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14 **FIRST JUDICIAL DISTRICT COURT OF NEVADA**
15 **IN AND FOR CARSON CITY**

16 NATIONAL TAXPAYERS UNION, a non-
17 profit organization, and ROBIN L. TITUS,
MD,

18 Plaintiffs,

19 v.

20 JOSEPH LOMBARDO, in his official capacity
as Governor of the State of Nevada; ZACH
21 CONINE, in his official capacity as Nevada
State Treasurer; RICHARD WHITLEY, in his
22 official capacity as Director of the Nevada
Department of Health and Human Services;
23 SCOTT J. KIPPER, in his official capacity as
the Nevada Commissioner of Insurance; and
24 RUSSELL COOK, in his official capacity as
Executive Director of the Silver State Health
25 Insurance Exchange,

26 Defendants.

Case No.

Dept. No.

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4. *Third*, SB 420 violates the separation-of-powers principle in Article III, Section 1, which states that “no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others[.]” SB 420 impermissibly delegates lawmaking authority to executive branch agency directors without providing any suitable standard to govern the manner and circumstances under which that authority is exercised.

5. The Court should therefore declare that SB 420 is unconstitutional and enjoin the Defendants from implementing, enforcing, or executing the law.

PARTIES

6. Plaintiff NTU is a public interest, nonprofit, nonpartisan corporation organized under the laws of Delaware and under section 501(c)(4) of the Internal Revenue Code. It is authorized to do business in Nevada, and its forty-five Nevada members and supporters will be harmed by SB 420.

7. Plaintiff Robin L. Titus, MD is a Nevada resident, a licensed and practicing physician, and an elected member of Nevada’s citizen legislature.

8. Defendant Joseph Lombardo currently serves as the Governor of the State of Nevada, with chief executive authority under Nevada’s Constitution and state law.

9. Defendant Zach Conine currently serves as Nevada State Treasurer.

10. Richard Whitley is the Director of the DHHS, an agency of the State of Nevada Executive Department established under NRS Chapter 232. As DHHS Director, Whitley oversees the Nevada Division of Health Care Financing and Policy (“DHCFP”).

11. Commissioner Scott J. Kipper is the Nevada Commissioner of Insurance, the chief officer of the Nevada Division of Insurance, an agency of the State of Nevada Executive

1 Department housed within the Nevada Department of Business and Industry under NRS Chapter
2 232.

3 12. Russell Cook is the Executive Director of the SSHIX, an agency of the State of
4 Nevada Executive Department established under NRS Chapter 695I.
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6 **JURISDICTION AND VENUE**

7 13. The Court has subject matter jurisdiction pursuant to Article VI, Section 6, clause
8 1 of the Nevada Constitution and NRS 30.030. Furthermore, because Plaintiffs seek injunctive
9 relief, this Court has original jurisdiction over such claims. *See Edwards. v. Emperor’s Garden*
10 *Rest.*, 122 Nev. 317, 324, 130 P.3d 1280, 1284 (2006) (“The district court possesses original
11 jurisdiction ... over claims for injunctive relief.”).
12

13 14. The Court has personal jurisdiction over all of the Defendants, who are residents
14 and officials of the State of Nevada, pursuant to NRS 14.065.

15 15. Venue is proper pursuant to NRS 13.010, 13.020(3), and 13.040 because all of the
16 Defendants either reside or carry out their official duties in Carson City.

17 **FACTUAL ALLEGATIONS**

18 16. NTU is a nonpartisan, nonprofit, public-interest organization whose primary
19 purpose is to advocate for public policies that promote transparency, accountability, and efficiency
20 in government. NTU’s leadership directly and actively advocated for the passage of the Nevada
21 Constitution’s two-thirds supermajority provision and the organization has and continues to
22 advocate for related policies that promote transparency and constitutional governance.
23

24 17. NTU’s Bylaws, Sec. 3.1, provide “Any individual or entity that provides support
25 or assistance to [NTU] may be designated as a ‘supporting member’...”. NTU’s forty-five
26 Nevada-based supporting members include individuals and other entities who support
27 constitutional tax limitations, individuals and other entities who support restraint in government
28

1 spending, and individuals and other entities who support private sector-driven, market-based
2 policies concerning health care and health insurance. As part of its mission, NTU encourages and
3 advises citizen activists to enact state and local laws restraining taxes and expenditures. Since
4 1988, NTU and its research affiliate have provided training, networking, and support for citizens
5 seeking to limit state and local taxes and expenditures through constitutional or statutory means,
6 including inviting activists from Nevada to participate in all these proceedings. NTU has helped
7 to qualify and educate taxpayers on tax restraint ballot measures in numerous states, including in
8 particular, Nevada’s Question 11 (1994 & 1996), the supermajority requirement adopted and now
9 codified as Article IV, Section 18(2), as well as Arizona (1992), California (1978 and 1996),
10 Colorado (1992), Florida (1996), Massachusetts (1980) Michigan (1978), Missouri (1980 and
11 1996), Oklahoma (1992), and South Dakota (1996). NTU and its research affiliate featured
12 Nevada Question 11 eight times in its newsletters (circulation as high as 60,000) between 1993
13 and 1996, providing contact information for readers who wished to volunteer for the Nevada
14 campaign. NTU and its research affiliate have also reported on ballot initiatives such as the
15 Property Tax Restraint Initiative in Nevada and local taxpayer activity in the Incline Village area.
16 Finally, NTU has provided litigation defense against attempts to weaken or repeal state-level
17 constitutional tax and expenditure limitations, including in Montana (1998) and Colorado (2022–
18 23). NTU’s forty-five Nevada-based supporting members will be harmed by the continued
19 implementation of SB 420, in light of its unconstitutional increases in revenue and its
20 unconstitutional separation-of-powers and appropriations provisions. NTU has both an
21 institutional interest in defending the Nevada Constitution’s supermajority provision, Article IV,
22 Section 18(2), and an interest in protecting its members from the harms effectuated under SB 420.
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18. Dr. Titus, a practicing physician, will be personally harmed by the Defendants’ continued implementation of the Public Option, a government-run health insurance program that requires Nevada healthcare providers to participate and accept lower reimbursement rates.

19. The question of whether SB 420 violates the Nevada Constitution is an issue of significant public importance.

20. Likewise, this case involves a challenge to a legislative expenditure or appropriation on the basis that it violates specific provisions of the Nevada Constitution.

21. The Plaintiffs are appropriate parties to bring this lawsuit. They are also interested parties within the meaning of NRS 30.040.

SB 420

22. SB 420 requires that the Defendants design, establish, and operate a health benefit plan known as the “Public Option.”

23. The bill requires the DHHS Director to make the Public Option available to consumers for purchase as a Qualified Health Plan (“QHP”) on the SSHIX, and for “direct purchase” as individual health insurance plans.

24. SB 420 further requires that the Public Option products provide minimum levels of coverage and that they be offered for purchase at a statutorily mandated discount—*i.e.*, a “premium reduction” that is aligned with certain “premium reduction targets” established in statute.

25. Specifically, SB 420 requires the Public Option product premiums be “at least 5 percent lower than the reference premium for that zip code,” and the premiums “must not increase in any year by a percentage greater than the increase in the Medicare Economic Index for that year.”

26. At the same time, SB 420 also purports to authorize the Defendants to “revise” these premium reduction targets to any amount they choose as long as “the average premiums for

1 the Public Option [are] at least 15 percent lower than the average reference premium in this State
2 over the first 4 years in which the Public Option is in operation.”

3 27. SB 420 seeks to implement the Public Option through a waiver application
4 submitted to the US Secretary of Health and Human Services pursuant to 42 U.S.C. § 18052 to
5 obtain “pass-through” federal funding.
6

7 28. 42 U.S.C. § 18052, in pertinent part, authorizes the federal government to pay to
8 the State the “amount of such credits or reductions that would have been paid on behalf of
9 participants in the [State Health Insurance] Exchanges . . . had the State not received such a
10 waiver.” In other words, the State may submit a plan to divert money in the form of federal
11 insurance premium tax credits, cost-sharing reductions, and small business tax credits from
12 consumers and small businesses to the State.
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14 29. One express criterion that the State must meet as part of its waiver application is
15 that the State justify its State Plan based on “a comprehensive description of the State legislation
16 and program to implement a plan meeting the requirements for a waiver.” Nevada’s plan to obtain
17 pass-through federal dollars by implementing the Public Option is outlined in SB 420.

18 30. Nevada’s waiver application seeks approval for the State to contract with health
19 insurers to offer the new state-contracted Public Option insurance products to individuals for
20 purchase beginning January 1, 2026. The State seeks approval for this structure to offer the Public
21 Option products in part because it will allow the State “to impose additional requirements” on
22 health carriers “that go beyond those set forth in state law.”
23

24 31. Because these new health insurance products must be offered at a discount,
25 mandated by statute, the State’s waiver application projects that the State will directly receive
26 hundreds of millions of dollars in pass-through federal funding that the federal government would
27 otherwise direct to offset consumers’ costs to pay for health insurance.
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32. The legislature in 2019 authorized only the Nevada Insurance Commissioner to submit a waiver application under 42 U.S.C. § 18502, and this authorization is specific and limited. *See* NRS 686B.010(1); NRS 686B.045. The legislature in 2019 authorized only the Nevada Insurance Commissioner to submit a waiver application “to achieve the purposes stated” in NRS 686B.010(2)(a)–(f), and such purposes expressly are “not an independent source of power.” NRS 686B.010(1). The legislature’s 2019 authorization did not extend to any agency official other than the Nevada Insurance Commissioner. *See* NRS 686.045(1)–(2).

33. The legislature in 2019 did not authorize the submission of a waiver application to establish and implement the Public Option health insurance benefit plan, nor did the legislature’s 2019 authorization contemplate or approve the new and increased revenues to the State that will necessarily result from the sale of Public Option products under SB 420.

34. SB 420 requires that the Public Option product be offered as a QHP and specifies that as a QHP offered for sale on the State’s health insurance exchange, the purchase of Public Option products will be subject to QHP carrier fees which are the primary source of operating revenue for the SSHIX.

35. SB 420 also mandates that the Public Option products must be offered “for direct purchase” subject to “other applicable provisions of this title”, *i.e.*, Title 57 of the Nevada Revised Statutes, when offered for sale as a QHP or “as a policy of individual health insurance.” Title 57, Nevada’s Insurance Code, establishes among other things the insurance premium tax which is imposed on the sale of individual health insurance plans, and other “fees and taxes” imposed on participants in the insurance market. *See* NRS 680B.010–680B.120. SB 420, § 12(6)(a) requires that any health carrier or other person or entity contracted to offer Public Option products for sale must comply with NRS 686B.010 to NRS 686B.1799.

1 36. SB 420 requires each health carrier that provides healthcare services through
2 managed care, as a condition of continued participation in any Medicaid managed care program,
3 to submit a good-faith proposal to provide state-contracted Public Option plans.

4 37. SB 420 empowers the State, if it chooses, to “directly administer” the Public Option
5 “if necessary” because private sector carriers decline to participate.

6 38. SB 420 also imposes a mandate on healthcare providers in Nevada to participate in
7 the Public Option program. SB 420 requires any healthcare provider who participates in the Public
8 Employees Benefit Program, the Medicaid program, or Nevada’s workers’ compensation program
9 to enroll as a participating provider in a Public Option network and to accept new patients enrolled
10 in the Public Option.
11

12 39. Finally, SB 420 requires “any money” received from the State’s implementation of
13 the Public Option program to be deposited to the State Public Option Trust Fund. The sources of
14 revenue SB 420 allocated to the Public Option Trust Fund include “any money” generated pursuant
15 to the State’s waiver application, and “any money” generated by the administration of Public
16 Option insurance products, including “any money” generated by the State “directly
17 administer[ing]” the Public Option if it chooses to do so.
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19 40. SB 420 mandates that “the [DHHS] Director shall deposit into the Trust Fund any
20 money received from (a) a Health Carrier or other person or entity with which the Director
21 contracts to administer the Public Option, or (b) If the Director directly administers the Public
22 Option...any money received from any person or entity in the course of administering the Public
23 Option.” SB 420 allows the DHHS Director “to use a portion determined by the State Treasurer
24 of any additional money in the Trust Fund to increase the affordability of the Public Option.”
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26 41. SB 420 passed on party lines in both houses during the 81st legislative session (26–
27 15 in the Assembly and 12–9 in the Senate) and was signed into law on June 9, 2021.
28

Two-Thirds Majority.

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2 42. The Nevada Constitution requires that any legislation that creates, generates, or
3 increases any public revenue in any form is subject to a two-thirds legislative supermajority
4 threshold for passage:

5 [A]n affirmative vote of not fewer than two-thirds of the members
6 elected to each House is necessary to pass a bill or joint resolution
7 which creates, generates, or increases any public revenue in any
8 form, including but not limited to, taxes, fees, assessments and rates,
or changes in the computation bases for taxes, fees, assessments and
rates.

9 NEV. CONST., Art. IV, § 18, ¶ 2.

10 43. Nevada’s two-thirds supermajority provisions “plainly encompass a bill that results
11 in the State receiving more public revenue than it would have realized without it . . . [and] has
12 broad application . . . to all bills that create, generate, or increase public revenue.” *State Legislature*
13 *v. Settelmeyer*, 137 Nev. 231, 235–36, 486 P.3d 1276, 1280–81 (2021).

14 44. The intent and purpose of the two-thirds requirement is to subject any revenue-
15 creating legislation to a heightened standard of legislative approval and to protect taxpayers from
16 new and increased taxes, fees, and other assessments.

17 45. SB 420 provides that the DHHS Director “shall make the Public Option available:
18 (1) As a qualified health plan through the [Silver State Health] Exchange to natural persons who
19 reside in this State and are eligible to enroll in such a plan through the Exchange under the
20 provisions of 45 C.F.R. § 155.305; and (2) For direct purchase as a policy of individual health
21 insurance by any natural person who resides in this State.”

22 46. In establishing a new health insurance benefit product and requiring that such
23 product be offered to consumers for purchase as a QHP through the SSHIX, and for individual
24 purchase as a health insurance policy, SB 420 creates, generates, and increases public revenue.
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47. The SSHIX also assesses Revenue/Carrier Premium Fees (“CPF’s” or “QHP fees”) at a rate of 3.05% of total premiums collected on the sale of health insurance plans sold through the Exchange. Premiums for Public Option products offered for purchase through the Exchange will be subject to these 3.05% QHP fees.

48. An interim study on the Public Option model, which the legislature commissioned pursuant to Senate Concurrent Resolution 10 prior to the 2021 legislative session, relied on a “key assumption” that exchange-assessed carrier fees, CPFs, would also be assessed on new Public Option products sold on the SSHIX.

49. In a fiscal note submitted for SB 420, the SSHIX stated that “the Carrier Premium Fees the SSHIX collects are charged to carriers operating on the Exchange and grounded in the requirements of the Affordable Care Act (ACA). The transfer of the SSHIX’s fee revenue to other uses is inconsistent with the ACA and NRS [Chapter] 695I, and if an attempt were made to transfer such funds to other uses, it may be subject to a legal challenge by carriers who paid the fee.”

50. As a result, the State will receive revenue in the form of CPFs or QHP fees assessed on new Public Option products which the State would not otherwise receive but for SB 420.

51. Nevada also assesses an insurance premium tax of 3.5% on net premiums, which is assessed on the sale of individual health insurance policies. The insurance premium tax will apply to sales of Public Option insurance products that are sold as individual health insurance plans.

52. An interim study on the Public Option model, commissioned pursuant to Senate Concurrent Resolution 10 prior to the 2021 legislative session, relied on a “key assumption” that “Public Option taxes” and “Nevada state fees” would be applicable to Public Option products sold on the individual health insurance market.

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53. In a Fiscal Note submitted for SB 420, DHCFP stated that “insurance premiums and Medicaid managed care capitation payments are subject to the State’s 3.5% insurance premium tax. Although DHCFP is unable to quantify the potential premium tax revenue related to the Public Option, DHCFP estimates the premium tax revenue from the Medicaid initiatives at a reduction of \$2,981 for the 2022–23 biennium, and an increase of \$7,801 for the 2024–25 biennium.”

54. Nevada will receive insurance premium tax revenue which it otherwise would not receive but for SB 420’s Public Option product provisions mandating that the new Public Option products be offered for sale to individual consumers.

55. In addition, the State will receive federal pass-through funding revenue which the State would not otherwise receive but for SB 420’s premium reduction mandates, which require the sale of a health insurance product (a QHP) at a statutorily mandated reduced price (the premium reduction target), which will purportedly allow the State to divert federal premium tax credit dollars that would otherwise offset consumer health insurance purchases. Instead, as a direct result of SB 420’s premium reduction mandates, these federal pass-through dollars will be redirected to the State Public Option Trust Fund.

56. On December 29, 2023, Director Whitley submitted the State’s Section 1332 waiver application (“Application”) to the federal government.

57. The Application confirms the revenue-generating effects of SB 420’s Public Option provisions. To begin with, it states that Public Option products “shall operate as individual health insurance products that comply with State and federal requirements for QHPs and all State health insurance laws and regulations.” State law imposes taxes on premiums for health insurance products, and the Application states that new Public Option products will be among the “private health insurance plans in the individual market.”

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63. An “appropriation” is “the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.” *Schwartz v. Lopez*, 132 Nev. 732, 753, 382 P.3d 886, 900 (2016) (citations omitted).

64. The Appropriations Clause is intended to promote transparency and accountability and to ensure that the people are informed about how their government intends to expend public funds.

65. SB 420, § 15 establishes a Public Option Trust Fund consisting of Public Option revenues, appropriated funds, and interest and income earned on money in the Public Option Trust Fund.

66. The Public Option Trust fund is part of the State Treasury.

67. SB 420, § 15(5) further provides that “[i]f the State Treasurer determines that there is sufficient money in the Trust Fund to carry out the provisions of [SB 420] sections 2 to 15, inclusive . . . for the current fiscal year, the [DHHS] Director may use a portion determined by the State Treasurer of any additional money in the Trust Fund to increase the affordability of the Public Option.”

68. SB 420, § 15 wholly lacks the certainty and specificity that is required of a legislative appropriation. It provides unbridled discretion to executive branch officials to use unspecified amounts of funds for the nebulous and vague purposes of “increasing the affordability of the Public Option.”

69. A December 14, 2022 “Briefing on Nevada Public Option” presentation illustrates the unconstitutional lack of specificity. In a slide entitled “New Funds for Affordability Policies” addressing “New State Revenue (Federal Pass-Through Funds),” the presentation states that “[l]eftover PTF [pass-through funding] can be used by [the] Director of DHHS to establish

1 new affordability policies,” and lists as examples “new state premium wraps” and “new funds for
2 supporting enrollment (*e.g.*, navigators).”

3
4 *Separation of Powers*

5 70. The Nevada Constitution provides for the separation of powers among three
6 distinct branches of state government:

7 The powers of the Government of the State of Nevada shall be
8 divided into three separate departments—the Legislative, the
9 Executive, and the Judicial; and no persons charged with the
10 exercise of powers properly belonging to one of these Departments
11 shall exercise any functions, appertaining to either of the others,
12 except in the cases expressly directed or permitted in this
13 constitution.

14 NEV. CONST., Art. III, § 1, cl. 1.

15 71. “The separation of powers doctrine is the most important foundation for preserving
16 and protecting liberty by preventing the accumulation of power in any one branch of government.”
17 *Shea v. State*, 138 Nev. Adv. Op. 36, 510 P.3d 148, 152 (2022) (quoting *Berkson v. LePome*, 126
18 Nev. 492, 498, 245 P.3d 560, 564 (2010)).

19 72. One of the principles underlying separation of powers as established in Nevada’s
20 Constitution is the notion that only elected legislators should enact and amend the law—not
21 unelected agency officials who are insulated from the democratic process.

22 73. SB 420, § 10(4)(a)–(b) establishes premium level reduction targets for Public
23 Option Health Benefit insurance products and provides that such premiums “(a) [m]ust be at least
24 5 percent lower than the reference premium for that zip code; and (b) [m]ust not increase in any
25 year by a percentage greater than the increase in the Medicare Economic Index for that year.”

26 74. SB 420 also purports to enable the Defendants—all executive branch officials—to
27 enact and outright “revise” statutory language, a lawmaking function that is exclusively assigned
28 to the legislative branch.

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75. Specifically, § 10(5) states that “[t]he [DHHS] Director, in consultation with the Commissioner [of Insurance] and the Executive Director of the [Silver State Health] Exchange, *may revise the requirements* of [SB 420, Sec. 10] subsection 4, provided that the average premiums for the Public Option must be at least 15 percent lower than the average reference premium in this State over the first 4 years in which the Public Option is in operation.” (Emphasis added.)

76. The Defendants have exercised that lawmaking authority to “revise” SB 420’s premium reduction targets by issuing two “Guidance Letters.” The first, General Guidance Letter 22-001, was issued on October 4, 2022 by Defendant Whitley and then-DHCFP Administrator Bierman. The second, General Guidance Letter 22-003, was issued on November 20, 2023 by Defendant Whitely and DHCFP Administrator Stacie Weeks.

77. The Defendants did not engage in administrative rulemaking under the Nevada Administrative Procedure Act in issuing the two Guidance Letters.

78. The Guidance Letters expressly invoke the DHHS Director’s authority under SB 420 to “revise” the statutory requirements noted above.

79. By issuing the Guidance Letters, the Defendants have in substance and effect struck out existing statutory language and amended it with the executive branch’s preferred language.

80. In addition, as described above, SB 420 § 15(5) purports to give the State Treasurer and the DHHS Director the unilateral power to decide whether and how much public funds should be spent “to increase the affordability of the Public Option” products.

FIRST CAUSE OF ACTION
(Declaratory Relief - Violation of Two-Thirds Majority Requirement (NEV. CONST., Art. IV, § 18))

81. Plaintiffs re-allege and incorporate all of the foregoing paragraphs.

82. SB 420 creates, generates, or increases public revenue and was therefore subject to the Nevada Constitution’s two-third supermajority requirement.

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THIRD CAUSE OF ACTION
(Declaratory Relief - Violation of Separation of Powers (NEV. CONST., Art. III, § 1))

96. Plaintiffs re-allege and incorporate all of the foregoing paragraphs.

97. SB 420 purports to delegate legislative authority to the DHHS Director, Insurance Commissioner, SSHIX Director, and the State Treasurer without establishing suitable standards to govern the manner and circumstances under which the Defendants can exercise this delegated authority.

98. SB 420 therefore violates Article III, Section 1 of the Nevada Constitution.

99. Without this Court's intervention, Defendants will proceed to implement SB 420, resulting in irrevocable and irreparable harm to the rights of Nevada citizens protected under Nevada's Constitution.

100. There exists no adequate remedy at law to prevent these constitutional violations.

101. Plaintiffs, acting in the public interest, are entitled to injunctive relief to prevent the constitutional violations alleged in this Complaint.

102. This Court has the power to grant such relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. A judgment in the Plaintiffs' favor and against the Defendants;

B. A declaration that SB 420 violates Article IV, Section 18 of the Nevada Constitution;

C. A declaration that SB 420 violates Article IV, Section 19 of the Nevada Constitution;

D. A declaration that SB 420 violates Article III, Section 1 of the Nevada Constitution;

1 E. An injunction prohibiting the Defendants from implementing, enforcing, or
2 executing any and all provisions of SB 420;


3 F. For reasonable attorneys' fees and costs; and

4 G. For such other and further relief as the Court may deem just and proper.
5

6 The undersigned affirms that this document does not contain the social security number
7 of any person and acknowledge that when any additional documents are filed, an affirmation
8 will be provided only if the document does contain personal information.

9 DATE: January 2, 2024

10 HOLLAND & HART LLP

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