra* 128 (Walter Kaufmann trans., Penguin 1978)
(1883).

1 ensuring a full and uninterrupted resolution of the merits of this lawsuit and by preserving First
2 Amendment rights.

3 The Board opposes Castillo’s motion because it asserts, contrary to the plain language of
4 the law, and without any statutory or regulatory authority to do so, that it will simply ignore the
5 law and refrain from enforcing the in-state office requirement against PIs who do not have
6 employees in Nevada. Defendants’ Opposition (Opp.) at 9 [Doc. No. 36]. It therefore claims that
7 Castillo faces no risk of prosecution.

8 This argument is unavailing. *First*, even if it were true, it fails to address Castillo’s facial
9 First Amendment allegations—specifically, that the licensing requirement *itself*, even laying aside
10 the in-state office requirement, constitutes a prior restraint and a content-based speech restriction,
11 and is unconstitutionally overbroad. For this reason alone, Castillo is entitled to an injunction.

12 *Second*, with relation to the in-state office requirement, there is nothing in the licensing
13 statutes or implementing regulations that limits this requirement to businesses with employees.
14 Indeed, as explained below, the statute plainly says the opposite. Although the Board claims that
15 the purpose of the in-state office requirement was always to deal with businesses of more than one
16 employee, *id.* at 5-6, the Board never said so until now, and made no mention of it in its first
17 motion to dismiss. In fact, the text of the statute, the legislative history,² and other statements by
18 ///

20 ² Hearings on Assembly Bill 306 (1st Reprint) (BDR 54-677) before the Senate Committee on
21 Commerce, Labor and Energy, 77th Sess. 4 (Apr. 29, 2013) (statement of Kevin Ingram, Executive
22 Director, Private Investigator Licensing Board), hereinafter “Ingram Testimony,” *available at*
23 <http://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/CL/Final/993.pdf> (“The Board does
24 not have sufficient funding to send investigators to other states to audit licensees,” and thus the
25 purpose of the in-state office requirement was to reduce the traveling costs of auditing *all*
26 licensees.).

1 the Board³ make clear that the in-state office requirement applies to *all* licensees.

2 *Third*, even if the Board did have authority to simply choose not to enforce the in-state
3 office requirement against solo practitioners like Castillo, any such suspension would constitute
4 voluntary cessation of illegal conduct, and would *not* render the case moot unless the Board proves
5 that it will *never* enforce the law as written—which it has not done. *See Bell v. Boise*, 709 F.3d
6 890, 899 (9th Cir. 2013).

7 *Finally*, by the Board’s own admission, Castillo must comply with at least a “virtual office”
8 requirement (though it is not clear what that means), and the Board has enforced and will continue
9 to enforce³ that requirement. *See Opp.* at 4. Castillo does not maintain any type of office in
10 Nevada, “virtual” or otherwise, VFAC ¶ 8, meaning he is forced to self-censor and to avoid taking
11 employment opportunities out of a reasonable fear of prosecution. *Id.* ¶ 41. His case is thus ripe
12 and not moot. For these reasons, and for those set forth in the Motion for Preliminary Injunction,
13 preliminary injunctive relief should be granted.

14 **I**

15 **THE BOARD’S OPPOSITION FAILS TO**
16 **ADDRESS CASTILLO’S FACIAL FIRST AMENDMENT**
17 **CHALLENGE TO THE LICENSING REQUIREMENT**

18 **A. The Board Fails to Address Castillo’s Facial Prior Restraint and**
19 **Content-Based Restriction Challenges to the Licensing Requirement**

20 The Board claims that Castillo is not subject to the in-state office requirement because he
21 has no employees, and therefore he lacks standing, and faces no risk of injury sufficient to warrant
22 preliminary injunctive relief. *Opp.* at 9. But even if this argument had merit—it does not, as
23 explained below—it simply does not respond to Castillo’s First Amendment arguments in the
24

25 ³ Letter from Defendant Kevin Ingram to California licensee Michael Julian, President of the
26 California Association of Licensed Investigators, Feb. 3, 2014, attached hereto as Exhibit A.

1 motion for preliminary injunction. *See* Memorandum in Support of Plaintiff’s Motion for
2 Preliminary Injunction (Mtn.) at 9 [Doc. No. 30-1]. For this reason alone, Castillo’s motion should
3 be granted. *See Alrawashdeh v. Holder*, 474 F. App’x 710, 711 (9th Cir. 2012) (issues not
4 addressed in a party’s brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60
5 (9th Cir. 1996) (same).

6 Castillo does not just challenge the in-state office requirement in Nev. Rev. Stat.
7 § 648.148(1)(a), but has also pled a facial challenge to the constitutionality of the licensing
8 requirement itself—Nev. Rev. Stat. §§ 648.060 and 648.012—which requires “private
9 investigators” to get a license, and then defines “private investigator” as a person who is paid to
10 “furnish . . . information” about various subjects, including “[t]he identity, habits, conduct . . .
11 honesty, integrity, credibility, knowledge, trustworthiness . . . loyalty . . . acts, [or] reputation . . .
12 of any person,” the “location . . . of lost or stolen property,” or “[a] crime or tort that has been
13 committed,” among other things.⁴ *See* VFAC ¶¶ 64-79; Mtn. at 9-14.

14 Furnishing information about a person’s identity, honesty, reputation, etc., or about the
15 location of property, or about a crime that has been committed—this is all fully protected First
16 Amendment speech. *See generally* *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718-19 (1931).
17 It is a quintessential violation of the First Amendment for the state to impose a licensing
18 requirement on a person engaged in furnishing such information. *See Grosjean v. American Press*
19

20 ⁴ Note that the statute defines a PI as a person who “furnish[es] . . . information” *or* who makes an
21 investigation for the purpose of obtaining information. Nev. Rev. Stat. § 648.012. Either one
22 would alone violate the Constitution, since “obtaining information” and “furnishing” it are both
23 protected First Amendment activities. *Condit v. Nat’l Enquirer, Inc.*, 289 F. Supp. 2d 1175, 1177
24 (E.D. Cal. 2003) (“[T]he First Amendment protects the right of the press to gather news and
25 information.”). But as written the statute makes it a crime *either* to furnish information *or* to
26 investigate to obtain information.

1 *Co., Inc.*, 297 U.S. 233, 249 (1936). Yet under this law, it would be illegal to accept employment
2 to give a public lecture about, say, the killing of Tupac Shakur (crimes which have been
3 committed) or to present a television series speculating about where Bill Brennan took the money
4 he stole in the famous 1992 Stardust Casino heist (the location of stolen property). It would be a
5 crime to write a biography of opposing counsel’s favorite writers, Anne Brontë or Irene Hunt, since
6 this would be “investigating” to “obtain” “information” about the “reputation” of “persons” for
7 money. It would be a violation of the law to receive pay for teaching a class of students about
8 Mark Twain’s days in Virginia City (the conduct or acts of a person), giving a tour of the
9 Governor’s Mansion and talking about past Nevada governors (the habits of a person), or *even*
10 *publishing a newspaper column criticizing a political candidate’s “honesty, integrity, credibility,*
11 *knowledge, trustworthiness,” or “loyalty.”* Nev. Rev. Stat. §§ 648.060 and 648.012.

12 The Board cannot try to claim that these First Amendment concerns are exaggerated, or that
13 it will not enforce the licensing requirement against people who are engaged solely in First
14 Amendment activities, because it has in fact enforced the statute, recently, against a person
15 engaged in the purely First Amendment activity of obtaining and furnishing information as an
16 expert witness in state court. *See State v. Tatalovich*, 309 P.3d 43 (Nev. 2013). The state Supreme
17 Court ruled against the Board, and the statute was then amended to exempt expert witnesses—*and*
18 *only* expert witnesses—from licensing. But this makes clear that the Board is likely to enforce the
19 challenged laws in the future against others who do not enjoy an exemption and are engaged in the
20 speech activities that the statute defines as “private investigation.”

21 Castillo is likely to prevail upon the merits of his First Amendment cause of action because
22 (1) requiring a person to obtain a government license before that person may “furnish” such
23 “information” is a quintessential prior restraint. *See Times Film Corp. v. City of Chicago*, 365 U.S.
24 43, 81-83 (1961). The challenged laws also (2) impose a content-based speech restriction because
25 a license is only required if a person “furnish[es]” information about the subjects specified in the
26 statute, and not other subjects. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). For

1 instance, Nev. Rev. Stat. §§ 648.060 and 648.012 would make it a crime for Anne Brontë to accept
2 pay to write the poem “To Cowper,” because it is about the “identity,” “habits,” and “conduct” of
3 a person, whereas her poem “The Captive Dove” could be published without a license, since it is
4 not about “a person.”

5 **B. The Board Fails to Address Castillo’s Overbreadth Claim**

6 Castillo has also pled an overbreadth challenge to the licensing requirement, VFAC ¶¶ 73-
7 79, and he is likely to succeed on the merits of this claim. A law is unconstitutionally overbroad
8 if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s
9 plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010). As explained
10 above, the broad definition of “private investigator” in Nev. Rev. Stat. § 648.012 sweeps within
11 its ambit a vast assortment of practices and professions, so that on its face it would apply to
12 journalists, political activists, lecturers, genealogists, historians, biographers, and teachers. VFAC
13 ¶ 76. The Board has even attempted to require licensure of an expert witness who testified at a
14 trial. *Tatalovich*, 309 P.3d at 43-44.

15 The Board makes no effort to rebut Castillo’s overbreadth allegations, except for its claim
16 that the in-state office requirement only applies to businesses with employees. But this only
17 bolsters Castillo’s overbreadth claim, as it shows that, *at the very least*, reporters, political activists,
18 journalists, etc., who have employees, are certainly barred from engaging in First Amendment
19 speech—from “furnish[ing]” the specified “information”—unless they obtain a license and have
20 a “virtual” location in the state. Given that the statute substantially chills protected speech, Castillo
21 is likely to prevail on his claim that the statute is overbroad. *See* VFAC ¶¶ 73-79.

22 **C. Castillo Satisfies All Other Requirements for**
23 **Injunctive Relief on His First Amendment Claims**

24 The law explicitly requires Castillo to obtain a license before he accepts employment to

25 ///

26 ///

1 “furnish” certain “information,” and he is also required to renew his license annually.⁵ Nev. Rev.
2 Stat. § 648.144. If he were to “furnish” the “information” without a valid license, he would be
3 subject to civil penalties and even criminal prosecution. Nev. Rev. Stat. §§ 648.210, 193.150,
4 193.140. The Board does not contend otherwise—it acknowledges that a license is required, and
5 in its prior motion to dismiss even asserted that it was *proper* to require government “vetting” for
6 anyone engaged in such quintessential speech activities as “furnishing information.” Defendants’
7 Motion to Dismiss at 18 [Doc. No. 21].

8 As a result of the laws challenged here, Castillo has been forced to refrain from exercising
9 his First Amendment rights to obtain and furnish information, which is an irreparable injury. *Elrod*
10 *v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal
11 periods of time, unquestionably constitutes irreparable injury” for purposes of a preliminary
12 injunction.). And Castillo has been forced to reject business opportunities, *see* VFAC ¶¶ 29-33,
13 which is also an irreparable harm sufficient for injunctive relief. *Enyart v. Nat’l Conference of Bar*
14 *Examr’s, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011).

15 The balance of equities tips in Castillo’s favor given the “significant public interest in
16 upholding First Amendment principles,” and the fact that “enforcement of the potentially
17 unconstitutional regulations” at issue here infringe not only his speech rights, but also the rights
18 of countless others, both in and out of Nevada, who wish to obtain and furnish information, and
19 risk criminal prosecution if they do so without the Board’s permission. *Sammartano v. First*
20 *Judicial Dist. Court*, 303 F.3d 959, 974-75 (9th Cir. 2002). Given that the Board has “made
21 virtually no factual showing, on the current record, to support the claimed need for the Rules as
22 they are now written,” the balance of equities tips in Castillo’s favor. *Id.*

23
24 _____
25 ⁵ For this reason, the fact that he already holds a Nevada license does not render the case moot,
26 since he seeks prospective relief against having to renew his license next year. *See* VFAC ¶¶ 16,
21.

1 Because Castillo satisfies the requirements for preliminary injunctive relief regarding his
2 First Amendment causes of action, the Court should grant his motion for this reason alone.

3 **II**

4 **THE BOARD’S ARGUMENTS AGAINST ENJOINING**
5 **THE IN-STATE OFFICE REQUIREMENT ALSO FAIL**

6 In addition to his facial challenge to the licensing requirement, Castillo also challenges a
7 subset of the requirement—namely, that licensees maintain a physical “principal place of business”
8 in Nevada—as a violation of the First Amendment, the Commerce Clause, the Privileges and
9 Immunities Clause, and the Fourteenth Amendment. *See* Mtn. at 11-13, 15-16, 18. The Board’s
10 opposition focuses only on this portion of Castillo’s motion. It argues that the in-state office
11 requirement does not apply to him because he has no employees, Opp. at 9, and that he can satisfy
12 this requirement by maintaining a “virtual office.” *Id.* at 6. These arguments are unavailing.

13 **A. Castillo Has Alleged a Credible Threat of**
14 **Enforcement of the In-State Office Requirement**

15 In a pre-enforcement case, a plaintiff need not wait for the government to take action
16 against him before seeking a court order to prevent such enforcement. *Susan B. Anthony List v.*
17 *Driehaus*, 134 S. Ct. 2334, 2342 (2014). A case for prospective relief is ripe if: (1) the plaintiff
18 has alleged an intention to act in a manner affected with a constitutional interest, but proscribed
19 by the challenged law; and (2) there exists a credible threat of prosecution. *Id.*; *Babbitt v. United*
20 *Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). The Verified First Amended Complaint
21 passes this test.

22 In *Babbitt*, the Supreme Court held that a pre-enforcement challenge to laws prohibiting
23 certain consumer publicity campaigns was ripe even though the plaintiffs were not engaged in such
24 campaigns at the time, and even though the penalty provisions “ha[d] not yet been applied” to the
25 plaintiffs. *Id.* at 302. The Court held that because the challenged statute proscribed the conduct
26 on its face, the plaintiffs could not engage in that conduct without risking enforcement penalties,

1 and they therefore faced a realistic prospect of prosecution if they engaged in the prohibited
2 conduct. *Id.* The plaintiffs could therefore seek prospective relief in the form of an injunction to
3 bar such enforcement in the future. *Id.*

4 The same reasoning applies here. Castillo is ready, willing, and able to operate as a PI in
5 Nevada, but is prohibited from doing so because he does not have an in-state place of business.
6 VFAC ¶ 8. He has alleged that he has received and continues to receive offers for employment in
7 Nevada, and would have accepted those jobs, were it not for the challenged laws. *Id.* ¶¶ 30-33.
8 He has been forced to decline those offers and to refrain from “furnish[ing] . . . information,” Nev.
9 Rev. Stat. § 648.012—as a consequence of the challenged laws. VFAC ¶¶ 40, 41. He further
10 alleges that the Board has sought to enforce the office requirement against him, and that Board
11 materials demonstrate that it has enforced the licensing requirements in the past and intends to
12 enforce them in the future. *Id.* ¶¶ 36-39. Because Castillo is forced to choose between exercising
13 his constitutional rights or subjecting himself to fines and penalties, his case is ripe and he can
14 bring suit now. *See Susan B. Anthony List*, 134 S. Ct. at 2344; *Steffel v. Thompson*, 415 U.S. 452,
15 462 (1974) (where plaintiff is placed “between the Scylla of intentionally flouting state law and
16 the Charybdis of forgoing what he believes to be constitutionally protected activity,” the case is
17 ripe).

18 **B. This Court Cannot Credit the Board’s Unsubstantiated**
19 **Assertion That It Will Disregard the In-State Office Requirement**

20 The Board *agrees* that Castillo alleged a threat of enforcement, Opp. at 8, but then claims
21 that it no longer intends to enforce the in-state office requirement as written. *Id.* at 9. The Board
22 now claims that “hav[ing] . . . employees working in Nevada” is “the precursor to any enforcement
23 action.” *Id.* This claim is contrary to the text of the statute and regulations, and the *only* source
24 the Board cites for it is the declaration by Defendant Kevin Ingram. Defendant Ingram has
25 contradicted this statement elsewhere. *See* Exhibit A. But in any event, the Declaration does not,
26 and cannot, stand for the proposition that there *will never* be consequences in the future, as

1 Defendant Ingram speaks only for himself and has no legal authority to bind his successors. Nor
2 does the Board cite any *legal* basis for the proposition that having in-state employees is a
3 “precursor” to enforcement, because there is no such basis.

4 First, the plain language of the challenged statutes provides no exemption for businesses
5 that have no employees. Nev. Rev. Stat. § 648.060(1) says that “*no person* may . . . [e]ngage in
6 the business of private investigator” without having a license. (Emphasis added). Two *different*
7 sections, Nev. Rev. Stat. §§ 648.060(2) and 648.060(3), specifically regulate businesses that have
8 employees, but Section 648.060(1) contains no such limitation. Section 648.148 then provides that
9 “[e]ach *licensee* shall . . . [m]aintain a principal place of business in this State.” (Emphasis added).
10 That section is *not* limited to businesses with employees.

11 The Board cites no legal authority for suspending enforcement of the in-state office
12 requirement against PIs who do not employ other people—because there is none. The Board has
13 no discretion to disregard the licensing requirement in general, or the in-state office requirement
14 specifically. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“Of course, an agency is not free simply
15 to disregard statutory responsibilities.”); *Torres-Valdivias v. Holder*, 766 F.3d 1106, 1114 (9th Cir.
16 2014) (“An agency may not . . . simply disregard rules that are still on the books.” (citation
17 omitted)). Thus neither Castillo nor this Court can rely on the Board’s non-binding,
18 unsubstantiated, and indeed unlawful assertion that it will simply ignore the legislatively-imposed
19 in-state office requirement in Section 648.148. Nor can Castillo or this Court rely on the self-
20 serving declaration of Defendant Ingram, which, in any event, does not substantiate the proposition
21 that having in-state employees is a prerequisite to enforcement of the challenged laws.

22 Moreover, the same Defendant has said the opposite on other occasions. In a February,
23 2014, letter to a PI in California, *see* Exhibit A, Mr. Ingram stated that the in-state office
24 requirement does apply to *all* PIs. The in-state office requirement was added, he wrote, “as a way
25 to more efficiently and effectively complete the audits the [Board] is required to conduct,”
26 including the “individuals from other states” who “do[] business in Nevada.” Any “licensee [who]

1 does not have any employees working in this state,” he claimed, “can maintain a ‘virtual office,’”
2 but such individuals are *still required to comply*. (As explained below, this “virtual office” claim
3 does not defeat Castillo’s motion, as the Board asserts.) Nowhere in this letter did Mr. Ingram
4 indicate that the in-state office requirement does not apply to businesses with no employees.

5 Second, even if this Court could rely on the Board’s assertion that it will not enforce the
6 challenged statutes, its choice to suspend enforcement would be nothing more than voluntary
7 cessation of illegal conduct. When a party ceases illegal conduct in response to a lawsuit, that
8 party bears the burden of demonstrating that it is “absolutely clear that the allegedly wrongful
9 behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’tl.*
10 *Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). This burden is a “heavy” and “formidable” one, *id.*
11 at 189-90, because otherwise a defendant could “engage in unlawful conduct, stop when sued to
12 have the case declared moot, then pick up where he left off, repeating this cycle until he achieves
13 all his unlawful ends.” *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). Suffice to say, the
14 Board has failed to make any such showing. It has merely asserted, contrary to the black-letter
15 language of the statute and regulations, that because Castillo has no employees, it will refrain from
16 enforcing the law against him, and supported this assertion with a Declaration by a Defendant
17 which is contradicted by other Board statements.⁶

18 In sum, the Board’s claim that it does not enforce the law as written does not “deprive a
19 federal court of its power to determine the legality” of that statute. *Friends of the Earth*, 528 U.S.
20 at 189 (citations omitted). Even repeal or amendment of an ordinance will not necessarily moot
21 a case, *Bell*, 709 F.3d 899, let alone non-binding statements about the *past* enforcement history of
22 the law.

23 ///

24
25 _____
26 ⁶ Plaintiff’s counsel offered the Board the opportunity to stipulate to an injunction whereby it
would be bound not to enforce the challenged requirements. That offer was refused.

1 **C. The Board Concedes It Intends to Enforce Some Form of the In-State**
2 **Office Requirement Against Castillo, and That Violates the Constitution**

3 Paradoxically, the Board also says that Castillo *is* subject to the office requirement, but that,
4 unlike licensees who have employees, he can satisfy this requirement by obtaining a “virtual
5 office.” *See* Opp. at 4. Needless to say, no statute or regulation provides for a “virtual office” or
6 defines what this term means. In its Opposition now, the Board claims that Castillo need not
7 obtain “dedicated office space” to fulfill the “virtual office” requirement. *Id.* Yet Defendant
8 Ingram’s prior letter makes clear that a “virtual office” *does* in fact require physical, brick-and-
9 mortar office space—such that the licensee can house his records, display his license, and allow
10 the Board to physically audit the licensee. Defendant Ingram claimed that a “virtual office” could
11 be, for example, “a friend or relative’s home office.” *See* Exhibit A at 3. And the statute requires
12 that a “principal place of business” have a physical “street address.” Nev. Rev. Stat.
13 § 648.148(1)(b).

14 But while it is unclear whether such a “virtual office” would actually be allowed under the
15 statute, even a “virtual office” requirement would still violate the Commerce and Privileges or
16 Immunities Clauses for the reasons laid out in Castillo’s Motion. As the District Court observed
17 in *Schoenefeld v. New York*, 907 F. Supp. 2d 252 (N.D.N.Y. 2011), an in-state physical location
18 requirement differentiates between those already located in the state, who can use their physical
19 residences as their “principal place of business,” Nev. Rev. Stat. § 648.148(1)(a), or “virtual
20 offices,” whereas out-of-state PIs like Castillo are forced to maintain not only their actual offices
21 in their home states, but *also* some physical location in the state—even if they, for instance, pay
22 an in-state PI for the right to use his office for an in-state address. Simply put, there is nothing
23 “virtual” about being forced to rent or borrow a physical in-state location. It “imposes a financial
24 burden” that is “a significant burden on those who wish to [work] in multiple states.” *Schoenefeld*,
25 907 F. Supp. at 260.

26 ///

1 While the Board certainly has a legitimate interest in regulating PIs and ensuring that they
2 can be disciplined and their records inspected, the in-state office requirement (“virtual” or
3 otherwise) does not serve this goal: a PI in Elko is situated 434 miles from the Board’s Las Vegas
4 offices and 305 miles from its Las Vegas offices—but Castillo’s Palm Springs home is only 233
5 miles from Las Vegas. *See* Plaintiff’s Opposition to Motion to Dismiss at 21 n.5 [Doc. No. 23].
6 Yet the former may satisfy the in-state office requirement with a single location, while Castillo is
7 forced to obtain a second, in-state office, or rent space from a Nevada-licensed PI.

8 In short, even if the Board’s “virtual office” theory is correct, it is irrelevant and the
9 injunction should be granted.

10 **D. Castillo’s Content-Based Speech Restriction and Prior Restraint**
11 **Claims Are Ripe, and Castillo Is Likely to Succeed on the Merits**

12 First Amendment claims are subject to a relaxed ripeness standard. *See*
13 *Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014), *cert. denied*,
14 No. 14–434, 2015 WL 852423 (U.S. Mar. 2, 2015). In pre-enforcement actions involving First
15 Amendment violations, a plaintiff need only allege that he has “a ‘concrete plan to violate the
16 law,’” and that “a threat of potential enforcement will cause him to self-censor, and not follow
17 through with [that] concrete plan.” *Id.* (citation omitted). Castillo easily passes this relaxed
18 standard.

19 In his Verified First Amended Complaint, Castillo provides several concrete examples of
20 jobs he has been offered and would like to take in the future. VFAC ¶¶ 29-33. He also alleges
21 that, because he cannot take those jobs without complying with the in-state office requirement, he
22 has refrained from exercising his speech rights and accepting those opportunities. *Id.* ¶¶ 40, 41.
23 Castillo alleges that he has been forced to refrain from accepting employment for “furnish[ing] . . .
24 information” about the “identity . . . activity . . . reputation or character” of “person[s]” because
25 he does not have an in-state office, as required by the statute. *Id.* His claims are therefore ripe.

26 ///

1 Castillo is likely to prevail on his First Amendment challenge to the in-state office
2 requirement. On a motion for preliminary injunction, it is the government’s burden to justify its
3 restriction on speech. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). But
4 the in-state office requirement bears no relationship to any public purpose. VFAC ¶¶ 67-69.

5 The Board states that the purpose of the requirement is to “ensure that licensees [are]
6 physically present in this state to supervise their employees.” Opp. at 2. But the in-state office
7 requirement is not narrowly tailored to achieve this purpose. On its face, the requirement applies
8 to all “licensees,” Nev. Rev. Stat. § 648.148, not just to those who supervise employees.
9 Moreover, the Board could just as easily achieve its goal by simply requiring supervision, rather
10 than imposing a brick and mortar office requirement.

11 The Board offers no other interest to justify imposing the in-state office requirement on
12 persons engaged in such speech activities as obtaining and furnishing information. Where a person
13 chooses to maintain his principal place of business has no relationship to his or her competency
14 to research or communicate information, or honesty, or diligence in keeping information private.
15 There is no connection *at all* between any public harm that might be caused by the investigation
16 or furnishing of information and the statutory requirement of locating a physical place of business
17 in the state. Castillo is therefore likely to prevail on his prior restraint and content-based speech
18 restriction claim.

19 **E. Castillo Is Likely to Prevail in His Claims That the**
20 **Licensing Requirements Violate the Fourteenth Amendment**

21 In order to satisfy the requirements of the Due Process Clause, any occupational licensing
22 requirement must be rationally related to “the applicant’s fitness or capacity to practice” the
23 profession. *Schware v. Bd. of Bar Examr’s of N.M.*, 353 U.S. 232, 239 (1957). Protecting a
24 discrete interest group from economic competition is not related to ensuring an applicant’s fitness,
25 and thus purely protectionist licensing requirements are unconstitutional. *Merrifield v. Lockyer*,

26 ///

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 9, 2015, the foregoing was filed electronically with the Clerk
3 of the Court to be served by operation of the Court's electronic filing system upon the following:

4 **RAELENE K. PALMER**

5 E-Mail: rpalmer@ag.nv.gov, cknight@ag.nv.gov,

6 dturman@ag.nv.gov, kbeverly@ag.nv.gov,

7 mmillam@ag.nv.gov, mpizzariello@ag.nv.gov

8 *Counsel for Defendants*

9
10 **TIMOTHY SANDEFUR**

11 E-Mail: tms@pacificlegal.org, IncomingLit@pacificlegal.org,

12 bas@pacificlegal.org

13
14 **ANASTASIA PAULINNA BODEN**

15 E-Mail: apb@pacificlegal.org, IncomingLit@pacificlegal.org,

16 bas@pacificlegal.org

17
18 **LEE I. IGLODY**

19 E-Mail: lee@iglody.com, patty@iglody.com

20 *Counsel for Plaintiff*

21
22
23 s/ Anastasia P. Boden
ANASTASIA P. BODEN, Cal. Bar No. 281911*

24 Attorney for Plaintiff

25 **pro hac vice*