No. 15-16549

In the United States Court of Appeals for the Ninth Circuit

KEVIN BREAZEALE, KAREN SOLBERG, KEVIN HIEP VU, NANCY MORIN, AND NARISHA BONAKDAR,
Plaintiffs-Appellees,

v.

VICTIM SERVICES, INC., d/b/a CorrectiveSolutions, NATIONAL CORRECTIVE GROUP, d/b/a CorrectiveSolutions, AND MATS JONSSON,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

INTRODUCTION

The plaintiffs here received official notices from local district attorneys accusing them of violating California's criminal bad-check law and threatening them with prosecution and even jail unless they paid hundreds of dollars in fees.

Or so they thought. In reality, no prosecutor had ever determined that any of the plaintiffs had broken the law, and the notices actually came from Victim Services, Inc. (VSI)—a for-profit company that rents out the local prosecutor's seal to aid its private debt-collection efforts. The ABA recently condemned this "abusive" scheme because it falsely "gives the impression that the machinery of the criminal justice system has been mobilized against the debtor." ABA Formal Ethics Op. 469 (2014). Realizing that they—and many other consumers just like them—had been duped, the plaintiffs filed this class action to hold VSI accountable for its wholesale disregard of federal and state consumer-protection laws.

VSI responded with a special motion to strike the plaintiffs' state-law claims under California's anti-SLAPP statute, which is designed to thwart lawsuits "aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 21 (2010). Rejecting VSI's gambit, the district court held that this case falls squarely within the statute's public-interest exception, Cal. Civ. Proc. Code § 425.17(b). That exception was created to prevent "corporations" from "misus[ing]" the statute by

wielding "meritless anti-SLAPP motions as a litigation weapon" against public-interest actions. *Grewal v. Jammu*, 191 Cal. App. 4th 977, 996 & n.10 (2011).

To ensure that public-interest litigants like the plaintiffs here have their day in court, the California legislature also eliminated a defendant's right to immediately appeal where, as here, a "trial court denies a special motion to strike on the grounds that the action . . . is exempt" under the public-interest exception. Cal. Civ. Proc. Code § 425.17(e). In this Court, the "availability of an immediate appeal pursuant to the collateral order doctrine . . . depend[s] on the particular features of each state's law." *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1016 (9th Cir. 2013). And if this case had been brought in state court, VSI's appeal would be impossible. Accordingly, asserting jurisdiction here would create a perverse anomaly: an immediate *federal* appeal on a state-law question where the *state itself* is "satisfied that the values underlying the remedy could be sufficiently protected by a trial judge's initial review . . . followed by appellate review only after a final judgment." *Englert v. MacDonell*, 551 F.3d 1099, 1106 (9th Cir. 2009). That makes no sense, and nothing in this Court's cases compels such a result. The Court should therefore dismiss this appeal for lack of jurisdiction.

If this Court nevertheless finds appellate jurisdiction, however, it should affirm the district court's conclusion that this is an "action brought solely in the

public interest." Cal. Civ. Proc. Code § 425.17(b). This class action is precisely the type of lawsuit that the public-interest exception was intended to protect.

First, the plaintiffs seek no "relief greater than or different from" that sought for the class. *Id.* § 425.17(b)(1). Classwide restitution under California's consumer-protection laws is not merely "personal" or "individualized" relief. VSI's argument relies on case law arising from strikingly different facts: suits to reinstate the plaintiffs on a board of directors, or individual antidiscrimination lawsuits—actions that in no way seek relief on behalf of the public. *Second*, this action "would enforce an important right affecting the public interest, and would confer a significant benefit . . . [on] a large class of persons." *Id.* § 425.17(b)(2). VSI essentially admits this is true, instead arguing erroneously that any relief is mooted by a federal consent order and focusing on irrelevant merits questions. *Third*, "[p]rivate enforcement is necessary." *Id.* § 425.17(b)(3). That a federal agency has also recently taken action against VSI is immaterial, because the debt-collection laws specifically intend for private lawsuits to complement public enforcement.

Allowing VSI to claim the protection of California's anti-SLAPP law here would "turn[] the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head." *Grewal*, 191 Cal. App. 4th at 996 n.10. This Court should decline that invitation.

JURISDICTIONAL STATEMENT

The plaintiffs agree with VSI that the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1367. But, for the reasons given in Section I of the Argument, there has been no final judgment within the meaning of 28 U.S.C. § 1291. This Court accordingly lacks jurisdiction to review the district court's interlocutory denial, based on the California anti-SLAPP statute's public-interest exception, of VSI's motion to strike.

STATEMENT OF ISSUES

1. Jurisdiction. Does this Court lack collateral-order jurisdiction over the district court's denial of VSI's anti-SLAPP motion because California has eliminated the right to immediately appeal denials in public-interest cases?

2. The Public-Interest Exception. Did the district court correctly conclude that because the plaintiffs' class action was "brought solely in the public interest or on behalf of the general public," it falls squarely within the anti-SLAPP statute's public-interest exception? Cal. Civ. Proc. Code § 425.17(b).

3. Anti-SLAPP Statute. If the public-interest exception does not apply, should this Court evaluate VSI's anti-SLAPP motion in the first instance, or should it remand to the district court? If the former, has VSI established that its misleading notices are protected acts under the anti-SLAPP statute, and have the plaintiffs shown a probability of prevailing on the merits?

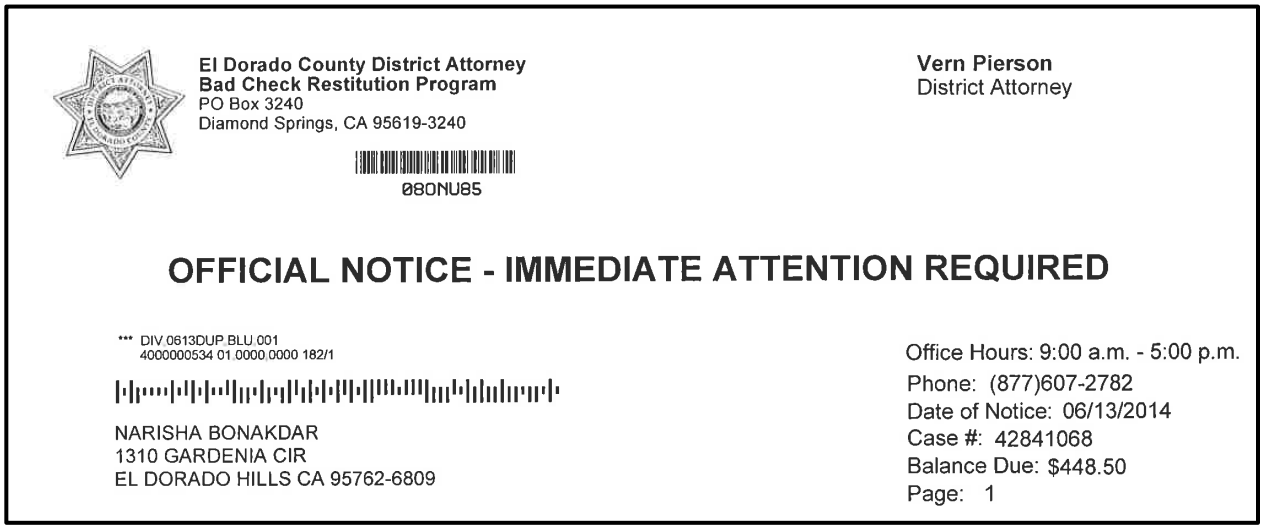
STATEMENT OF THE CASE

A. Factual background

1. VSI sends threatening and misleading letters to thousands of California consumers, including the plaintiffs here.

Using district attorney letterhead, VSI and its predecessors have sent hundreds of thousands of form letters deceptively informing California consumers that, unless they pay steep collection fees, they may be prosecuted for writing a bad check. The plaintiffs here were victims of VSI's disguised debt-collection scheme.

One such victim, Narisha Bonakdar, "a single mother [who] lives month to month," received a letter in June 2014 from the "El Dorado County District Attorney Bad Check Restitution Program" that began like this:



El Dorado County District Attorney
Bad Check Restitution Program
PO Box 3240
Diamond Springs, CA 95619-3240

080NU85

Vern Pierson
District Attorney

OFFICIAL NOTICE - IMMEDIATE ATTENTION REQUIRED

*** DIV.0613DUP.BLU.001
4000000534 01.0000.0000 182/1

NARISHA BONAKDAR
1310 GARDENIA CIR
EL DORADO HILLS CA 95762-6809

Office Hours: 9:00 a.m. - 5:00 p.m.
Phone: (877)607-2782
Date of Notice: 06/13/2014
Case #: 42841068
Balance Due: $448.50
Page: 1

See ER 612. The notice appeared to be signed by Vern Pierson, the current District Attorney. ER 462. It informed Ms. Bonakdar that she was "accused" of committing a crime punishable by "up to one . . . year in the county jail,"

referencing a check she had written for her monthly bus pass that she had mistakenly believed had been paid in full. *Id.*; *see* ER 612–16. Ms. Bonakdar could avoid charges, the letter continued, by participating in the "Bad Check Restitution Program," which would require that she attend a financial accountability class, pay restitution of the $200 check, and pay $248.50 in program fees. ER 462.

"[C]onfused and frightened" by the letter, and "believ[ing] she had been accused of a crime," Ms. Bonakdar began making regular payments to the bad-check diversion program, even though "[s]he did not believe that she had bounced a check . . . that she had not already paid in full." ER 463. To avoid prosecution and jail, she also participated in the mandatory "financial education class," which forced her to secure childcare for her daughter during the time she was absent. *Id.*

Kevin Breazeale received a similar letter in January 2014, which appeared to be from the "Alameda County District Attorney Bad Check Restitution Program." ER 454. The letter referred to a post-dated check for $500 that Mr. Breazeale had given to the Dublin Hyundai dealership as a security deposit to lease a car. ER 453. After giving the check to Dublin Hyundai, Mr. Breazeale "realized he did not have enough money in his account to cover the check." *Id.* When he contacted Dublin Hyundai to explain the situation, the dealership had already deposited the check. *Id.* Dublin Hyundai agreed, however, that Mr. Breazeale could cover the

check with partial monthly payments; Mr. Breazeale is still leasing the car and making the monthly payments required under the lease agreement. ER 454.

Despite his payments to, and agreement with, Dublin Hyundai, the letter Mr. Breazeale received "demanded payment for the check to Dublin Hyundai and additional fees"—totaling $730—under penalty of criminal prosecution and "up to a year in prison." *Id.* The letter was on the letterhead of the Alameda County District Attorney, and bore the signature of "Nancy O'Malley, District Attorney." *Id.* Mr. Breazeale was "shaken and upset" by the letter, and so he called the toll-free number listed in the letter, "which appeared to be the phone number for the Office of the Alameda County District Attorney." *Id.*

After explaining that "he had resolved the unpaid check issue with Dublin Hyundai," Mr. Breazeale was directed to send in a receipt showing payment of the check. *Id.* Mr. Breazeale wrote back to dispute that he owed any money to Dublin Hyundai. Instead of receiving a response to his letter, he received at least two more notices threatening prosecution unless he complied with the first notice. ER 455. Mr. Breazeale did not pay any fees to the program, nor did he attend the financial accountability class, "because he had paid the dealership and had not committed a crime." *Id.* Mr. Breazeale was never prosecuted. ER 456.

2. VSI administers its programs without local prosecutors' involvement, in wholesale violation of state and federal law.

In California, writing a check that is returned for insufficient funds, without more, is not a crime; it becomes a crime only where the check writer has "willfully, with intent to defraud," made or delivered a check, "knowing at the time" that he or she does not have sufficient funds to pay it. Cal. Penal Code § 476a(a). California law regards this "intent to defraud" as "the gist of the offense," *People v. North*, 131 Cal. App. 3d 112, 117 (1982), for which "no presumption of law will suffice," *People v. Becker*, 137 Cal. App. 349, 352 (1934). Establishing fraudulent intent is particularly important because, in California, "the use of criminal prosecution" simply "as a means of collecting a debt is against public policy." *Shasta Water Co. v. Croke*, 128 Cal. App. 2d 760, 764 (1954); *cf. Goldyn v. Hayes*, 444 F.3d 1062, 1069 (9th Cir. 2006) (noting that the "failure to repay" an obligation "is not a crime; the days of imprisoning insolvent debtors are long gone").

In accordance with that policy, California's Bad Check Diversion Act, Cal. Penal Code §§ 1001.60–67, which authorizes district attorneys to establish pretrial "bad check diversion" programs, strictly limits diversion to only those cases in which "there is probable cause to believe there has been a violation of Section 476a." *Id.* § 1001.60. In other words, for a case to be eligible for the diversion program, there must be probable cause to believe there has been fraud. The district attorney has the sole authority to "refer a bad check case to the diversion program,"

and the Act lists factors that he or she must consider in determining whether a "case is one which is appropriate to be referred." *Id.* §§ 1001.61–62. The only fees that may be charged are a $50 administrative fee and the bank charges actually incurred by the merchant, which are capped at $15. *Id.* § 1001.65.

But VSI flouts these requirements. In its diversion programs, "no prosecutor has reviewed the evidence, made a probable cause determination, or charged the check writer before he or she is offered 'diversion.'" ER 450. And "it is unlikely that a check writer who ignores the diversion offer"—like Mr. Breazeale—will ever "be charged with a crime." *Id.* (None of the plaintiffs who ignored the notices and failed to pay fees to VSI were prosecuted. *See* ER 453–59.) VSI also demands fees that dramatically exceed—by hundreds of dollars—those permitted by California law. ER 452; *see* Cal. Penal Code § 1001.65.

VSI maintains that it only "aid[s] in the administrative aspects of the [bad check diversion program]," and that "the District Attorney retains full prosecutorial discretion and does not delegate to Defendants any aspect of that discretion." VSI Br. 8, 32–33, 40. But the bulk of the checks are submitted "directly" to VSI "from retailers and private collection agencies, not from district attorneys." ER 450. And the information submitted usually "includes little more than is available from reviewing the face of the check"—far less than necessary to weigh the statutory factors, *see* Cal. Penal Code § 1001.62, let alone determine

probable cause. ER 450. Thus, when VSI "threatens prosecution in its collection letters, it does not know that the district attorney will prosecute if the check writer refuses to participate in its program or pay the fees that [VSI] demands." ER 452. In fact, "[i]n some cases, [VSI] *knows* that the district attorney will *not* initiate prosecution because the amount of the check falls below the district attorney's established threshold for even considering prosecution." *Id.* (emphasis added).[1]

The plaintiffs filed this class action alleging that VSI's practices violate the Fair Debt Collection Practices Act (FDCPA) by using official letterhead to falsely represent that the letters are from prosecutors; by making false threats that the failure to pay will result in arrest or imprisonment; and by charging fees that are not permitted by state law. *See* ER 468–73. The plaintiffs also allege numerous violations of California's Unfair Competition Law, in addition to claims of fraudulent and negligent misrepresentation.

[1] Recent discovery has confirmed that, at least in certain jurisdictions, local prosecutors have little to no involvement in VSI's diversion programs. *See* Dist. Ct. Dkt. No. 106, at 2–6. In several depositions, district attorney staff have testified that prosecutors rarely, if ever, review alleged bad checks for probable cause before submitting them to VSI, and that cases that would never have been prosecuted are nonetheless submitted to VSI for diversion. *Id.* Because anti-SLAPP motions turn on "the pleadings, and supporting and opposing affidavits," Cal. Civ. Proc. Code § 425.16(b)(2); *see Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010), this limited discovery (conducted in connection with VSI's recent arbitration motion, after denial of the motion to strike) falls outside the record on appeal.

B. Statutory background

1. California's anti-SLAPP law

This appeal centers on VSI's unsuccessful attempt to characterize this case as a "SLAPP," or a "strategic lawsuit against public participation." A SLAPP is "a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 21 (2010). "In 1992, out of concern over 'a disturbing increase' in these types of lawsuits, the Legislature enacted section 425.16, the anti-SLAPP statute." *Id.* It was intended to "prompt[ly] expos[e] and dismiss[]" "generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 816–17 (1994).

Under the statute, defendants may file "a special motion to strike" any claim "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1); *see also* § 425.16(e). Filing an anti-SLAPP motion stays all discovery, and a prevailing defendant is entitled to recover costs and attorneys' fees. § 425.16(c)(1), (g). An

order granting or denying the motion is, as a general matter, immediately appealable in state court. *See* § 425.16(i).

2. The public-interest exception

Soon after the anti-SLAPP law came into force, however, "both the Legislature and the courts" began to realize that "the anti-SLAPP statute has as much potential for abuse as the frivolous SLAPP suits it was enacted to summarily resolve." *Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 621–22 (2011). Defendants—most often corporate defendants—increasingly used anti-SLAPP motions to hinder meritorious litigation, "overburden[ing]" the California courts in the process. *Grewal v. Jammu*, 191 Cal. App. 4th 977, 989 (2011); *see also Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1184 (2015) ("[W]e have seen far more anti-SLAPP motions in garden-variety civil disputes than in cases actually resembling the paradigm.").[2] Even where a defendant knew that "the plaintiff could meet [its] burden," filing the motion would "cause plaintiff to expend thousands of dollars to oppose it, all the while causing plaintiff's case, and ability to do discovery, to be stayed." *Grewal*, 191 Cal. App. 4th at 999–1000.

[2] In *Grewal*, the Court of Appeal comprehensively detailed this "explosion of anti-SLAPP motions." 191 Cal. App. 4th at 998. For example, "[b]etween 1992, when the statute was first enacted, and January 1, 2000 there were only 34 published appellate decisions on the statute. But between January 1, 2000 and September 25, 2003, there were 184 published and unpublished decisions." *Id.* The Court further noted that, while 55 anti-SLAPP motions were filed in 1999, *558* such motions were filed in 2009. *Id.* at 999.

These practices struck at the heart of the anti-SLAPP statute's purposes:

> The classic SLAPP suit involved a large corporate plaintiff bringing a meritless lawsuit against an individual or small organization focused on the public good, where the corporate player's goal was to distract, to delay, and to bleed the opposing side dry, not to win. The point of Section 425.16 was to encourage participation in activities such as testifying at a city council meeting or writing a letter to the editor to protest construction of a nuclear power plant. The goal was not to give corporations a tool to use against individuals bringing discrimination lawsuits against them.

Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 Rutgers J.L. & Pub. Pol'y 426, 458 (2015). One law professor, "whose work was the basis of [the anti-SLAPP law]," told the Legislature that "corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon," "turn[ing] the original intent" of the law "on its head." *Grewal*, 191 Cal. App. 4th at 996 n.10. And Justice Brown presciently warned that "[t]he cure has become the disease—SLAPP motions are now just the latest form of abusive litigation." *Navellier v. Sletten*, 29 Cal. 4th 82, 96 (2002) (Brown, J., dissenting).

Recognizing "that there ha[d] been a disturbing abuse of Section 425.16," contrary to the purpose and intent" of the statute, the California Legislature in 2003 enacted an important amendment: Section 425.17(b), or the "public-interest exception." § 425.17(a). This exception specifically addressed the fact that, as a sponsor put it, "the same types of businesses who used the SLAPP action were inappropriately using the anti-SLAPP motion against their public-interest

adversaries." *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 913 (2004). Stressing "the public interest [in] encourag[ing] continued participation in matters of public significance," the Legislature exempted from the anti-SLAPP law "any action brought solely in the public interest or on behalf of the general public." § 425.17(a), (b). If an action meets the three conditions set forth in Section 425.17(b), the anti-SLAPP provisions of Section 425.16 are inapplicable .[3]

While debating the public-interest exception, the California legislature was acutely aware that "'[t]he filing of [a] meritless SLAPP motion by the defendant, even if denied by the court, is instantly appealable, which allows the defendant to continue its unlawful practice for up to two years, the time of the appeal.'" *Grewal*, 191 Cal. App. 4th at 1001 (quoting Cal. Sen. Comm. on Judiciary, Analysis of A.B. No. 515 (2003–2004 Reg. Sess.) as amended May 1, 2003, pp. 11–12.). This allowed defendants "to unreasonably delay a case from being heard on the merits, thus adding litigation costs and making it more cumbersome for plaintiffs to pursue

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[3] Section 425.17(b) provides that the anti-SLAPP law "does not apply . . . if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. . . .

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." Cal. Civ. Proc. Code § 425.17(b).

legitimate claims." *Id.* To end that problem, the legislature eliminated the right to appeal where the "trial court denies [an anti-SLAPP motion] on the grounds that the action . . . is exempt" under the public-interest exception. Cal. Civ. Proc. Code § 425.17(e); *see Goldstein v. Ralphs Grocery Co.*, 122 Cal. App. 4th 229, 233 (2004).

C. Procedural background

1. VSI files an anti-SLAPP motion repeating the same arguments as its predecessor's unsuccessful motion.

Several months after the plaintiffs filed this case, VSI moved to strike their UCL and fraudulent misrepresentation claims under the anti-SLAPP law. *See* ER 364–90. As it now does on appeal, VSI contended that this case targets "communications . . . made in connection with issues under consideration or review by official bodies or proceedings authorized by law," which are protected under Sections 425.16(e)(1) and (2). ER 378. VSI then turned to whether the plaintiffs had a reasonable probability of prevailing. VSI argued only that the plaintiffs' state-law claims are categorically barred under California's litigation privilege, absolute prosecutorial immunity, and a federal "good-faith" defense. ER 383–86. Finally, VSI asserted that, because the plaintiffs "attempt to secure relief for themselves that is greater than and different from the relief sought on behalf of the entire class," the action falls outside the public-interest exception. ER 386–89.

VSI's anti-SLAPP motion was nearly identical to a motion filed by National Corrective Group—VSI's predecessor-in-interest and a defendant here—in the

Smith class action, which "challeng[ed] the same collection practices." ER 158; *compare* ER 164–83 (*Smith* motion to strike) *with* ER 364–90 (motion to strike below). In that case, Judge White rejected the same argument made by VSI here, concluding that the action "satisfied" all of Section 425.17(b)'s conditions. *Smith v. Levine Leichtman Capital Partners*, 723 F. Supp. 2d 1205, 1218 (N.D. Cal. 2010). Judge White "d[id] not find . . . persuasive" NCG's argument that the plaintiffs were "seeking relief for themselves that is greater than and different to the relief sought for the entire class." *Id.* VSI, however, did not mention Judge White's decision in its motion to strike, despite its repetition of the same argument. *See* ER 158–59. On appeal, VSI now describes *Smith* as "an unrelated 2010 action." VSI Br. 9.

In response, the plaintiffs reiterated that this case falls squarely in the public-interest exception, "a category specifically designed to include consumer class actions." ER 159. Because VSI's motion duplicated in most respects the motion in *Smith*, the plaintiffs' opposition incorporated by reference all of the arguments made in *Smith*. ER 159; *see* ER 185–206 (*Smith* opposition).

VSI also simultaneously moved to dismiss the case. *See* ER 404–39. It argued it was immune from FDCPA liability under 15 U.S.C. § 1692p, a narrow exemption for pretrial diversion programs. *See* ER 423–24. But this exemption would require VSI to show that it, among other things, "operates under the direction, supervision, and control of such State or district attorney," "complies

with the penal laws of the State," and "contacts any alleged offender . . . only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exist," § 1692p. The plaintiffs maintained that VSI wholly failed to meet these conditions.

2. The district court denies VSI's motion to strike, and then denies its attempt to stay proceedings pending this appeal.

At the hearing on both motions, Judge Chhabria remarked: "I'm trying to figure out how this case at this stage is distinguishable from Judge White's case [*Smith*], because. . . the plaintiffs aren't seeking anything over and above what they're seeking for the class members." ER 29. He continued: "the main point that Judge White was making. . . is that the named plaintiffs were seeking effectively the same thing for themselves as they're seeking for . . . class members, and I think that's true here, as well." ER 32.

VSI's motion to dismiss presented, according to Judge Chhabria, "a very easy statutory interpretation question." ER 6. The FDCPA exception, he explained to VSI's counsel, requires private entities to "run one of these bad check diversion programs in a particular way, and [the plaintiffs] allege that you don't run it in that particular way and so you don't fall within the exception." ER 6–7. Absent the exception, he continued, "based on the allegations, you've violated the statute, because you've sent this letter that makes it seem like it's a letter from the district attorney, when it's not." ER 7; *see* ER 39 ("If [VSI] do[es]n't fall within the

exception to the [FDCPA], they're doing a whole host of things wrong."). At the end of the hearing, Judge Chhabria denied both motions. ER 46.

Following the hearing, the district court issued a short written order, concluding that "the plaintiffs' state law claims . . . satisfy all the conditions necessary to fall within the statute's exception for 'action[s] brought solely in the public interest.'" ER 2 (quoting Cal. Civ. Proc. Code § 425.17(b)). Citing Judge White's decision in *Smith*, the court emphasized that "it does not appear that the named plaintiffs seek any relief greater than or different from the relief sought for . . . a class of which they are members." *Id.* (internal quotation marks omitted). Because the public-interest exception applied, the order did not address whether VSI's motion to strike was otherwise viable under the anti-SLAPP law. *Id.*

The order also denied VSI's motion to dismiss. As relevant here, the court determined that VSI "do[e]s not qualify for the [§ 1692p] exclusion," because "the complaint plausibly alleges that the defendants did not effectively implement the measures imposed by district attorneys, and that the defendants did not do so for the named plaintiffs in this case." ER 1. The court concluded that the plaintiffs had plausibly established their UCL and fraudulent misrepresentation claims. ER 2.

Shortly after filing this appeal, VSI sought to stay all proceedings pending appeal—even litigation over the FDCPA claims, which were unaffected by the anti-SLAPP motion. *See* Dist. Ct. Dkt. No. 72. The plaintiffs maintained that,

particularly because the motion "was a carbon copy of an equally unsuccessful motion filed by Defendants' predecessor-in-interest," the appeal should certified as frivolous. Dist. Ct. Dkt. No. 74, at 3. VSI's appeal, the plaintiffs continued, "has nothing to do with the merits"; rather, its "obvious purpose, once again, is to delay things as long as possible." *Id.*

The district court denied the stay. *See* Dist. Ct. Dkt. No. 83. It emphasized that "the FDCPA claim is not involved in the appeal, and no matter what, the defendants will eventually have to defend themselves on the FDCPA claim." *Id.* at 2. And, given that "the FDCPA claim and the state law claims overlap almost completely, . . . the parties must conduct that discovery no matter what." *Id.* at 3. The district court concluded, however that "class certification would be tabled" pending disposition of this appeal. D. Ct. Dkt. No. 104, at 3. Thus, despite the denial of a stay, the proceedings below—at least with respect to the critical issue of class certification—have been delayed by this appeal.

STANDARD OF REVIEW

This Court "review[s] de novo the denial of a motion to strike under California's anti-SLAPP statute." *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176 (9th Cir. 2015). Likewise, this Court considers its own jurisdiction de novo. *See Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 798 (9th Cir. 2012)

SUMMARY OF ARGUMENT

I. This Court should dismiss this appeal because the Court lacks jurisdiction under the collateral-order doctrine to review the denial of VSI's anti-SLAPP motion. California has eliminated the right to immediately appeal anti-SLAPP denials in public-interest cases. Permitting an interlocutory federal appeal where it is unavailable in state court would undermine California's substantive state policy of encouraging public-interest actions and run afoul of this Court's precedent. This Court should not extend collateral-order jurisdiction to this new category of cases.

II. If the Court finds appellate jurisdiction, it should affirm because this class action is precisely the type of lawsuit that the public-interest exception was intended to cover and hence "may not be attacked under the anti-SLAPP statute." *Club Members For An Honest Election v. Sierra Club*, 45 Cal. 4th 309, 316 (2008).

A. The plaintiffs seek the same relief for the class as they seek for themselves. That the measure of damages and restitution may differ among class members does not mean that the relief is "personal" or "individualized." California courts have held that the public-interest exception was meant in part to protect consumer class actions—indeed, debt-collection actions under the UCL and FDCPA—like this one. And the cases that VSI invokes are irrelevant: They involve plaintiffs seeking relief that would advance their own unique interests, not classwide relief to remedy systemic violations of state and federal law.

B. VSI does not deny that bringing its debt-collection scheme into compliance with state law "would enforce an important right affecting the public interest," and "would confer a significant [public] benefit." Cal. Civ. Proc. Code § 425.17(b)(2). And VSI's arguments that this action is moot and unlikely to succeed are not only wrong but irrelevant to the public-interest exception.

C. That VSI has entered into a consent order with the federal Consumer Financial Protection Bureau does not preclude the public-interest exception's application. This suit seeks different forms of relief under different laws. And, because debt-collection laws depend on actions like this one, "[p]rivate enforcement is necessary." *Id.* § 425.17(b)(3).

III. If this Court concludes the public-interest exception does not apply, it should remand because the district court never addressed the merits of the anti-SLAPP motion. In any event, VSI cannot establish that its collection notices are acts "in furtherance of [a] person's [constitutional] right of petition or free speech," Cal. Civ. Proc. Code § 425.16(b)(1), so its communications are not protected under the anti-SLAPP statute. And the plaintiffs can easily demonstrate that they are likely to succeed on their state-law claims. VSI does not even address these claims' merits, instead raising immunity defenses that are flawed or unavailable.

ARGUMENT

I. This Court lacks jurisdiction to review orders denying anti-SLAPP motions based on the public-interest exception.

This appeal is governed by the final-judgment rule: "a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009). Although this Court has held that it has "jurisdiction to review the denial of an anti-SLAPP motion pursuant to the collateral order doctrine," denials based on the public-interest exception are different—they fall outside that "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system nonetheless be treated as final." *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003). Because California has eliminated immediate appeals in public-interest cases like this one, a contrary conclusion would create a truly "anomalous" result: an automatic appeal in *federal* court, even where the *state* is "satisfied that the values underlying the remedy could be sufficiently protected" without immediate appeal. *Englert v. MacDonell*, 551 F.3d 1099, 1105–06 (9th Cir. 2009). The Court should avoid that anomaly and dismiss this appeal.

A. Because the "availability of an immediate appeal pursuant to the collateral order doctrine . . . depend[s] on the particular features of each state's law," this Court lacks jurisdiction where, as here, the state has determined that a denial is *not* "effectively unreviewable on appeal from a final judgment." *DC Comics*

v. Pacific Pictures Corp., 706 F.3d 1009, 1014, 1016 (9th Cir. 2013). That is what California has done in public-interest cases: Section 425.17(e) specifically eliminates immediate appeals when a "trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to" the public-interest exception. Cal. Civ. Proc. Code § 425.17(e). California courts have held that this "language . . . is clear": "[O]nce the challenged cause of action is subject to one of the exemptions in section 425.17, subdivision (b) . . . , *the immediate appeal right no longer exists*." *Goldstein*, 122 Cal. App. 4th at 233 (emphasis added).

Had VSI brought its anti-SLAPP motion in state court, the denial based on the public-interest exception would be the end of it. VSI would have to wait until final judgment to appeal. To nonetheless permit an appeal—on a purely state-law question—because this case was brought in federal court would "simply be anomalous," in light of the fact that California "was satisfied that the values underlying the remedy could be sufficiently protected by a trial judge's initial review." *Englert*, 551 F.3d at 1105–06. Such an approach subverts basic tenets of federalism, for this Court "must make particular efforts to accommodate the substantive aims of states when, as here, [it] entertain[s] state law claims as a federal court sitting in diversity." *DC Comics*, 706 F.3d at 1016.

This Court's precedent requires that it take seriously a state's decision to eliminate immediate appeals when considering its jurisdiction to review anti-

SLAPP denials. For example, in *Englert*, this Court reasoned that "the failure of the Oregon anti-SLAPP statute to provide for an appeal from an order denying a special motion to strike . . . surely suggests that Oregon does not view such a remedy as necessary to protect the considerations underlying its anti-SLAPP statute." 551 F.3d at 1105. Thus, this Court held it was "without jurisdiction to entertain th[e] appeal." *Id.* at 1107. Similarly, because "Nevada's anti-SLAPP statute does not expressly provide for an immediate right to appeal," this Court concluded that the "legislature did not intend for its anti-SLAPP law to function as an immunity from suit." *Ferrell*, 693 F.3d at 801–02. It therefore held it had no jurisdiction over denials of Nevada anti-SLAPP motions. *Id.* at 802.

As it did with respect to Oregon's and Nevada's anti-SLAPP laws, this Court must uphold California's "substantive aim[]," *DC Comics*, 706 F.3d at 1016, in enacting the public-interest exception: to "encourage continued participation in matters of public significance," Cal. Civ. Proc. Code § 425.17(a). And to ensure that aim "not be chilled through abuse of the judicial process"—by, for example, the kind of dilatory appeal that VSI has taken in this case—California eliminated the right to immediately appeal in public-interest cases. *Id.* § 425.17(a), (e). That considered choice requires dismissal of VSI's appeal.

B. Not only is this conclusion consistent with *Batzel*, but it also flows from that decision's reasoning. In concluding that it had jurisdiction, *Batzel* emphasized

"that California's anti-SLAPP statute provides that an order denying an anti-SLAPP motion may be appealed immediately . . . demonstrat[ing] that California lawmakers wanted to protect speakers from the trial itself rather than merely from liability." 333 F.3d at 1025. And *DC Comics*—which "affirm[ed] the validity of *Batzel*'s holding"—similarly stressed that "[t]he California legislature's determination, through its enactment of the anti-SLAPP statute, that such constitutional rights would be imperiled absent a right of interlocutory appeal deserves respect." 703 F.3d at 1015, 1016.

The legislature's "determination" that a defendant may not immediately appeal in public-interest cases likewise "deserves respect." *Id.* at 1016. The collateral order doctrine applied in the ordinary anti-SLAPP case "[b]ecause California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit." *Batzel*, 333 F.3d at 1025–26. But the California legislature has decided that such a "substantive immunity" is not available to defendants facing public-interest actions: the public-interest exception is a "threshold" requirement that must be evaluated before a court can examine a motion to strike. *Navarro v. IHOP Properties, Inc.*, 134 Cal. App. 4th 834, 840–841 (2005). And where a plaintiff has shown that a case falls within the exception, no immunity from suit lies. Thus, under *Batzel*, there is no "appealable final decision" for purposes of the collateral order doctrine. 333 F.3d at 1026.

C. While the Court lacks jurisdiction under its existing precedent, for the reasons given above, many have suggested that this precedent rests on shaky foundations. Although this Court need go no further to resolve this appeal, these concerns supply additional grounds for refraining from extending collateral-order jurisdiction to public-interest cases.

As several members of this Court have recently noted, there are good reasons to believe that anti-SLAPP denials should not be appealable under the collateral order doctrine. Indeed, four judges on this Court recently questioned *Batzel*'s holding, suggesting that it was inconsistent "with controlling Supreme Court precedent." *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing en banc). Even assuming that California's anti-SLAPP statute does confer a substantive immunity, the U.S. Supreme Court has held that interlocutory appeals are not permitted "when the immunity issues are not distinct from the merits" and "stray[] beyond a purely legal question," as is the case under California's anti-SLAPP law. *Id.* at 1191. And the "circuit's anti-SLAPP precedent" demonstrates additional "incoherence." *Id.* at 1190. Decisions like *Batzel*, *Englert*, and *Ferrell* have allowed state-law "differences [to] play out in the availability of an appeal under the collateral order doctrine," "despite [the] facial similarities and identical procedural purposes of each state's

anti-SLAPP statute." *Makaeff v. Trump University, LLC*, 715 F.3d 254, 275–76 (9th Cir. 2013) (Paez, J., concurring).

Yet there is an even more fundamental problem with *Batzel*: California's anti-SLAPP law creates a set of *procedural* rules—it does not confer a "substantive immunity from suit." 333 F.3d at 1025–26. This misconception stems from *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999), which first held that "the twin purposes of the *Erie* rule . . . favor application of California's Anti–SLAPP statute in federal cases." But, as Judge Kozinski has explained, "[t]he anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights." *Makaeff*, 715 F.3d at 273 (Kozinski, J., concurring). And "[f]ederal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules." *Id.* at 275.[4] Since *Batzel*, in fact, the California Supreme Court has held that "the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of 'immunity'"; instead, "it is a procedural device for screening out meritless claims." *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.

[4] The D.C. Circuit recently adopted this reasoning when it declined to apply the D.C. anti-SLAPP law, because it "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015).

4th 728, 737–38 (2003). On that basis, neither this Court nor any other federal court should be applying California's anti-SLAPP law at all.

Ultimately, this appeal does not require this Court to revisit its precedent. But while *Batzel* remains binding precedent as to ordinary anti-SLAPP denials, there is no reason to extend *Batzel* to anti-SLAPP denials based on the public-interest exception—a category of cases for which California itself has expressly removed the right to immediate appeal. Instead, this Court should dismiss VSI's appeal for lack of jurisdiction.

II. This class action falls squarely within the public-interest exception.

If the Court nonetheless concludes that it has jurisdiction, it should affirm the decision below because this lawsuit is the type of "public interest" action that is categorically immunized from an attack under California's anti-SLAPP law. On behalf of thousands of similarly victimized Californians, the plaintiffs challenge VSI's deceptive debt-collective scheme—in which it holds itself out as a local prosecutor to coerce consumers into paying unlawful fees under penalty of prosecution and jail. The district court had little trouble concluding that this action "f[e]ll within the statute's exception for 'action[s] brought solely in the public interest.'" ER 2 (quoting Cal. Civ. Proc. Code § 425.17(b)). Because the "complaint satisfies the provisions of" Section 425.17(b), "it may not be attacked under the anti-SLAPP statute." *Club Members*, 45 Cal. 4th at 316.

A. The relief that the plaintiffs seek is no different from the relief they seek on behalf of the class.

VSI's primary argument against the public-interest exception largely reduces to its claim that the plaintiffs "seek individualized relief." VSI Br. 12; *see also* ER 386–89. When denying VSI's motion to strike, the district court expressly rejected this argument. *See* ER 2. This Court should as well.

Despite what VSI says, the named plaintiffs are in fact seeking the exact same relief as "the relief sought for" the "class of which the plaintiff[s] [are] member[s]." Cal. Civ. Proc. Code § 425.17(b)(1). This includes: (1) a declaratory judgment that VSI's practices violate federal and state law; (2) a permanent injunction preventing VSI from operating diversion programs until it complies with these laws; (3) actual damages; (4) restitution; (5) FDCPA statutory damages; and (6) punitive damages. ER 473–74. None of this is "individualized personal relief." VSI Br. 12. The prayer for relief expressly requests that all forms of relief "be entered for [the plaintiffs] and for members of the class," ER 473, and the complaint seeks no special or unique relief for the named plaintiffs.

VSI nonetheless attempts to muddy these clear waters by arguing that the statutory damages "are available only to the named plaintiffs and not the entire class." VSI Br. 15. Not so. For starters, the anti-SLAPP law does not apply to federal claims to begin with. *See Hilton v. Hallmark Cards*, 580 F.3d 874, 881 (9th Cir. 2009). Therefore, as Judge White explained when denying the motion to strike by

VSI's predecessor-in-interest NCG: "If the anti-SLAPP statute does not apply to Plaintiffs' FDCPA claim, then it would be inconsistent and contradictory to rely on statutory damages sought under the FDCPA claim to find that the exception to the anti-SLAPP statute is barred." *Smith*, 723 F. Supp. 2d at 1218. In any event, VSI misreads the federal statute. Both the named plaintiffs and the absent class members are entitled to recover statutory damages under the FDCPA; it is only the *measure* of damages that may differ. *See* 15 U.S.C. § 1692k(a)(2)(B).

Next, VSI contends (at 15–18) that, because calculating actual damages, restitution, and punitive damages requires a "subjective and particularized" analysis of "individual circumstances," the plaintiffs "are exposed as seeking personal relief unavailable to the members of the putative class." VSI cites no authority supporting this principle, which, if adopted, would effectively exclude the vast majority of class actions seeking monetary relief from the public-interest exception. Indeed, the exception expressly provides that "penalties do[] not constitute greater or different relief for purposes of" Section 425.17(b)(1).

More fundamentally, the statute's plain language, as well as the case law interpreting it, indicates that what matters is not the *amount* of relief that the plaintiffs seek, but whether the *forms* of relief benefit "solely" their own interests. *Club Members*, 45 Cal. 4th at 317. That is, the statute does not require courts to assess whether certain plaintiffs may ultimately end up receiving more or less, so

long as the relief that is sought is the same for all. As one court explained: "The merits of plaintiffs' claims"—the extent of damages, for example—"are irrelevant." *The Inland Oversight Comm. v. Cnty. of San Bernardino*, 239 Cal. App. 4th 671, 677 (2015). Rather, "[t]he relevant question is whether plaintiffs' complaint asserts the kind of claims and the kind of relief that the Legislature intended to exempt from the scope of the anti-SLAPP statute." *Id.* VSI cannot articulate any meaningful difference between "the kind[s] of relief" sought here.[5]

To conclude otherwise, as VSI suggests, would subvert the public-interest exception's purpose, improperly rewarding "businesses who use . . . the anti-SLAPP motion against their public-interest adversaries." *Blanchard*, 123 Cal. App. 4th at 913. Consumer class actions like this one, which challenge systematic violations of the consumer-protection laws, are quintessential public-interest actions. In fact, "[a]n early Senate committee analysis of th[e] bill" that became the public-interest exception "identifies its sponsor as the Consumer Attorneys of California." *Major v. Silna*, 134 Cal. App. 4th 1485, 1496 (2005). And, in enacting

[5] VSI's odd argument (at 17–18) concerning the fraudulent misrepresentation claim fails for the same reason. That some class members may not have relied on VSI's misrepresentations goes to establishing damages, not to whether the plaintiffs sought different relief from the class. And it is unclear what VSI's discussion of Rule 9(b) has to do with its anti-SLAPP appeal, particularly given that the district court rejected this argument when denying VSI's motion to dismiss. *See* ER 2.

the exception, the Senate analysis expressly stated that the law "was intended to overrule *DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4th 562 (2000)"—a class action against a drug manufacturer under California's consumer-protection laws in which a court held that the "manufacturer was entitled to file an anti-SLAPP motion." *Major*, 134 Cal. App. 4th at 1496 n.8.

Not only does VSI's position undermine the public-interest exception's policies, but it also finds no support in the case law. State courts have never held that seeking class damages or restitution violates Section 425.17(b)(1). The cases that VSI cites (at 12–16) involve markedly different facts: plaintiffs who seek personal "gain" or "narrow advantage" in service of their own unique interests. [6]

In *Club Members*, for instance, the California Supreme Court held that the public-interest exception did not apply to several lawsuits brought against the Sierra Club by Robert van de Hoek, a candidate in the Club's annual board election, and his supporters. 45 Cal. 4th at 313. Alleging that the Club's electoral procedures were unfair to particular candidates, the lawsuit sought "the removal of

[6] There is little case law analyzing the public-interest exception—far less than that interpreting the anti-SLAPP law generally. That is no accident. As we explained above, when a trial court denies an anti-SLAPP motion on the basis of the public-interest exception, the defendant may not bring an interlocutory appeal. *See* Cal. Civ. Proc. Code § 425.17(e). Thus, it is no surprise that the state appellate courts have had little opportunity to weigh in on the exception. And, because of this state-law procedural bar, the trial court will have invariably concluded—in those few cases that *do* get appealed—the public-interest exception *does not* apply.

five elected or appointed Board members and the installation of van de Hoek and four other unsuccessful candidates." *Id.* at 314. The Court held that the suit "did not seek relief solely in the public interest or on behalf of the general public." *Id.* at 315, 317. Rather, "there was no doubt that portions of the prayer for relief sought a personal advantage by advancing plaintiffs' own interests"—for example, the lawsuit "asked the court to order the Club to install" *the plaintiff* on the Club's board. *Id.* at 293–94.

Some of VSI's other cases did not even purport to be public-interest actions. In *Ingels v. Westwood One Broadcasting Services, Inc.*, the public-interest exception didn't apply because the plaintiff brought an antidiscrimination suit seeking "damages personal to himself." 129 Cal. App. 4th 1050, 1066–67 (2005). But *Ingels* was an individual action (not a class action) against a radio host who allegedly caused the plaintiff to suffer "loss of dignity, hurt feelings, and emotional upset and distress" by not letting him participate in a radio show. *Id.* at 1066. Similarly, *Thayer v. Kabateck Brown Kellner LLP* involved solely personal interests. The plaintiff, "a co-owner[] of a resort membership," sued a law firm for fraud in connection with its representation of that plaintiff—a private dispute between a client and his lawyers. 207 Cal. App. 4th 141, 146–50 (2012). The case fell outside Section 425.17(b), the court observed in passing, because the plaintiff sought damages for "pain and suffering, emotional distress, and other 'subjective' items." *Id.* at 156–57.

Unlike the plaintiffs in VSI's cases, the plaintiffs here seek only *classwide* relief. They do not hope for injunctive relief that "advance[es] [their] own interests," as the plaintiffs did in *Club Members*. 45 Cal. 4th at 317. Nor do they desire relief that serves solely their unique interests, as in *Ingels* and *Thayer*.

Of all the decisions cited by VSI, only *Tourgeman v. Nelson & Kennard*, 222 Cal. App. 4th 1447 (2014), is relevant.[7] But, contrary to VSI's characterization, *Tourgeman* supports the public-interest exception's application here. It held that a class action alleging violations of the FDCPA and the UCL "satisfied each of the requirements of the public interest exception." *Id.* at 1451–52. And it noted that the legislative history "confirm[ed]" that, "[i]n general, the qualifying language of [Section 425.17(b)] would *clearly encompass* claims brought under the Unfair Competition Law." *Id.* at 1459 (emphasis added).

VSI twists the *Tourgeman* court's observation that the plaintiff "did not seek damages or restitution on behalf of himself or the class or the general public," 222 Cal. App. 4th at 1461, into a holding that class actions seeking damages or restitution foreclose the public-interest exception. But the court held no such thing. Instead, *Tourgeman* held that FDCPA and UCL class actions "benefit the general

[7] VSI also contends (at 13–14) that *Blanchard v. DIRECTV*, 123 Cal. App. 4th 903 (2004), bears on this Court's analysis of Section 425.17(b)(1). VSI's reliance on that case is misplaced, however, because *Blanchard* only discussed "the second and third factors of subdivision (b)." *See id.* at 914–17.

public . . . by ensuring that [defendants] comply with state and federal statutory law," *id.*—an idea that in fact motivated the enactment of the public-interest exception in the first place, *see Major*, 134 Cal. App. 4th at 1496 n.8. Because this case is such an action, this Court should affirm.

B. Ending VSI's illegal and deceptive debt-collection practices would significantly benefit the public interest.

VSI's argument on the exception's second condition fares no better. Its theory boils down to a series of assertions: that (1) this action's only public benefit is injunctive relief; (2) the relief the plaintiffs seek has already been granted in the CFPB's Consent Order; and (3) the plaintiffs do not have Article III standing to obtain injunctive relief.

The theory falls apart at all three steps. First, the requested injunctive relief is not the only relief that would benefit the public. The plaintiffs seek a declaratory judgment that VSI's "collection practices violate the FDCPA and the UCL." ER 473. Declaratory relief itself would "confer a significant benefit . . . on the general public or a large class of persons," *id.*; for example, it could bring public pressure to bear on VSI's debt-collection practices, or it could result in legislative reform of California's diversion-program regime. Damages would also benefit the public by deterring VSI and other debt collectors from engaging in illegal and deceptive practices. What else could the legislature have intended when it declared that the "significant benefit" to the public or a large class of persons could be "pecuniary or

nonpecuniary?" *Id.*; *see People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th 487, 502 (2012) (holding, in qui tam context, that monetary relief can "advance[] the public purpose and benefit" by encouraging public-interest actions).

In any event, the CFPB's consent order does not moot the requested injunctive relief. The consent order provides for a "permanent injunction to prevent and restrain future violations" under federal law, ER 102, 108, but obtains no additional relief under California's laws, as sought by the plaintiffs here, *see* ER 468–73. The order also fails to include certain relief that the plaintiffs have specified; for example, the order does not prohibit VSI "from seeking to collect, or collecting, any unlawful fees, including, but not limited to, class fees." ER 473; *compare with* ER 108–12. And while the order levies civil penalties on VSI, it obtains no specific restitution for California consumers. *Id.*

VSI's questioning (at 21–22) of whether the plaintiffs have Article III standing to seek injunctive relief is further afield. Again, "[t]he merits of [the plaintiff's] claim are . . . irrelevant in determining whether the action meets the public benefit requirement of section 425.17, subdivision (b)(2)." *Tourgeman*, 222 Cal. App. 4th at 1463. The question is whether the plaintiffs' action, "*if successful*, would enforce an important right affecting the public interest, and would confer a significant benefit . . . on the general public or a large class of persons," Cal. Civ. Proc. Code § 425.17(b)(2) (emphasis added). Whether the plaintiffs would have

standing to obtain injunctive relief is a merits question, not a question whether their class action is in the public interest. And VSI does not dispute that the injunctive relief, at least, would be in the public interest if granted.

VSI's heavy reliance on *Blanchard v. DIRECTV* actually illustrates the extent to which this action benefits the public. *Blanchard* held that the public-interest exception did not apply to a class action alleging that DIRECTV had violated the UCL by sending demand letters to thousands of consumers insisting that they cease using "decryption devices" that "enable users to steal DIRECTV's programming." 123 Cal. App. 4th at 909–10. The court found that the plaintiffs sought "to enjoin DIRECTV from sending this particular demand letter concerning this specific electronic device"; "[t]hey [were] not seeking to assert some general right not to receive demand letters. . . [n]or d[id] they seek a declaration about demand letters in general." *Id.* at 914–15. "[T]here is no public interest principle being vindicated by this action," the court continued: "[I]f plaintiff's UCL claim were successful, it would establish no ringing declaration of the rights of all pirating-device purchasers, nor would it lead to a wholesale change in the practice of sending demand letters." *Id.* at 915.

All of the elements found lacking in *Blanchard* are present here. The plaintiffs do not seek to enjoin VSI from sending the "*particular*" notice they received—they seek to prohibit VSI from ever again sending letters to California consumers while

misrepresenting itself as a local district attorney. *Id.* at 914. The plaintiffs *are* "seeking to assert some general right" not to be coerced into diversion programs under the false threat of criminal prosecution, and they *do* "seek a declaration" about these unlawful practices "in general." *Id.* at 915. And, if this action were successful, it *would* "establish [a] ringing declaration of the rights of all" California consumers to be free from unfair debt-collection practices by private entities who contract with prosecutors to extort illegal fees, potentially "lead[ing] to a wholesale change in the practice" of diversion programs state-wide. *Id.*

This action, if successful, would "vindicate" a number of "public interest principle[s]." *Id.* The ABA has described the kind of practices used by VSI as "abusive": they give "the impression that the machinery of the criminal justice system has been mobilized against the debtor, and that unless the debtor pays the debt, the debtor faces criminal prosecution and possible incarceration." Formal Ethics Op. 469 (2014). If a court order ending these practices would not "enforce an important right affecting the public interest" or "confer a significant benefit . . . on the general public or a large class of persons," Cal. Civ. Proc. Code § 425.17(b)(2), it's hard to imagine any case that would.

C. Private enforcement is necessary.

That the federal Consumer Financial Protection Bureau (CFPB) has recently sued VSI over its unlawful collection practices, and entered into a consent order,

only highlights the public-interest nature of this class action. It does not mean that "[p]rivate enforcement is not necessary." VSI Br. 23; *see* Cal. Civ. Proc. Code § 425.17(b)(3). The limited relief obtained by the CFPB is not coextensive with the relief sought here: the plaintiffs seek different forms of relief (damages and restitution, a more specific injunction), under different laws (state consumer-protection laws), for a different time period. The precedent that VSI cites (at 23) says nothing about these circumstances; those cases merely noted the absence of public enforcement—they did not hold that absence to be dispositive.

In any event, as the Supreme Court has recently recognized, the FDCPA consists of a "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 577 (2010). "In enacting the FDCPA, Congress made clear that the FDCPA was intended to be a 'primarily self-enforcing' statute, with private individual and class actions providing collectors with a powerful incentive to comply with the statute." Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 66 (Feb. 2009), http://1.usa.gov/1nmdjKZ (quoting S. Rep. No. 95-382, at 1 (1977)). Because the government receives tens of thousands of debt-collection complaints each year, "it is not feasible for [public] law enforcement to be the exclusive or primary means of deterring all possible law violations." *Id.* at 65.

In other words, private enforcement is complementary to public enforcement actions. Indeed, the CFPB's consent order expressly precludes VSI from claiming offsets based on penalties in "related consumer actions"—*i.e.*, actions based on "substantially the same facts" as alleged in the CFPB complaint. ER 108, 112–13. The CFPB itself thus recognizes that private enforcement like this class action is necessary to ensure compliance and compensation.

This action also meets the second prong of Section 425.17(b)(3)—that private enforcement "places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." VSI's arguments (at 23–24) to the contrary just restate its erroneous claim that this action seeks "personal benefits." That is incorrect, as we explain above. "The relevant inquiry is whether the cost of the [plaintiffs'] legal victory transcends [their] personal interest." *Blanchard*, 123 Cal. App. 4th at 915. Here, "the effect that this lawsuit could possibly have on the public at large" "far exceeds" the plaintiffs' "personal stake." *Id.* at 916. If successful, the plaintiffs' action will remedy VSI's statewide violations of consumer-protection laws, and bring diversion programs into compliance with the Diversion Act. These public benefits far outweigh the financial recovery some plaintiffs may receive—and others, as VSI admits (at 17), may receive no compensation.

* * * *

In sum, although it may be true that "[n]ot all public interest or class actions, are intended to be exempt from the anti-SLAPP law," *Save Westwood Vill. v. Luskin*, 233 Cal. App. 4th 135, 143 (2014), the California legislature surely intended that actions like this one—representing thousands of consumers who seek to remedy numerous violations of consumer-protection laws committed by a private debt-collector in the name of the State—be covered by the public-interest exception. This Court should uphold that intent, and affirm the district court's judgment.

III. Even if this Court determines that the public-interest exception does not apply, VSI's anti-SLAPP motion should not be granted.

A. If the Court holds that the public-interest exception does not apply, it should remand this case to the district court.

This Court should either dismiss the appeal for lack of jurisdiction or affirm the district court's conclusion that the action falls within the public-interest exception. But if this Court disagrees, it should remand the case to the district court.

As VSI itself recognizes, "[a]n anti-SLAPP motion is in effect an early motion for summary judgment." VSI Br. 5; *see D'Arrigo Bros. of California v. United Farmworkers of Am.*, 224 Cal. App. 4th 790, 800 (2014). The two-step anti-SLAPP test requires both parties to make "prima facie showing[s]" regarding the law's twin requirements. *Mindys Cosmetics*, 611 F.3d at 595. Here, however, because the district court concluded that the public-interest exception applies, it never addressed whether either party had made those showings. Instead of deciding these

issues for the first time on appeal, this Court should remand the case so the district court may "consider the pleadings, and supporting and opposing affidavits" in the first instance. Cal. Civ. Proc. Code § 425.16(b)(2); *see also Batzel*, 333 F.3d at 1035.

B. The anti-SLAPP law does not protect VSI's notices falsely threatening recipients with prosecution.

In any event, VSI's anti-SLAPP motion stumbles on the first step of the test. VSI's misleading letters to California consumers are not "act[s] . . . in furtherance of [a] person's right of petition or free speech under the United States Constitution or the California Constitution." Cal. Civ. Proc. Code § 425.16(b)(1). Sending notices to consumers that falsely threaten prosecution and jail time in the name of the State does not touch on any "right of petition or free speech." *Id.*

As a matter of law, VSI's diversion program is not an "official proceeding" within the meaning of the anti-SLAPP law. Cal. Civ. Proc. Code § 425.16(e)(1), (e)(2). The statute protects only the petitioning of judicial or quasi-judicial proceedings that are capable of considering and resolving a petition, not "private alternative[s] to a judicial proceeding." *Century 21 Chamberlain Assocs. v. Haberman*, 173 Cal. App. 4th 1, 5 (2009). "The bare fact that statutes govern [VSI's diversion programs] does not mean" that statements made in connection with those programs are "subject to anti-SLAPP protection." *Id.* at 9. In other words, VSI's notices are not protected acts under the statute.

And VSI's assertions to the contrary misconstrue the plaintiffs' case. The plaintiffs certainly "dispute" whether the diversion programs—as administered by VSI—are "official proceeding[s] authorized by law." VSI Br. 26; *see* Cal. Civ. Proc. Code § 425.17(e)(1). And the plaintiffs do not "concede" that VSI's misleading notices to consumers "were made in connection with issues under consideration or review" by local prosecutors. VSI Br. 27; *see* Cal. Civ. Proc. Code § 425.17(e)(2). These questions go to the crux of the plaintiff's allegations: that VSI blatantly runs its diversion programs in violation of state law, and that local prosecutors do not review alleged bad checks in any meaningful way before sending them to VSI. *See* ER 449–53. Thus, even if its programs were "official proceedings" under the anti-SLAPP law—which they are not—VSI's failure to comply with the Diversion Act would deprive it of the law's protection.

VSI's litigation-privilege arguments similarly fail. Initially, "statements protected by the litigation privilege are not necessarily protected by the anti-SLAPP statute," because "the litigation privilege and the anti-SLAPP statute are substantively different statutes that serve quite different purposes." *Century 21*, 173 Cal. App. 4th at 10 (internal quotation marks omitted). And VSI's arguments depend on various mischaracterizations of the record, which VSI supports only by reference to two declarations—one by its own CEO:

- "Defendants have no discretion as to who should or should not participate in the program."

- "[E]ach and every case referred to the diversion program was a case eligible for prosecution."

- "[P]robable cause had been established before Defendants communicated with the bad check offenders on behalf of the District Attorneys in connection with the BCDPs."

- "[E]ach bad check offender who is offered an opportunity to participate in the BCDP has a legitimate and serious chance of being prosecuted."

VSI Br. 27–34. But the allegations here, which the district court fully credited in denying VSI's motion to dismiss, contradict these assertions. *See* ER 1–2. As do the plaintiffs' experiences. Four plaintiffs did not agree to VSI's demands. *None* of them have been prosecuted—presumably because none of them had the fraudulent intent required to commit a crime, and so they never should have received a notice from VSI in the first place. *See* Cal. Penal Code § 1001.60.

Because VSI's notices were neither "authorized by law," "designed to achieve the[] objectives" of criminal diversion programs, nor "made in good faith, serious consideration of potential prosecution," VSI Br. 29–30, 34, they are not entitled to the litigation privilege. And for these reasons too, their notices are not protected by the anti-SLAPP statute.

C. The plaintiffs will succeed on the merits.

Although this Court should remand the anti-SLAPP merits question, the plaintiffs can easily establish its "low burden": Their claims more than satisfy the

required "minimum level of legal sufficiency and triability." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014).

In fact, VSI already had an opportunity to argue that the plaintiffs had not established a likelihood of success on the merits—and it was rejected. In denying VSI's motion to dismiss, the district court agreed that the plaintiffs "plausibly" allege that VSI "did not effectively implement the measures" required by California law when running its bad-check diversion programs. ER 1. And it also concluded that "it's plausible that the defendants knew they were violating the FDCPA, and knew they were misleading people by sending them letters implying that they would be prosecuted if they didn't participate in the diversion program." ER 2. In other words, the district court credited the plaintiffs' allegations that, although VSI tells consumers that they will be prosecuted unless they pay substantial fees, "no prosecutor has reviewed the evidence, made a probable cause determination, or charged the check writer before he or she is offered 'diversion,'" and "it is unlikely that a check writer who ignores the diversion offer will be charged with a crime." ER 450.

That decision alone demonstrates "a probability that the plaintiff[s] will prevail on the[ir] claim[s]." Cal. Civ. Proc. Code § 425.16(b)(1). A court evaluating an anti-SLAPP motion—like a court evaluating a motion to dismiss—"neither weigh[s] credibility [nor] compare[s] the weight of the evidence." *Greater L.A. Agency*,

742 F.3 at 425. The court "evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Id.* The district court here concluded that it did not. Nor is its decision without precedent. *Two* other courts have reached the same conclusion in cases against VSI's predecessors-in-interest, challenging the very same rent-a-prosecutor practices. *See Smith*, 723 F. Supp. 2d at 1213 (denying NCG's motion to dismiss); *Del Campo v. Am. Corrective Counseling Serv. Inc.*, 718 F. Supp. 2d 1116, 1132–1136, 1138 (N.D. Cal. 2010) (granting summary judgment and finding that ACCS violated the FDCPA and UCL); *see also Del Campo v. Kennedy*, 517 F.3d 1070, 1072–73 (9th Cir. 2008) (discussing denial of ACCS's motion to dismiss and rejecting its immunity defense).

Perhaps for that reason, VSI does not dispute the actual merits of the UCL and fraudulent misrepresentation claims on appeal. Instead, it offers (at 36–40) three blanket defenses: the litigation privilege, qualified immunity, and a subjective good-faith defense. All lack merit.

We have already described why the litigation privilege does not apply. Qualified immunity doesn't either. *Bradley v. Medical Board of California*, 56 Cal. App. 4th 445 (1997), VSI argues, creates a "California law" immunity for private entities. But VSI conflates state and federal law. *Bradley*—in which the plaintiff brought claims pursuant to 42 U.S.C. § 1983—concerns *federal* qualified immunity, which applies only to *federal* claims. *See id.* at 454–62. "There is no comparable qualified

immunity under California law." *Venegas v. Cnty. of L.A.*, 153 Cal. App. 4th 1230, 1249 (2007). And *Bradley* is directly at odds with this Court's precedent; indeed, *Bradley* acknowledged that it "disagree[d] with the [Ninth Circuit's] apparent blanket position that qualified immunity does not shield private defendants from section 1983 liability." 56 Cal. App. 4th at 462 n.14 (citing Ninth Circuit cases).

VSI also mixes up qualified and absolute immunity. *See* VSI Br. 38–39. This Court has already rejected—in a case against VSI's predecessor, ACCS—the argument that a private entity receives derivative absolute or sovereign immunity because of its relationship with local prosecutors. *See Del Campo*, 517 F.3d at 1081. If there were any doubt, the Supreme Court recently eliminated it in *Campbell-Ewald Co. v. Gomez*, where it held that where a private contractor violates the law—as alleged here—"no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." No. 14-857, slip op. at 12. (U.S. Jan. 20, 2016).

Finally, VSI claims that it could not be liable even if it did violate the law, because of its subjective "good faith." Yet this too is a federal defense, like the qualified-immunity defense arising in the context of Section 1983 claims. *See Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008). It thus has no bearing on the plaintiffs' state-law claims—the only claims at issue on appeal.

CONCLUSION

This Court should dismiss VSI's appeal for lack of jurisdiction. In the alternative, this Court should affirm the district court's judgment in its entirety.

Respectfully submitted,

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January 28, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify that my word processing program, Microsoft Word, counted 11,561 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta
Deepak Gupta

January 28, 2016

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Plaintiffs-Appellees state that they are not aware of any case pending before this Court that presents related legal issues.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, I electronically filed the foregoing Brief for Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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