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12 Attorneys for Plaintiffs
American Financial Services Association,
13 Nevada Credit Union League,
& Nevada Bankers Association
14

15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF NEVADA**

17 AMERICAN FINANCIAL SERVICES
ASSOCIATION, NEVADA CREDIT
18 UNION LEAGUE, & NEVADA
BANKERS ASSOCIATION,

19 Plaintiffs,

20 vs.

21 MARY YOUNG, in her official
22 capacity as Commissioner of the
Financial Institutions Division of the
23 Nevada Department of Business and
Industry, & AARON FORD, in his
24 official capacity as Nevada Attorney
General,

25 Defendants.
26

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 **I. INTRODUCTION**

2 1. Plaintiffs bring this action seeking declaratory and injunctive relief to
3 prevent the enforcement of Section 3 of Nevada’s Senate Bill 311 (“SB 311”).

4 2. SB 311 seeks to prohibit discriminatory practices against a person
5 seeking credit—a laudable overall goal, which plaintiffs and their members certainly
6 share. However, Section 3 of the legislation is unworkable, because it purports to
7 create requirements inconsistent with federal law that preempts it, and puts
8 plaintiffs’ members in the impossible position of failing to comply with either
9 federal law or Nevada law. Section 3 permits an applicant for credit who was
10 married, but has no credit history, to request that a creditor deem the applicant’s
11 credit history to be identical to that of the applicant’s spouse during their marriage.
12 That provision conflicts with, and is preempted by, federal law. If permitted to
13 stand, SB 311 will immediately and adversely affect the credit market in Nevada to
14 the detriment of both lenders and borrowers.

15 3. This Court should issue a declaratory judgment indicating that Section
16 3 of SB 311 is preempted by federal law, including but not limited to the Fair Credit
17 Reporting Act, the Equal Credit Opportunity Act, various federal regulations, and
18 federal mortgage guidelines. Further, the Court should enjoin Nevada state officials
19 from enforcing Section 3 on the grounds that it conflicts with, and creates an
20 obstacle to, to the accomplishment and execution of the full purposes and objectives
21 of Congress.

22 **II. JURISDICTION AND VENUE**

23 4. This Court has subject matter jurisdiction because this action arises
24 under the Constitution, including the Supremacy Clause, and the laws of the United
25 States. U.S. CONST. art. VI, cl. 2; 28 U.S.C. § 1331. Under *Ex parte Young*, 209 U.S.
26 123, 159–60 (1908), a federal court has jurisdiction to enjoin the conduct of state
27 officials if it conflicts with the Constitution or congressional statutes. *Id.* at 155–56;
28 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (authorizing

1 offensive use of preemption arguments in federal suits seeking declaratory and
2 injunctive relief under *Ex parte Young*); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307
3 F.3d 835, 848 (9th Cir. 2002) (extending *Ex parte Young* to claims for declaratory
4 relief).

5 5. Venue is proper because a substantial part of the events giving rise to
6 the claims occurred in this judicial district, and the defendants maintain offices,
7 work, and reside in this judicial district.

8 III. PARTIES

9 *The Plaintiffs*

10 6. The American Financial Services Association (“AFSA”) is a non-profit
11 trade association incorporated in the District of Columbia. AFSA is the nation’s
12 largest trade association representing market-funded providers of financial services
13 to consumers and small businesses. AFSA’s mission is “to assure a strong and
14 healthy broad-based consumer lending services industry which is committed to: (1)
15 providing the public with quality and cost-effective service, (2) promoting a
16 financial system that enhances competitiveness, and (3) supporting the responsible
17 delivery and use of credit and credit-related products.” Moreover, AFSA monitors
18 national, state, and local legislation that purports to have an impact on its members’
19 rights and obligations.

20 7. AFSA represents approximately 360 companies operating more than
21 10,000 offices engaged in extending \$200 billion, or approximately 15 to 20 percent
22 of all consumer credit in the United States. AFSA members include credit card
23 issuers, independently-owned consumer finance companies, diversified financial
24 services companies, and automobile finance companies. They provide a broad range
25 of financial products and services to consumers throughout the United States,
26 including credit card, checking account, and deposit account services, unsecured
27 personal loans, home mortgage loans, home equity loans, retail installment
28 financing, and automobile and mobile home financing and lines of credit.

1 8. The Nevada Credit Union League (“NCUL”) is the trade association
2 for Nevada’s credit unions. NCUL works in partnership with the California Credit
3 Union League, the trade association for California’s credit unions, to provide
4 advocacy, information, education and business solutions for the benefit of its
5 members. There are currently fifteen credit unions headquartered in Nevada with
6 over \$5.3 billion in assets serving more than 363,500 members. Approximately ten
7 of those credit unions are NCUL members. As fully regulated financial institutions,
8 credit unions are subject to the state and federal laws and regulations that govern
9 these transactions, including the Equal Credit Opportunity Act, the Fair Credit
10 Reporting Act, and the Nevada Equal Credit Opportunity Law.

11 9. The Nevada Bankers Association (“NBA”) is a Nevada-based industry
12 association representing Nevada banks and banking professionals. The NBA and its
13 members are dedicated to providing the best financial products, services and
14 resources to drive and support economic growth, job creation and prosperity
15 throughout the state of Nevada. Approximately thirty banks and/or financial
16 institutions operating in Nevada are NBA members. As fully regulated financial
17 institutions, these NBA members are subject to the state and federal laws and
18 regulations that govern these transactions, including the Equal Credit Opportunity
19 Act, the Fair Credit Reporting Act, and the Nevada Equal Credit Opportunity Law.

20 10. Plaintiffs’ members include institutions and furnishers of credit
21 reporting information which make, service, and report on many types of secured and
22 unsecured loans in Nevada. Consequently, plaintiffs’ member institutions are
23 subject to SB 311. Those member institutions could bring suit in their own right.

24 11. Because plaintiffs’ member institutions are directly affected by SB 311
25 and because Section 3 of the statute undermines plaintiffs’ respective missions—
26 namely, quality and cost-effective service, the promotion of competition in the
27 consumer finance industry, and the responsible delivery and use of credit—plaintiffs
28 bring this action to enjoin enforcement of Section 3 of the statute.

1 12. Plaintiffs' member institutions suffer immediate or threatened injury as
2 a result of Section 3 and therefore have an interest in this litigation that is
3 substantial, direct, and immediate. That injury is redressable by an order from this
4 Court.

5 13. Plaintiffs' claims and requests for declaratory and injunctive relief do
6 not require the participation of the individual members of plaintiffs.

7 ***The Defendants***

8 14. Defendant Mary Young is the Commissioner of the Financial
9 Institutions Division of the Nevada Department of Business and Industry. She is
10 responsible for administering the provisions of SB 311, as well as assisting all
11 public and private organizations that carry on programs to prevent or eliminate
12 discrimination in credit practices.

13 15. Defendant Aaron Ford is the Nevada Attorney General and, as the
14 State's chief law enforcement officer, has the primary responsibility of enforcing SB
15 311.

16 16. Defendants, together and separately, have the requisite enforcement
17 power to apply the provisions of SB 311 to AFSA's members.

18 **IV. RELEVANT BACKGROUND ABOUT SB 311**

19 17. June 1, 2019, Governor Sisolak signed SB 311 into law. The law is set
20 to go into effect on October 1, 2019. A true and correct copy of SB 311 is attached
21 hereto as Exhibit A.

22 18. SB 311 was intended to fix the problem faced by a person who has no
23 credit history because he or she has been married and their spouse has handled the
24 couple's credit during the marriage in such a way that the person's spouse, but not
25 the person, is the only one of the married couple to have a credit history. As the
26 statute's sponsors explained:

27 In this case, the person may not be able to obtain credit,
28 even though the person contributed to the development of

1 the couple's credit history, because the credit history is
2 entirely in the spouse's name.

3 The intent of this proposed conceptual amendment is to
4 address this problem by providing a new requirement that
5 a creditor deem the credit history of an applicant for
6 credit to be identical to the credit history of that person's
spouse under certain circumstances.

7 *Minutes Re: Proposed Conceptual Amendment for Senate Bill No. 311 (Proposed by*
8 *Senator Parks, Senator Harris, and Assemblywoman Tolles)*, May 1, 2019, available
9 at [https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf)
10 [OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf)
11 [20session.pdf](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf). A true and correct copy of these minutes is attached hereto as Exhibit
12 B.

13 19. As enacted into law, SB 311 provides a procedure by which an
14 applicant for credit may compel a creditor to deem the applicant's credit history to
15 be identical to that of the applicant's spouse during their marriage. Specifically,
16 Section 3(1) of SB 311 provides as follows:

17 If an applicant for credit:

- 18 (a) Has no credit history;
19 (b) Was or is married;
20 (c) Requests that the creditor deem the credit history
21 of the applicant to be identical to the credit history
22 of the applicant's spouse which was established
23 during the marriage referenced in paragraph (b);
24 and
25 (d) If requested by the creditor, provides, with regard
26 to the marriage referenced in paragraph (b),
27 evidence of:
28 (1) The existence of the marriage; and
(2) The date of the marriage and, if applicable,
the date the marriage ended,

The creditor must deem the credit history of the applicant
to be identical to the credit history of the applicant's

1 spouse which was established during the marriage
2 referenced in paragraph (b).

3 20. The consequences of failing to comply with the foregoing section are
4 severe. Section 3(2) of the bill provides that “[v]iolation of this section by a creditor
5 shall be deemed to be discrimination based on marital status.”

6 **V. SB 311 IS PREEMPTED, TRAMPLES PRIVACY RIGHTS, AND IS**
7 **UNWORKABLE IN PRACTICE**

8 21. The Fair Credit Reporting Act (“FCRA”)¹ prohibits a creditor from
9 accessing a consumer report unless the consumer provides consent or there is a
10 permissible purpose to obtain the credit report. 15 U.S.C. § 1681b. The FCRA
11 supplies a list of “permissible purposes” for which a consumer report may be issued,
12 but the statute makes clear there is “no other” permissible purpose beyond those
13 identified in statute. 15 U.S.C. § 1681b(a). SB 311, in contrast, necessarily requires
14 creditors to violate the provisions the FCRA by forcing creditors to access and use a
15 consumer report without a permissible purpose, and to do so even if the
16 consumer—the applicant’s spouse or ex-spouse—has not provided consent.

17 22. Under the Equal Credit Opportunity Act (“ECOA”)² and its
18 implementing regulation, Regulation B, creditors are generally prohibited from
19 requesting information concerning the spouse or former spouse of an applicant. 12
20 C.F.R. § 1002.5(c)(1). In direct contrast, Section 3 of SB 311 *requires* creditors to
21 obtain information about a non-applicant spouse or ex-spouse, solely based on the
22 applicant’s request. There is no mention of obtaining the non-applicant spouse’s
23 consent, nor even a requirement that they be notified.

24 23. Section 3 of SB 311 requires creditors to invade longstanding privacy
25 rights by not only obtaining, but also disseminating, private financial information

26 _____
27 ¹ 15 U.S.C. §§ 1681–1681x.

28 ² 15 U.S.C. §§ 1691–1691f.

1 about an applicant’s spouse or former spouse without the spouse’s knowledge or
2 consent.

3 24. Section 3 is also hopelessly unworkable, and impossible to comply
4 with in practice—especially in the context of ex-spouses. One important illustration
5 of that—though not the only one—is how it operates in the context of ex-spouses.
6 Credit reports are a snapshot of the present moment in time. Even if a creditor had a
7 way of legally obtaining a credit report for an ex-spouse in order to comply with
8 Section 3 (which it does not), the information in the credit report would be accurate
9 as to the ex-spouse as of the date the report is obtained; but it would *not* be accurate
10 as to the applicant seeking credit, since the report would reflect account activity
11 accumulated since the termination of the marriage. For example, the credit report
12 might reflect account closures, new account openings, negative and positive
13 payment performance on old and new accounts, and other information arising out of
14 events that occurred after the termination of the marriage. Also, the ex-spouse’s
15 credit score would be calculated based on information as of the date of the credit
16 report; and this would not necessarily be accurate as to the applicant spouse, whose
17 participation in the activities reflected in the credit report would have terminated
18 with the spousal relationship. There is no way for creditors to obtain from credit
19 reporting agencies a credit report and/or credit score back-dated to a particular date,
20 such as the date of the termination of the spousal relationship. Crucially, as a
21 practical matter, this means that compliance with Section 3 would require creditors
22 to make credit decisions based on information they *know* to be inaccurate with
23 regard to the applicant. In addition to these problems, the statute itself does not even
24 define what it means for a person to have “no credit history,” thereby leaving it open
25 to question which applicants are entitled to rights under Section 3 and which are not.

26 25. SB 311 violates longstanding privacy and data security rules and
27 practices by requiring creditors to invade a consumer’s private information and
28 disclose it to an applicant without the consumer’s knowledge or consent.

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VI. CAUSES OF ACTION

First Cause of Action—Declaratory Relief

26. Plaintiffs incorporate herein the allegations of the foregoing paragraphs as though fully set forth herein.

27. The Nevada Legislature has enacted SB 311 and Governor Sisolak has signed the legislation into law, set to take effect on October 1, 2019.

28. An actual and substantial controversy has arisen and now exists between plaintiffs and defendants relative to their respective rights and duties. Further, plaintiffs and defendants have adverse legal interests. Plaintiffs previously wrote to interim Commissioner Rickisha Hightower on behalf of their members in order to highlight the significant legal barriers, preemption issues, and other problems raised by SB 311’s enactment. Representatives of plaintiffs have also met in person with Hightower to discuss those concerns, and to request that enforcement of the law be stayed until SB 311 is amended or other guidance is issued that would eliminate the multiple legal barriers set forth in this complaint. To date, neither Hightower nor anyone else from the Department of Financial Institutions has agreed to stay enforcement of Section 3 of SB 311 or provide any guidance that would resolve the present controversy.

29. A judicial declaration is thus necessary and appropriate so that the parties may ascertain their respective rights and duties with regard to the subject matter of this action, and particularly so that plaintiffs, their members, and the general public may determine the validity and enforceability of Section 3 of SB 311 without subjecting themselves to liability for violating its requirements.

Second Cause of Action—Injunctive Relief

30. Plaintiffs incorporate herein the allegations of the foregoing paragraphs as though fully set forth herein.

1 DATED: October 1, 2019

2 SEVERSON & WERSON, P.C.

3 By: /s/ Kerry W. Franich
4 KERRY W. FRANICH

5
6 SNELL & WILMER, LLP

7
8 By: /s/ Alex L. Fugazzi
9 ALEX L. FUGAZZI

10 Attorneys for Plaintiffs
11 American Financial Services Association,
12 Nevada Credit Union League,
13 & Nevada Bankers Association
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Senate Bill No. 311—Senators Parks, D. Harris,
Brooks; Spearman and Woodhouse

Joint Sponsors: Assemblymen Jauregui,
McCurdy, Spiegel and Tolles

CHAPTER.....

AN ACT relating to credit; prohibiting discrimination against a person who seeks to obtain credit; revising provisions governing discrimination based on the marital status of a person who seeks to obtain credit; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law requires that any person seeking credit be afforded equal opportunity to have their creditworthiness evaluated under the same relevant economic standards and without any discrimination on the basis of their sex or marital status. (NRS 598B.020, 598B.100) **Section 2** of this bill defines marital status. **Section 3** of this bill permits an applicant for credit who has no credit history and was married to request that a creditor deem the applicant's credit history to be identical to that of the applicant's spouse during their marriage. Under **section 3**, the failure of a creditor to comply with such a request is deemed to be discrimination based on marital status. **Sections 4 and 7** of this bill expand the protection against discrimination to include race, color, creed, religion, disability, national origin or ancestry, sexual orientation, and gender identity or expression. **Section 6** of this bill requires the Commissioner of Financial Institutions to study the nature and extent of any discrimination based on race, color, creed, religion, disability, national origin or ancestry, sexual orientation, and gender identity or expression. **Section 6** also requires the Commissioner of Financial Institutions to cooperate with and assist in programs to prevent or eliminate such discrimination.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 598B of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *“Marital status” means all states of being married or unmarried, and includes, without limitation, the states of being single, married, separated, divorced or widowed.*

Sec. 3. 1. *If an applicant for credit:*

(a) Has no credit history;

(b) Was or is married;

(c) Requests that the creditor deem the credit history of the applicant to be identical to the credit history of the applicant's



spouse which was established during the marriage referenced in paragraph (b); and

(d) If requested by the creditor, provides, with regard to the marriage referenced in paragraph (b), evidence of:

(1) The existence of the marriage; and

(2) The date of the marriage and, if applicable, the date the marriage ended,

↳ The creditor must deem the credit history of the applicant to be identical to the credit history of the applicant's spouse which was established during the marriage referenced in paragraph (b).

2. Violation of this section by a creditor shall be deemed to be discrimination based on marital status.

Sec. 4. NRS 598B.020 is hereby amended to read as follows:

598B.020 It is hereby declared to be the public policy of the State of Nevada that all people in the State desiring to obtain credit shall be afforded equal opportunity to have their creditworthiness evaluated under the same relevant economic standards and without any discrimination on the basis of their *race, color, creed, religion, disability, national origin or ancestry, sex, sexual orientation, gender identity or expression*, or marital status.

Sec. 5. NRS 598B.030 is hereby amended to read as follows:

598B.030 As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 598B.040 to 598B.080, inclusive, *and section 2 of this act* have the meanings ascribed to them in such sections.

Sec. 6. NRS 598B.090 is hereby amended to read as follows:

598B.090 The Commissioner of Financial Institutions through the Division shall:

1. Administer the provisions of this chapter;

2. Study the nature and extent of any discrimination as to *race, color, creed, religion, disability, national origin or ancestry, sex, sexual orientation, gender identity or expression*, or marital status in credit practices in this state; and

3. Cooperate with and assist all public and private agencies, organizations and institutions which are formulating or carrying on programs to prevent or eliminate discrimination on the basis of *race, color, creed, religion, disability, national origin or ancestry, sex, sexual orientation, gender identity or expression*, or marital status in credit practices.

Sec. 7. NRS 598B.100 is hereby amended to read as follows:

598B.100 It is unlawful for any creditor to discriminate against any applicant on the basis of the applicant's *race, color, creed, religion, disability, national origin or ancestry, sex, sexual*



orientation, gender identity or expression, or marital status with respect to any aspect of a credit transaction.



Committee Action:

Do Pass _____

Amend & Do Pass _____

Other _____

Assembly Committee on Commerce and Labor

This measure may be considered for action during today's work session.

SENATE BILL 311

Prohibits certain discriminatory practices against a person seeking credit. (BDR 52-1048)

Sponsored by: Senators Parks, Harris, and Brooks, et al.

Date Heard: May 1, 2019

Fiscal Impact: Effect on Local Government: Increases or Newly Provides for Term of Imprisonment in County or City Jail or Detention Facility.

Effect on the State: Yes.

Senate Bill 311 expands the protection against discrimination of a person seeking credit to include color, creed, disability, gender identity or expression, national origin or ancestry, race, religion, and sexual orientation. The bill requires the commissioner of the Financial Institutions Division of the Department of Business and Industry to study the nature and extent of any discrimination of the expanded protections and to cooperate with and assist in programs to prevent or eliminate such discrimination.

Amendments:

Senators Harris and Parks and Assemblywoman Tolles propose the following amendments to Senate Bill 311 (see attached):

1. Add a new section to the chapter governing equal opportunity for credit to require a creditor to deem the credit history of a credit applicant to be identical to the credit history of that person's spouse under certain circumstances outlined in the proposed conceptual amendment. A violation of this new requirement is deemed to be discrimination based on marital status;
2. Define "marital status" for the chapter governing equal opportunity for credit, which prohibits credit discrimination based on marital status, to include all states of being married or unmarried, and expressly include the states of being divorced, married, separated, single, or widowed. The intent is to clarify that discrimination based on any type of marital status is prohibited; and
3. Add Senator Harris as a primary cosponsor and Assembly Members Jauregui, McCurdy II, Spiegel, and Tolles as primary joint sponsors.

Proposed Conceptual Amendment for Senate Bill No. 311

(Proposed by Senator Parks, Senator Harris and Assemblywoman Tolles)

Amend the bill as follows:

- Add a new section to NRS Chapter 598B to address the problem of a person who has no credit history because the person has been married and the person's spouse has handled the couple's credit during the marriage in such a way that the person's spouse, but not the person, is the only one of the couple to have a credit history. In this case, the person may not be able to obtain credit, even though the person contributed to the development of the couple's credit history, because the credit history is entirely in the spouse's name.

The intent of this proposed conceptual amendment is to address this problem by providing a new requirement that a creditor deem the credit history of an applicant for credit to be identical to the credit history of that person's spouse under certain circumstances. Violation of this new requirement would be deemed to be discrimination based on marital status, which is already prohibited in language found in Section 3 of the bill. To achieve the intent of addressing this problem, this proposed conceptual amendment would add a new section to the bill, to read as follows:

1. If an applicant for credit:
(a) Has no credit history;
(b) Was or is married;
(c) Requests that the creditor deem the credit history of the applicant to be identical to the credit history of the applicant's spouse which was established during the marriage referenced in paragraph (b); and
(d) If requested by the creditor, provides, with regard to the marriage referenced in paragraph (b), evidence of:
(1) The existence of the marriage; and
(2) The date of the marriage and, if applicable, the date the marriage ended,
then the creditor must deem the credit history of the applicant to be identical to the credit history of the applicant's spouse which was established during the marriage referenced in paragraph (b).
2. Violation of this section by a creditor shall be deemed to be discrimination based on marital status.

- Define "marital status" for the purposes of the provisions of NRS Chapter 598B which prohibit discrimination based on marital status with regard to credit. The intent of this proposed conceptual amendment is to clarify that discrimination based on any type of marital status is prohibited. To achieve this intent, define the term "marital status" for the chapter to include all states of being married or unmarried, and expressly include the states of being single, married, separated, divorced or widowed.
- Add Senator Harris as a primary co-sponsor, with her name added immediately after Senator Parks's name, and add Assemblywoman Jauregui, Assemblyman McCurdy, Assemblywoman Spiegel and Assemblywoman Tolles as primary joint sponsors.