UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ACA International, Inc. and Independent Recovery Resources, Inc. Plaintiffs, v. Eric Adams, in his official capacity as mayor of New York City; New York City Department of Consumer and Worker Protection; Vilda Vera Mayuga in her official capacity as Commissioner of the Department of Consumer and Worker Protection, and the City of New York. Defendants.	Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs ACA International, the Association of Credit and Collection Professionals, a Minnesota nonprofit corporation ("ACA") and Independent Recovery Resources, Inc. ("IRR") bring this action for declaratory and injunctive relief against Defendants Eric Adams, in his official capacity as mayor of New York City; New York City Department of Consumer and Worker Protection ("DCWP"); and Vilda Vera Mayuga in her official capacity as Commissioner of the DCWP. Plaintiffs respectfully request this Court to enjoin the adoption, effect, and enforcement of, and set aside, a rule amending Title 6 of the Rules of the City of New York (the "Rule") as it relates to debt collectors. (City Rec, Aug. 12, 2024 at 4068–79 (Consumer and Worker Protection Notice of Adoption)) (attached hereto as **Exhibit 1**). The Rule must be set aside because it offends the U.S. Constitution and is preempted by federal and state law.

Plaintiffs assert six claims against Defendants. First, the Rule discriminates based on the content and speaker of targeted speech and fails to justify that restriction of protected speech in violation of the First Amendment. Second, the Rule violates the First Amendment's petitions clause because it restricts access to courts based on the identity of the petitioner. Third, the Rule mandates that collectors engage in unnecessary, irrational speech, in violation of the First Amendment, to both their own detriment and the detriment of consumers. Fourth, the Rule violates the Fourteenth Amendment's due process clause by promulgating confusing, contradictory, and vague rules that leave collectors with little guidance as to what actions are permitted or unpermitted. Fifth, the Rule is preempted by federal law that states that additional state regulations are not permitted if they fail to provide consumers more protection (which the Rule fails to do). Finally, the Rule violates the Constitution of the State of New York because comprehensive state laws and regulations foreclose additional municipal regulations on the subject of default judgments.

In support of this Complaint, Plaintiffs allege as follows:

I.
PARTIES

ACA International

1. ACA is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota. Founded in 1939, ACA represents approximately 1,800 members, including third-party collection agencies, law firms, creditors, asset-buying or debt-buying companies, and vendor affiliates. ACA provides a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. ACA's

primary purpose is to promote and maintain the highest standards of professionalism in the credit-and-collection industry. To that end, ACA represents its members' interests in the legislative and regulatory processes and addresses regulatory issues that are critical to members' success.

2. ACA's membership includes credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates members located across the United States and in New York. Many ACA members are licensees of Defendant DCWP and will have their activities affected and restricted by the Rule at issue in this case.

3. ACA members collecting debt in New York City regularly need to communicate with Consumers who reside in New York City. The accounts placed for collection arise from a variety of consumer transactions for goods and services provided by small and large businesses located in New York City and elsewhere. In collecting these accounts, ACA members seek to recover unpaid past due amounts for services rendered—including for medical and hospital care—as well as from unpaid past-due obligations due for resolving credit accounts, residential leases, utilities, and municipal fines. ACA members use multiple mediums to contact consumers in New York City, including telephone calls, email, text messages, and U.S. mail. These members have performed these activities in the past and will continue to perform them after the Rule's effective date, December 1, 2024.

4. In addition, ACA members must at times enforce judgments against New York City residents in the courts of New York City. These judgments may have been obtained in New York courts, or they may have been obtained in other states where a current New York City resident may have previously resided. These members have performed these activities in the past but will also perform them after the Rule's effective date, December 1, 2024.

5. ACA's members include firms that purchase past-due accounts from original creditors and then seek to collect those accounts. Such purchases will and have occurred in the past—prior to the Rule's effective date—and will occur going forward, after December 1, 2024. Many of these members have in the past and will in the future seek to contact New York City residents to collect accounts and to enforce default.

6. ACA's members who meet the definition of "debt collector" under the federal Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. §§ 1692–1692, have been complying with the provisions of that overarching federal debt-collection law since its enactment in 1977. In addition, ACA's members have been complying with the provisions of Regulation F, codified at 12 C.F.R. Part 1006, which the federal Consumer Finance Protection Bureau began exploring in October 2012 via public field hearings before promulgating a final rule some either years later in October 2020. These members have performed these activities in the past but will also perform them after the Rule's effective date, December 1, 2024.

Independent Recovery Resources, Inc.

7. IRR, a certified Woman Owned Small Business based in Patchogue, New York, operates as a full-service debt collection agency and employs a staff of five. IRR is a female owned and operated Certified Women Owned Small Business (WOSB). Anita Manghisi, the president and chief executive officer of IRR, created this small business in March of 1996 and has employed dozens of New York residents and worked with dozens of clients in the state. IRR's clients rely on it to help recover their outstanding debt so that they can continue operating and providing quality healthcare to the consumers they serve.

8. IRR is a licensee of Defendant DCWP and will have its activities affected and restricted by the Rule at issue in this case. As a small business, with just five employees, IRR

will incur substantial harm since its small staff will need to divert significant time and resources to an effort to become complaint with the Rule by December 1, 2024. If IRR cannot come into compliance, the company risks violating the Rule, or, in the alternative, it must cease collecting on accounts until it can come into compliance.

9. If IRR must stop or curtail collections for any period due to the Rule, its property—comprised of payment rights on accounts receivables—will age and become less valuable.

10. Beyond this, parts of the Rule that are unconstitutionally vague and it will thus be impossible to comply by December 1, 2024. Any inability to decipher what the Rule requires will lead to additional costs if IRR and other ACA members have to make further changes once the vague provisions become clear—if they ever do— particularly where the clarity comes via litigation or via a DCWP enforcement action.

11. IRR will not be able to comply with many of the record and log requirements for complaints and communication attempts the new rule requires. Like most other collection agencies, IRR's systems of record would require the purchase of new and unique systems just for collection from residents of New York City as well as customization to obtain these new data elements. This will add an additional exorbitant expense to IRR as they simply do not have the internal resources to extract this data.

12. IRR has accounts in New York City, including in the Eastern District of New York, and it regularly makes calls and sends emails for those accounts. Currently, IRR adheres to the frequency limits and other parameters outlined in Regulation F, including adhering to a per account limitation on telephone calls.. Under the Rules, however, communications and communication attempts—not just calls, but all channels of communication, would be capped on

a per consumer basis. Therefore, the Rule would greatly limit the ability of IRR to make contact with that consumer. For example, if two of a consumer's accounts were placed with IRR for collection, IRR would be able to attempt to communicate with the consumer only 1.5 times every seven days. This would significantly burden IRR's ability to communicate with consumers and would, in turn, make it more difficult for IRR to collect debt for its clients.

13. In addition, in an effort to become complaint with the Rule, IRR would need to add a second itemization of debt in its validation notice for each consumer debt it attempts to collect. This special itemization for New York City would, it appears, largely overlap with the itemization required by Regulation F, but to the extent it requires different information, it would clearly require a novel—and vague—disclosure. The estimate of the cost of updating its validation notices to be $2,500.00, which does not include the soft costs of diverting its small staff's energies to understanding the new requirements, working with vendors to implement necessary changes, and monitoring for compliance with the new procedures.

14. Under the new Rule, for medical debts, information about the debt cannot be reported to a consumer reporting agency, and this information must now be disclosed to the consumer in the validation notice. Both of these changes also have a direct impact on the ability to collect and will also add administrative costs.

15. Beyond the above specifically mentioned changes, there are a number of other changes in the Rule that deviate from Regulation F (12 C.F.R. Part 1006), which will require additional programming, administrative, and opportunity costs. In sum, IRR will be irreparably harmed if the Rule becomes effective.

16. IRR's allegations at paragraphs 8 through 15 are common to most ACA members who collect on accounts from New York City residents.

Defendants

17. Defendant Eric Adams, sued in his official capacity, is the Mayor of the City of New York.

18. Defendant Vilda Vera Mayuga, sued in her official capacity, is the Commissioner of the City of New York's Department of Consumer and Worker Protection.

19. Defendant City of New York is a municipal corporation incorporated under the laws of the State of New York.

20. Defendant City of New York Department of Consumer and Worker Protection is an agency of the City of New York created by the New York City Council in 1969.

II.
JURISDICTION AND VENUE

21. This action arises under the United States Constitution, Amendments One, Five, and Fourteen.

22. Federal question jurisdiction lies in this Court pursuant to 28 U.S.C. § 1331. This action seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1983 and 1988.

23. Venue lies in this District pursuant to 28 U.S.C. § 1391(b) because the Rule at issue affects activities in connection with New York City residents and businesses collecting debt in New York City from New York City residents. This District covers three of the five boroughs of New York City – Brooklyn, Queens and Staten Island—and therefore will directly affect activities within this District. Additionally, a substantial part of the events and omissions giving rise to this action occurred in this District.

III.
FACTUAL ALLEGATIONS

A. Regulation of the Debt Collection Field

24. The New York City Rule at issue was published about four years after the federal agency that regulates financial services, the Consumer Financial Protection Bureau ("CFPB"), issued and finalized its debt-collection rules. *See* Regulation F (12 C.F.R. Part 1006) (published October 30, 2020, most recently amended April 19, 2023). Regulation F implements the federal FDCPA, which governs debt-collection practices nationwide. *See* 15 U.S.C. §§ 1692–1692p.

25. The CFPB's Regulation F required over *seven years* of regulatory effort that involved multiple government studies and consumer testing.

26. Regulation F regulates all aspects of debt collection, ranging from telephone call frequency, disclosures, electronic communications, and debt collection litigation.

27. Industry representatives including ACA spent thousands of hours educating the CFPB about how members conduct business, the importance of debt collection to the functioning of the U.S. economy, and how collection efforts can legally and efficiently be accomplished.

28. Setting aside whether certain aspects of Regulation F may be problematic from a Constitutional and Administrative Procedure Act perspective, there is no question that when it became effective on November 30, 2021, debt collector practices across the United States—including in New York City—were significantly limited and became much more highly regulated.

29. The CFPB issued Regulation F on October 30, 2020 and it was published in the Federal Register on November 30, 2020. Regulation F became effective one year later, on November 30, 2021. 85 Fed. Reg. 76734 (Nov. 30, 2020). To aid implementation, the CFPB

provided FAQs, a Small Entity Compliance Guide, and a variety of other materials to help stakeholders successfully comply.

30. After November 30, 2021, debt collectors in New York were bound to follow Regulation F's heightened standards.

B. New York City's 2024 Debt Collection Rule

31. On August 12, 2024, the New York City Department of Consumer and Worker Protection published a rule amending Title 6 of the Rules of the City of New York as it relates to "debt collectors," a defined term under the City of New York Code. The Rule will take effect on December 1, 2024. The Rule applies to:

(a) collection activities by New York City licensed debt collectors on or after December 1, 2024, on accounts due from New York City residents;

(b) all debt accounts collected by licensees regardless of when the account was charged off or when debt collection began, with only one exception.[1]

32. It is unclear from the Rule's face whether the Rule applies to debt collectors located in New York City who collect accounts from residents outside of New York City.

C. DCWP's Stated Interests

33. The administrative record, at **Exhibit 1**, provides the following rationale for promulgating the Rule:

> (a) To "update its debt collection rules in response to changes in federal regulations." New York City Department of Consumer and Worker Protection, Notice of Public Hearing and Opportunity to Comment on Proposed Rules (Sept. 20, 2023) at 3; (City Rec, Aug. 12, 2024 at 4068 (Consumer and Worker Protection Notice of Adoption)).
>
> (b) To respond to "additional questions and feedback to the Department" from the industry. (City Rec, Aug. 12, 2024 at 4068 (Consumer and Worker Protection Notice of Adoption)).

[1] The verification requirements in § 5-77(f)(7) do not apply to debt accounts purchased before December 1, 2024.

(c) "To further address trade practices and consumer protection concerns as it pertains to debt collection from New York City residents." (City Rec, Aug. 12, 2024 at 4068 (Consumer and Worker Protection Notice of Adoption))..

34. Another stated justification for the adoption of the Rule was to bring the City's regulations into alignment with federal rules, such as Regulation F. As detailed below, however, the Rule materially deviates from the requirements of the FDCPA and its implementing regulation, "Regulation F" (12 C.F.R. Part 1006), in many material respects. *Infra* ¶¶ 62 through 115.

35. The DCWP's justifications cited above are not supported by data, studies, or facts that support changing existing rules, nor do they specifically identify any existing problems that the Rule's provisions will purportedly solve. Nor does it explain why New York state and federal debt collection regulation is insufficient in the area. Moreover, the administrative record does not cite any evidence that the Rule will directly improve the problems it has observed. Additionally, if the government's interest in stopping debt collection calls was substantial enough to justify this regulation, the government would surely need to address problems created by all collection activities—not merely those from licensee debt collectors.[2]

D. Summary of the Ways in Which the Rule Violates the Law

36. As explained in more detail below, this Rule violates targeted licensee's constitutional rights. First, the rule violates the First Amendment when it imposes material restraints on speech for no good reason. For example, it sets an arbitrary cap that limits licenses from making more than three contact attempts per week via any communication method. Thus,

[2] Again, government entities, public utilities, and original creditors are exempt from the Rule's speech limitations. Of the 261 complaints received by the CFPB regarding excessive calls in New York City, only half came from third-party debt collectors. The rest came from original creditors who are exempt from this Rule. Supra ¶ 33(c).

even if the fourth contact is a consumer making an inbound call to a collector, the debt collector violates the law.

37. The Rule deprives Plaintiffs of their Fifth and Fourteenth Amendment due process rights because the Rule in several respects is unconstitutionally vague and imposes impossible restrictions. For example, one section requires an untruthful disclosure that certain debt "will" be reported to a credit reporting agency, even if it may not be. Another section requires disclosure of an "itemization reference date" that for many types of collected accounts simply does not exist.

38. As such, third-party collection agencies, asset buyers, and law firms must fabricate information to comply with the Rule (something that they would, of course, be prohibited from doing under the FDCPA). Further, the Rule imposes verification of debt requirements with a strict timeframe that when unmet will make certain accounts uncollectable, thus taking property without providing a process or proceeding.

39. Despite the fact that a claimed rationale for the Rule is to "update its debt collection rules in response to changes in federal regulations," the Rule ignores various provisions of Regulation F, as its provisions materially deviate from the CFPB's Rule. As a result, the Rule effectively (and unlawfully) requires New York City-licensed debt collectors to establish and implement systems and processes that are different for people who reside *in* New York City than for people who reside *outside* of New York City (i.e., anywhere else in the United States). DCWP specifically includes new requirements in the Rule that the CFPB, after careful consideration over a process that spanned for several years and included analytical data analysis, ultimately decided did not make sense.

40. The Rule conflicts with Regulation F in at least 11 respects, which are detailed in the following section. In addition, the Rule conflicts with New York State laws enacted to ensure both consumer protection in the event of default judgments and full faith and credit for foreign judgments. N.Y.C.P.L.R. 3215 (McKinney 2014); N.Y. Comp. Codes R. & Regs. 22, §§ 202.27-a and 202.27-b. Thus, both the FDCPA and these state laws preempt the New York City Rule.

41. Not only does the Rule violate constitutional rights and conflict with other laws, the DCWP only gave licensees 112 days (less than four months) to review, analyze the Rule, and determine how to reprogram systems and modify processes prior to the Rule's implementation date. This is an irrationally short period of time given the complexity and breadth of the Rule's provisions. In contrast, the CFPB gave debt collectors a full year to adjust systems when it promulgated Regulation F—a set of rules with similar complexity and impact to the processes of those in the collection industry. For example, the Rule suddenly requires licensees to create summaries of telephone calls with consumers. No electronic record keeping systems even exist that can automate this process. It may be years before one is developed. This impossible situation will cause ACA's member licensees to violate the law beginning December 1, 2024, and will expose them to unintentional regulatory violation risk from DCWP and private plaintiff litigation risk from consumers residing in New York City.

42. Finally, this Rule hurts New York City residents and burdens the courts by encouraging litigation when communication is stymied. Without question, the payment of just debts on voluntary terms reduces needless litigation. Collectors and creditors prefer voluntary resolutions because they are usually faster, more predictable, and private. In addition, voluntary resolutions avoid attorney fees and typically maintain the goodwill of the consumer. Consumers benefit from out-of-court resolutions as they avoid the time-consuming litigation process.

Indeed, when discussing a debt with a collector, consumers can learn about a variety of options to resolve their past-due accounts, including payment deferral, extended payment plans, or other financial assistance—any of which the consumer may prefer to litigation. The concern about over-regulation causing needless litigation is proven by history. Following the enactment of new debt collection regulations in 2015, in New York State, collections lawsuit filings rose 32% in 2018 and 61% in 2017 from pre-2015 levels. Yuka Hayashi, Debt *Collectors Make a Comeback*, Wall Street Journal Podcast, July 5, 2019 (crediting New Economy Project, a consumer advocacy group). The Rule stifles productive communications to resolve accounts, thereby increasing the likelihood of a collection lawsuit eventually being filed against the consumer. And in the time that passes before the filing of a collection lawsuit, in some cases interest may continue to accrue (increasing the amount of debt owed).

E. The Rule's Effects on ACA, Its Members, and the Public Interest

43. The Rule provisions described below at paragraphs 95 through 115 impose on affected debt collectors burdens that are in addition to the burdens imposed by federal debt collection law or New York state debt collection law. Yet nothing in the administrative record supports the rationale for these unmanageable burdens. Many of the changes that appear in the NYC Rule were directly considered by the CFPB and ultimately rejected after studying the issues and engaging with stakeholders.

44. These deviations between federal requirements and the Rule require every debt collector to modify systems, computers, training, and processes to adapt their often nationwide policies and procedures to meet the peculiar demands of just this one metropolitan area.

45. Each of these departures from the federal regulations creates hardship for collectors who must invest significant time, money, and manpower in adjusting national practices for this localized metropolitan area. Collectors who do not have the resources to adjust

systems in order to so quickly comply face two harmful options: (1) continue to collect without complying with the Rule or (2) stop collecting on accounts owed by New York City consumers and instead let their accounts receivable assets age and lose their value. *See also supra* ¶¶ 9–16.

46. The Rule has already inflicted upon ACA members, including Plaintiff IRR, concrete, particularized, actual and imminent harm in several ways. The Rule requires the need to divert from existing duties dozens of hours of licensee staff time and other company resources to understand the Rule, purchase and reprogram computer systems and communications to comply with the Rule. *See also supra* ¶¶ 9–16.

47. The Rule has already inflicted upon ACA concrete, particularized, actual and imminent harm in several ways. The Rule requires the need to divert from existing duties dozens of hours of ACA staff time and other company resources to help members understand the Rule and to develop internal compliance materials, including an FAQ resource, to educate members and help members achieve early compliance prior to the unnecessarily quick effective date.

48. The Rule poses an imminent threat to ACA's membership levels and revenues from membership dues.

49. The Rule poses an imminent threat to ACA's members' revenues.

F. <u>Relief Requested</u>

50. Plaintiffs seek an order from this Court enjoining the enactment and enforcement of the Rule in its entirety. While this Complaint focuses on 11 key provisions that are unlawful, there are no stand-alone aspects of the Rule as amended in the instant rulemaking that would make sense or achieve a government interest if they were severed from the main offending provisions.

51. The claims and relief requested in this lawsuit do not require participation of individual ACA members because the members who are subject to the Rule will benefit similarly

from a favorable decision in this case, as would the consumers that the ACA members wish to help.

52. A decision in this case favorable to ACA will redress the injury to ACA and its members because, among other things, it will protect against further constitutional infringement and will relieve ACA's members of the costs imposed by the Rule, permitting them to operate in a manner that respects their relationship with each individual consumer and their contracts with their clients.

53. Injunctive relief will also help consumers, including those who wish to pay their debts or who would benefit from hardship programs that debt collectors can employ when resolving accounts. In the process, it will also eliminate needless litigation over unpaid bills.

G. Notice and Comment History

54. DCWP published the proposed rule on Sept. 20, 2023, and provided the public opportunity for comment. Comments were due on or before Nov. 29, 2023. DCWP held a public hearing on the proposed rule on Nov. 29, 2023, and the transcript is attached at **Exhibit 2**.

55. All comments received by DCWP on the proposed rule remain available online and are incorporated herein by reference. *NYC Consumer and Worker Protection*, Comments Received by the Department of Consumer and Worker Protection on Proposed Rules related to Debt Collectors, at https://www.nyc.gov/assets/dca/downloads/pdf/about/PublicComments-Proposed-Rules-Debt-Collectors.pdf. (hereinafter "DCWP Comments").

56. The DCWP received comments on the proposed Rule that described its significant costs to third-party collector, asset buyers, law firms, account owners, consumers, and New York City commerce, summarized as follows:

> (a) The Rule is not necessary. Regulation F appears to meet the government's regulation goals. In the two years since Regulation F went into effect, consumer

complaints and plaintiff litigation has declined. (DCWP Rs. Hr'g Tr. at 13:6–14, Nov. 29, 2023 (Ex. 2)).

(b) Collectors are not trying to bother consumers, rather to work with consumers to pay off a legitimate debt. If collectors cannot reach consumers and creditors cannot collect outstanding debt, this leads to creditors restricting credit and making it more costly to get credit in the first place. (*Id.* at 23:5–14). This also increased other negative consequences, like negative information on credit reports and lawsuits. (*Id.* at 23:15–22).

(c) The Rule uses overwhelming means to solve a nonexistent problem. The Consumer Finance Protection Bureau ("CFPB") reports receiving only 261 total complaints concerning excessive phone calls in New York City from November 30, 2021, through November 29, 2023. This works out to roughly 0.2 complaints per day. As for electronic communications, the CFPB reports only ten complaints over the same nearly three-year period. Of those ten, only half involved debt collectors. DCWP Comments, Stieger, J. (Nov. 29, 2023) at 6–7.

Of the 261 total complaints of excessive phone call complaints in New York City, roughly half involved original creditors—meaning that the problem that the Rule purports to solve is only half-accomplished by the Rule. *Id.* at 6.

(d) This rulemaking requires a complete overhaul of how collectors communicate with consumers, thus an effective date must be on or after January 2025. (DCWP Rs. Hr'g Tr. at 24:10–20, Nov. 29, 2023 (Ex. 2)).

(e) It hurts consumers to requires a telephone call or written permission before collectors attempt to reach a consumer by email or text if telephone calls or written mail is not the way the consumer wishes to communicate. (*Id.* at 12:15–22).

(f) Consumers change their mailing addresses, but not electronic addresses. So, collectors are more likely to accurately reach people by using email. (*Id.* at 12:23–13:1). If collectors use a channel that a consumer does not like, they can easily tell collectors or just not answer the phone. (*Id.* at 13:1–3). Most consumers prefer text messages. (*Id.* at 13:3–5).

(g) The proposed call caps are extremely restrictive. Commenters requested that the Rule's call frequency limitations mirror the 7 per 7-day period standard of Regulation F. (*Id.* at 16:13-18).

(h) A recent U.S. Postal Service audit found that during a six-month period of March 1 through September 30, 2020, Postal Service misrouted 73 million first-class letters. (*Id.* at 21:14–17). These Postal Service mistakes result in the wrong people receiving dunning letters. (*Id.* at 21:17-19). The Rule requires collectors to respond to any dispute with a document dump of highly confidential credit information. (*Id.* at 22:4–10).

Take, for example, a default judgment obtained years ago. If the consumer requests verification, under the Rule, a copy of the judgment won't be sufficient, and collectors would need to obtain other forms of documents to verify judgments. This may be impossible for some older accounts. Applying the new rule to accounts purchased prior to the effective date would be a retroactive, unconstitutional application of the law. (*Id.* at 24:21–25:4). Every judgment should be entitled to full faith and credit. (*Id.* at 30:4–11). Requiring additional documents be used to enforce a judgment would be unconstitutional because actions merge into a judgment when one is awarded. (*Id.* at 30:4–11).

(i) The Rule presents such difficulty and expense with compliance that it will cause small debt collection businesses to withdraw their New York City licenses and or prevent small businesses from operating in New York. *Id.*, Bob (Nov. 13, 2023).

(j) Over regulation harms consumers by causing creditors to raise prices and/or restrict services in order to stay in business. *Id.*, Bob (Nov. 13, 2023).

(k) The Rule causes consumers to shirk their financial obligations. *Id.*, Bob (Nov. 13, 2023).

(l) The searchable record keeping will incur substantial costs and is highly burdensome. There is no space in current collection software to reflect to whom a collector spoke. *Id.*, Vincent, G. (Nov. 21, 2023).

(m) It is duplicative to require a contact summary if the Rule also requires collectors to record calls and retain copies of call recordings. *Id.*, Vincent, G. (Nov. 21, 2023).

(n) The minimum time necessary to implement the Rule is 18-24 months, therefore, the 90-day implementation period of the New York City Rule is impossibly short. *Id.*, Vincent, G. (Nov. 21, 2023); *Id.*, Newsome, D. (Nov. 22, 2023); *Id.*, Brian (Nov. 29, 2023).

(o) When collectors cannot contact consumers to resolve accounts, collectors are more likely to file immediate litigation to recover on breached contracts. *Id.*, Vincent, G. (Nov. 21, 2023); *Id.*, Newsome, D. (Nov. 22, 2023); *Id.*, Brian (Nov. 29, 2023).

(p) The definition of "medical debt" and "medical providers" is so broad that it covers small business owners such as chiropractors, dentists, mobile massage therapists, etc. If accounts are uncollectable because these small businesses cannot comply with its burdens, these small businesses will suffer. *Id.*, Wan, T., Esq. (Nov. 28, 2023).

(q) There is no need to record a failed communication if a consumer has no way of knowing an attempted communication was ever made. Adding this

clarifying language would keep the proposed amendments consistent with exceptions contained in Regulation F and the recently enacted debt collection law in Washington, D.C. *Id.*, Madden, A. (Nov. 29, 2023) at 2.

(r) Commenter requested the addition of the caveat to the definition of "clear and conspicuous" so that disclosures may be on another page if it is not possible to provide it on the same page because of the length of the text as well as the clarifications that hyperlinks in electronic communications related to modifications, explanations or clarifications are permitted. These exceptions would permit collection agencies to comply with federal, state and local requirements without forcing all required disclosures onto a single oversized sheet of paper. In many cases, all mandated disclosures will not fit on a single page and attempting to fit the legally required disclosures on one page will make the document difficult to read and likely confuse the consumer. *Id.*, Madden, A. (Nov. 29, 2023) at 2.

(s) There should be a limited carve out for attorneys to permit licensed attorneys the ability to practice law without creating conflicts with the proposed amendments. *Id.*, Madden, A. (Nov. 29, 2023) at 3.

(t) Multiple level regulations cause an increase in cost and confusion that can have an unintended impact on the consumer. Increased costs for small businesses get passed on to consumers. (DCWP Rs. Hr'g Tr. at 7:6–6:18, Nov. 29, 2023).

(u) Consumers want to be contacted via the channel of their choice. *Id. at* 12:15–22.

(v) The Rule should be consistent with Regulation F. *Id.* at 13:6–20.

(w) Not all contact attempts are captured by phone systems, much less an account management system. *Id.* at 13:21–14:7.

57. The DCWP did not address any of the comments above in its administrative record that promulgated the Rule.

58. Moreover, ACA and its members have met with DCWP after the Rule was issued to raise its concerns about the Rule. As recently as yesterday, October 17, 2024, ACA requested DCWP delay enactment and enforcement of the Rule. These efforts have been rebuffed.

H. Persons Affected by the Rule

59. New section 5-76 amends definitions that impact the interpretation of section 5-77. Specifically, the Rule redefines "debt collector" to cover third-party debt collectors, debt buyers, and creditors that collect their own accounts using an alias:

> any person, including any natural person or organization, including a debt collection agency, engaged in any business the principal purpose of which is the collection of any debts or who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another person. Notwithstanding the exceptions contained in this section, debt collector includes a buyer of debts who seeks to collect on such debts either directly or indirectly, as well as any creditor that, in collecting its own debts, uses any name other than its own that would suggest or indicate that someone other than such creditor is collecting or attempting to collect such debts. N.Y.C. Consumer Prot. L. Regs. § 5-76 (2024).

60. This definition of debt collector does not include all persons who communicate with New York City consumers in connection with the collection of debts. Earlier regulation by DCWP already excluded government employees collecting in their official capacities, nonprofit credit counseling organizations, and public utilities regulated by the Public Service Commission from the definition of debt collectors. *Id.*.

61. The new Rule further carves out exceptions to the "debt collector" definition and excludes original creditors that collect on their own accounts and persons attempting to serve legal process. *See* NYC Consumer and Worker Protection, Debt Collection Guide (Sept. 2023), https://www.nyc.gov/assets/dca/downloads/pdf/consumers/Consumers-Debt-Collection-Guide-English.pdf.[3]

62. Thus, the Rule limits the activities of an estimated half of the companies and persons who routinely contact New York City residents to collect on past due accounts.

[3] The Rule also provides that original creditors seeking to collect debts under name other than its own would fall under the Rule's definition of "debt collector." *City Record*, Consumer and Worker Protection Notice of Adoption (Aug. 12, 2024) at 407.

I. Many Provisions of the Final Rule Violate the First, Fifth, and Fourteenth Amendments

63. The Rule was issued by the Commissioner of the DCWP pursuant to authorities under §§ 1043 and 2203(f) of the New York City Charter, §§ 20-104, 20-493(a), and 20-702 of the New York City Administrative Code. The Rule amends Title 6 of the Rules of the City of New York, as it relates to debt collectors. The Rule provisions salient to the instant lawsuit are set forth in the paragraphs below.

(1) Provisions that Directly Limit Speech by Certain Persons about Certain Content

a. Ban on Communications or Attempts to Communicate More than Three Times in One Week.

64. New section 5-77(b)(iv) prohibits collectors from communicating or attempting to communicate with a consumer (inbound or outbound) by any medium more than three times in total during a seven-consecutive-calendar day period or any time after the consumer responded to a prior communication within such period. N.Y.C. Consumer Prot. L. Regs.§ 5-77(b)(iv). This ban does not apply to original creditors, government collectors, or utility companies—only to third-party debt collectors.

65. Federal law establishes a safe harbor with FDCPA section 806(5) (15 U.S.C. § 1692d(5)) if the debt collector places a telephone call to a particular person in connection with the collection of a particular debt neither: (A) More than seven times within seven consecutive days; nor (B) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. Importantly, the CFPB initially proposed a 3-day limit like the NYC Rule, but ultimately rejected it and created instead a safe harbor for calls limited in frequency to 7 per 7 days per account. *See* CFPB, Consumer Experiences with Debt Collection: Findings From the CFPB's Survey on Consumer

Views on Debt (Jan. 12, 2017), https://www.consumerfinance.gov/data-research/researchreports/consumer-experiences-debt-collection-findings-cfpbs-survey-consumer-views-debt/).

66. Note also that federal law distinguishes between making calls per account, whereas the New York City law limits contacts through all alternative channels per consumer, which is a meaningful difference to licensees.

67. Finally, Regulation F does not count communications that are initiated by the collector in the communication cap if they are made with consumer consent. Section 5-77 (b) (1) (iii)(C) of the Rule, however, does not have that exception (it does say "at the request of the consumer"). This is different than consent, however, and unreasonably restricts communications.

68. There is no precedent for the Rule's extensive government-imposed speech restriction. News, advertising, original creditor billing, and shipment notifications get sent at all hours of the day, at a frequency dictated by best business practice. The DCWP provides no justification for why it is limiting all communications by licensees, instead of those communications that may actually be harassing.

69. Debt collectors must be allowed to freely communicate with consumers in order to attempt to resolve accounts. Modern methods of communication include U.S. Mail, telephone calls to landlines and mobile phones, text messages, email messages, and alternative app-based messages like "WhatsApp." There is a significant price difference between the communication mediums. A standard piece of U.S. mail costs approximately $ 0.70 per piece. In contrast, an email will cost less than one penny up to $ 0.05 per email, depending on style and delivery factors.

70. The restrictions forth above in paragraphs 63 through 68 not only impose restrictions on speech, they deprive both collectors and consumers the opportunity to resolve accounts outside litigation. As expressed in the public hearing testimony, the collectors who have one-on-one contact with consumers often help them understand their rights and options, and ultimately provide a service that can help save them money and preserve their credit. (DCWP Rs. Hr'g Tr. at 5:5–6:7 (Ex. 2)).

71. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

b. Ban on Electronic Communication.

72. New section 5-77(b)(5) limits how debt collectors may employ modern communication technologies in compliance with the law, including voicemails, email, text messages, and social media. In particular, debt collectors are only permitted to send an initial electronic message to a consumer solely to obtain permission to communicate electronically with such consumer. N.Y.C. Consumer Prot. L. Regs. §§ 5-77(b)(5)(i)-(iii). This ban does not apply to original creditors, government collectors, or utility companies—only to third-party debt collectors.

73. Federal regulations allow validation notices to be sent electronically. 12 C.F.R. § 1006.34(d)(3)(v)(B). It also provides how a debt collector "may" format the notice. *Id.* § 1006.34(d)(4). And federal law generally provides workable procedures for electronic communications. *Id.* § 1006.6(d)(3). The Rule at issue is directly contrary to these permissions.

74. In contrast, section 5-77(b)(5) forecloses reasonable communication channels. It requires a very specific type of speech—the initial contact message—to be provided via paper mail or telephone call only.

75. The restrictions above foreclose multiple alternative channels of communication. This harms both debt collectors and consumers. Collectors want to use reliable and inexpensive methods of contact and consumers want to be contacted via the channel of their choice. (DCWP Rs. Hr'g Tr. at 12:15–22 (Ex. 2)).

76. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

c. Ban on Communication at Employer.

77. New section 5-77(b)(6) bars debt collectors from communicating with a consumer at the place of the consumer's employment unless the consumer has provided their prior consent to the contact directly to the debt collector. N.Y.C. Consumer Prot. L. Regs. § 5-77(b)(6). This Rule is ridiculously broad. For example, it would cause a violation if a consumer was at their home office and received a telephone call on their mobile phone during their working hours.

78. The Rule creates an outright ban on speech when a consumer is at their workplace, whereas the federal regulation forbids the speech only if the collector knows or has reason to know that the communication at the workplace is prohibited. 12 C.F.R. § 1006.6(b)(3) ("a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.")

79. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

d. Limits on Communication with Credit Reporting Agencies.

80. New section 5-77(e)(10) requires debt collectors to disclose the existence of a debt to consumers at least 14 days before reporting information about the debt to a consumer reporting agency. N.Y.C. Consumer Prot. L. Regs. § 5-77(e)(10).

81. The Rule arbitrarily requires that the collector disclose the existence of the debt and then wait 14 days before credit reporting, whereas the federal rule only requires that an initial collection contact first be completed prior to communicating account information to credit reporting agencies. 12 C.F.R. § 1006.30(a).

82. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

83. Banning Electronic Communications for Required Initial Communications. Section 5-77(f)(2) makes collectors send the consumer a written validation notice by U.S. mail or delivery service and requires this notice to contain "the name of a natural person for the consumer to contact." N.Y.C. Consumer Prot. L. Regs. §§ 5-77(f)(2), (f)(2)(ii). The Rule bans electronic communications unless the consumer has given express written permission directly to the collector.

84. Federal regulations allow validation notices to be sent electronically. 12 C.F.R. § 1006.34(d)(3)(v)(B). It also provides how a debt collector "may" format the notice. *Id.* §

1006.34(d)(4). And federal law generally provides reasonable procedures for electronic communications. *Id.* § 1006.6(d)(3).

85. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

e. Banning Communication about Medical Debt with Credit Reporting Agencies.

86. New Rule 5-77(f)(11) bans debt collectors from reporting information about medical debt accounts to a consumer reporting agency. N.Y.C. Consumer Prot. L. Regs. § 5-77(f)(11).

87. Federal law currently does not prevent debt collectors from furnishing information about medical debt accounts to credit reporting agencies. The Rule stops truthful speech about past due medical accounts to be made between a debt collector and a specific listener, a credit reporting agency.

f. Curtailing the Right to Petition and Full Faith and Credit.

88. Section 5-77(f)(7) prohibits a debt collector from enforcing a default judgment against a New York City resident if it does not also have additional validation information. This Rule applies to default judgment obtained anywhere in the United States. Therefore, if a default judgment is obtained outside New York—even prior to the Rule's effective date—no out-of-state default judgment can be enforced in New York City by a debt collector if an extra regulatory hurdle is not overcome. Debt collectors with older default judgments—though still valid—may have a harder time obtaining the documents required under the Rule's retroactive judgments

requirements. This is especially true for collectors who may have discarded certain originating documents due to their reliance on the validity of the default judgment.

g. Taking Accounts when Certain Speech is Not Provided.

89. Section 5-77(e)(13) prohibits the selling, transferring, returning to the debt's owner or creditor, or placing for collection or with an attorney or law firm to sue a New York City consumer to recover any debt for which the debt collector was unable to provide written verification of the debt that meets specific New York City requirements. Thus, a property right is extinguished by failure to conform to specific government-required speech.

90. The required speech is a verification document. The verification document must conform with section 5-77(f)(6) and must include:

> (A) a copy of the debt document issued by the originating creditor or an original written confirmation evidencing the transaction resulting in the indebtedness to the originating creditor, including the signed contract or signed application that created the debt or, if no signed contract or application exists, a copy of a document provided to the alleged debtor while the account was active, demonstrating that the debt was incurred by the consumer. For a revolving credit account, the charge- off account statement, the most recent monthly statement recording a purchase transaction, payment, or balance transfer shall be deemed sufficient to satisfy this requirement. Documents created or generated after the time of charge-off of the debt or institution of debt collection procedures shall not qualify as such confirmation;
>
> (B) records reflecting the amount and date of any prior settlement agreement reached in connection with the debt;
>
> (C) the final account statement or charge-off statement, or other such document that reflects the total outstanding balance alleged to be owed, mailed to the consumer on or before the charge-off date and prior to the institution of debt collection procedures…

91. In contrast, the federal rule does not dictate the content of a debt verification. See 12 C.F.R. 1006.38(d). Rather, it allows for all reasonable records and media to verify a debt. This is essential because the proscriptive method above is not applicable to many types of past due obligations. For example, an unpaid invoice for damages to a rented apartment would not generate any of the documents required by the Rule.

92. The speech restrictions noted above are content-based restrictions because they favor speech made for the purpose of collecting originator, government, or utility debt while disfavoring speech made for the purpose of third-party debt collection. The Rule is content-based because it "singles out specific subject matter for differential treatment." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 619 (2020).

93. The speech restrictions noted above are content-based restrictions because they favor one category of speech—debt collection by government officials or original creditors—over another category of speech—debt collection by third parties—and restricts the speakers of this latter category because of this content preference. A regulation of speech may also be content-based when it favors some speakers over others "when the legislature's speaker preference reflects a content preference." *Id.*, 591 U.S. at 619-20 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 170 (2015) (internal quotations omitted).

94. The Rule's regulation of speech is thus content-based.

95. The Rule cannot overcome the presumption of unconstitutionality that arises from a content-based speech restriction.

(2) Provisions that Curtail the Freedom of Speech by Requiring Certain Speech

a. Record Creation Requirement One – All Outbound Contacts.

96. New section 2-193(a) requires debt collection agencies to maintain detailed records of the agencies' consumer contacts. The Rule requires maintenance of any and all records showing compliance with relevant laws and rules as well as monthly logs documenting certain consumer interactions. N.Y.C. Consumer Prot. L. Regs. § 2-193(a) (2024).

97. Required materials that must be affirmatively created by collectors include: a copy of all communications and attempted communications with the consumer (§ 2-193(a)(1)); a monthly log, account notes or records sufficient to identify the total number of all

communications and attempted communications by any medium between a debt collection agency and a New York City consumer in connection with the collection of a debt (§ 2-193(a)(6)); this newly required log must be "searchable" and contain the date, time, and duration of the communication or attempted communication, the medium, names and contact information of persons involved in the communication, and "a contemporaneous summary in plain language of the communication or attempted communication" (§§ 2-193(a)(6)(i)-(iv)). *Id.*

98. There are no other state or federal requirements that dictate the creation of contact logs. All record-keeping requirements merely require maintaining records created in the ordinary course of business. *See* 12 C.F.R. § 1006.100 ("a debt collector must retain records that are evidence of compliance or noncompliance with the FDCPA and this part starting on the date that the debt collector begins collection activity on a debt until three years after the debt collector's last collection activity on the debt").

99. To the best of plaintiffs' knowledge, there are no automated loan management or communication systems that will create a "contemporaneous summary," of communications. Since call recordings must be preserved, this provision is duplicative and unnecessary.

100. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

b. Record Creation Requirement Two – Complaint Log and Summary.

101. New section 2-193(b) requires debt collection agencies to create and maintain detailed monthly logs of consumer complaints, disputes and requests to cease further communication. N.Y.C. Consumer Prot. L. Regs. § 2-193(b)(1). The logs required to be created must identify each complaint by date, consumer name and account number, source of the

complaint, and have a summary of the consumer's complaint, as well as the debt collector's response to the complaint, if any, and the current status of the complaint. *Id.* § 2-193(b)(1)(i).

102. There are no other state or federal requirements that dictate the creation of contact logs. All record-keeping requirements merely require maintaining records created in the ordinary course of business. *See* 12 C.F.R. § 1006.100.

103. The government-imposed requirements to create records and logs are restrictions on speech. Not all contact attempts are captured by phone systems, much less an account management system. (DCWP Rs. Hr'g Tr. at 13:21–14:7 (Ex. 2)). The record creation requirements not only are causing licensees to expend unreasonable amounts of time and money to acquire or reprogram computer systems, the "summaries" required can often be statements against the interest of debt collectors and may be harmful or antithetical to their own beliefs about any given debt collection situation.

104. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

c. Mandatory Disclosures that Are Confusing and Wrong.

105. The Rule requires additional disclosures on validation notices to consumers. N.Y.C. Consumer Prot. L. Regs. § 5-77(f)(2). One part of the disclosure must have an "itemization" date for each account in collections. The Rule changed the itemization date definition to include, only, one of the following dates, "(1) on revolving or open-end credit accounts, the charge-off date of the debt, or (2) on closed-end accounts, either the date of the last payment, if such date is available, or the charge-off date of the debt." *Id.* § 5-76 "Itemization

reference date." Many accounts in collections—principally those for unpaid services rendered—do not have charge-off dates. Thus, the Rule's requirement is nonsensical in many instances.

106. The Rule's required notice is different from both the state and federal notices. The Rule risks validation notices having two different statement of rights and information about accounts that will confuse consumers and obfuscate the very protections the Rule seeks to emphasize. The Rule's definition of itemization date is different from Regulation F, which can be any one of the following five potential dates:

> (a) The last statement date, which is the date of the last periodic statement or written account statement or invoice provided to the consumer by a creditor;
> (b) The charge-off date, which is the date the debt was charged off;
> (c) The last payment date, which is the date the last payment was applied to the debt;
> (d) The transaction date, which is the date of the transaction that gave rise to the debt; or
> (e) The judgment date, which is the date of a final court judgment that determines the amount of the debt owed by the consumer.

12 C.F.R. 1006.34(b)(3).

107. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

d. Required Inaccurate Disclosure about Credit Reporting.

108. The Rule at §5-77(e)(10) requires—as part of the mandated validation notice—that debt collectors state "clearly and conspicuously, that the information about the debt *will* be reported to a consumer reporting agency…." N.Y.C. Consumer Prot. L. Regs.§ 5-77(b)(iv) (emphasis added).

109. No federal or state law requires the furnishing of consumer report information. Furnishing account information to a credit reporting agency is an entirely voluntary activity. The

Fair Credit Reporting Act only governs activities once a furnisher determines to undertake reporting. The Rule requires a disclosure that may be untruthful.

110. This disclosure may be untruthful if an agency does not furnish to a consumer reporting agency ("CRA"). For any number of reasons, debt may not be reported to an agency, including if the customer pays, the customer disputes, or for collector business purposes. The Rule makes no room for these scenarios and effectively requires a statement that may at times inform consumers of inaccurate information.

111. The administrative record does not cite any evidence showing that this provision is necessary in New York City. Nor does the record discuss how this provision will directly solve a problem or achieve a governmental interest. The FDCPA and Regulation F are less restrictive limits on speech.

(3) Provisions that Violate the Fifth and Fourteenth Amendments

a. Vague Validation Period.

112. The Rule at § 5-76 defines the "validation period" as a timeframe with seemingly no end—during which debt collectors "must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and request the name and address of the original creditor." *Id.* § 5-76 "Validation period." Section 5-77(f)(4)–(5) states that the validation period "extends for at least 30 consecutive days from the date a consumer receives or is assumed to receive a validation notice." *Id.* § 5-77(f)(4)–(5). But the Rule provides no guidance regarding when the period ends. Moreover, the Rule gives consumers the right to request validation at any time—not just during a delineated validation period.

b. Vague Calendar-Day Period

113. Section 5-77(b)(1)(iii)(c) is impermissibly vague in situations in which a communication with a consumer occurs via U.S. mail. Section 5-77(b)(1) limits "contact" frequency "by any medium of communication,"—including email, phone, and U.S. mail. *Id.* § 5-77(b)(1)(iii)(c). It limits these contacts to three times in a 7-day period. But it is vague as to how a licensee must determine the period when a piece of U.S. mail is sent. It could be the day the letter is sent, a 5-day estimated receipt period, or some other date yet to be determine. Without clarity, this rule is vague and licensees do not have the guidance to know how to comply.

c. Taking Debt that Cannot be Verified in 45 Days.

114. New Rule 5-77(f)(7) requires collectors to send a written response to a consumer's dispute or request for verification within 45 days after receiving the first dispute/verification request. N.Y.C. Consumer Prot. L. Regs. § 5-77(f)(7)(i). The Rule specifies in detail the content of the verification information. *Id.* § 5-77(f)(7)(iii). In particular, a "copy of the judgment obtained by default does not provide the consumer verification of the alleged debt." *Id.* § 5-77(f)(7)(iv). It must cease collection activity until the consumer is deemed to have received the verification information. *Id.* § 5-77(f)(7)(ii). If it cannot send the verification information within the 45-day period, it cannot resume collection activity ever again, thus extinguishing the contractual obligation. *Id.*

115. Federal law already requires certain detailed debt validation disclosures. 12 C.F.R. § 1006.34(a). It further provides a 30-day period for consumers to dispute the debt prior to collection contacts occurring. 12 C.F.R. § 1006.38(b). And if a consumer asks for additional verification information, it allows collectors to resume collections upon providing such information without regard to a deadline for providing this information. 12 C.F.R. § 1006.38(d)(2). In contrast, the Rule terminates collectors' ability to collect on accounts if

detailed validation information is not provided within 45 days of a validation request by a New York City resident.

116. Section 5-77(f)(7)(ii) deprives licensees and the firms that own the accounts collected by licensees of their property if detailed validation information is not provided within 45 days of a validation request by a New York City resident. There are no processes or procedures for avoiding this taking. And the account owner is not compensated by the government for the loss of its property right.

IV.
CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

COUNT I

[First Amendment – Restriction of Speech Based on Content]

117. Plaintiffs incorporate paragraphs 1 through 116 here by reference.

118. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

119. The First Amendment proclaims that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. State and local governments are subject to this prohibition through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

120. "Content-based laws – those that target speech on its communicative content – are presumptively unconstitutional." *Reed*, 576 U.S. at 163. The Supreme Court has rarely, if ever,

upheld such a regulation. *See United States v. Playboy Entm't Gr., Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *United States v. Marcavage*, 609 F.3d 264, 286 (3d Cir. 2010) ("Because the restrictions imposed . . . were content-based, they are presumptively invalid"). "Content-based speech restrictions are subject to 'strict scrutiny'" … Meanwhile, non-content-based regulation and regulation of commercial speech—expression solely related to the economic interests of the speaker and its audience—are subject to intermediate scrutiny." *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012).

121. A government restriction of protected speech will not be narrowly tailored—and thus fail a strict scrutiny analysis—when it is "hopelessly underinclusive." *See Reed*, 576 U. S. at 171.

122. A regulation will be underinclusive when it fails to justify the differentiation between the regulated and unregulated speech and when it fails to limit similar activities that "create the same problem." *Reed*, 576 U.S. at 172.

123. The DCWP, in promulgating sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7), discriminates based on the content of messages.

124. As the CFPB explains in its final rule, a "debt collection communication" has specific content: A debt collection communication occurs if information regarding a debt is conveyed directly or indirectly to any person through any medium. If a debt collector leaves a voicemail for a consumer that includes details about the debt, the debt collector has engaged in a debt collection communication with the consumer but has not had a telephone conversation. Likewise, if a consumer answers a debt collector's telephone call and, before anything else is

said, asks the debt collector to call back in 10 minutes, the debt collector has engaged in a telephone conversation with the consumer but may not have had a debt collection communication. 85 Fed. Reg. 76805 (Nov. 30, 2020).

125. "At the same time, debt collectors have a legitimate interest in reaching consumers because communicating with consumers is central to their ability to recover amounts owed to creditors, and too greatly restricting debt collectors' and consumers' ability to communicate with one another could prevent debt collectors from establishing right-party contact and resolving debts, even when doing so is in the interests of both consumers and debt collectors" *Id.* 76811 (Nov. 30, 2020).

126. The DCWP, in promulgating sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) does not justify the differentiation between government and originator debt collection speech on one hand and third-party debt collection speech on the other, meaning it is underinclusive and not narrowly tailored.

127. Additionally, sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) do not serve a substantial government interest.

128. Sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) also fail an intermediate scrutiny review, which would apply only if the provision were found to be content-neutral (it is not content-neutral). *See Caronia,* 703 F.3d at 163.

129. If the Rule was content neutral (it is not), it would be analyzed—and fail under—*Central Hudson*'s intermediate scrutiny analysis because the Rule restricts lawful speech, does not advance a substantial government purpose by direct means, and sweeps far more broadly than necessary. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 566 (1980).

130. The provision cannot overcome the presumption of unconstitutionality that arises where truthful and non-misleading expression will be ensnared along with fraudulent or deceptive commercial speech, and the City cannot demonstrate that sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) serve a state interest and is designed in a reasonable way to accomplish that end.

131. The enactment of sections 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) will cause irreparable harm to plaintiffs and plaintiff members.

COUNT II

[First Amendment – Government Mandated Speech]

132. Plaintiffs incorporate paragraphs 1 through 116 here by reference.

133. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

134. "The right to speak and the right to refrain from speaking are complementary components" of the First Amendment's freedom of speech. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). State and local governments are subject to this prohibition through the Fourteenth Amendment. *See Cantwell*, 310 U.S. at 303.

135. "A system which secures [the freedom of speech] must also guarantee the concomitant right to decline" to speak. *Wooley*, 430 U.S. at 714.

136. This is true whether the speaker is an individual, or a corporation. *See W. Va. State Bd. of Educ. v. Barnett*e, 319 U.S. 624, 642 (1943); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986).

137. In the context of commercial speech of required disclosures, the First Amendment accepts that "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception." *In re R. M. J.*, 455 U.S. 191, 201 (1982) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

138. Nevertheless, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

139. Regulation of commercial speech in the form of mandatory disclosures or speech creation is thus only permissible when "disclosure requirements are reasonably related to the [s]tate's interest in preventing deception of consumers." *Id.*, 471 U.S. at 651; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014).

140. Sections 2-193(a), 2-193(b), 5-77(e)(1), and § 5-77(f)(2) are governmental requirements for certain speech to be created that is not useful in the ordinary course of business, may be negative and antagonistic in content to the interests of the required speaker, has already and will continue in the future to cause considerable burden in terms of time, money, and resources. Further, it does not prevent deception—indeed, it creates deception in the case of § 5-77(f)(2).

141. The enactment of sections 2-193(a), 2-193(b), 5-77(e)(10), and § 5-77(f)(2) will cause irreparable harm to plaintiffs and plaintiff members.

COUNT III

[First Amendment – Denial of Access to Courts/Petitions Clause]

142. Plaintiffs incorporate paragraphs 1 through 116 here by reference.

143. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

144. "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. State and local governments are subject to this prohibition through the Fourteenth Amendment. *See Cantwell*, 310 U.S. at 303.

145. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)).

146. The right to sue and have grievances redressed in court is "one of the highest and most essential privileges of citizenship, and must be allowed by each state…" *Chambers v. Baltimore & Ohio R.R. Co*., 207 U.S. 142, 148 (1907).

147. When a government regulation restricts access to the courts, as protected by the Petitions Clause of the First Amendment, that regulation is subject to strict scrutiny. *See NAACP v. Button*, 371 U.S. 415,438–44 (1963) ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."). The regulation can only be upheld when it protects a compelling state interest by the most narrowly tailored means. *See Thomas v. Collins*, 407 U.S. 516, 530 (1945).

148. Section 5-77(f)(7) of the Rule restricts access to courts because it holds that a valid, final judgment of a debtor's default of debt is not enough to seek enforcement in the City of New York. Instead, a potential debt collector must obtain a slew of original credit documents

to accompany the valid, final judgment. Without both, the debt collector cannot access the courts to redress their grievances.

149. Importantly, this restriction only applies to third-party debt collectors and debt buyers. A hypothetical original creditor, armed with a valid, court-signed judgment but without original documentation, would be permitted access to the court system to enforce the judgment. But a hypothetical third-party debt collector, armed with a valid, court-signed judgment but without original documentation, would not be permitted access to the court system to enforce the judgment.

150. Access to the courts is thus restricted and regulated based on the identity of the petitioner. Such a speaker-based restriction is antithetical to First Amendment principles and triggers heightened review.

151. As such, the restriction on access to courts is subject to strict scrutiny.

152. Section 5-77(f)(7) cannot survive strict scrutiny review because it neither serves a compelling government interest nor is it narrowly tailored to that interest. The City's potential interest in requiring original credit documents would likely be in preventing fraudulent or mistaken enforcement against debtors. But the debt in question has already been reviewed by a judge and a judgment already issued. The Rule's haphazard reevaluation of that valid judgment—by requiring additional documentation—is nonsensical, time-consuming, and unnecessary.

153. Section 5-77(f)(7) is also not narrowly tailored to the interest in preventing fraudulent or mistaken enforcement against debtors. The Rule's judgment requirements only apply to third-party debt collectors, not to original creditors, government creditors, or utility companies. The Rule is thus underinclusive.

154. An underinclusive, unnecessary requirement of additional documentation to allow access to courts cannot satisfy the strict scrutiny analysis required by the First Amendment.

155. The enactment of section 5-77(f)(7) will cause irreparable harm to plaintiffs and plaintiff members.

COUNT IV

[Fifth and Fourteenth Amendments – Unconstitutional Vagueness]

156. Plaintiffs incorporate paragraphs 1 through 116 here by reference.

157. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

158. The due-process clause of the Fourteenth Amendment provides that ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

159. A government statute or regulation is unconstitutionally vague in violation of the Due Process Clause if it (1) "fails to provide a person of ordinary intelligence fair notice of what is prohibited," or (2) "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18 (2010) (internal quotation marks omitted). Vagueness review is heightened when, as here, a challenged statute pertains to speech protected by the First Amendment. *See Holder*, 561 U.S. at 19.

160. Ultimately "what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008).

161. Thus, government mandates that leave regulated entities with little or nothing to understand what an incriminating, illegal, or prohibited act is, must be unconstitutionally vague.

"Place of Employment"

162. Section 5-77(b)(6) prohibits debt collectors from communicating or attempting to communicating with a consumer "at the consumer's place of employment, including by sending an electronic message to an email address or a text message number that the debt collector knows or should know is provided to the consumer by the consumer's employer."

163. Debt collectors attempting to comply with the Section 5-77(b)(6) are left uncertain as to whether they are prohibited from contacting consumers at work by way of employer-provided means (such as a company phone or email address), or if the prohibition applies to any time a consumer is physically present at work (for example, if a collector called a consumer on their personal phone while the consumer happened to be at work). Debt collectors are left without guidance on how to approach individuals who work from home or remain on the clock while not physically at their place of employment. The Rule fails to clarify what, exactly, a prohibited action would be.

"Itemization Reference Date"

164. Additionally, the Rule's revisions of the definition of "itemization reference date" present a similar vagueness issue. The definition was changed to include, only, one of the following dates, "(1) on revolving or open-end credit accounts, the charge-off date of the debt, or (2) on closed-end accounts, either the date of the last payment, if such date is available, or the charge-off date of the debt."

165. The Rule invites licensees to fabricate a date that has no basis in reality. This does not increase understanding or allow consumers to better enforce their rights.

166. The divergence between the Rule and Regulation F's itemization dates creates a confusing, vague regulatory framework that leaves debt collectors with little guidance. Following the federal rule—Regulation F—would leave entities in violation of the Rule at issue here.

"Validation Period"

167. Finally, the Rule's definition of the "validation period" creates a time period—with seemingly no end—during which debt collectors "must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and request the name and address of the original creditor."

168. Section 5-77(f)(4)-(5) states that the validation period "extends for at least 30 consecutive days from the date a consumer receives or is assumed to receive a validation notice." The Rule also identifies when a debt collector may assume the period began, but provides no guidance regarding when the period ends. Consumers are also given the right to cease collection activity at any time by submitting a validation request, thus impliedly extending the validation period indefinitely. The open-ended validation period provides no guidance to debt collectors regarding when the validation period can end.

169. The lack of clarity in the aforementioned provisions runs afoul of the Fifth and Fourteenth Amendments' Due Process Clauses.

170. Enactment of these provisions would cause irreparable harm to plaintiffs and plaintiff members.

COUNT V

[Federal Preemption – The FDCPA Preempts Portions of the Rule]

171. Plaintiffs incorporate paragraphs 1 through 116 here by reference.

172. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

173. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."

174. Federal law can impliedly preempt state laws that stand as "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

175. The Federal Fair Debt Collection Practices Act ("FDCPA") includes a preemption clause that eschews preemption of state law only when "those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency." 15 U.S.C. § 1692n.

176. Additionally, the FDCPA's preemption clause notes: "a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter." *Id.*

"Place of Employment"

177. Section 5-77(b)(6) prohibits debt collectors from communicating or attempting to communicating with a consumer "at the consumer's place of employment, including by sending an electronic message to an email address or a text message number that the debt collector knows or should know is provided to the consumer by the consumer's employer." This provision is inconsistent with the FDCPA as implemented by Regulation F and makes it difficult—if not impossible—to conduct lawful activities under both Regulation F and the Rule.

"Itemization Reference Date"

178. The Rule's revisions of the definition of "itemization reference date" at § 5-76 is preempted by federal law. The definition was changed to include, only, one of the following dates, "(1) on revolving or open-end credit accounts, the charge-off date of the debt, or (2) on closed-end accounts, either the date of the last payment, if such date is available, or the charge-off date of the debt." This provision is inconsistent with the FDCPA as implemented by Regulation F and makes it difficult—if not impossible—to conduct lawful activities under both Regulation F and the Rule.

"Validation Period"

179. The Rule's definition, at § 5-77(f)(4)-(5), of the "validation period" creates a time period—with seemingly no end—during which debt collectors "must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and request the name and address of the original creditor." This provision is inconsistent with the FDCPA as implemented by Regulation F and makes it difficult—if not impossible—to conduct lawful activities under both Regulation F and the Rule.

180. The Rule provisions cited in this Count lack any stated interest in changing the compliance obligations of debt collector licensees beyond what is already dictated by the FDCPA as implemented by Regulation F. The administrative record does not measure, analyze, or describe how it affords any consumer greater protections than those under the FDCPA or Regulation F.

181. Indeed, by crafting extensive barriers to communication with debt collectors, the Rule is likely increasing the risk of debt collection litigation and therefore providing lesser

protection to consumers. By making it difficult or impossible to conduct activities that are lawful and truthful under the FDCPA, the Rule is inconsistent with the FDCPA.

"Electronic Communications"

182. The Rule in § 5-77(b)(5)(i)(A) forbids the use of email, text message, social media account, or specific electronic medium unless the debt collector has first obtained in writing from the consumer consent to use the electronic medium. This rule conflicts with the intent of Congress in the FDCPA and an express safe harbor in Regulation F.

183. The FDCPA statute allows all mediums of communication with consumers except for postcard. 12 U.S.C. § 1692c. Further, in crafting Regulation F, the CFPB determined that electronic communication--email and text in particular--were communication methods that were more favorable to the consumer. 12 C.F.R. § 1006.6(d)(3)–(5) provides procedures that debt collectors may follow to obtain a safe harbor from civil liability for unintentional third-party disclosures when communicating with consumers by email or text message.

184. Restricting electronic medium does not better "protect" consumers. To the contrary, the CFPB stated in its final rule that electronic medium can be better for consumers: "The Bureau determines that electronic communications can offer benefits to consumers and debt collectors. Technologies such as email and text messaging allow consumers to exert greater control over the timing, frequency, and duration of communications with debt collectors, including by choosing when, where, and how much time to spend responding to a debt collector's email or text message." 85 Fed. Reg. 76755 (Nov. 30, 2020).

185. The Rule can only triumph under Regulation F and the FDCPA's preemption provision if the Rule "affords any consumer…greater [protection] than the protection provided

by this subchapter." 15 U.S.C. § 1692n. The Rule places different obligations on debt collectors, and does not provide greater protection to consumers. Therefore. it is preempted by federal law.

186. Enactment of these provisions would cause irreparable harm to plaintiffs and plaintiff members.

COUNT VI

[STATE PREEMPTION – STATE LAW PREEMPTS PORTIONS OF THE RULE]

187. Plaintiffs incorporate paragraphs 1 through 115 here by reference.

188. The rights enforceable by 42 U.S.C. § 1983 include, among other rights guaranteed by the United States Constitution, the right to be free from discriminatory municipal action that violates the First Amendment of the United States Constitution.

189. In New York, state law will preempt local law 1) when a local law directly conflicts with a state statute; and 2) when a local government legislates in a field the state occupies, either expressly or by implication. *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 190 (N.Y. 2001).

190. New York courts have enacted Civil Practice Law and Rules ("CPLR") 3215 concerning the enforcement of default judgments. And 22 N.Y.C.R.R. §§ 202.27-a and 202.27-b govern the proof needed to obtain a default judgment in a consumer credit matter.

191. Rule § 5-77(f)(7) directly conflicts with CPLR 3215 and New York Code, which govern the field of default judgments in consumer credit matters.

192. Therefore, Rule § 5-77(f)(7) is preempted by state law.

193. Enactment of these provisions would cause irreparable harm to plaintiffs and plaintiff members.

V.
PRAYER FOR RELIEF

A. On Count I, a declaratory judgment that § 5-77(b)(iv), 5-77(b)(5), 5-77(b)(6), 5-77(e)(10), 5-77(f)(2), 5-77(f)(11), and 5-77(f)(7) are invalid because they violate the First Amendment to the United States Constitution;

B. On Count II, a declaratory judgment that § 2-193(a), 2-193(b), 5-77(e)(10), and § 5-77(f)(2) are invalid because they violate the First Amendment to the United States Constitution;

C. On Count III, a declaratory judgment that § 5-77(f)(7) is invalid because it violates the First Amendment to the United States Constitution;

D. On Count IV, a declaratory judgment that § 5-77(b)(6), 5-77(f)(4)-(5), and 5-76 are invalid because they violate the Fourteenth Amendment to the United States Constitution;

E. On Count V, a declaratory judgment that § 5-77(b)(6), 5-77(f)(4)-(5), and 5-76 are invalid because they are preempted by federal law;

F. On Count VI, a declaratory judgment that § 5-77(f)(7) is invalid because it is preempted by state law;

G. On all Counts, a permanent injunction enjoining Defendants from enacting or enforcing the regulation;

H. An Order granting Plaintiffs its attorney's fees in bringing this action, to the extent authorized by 42 U.S.C. § 1983, or other law;

I. An Order granting Plaintiffs the costs incurred in bringing this lawsuit; and

J. Awarding such further and additional relief that the Court deems just and proper.

Dated: October 18, 2024

Respectfully submitted,

ACA INTERNATIONAL

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CERTIFICATE OF SERVICE

I certify that on October 18, 2024 I electronically filed the foregoing document(s) using the CM/ECF system and they are available for viewing and downloading from the Court's CM/ECF system, and that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system where appropriate.

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