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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF NEVADA**

17 DEREK EISENBERG,
18
Plaintiff,

19 v.

20 DR. KRISTOPHER SANCHEZ, in his
21 official capacity as the Director of the
22 Department of Business and Industry;
23 DARRELL PLUMMER, in his official
24 capacity as President of the Nevada Real
Estate Commission; DONNA A. RUTHE, in
25 her official capacity as Vice President of the
26 Nevada Real Estate Commission;
27 FORREST BARBEE, in his official capacity
as Secretary of the Nevada Real Estate
28 Commission; DAVID TINA, in his official
capacity as Commissioner of the Nevada
Real Estate Commission; and WILLIAM

Civil Action No. 2:24-cv-02377-
JAD-MDC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

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BRADLEY SPIRES, in his official capacity
as Commissioner of the Nevada Real Estate
Commission,

Defendants.

INTRODUCTION

1
2 Defendants' Motion to Dismiss invites more factual questions than it answers,
3 emphasizing the need for discovery and a full adjudication on the merits. For example:
4 the motion raises factual questions about the actual monetary costs and logistical
5 burdens imposed on interstate commerce by the in-state office requirement, including
6 rent, staffing, and travel expenses for non-resident brokers like Plaintiff; the number
7 of in-state brokers using their homes as their "definite place of business" and whether
8 this confers a competitive advantage over non-resident brokers; whether Defendants
9 have concrete evidence—beyond speculation—that the law meaningfully advances its
10 purported goals given its apparent facial disconnect from ensuring broker
11 qualifications or consumer protection; and the feasibility of less discriminatory
12 alternatives, such as remote recordkeeping, that could achieve the same regulatory
13 ends without disproportionately burdening non-resident brokers.

14 Despite their attempt to deem, by *ipse dixit*, the challenged laws not
15 discriminatory, not unduly burdensome, narrowly tailored, and rationally related to a
16 legitimate end, these inquiries are inherently ill-suited to dismissal. *See Vance v.*
17 *Amazon.com Inc.*, 525 F. Supp. 3d 1301, 1310 (W.D. Wash. 2021) (dormant commerce
18 clause claims in particular require courts to understand "detailed facts" and are "more
19 properly addressed on a motion for summary judgment"). Defendants' unsupported
20 factual allegations cannot defeat Mr. Eisenberg's well-pleaded claims, and the motion
21 to dismiss should be denied.

BACKGROUND

22
23 Plaintiff Derek Eisenberg is an experienced real estate broker with over 30
24 years in the industry. Compl. ¶ 7. He holds real estate broker licenses in the District
25 of Columbia and 26 states, including Nevada. *Id.* Mr. Eisenberg is the founder and
26 President of Continental Real Estate Group, Inc., a company that offers a cost-
27 effective and flexible approach to buying and selling homes. *Id.* ¶ 10. Continental can
28

1 offer these services online and across state lines, as is common in today's technology-
2 driven world, making it less expensive and more convenient for customers to conduct
3 real estate transactions. *Id.* ¶¶ 11–14. Continental employees are licensed as brokers
4 in 42 states, including Nevada. Continental's business model allows customers to
5 choose from a fee-for-service model rather than the traditional full-service model
6 offered by most real estate brokers. *Id.* ¶¶ 11–14. This allows customers to tailor their
7 experience to their specific needs and budget. *Id.* Mr. Eisenberg's goal is to make real
8 estate services more convenient and affordable.

9 This case concerns Nevada's outdated and anti-competitive requirements for
10 real estate brokers to maintain and operate out of a physical office in the state. *Id.* ¶
11 2. These laws include Nev. Rev. Stat. §§ 645.510 and 645.550, which requires brokers
12 to have and maintain a "definite place of business" in Nevada, and Nev. Admin. Code
13 §§ 645.627 and 645.655, which impose additional restrictions on brokers' operations.
14 Compl. ¶¶ 2, 23–26. They not only impose significant and disparate costs on brokers
15 like Mr. Eisenberg, but also irrationally limit consumer choice and stifle innovation
16 in the real estate market.

17 This case does not challenge the state's authority to regulate real estate
18 brokers, nor does it seek to eliminate licensure standards that actually ensure brokers
19 are competent or qualified. Rather, it challenges the constitutionality of specific laws
20 that discriminate against out-of-state brokers and impose irrational requirements on
21 the industry. Even if Plaintiff is successful, the state could still require brokers to be
22 licensed, require them to be competent, and discipline them if they are not. But the
23 challenged laws discriminate against out-of-state brokers by forcing them to maintain
24 and operate from a physical office in Nevada even though they can provide the same
25 services as in-state brokers without one. Plaintiff alleges that this discriminatory
26 treatment not only harms out-of-state brokers like Mr. Eisenberg, but also limits
27 competition in the Nevada real estate market, leading to higher prices, fewer choices
28 for consumers, and no cognizable benefit. Complaint ¶¶ 29–54.

1 Mr. Eisenberg sued Dr. Kristopher Sanchez, Director of the Nevada
2 Department of Business and Industry, and members of the Nevada Real Estate
3 Commission in their official capacities, seeking declaratory and prospective injunctive
4 relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908). Defendants moved to dismiss.
5 Defs.’ Mot. to Dismiss. ECF No. 21 (MTD). Defendants argue Mr. Eisenberg has failed
6 to allege a violation of his constitutional rights. That motion should be denied.

7 LEGAL STANDARD

8 In considering a motion to dismiss, a district court must “take all allegations of
9 material fact as true and construe them in the light most favorable to the nonmoving
10 party.” *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citing
11 *Everest & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th
12 Cir.1994)). “A complaint should not be dismissed unless it appears beyond doubt the
13 plaintiff can prove no set of facts in support of his claim that would entitle him to
14 relief.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994).

15 There is no difference between what must be pleaded to raise an as-applied
16 challenge and a facial challenge, as “the distinction between facial and as-applied
17 challenges . . . goes to the breadth of the remedy employed by the Court, not what
18 must be pleaded in a complaint.” *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

19 Plaintiff’s complaint easily meets this standard.

20 ARGUMENT

21 I. Mr. Eisenberg Plausibly Alleged That the In-State Office 22 Requirements Violate the Commerce Clause

23 Plaintiff has plausibly alleged that the challenged laws discriminate against
24 and unduly burden interstate commerce. Compl. ¶¶ 29–38. While these laws are
25 facially neutral, they have a discriminatory effect in practice. Resident brokers can
26 use their homes or a preexisting office to meet these requirements, but out-of-state
27 brokers must establish and maintain a new office in Nevada and pay the associated
28 costs. Defendants never deny that these discriminatory effects exist; they simply

1 characterize them as neutral. *See* MTD at 7–8. But even under the *Pike* balancing
2 test, Plaintiff has plausibly alleged that requiring a physical office, in-state
3 transactions, and in-state record-keeping is clearly excessive in relation to the non-
4 existent local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

5 **A. Nevada’s Discriminatory Treatment of Out-of-State Brokers Is**
6 **Per Se Invalid**

7 Laws that discriminate in purpose or effect are subject to a virtually per se rule
8 of invalidity. Seeking to avoid this standard, Defendants say that it only applies to
9 laws that discriminate on their face. *See* MTD at 6–7. However, as several cases make
10 clear, a law is per se invalid when it “directly regulates or discriminates against
11 interstate commerce, or when its effect is to favor in-state economic interests over out-
12 of-state interests.” *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019)
13 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573,
14 579 (1986)) (emphasis added). Even where a law is facially neutral, it will still be
15 subject to this demanding test because “the critical consideration is the overall effect
16 of the statute on both local and interstate activity.” *Brown-Forman*, 476 U.S. at 579.
17 Laws that discriminate against interstate commerce in purpose or effect must be
18 invalidated unless the state proves “it has no other means to advance a legitimate
19 local interest.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

20 Many courts have recognized that in-state office requirements have significant
21 discriminatory effects and have struck them down as per se unconstitutional. *See, e.g.*,
22 *Nutritional Support Servs., L.P. v. Miller*, 830 F. Supp. 625 (N.D. Ga. 1993) (striking
23 down an in-state office requirement); *Georgia Ass’n of Realtors, Inc. v. Alabama Real*
24 *Est. Comm’n*, 748 F. Supp. 1487, 1493 (M.D. Ala. 1990) (same); *Underhill Assocs., Inc.*
25 *v. Coleman*, 504 F. Supp. 1147, 1151 (E.D. Va. 1981) (“[w]hile the requirement is
26 facially neutral, its obvious effect is prejudicial to out of state brokers, who must
27 duplicate the expense of maintaining an office in Virginia in order to do business with
28 its residents.”).

1 The Ninth Circuit has addressed a similar scheme. In *Codar, Inc. v. State of*
2 *Arizona*, the court stated that an in-state office requirement for debt collectors would
3 be unconstitutional if it required them to “perform normal business operations from
4 their Arizona office.” 95 F.3d 1156, at *4 (9th Cir. 1996) (unpublished table decision).
5 The statute at issue required all debt collectors to “maintain an office in this state for
6 collection of claims.” *Id.* The court remanded the case to determine whether the law
7 required debt collectors to operate from their required in-state office, since any such
8 requirement would be discriminatory and likely per se invalid. *Id.*

9 Here, the challenged laws explicitly require non-resident brokers to perform
10 their normal business operations from their Nevada office. See NRS § 645.510 (“No
11 real estate license issued under the provisions of this chapter shall give authority to
12 do or perform any act specified in this chapter . . . from any place of business other
13 than that specified therein.”); Nev. Rev. Stat. § 645.550(3) (“No license authorizes the
14 licensee to transact business from any office other than that designated in the
15 license.”); Nev. Admin. Code § 645.627 (requiring brokers to dedicate a space for the
16 purpose of “conducting his or her real estate business.”) Nev. Admin. Code § 645.655(2)
17 (requiring brokers’ records to be kept in the state and open to inspection during its
18 usual business hours). They are, therefore, discriminatory and subject to the
19 heightened dormant Commerce Clause standard.

20 Defendants argue that these laws should not be subject to the per se rule
21 because this Court has already found Nevada’s statutory scheme for real estate
22 brokers is not “purposefully facially discriminatory.” MTD at 7 (citing *Marcus &*
23 *Millichap Real Est. Inv. Servs. of Nev., Inc. v. Decker*, 400 F. Supp. 3d 1074, 1084–85
24 (D. Nev. 2019)). This argument not only misstates the holding in that case but also
25 limits the applicable legal test. In *Marcus & Millichap Real Estate*, the court’s ruling
26 was limited to Nevada’s requirement that brokers obtain a state license or certificate
27 before engaging in interstate commercial real estate transactions in Nevada. *Id.* at
28 1082. That requirement does not resemble the challenged laws in this case, which

1 force non-resident brokers to establish an in-state office, conduct transactions in-state,
2 and maintain records in-state, which the Ninth Circuit indicated would be
3 discriminatory and unconstitutional. *See Codar*, 95 F.3d 1156.

4 What’s more, several cases (including those cited by Defendants) confirm that
5 laws are subject to the per se rule of invalidity when they discriminate on their face
6 or in effect. *See, e.g., Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099, 1107
7 (3d Cir. 1997) (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579)
8 (“[H]eightedened scrutiny applies not only when legislation is facially discriminatory,
9 but also when a state statute or regulation’s ‘effect is to favor in-state economic
10 interests over out-of-state interests. . . .”); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040
11 (10th Cir. 2009) (quoting *C & A Carbone, Inc.*, 511 U.S. at 402) (“The first-tier inquiry
12 turns on whether the challenged law ‘affirmatively or clearly discriminates against
13 interstate commerce on its face or in practical effect.’ . . . A statute may be neutral in
14 its terms and still discriminate against interstate commerce.”). The *Tolchin* and
15 *Kleinsmith* courts went on to conduct in-depth, fact-based inquiries on the practical
16 effects of facially neutral laws to determine whether those laws should be subject to
17 the per se standard. *See Tolchin*, 111 F.3d at 1106–08; *Kleinsmith*, 571 F.3d at 1040–
18 43. This alone cuts against premature dismissal before such an inquiry can take place
19 in the present case: the Court needs discovery to determine which standard applies.
20 At this point, it’s sufficient that Plaintiff has plausibly alleged that the laws are
21 discriminatory.

22 Given their discriminatory effects, the challenged laws “will survive only if
23 [they] advance[] a legitimate local purpose that cannot be adequately served by
24 reasonable nondiscriminatory alternatives.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S.
25 328, 338 (2008) (internal quotation omitted). Plaintiff has alleged that they do not,
26 and Defendants fail to argue otherwise. Because Defendants have failed to rebut
27 Plaintiff’s well-pleaded claims, their attempt to dismiss Plaintiff’s Commerce Clause
28 claims should be denied.

1 **B. Nevada’s Restrictions Fail the *Pike* Balancing Test**

2 Even if the in-state office requirements are considered non-discriminatory,
3 Plaintiffs have plausibly alleged that the challenged laws violate the Commerce
4 Clause under the *Pike* balancing test. Under *Pike*, a law will only be upheld if the
5 incidental burden it places on interstate commerce is not “clearly excessive” in relation
6 to the local benefits it provides. *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of*
7 *State of Or.*, 511 U.S. 93, 99 (1994) (citing *Pike*, 397 U.S. at 142). Moreover, a state
8 may not mandate in-state business operations that could be more efficiently conducted
9 elsewhere. *See Pike*, 397 at 145. Plaintiff has alleged that the challenged laws violate
10 *Pike* because they impose substantial costs on interstate commerce, such as
11 duplicative rent, travel, logistics, utilities, maintenance, and staffing expenses,
12 Complaint ¶¶ 17–18, 32–35, forcing in-state business operations that could be more
13 efficiently conducted elsewhere, yet providing no legitimate benefits. *Id.* at ¶¶ 36–37.

14 The facts of *Pike* are instructive. In *Pike*, a farmer challenged a law requiring
15 him to package his cantaloupes in-state before shipping them out-of-state. *Pike*, 397
16 U.S. at 139. The Supreme Court ruled that the requirement was an unconstitutional
17 burden on interstate commerce, stating it “has viewed with particular suspicion” laws
18 requiring operations in one state when they “could more efficiently be performed
19 elsewhere. Even where the State is pursuing a clearly legitimate local interest, this
20 particular burden on commerce has been declared to be ‘virtually per se illegal.’” *Id.*
21 at 145. Like *Pike*, the challenged laws force non-resident businesses to perform their
22 operations in Nevada. They compel non-resident brokers to perform core business
23 functions—such as client meetings, transactions, property management, and record
24 management—in Nevada, even though these activities could be more efficiently
25 managed from their existing out-of-state offices. *See Nev. Rev. Stat. § 645.030.*

26 While Plaintiff alleges that the burdens are great, several courts have found
27 that in-state office requirements provide no legitimate benefits. *See, e.g., Underhill*
28 *Assocs., Inc.*, 504 F. Supp. at 1151; *Nutritional Support Servs., L.P.*, 830 F. Supp. 625;

1 *Georgia Ass’n of Realtors, Inc.*, 748 F. Supp. at 1493 (holding “Alabama could impose
2 less onerous requirements which could adequately protect its legitimate interests, the
3 Court finds the in-state ‘place of business’ requirements [for real estate brokers] . . .
4 violate the Commerce Clause.”).

5 Those courts ruled that not only are in-state office requirements
6 discriminatory, any “legitimate local interests” could “adequately be served by less
7 burdensome or discriminatory measures.” *Underhill Assocs., Inc.*, 504 F. Supp. at
8 1151. In *Underhill*, the court rejected the state’s argument that the in-state office
9 requirement gave state residents “a place to go” to review their accounts, allowed
10 consumers to have access to their broker, or provided state agencies with access to
11 records for investigations of customer complaints. *Id.* at 1152. The court reasoned that
12 customers who prefer face-to-face interactions or the ability to physically review their
13 services can use a local broker, and there are far less discriminatory measures for
14 ensuring agencies have access to necessary documents. For example, the state could
15 condition brokers’ licenses on an agreement to provide agencies access to such records.
16 *See Nutritional Support Servs., L.P.*, 830 F. Supp. at 629; *Georgia Ass’n of Realtors,*
17 *Inc.*, 748 F. Supp. at 1493.

18 Defendants argue that the challenged laws ensure real estate brokers are
19 competent, practice ethically, and protect the public from untrustworthy brokers. *See*
20 MTD at 8–9. Not only is this argument on the merits premature on a motion to
21 dismiss, it has also been repeatedly rejected. *See, e.g., Underhill Assocs., Inc.*, 504 F.
22 Supp. at 1152; *Georgia Ass’n of Realtors, Inc.*, 748 F. Supp. at 1493. There is simply
23 no reason to believe, contrary to Plaintiff’s allegations and before any discovery, that
24 residents behave better than out-of-staters merely by virtue of their residency, and
25 any argument to the contrary illustrates pure animus against out-of-staters.

26 Contrary to Defendants’ assertions, *Marcus & Millichap* did not find such
27 benefits are advanced by in-state office requirements. *See* MTD at 9. That case was
28 narrowly confined to Nevada’s requirement that brokers obtain a state license or

1 certificate before engaging in brokerage services. *Marcus & Millichap Real Est. Inv.*
2 *Servs. of Nevada, Inc.*, 400 F. Supp. 3d at 1082. Unlike that requirement, the laws
3 challenged here have no bearing on establishing knowledge or ethical standards for
4 real estate professionals. Instead, they create unnecessary burdens that could be
5 served by less discriminatory and less burdensome means.

6 Defendants also assert that these laws guarantee “availability to regulators
7 and clients.” MTD at 10. Again, courts have repeatedly rejected these arguments
8 because less burdensome alternatives—such as electronic record-keeping or remote
9 access—can serve the same regulatory purpose, and because the consumer “who
10 prefers having face-to-face contact with his broker and ‘a place to go’ to review his
11 account may, and presumably will, do business with [an in-state] broker.”); *Underhill*
12 *Assocs., Inc.*, 504 F. Supp. at 1152; *Georgia Ass’n of Realtors, Inc. v. Alabama Real*
13 *Est. Comm’n*, 748 F. Supp. at 1493 (same).

14 Plaintiff has plausibly alleged that the challenged laws’ many burdens
15 outweigh these nonexistent benefits. These mandates saddle non-resident brokers
16 with duplicating expenses—including renting in-state office space, arranging Nevada
17 staffing, and travel expenses—whereas in-state brokers can use their homes or
18 existing Nevada offices. Courts that have struck down similar in-state office mandates
19 have consistently ruled that such burdens “cannot be deemed merely incidental” and
20 “impose[] a considerable burden on interstate commerce.” *See Underhill Assocs., Inc.*,
21 504 F. Supp. at 1152–53; *Georgia Ass’n of Realtors, Inc.*, 748 F. Supp. at 1493;
22 *Nutritional Support Servs., L.P.*, 830 F. Supp. at 629. While Defendants insist that
23 the burdens are minimal, that’s an argument they can make on the merits after
24 discovery has concluded.

25 **II. Mr. Eisenberg Plausibly Alleged That Nevada’s Real-Estate**
26 **Brokerage Laws Violate the Privileges and Immunities and Equal**
27 **Protection Clauses**

28 Defendants argue that Plaintiff failed to state claims under the Privileges and

1 Immunities and Equal Protection Clauses because the challenged laws provide “equal
2 treatment” and are “applie[d] equally.” MTD at 11, 14. As illustrated above, these
3 arguments ignore the laws’ substantial unequal effects on non-resident brokers.

4 The Privileges and Immunities Clause protects citizens’ right to work in
5 another state on substantially equal terms with that state’s residents. *Toomer v.*
6 *Witsell*, 334 U.S. 385, 396 (1948). Where a law denies someone that privilege by
7 “bias[ing] employment opportunities in favor of its own residents,” *Hicklin v. Orbeck*,
8 437 U.S. 518, 525 (1978), the state must prove that non-residents threaten some
9 “peculiar source of evil,” and that the law bears a substantial relationship to
10 ameliorating this evil. *Id.* at 526–27. This requires the state to show (1) it has a
11 substantial interest in its discrimination, (2) the means it used bears a substantial
12 relation to that interest, and (3) it has no less restrictive means that would advance
13 that interest. *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). Plaintiff plausibly
14 alleged that requiring a physical office, in-state transactions, and in-state record-
15 keeping force non-resident brokers to bear substantially higher costs than West
16 Virginia residents before plying their trade, lacks a substantial relationship to any
17 government interest, and has less restrictive means to achieve its ends. Compl. ¶¶
18 39–44.

19 Defendants argue that “disparate effects” alone do not establish a violation.
20 MTD at 11 (quoting *Schoenefeld v. Schneiderman*, 821 F.3d 273, 280 (2d Cir. 2016)).
21 That’s true, but even the precedent Defendants cite acknowledges that “disparate
22 effects” are relevant and “can sometimes admit an inference of proscribed intent” that
23 amounts to a violation. *Id.* Here, Mr. Eisenberg alleged that Nevada’s in-state
24 requirements “intentionally giv[e] its own citizens a competitive advantage in
25 business or employment.” *McBurney v. Young*, 569 U.S. 221, 229 (2013). Therefore,
26 Plaintiff has plausibly alleged a Privileges and Immunities Clause violation, and
27 Defendants’ motion to dismiss that claim should be denied.

28 Like the Privileges and Immunities Clause, the Equal Protection Clause is

1 concerned with unequal treatment. It forbids a state from treating similarly situated
2 parties differently without a rational connection to public health, safety, morals, or
3 general welfare. *Lebbos v. Judges of Sup. Ct., Santa Clara Cnty.*, 883 F.2d 810, 818
4 (9th Cir. 1989). Plaintiff alleged that the in-state requirements treat similarly
5 situated real estate brokers differently, Compl. ¶¶ 45–47, and yet they serve no
6 legitimate state interest. *Id.* at 48–49.

7 Defendants attempt to defeat those well-pleaded claims by arguing that the
8 standard of scrutiny for equal protection claims involving economic regulations is low.
9 MTD at 14. That’s true, but it’s still a legal question that must be reserved for the
10 merits after Plaintiff has had the benefit of discovery. Many courts have refused to
11 allow the government’s *ipse dixit* that a law serves a legitimate public purpose defeat
12 a plaintiff’s well-pleaded claim. *See, e.g., St. Joseph Abbey v. Castille*, Civil Action No.
13 10-2717, 2011 WL 1361425, at *9 (E.D. La. Apr. 8, 2011) (denying motion to dismiss
14 due process and equal protection claims challenging license requirement for casket
15 sales); *Bruner v. Zawacki*, Civil Action No. 3:12-57-DCR, 2013 WL 684177 (E.D. Ky.
16 Feb. 25, 2013) (denying motion to dismiss due process and equal protection challenge
17 to a licensing law for movers). Defendants’ motion should be denied.

18 **III. Mr. Eisenberg Plausibly Alleged That Nevada’s Real-Estate** 19 **Brokerage Laws Violate the Due Process Clause**

20 The Due Process Clause requires a restriction on the right to earn a living to be
21 rationally related to a legitimate government interest. *See Merrifield v. Lockyer*, 547
22 F.3d 978 (9th Cir. 2008). A law that burdens that right while serving no end other
23 than protecting favored groups from economic competition is arbitrary and violates
24 due process. *See, e.g., id.* at 991 n.15 (“[M]ere economic protectionism . . . is irrational
25 . . . [under] rational basis review.”); *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161
26 (5th Cir. 2012) (same); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same).
27 Using this standard, the Supreme Court has repeatedly struck down regulations that
28 lack a genuine means-end fit or are otherwise irrational. *See, e.g., City of Cleburne v.*

1 *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Zobel v. Williams*, 457 U.S. 55, 56
2 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *New State Ice Co. v.*
3 *Liebmann*, 285 U.S. 262, 274 (1932).

4 Here, Mr. Eisenberg plausibly alleged that the challenged laws burden his right
5 to earn a living without serving a rational connection to a legitimate state interest.
6 Compl. ¶¶ 50–52. These requirements fail to enhance broker competence or consumer
7 protection. Instead, these mandates only serve to insulate in-state brokers from new
8 competition from non-resident brokers. *Id.* at 52–54. He has, therefore, pleaded
9 allegations that state a valid claim for relief and that is sufficient to survive the
10 Defendants' motion.

11 Defendants attempt to defeat these well-pleaded claims by observing that the
12 rational basis test is easily met. MTD at 13. While the test is undoubtedly deferential,
13 it is not “toothless.” *Louisiana Seafood Mgmt. Council, Inc. v. Foster*, 917 F. Supp. 439,
14 446 (E.D. La. 1996). It establishes a rebuttable presumption of constitutionality that
15 can be overcome by record evidence demonstrating that a law does not further its ends
16 or that its ends are illegitimate. *See, e.g., United States v. Carolene Prods.*, 304 U.S.
17 144, 152 (1938) (stating a law is presumed constitutional “unless in the light of the
18 facts made known or generally assumed it is of such a character as to preclude the
19 assumption that it rests upon some rational basis”); *Heller v. Doe by Doe*, 509 U.S.
20 312, 321 (1993) (“even the standard of rationality as we so often have defined it must
21 find some footing in the realities of the subject addressed by the legislation”);
22 *Merrifield*, 547 F.3d 978 (invalidating economic regulation under the rational basis
23 test).

24 Thus, at the pleading stage, Plaintiff need only plausibly allege that the
25 challenged law is not rationally related to its purported end. He has satisfied that
26 burden, and Defendants' motion to dismiss the claim should be denied.

27
28

1 **IV. Mr. Eisenberg Agrees that his Privileges or Immunities Clause Claim**
2 **Is Foreclosed by Supreme Court Precedent**

3 Plaintiff acknowledges that the *Slaughter-House Cases*, 83 U.S. 36 (1872),
4 currently foreclose his Privileges or Immunities Claim, but believes that decision was
5 incorrect and undermines the purpose and function of the Privileges or Immunities
6 Clause as a protection for economic rights of citizens. The text, history, and ratification
7 debates surrounding the Fourteenth Amendment confirm that it was meant to protect
8 those liberties advanced by the Privileges and Immunities Clause, the Bill of Rights,
9 and common law rights of Englishmen from infringement by the states. This includes
10 the right to earn a living. *McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010)
11 (Thomas, J., concurring). Plaintiff, therefore, asserts the claim to preserve it for
12 appeal. Compl. ¶¶ 50–54.

13 **CONCLUSION**

14 For the reasons stated above, Defendants’ motion to dismiss should be denied.

15
16 DATED: March 19, 2025.

17 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day, March 19, 2025, I served copies of the foregoing on counsel of record for all Defendants using the Court’s CM/ECF system.

By /s/ Anastasia P. Boden
Anastasia P. Boden