

LAW COMMITTEE
VEHICLE FINANCE AGENDA
October 21-22, 2019
JW Marriott // Nashville, Tennessee
Monday, Oct. 21 11:00 a.m. – 12:30 p.m.

- ABA resolution on VF race data, dealer reserve, and VPPs
- Ancillary Product / VPP Backlash (supervisory highlights and state regulators)
- CFPB fair lending report: servicing / discretionary servicing
- FTC Safeguard Rule Update
- Safe at Home
- SCRA settlement
- Servicemember database Settlement / SSNs / passwords
- Pre-qualified / pre-approved offers of credit
- New NY Leasing laws
- FL new law lien fraud fix
- MA AFSA legislation update

WITHDRAWN

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
2 tribal governments to adopt and enforce fair lending laws and other federal and state laws
3 targeting unfair or deceptive acts or practices to address discrimination in vehicle sales
4 and financing markets;

5
6 FURTHER RESOLVED, That the American Bar Association urges Congress to amend
7 the Equal Credit Opportunity Act, 15 U.S.C 1691, to require documentation and collection
8 of the applicant's race, gender and national origin for vehicle credit transactions, through
9 applicant voluntary self-identification using disaggregated racial and ethnic categories,
10 made available through a Demographic Information Addendum, or some equivalent
11 measurement;

12 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
13 territorial, and tribal legislatures and governmental agencies to adopt laws and policies
14 that promote the adoption of an enhanced nondiscrimination compliance system for a
15 vehicle loan, or reduce dealer discretion by placing limits on dealer markup, or eliminate
16 dealer discretion to mark up interest rates by using a different method of dealer
17 compensation, such as a flat fee for each transaction;

18 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
19 territorial and tribal governments to adopt legislation requiring the timely notice and
20 disclosure of pricing of add-on products by dealers on each vehicle through reasonable
21 means, such as a pricing sheet and/or website prominently displayed and available at its
22 location, before a consumer negotiates to purchase a vehicle; and

23 FURTHER RESOLVED, That the American Bar Association encourages state, local,
24 territorial and tribal bar associations to offer educational programming and materials to
25 lawyers and consumers to help them understand and navigate purchases and financing
26 of vehicles, and understand consumers' legal rights with respect to such purchases and
27 loans.

Supervisory Highlights

Issue 19, Summer 2019

Table of contents

Table of contents.....	1
1. Introduction.....	2
2. Supervisory observations.....	3
2.1 Automobile loan origination.....	3
2.2 Credit card account management	4
2.3 Debt collection	7
2.4 Furnishing	8
2.5 Mortgage origination	11
3. Supervision program developments.....	14
3.1 Recent Bureau rules and guidance.....	14
4. Conclusion	16

1. Introduction

The Consumer Financial Protection Bureau (CFPB or Bureau) is committed to a consumer financial marketplace that is free, innovative, competitive, and transparent, where the rights of all parties are protected by the rule of law, and where consumers are free to choose the products and services that best fit their individual needs. To effectively accomplish this, the Bureau remains committed to sharing with the public key findings from its supervisory work to help industry limit risks to consumers and comply with Federal consumer financial law.

The findings included in this report cover examinations in the areas of automobile loan origination, credit card account management, debt collection, furnishing, and mortgage origination that were generally completed between December 2018 and March 2019 (unless otherwise stated).

It is important to keep in mind that institutions are subject only to the requirements of relevant laws and regulations. The information contained in *Supervisory Highlights* is disseminated to help institutions better understand how the Bureau examines institutions for compliance with those requirements. This document does not impose any new or different legal requirements. In addition, the legal violations described in this and previous issues of *Supervisory Highlights* are based on the particular facts and circumstances reviewed by the Bureau as part of its examinations. A conclusion that a legal violation exists on the facts and circumstances described here may not lead to such a finding under different facts and circumstances.

We invite readers with questions or comments about the findings and legal analysis reported in *Supervisory Highlights* to contact us at CFPB_Supervision@cfpb.gov.

2. Supervisory observations

2.1 Automobile loan origination

The Bureau continues to examine auto loan origination activities, including assessing whether originators have engaged in any unfair, deceptive, or abusive acts or practices prohibited by the Consumer Financial Protection Act of 2010 (CFPA).

2.1.1 Abusive act or practice when selling add-on GAP products

Under the prohibition against abusive acts or practices in Sections 1031 and 1036 of the CFPA,¹ an act or practice is abusive if, among other things, it takes unreasonable advantage of a consumer's lack of understanding of the material risks, costs, or conditions of the product or service.²

Some auto lenders may sell consumers a guaranteed asset protection (GAP) product to cover the difference, or “gap,” between the amount the consumer owes on the auto loan and the amount received from the auto insurer in the event a vehicle is stolen, damaged, or totaled. Such a gap is more likely to occur in an auto loan with a high loan-to-value (LTV) ratio than one with a low LTV, because in a loan with a low LTV, the insurance payout for a totaled vehicle may cover the outstanding debt.

One or more examinations completed in 2018³ found instances in which auto lenders sold a GAP product to consumers under circumstances that led to an abusive practice. Specifically, examiners observed that lenders sold a GAP product to consumers whose low LTV meant that they would not benefit from the product. By purchasing a product they would not benefit from, consumers demonstrated that they lacked an understanding of a material aspect of the product. The lenders had sufficient information to know that these consumers would not benefit from the product. These sales show that the lenders took unreasonable advantage of the consumers' lack

¹ 12 USC 5531 and 12 USC 5536.

² 12 USC 5531(d)(2)(A).

³ This examination work was completed prior to the review period for this report.

of understanding of the material risks, costs, or conditions of the product. In response to these examination findings, the lenders have undertaken remedial and corrective actions, including reimbursing consumers for the cost of the product and establishing an LTV minimum for GAP product sales.

2.2 Credit card account management

The Bureau continues to examine the credit card account management operations of one or more supervised entities. These examinations may focus on all aspects of credit card origination and account servicing for compliance with various Federal consumer financial laws including the Truth in Lending Act and its implementing regulation, Regulation Z. Selected recent findings are below.

2.2.1 Triggered disclosures for online credit card advertisements

Regulation Z, 12 CFR 1026.16(b), requires credit card issuers in credit card advertisements to clearly and conspicuously provide certain disclosures if the advertisements contain certain pricing terms (“triggering terms”).

In one or more examinations completed in 2018,⁴ examiners found that entities failed to clearly and conspicuously provide disclosures required by triggering terms in online advertisements. In some instances, the triggered disclosures were available to consumers via a hyperlink that was not labeled in a way that referred to the triggered disclosures. Consumers would have to click on the insufficiently clear or conspicuous hyperlink, and then navigate through an online application before arriving at triggered disclosures. In other instances, consumers had to click on multiple hyperlinks and could only view the triggered disclosures after completing an eight-page application. Issuers have undertaken corrective actions in these cases in response to examination findings.

2.2.2 Offset of credit card debt

Regulation Z, 12 CFR 1026.12(d), prohibits credit card issuers from offsetting credit card debt with funds the consumer has on deposit with the issuer. However, subsection 1026.12(d)(2)

⁴ This examination work was completed prior to the review period for this report.

expressly permits issuers to obtain or enforce a consensual security interest in such funds, so long as certain requirements specified in the Staff Commentary are met. Such security interests must be affirmatively agreed to by the consumer and must be disclosed in the account-opening disclosures. A security interest may not simply be the functional equivalent of offset, however. Thus, routinely including a provision in a cardholder agreement indicating that consumers are giving a security interest in any deposit accounts maintained with the issuers would not qualify for the exception under subsection 1026.12(d)(2). Instead, for a security interest to qualify, the consumer must be aware that granting a security interest is a condition for the credit card (or for more favorable account terms) and must specifically intend to grant a security interest in the deposit account. Indicators of the consumers' awareness and intent include at least one of the following (or a substantially similar procedure):

- Separate signature or initials on the agreement indicating that a security interest is being given;
- Placement of the security agreement on a separate page, or otherwise separate security interest provisions from other contract and disclosure provisions; or
- Reference to a specific amount of deposited funds or to a specific deposit account number.

One or more examinations completed in 2018⁵ found that issuers violated Regulation Z, 12 CFR 1026.12(d)(1), by offsetting consumers' credit card debt against funds that the consumers had on deposit with the issuers without sufficient indication of the consumer's awareness of, and intent to grant, a security interest in those funds. The issuers' policies or procedures required the issuers to have obtained a signed authorization form from consumers before attempting to enforce the security interest. However, in some instances, the issuers enforced the security interest against the funds on deposit where such forms had not been signed by the consumer or could not be located. In response to examination findings, issuers have implemented corrective action to ensure compliance with the regulatory requirements.

⁵ This examination work was completed prior to the review period for this report.

2.2.3 Deceptive threats of repossession or foreclosure in credit card collections

Under the prohibition against deceptive acts or practices in Sections 1031 and 1036 of the CFPA,⁶ an act or practice is deceptive when: (1) it misleads or is likely to mislead the consumer; (2) the consumer's interpretation is reasonable under the circumstances; and (3) the misleading act or practice is material. In one or more examinations completed in 2018,⁷ examiners found that one or more credit card issuer(s) misled or were likely to mislead consumer credit card holders by sending collection letters that suggested that the issuer(s) could repossess consumers' automobiles, or foreclose on homes, securing loans or mortgages owned by the issuer(s). In fact, the issuer(s) did not repossess any vehicles or foreclose on any mortgages in connection with delinquent credit card accounts, and it was against the policies of the issuer(s) to do so. The representations by the issuer(s) were likely to mislead consumers into believing that they might be subject to repossession or foreclosure for delinquent credit card accounts if they had an automobile loan or mortgage with the issuer(s). The consumers' beliefs were reasonable given the representations made in the collection letters. The misrepresentations were material since they were likely to induce cardholders to change their conduct with respect to their delinquent credit card accounts. In response to these examiner findings, the issuers discontinued the use of the collection letters.

2.2.4 Deceptive marketing regarding secured credit card accounts

Under the prohibition against deceptive acts or practices in Sections 1031 and 1036 of the CFPA,⁸ a practice is deceptive when: (1) it misleads or is likely to mislead the consumer; (2) the consumer's interpretation is reasonable under the circumstances; and (3) the misleading act or practice is material. In one or more examinations, examiners found that credit card issuers misled or were likely to mislead consumers by orally representing that secured credit card accounts would automatically graduate (or be upgraded) to unsecured credit card accounts on a specific timeframe, such as six or twelve months after origination, so long as cardholders maintained their accounts in good standing. In fact, the issuers did not upgrade secured card accounts on any preset timeframe, and upgrade or graduation was conditioned on additional

⁶ 12 USC 5531 and 12 USC 5536.

⁷ This examination work was completed prior to the review period for this report.

⁸ 12 USC 5531 and 12 USC 5536.

factors, as some subsequent disclosures and online and print solicitations suggested. The oral representations misled or were likely to mislead consumers about both the timing and likelihood of upgrade or graduation, and subsequent written disclosures were inadequate to cure the oral representations. The consumers' interpretation of the preset graduation or upgrade was reasonable based on the oral representations. The representations were also material to the consumers' decisions to apply for a secured card account with the issuers.

In one or more examinations, examiners found that credit card issuers misled or were likely to mislead consumers by representing in prescreened offers of credit that secured credit card accounts subject to an annual fee would be "periodically" reviewed for graduation (or upgrade). In fact, the issuers did not review such accounts for a year or more but did not provide additional disclosures to accountholders or modify their marketing materials. Such representations were likely to mislead consumers about the timing for a potential upgrade. Consumers' interpretations of such representations were reasonable under the circumstances. The issuers' misrepresentations were material to consumers' decisions to apply for a secured card account and to existing cardholders' decisions to maintain their secured card accounts.

In all the above cases, the issuers have developed action plans to identify and compensate impacted consumers, and updated their policies and procedures to prevent future violations.

2.3 Debt collection

Supervision continues to examine consumer debt collection for compliance with various Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA). Below are findings resulting from these supervisory activities.

2.3.1 False representation of the amount and legal status of debt

Section 807 of the FDCPA prohibits the use of any false, deceptive, or misleading representation or means in the collection of any debt. Specifically, Section 807(2)(A) of the FDCPA prohibits the false representation of the character, amount, or legal status of any debt. Examiners found that one or more debt collectors claimed and collected from consumers, interest not authorized by the underlying contracts between the debt collectors and the creditors. In doing so, one or more debt collectors falsely represented to consumers the amount due and authorized in violation of Section 807(2)(A) of the FDCPA. In response to these examination findings, one or

more debt collectors conducted or are conducting a full accounting of these charges and providing remediation for affected consumer accounts, including accounts in which consumers paid in full, settled in full, or made partial payments.

2.4 Furnishing

Entities that furnish information relating to consumers to consumer reporting companies for inclusion in consumer reports (furnishers) play a vital role in the consumer reporting process. They are subject to several requirements under the Fair Credit Reporting Act (FCRA)⁹ and its implementing regulation, Regulation V,¹⁰ including accuracy and dispute handling requirements.

In one or more recent furnishing reviews, examiners found deficiencies in furnisher compliance with FCRA accuracy and dispute investigation requirements.

2.4.1 Duty to timely complete dispute investigations

The FCRA requires that when a furnisher receives notice of a dispute from a credit reporting company (CRC) pursuant to FCRA Section 623(b)(1),¹¹ the furnisher must complete its investigation of disputes “before the expiration of the period under section 611(a)(1). . .” within which the CRC must complete its own dispute investigation.¹² This period of time is normally 30 days from the date the CRC receives a dispute and can be extended to 45 days in certain limited circumstances.¹³ Examiners found that one or more furnishers failed to complete dispute investigations within the required time period. At one or more furnishers, examiners found certain disputes of which the furnisher(s) received notice from the CRC but failed to conduct an investigation or respond to the CRC. In response to these findings, one or more furnishers are

⁹ 15 USC 1681s-2(a)-(e).

¹⁰ 12 CFR 1022.40-43.

¹¹ 15 USC 1681s-2(b)(1).

¹² 15 USC 1681s-2(b)(2).

¹³ 15 USC 1681i(a)(1)(B).

establishing and implementing enhanced monitoring activities, and policies and procedures regarding compliance with furnisher-specific requirements of the FCRA.

2.4.2 Duty to provide results of dispute investigations to CRCs

The FCRA requires that if a furnisher's dispute investigation finds that disputed information is incomplete or inaccurate, the furnisher must report the results not only to the CRC that sent the dispute to the furnisher but also to all nationwide CRCs to which the furnisher provided the information.¹⁴ Examiners found that one or more furnishers failed to report updates or corrections to information found to be incomplete or inaccurate following a dispute investigation to all applicable CRCs. At one or more furnishers, examiners found the systematic failure of reporting dispute investigation results to a particular CRC. In response to these findings, one or more furnishers are establishing and implementing enhanced monitoring activities, as well as policies and procedures regarding compliance with furnisher-specific requirements of the FCRA, and providing validation of corrective action.

2.4.3 Duty to promptly correct and update previously furnished information

The FCRA requires that if a furnisher determines that previously furnished information is not complete or accurate, the furnisher must promptly notify the CRC of that determination and provide the CRC with any corrections to that information, or any additional information, that is necessary to make the information complete and accurate.¹⁵ In addition, a furnisher cannot thereafter furnish to the CRC any of the information that remains incomplete or inaccurate.¹⁶

Examiners found that one or more furnishers failed to promptly send corrections or updates to all applicable CRCs after making a determination, as reflected in the relevant system of record, that previously furnished information about certain accounts was no longer accurate. As a result, one or more furnishers are establishing and implementing enhanced monitoring activities, as well as policies and procedures regarding compliance with furnisher-specific requirements of the FCRA, and providing validation of corrective action.

¹⁴ 15 USC 1681s-2(b)(1)(D).

¹⁵ 15 USC 1681s-2(a)(2)(B).

¹⁶ 15 USC 1681s-2(a)(2)(B).

Examiners found that one or more furnishers of deposit account information failed to furnish updated information regarding accounts that were paid-in-full or settled-in-full. When one or more furnishers removed their company identification from account number fields at the request of a nationwide specialty CRC, and the removal of the identification changed the search key that the furnishers used for matching when making account updates, the furnishers discovered that almost two thousand accounts were not corrected to reflect the paid-in-full or settled-in-full status. Examiners observed that one or more furnishers did not promptly notify the nationwide specialty CRC after having determined that the accounts were not corrected and updated, in violation of the FCRA. In light of these findings, one or more furnishers have taken action to update and correct information that it previously furnished when they determined that the information was not complete or accurate.

2.4.4 Duty to provide notice of dispute

The FCRA prohibits furnishers from furnishing information to any CRC without notice that such information is disputed if the completeness or accuracy of the information furnished is disputed by a consumer.¹⁷ Examiners found that one or more furnishers of deposit account information received consumer disputes and then continued furnishing information about the disputed accounts for several months without notifying a nationwide specialty CRC that the information furnished was disputed, in violation of the FCRA. As a result of these examination findings, one or more furnishers have taken action to provide timely notice to CRCs upon receipt of a direct dispute from a consumer who has disputed information previously furnished.

2.4.5 Regulation V duty to establish and implement policies and procedures

Regulation V requires furnishers to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a CRC.¹⁸ Examiners found that one or more furnishers of deposit account information failed to implement reasonable written policies and procedures regarding the accuracy and integrity of deposit account information it furnished to nationwide specialty CRCs. Such policies and procedures were also not appropriate to the nature, size, complexity, and scope of the furnishing activities. For example, there were no written policies and procedures for

¹⁷ 15 USC 1682s-2(a)(3).

¹⁸ 12 CFR 1022.42(a).

handling disputes regarding account information from certain files. The existing policies also did not address compliance with FCRA dispute requirements, such as the duty to conduct a reasonable investigation. There were also no policies and procedures for training, monitoring, or conducting internal audits regarding a business unit’s responsibilities to forward disputes of furnished information. Finally, one or more furnishers failed to have policies and procedures for one business unit to conduct investigations of consumer disputes alleging account abuse caused by fraud. As a result of these observations, one or more furnishers have taken action to comply with the Regulation V requirements to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information furnished to nationwide CRCs.

Regulation V requires furnishers to consider and incorporate, as appropriate, the guidelines in Appendix E of Regulation V.¹⁹ Examiners found that one or more furnishers of deposit account information failed to consider the guidelines in Appendix E of Regulation V. For example, such guidance states that a furnisher’s policies and procedures should consider and incorporate, as appropriate, conducting “reasonable investigations of consumer disputes and take appropriate action based on the outcome of such investigations.” However, the policies of one or more furnishers did not consider and incorporate such guidance. Based on examiner findings, one or more furnishers have taken action to consider and incorporate, as appropriate, the guidance in Appendix E of Regulation V.

2.5 Mortgage origination

Supervision continues to examine both forward and reverse mortgage origination activities for compliance with various Federal consumer financial laws, including the Truth in Lending Act and its implementing regulation, Regulation Z.

2.5.1 Inaccurate APR and TALC disclosures in reverse mortgage transactions

Regulation Z requires creditors to disclose the annual percentage rate (APR) in accordance with either the actuarial method or the U.S. Rule method.²⁰ The explanations, equations, and

¹⁹ 12 CFR 1022.42(b), Appendix E.

²⁰ 12 CFR 1026.22(a)(1).

instructions for determining the APR in accordance with the actuarial method are set forth in Appendix J to 12 CFR Part 1026.²¹

Appendix J provides that the unit-period for a single advance, single payment transaction, for the purposes of determining the APR, shall be the term of the transaction, but shall not exceed one year.²² In all other transactions, the unit-period shall be the common period that occurs most frequently in the transaction unless an exception applies.²³

Generally, by its terms, a closed-end reverse mortgage is a single advance, single payment transaction because it includes a single lump-sum advance at origination and a single payment due at the end of the loan term. Thus, per Appendix J and Regulation Z, the unit-period for the purposes of determining the APR for such a closed-end reverse mortgage, with a term greater than a year, is one year.

In addition to a single lump-sum advance at origination, some closed-end reverse mortgages may have multiple advances throughout the loan term. For example, a closed-end reverse mortgage with a life-expectancy set-aside (LESA) typically has a set number of semiannual advances for the payment of property taxes, and flood and hazard insurance premiums. Thus, per Appendix J and Regulation Z, the unit-period for the purposes of determining the APR for such a loan would be six months because that would be the common period that occurs most frequently in the transaction.

In addition, Regulation Z states that the APR shall be considered accurate for a regular transaction if it is not more than 1/8 of one percentage point above or below the APR determined in accordance with section 1026.22(a)(1).²⁴ Likewise, the APR shall be considered accurate for an irregular transaction if it is not more than 1/4 of one percentage point above or below the APR determined in accordance with section 1026.22(a)(1).²⁵

²¹ *Id.*

²² 12 CFR Part 1026, App. J(b)(4)(ii).

²³ 12 CFR Part 1026, App. J(b)(4)(i).

²⁴ 12 CFR 1026.22(a)(2).

²⁵ 12 CFR 1026.22(a)(3).

In one or more examinations, examiners observed that creditors were disclosing inaccurate APRs for closed-end reverse mortgages. Specifically, while conducting loan file reviews, examiners observed creditors using a unit-period of one month instead of one year to calculate the APR, leading to inaccurate calculations outside of Regulation Z's permissible tolerances.²⁶ In response to this finding, the creditors have revised their calculation methodology to reflect the correct unit-period and provided affected consumers with reimbursements.

Examiners also found creditors disclosing inaccurate APRs for closed-end reverse mortgages with a LESA. While conducting loan file reviews, examiners observed creditors using a unit-period of one month instead of six months to calculate the APR, leading to inaccurate calculations outside of Regulation Z's permissible tolerances.²⁷ In response to this finding, the creditors have revised their calculation methodologies to reflect the correct unit-period.

Examiners observed similar issues in relation to the calculation of the total annual loan cost (TALC). Regulation Z requires that, in a reverse mortgage transaction, the creditor provide a good-faith projection of the total cost of credit, determined in accordance with paragraph (c) of this section and expressed as a table of "total annual loan cost rates," in accordance with Appendix K of 12 CFR Part 1026.²⁸

Per Appendix K, the unit-period for a single advance, single payment transaction, for the purposes of determining the TALC rate, shall be the term of the transaction, but shall not exceed one year.²⁹ Both a closed-end reverse mortgage and an open-end reverse mortgage with a line of credit are single advance, single payment transactions, even though the latter may have multiple advances over the loan term.³⁰ Accordingly, the appropriate unit-period for such transactions when determining the TALC rate and the future value of all advances, a variable of the TALC equation, is one year. While conducting loan file reviews, examiners observed creditors using a unit-period of one month instead of one year to calculate the TALC rate and the future value of all advances, leading to inaccurate TALC disclosures. In response to these findings, the creditors have revised their calculation methodologies to reflect the correct unit-period.

²⁶ 12 CFR 1026.22(a)(2) and (3).

²⁷ *Id.*

²⁸ 12 CFR 1026.33(b)(2).

²⁹ 12 CFR Part 1026, App. K(b)(4)(ii).

³⁰ 12 CFR Part 1026, App. K(b)(9) (Regulation Z treats such open-end reverse mortgages with a line of credit as single advance, single payment transactions for purposes of calculating the TALC).

3. Supervision program developments

3.1 Recent Bureau rules and guidance

3.1.1 Small entity compliance guide

On June 28, 2019, the Bureau updated the small entity compliance guide summarizing the Payday Lending Rule's payment-related requirements. The guide has been updated to incorporate the changes that the Delay Final Rule made to the 2017 Payday Lending Rule.³¹

3.1.2 Memorandum of Understanding with the Federal Trade Commission

On February 26, 2019, the CFPB and the Federal Trade Commission (FTC) announced a new memorandum of understanding (MOU) between the agencies that went into effect on February 25, 2019.³² The MOU, which facilitates cooperation and coordination on supervision, enforcement and consumer response activities, renews a previous MOU between the agencies, and is required by the CFPA.³³

3.1.3 Amendment to the annual privacy notice requirement under the Gramm-Leach-Bliley Act (Regulation P)

On August 10, 2018, the CFPB published a final rule to implement a December 2015 statutory amendment to the Gramm-Leach-Bliley Act.³⁴ The rule provides an exception under which financial institutions that meet certain conditions are not required to provide annual privacy notices to customers. To qualify for this exception, a financial institution must not share

³¹ There is currently a stay on the compliance date for the 2017 Payday Lending Rule.

³² The MOU can be found here: https://www.consumerfinance.gov/documents/7302/cfpb_ftc_memo-of-understanding_2019-02.pdf.

³³ 12 USC 5514(c)(3)(A).

³⁴ The final rule can be found here: <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/amendment-annual-privacy-notice-requirement-under-gramm-leach-bliley-act/>.

nonpublic personal information about customers except as described in certain statutory exceptions. In addition, the rule requires that the financial institution must not have changed its policies and practices with regard to disclosing nonpublic personal information from those that the institution disclosed in the most recent privacy notice it sent. As part of its implementation, the Bureau is also amending Regulation P to provide timing requirements for delivery of annual privacy notices in the event that a financial institution that qualified for this annual notice exception later changes its policies or practices in such a way that it no longer qualifies for the exception. The Bureau is also removing the Regulation P provision that allows for use of the alternative delivery method for annual privacy notices because the Bureau believes the alternative delivery method will no longer be used in light of the annual notice exception. The final rule went into effect on September 17, 2018.

4. Conclusion

The Bureau will continue to publish *Supervisory Highlights* to aid Bureau-supervised entities in their efforts to comply with Federal consumer financial law. The report shares information regarding general supervisory and examination findings (without identifying specific institutions, except in the case of public enforcement actions), communicates operational changes to the program, and provides a convenient and easily accessible resource for information on the Bureau's guidance documents.

ABOUT SAFE AT HOME



Safe at Home

Minnesota's Address Confidentiality Program

Safe at Home is a statewide address confidentiality program administered by the Office of the Minnesota Secretary of State. It is governed by *Minnesota Statutes, Chapter 5B* and *Minnesota Rules Chapter 8290*.

Safe at Home is designed to help people who fear for their safety maintain a confidential address. Many times program participants are survivors of domestic violence, sexual assault, or stalking.

When someone enrolls in Safe at Home, they are assigned a PO Box address that they can use as their legal address. In Minnesota, all public and private entities must accept a participant's assigned address and a participant cannot be required to disclose their real address. This allows a program participant to go about his or her daily life without leaving traces of where they can typically be located, such as their residential address, a school address, or an employment address. This safety measure is an attempt to keep their aggressor from locating them.

Because program participants use a PO Box address assigned to them, Safe at Home provides a mail forwarding service. First Class Mail is forwarded to a participant's home address. The participant's real address remains under security with the Safe at Home office. In addition to being the participant's agent to receive mail, the Office of the Minnesota Secretary of State is a participant's agent to receive service of process (legal papers).

Go here to [find a safe, emergency shelter](#).

[Enroll](#) in the Safe at Home Program

STATE OF NEW YORK

3631

2019-2020 Regular Sessions

IN SENATE

February 11, 2019

Introduced by Sens. BRESLIN, SEWARD, SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to expanding the availability of meaningful service contracts to protect New Yorkers leasing automobiles for their personal use from unanticipated "lease-end" charges related to excess use or wear and tear of the leased vehicle

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subsection (k) of section 7902 of the insurance law, as
2 amended by chapter 409 of the laws of 2012, is amended to read as
3 follows:
4 (k) "Service contract" means a contract or agreement, for a separate
5 or additional consideration, for a specific duration to perform the
6 repair, replacement or maintenance of property, or indemnification for
7 repair, replacement or maintenance, due to a defect in materials or
8 workmanship or wear and tear, with or without additional provision for
9 indemnity payments for incidental damages, provided any such indemnity
10 payment per incident shall not exceed the purchase price of the property
11 serviced. Service contracts may include towing, rental and emergency
12 road service, and may also provide for the repair, replacement or main-
13 tenance of property for damage resulting from power surges and acci-
14 dental damage from handling. Service contracts may also include
15 contracts to repair, replace or maintain residential appliances and
16 systems. Such term shall also mean a contract or agreement made (1) by
17 or for the manufacturer or seller of a motor vehicle tire for repair or
18 replacement of the tire or wheel as the result of damage arising from a
19 road hazard, (2) by or for the supplier or seller of a service for
20 repair of chips or cracks in a motor vehicle windshield, but not includ-
21 ing services that involve the replacement of the entire windshield, and
22 (3) by or for the supplier or seller of a service for repair or removal

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD03105-01-9

1 of dents, dings or creases from a motor vehicle without affecting the
2 existing paint finish using paintless dent repair techniques, but not
3 including services that involve the replacement of vehicle body panels,
4 or sanding, bonding or painting. In conjunction with a motor vehicle
5 leased for personal use, such term shall also mean a contract to perform
6 the repair, replacement or maintenance of property, or to provide indem-
7 nification for repair, replacement or maintenance, due to excess wear
8 and use or damage for items such as tires, paint cracks or chips, inte-
9 rior stains, rips or scratches, exterior dents or scratches, windshield
10 cracks or chips, missing interior or exterior parts that result in a
11 lease-end charge not otherwise covered by a service agreement or warran-
12 ty, provided any such payment shall not exceed the purchase price of the
13 vehicle.

14 § 2. This act shall take effect immediately.

STATE OF NEW YORK

4019

2019-2020 Regular Sessions

IN SENATE

February 25, 2019

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law and the personal property law, in relation to early termination of motor vehicle lease contracts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 1 of section 399-zzzz of the general business
2 law, as added by chapter 331 of the laws of 2016, is amended to read as
3 follows:

4 1. Subject to federal law and regulation[7]:

5 a. no provider of telephone, cellular telephone, television, internet,
6 energy, or water services shall impose a fee for termination or early
7 cancellation of a service contract in the event the customer has
8 deceased before the end of such contract; and

9 b. a retail lessee, as defined in section three hundred thirty-one of
10 the personal property law, shall not be liable for charges for the early
11 termination of a retail lease agreement of a motor vehicle if he or she
12 has deceased before the end of such lease.

13 § 2. Paragraphs (i), (j) and (k) of subdivision 5 of section 337 of
14 the personal property law are relettered paragraphs (j), (k) and (l) and
15 a new paragraph (i) is added to read as follows:

16 (i) A statement in at least eight-point bold type stating that the
17 lessee shall not be liable for an early termination fee if he or she has
18 deceased before the end of the lease;

19 § 3. Section 341 of the personal property law is amended by adding a
20 new subdivision 4 to read as follows:

21 4. There shall be no early termination liability to the lessee if he
22 or she has deceased before the end of such lease.

23 § 4. This act shall take effect on the ninetieth day after it shall
24 have become a law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD01695-01-9

STATE OF NEW YORK

5859

2019-2020 Regular Sessions

IN SENATE

May 15, 2019

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the personal property law, in relation to the disclosure of liability of a motor vehicle lessee in the case of a total loss or the vehicle is rendered inoperable

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 5 of section 337 of the personal property law
2 is amended by adding a new paragraph (1) to read as follows:

3 (1) The liability of the lessee in the case of a total loss of the
4 vehicle or the vehicle is rendered inoperable. Discloser of liability
5 pursuant to this paragraph shall include the financial liability of the
6 lessee and the lessor's rules, policies and procedures in the event the
7 car is declared a total loss or rendered inoperable during the term of
8 the lease.

9 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD10318-01-9

HOUSE No. 220

The Commonwealth of Massachusetts

PRESENTED BY:

Mark J. Cusack

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to negative equity.

PETITION OF:

NAME:

Mark J. Cusack

DISTRICT/ADDRESS:

5th Norfolk

HOUSE No. 220

By Mr. Cusack of Braintree, a petition (accompanied by bill, House, No. 220) of Mark J. Cusack relative to certain businesses providing loans. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court
(2019-2020)**

An Act relative to negative equity.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 96 of chapter 140 of the General Laws, as appearing in the 2016
2 Official Edition, is hereby amended, at the end thereof, by inserting the following new
3 paragraph:-

4 “This section shall not apply to any transactions engaged in pursuant to a license granted
5 under any other section of this chapter or section 2 of chapter 255B.”

6 SECTION 2. This act shall take effect immediately.

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14 UNITED STATES DISTRICT COURT
15 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 capacity as
22 Commissioner of the Financial Institutions
Division of the Nevada Department of Business
23 and Industry, AARON FORD, in his official
capacity as Nevada Attorney General,

24 Defendants.
25

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

26 **I. INTRODUCTION**

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

III. PARTIES

The Plaintiffs

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

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

19 8. The Nevada Credit Union League (“NCUL”) is the trade association for Nevada’s
20 credit unions. NCUL works in partnership with the California Credit Union League, the trade
21 association for California’s credit unions, to provide advocacy, information, education and business
22 solutions for the benefit of its members. There are currently fifteen credit unions headquartered in
23 Nevada with over \$5.3 billion in assets serving more than 363,500 members. Approximately ten of
24 those credit unions are NCUL members. As fully regulated financial institutions, credit unions are
25 subject to the state and federal laws and regulations that govern these transactions, including the
26 Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Nevada Equal Credit
27 Opportunity Law.
28

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

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

13 11. Because plaintiffs’ member institutions are directly affected by SB 311 and because
14 Section 3 of the statute undermines plaintiffs’ respective missions—namely, quality and cost-
15 effective service, the promotion of competition in the consumer finance industry, and the
16 responsible delivery and use of credit—plaintiffs bring this action to enjoin enforcement of Section
17 3 of the statute.

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

21 13. Plaintiffs’ claims and requests for declaratory and injunctive relief do not require
22 the participation of the individual members of plaintiffs.

23 ***The Defendants***

24 14. Defendant Mary Young is the Commissioner of the Financial Institutions Division
25 of the Nevada Department of Business and Industry. She is responsible for administering the
26 provisions of SB 311, as well as assisting all public and private organizations that carry on programs
27 to prevent or eliminate discrimination in credit practices.
28

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1 applicant’s spouse which was established during the
2 marriage referenced in paragraph (b); and
3 (d) If requested by the creditor, provides, with regard to the
4 marriage referenced in paragraph (b), evidence of:
5 (1) The existence of the marriage; and
6 (2) The date of the marriage and, if applicable, the date
7 the marriage ended,

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

11 20. The consequences of failing to comply with the foregoing section are severe. Section
12 3(2) of the bill provides that “[v]iolation of this section by a creditor shall be deemed to be
13 discrimination based on marital status.”

14 **V. SB 311 IS PREEMPTED, TRAMPLES PRIVACY RIGHTS, AND IS UNWORKABLE**
15 **IN PRACTICE**

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

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

29 ¹ 15 U.S.C. §§ 1681–1681x.
30 ² 15 U.S.C. §§ 1691–1691f.

1 ///

2 23. Section 3 of SB 311 requires creditors to invade longstanding privacy rights by not
3 only obtaining, but also disseminating, private financial information about an applicant's spouse or
4 former spouse without the spouse's knowledge or consent.

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

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

28 ///

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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.

31. Nevada’s regulation of the credit application and review process duplicates and contradicts federal law.

32. Defendants are empowered to enforce Section 3 of SB 311 unless enjoined by this Court. Plaintiffs’ members will thus be forced to choose between obeying SB 311 and foregoing

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1 rights and obligations created under federal law, or alternatively, violating SB 311 at the risk of
2 severe penalties and monetary damage awards.

3 33. Plaintiffs and their members will be irreparably harmed if defendants are not
4 restrained from enforcing Section 3 of SB 311. Plaintiffs and their members have no adequate
5 remedy at law against the harm likely to be caused by enforcing Section 3 of SB 311.

6 34. Plaintiffs request that this Court immediately issue a preliminary injunction and
7 issue a permanent injunction after trial, restraining defendants from enforcing Section 3 of SB 311.

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VII. PRAYER

Wherefore, plaintiffs seek relief as follows:

1. For preliminary and permanent injunctions restraining the defendants from enforcing Section 3 of SB 311;
2. For a judicial declaration that Section 3 of SB 311 is preempted by federal law, invalid, and void;
3. For costs;
4. For such other and further relief as this Court deems just and proper.

Dated: October 1, 2019

SNELL & WILMER L.L.P.

By: /s/ Alex L. Fugazzi

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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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24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION..... 1

II. RELEVANT FACTS 3

III. LEGAL STANDARD 4

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS 4

 A. Governing Preemption Principles 4

 B. It Is Impossible For Creditors To Comply With Both Federal
 Law And Section 3 of SB 311 5

 1. The Fair Credit Reporting Act Preempts SB 311 5

 2. The Equal Credit Opportunity Act Preempts SB 311 8

 3. Section 3 of SB 311 Obstructs Congress’s Purposes In
 Limiting Access To Sensitive Consumer Credit
 Information 9

V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT
AN INJUNCTION 10

VI. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS 11

VII. A PRELIMINARY INJUNCTION SERVES THE PUBLIC
INTEREST 12

VIII. CONCLUSION 14

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TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>A.A. v. New Jersey</i> , 176 F. Supp. 2d 274 (D. N.J. (2001)).....	12
<i>Am. Trucking Assocs., Inc. v. City of Los Angeles</i> , 559 F.3d 1046 (9th Cir. 2009).....	12
<i>Awad v. Ziriax</i> , 670 F.3d 1111 (10th Cir. 2012).....	10
<i>Bernhardt v. Los Angeles Cnty.</i> , 339 F.3d 920 (9th Cir. 2003).....	12
<i>Burke v. Federal Nat’l Mortg. Ass’n</i> , No. 3:16-CV-153, 2016 U.S. Dist. LEXIS 105103 (E.D. Va. Aug. 9, 2016)	10
<i>Chamber of Commerce of U.S. v. Edmondson</i> , 594 F.3d 742 (10th Cir. 2010).....	11
<i>Cole v. U.S. Capital, Inc.</i> , 389 F.3d 719 (7th Cir. 2004).....	5
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974).....	10
<i>Freightliner Corp. v. Myrick</i> , 514 U.S. 280 (1995).....	passim
<i>Friendly House v. Whiting</i> , 846 F. Supp. 2d 1053 (D. Ariz. 2012).....	12
<i>Kauffman v. Kauffman</i> , No. CV-17-04463-PHX-DGC, 2018 U.S. Dist. LEXIS 91820 (D. Ariz. June 1, 2018).....	5
<i>Kehoe v. Fid. Fed. Bank & Trust</i> , 421 F.3d 1209 (11th Cir. 2005).....	10
<i>KPMG LLP v. United States</i> , 139 Fed. Cl. 533 (Fed. Cl. 2018).....	11
<i>Madden v. Experian Info. Sols., Inc.</i> , No. 5:12-CV-00162, 2014 U.S. Dist. LEXIS 133597 (W.D.N.C. Sept. 23, 2014)	7
<i>Mut. Pharm. Co., Inc. v. Bartlett</i> , 570 U.S. 472 (2013).....	4
<i>Nelson v. Nat’l Aeronautics & Space Admin.</i> , 530 F.3d 865 (9th Cir. 2008).....	2, 10
<i>Oak v. Oak</i> , No. 4:12-cv-00040-REB, 2014 U.S. Dist. LEXIS 46026 (D. Id. Mar. 31, 2014) ..	6
<i>Perez v. Wells Fargo & Co.</i> , No. 17-cv-00454-MMC, 2017 U.S. Dist. LEXIS 122772 (N.D. Cal. Aug. 3, 2017).....	8
<i>Perrill v. Equifax Info. Servs., LLC</i> , 205 F. Supp. 3d 869 (W.D. Tex. 2016).....	10
<i>S. Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.</i> , 860 F.3d 844 (6th Cir. 2017).....	11
<i>Short v. Brown</i> , 893 F.3d 671 (9th Cir. 2018).....	4
<i>Thibodeaux v. Rupers</i> , 196 F. Supp. 2d 585 (S.D. Ohio 2001)	6
<i>Thomas v. FTS USA, LLC</i> , 193 F. Supp. 3d 623 (E.D. Va. 2016).....	10
<i>Thompson v. Prof’l Collection Consultants</i> , No. CV-2474-RGK (JCGx), 2013 U.S. Dist. LEXIS 194028 (C.D. Cal. Sept. 18, 2013).....	7

TABLE OF AUTHORITIES
(continued)

		Page
1		
2	<i>Trans Union, LLC v. FTC</i> ,	
3	295 F.3d 42 (D.C. Cir. 2002)	5
4	<i>Weinberger v. Romero-Barcelo</i> ,	
5	456 U.S. 305 (1982)	12
6	<i>Winter v. Natural Resources Defense Council</i> ,	
7	555 U.S. 7 (2008)	1, 4
8	<i>Wolfson v. Lewis</i> ,	
9	924 F. Supp. 1413 (E.D. Penn. 1996)	12
10	Federal Statutes	
11	15 U.S.C. § 1681(a)(4)	6
12	15 U.S.C. § 1681b	6, 8
13	15 U.S.C. § 1681b(a)	6
14	15 U.S.C. § 1681b(a)(1)–(4)	6
15	15 U.S.C. § 1681b(a)(3)	7, 8
16	15 U.S.C. § 1681b(c)	8
17	15 U.S.C. § 1681n	7
18	15 U.S.C. § 1681o(a)	7
19	15 U.S.C. § 1681t(b)(1)(A)	8
20	15 U.S.C. § 1691d(f)	10
21	15 U.S.C. §§ 1681–1681x	1
22	15 U.S.C. §§ 1691–1691f	1
23	State Statutes	
24	N.R.S. § 598B	1
25	N.R.S. § 598B.090	2
26	N.R.S. § 598B.100	2
27	Other Authorities	
28	12 C.F.R. § 1002.5(c)	9
29	12 C.F.R. § 1002.5(c)(1)	9
30	12 C.F.R. § 1002.5(c)(2)(i)–(v)	10
31	12 C.F.R. § 1002.5(c)(2)(v)	10
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34	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/	7
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36	<i>Information on an Applicant’s Spouse: Lack of Permissible Purpose</i> , 2 Federal Fair	
37	Lending and Credit Practices Manual (A.S. Pratt 2019) § 11.02	7
38	Joseph T. McLaughlin, 13 MOORE’S FEDERAL PRACTICE—CIVIL § 65.22	13
39	<i>Proposed Conceptual Amendment for Senate Bill No. 311</i> (Proposed by Senator	
40	Parks, Senator Harris, and Assemblywoman Tolles), May 1, 2019, available at	
41	https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf	3
42	S.B. 311	passim
43	S.B. 311, § 3	passim
44	S.B. 311, § 3(1)	4
45	S.B. 311, § 3(2)	4
46	U.S. CONST. art. VI, cl. 2	5

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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

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

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

6 Exh. A to Complaint, ECF 1-1, at 2–3.

7 The consequences of failing to comply with the foregoing section are severe. Subsection
8 3(2) of the bill provides that “[v]iolation of this section by a creditor shall be deemed to be
9 discrimination based on marital status.” *Id.* at 4.

10 **III. LEGAL STANDARD**

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

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

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

25 **IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

26 **A. Governing Preemption Principles**

27 The Supremacy Clause of the United States Constitution makes federal law “the supreme
28 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.

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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.
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- 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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