Paul Arons, State Bar # 84970
LAW OFFICE OF PAUL ARONS
685 Spring Street, #104
Friday Harbor, WA 98250
Tel: (360) 378-6496
Fax: (360) 378-6498
lopa@rockisland.com

Deepak Gupta, D.C. Bar # 495451
(*pro hac vice*)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
Tel: (202) 588-1000
Fax: (202) 588-7795
dgupta@citizen.org

additional counsel on signature page
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ELENA DEL CAMPO on behalf of herself and all others similarly situated, Plaintiffs, v. GEORGE KENNEDY, AMERICAN CORRECTIVE COUNSELING SERVICES, INC., BRUCE RAYE, DONALD R. MEALING, LYNN R. HASNEY and DOES 1 through 20. Defendants.	Civ. No. 01-21151 JW CLASS ACTION **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS BASED ON ABSTENTION** Date: April 24, 2006 Time: 9:00 a.m. Courtroom 8
AND CONSOLIDATED ACTION	Civ. No. 03-02691 JM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

BOOKS AND ARTICLES

INTRODUCTION

Defendants' motion does not challenge the substance of plaintiffs' claims or contest this Court's jurisdiction to adjudicate them. Instead, it seeks to have this entire class action thrown out on the basis of rarely-invoked administrative abstention principles that have nothing to do with this case. "Because the federal courts' obligation to adjudicate claims within their jurisdiction is virtually unflagging, abstention is permissible only in a few carefully defined situations with set requirements." *United States v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001). But the only abstention doctrine that defendants propose—*Burford* abstention—is not implicated here. "*Burford* represents an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28 (1996). Defendants ask this Court to ignore the fact that the predicates for that "extraordinary and narrow exception"—a suit seeking review of action by a state administrative agency and a mechanism for timely and adequate state-court review of the agency's action—are wholly absent here.

Even assuming these hurdles could be overcome, *Burford* abstention would be clear error under the law of this circuit. In the Ninth Circuit, *Burford* abstention is only appropriate where:

- "the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court";
- "the federal issues could not be separated from the complex state law issues with respect to which state courts might have special competence"; and
- "federal review might disrupt state efforts to establish a coherent policy."

City of Tucson v. U.S. West Communications, Inc., 284 F.3d 1128, 1133 (9th Cir. 2002). If any of these factors is lacking, a district court may not abstain. In this case, none of the requirements is satisfied. Finally, because abstention is predicated on the courts' equitable powers, federal courts

have authority to dismiss suits based on abstention principles only where the relief sought is solely equitable or discretionary. Because this action seeks damages, dismissal is impermissible. The motion should be denied.

BACKGROUND

This Court can easily dispose of defendants' motion on the basis of settled Supreme Court and Ninth Circuit law. Because defendants' memorandum mischaracterizes the nature of the challenged program, however, plaintiffs must first set the record straight.

As part of their effort to escape federal court scrutiny, the defendants have painted a rosy picture of a legitimate criminal diversion program focused on allowing real criminal suspects an opportunity to correct their behavior through remedial instruction. This picture contrasts starkly with the allegations in the complaint, which describe a money-making scheme in which the district attorney rents his name and authority to a private, for-profit debt collector who, in turn, extorts unlawful fees from consumers through false threats of prosecution and then splits the profits with the prosecutor.[1]

Criminal diversion programs are supposed to be for actual criminal suspects. In California, the act of writing a check that is returned for insufficient funds, standing alone, is not a crime. Rather, under section 476a of the Penal Code, it is a crime only if the check writer *intends to defraud* the merchant. Indeed, the California courts have described "intent to defraud the person to whom the check was delivered" as "the gist of the offense." *People v. North*, 182 Cal. Rptr. 126, 128 (Cal. Ct. App. 1982). The defendants misleadingly state that there is a statutory

[1] For purposes of a motion to dismiss based on abstention, the allegations in the complaint must be taken as true. *See Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 791 F.2d 1111, 1115 n.4 (3d Cir. 1986). The Court has not yet ruled on the plaintiffs' pending motion for leave to file a consolidated complaint. However, because the defendants have elected not to oppose that motion and because their motion to dismiss appears directed to the consolidated complaint, this brief refers to the allegations in that complaint.

presumption that "mere issuance" of a returned check establishes the "requisite *mens rea*" for the crime. Defs' Mem. at 2. That is not so. The statute provides only that "the notice of protest" of a check for "insufficiency of funds" is, as one might expect, "presumptive evidence of knowledge of [the] *insufficiency of funds*." Cal. Penal Code § 476a(c) (emphasis added). But this has nothing to do with section 476a's "necessary element" of intent to defraud, which requires a showing of "an intent to deceive another person for the purpose of gaining some material advantage and to accomplish that purpose by a false statement or representation or by any other deceptive act." *Harrington v. Dept. of Real Estate*, 263 Cal. Rptr. 528, 532 (Cal. Ct. App. 1989).

Given this essential criminal-intent element, one of the many critical failings of the challenged program is defendants' fiction that any person who writes a returned check has violated section 476a. When merchants refer checks for collection, they are not accusing their customers of committing a crime, and the District Attorney has not determined, as section 1001.60 of the Penal Code expressly requires, that there is probable cause to believe that a crime has been committed. Thus, when American Corrective Counseling Services (ACCS) commences collection procedures, neither ACCS nor any of the defendants has evidence that the consumer has committed a crime. Indeed, ACCS itself, in its class workbook, informs all participants in the bad check program that they have been targeted solely because "[k]nowingly, *or unknowingly*, you passed at least one bad check resulting in the victim(s) filing a bad check complaint." *Checks and Balances: A program for getting your checkbook and life back in balance* at 2 (emphasis added).[2]

---

[2] The ACCS class workbook is attached as Exhibit 1 to the Declaration of Paul Arons ("Arons Decl."), which is being filed with this opposition. Given defendants' assertions that the financial responsibility class is the centerpiece of the challenged program, it is notable that a significant portion of the workbook focuses on understanding a bank statement, balancing a checkbook, and accurate record-keeping—lessons that would presumably help only consumers who *unintentionally* pass bad checks. A check writer who writes a returned check because he or she mistakenly believes there are sufficient funds in the checking account has not knowingly written a dishonored check and does not have an intent to defraud the merchant—the two essential elements of Penal Code 476a.

Furthermore, despite the defendants' glowing self-assessment of the benefits of the ACCS program, they have not presented any competent evidence in support of their contention that the check diversion program is more effective than ordinary civil check collection. To support the claim that the check diversion program is necessary, the defendants cite statistics that purportedly reflect a low "recidivism rate." Defs' Mem. at 4. However, the declarant, George Kennedy, does not know how this rate was calculated. (Kennedy Depo. at 23:11-25:1, Exh. C to Jenkins Decl.). Based on information obtained in other litigation against ACCS, plaintiffs believe that the company devised this statistic as a promotional tool, based solely on the number of consumers who participated in the ACCS program on multiple occasions. There are at least three problems with the so-called recidivism rate. *First*, it is worthless without some control group or meaningful comparator, *i.e.* the rate of recidivism in the general population. *Second*, because the statistic is calculated only by looking at those who appear in the ACCS program on multiple occasions, it ignores those "alumni" of the program who subsequently write returned checks, but are not referred to ACCS—because, for instance, the merchants to whom the checks are written do not participate in the program. And it ignores all ACCS alumni who, after completing the program, are actually prosecuted and convicted for writing subsequent bad checks with intent to defraud, but without being targeted again by ACCS. *Third*, even if these defects were corrected, the statistic would not be a meaningful indicator of criminal recidivism because the vast majority of the people in the sample set did not have the requisite intent to defraud and therefore never committed a crime in the first place.

Defendants' claim that the most prominent goal of the diversion program is its educational requirement is similarly unsupported by facts. There is no evidence that consumers who pay ACCS its fees, but who never attend classes, suffer any negative consequences. Indeed, a consumer who serially writes returned checks can repeatedly participate in the program without

taking any classes. (Bruce D. Raye Depo. at 86:10-89:25, Exh. 2 to Arons Decl.). That fact—that so long as they pay fees that go directly into ACCS's corporate coffers, repeat participants can escape the program's other "requirements"—entirely undermines the suggestion that ACCS is anything other than a for-profit debt collector dressed in law-enforcement clothing.

ARGUMENT

A. Supreme Court and Ninth Circuit Law on *Burford* Abstention

Although defendants ask this Court to take the extraordinary step of dismissing this case on abstention grounds, they rely chiefly on sweeping generalities about federalism and comity. Their motion fails entirely to confront—let alone overcome—the strict limits on abstention articulated by the Supreme Court and the Ninth Circuit. A review of the case law reveals that the only abstention doctrine defendants propose, the *Burford* doctrine, is inapplicable here.

1. *Burford v. Sun Oil Co*. The *Burford* abstention doctrine, also known as "administrative abstention," gets its name from *Burford v. Sun Oil Co*., 319 U.S. 315 (1943). The question there was whether the federal courts should hear a suit by the Sun Oil Company "attack[ing] the validity of an order of the Texas Railroad Commission granting the petitioner Burford a permit to drill four wells on a small plot of land in the East Texas oil field." *Id.* at 317. Jurisdiction in the federal district court was premised on diversity of citizenship as well as the company's claim that the order was an "unreasonable" application of state law and, for that reason alone, violated the Fourteenth Amendment. *Id.* The only federal question thus turned solely on whether the Commission had reasonably applied Texas's oil and gas conservation regulations. *Id.* at 331 & n.28.

In concluding that abstention was appropriate under these circumstances, the Supreme Court placed heavy emphasis on Texas's complex state administrative processes and the need for centralized decision making in allocating oil-drilling rights. Because of the potentially

overlapping claims of parties who might have an interest in the common pool of oil, Texas had given the Commission exclusive regulatory authority over this area, which, according to the Court, was "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Id.* at 318. The Court explained that a single agency was best equipped to deal with these "thorny" issues because, "since oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain the oil from the most distant parts of the reservoir." *Id.* at 318-19.

The Court also emphasized that, "to prevent the confusion of multiple review," Texas had created a centralized system for judicial review. *Id.* at 326. The Commission's orders were subject to *de novo* review in a specific state trial court and could be appealed to a specific branch of the civil appeals court and, from there, to the state supreme court. *Id.* at 325. This "[c]oncentration of judicial supervision of Railroad Commission orders permit[ted] the state courts, like the Railroad Commission itself, to acquire a specialized knowledge" of the regulations and the industry. *Id.* at 327. Taken as a whole, the process established a "unified method for the formation of policy and determination of cases by the Commission and by the state courts." *Id.* at 333-34. The Court further concluded that the state courts' review of the Commission's orders was "expeditious and adequate" and that this contrasted sharply with ongoing federal review, which had already led to conflicting rulings between the specialized state courts and the non-specialized federal district courts. *Id.* at 332. If federal interference were permitted to continue, such federal-state conflict was "almost certain" to occur again. *Id.* at 334. On the other hand, "if the state procedure [was] followed from the Commission to the State Supreme Court," review of the federal questions would be "fully preserved" for review by the U.S. Supreme Court. *Id.* Given these circumstances, the Court held, it was appropriate for a "federal equity court to stay its hand." *Id.*

2. Post-*Burford* Jurisprudence in the Supreme Court. In the sixty-three years since *Burford*, the Supreme Court has found abstention under *Burford* to be appropriate only once, in a suit by a railroad challenging an administrative order of the Alabama Public Service Commission concerning the discontinuation of local train service. *See Ala. Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951). In every case since 1951 in which a party has raised *Burford* abstention, the Court has rejected it as unwarranted and has taken pains to rein in the doctrine. For example, in *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 & n.6 (1963), the Court held that *Burford* abstention was inappropriate in a constitutional challenge to a state's segregated school system, despite the possibility of interference with state administrative procedures. "[W]herever the Federal courts sit," the Court announced, "rights under the Federal Constitution are always a proper subject for adjudication, and . . . we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Id.* Similarly, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court rejected *Burford* abstention in a challenge to state marriage licensing requirements, declaring that there is "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 379 n.5.

More recently, in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*"), the Court provided a distillation of "the principle now commonly referred to as the '*Burford* doctrine.'" *Burford*, the Court explained, applies "[w]here timely and adequate state-court review is available" and "a federal court sitting in equity" is asked "to interfere with the proceedings or orders of state administrative agencies." *Id.* In such situations, abstention is appropriate only where there are difficult state-law questions whose importance transcends the particular case or where federal review would disrupt efforts to

establish a coherent state policy, and then only if state administrative law material is "entangled in a skein" of the federal suit. *Id.* at 361.

And even where these requirements are satisfied, federal courts should be cautious in considering abstention: "While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *Id.* at 362. Rather, *Burford* is appropriate only where there is also a danger that federal court review of the administrative agency's action would "disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem." *Id.* at 364.[3]

Finally, in its most recent decision on the subject, the Supreme Court held that dismissal under *Burford* is inappropriate in an action seeking money damages, because "[t]he power to dismiss under the *Burford* doctrine, as with other abstention doctrines . . . derives from the discretion historically enjoyed by courts of equity." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28 (1996). "Under our precedents," the Court held, "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is

[3] As the First Circuit has put it, "*NOPSI* cabins the operation of the *Burford* doctrine. Post-*NOPSI Burford* applies only in narrowly circumscribed situations where deference to a state's administrative processes for the determination of complex, policy-laden, state-law issues would serve a significant local interest and would render federal-court review inappropriate." *Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993). "In short, a *Burford* case is one that cannot be resolved by the federal court without running the unacceptable risk of error as to matters of state law which have been entrusted by the state legislature to an expert administrative body." Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DePaul L. Rev. 859, 909 (1993); *see also* Erwin Chemerinsky, *Federal Jurisdiction* § 12.2 at 758 (3d ed. 1999) ("*NOPSI* makes clear that the mere existence of state administrative procedures, or even a complex state administrative apparatus, does not necessarily warrant abstention. *Burford* abstention requires that the administrative system have a primary purpose of achieving uniformity within a state and that there be the danger that judicial review would disrupt the proceedings and undermine the desired uniformity.").

equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Id.* at 731.

3. The Ninth Circuit's *Burford* Jurisprudence. Given the paucity of Supreme Court decisions defining the parameters of *Burford* abstention, the "doctrine has received its real shape" in the lower courts. Young, *Federal Court Abstention and State Administrative Law*, *supra*, at 898. The "Ninth Circuit," in particular, "narrowly limits the doctrine to cases closely resembling the facts of the original *Burford* case." *Id.* at 900; *see Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) ("This circuit has been careful to avoid extending *Burford*."). "In an effort to limit the application of abstention under the *Burford* principle," *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991), "the Ninth Circuit requires the presence of certain factors before a district court can abstain under *Burford*." *City of Tucson*, 284 F.3d at 1133. Tracking the facts of *Burford* itself, the Ninth Circuit requires "first, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that the federal issues could not be separated easily from the complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy." *Id.* Abstention where any of these factors are lacking is error. *Id.*

B. Unlike *Burford*, This Suit Seeks Neither Review of State Administrative Agency Action Nor Displacement of a State Mechanism for Judicial Review.

The first, and perhaps most fundamental, problem with defendants' motion to dismiss is that *Burford* abstention is limited to suits in which a federal court has been asked to review "the proceedings or orders of state administrative agencies." *NOPSI*, 491 U.S. at 361. The defendants have not cited, nor can they, any state administrative agency process, complex or otherwise, that is arguably at issue here. *Burford* abstention, therefore, is inapposite. *Fragoso*, 991 F.2d at 882-83 (*Burford* is not "at all relevant" where the action does not seek review of action by a "state

administrative agency"); *Nucor Corp. v. Neb. Pub. Power Dist.*, 891 F.2d 1343, 1348 (8th Cir. 1989) (*Burford* abstention is inappropriate where "the challenges are not directed at the decisions of an independent regulatory commission, nor is there a centralized state judicial review scheme in place").

Along the same lines, *Burford* abstention is relevant only "[w]here timely and adequate state-court review is available." *NOPSI*, 491 U.S. at 361. But California has not established *any* procedure by which citizens who are targeted by bad check diversion programs may seek judicial review and raise the claims being made in this lawsuit, *e.g.*, that the defendants target non-criminals and collect unlawful fees. Indeed, the suggestion that *Burford* abstention applies in this case is particularly bizarre because one of plaintiffs' allegations is that the challenged program violates the Due Process Clause by failing to provide them with a hearing to challenge the deprivation of their property. And, as a general matter, "[f]ederal courts should be reluctant to abstain in civil rights cases regardless of the type of constitutional interest at stake; abstention can delay the redress of significant constitutional wrongs. The practical effect of abstention in these cases may be to impose an exhaustion requirement not appropriate to 42 U.S.C. § 1983." *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985).

C. Unlike *Burford*, This Suit Would Not Displace Review by a Particular State Court With Specialized Expertise.

Even assuming incorrectly that this lawsuit were seeking review of a complex administrative process with an established avenue for state-court judicial review, abstention would be improper because the case does not meet the Ninth Circuit's first criterion for *Burford* abstention: Unlike the Texas oil-drilling scheme in *Burford*, California has not established a mechanism through which consumers can challenge fee assessments by bad check diversion programs in a court with specialized expertise in such matters. Because one of the central rationales of *Burford* was the need to avoid disruption of the uniform regulation of oil-drilling by

specialized state administrators and judges, the Ninth Circuit has consistently held that *Burford* is implicated only where "the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court." *City of Tucson*, 284 F.3d at 1113.[4] Indeed, it is difficult to imagine why a specialized court would ever be established to decide the issues in this case. The question presented here—whether the defendants' bad check diversion program complies with federal statutory and constitutional law—is a far cry from *Burford*'s complex regulatory scheme for adjudicating potentially interlocking oil-drilling rights on a case-by-case basis.

D. Unlike *Burford*, This Suit Does Not Primarily Involve State Law, and the State-Law Issues Presented Are Unexceptional.

Burford abstention is appropriate, if it all, only "where the issues sought to be adjudicated in federal court are primarily questions regarding that state's laws." *Tucker*, 942 F.2d at 1407. As in *Tucker*, "[t]his simply is not the situation before us," and therefore, "abstention under the principles set forth in *Burford* [is] not appropriate in this case." *Id.* The central issues in this case concern whether the defendants' practices and policies run afoul of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., and the Due Process and Equal Protection Clauses of the United States Constitution. Plaintiffs have also pleaded supplemental state-law causes of action, but defendants have not suggested that those claims are the primary questions in the case or that they are especially complex.

---

[4] *See also Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 734 (9th Cir. 1991) ("The fact that California has not established a specialized court system to resolve disputes over insurance policy coverage convinces us that application of the *Burford* doctrine to this case is unwarranted."); *Almodovar v. Reiner*, 832 F.2d 1138, 1141 (9th Cir. 1987) (*Burford* abstention is improper where "California has not established a specialized court system"); *Knudsen*, 676 F.2d at 377 (*Burford* abstention was improper where "Nevada has not concentrated challenges to the regulations in any particular or specialized court"); *Int'l Bhd. of Elec. Workers v. Public Serv. Comm'n*, 614 F.2d 206, 211 (9th Cir. 1980) (*Burford* abstention was improper where "Nevada has not concentrated challenges to the Commission's regulatory orders in any particular or specialized court; such suits may arise in any state district court").

Even setting aside the overwhelming federal-law nature of this suit, defendants' motion fails because it does not meet the Ninth Circuit's second basic criterion for *Burford* abstention—that the federal issues cannot be separated from "complex state law issues with respect to which state courts might have special competence." *City of Tucson*, 284 F.3d at 1133. Although the presence of such complex state-law issues is the *sine qua non* of *Burford* abstention, defendants do not attempt to identify any such issues until the final pages of their brief. There, they assert that this case may require the Court to "determine complex state law issues such as whether or not the Diversion Program is operating in compliance with its authorizing California Penal Code statutes and whether or not the District Attorney is exercising sufficient control over the Diversion Program." Defs' Mem. at 16-17. Defendants provide no explanation as to why these issues should be considered "complex" or why the state courts have "special competence" to decide them.

By contrast, just last month, Judge Shubb of the U.S. District Court for the Eastern District of California, in a nearly identical lawsuit challenging a district attorney's bad check diversion program, rejected a request to decline to exercise jurisdiction on the grounds that the suit presented "complex" state-law issues and implicated comity and federalism concerns. "The court here faces a single, unexceptional question of statutory interpretation: whether [the debt collector defendant] had statutory authorization under California law to seek fees from putative plaintiffs beyond the actual amount of bank charges incurred." *Schwarm v. Craighead*, 2006 U.S. Dist. LEXIS 8791, at *8 (E.D. Cal. March 7, 2006) (attached as Exhibit 3 to Arons Decl.).[5] The supposedly "complex"

[5] To be sure, the defendants in *Schwarm* relied on comity and federalism principles in support of a request that the district court decline to exercise supplemental jurisduction over state-law claims and deny class certification of federal FDCPA claims, whereas here, the defendants ask the Court to dismiss the entire action on abstention grounds. With respect to identifying "complex" state-law issues, however, the same underlying principles are implicated in the law of abstention and supplemental jurisdiction. *See, e.g.*, *Executive Software North America, Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1553, 1556-57 (9th Cir. 1994).

issue cited by the defendants here is the same "single, unexceptional question of statutory interpretation." *Id.*[6]

Finally, the question "whether or not the Diversion Program is operating in compliance with its authorizing California Penal Code statutes" (Defs' Mem. at 16) fails to satisfy the Ninth Circuit's third criterion for *Burford* abstention—"that federal review might disrupt state efforts to establish a coherent policy." *City of Tucson*, 284 F.3d at 1133. On the contrary, to the extent the Court must decide it, this question concerns whether the design and implementation of the challenged program *deviates from* the statewide policy embodied in the bad check diversion statute. The issue, in other words, is whether the challenged program is *inconsistent* with the state's "efforts to establish a coherent policy." As in *City of Tucson*, this suit "does not attack [California's bad check diversion] policy" as a general matter, but instead, presents a challenge to defendants' specific practices, a challenge that "can be decided by a federal district court" based on the facts and circumstances of the case. *Id.* at 1134. The case, as in *NOPSI* and *Zablocki*, "may

---

[6] The presence of such antecedent state-law issues is not unusual in FDCPA suits in federal court. Indeed, several decisions in this District and in the Eastern District of California have considered whether California law authorizes check fees and charges that were assessed by debt collectors, even when there was no state-law precedent on point, in order to adjudicate both FDCPA and state-law claims. In *Irwin v. Mascott*, 112 F. Supp. 2d 937 (N.D. Cal. 2000), for example, the court held that California Civil Code § 1719 precluded the right to collect interest on a dishonored check. Judge Whyte reached the same conclusion in *Palmer v. Stassinos*, 348 F. Supp. 2d 1070 (N.D. Cal. 2004). Prior to these rulings, no California court had ever addressed the issue. Similarly, in *Newman v. Checkrite Cal., Inc.*, 912 F.Supp. 1354 (E.D. Cal. 1995), Judge Karlton was called upon to decide whether debt collectors met the requirements of California Civil Code § 1719, which authorizes various collection fees for dishonored checks, and whether California Penal Code § 490.5, which pertains to shoplifting, could be applied to dishonored checks. Although there was no California case law on point, the court rejected a request to decline jurisdiction over these allegedly "complex" issues. *Id.* at 1374. And in *Ballard v. Equifax Check Servs*., Inc., 27 F. Supp. 2d 1201 (E.D. Cal. 1998), and *Ballard v. Equifax Check Servs., Inc*., 158 F. Supp. 2d 1163 (E.D. Cal. 2001), Judge Damrell was required to determine whether a California statute authorized a $20.00 service charge that the defendant assessed on dishonored checks. Again, although no California court had ever decided whether the statute authorizes a debt collector's service charge, the court was able to interpret California law and apply it to the facts of the case, ruling that the service charge was not permitted by law.

of course, result in an injunction against the [bad check program], but there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning" of the defendants' challenged policies. *NOPSI*, 491 U.S. at 363.

E. Contrary to Defendants' Suggestion, Any Inconsistency Between State and Federal Law Provides Further Reason *Not* to Abstain.

Defendants' most extraordinary argument is that "certain elements of the Diversion Program which are critical to its purpose are required under the California Penal Code but prohibited under the FDCPA" (Defs' Mem. at 14), and that this alleged inconsistency between state and federal law counsels in favor of abstention. But under the Supremacy Clause, any inconsistency could only mean one thing: that state law must give way.

In effect, defendants concede that their practices violate the FDCPA and argue that it is *this very illegality* that provides the basis for them to escape federal-court scrutiny. Not surprisingly, nothing in Supreme Court or Ninth Circuit jurisprudence supports the wild notion that inconsistency between state and federal statutes is an appropriate basis for abstention under *Burford*. Quite the opposite. The Ninth Circuit has repeatedly declared that *Burford* abstention is "particularly inappropriate" where preemption by a federal statute may be at issue, "because abstaining under *Burford* would be an implicit ruling on the merits." *Morros*, 268 F.3d at 705; *see also NOPSI*, 491 U.S. at 362-63 ("[F]ederal adjudication of this sort of pre-emption claim would not disrupt the state's attempt to ensure uniformity in the treatment of an essentially local problem."). As then-Judge Kennedy explained, where preemption is potentially at issue, *Burford* "cannot be appropriate" because the question is whether "Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions." *Int'l Bhd. of Elec. Workers*, 614 F.2d at 212 n.1. Thus, to the extent that the FDCPA

imposes obligations inconsistent with those imposed by California law, abstention under *Burford* is especially unwarranted.[7]

F. Because this Suit Seeks Damages, Dismissal Under *Burford* Is Impermissible.

Finally, the defendants' motion should be denied because, even if all other requirements for *Burford* abstention were met, the "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary," and may not do so where damages are sought. *Quackenbush,* 517 U.S. at 731; *see Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 702 (5th Cir. 1999) (describing the holding of *Quackenbush* as "an ironclad, *per se* bar" to the dismissal or remand of damages actions that "left no exceptions"). As in *Quackenbush*, this suit seeks damages, which are not a form of discretionary relief. "If the elements . . . are satisfied, the district court would have no discretion to deny relief to the [plaintiffs] on their legal claim[s]" under the FDCPA. *Gross v. Weingarten*, 217 F.3d 208, 223 (4th Cir. 2000); *see also* 15 U.S.C. § 1692k(a) (providing that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of" statutory damages and "any actual damage

[7] In any event, defendants' assertions of inconsistency are overblown, if not entirely spurious. The FDCPA simply requires that debt collectors, like ACCS, tell the truth and not try to collect more than is owed. Thus, ACCS may not seek to collect fees in excess of those permitted by law, or masquerade as the prosecutor to enhance the coercive impact of its collection demands. 15 U.S.C. §§ 1592(f)(1), e(10), e(14). Nothing in the FDCPA would block ACCS from asking only for payments that are lawfully due and honestly stating that it is a private company hired by the district attorney. Nor is there any inconsistency with respect to notice requirements. The FDCPA requires disclosure that a communication is from a debt collector and gives a consumer thirty days from an initial communication to request verification of the debt, 15 U.S.C. §§ 1692e(11), 1692g(a), while the California statute lists four items that must be included in the initial communication: the date and amount of the check, the payee's name, the date by which the consumer must respond, and a statement of the penalty for the offense. Cal. Penal Code § 1001.63. There is no reason why ACCS could not comply with both state and federal law by including in its initial communications both the notice required by the FDCPA and the notice required by the California statute.

sustained by such person as the result of such failure"). Accordingly, under *Quackenbush*, this Court lacks the power to dismiss this action under *Burford*.

CONCLUSION

Defendants' motion to dismiss based on abstention should be denied.

Respectfully submitted,

DATED: March 31, 2006

LAW OFFICES OF PAUL ARONS

By_____
PAUL ARONS
Attorney for Plaintiffs
ELENA DEL CAMPO, ASHORINA MEDINA, MIRIAM CAMPOS and LISA JOHNSTON

Additional Plaintiffs' Counsel:

Ronald Wilcox, State Bar # 176601
LAW OFFICE OF RONALD WILCOX
2160 The Alameda, 1st Flr., Suite F
San Jose, CA 95126
Tel: (408) 296-0400
Fax: (408) 296-0486

O. Randolph Bragg, IL Bar # 06221983
HORWITZ, HORWITZ & ASSOCIATES
25 East Washington, Suite 900
Chicago, IL 60602
(312) 372-8822

Of Counsel:
Brian Wolfman, D.C. Bar # 427491
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000