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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12  
 13 **JOEL FINK,**

3:23-cv-05921-RFL

14 Plaintiff,

15 v.

**NOTICE OF MOTION AND MOTION  
 TO DISMISS**

16 **KIMBERLY KIRCHMEYER, in her**  
 17 **official capacity as Director of the California**  
 18 **Department of Consumer Affairs; and**  
 19 **LYNNE JENSEN, in her official capacity as**  
**Bureau Chief of the Bureau of Security and**  
**Investigative Services,**

Date: February 6, 2024  
 Time: 10:00 a.m.  
 Courtroom: 15  
 Judge: Rita F. Lin  
 Trial Date: None set  
 Action Filed: November 16, 2023

20 Defendants.  
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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on February 6, 2024, at 10:00 a.m., or as soon thereafter as this matter may be heard in Courtroom 15 of the above-entitled Court, located at 450 Golden Gate Ave., 18th Floor, San Francisco, California 94102, Defendants Kimberly Kirchmeyer, in her official capacity as Director of the California Department of Consumer Affairs, and Lynne Jensen, in her official capacity as Bureau Chief of the Bureau of Security and Investigative Services, will and hereby do move this Court to dismiss this action under Federal Rules of Civil Procedure 12(b)(6) on the ground that the Complaint fails to state a claim upon which relief may be granted.

This motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the accompanying request for judicial notice; all pleadings and papers on file in this action; and such other matters as the Court may deem appropriate. Counsel for Defendants conferred with opposing counsel and agreed that February 6, 2024 is a mutually convenient hearing date for the instant motion.

Dated: December 29, 2023

Respectfully submitted,

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*/s/ Kevin J. Kelly*  
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 18 **Department of Consumer Affairs; and**  
 19 **LYNNE JENSEN, in her official capacity as**  
**Bureau Chief of the Bureau of Security and**  
**Investigative Services,**

20 Defendants.

3:23-cv-05921-RFL

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION TO DISMISS**

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## INTRODUCTION

1  
2 Plaintiff purports to engage in a business in which his clients provide him access to their  
3 email accounts. Plaintiff then identifies emails as legally “actionable” under California’s Anti-  
4 Spam Act and transmits that information to his clients. California’s Bureau of Security and  
5 Investigative Services (the “Bureau”) cited Plaintiff for violating the California Private  
6 Investigator Act (the “Act”) and directed him to cease and desist from unlawfully acting as an  
7 unlicensed private investigator.

8 Plaintiff now challenges the constitutional basis for any future enforcement of the Act  
9 against him, but Plaintiff’s claims all fail as a matter of law. First, Plaintiff claims that  
10 enforcement of the Act violates his First Amendment rights, but such enforcement is a  
11 permissible regulation of his professional conduct that only incidentally regulates his speech. To  
12 the extent it does regulate any protected speech, it regulates his commercial speech, which is  
13 properly regulated under the Supreme Court’s *Central Hudson* test. Plaintiff’s Fourteenth  
14 Amendment substantive due process claim similarly fails because enforcement of the Act is  
15 rationally related to promoting Plaintiff’s own fitness and competency to perform his work and  
16 conduct his business effectively and responsibly, as well as the state’s legitimate interests in  
17 protecting consumers and their privacy interests, ensuring the reliability of evidence presented in  
18 judicial proceedings, and protecting the integrity of the judicial system. His Fourteenth  
19 Amendment equal protection claim fails because he fails to identify a protected class, and his  
20 privileges or immunities claim fails because, as he admits, it is barred under binding precedent.  
21 This Court should dismiss the complaint in its entirety.

## BACKGROUND

### 23 I. STATE REGULATION OF PRIVATE INVESTIGATORS AND THE CALIFORNIA PRIVATE 24 INVESTIGATORS ACT

25 Relevant to Plaintiff’s claims, a “private investigator” under the Act includes anyone “who,  
26 for any consideration whatsoever engages in business or accepts employment to furnish, or agrees  
27 to make, or makes, any investigation for the purpose of obtaining information” with reference to:  
28



1 (b) The identity, habits, conduct, business, occupation, honesty, integrity,  
 2 credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement,  
 3 whereabouts, affiliations, associations, transactions, acts, reputation, or character of  
 4 any person. . . . (d) The cause or responsibility for fires, libels, losses, accidents, or  
 damage or injury to persons or to property. . . . [or] (e) Securing evidence to be used  
 before any court, board, officer, or investigating committee.

5 Cal. Bus. & Prof. Code § 7521. In order to obtain a private investigator license, an individual  
 6 must, among other things, be at least 18 years old and not have committed acts or crimes  
 7 warranting denial of licensure (*id.* § 7526),<sup>1</sup> pass an examination that “determine[s] the ability  
 8 and fitness of the applicant to engage in business” as a private investigator (Cal. Code Regs. tit.  
 9 16, § 605), and have at least three years’ experience in investigation work, with at least 2,000  
 10 hours of actual compensated work per year (Cal. Bus. & Prof. Code § 7541(a)). The experience  
 11 requirement may be satisfied by working for three years as an employee of a licensed private  
 12 investigator or by working in various other capacities, such as a sworn law enforcement or  
 13 military police officer, insurance adjuster, investigator employed by a public defender, or  
 14 investigative reporter. *See* Cal. Bus. & Prof. Code § 7541.1(a).

15 As the California Legislature observed in considering certain amendments to the Act in  
 16 2017, private investigators “play a unique role in that their job is to delve into an individual’s  
 17 personal information, history, and behavior” and “have a unique ability [to] interact with  
 18 consumers’ sensitive information.” Defendants’ Request for Judicial Notice in Support of Motion  
 19 to Dismiss, Exh. A, at 8. Moreover, the “ability to suspend, revoke, or deny a private  
 20 investigator’s license provides the [Bureau] with some ability to protect consumers and respond  
 21 to complaints from consumers regarding a licensee.” *Id.* at 7-8.

## 22

### 23 **II. PLAINTIFF’S BUSINESS**

24 As alleged in his Complaint, Plaintiff operates a business called “Spam Private Eye.”  
 25 Complaint ¶ 19. In the course of his business, Plaintiff’s clients grant him access to their email

26 \_\_\_\_\_  
 27 <sup>1</sup> Such crimes include those an applicant has been convicted of during the preceding seven  
 28 years from the date of application that are substantially related to the qualifications, functions, or  
 duties of private investigator work; serious felonies; and certain felony financial crimes. *See* Cal.  
 Bus. & Prof. Code §§ 480, 7526.

1 accounts and he and a team of three contractors review the junk and spam folders to identify  
2 external emails that may violate the California Anti-Spam Act, Cal. Bus. & Prof. Code §§ 17529  
3 *et seq.* Complaint ¶¶ 19, 20, 24. After Plaintiff and his team identify emails that potentially  
4 violate state law, Plaintiff lists them in spreadsheets and creates PDF copies of the emails.  
5 Complaint ¶ 25. His clients may then hire California attorneys and sue spammers under the Anti-  
6 Spam Act’s private right of action. Complaint ¶¶ 16, 26. Plaintiff has advertised his services on a  
7 business website and on a Facebook page. Complaint ¶ 21.

### 8 **III. THE BUREAU’S ENFORCEMENT OF THE ACT AGAINST PLAINTIFF**

9 On July 13, 2023, the Bureau informed Plaintiff that it was investigating him for violating  
10 the Act. Complaint ¶ 34. Plaintiff explained his business model to a Bureau representative in a  
11 phone call and the representative sent Plaintiff an email memorializing their conversation.  
12 Complaint ¶¶ 35-36 & Exh. 1. That email stated, among other things, that (1) Plaintiff reviewed  
13 client email account information to determine if they had received spam emails; (2) Plaintiff’s  
14 clients provided his findings to their attorneys or attorneys he referred them to; and (3) Plaintiff  
15 contracted with clients to receive 30% of the funds recovered from a client’s successful lawsuit.  
16 *See id.* ¶ 37 & Exh. 1, at 2. The email further informed Plaintiff that he was conducting private  
17 investigations for which a license was necessary and directed Plaintiff to review Business and  
18 Professions Code sections 7521(b) and (e). *Id.*, Exh. 1, at 2.

19 On September 20, 2023, the Bureau issued a Citation Order to Plaintiff. *Id.* ¶ 46 & Exh. 2.  
20 The Citation Order stated that “[a]s a result of a bureau investigation, it was discovered that Spam  
21 Private Eye and [Plaintiff] advertises private investigator services on spamprivateeye.com and  
22 Facebook page without a current and valid license issued by the Bureau.” *Id.*, Exh. 2, at 1. The  
23 Citation Order included an Order of Abatement directing Spam Private Eye and Plaintiff to  
24 “immediately cease and desist” from violating Business and Professions Code section 7520. *Id.*  
25 Plaintiff paid the \$1,000 administrative fine and stopped conveying information to his clients  
26 about their emails, stopped accepting new clients, and took down his business’s Facebook page.  
27 Complaint ¶¶ 54-57. He filed the Complaint on November 16, 2023. *See* ECF No. 1.

28

1 **IV. THE COMPLAINT**

2 Plaintiff alleges that the Bureau’s enforcement of the Act against him violates his First  
 3 Amendment “right to identify spam emails, regardless of his charging a fee for that speech” and  
 4 constitutes a content-based regulation of pure speech without appropriate justification. Complaint  
 5 ¶¶ 83-92. He claims it further violates his substantive due process right to “earn a living in the  
 6 occupation of a person’s choice subject to rational government regulation” under the Fourteenth  
 7 Amendment. *Id.* ¶¶ 93-104. He claims it violates his Fourteenth Amendment equal protection  
 8 rights because he is “similarly situated to a personal assistant or secretary” who is not obligated to  
 9 obtain a license to do their work. *Id.* ¶¶ 105-112. Lastly, he claims that it violates his right under  
 10 the Fourteenth Amendment’s privileges or immunities clause, although he admits that claim is  
 11 barred under Supreme Court precedent. *Id.* ¶¶ 113-116.

12 **LEGAL STANDARD**

13 A complaint may be dismissed for failure to state a claim upon which relief can be granted.  
 14 Fed. R. Civ. P. 12(b)(6). Dismissal is proper where there is no cognizable legal theory or there are  
 15 insufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729,  
 16 732 (9th Cir. 2001). To defeat a Rule 12(b)(6) motion, a plaintiff must allege facts sufficient to  
 17 “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
 18 555 (2007). In deciding a Rule 12(b)(6) motion, a court must assume the plaintiff’s allegations of  
 19 fact are true and must draw all reasonable inferences in their favor. See *Daniels-Hall v. Nat’l*  
 20 *Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, “the tenet that a court must accept as  
 21 true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft*  
 22 *v. Iqbal*, 556 U.S. 662, 678 (2009).

23 **ARGUMENT**

24 **I. PLAINTIFF’S FIRST AMENDMENT CLAIM FAILS AS A MATTER OF LAW.**

25 **A. The Regulation of Private Investigators is a Valid Exercise of the State’s**  
 26 **Police Powers.**

27 The Supreme Court and the Ninth Circuit have long recognized that states may validly  
 28 impose licensing requirements on persons engaged in certain activities, notwithstanding the First

1 Amendment. See *National Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*,  
2 228 F.3d 1043, 1053 (9th Cir. 2000) (“*NAAP*”) (“The Supreme Court has held that ‘it has never  
3 been deemed an abridgement of freedom of speech or press to make a course of conduct illegal  
4 merely because the conduct was in part initiated, evidenced, or carried out by means of language,  
5 either spoken, written, or printed.’” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490,  
6 502 (1949); see also *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (holding that “the  
7 State does not lose its power to regulate commercial activity deemed harmful to the public  
8 whenever speech is a component of that activity”). Indeed, a content-neutral licensing scheme  
9 may be a valid exercise of the state’s police power “[a]lthough some speech interests may be  
10 implicated.” *NAAP* at 1056; accord *Tingley v. Ferguson*, 47 F.4th 1005, 1076 (9th Cir. 2022),  
11 *pet’n for rehearing or rehearing en banc denied*, 57 F.4th 1072 (9th Cir. 2023).

12 Here, California has an interest in shielding the public from “the untrustworthy, the  
13 incompetent, or the irresponsible” (*Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J.,  
14 concurring)) by requiring that persons engaged in the practice of private investigation have the  
15 requisite education, experience, and knowledge, and to provide a means of oversight and  
16 accountability over them (*cf. Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361,  
17 2373-74 (2018) (“*NIFLA*”) (holding that the law at issue in that case was not a regulation of  
18 professional conduct)).

19 **B. The Act Does Not Burden Plaintiff’s First Amendment Rights Because It**  
20 **Regulates Conduct With At Most An Incidental Impact on Speech.**

21 The Supreme Court has observed that “the First Amendment does not prevent restrictions  
22 directed at commerce or conduct from imposing incidental burdens on speech” (*Sorrell v. IMS*  
23 *Health Inc.*, 564 U.S. 552, 567 (2011)) and the Ninth Circuit has likewise held that “the state’s  
24 power to regulate [professional conduct] is ‘great’ even though this type of regulation ‘may have  
25 an incidental effect on speech’” (*Tingley*, 47 F.4th at 1072 (quoting *Pickup v. Brown*, 740 F.3d  
26 1208, 1227 (9th Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. 2361)). In *Tingley*,  
27 the Ninth Circuit held that Washington’s law prohibiting licensed therapists from performing  
28 “conversion therapy” on minors “regulated only treatment, and any effect on free speech interests

1 is merely incidental.” 47 F.4th at 1073 (cleaned up). As such, the law was subject to rational basis  
2 review, and the law was “rationally related to the legitimate government interest of protecting the  
3 well-being of minors.” *Id.* (quoting *Pickup v. Brown*, 740 F.3d at 1232).

4 Here, Plaintiff is in the business of reviewing emails within his client’s email accounts,  
5 creating spreadsheets and PDF copies of emails that he believes may violate the Anti-Spam Act,  
6 and sharing them with his clients. Plaintiff alleges that “by telling [him] to not ‘review [a] client’s  
7 email account information’ without being licensed, Defendants are engaged in the content-based  
8 regulation of pure speech.” Complaint ¶ 86. But this allegation incorrectly frames the nature of  
9 the restriction—Plaintiff is not an unlicensed “private investigator” under the Act by virtue of any  
10 speech, but because he, for consideration, engages in business to furnish and make investigations  
11 for the purpose of obtaining certain types of information, without a license to do so. *See* Cal. Bus.  
12 & Prof. Code §§ 7520, 7521. The Act is thus properly understood as limiting professional  
13 conduct, and any resulting burden on speech is merely incidental. *See Eastern Profit Corp. Ltd. v.*  
14 *Strategic Vision US LLC*, 2021 WL 2554631, at \*30 (S.D.N.Y. June 22, 2021) (distinguishing  
15 between Virginia private investigator statute’s focus on an unlicensed business’s offer to  
16 undertake private investigator services and the counterparty’s actual use of the information  
17 provided). Indeed, Plaintiff remains free to express his views on any subject. Because  
18 enforcement of the Act against Plaintiff regulates his professional conduct with only an incidental  
19 impact on his speech, and because it easily satisfies rational basis review (*see* Section III, *infra*),  
20 his First Amendment claim necessarily fails.

21 **C. Plaintiff’s First Amendment Claim Would Also Fail as a Matter of Law**  
22 **Under the *Central Hudson* Test for Regulations of Commercial Speech.**

23 Even assuming the Bureau’s enforcement of the Act against Plaintiff regulates his  
24 “speech,” that speech could only be categorized as commercial, and Plaintiff’s First Amendment  
25 claim fails as a matter of law under the test for restrictions of commercial speech established in  
26 *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

1                   **1. To the extent the Act regulates “speech,” it regulates Plaintiff’s**  
2                   **commercial speech.**

3                   “[C]ommercial speech is usually defined as “speech that does no more than propose a  
4 commercial transaction,” but this definition is “just a starting point.” *Ariix, LLC v. NutriSearch*  
5 *Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (citations omitted). Courts try to make “a ‘common-  
6 sense distinction’ between commercial speech and other varieties of speech.” *Id. See Pharm.*  
7 *Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) (defining commercial speech as  
8 “expression related solely to the economic interests of the speaker and its audience”).

9                   Here, Plaintiff’s interest in his investigative activities is commercial. He is not engaged in  
10 political, religious, or philosophical discourse. Nor are his motives humanitarian. *Cf. Holder v.*  
11 *Humanitarian Law Project*, 561 U.S. 1, 21-22 (2010) (non-profit speaking on humanitarian and  
12 political issues); *Upsolve Inc. v. James*, No. 22-cv-627 (PAC), 2022 WL 1639554 (S.D.N.Y. May  
13 24, 2022) (unpaid volunteers helping the poor deal with debt collectors). Thus, even assuming  
14 Plaintiff’s professional conduct could be considered “speech,” it is solely commercial speech, and  
15 any restriction on it is subject to the *Central Hudson* test.

16                   **2. Enforcement of the Act against Plaintiff satisfies the *Central Hudson***  
17                   **test.**

18                   Assuming that Plaintiff’s speech concerns lawful activity and is not misleading,  
19 enforcement of the Act against Plaintiff satisfies the *Central Hudson* test. First, California has a  
20 substantial interest in protecting consumers from unlicensed activity. The state has declared that  
21 “[u]nlicensed activity in the professions and vocations regulated by the Department of Consumer  
22 Affairs is a threat to the health, welfare, and safety of the people of the State of California.” Cal.  
23 Bus. & Prof. Code § 145(a); *see also Gray v. Dep’t of Pub. Safety*, 248 A.3d 212, 222 (Me.  
24 2021), *cert. denied*, 142 S.Ct. 350 (2021) (“The government has a significant interest in  
25 maintaining standards of good character and competency for those who investigate and report on  
26 the intimate details of others’ lives.”). The Bureau can act to protect consumers from the willful  
27 misconduct and negligence of licensed private investigators by disciplining them, suspending  
28 their licenses, or even revoking them. That oversight is lacking to the extent that unlicensed,

1 untrained, and incompetent persons are permitted to engage in private investigations for profit,  
2 without the oversight to which licensees are subject. California also has a compelling interest in  
3 proscribing the advertising of services that are false or misleading, and preventing deceptive  
4 practices generally. *Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1064 (1999);  
5 *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 808 (1971).

6 The State’s interest is especially acute in the circumstances of this case, where Plaintiff  
7 seeks declaratory and injunctive relief as to “Defendants’ future enforcement of California’s  
8 private investigator laws and the regulations promulgated under the private investigator laws” as  
9 applied to him. Complaint at 16 (Request for Relief). Such relief would allow Plaintiff complete  
10 freedom to engage in unlicensed activity, and prohibit state regulators from stepping in to protect  
11 vulnerable consumers, no matter how egregious his conduct.

12 Enforcement of the Act against Plaintiff also satisfies the third prong of the *Central Hudson*  
13 test. The Act, and the Bureau’s enforcement of it, directly advances the State’s asserted interest  
14 in—and the Bureau’s mission of—protecting the public against persons and entities that offer  
15 illegal and unlicensed services and ensuring their professional competence. Any resulting  
16 restriction on Plaintiff’s speech entailed by application of the law will alleviate those harms to a  
17 material degree. “To be effective, the government must have the power to maintain *public safety*  
18 *and order, and this requires the government to regulate aspects of our lives.” Pac. Coast*  
19 *Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020) (emphasis added).

20 Finally, the fourth prong of the *Central Hudson* test requires that the restriction on speech  
21 be “not more than necessary to serve the interests that support it.” *Italian Colors Rest. v. Becerra*,  
22 878 F.3d 1165, 1178 (9th Cir. 2018). To satisfy this test, “California is not required to employ the  
23 least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged  
24 regulation to the asserted interest, or, in other words, a reasonable fit.” *Id.* (citation omitted).  
25 Here, enforcement of the Act against Plaintiff is narrowly tailored. It would only penalize  
26 Plaintiff for violating section 7520 of the Act (*see* Complaint, Exh. 2, at 1) and he would remain  
27 free to engage in communicative activity that does not otherwise constitute acting as an  
28 unlicensed private investigator under the statute.

1           **D. Even Under a Non-Commercial Speech Analysis, Intermediate Scrutiny**  
2           **Applies Because Enforcement of the Act Against Plaintiff is Content**  
3           **Neutral.**

4           Even if enforcement of the Act against Plaintiff could be deemed to restrict speech that is  
5           not commercial, it would still pass constitutional muster because it is content neutral and  
6           therefore subject to intermediate scrutiny, which it passes as a matter of law. Defendants  
7           respectfully submit that the Ninth Circuit decision in *NAAP*, 228 F.3d 1043, is dispositive. The  
8           *NAAP* Court held that the licensing scheme for psychoanalysts was content and viewpoint neutral.  
9           *Id.* at 1055. “Although the California laws and regulations may require certain training, speech is  
10          not being suppressed based on its message. . . . The licensing scheme . . . was not adopted  
11          because of any disagreement with psychoanalytical theories. It was adopted for the important  
12          purpose of protecting public health, safety, and welfare.” *Id.* Here, too, the Bureau has not  
13          restricted any of Plaintiff’s speech based on message but has simply required that he meet certain  
14          experience and licensing requirements. Thus, this case is unlike *Pacific Coast Horseshoeing*  
15          *School v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), where the Ninth Circuit held that the  
16          particular law at issue “*favours* particular kinds of speech and particular speakers through an  
17          extensive set of exemptions,” and for that reason was content-based. *Pac. Coast Horseshoeing*  
18          *Sch.*, 961 F.3d at 1072.<sup>2</sup> Here, the Act applies broadly to Plaintiff and all other persons engaged  
19          in the business of private investigation.

20          Determining whether the Act applies to Plaintiff may require someone to analyze whether  
21          his specific business activities fall within the Act’s definition of a “private investigator,” but that  
22          does not make the law “content-based.” In *City of Austin v. Reagan National Advertising of*  
23          *Austin, LLC*, 596 U.S. 61 (2022), the Supreme Court held that a sign regulation was not content-  
24          based simply because the law would require a reader to ask, “who is the speaker and what is the  
25          speaker saying.” *Reagan*, 596 U.S. at 69. “This Court’s First Amendment precedents and  
26          doctrines have consistently recognized that restrictions on speech may require some evaluation of  
27          the speech and nonetheless remain content neutral.” *Id.* at 72.

28          <sup>2</sup> The Court remanded to the district court to decide whether the statute regulated commercial speech, in which case intermediate scrutiny would apply. *Id.* at 1073-74.



1 Plaintiff alleges that his business activities are entitled to First Amendment protection  
2 because they involve receiving, reading, repackaging, and sharing information. *See, e.g.*,  
3 Complaint ¶ 83. Every profession—medicine, law, engineering, architecture—inevitably involves  
4 the conveying of information. *See, e.g., Tingley*, 47 F.4th at 1073. If the Bureau’s enforcement of  
5 the Act were held to be a content-based regulation of speech, under the same principle, no state or  
6 government regulation of any profession would survive unless it could meet the heavy burden of  
7 strict scrutiny—a standard not required by Supreme Court or Ninth Circuit authority.

## 8 **II. PLAINTIFF’S SUBSTANTIVE DUE PROCESS CLAIM FAILS AS A MATTER OF LAW.**

9 Plaintiff’s claim that enforcement of the Act against him violates his substantive due  
10 process rights to earn a living (Complaint ¶¶ 93-104) similarly fails as a matter of law.  
11 “[S]ubstantive due process prevents the government from engaging in conduct that shocks the  
12 conscience, or interferes with rights implicit in the concept of ordered liberty.” *United States v.*  
13 *Quintero*, 995 F.3d 1044, 1051-52 (9th Cir. 2021) (quoting *United States v. Salerno*, 481 U.S.  
14 739, 746 (1987)); *see also Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009); *Nunez v. City of*  
15 *Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). Absent circumstances triggering a higher level of  
16 scrutiny, which Plaintiff does not allege for purposes of his substantive due process claim, a  
17 challenged statute is subject to rational basis review. *Romero-Ochoa v. Holder*, 712 F.3d 1328,  
18 1331 (9th Cir. 2013). “Such review does not provide ‘a license for courts to judge the wisdom,  
19 fairness, or logic of legislative choices.’” *Id.* (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S.  
20 307, 313 (1993)). In the context of regulating entry into a profession, “any such regulation must  
21 be rationally related, not merely to a legitimate state interest, but more specifically to the ‘the  
22 applicant’s fitness or capacity to practice’ the profession itself.” *Dittman v. California*, 191 F.3d  
23 1020, 1030-31 (9th Cir. 1999) (citing *Schwartz v. Board of Bar Exam’rs*, 353 U.S. 232, 239  
24 (1957)).

25 In an attempt to support his substantive due process claim, Plaintiff alleges in broad,  
26 conclusory terms that his business is so dissimilar from “conventional private investigations” that  
27 “any government’s interest in regulating private investigators is not implicated.” Complaint ¶ 96.  
28 He tersely alleges that “[r]equiring [Plaintiff] to be licensed as a private investigator would not

1 protect the public” (*id.* ¶ 101), and he focuses almost entirely on whether compliance with  
2 statutory requirements would establish his competency to identify legally actionable spam (*see id.*  
3 ¶¶ 97-98 (alleging that “learning to identify actionable spam” takes “hours of training at most”  
4 and “does not take three years”)), *id.* ¶ 99 (“None of the fields in which Defendants require  
5 training have any meaningful connection to identifying spam emails.”); *id.* ¶ 100 (“The exam that  
6 [Plaintiff] would undergo does not test anything about spam email.”); *see also id.* ¶ 89). Plaintiff  
7 does not support these conclusions with any factual matter regarding, for example, the nature of  
8 “conventional” private investigator training or work or the content of the Bureau’s examinations,  
9 and the Court should thus disregard them. *See Iqbal*, 556 U.S. at 678.

10 But even so, competence to identify a potential violation of law represents only a fraction of  
11 what private investigator licensing requirements ensure, and compliance with California’s  
12 licensing requirements would in fact further Plaintiff’s fitness and competency to conduct his  
13 investigations effectively, efficiently, responsibly, and with a view to protecting his clients, the  
14 public, and himself. For example, requiring Plaintiff to obtain the requisite experience by working  
15 under a licensed private investigator—even if doing so does not involve any identification of  
16 spam emails—is rationally related to enhancing his ability to effectively communicate with his  
17 clients, understand their needs, develop investigation plans, and avoid client investigative  
18 requests that are illegal or unethical. *See* Complaint ¶¶ 23, 24, 25. To the extent he investigates  
19 his client’s email accounts to identify evidence for use in judicial proceedings (*see id.* ¶¶ 26, 28),  
20 passing an appropriate examination and gaining the requisite experience is rationally related to  
21 ensuring his understanding of those proceedings, evidence preservation requirements, chain of  
22 custody methods, and how to appropriately respond to subpoenas and court orders and testify  
23 about his findings and investigative methods if called to do so. The nature of Plaintiff’s business  
24 involves obtaining access to the sensitive communications of both his clients and the senders of  
25 emails in his client’s inboxes (*see id.* ¶ 24, 25)—who may include other members of the public  
26 who are unaware that a team of third parties has been granted access to potentially confidential  
27 emails primarily intended for the eyes of Plaintiff’s clients. Proper investigatory experience and  
28 examination would ensure that Plaintiff understands laws concerning privacy rights, personal

1 information, and disclosure of public and non-public information. *See Eastern Profit Corp. Ltd. v.*  
2 *Strategic Vision US LLC*, 2021 WL 2554631, at \*25 (S.D.N.Y. June 22, 2021) (examining  
3 Virginia private investigator statute and concluding that “to review confidential and not readily  
4 accessible information . . . is the stuff of private investigatory work, not mere research”). And to  
5 the extent Plaintiff is the owner and manager of his own business (*see* Complaint ¶¶ 19, 20), it  
6 would ensure he understands laws concerning advertising and solicitation, employee  
7 compensation, fee agreements, and employment and termination requirements.

8 In sum, requiring Plaintiff to comply with these requirements bears a direct relation to  
9 ensuring that he has the comprehensive competence and fitness to successfully and responsibly  
10 engage in his business, far beyond his ability to “identify spam emails.” And it would  
11 concurrently serve the state’s interests in protecting consumers, the privacy interests of the  
12 general public, the reliability of evidence, and the integrity of the judicial system. *See Fla. Bar v.*  
13 *Went for It, Inc.*, 515 U.S. 618, 625 (1995) (“States have a compelling interest in the practice of  
14 professions within their boundaries, and . . . as part of their power to protect the public health,  
15 safety, and other valid interests they have broad power to establish standards for licensing  
16 practitioners and regulating the practice of professions.” (quotation marks omitted)).

### 17 **III. PLAINTIFF’S EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW.**

18 An equal protection claim arises only when, as relevant here, a regulation treats one class of  
19 persons different from others who are similarly situated. Absent a fundamental right or suspect  
20 class—which plaintiff has not alleged—the law or restriction is subject to highly deferential  
21 rational basis scrutiny. *Big Tyme Invests., L.L.C. v. Edwards*, 985 F.3d 456, 468 (5th Cir. 2021).

22 But Plaintiff’s claim fails under any standard. Plaintiff does not allege that he is a member  
23 of a protected class, so his equal protection claim could only rest on a “class-of-one” theory,  
24 which requires plausible allegations that plaintiff has been “intentionally treated differently from  
25 others similarly situated and that there is no rational basis for the difference in treatment.” *Enquist*  
26 *v. Or. Dep’t of Agr.*, 553 U.S. 591, 601 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564  
27 (2000). Plaintiff would have to allege facts showing a high degree of similarity between him and  
28 those he claims received better treatment. *United States v. Moore*, 543 F.3d 891, 896 (7th Cir.

1 2008). To be similarly situated, “the class-of-one challenger and his comparators must be ‘prima  
2 facie identical in all relevant respects or directly comparable . . . in all material respects.’” *Id.* at  
3 896.

4 The Complaint alleges that plaintiff is similarly situated to “personal assistants and  
5 secretaries” who “often read another person’s emails and then convey information from those  
6 emails to that person.” Complaint ¶ 107. But the Act would not exempt those who, for example,  
7 read or convey such information for purposes of an “investigation” into a person’s activity or  
8 conduct (*see* Cal. Bus. & Prof. Code § 7521(b)), determine “the cause or responsibility” of  
9 “damage or injury” to a person by virtue of violating California’s Anti-Spam Laws (*see* Cal. Bus.  
10 & Prof. Code § 7521(d)), or secure emails and information for the purpose of presenting them as  
11 evidence in future court proceedings (*see id.* § 7521(e)). And Plaintiff has not alleged the specific  
12 facts that would be required to state a claim under the “class of one” theory, since he has not  
13 alleged that the Bureau does not enforce the Act against other non-licensed persons who engage  
14 in the practice of private investigation. His equal protection claim should be dismissed.

#### 15 **IV. PLAINTIFF’S PRIVILEGES OR IMMUNITIES CLAIM FAILS AS A MATTER OF LAW.**

16 Lastly, Plaintiff purports to bring a claim under the Fourteenth Amendment’s privileges or  
17 immunities clause (Complaint ¶¶ 113-116) but “recognizes that this claim is foreclosed by  
18 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)” (Complaint ¶ 116). While Plaintiff alludes  
19 to scholarly disagreement over whether *Slaughter-House* was correctly decided (*see id.*), it  
20 remains binding precedent, and this Court should therefore dismiss his privileges or Immunities  
21 claim.

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**CONCLUSION**

The Court should dismiss the Complaint because it fails to state a claim upon which relief may be granted.

Dated: December 29, 2023

Respectfully submitted,

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