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

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

20 Plaintiffs,

21 vs.

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

26 Defendants.

Case No. 2:19-CV-01708-APG-EJY

**MOTION FOR PRELIMINARY
INJUNCTION**

ORAL ARGUMENT REQUESTED IN
ACCORDANCE WITH LR 78-1

27
28

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to the standards set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) and *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018), plaintiffs American Financial Services Association, Nevada Credit Union League, and Nevada Bankers Association respectfully move this Court for a preliminary injunction to enjoin defendants Mary Young, in her official capacity as Commissioner of the Financial Institutions Division of the Nevada Department of Business and Industry, and Aaron Ford, in his official capacity as Nevada Attorney General, from enforcing the provisions of Section 3 of Nevada Senate Bill 311, which went into effect on October 1, 2019.

This motion is based on the accompanying memorandum of points and authorities, the pleadings and records of the Court, and any further oral and documentary evidence that may be presented before or during the hearing.

DATED: October 8, 2019

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1 **I. INTRODUCTION**

2 On October 1, 2019, Nevada Senate Bill 311 went into effect. This motion seeks to prevent
3 Nevada officials from relying on or enforcing Section 3 of the statute until the present lawsuit is
4 resolved.

5 Section 3 of SB 311, as codified in Chapter 598B of the Nevada Revised Statutes, permits
6 an applicant for credit who has no credit history to request that a creditor deem the applicant's
7 credit history to be the same as the applicant's spouse or ex-spouse during the time of the marriage.
8 The statute is rigid and unforgiving: failing to comply is deemed an act of marital discrimination.
9 The Court should enjoin the Financial Institutions Division of the Nevada Department of Business
10 and the Attorney General of the State of Nevada from enforcing the statute on the ground that it is
11 preempted by federal law, making compliance by creditors legally impossible. Plaintiffs satisfy all
12 four factors under *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

13 First, plaintiffs are likely to prevail on the merits because Section 3 of SB 311 is preempted
14 by federal law, which means that its enforcement would violate the Constitution's Supremacy
15 Clause. The Fair Credit Reporting Act ("FCRA")¹ provides an exclusive list of permissible
16 purposes for obtaining a consumer's credit report. Accessing a *non*-applicant ex-spouse's credit to
17 facilitate an *applicant's* request for credit—as envisioned by Section 3 of SB 311—is *not* one of
18 the FCRA's permissible purposes. Likewise, the Equal Credit Opportunity Act ("ECOA")²
19 expressly forbids creditors from requesting information about an applicant's former spouse except
20 in certain rare circumstances, none of which are contemplated in Section 3 of SB 311. Nevada may
21 not enforce legislation that conflicts with—and creates an obstacle to—the accomplishment and
22 execution of the full purposes and objectives of Congress. *See Freightliner Corp. v. Myrick*, 514
23 U.S. 280, 287 (1995). SB 311 seeks to do so. Because it is impossible for plaintiffs to comply with
24 both SB 311 and federal law, and because SB 311 creates an obstacle to Congress's purposes in
25 enacting the FCRA and ECOA, this Court must halt the enforcement of Section 3 of SB 311.

26
27
28 ¹ 15 U.S.C. §§ 1681–1681x.

² 15 U.S.C. §§ 1691–1691f.

1 Second, plaintiffs will suffer irreparable harm in the absence of injunctive relief because
2 constitutional violations cannot be remedied with damage awards. *Nelson v. Nat'l Aeronautics &*
3 *Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). Moreover, without an injunction, plaintiffs'
4 members could be deemed perpetrators of marital discrimination simply because they choose to
5 follow federal law, which could result in the irretrievable loss of customer goodwill and other
6 reputational harm.

7 Third, the balance of equities strongly favors plaintiffs. A narrow injunction targeted only
8 at Section 3 of SB 311 would cause Nevadans no harm, since it would permit the bulk of the new
9 statute to be enforced—including its laudable anti-discrimination provisions mandating equal
10 opportunity lending without regard to race, color, creed, religion, disability, national origin or
11 ancestry, sex, sexual orientation, and gender identity or expression.³ As to Section 3, the injunction
12 would merely preserve the status quo as it existed before the statute was enacted, with respect to
13 credit reviews for people who are or have been married. By contrast, denying a preliminary
14 injunction would subject plaintiffs' members to conflicting statutory schemes, needlessly expose
15 them to potential liability for invasions of privacy and other related claims, and cause widespread
16 confusion in the financial services industry.

17 Fourth, enjoining Nevada officials from enforcing the conflicting statute plainly serves the
18 public interest. The smooth functioning of Nevada's economy is dependent on the routine extension
19 of appropriate levels of credit to individual consumers. Imposing a hopelessly conflicting statutory
20 scheme on this fast-paced market risks disrupting the orderly review of consumer credit reports.
21 Ironically, the ensuing harm is likely to fall hardest on the most vulnerable credit applicants, such
22 as young people and those with questionable credit histories—in other words, exactly those whom
23 SB 311 is trying to protect. And moreover, even if SB 311 was not preempted (which it is), the
24 statute creates significant privacy concerns by requiring creditors to obtain confidential information
25 about applicants' spouses and ex-spouses without first obtaining those persons' consent, which
26 could lead to a variety of severe encroachments on the privacy of thousands of Nevada citizens, as
27 well as other unintended consequences.

28 _____
³ See Exh. A to Complaint, ECF 1-1, at 3; NEV. REV. STAT. §§ 598B.090, 598B.100.

1 For these reasons, the Court should issue a preliminary injunction that will prevent
2 enforcement of SB 311 while this matter is fully adjudicated.

3 **II. RELEVANT FACTS**

4 On June 1, 2019, Governor Sisolak signed SB 311 into law. The law went into effect on
5 October 1, 2019. *See* Exh. A to Complaint, ECF 1-1, at 2–4.

6 SB 311 was intended to fix the problem faced by “a person who has no credit history
7 because the person has been married and the person’s spouse has handled the couple’s credit during
8 the marriage in such a way that the person’s spouse, but not the person, is the only one of the couple
9 to have a credit history.” *Proposed Conceptual Amendment for Senate Bill No. 311* (Proposed by
10 Senator Parks, Senator Harris, and Assemblywoman Tolles), May 1, 2019, available at
11 [https://www.leg.](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf)

12 [state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=4326](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf)
13 [1&fileDownloadName=0515SB311_work%20session.pdf](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf). As the statute’s sponsors explained:

14 In this case, the person may not be able to obtain credit, even
15 though the person contributed to the development of the couple’s
16 credit history, because the credit history is entirely in the spouse’s
17 name.

18 The intent of this proposed conceptual amendment is to address this
19 problem by providing a new requirement that a creditor deem the
20 credit history of an applicant for credit to be identical to the credit
21 history of that person’s spouse under certain circumstances.

22 *Id.*

23 As enacted into law, SB 311 mandates the creation of a procedure by which an applicant
24 for credit may compel a creditor to deem the applicant’s credit history to be identical to that of the
25 applicant’s spouse during their marriage. Specifically, Section 3(1) of SB 311 provides:

26 If an applicant for credit:

- 27 (a) Has no credit history;
28 (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).

Exh. A to Complaint, ECF 1-1, at 2–3.

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

III. LEGAL STANDARD

The Ninth Circuit has summarized the standard by which a district court may award a preliminary injunction as follows:

Plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. The Ninth Circuit weighs these factors on a sliding scale, such that where there are only serious questions going to the merits—that is, less than a likelihood of success on the merits—a preliminary injunction may still issue so long as the balance of hardships tips sharply in the plaintiff’s favor and the other two factors are satisfied.

Short v. Brown, 893 F.3d 671, 675 (9th Cir. 2018) (internal citations and quotations omitted); *see also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) (implementing this list of factors).

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Governing Preemption Principles

The Supremacy Clause of the United States Constitution makes federal law “the supreme law of the land.” U.S. CONST. art. VI, cl. 2. As a result of the Supremacy Clause, state law is preempted to the extent it actually conflicts with federal statutes, regulations, or the Constitution. *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 479 (2013). Conflict preemption exists when it is “impossible for a private party to comply with both state and federal requirements” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514, U.S. 280, 287 (1995).

1 Here, Section 3 of SB 311 tramples both parts of the conflict preemption test described in
 2 *Freightliner Corporation*. First, it is impossible for creditors to comply with both Section 3 of SB
 3 311 and applicable federal law. Second, Section 3 of SB 311 stands as an obstacle to the
 4 accomplishment of Congress’s objectives in enacting various federal legislation. For these reasons,
 5 plaintiffs are highly likely to prevail on the merits of the underlying lawsuit.

6 **B. It Is Impossible For Creditors To Comply With Both Federal Law And Section**
 7 **3 of SB 311**

8 **1. The Fair Credit Reporting Act Preempts SB 311**

9 Congress enacted the FCRA in order to ensure that consumer reporting agencies exercise
 10 their duties with fairness, impartiality, and respect for consumers’ right to privacy. 15 U.S.C. §
 11 1681(a)(4). The provision of the FCRA relevant to the present suit is the section explaining the
 12 permissible purposes for furnishing a credit report. 15 U.S.C. § 1681b.

13 The FCRA’s list of permissible purposes is expressly enumerated in the statute. 15 U.S.C.
 14 § 1681b. Permissible purposes include furnishing a consumer’s report (1) in response to a court
 15 order, (2) in accordance with the consumer’s written instructions, (3) in response to a child support
 16 enforcement agency, and (4) in response to a request from a person the agency believes will use
 17 the information in connection with a credit transaction, employment purposes, insurance
 18 underwriting, or government licensing. 15 U.S.C. § 1681b(a)(1)–(4).

19 Importantly, however, the FCRA’s list is *exclusive* and *exhaustive*. The statutory text says
 20 so explicitly, providing unambiguously that there are “no other” permissible purposes beyond those
 21 identified in the statute. 15 U.S.C. § 1681b(a); *see Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725
 22 (7th Cir. 2004); *Trans Union, LLC v. FTC*, 295 F.3d 42, 49 n.4 (D.C. Cir. 2002). As one leading
 23 treatise succinctly put it: “The only permissible purposes are listed in the statute; consumer reports
 24 can be released for those purposes ‘and no other.’” Chi Chi Wu, FAIR CREDIT REPORTING § 7.1.2.1
 25 (2017) (quoting 15 U.S.C. § 1681b(a)); *see also Kauffman v. Kauffman*, No. CV-17-04463-PHX-
 26 DGC, 2018 U.S. Dist. LEXIS 91820, at *5 (D. Ariz. June 1, 2018) (“Section 1681b provides an
 27 exhaustive list of the permissible purposes.”).
 28

1 When a person requests, obtains, or uses a credit report *without* a permissible purpose, the
 2 consequences are severe. If a person negligently violates this section of the FCRA, the consumer
 3 is entitled to recover actual damages and attorney’s fees. 15 U.S.C. § 1681o(a). And if a person
 4 *willfully* violates the statute, the consumer is entitled to actual damages or \$1,000, whichever is
 5 greater, plus attorney’s fees and punitive damages, as the court may allow. 15 U.S.C. § 1681n.

6 Here, Section 3 of SB 311 disrupts and conflicts with the exhaustive federal statutory
 7 scheme described above by inventing a new purpose not recognized in the FCRA’s list of
 8 permissible purposes. Section 3 of SB 311 *requires* a creditor, upon applicant request, to deem the
 9 credit history of the applicant to be identical to the credit history of the applicant’s spouse as
 10 established during the parties’ marriage, thereby obliging creditors to first ascertain what the credit
 11 of the applicant’s spouse or ex-spouse was. There is no possible construction of the FCRA that
 12 permits creditors to obtain and use credit reports about an applicant’s living spouse or ex-spouse
 13 absent “written instructions” from that spouse or ex-spouse.⁴ 15 U.S.C. § 1681b(a)(3). On the
 14 contrary, “investigating the financial activities of a former or estranged spouse is not a permissible
 15 purpose for obtaining a credit report under the FCRA.” *Thibodeaux v. Rupers*, 196 F. Supp. 2d 585,
 16 591–92 (S.D. Ohio 2001).

17 Other courts that have considered the issue have ruled that
 18 investigating the financial activities of a former or estranged spouse
 19 is not a permissible purpose for obtaining a credit report under the
 20 FCRA. In the context of divorce proceedings or when parties are
 formally separated, often the reasons given are not a “permissible
 purpose” for obtaining the credit report.

21 *Oak v. Oak*, No. 4:12-cv-00040-REB, 2014 U.S. Dist. LEXIS 46026, at *49–50 (D. Id. Mar. 31,
 22 2014); *see also Information on an Applicant’s Spouse: Lack of Permissible Purpose*, 2 Federal Fair
 23 Lending and Credit Practices Manual (A.S. Pratt 2019) § 11.02 cmt. 604(3)(A)-5(B) (“There is no
 24 permissible purpose to obtain a consumer report on a nonapplicant former spouse or on a
 25

26 ⁴ The friction between SB 311 and the FCRA is particularly real because of Nevada’s
 27 disproportionately high divorce rate as a percentage of its married population. *See, e.g.,* Cheyenne
 28 Buckingham & Grant Suneson, *States With the Highest Rates of Divorce*, 24/7 WALL STREET (Oct.
 20, 2017, 6:00 AM), <https://247wallst.com/special-report/2017/10/20/states-with-the-highest-rates-of-divorce/3/>. Allowing SB 311 to reach ex-spouses—in contradiction of federal law—could affect many thousands of people.

1 nonapplicant spouse who has legally separated or otherwise indicated an intent to legally
2 disassociate with the marriage.”).

3 As the foregoing authorities show, SB 311 requires creditors to do precisely what the FCRA
4 forbids. SB 311 authorizes a credit applicant to invoke SB 311’s protections solely upon the
5 applicant’s own request, with no reference to whether the spouse or ex-spouse is deceased,
6 divorced, estranged, deployed in the military, or in any other way unavailable or unwilling to issue
7 the “written instructions” contemplated in 15 U.S.C. § 1681b(a)(3). In so doing, SB 311 purports
8 to create a new “permissible purpose” for pulling a consumer’s credit that is not recognized or
9 authorized by the FCRA: to facilitate a request for credit by someone to whom they are or have
10 been married. In this context, it is “impossible for a private party to comply with both state and
11 federal requirements.” *Freightliner Corp.*, 514 U.S. at 287. So Section 3 of SB 311 is incurably
12 preempted.

13 Worse, the preemption in the present case is not merely implied, but express. The FCRA
14 explicitly prohibits state laws which place additional requirements or prohibitions regarding the
15 furnishing of consumer reports in connection with credit transactions that—like those envisioned
16 by SB 311—are not initiated by the consumer. 15 U.S.C. § 1681t(b)(1)(A) (“No requirement or
17 prohibition may be imposed under the laws of any State—(1) with respect to any subject matter
18 regulated under—(A) subsection (c) or (e) of section 604 [15 USCS § 1681b], relating to the
19 prescreening of consumer reports[.]”); *see also* 15 U.S.C. § 1681b(c) (prohibiting the furnishing of
20 credit reports in transactions not initiated by the consumer except in explicitly enumerated
21 circumstances).

22 To be sure, a finding that Section 3 of SB 311 is conflict-preempted by the FCRA is not
23 only the result compelled by the statutory language, but also the result supported by existing case
24 law. Other courts around the country have consistently jettisoned state law claims that attempt to
25 interfere with or supplant requirements of the FCRA. *See, e.g., Madden v. Experian Info. Sols.,*
26 *Inc.*, No. 5:12-CV-00162, 2014 U.S. Dist. LEXIS 133597, at *15 (W.D.N.C. Sept. 23, 2014)
27 (“Section 1681t(a) mandates that Madden may not attempt to use state laws like the [North Carolina
28 Debt Collection Act] to create inconsistent standards with the FCRA.”); *Thompson v. Prof'l*

1 *Collection Consultants*, No. CV-2474-RGK (JCGx), 2013 U.S. Dist. LEXIS 194028, at *13 n.3
 2 (C.D. Cal. Sept. 18, 2013) (“To the extent Plaintiff seeks to state a claim against [defendant] for
 3 obtaining his credit report without a permissible purpose, the FCRA preempts that claim.”).
 4 Plaintiffs are likely to be successful in ultimately demonstrating that the same reasoning applies
 5 here.

6 **2. The Equal Credit Opportunity Act Preempts SB 311**

7 The ECOA, as initially enacted in 1974, prohibited credit discrimination on the basis of
 8 “sex or marital status,” the “purpose” being “to eradicate credit discrimination waged against
 9 women, especially married women whom creditors traditionally refused to consider for individual
 10 credit.” *Perez v. Wells Fargo & Co.*, No. 17-cv-00454-MMC, 2017 U.S. Dist. LEXIS 122772, at
 11 *10 (N.D. Cal. Aug. 3, 2017). The ECOA’s implementing regulation—Regulation B—includes a
 12 marital status inquiry regulation that specifically addresses what information creditors may, and
 13 may not, inquire about. 12 C.F.R. § 1002.5(c).⁵

14 As stated in Regulation B, the general rule is that “a creditor may *not* request any
 15 information concerning the spouse or former spouse of an applicant.” 12 C.F.R. § 1002.5(c)(1)
 16 (emphasis added). Regulation B supplies a few narrow exceptions to the general rule, but Section
 17 3 of SB 311 fits within none of them. Requests for information about an applicant’s spouse are
 18 permissible under the ECOA only when:

- 19 (i) The spouse will be permitted to use the account;
- 20 (ii) The spouse will be contractually liable on the account;
- 21 (iii) The applicant is relying on the spouse’s income as a basis for
 22 repayment of the credit requested;
- 23 (iv) The applicant resides in a community property state or is
 24 relying on property located in such a state as a basis for repayment
 of the credit requested; or
- 25 (v) The applicant is relying on alimony, child support, or separate
 26 maintenance payments from a spouse or former spouse as a basis
 for repayment of the credit requested.

27 12 C.F.R. § 1002.5(c)(2)(i)–(v).

28 ⁵ See generally Ann Graham, *et al.*, 9 BANKING LAW § 170A.03(1)(f)(iv)(6) (2019) (explaining parallel requirements under FCRA and ECOA for creditors’ treatment of nonapplicant spouses).

1 In other words, ECOA’s presumptive starting place is that a creditor may not request
2 spousal credit information, period. Section 3 of SB 311 upends this presumption—not only
3 permitting, but requiring, creditors to investigate the credit history of a spouse or ex-spouse without
4 any underlying justification at all, other than the applicant’s hope that it might help their credit
5 application.

6 Furthermore, of all the foregoing ECOA exceptions the general rule, only the last one
7 (subsection (v)) allows creditors to request information about *former* spouses. And even then, the
8 inquiry is only permissible where the applicant is relying on alimony, child support, or separate
9 maintenance payments from a former spouse as a basis for repayment of the credit requested.
10 12 C.F.R. § 1002.5(c)(2)(v). In such instances, creditors are faced with the stark choice of whether
11 to comply with either the ECOA or Section 3 of SB 311. This is a prime example of how compliance
12 with both statutes is impossible.

13 For these reasons, the Court should hold that plaintiffs have a high likelihood of success in
14 showing that Section 3 of SB 311 is conflict-preempted by the ECOA. *See* 15 U.S.C. § 1691d(f)
15 (federal preemption exists where “the laws of any State with respect to credit discrimination” are
16 inconsistent with ECOA).

17 As demonstrated above, it is impossible for plaintiffs’ members to consistently comply with
18 FCRA and ECOA while also complying with Section 3 of SB 311. For this reason, plaintiffs are
19 likely to be able to demonstrate that the challenged portion of SB 311 is preempted under the first
20 prong of conflict pre-emption—namely, the impossibility of compliance with both state and federal
21 requirements. *See Freightliner Corporation*, 514 U.S. at 287.

22 **3. Section 3 of SB 311 Obstructs Congress’s Purposes In Limiting Access** 23 **To Sensitive Consumer Credit Information**

24 The second prong of conflict preemption as described in *Freightliner Corporation* also
25 applies here, because Section 3 of SB 311 “stands as an obstacle to the accomplishment and
26 execution of the full purposes and objectives of Congress.” *Freightliner Corporation*, 514 U.S. at
27 287.

1 Congress enacted the FCRA for the specific purpose of maintaining privacy and ensuring
 2 the confidentiality of consumer credit reports. *See, e.g., Thomas v. FTS USA, LLC*, 193 F. Supp. 3d
 3 623, 633 (E.D. Va. 2016) (“It is clear from the statute’s legislative history that Congress intended
 4 that the FCRA be construed to promote the credit industry’s responsible dissemination of accurate
 5 and relevant information and to maintain the confidentiality of consumer reports.”); *Perrill v.*
 6 *Equifax Info. Servs., LLC*, 205 F. Supp. 3d 869, 874 (W.D. Tex. 2016) (“Congress’s judgment in
 7 enacting the FCRA was to provide consumers a right to privacy.”); *Burke v. Federal Nat’l Mortg.*
 8 *Ass’n*, No. 3:16-CV-153, 2016 U.S. Dist. LEXIS 105103 (E.D. Va. Aug. 9, 2016) (“The FCRA
 9 was meant to protect the interest of privacy.”).

10 Requiring creditors to obtain private information about applicants’ spouses and ex-spouses
 11 would trample these privacy rights and thwart Congress’s intent. This Court should aggressively
 12 protect Congress’s authority to enact laws that safeguard the privacy of American consumers.

13 **V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM**
 14 **ABSENT AN INJUNCTION**

15 Absent injunctive relief, plaintiffs will suffer irreparable harm in three respects.

16 First, plaintiffs will suffer constitutional harm since they will be forced to comply with a
 17 state law that is preempted by federal law. “[U]nlike monetary injuries, constitutional violations
 18 cannot be adequately remedied through damages and therefore generally constitute irreparable
 19 harm.” *Nelson*, 30 F.3d at 2; *Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012) (“[W]hen an
 20 alleged constitutional right is involved, most courts hold that no further showing of irreparable
 21 injury is necessary”).

22 Second, plaintiffs will suffer irreparable harm because there is no monetary remedy
 23 available that could compensate plaintiffs for the injuries they will sustain. “Damages for a
 24 violation of an individual’s privacy are a quintessential example of damages that are uncertain and
 25 possibly unmeasurable.” *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1213 (11th Cir. 2005).
 26 In addition, a federal court cannot award monetary damages or other retrospective relief designed
 27 to remedy past violations of federal law by state employees. *See Edelman v. Jordan*, 415 U.S. 651,
 28 668 (1974). And where the plaintiffs have no ability to recover monetary damages against the state,

1 their harm is irreparable. *See, e.g., KPMG LLP v. United States*, 139 Fed. Cl. 533, 537 (Fed. Cl.
2 2018); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010).

3 Third, without an injunction, SB 311 would brand the plaintiffs’ members as perpetrators
4 of marital discrimination, which would necessarily result in the loss of business goodwill and
5 reputational harm. *See S. Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d
6 844, 853 (6th Cir. 2017) (“[L]oss of customer goodwill is a prime example of intangible, irreparable
7 harm”). Indeed, since plaintiffs and their members are longstanding proponents of fair and equal
8 lending in the financial services industry, the threat of being deemed perpetrators of discrimination
9 is particularly harsh. Moreover, the harm plaintiffs’ members would suffer is not the sort that any
10 business should be expected to suffer in these circumstances; plaintiffs’ inability to comply with
11 SB 311 is not the result of some strategic business decision, but rather, the result of federal law.

12 **VI. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS**

13 A leading treatise summarizes the balance of equities test as follows:

14 In assessing a request for preliminary injunctive relief, courts will
15 weigh the relative hardships faced by each of the parties. In doing
16 so, the court balances the injury faced by the applicant for an
17 injunction against the injury that would be sustained by the
18 defendant if relief were granted. If the hardship experienced by the
19 movant if the injunction were denied would outweigh the hardship
20 experienced by the non-movant if the injunction were granted,
21 preliminary injunctive relief may be granted. If the hardship
22 experienced by the non-movant if the injunction were granted
23 outweighs the hardship likely to be experienced by the movant if
24 the injunction were denied, preliminary injunctive relief must be
25 denied.

26 Joseph T. McLaughlin, 13 MOORE’S FEDERAL PRACTICE—CIVIL § 65.22.

27 Here, the balance of hardships weighs firmly in plaintiffs’ favor. A narrow injunction
28 targeted only at Section 3 of SB 311 would cause Nevadans no harm, since it would permit the bulk
of the new statute to be enforced—including its worthy anti-discrimination provisions mandating
equal opportunity lending without regard to race, color, creed, religion, disability, national origin
or ancestry, sex, sexual orientation, and gender identity or expression. Putting a hold on Section 3
alone would preserve these important protections while halting enforcement of the unconstitutional

1 provisions of the new statute and preserving the status quo for credit reviews of consumers who are
2 or have been married.

3 By contrast, denying the preliminary injunction would subject plaintiffs' members to
4 potential enforcement or administrative actions by the defendants, cause rampant confusion about
5 whether plaintiffs' members should comply with state law versus federal law, and lay the
6 foundation for countless lawsuits by private citizens for purported marital discrimination based on
7 SB 311.

8 The balance of harm also weighs strongly in favor of issuing a preliminary injunction
9 because once a spouse or ex-spouse's private credit information is divulged to a creditor at an
10 applicant's request, that information will be permanently and irreversibly stripped of its
11 confidential status.

12 **VII. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST**

13 "The public interest inquiry primarily addresses impact on non-parties rather than parties.
14 It embodies the Supreme Court's direction that in exercising their sound discretion, courts of equity
15 should pay particular regard for the public consequences in employing the extraordinary remedy of
16 injunction." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931–32 (9th Cir. 2003) (internal
17 quotation marks and citation omitted); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312
18 (1982).

19 Here, issuing a preliminary injunction is appropriate because "[e]njoining violation of
20 federal statutes is in the public interest." *Am. Trucking Assocs., Inc. v. City of Los Angeles*, 559
21 F.3d 1046, 1060 (9th Cir. 2009). The public interest is not served by enforcing a statute that violates
22 federal law. *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1062 (D. Ariz. 2012).

23 The Court should also issue a preliminary injunction because "[t]he public has an interest
24 in protecting the privacy rights of its citizens." *Wolfson v. Lewis*, 924 F. Supp. 1413, 1435 (E.D.
25 Penn. 1996); *see also A.A. v. New Jersey*, 176 F. Supp. 2d 274, 307 (D. N.J. (2001) ("The interests
26 of the public are necessarily promoted when individual rights to privacy are protected from
27 unwarranted state intrusion.").

28

1 Moreover, enforcing Section 3 of SB 311 will necessarily create significant policy
2 problems. For example, an applicant’s ex-spouse may have strong reasons for wishing to sever all
3 ties to the applicant, including domestic violence or other illegal activity. But SB 311 creates a
4 process that will make it significantly more difficult for ex-spouses to ensure that those ties remain
5 severed. When a non-applicant ex-spouse discovers that a creditor obtained his or her credit report
6 without consent, he or she will undoubtedly ask why. The answers to those questions will lead
7 directly to the ex-spouse who wanted to sever ties.

8 Another unintended policy ramification is how creditors are to determine whether an
9 applicant does, or does not, have a “credit history.” SB 311 permits an applicant with “no credit
10 history” to request the creditor to deem the applicant’s credit history to be the same as the
11 applicant’s spouse or ex-spouse during the time of the marriage, but the statute supplies no
12 definition about what constitutes “no credit history.” If a consumer has a credit history, but disputes
13 all the information contained within his or her report, does that consumer have a “credit history” or
14 not?

15 Yet another consideration is the safety and soundness of the financial services industry,
16 which is crucial to the Nevada economy (as it is to all modern economies). If a consumer has
17 excellent credit and their spouse/ex-spouse has terrible credit, and the spouse is seeking a large loan
18 on the basis of the other’s excellent credit, Section 3 of Senate Bill 311 could cause a creditor to
19 make a highly risky investment by lending to that spouse. This risk would be virtually invisible to
20 other parties who might, in their turn, be relying on the creditor’s assessment of their borrowers’
21 soundness (such as parties who purchase loans on the secondary market).

22 Finally, a preliminary injunction serves the public interest because creditors, if asked to
23 choose between violating federal or Nevada law, may choose to opt-out and forego doing business
24 in Nevada altogether. Other creditors may reluctantly try and do business amidst a conflicting state-
25 federal statutory scheme, but since the cost of doing business in those circumstances will
26 undoubtedly be higher, so will the cost of credit. In either scenario, the public is worse off than if
27 a preliminary injunction were to issue and the status quo preserved.

28 ///

1 **VIII. CONCLUSION**

2 For the foregoing reasons, the Court should grant plaintiffs’ motion for a preliminary
3 injunction.

4 DATED: October 8, 2019

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **MOTION FOR PRELIMINARY INJUNCTION** by method indicated below:

- BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

Mary Young
c/o Office of the Commissioner
3300 W. Sahara Ave., Suite 250
Las Vegas, NV 89102

Aaron Ford
c/o Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701

- BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- BY PERSONAL DELIVERY:** by causing personal delivery by, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
- BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court’s Service List for the above-referenced case.
- BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

DATED this 8th day of October, 2019.

/s/ Maricris Williams
An employee of SNELL & WILMER L.L.P.

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