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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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

Plaintiff(s),

vs.

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

Defendant(s).

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Defendants, Commissioner Mary Young and Attorney General Aaron D. Ford, in their
official capacities, by and through their counsel, oppose Plaintiffs' Motion for Preliminary
Injunction.

I. Introduction

This Court should deny Plaintiffs' Motion for Preliminary Injunction. This Court
lacks subject matter jurisdiction under Article III and prudential ripeness standards. For
the same reason, Plaintiffs are not likely to succeed on the merits of their claims. Plaintiffs'

1 irreparable injury arguments are nothing more than speculation since Plaintiffs fail to offer
2 a shred of evidence that they will be subject to an imminent enforcement action of Section
3 3 of Senate Bill 311. This Court should not accept Plaintiffs' invitation to render an
4 unnecessary advisory opinion that a nascent state law is in conflict with federal law.

5 **II. Background**

6 **A. Plaintiffs' action**

7 Plaintiffs are three organizations, the American Financial Services Association,
8 Nevada Credit Union League, and the Nevada Bankers Association. ECF No. 1 at ¶¶6, 8,
9 and 9. Plaintiffs' Complaint seeks prospective declaratory and injunctive relief. *Id.* at pgs.
10 8-9. Plaintiffs' theory is that a newly enacted Nevada law, Section 3 of Senate Bill 311
11 (which amended in part Chapter 598B) stands as an obstacle to consumer privacy rights
12 under the Fair Credit Reporting Act and the Equal Credit Opportunity Act. *Id.* at ¶¶21-22.
13 Under both laws, Plaintiffs assert that a consumer's credit score is confidential information
14 that cannot be shared with a spouse or ex-spouse. *Id.*

15 **B. Nevada law**

16 Nevada's legislature added Section 3 to create a new statute in Chapter 598B. **Ex.**

17 **A. It provides:**

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

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

- 27 2. Violations of this section by a creditor shall be deemed to
28 be discrimination based on marital status.

1 *Id.* The Financial Institutions Division (“Division”) has the power to create regulations to
2 administer Chapter 598B. NRS 598B.090(1).

3 The Division may enforce Section 3 administratively. NRS 598B.150. The Division
4 has the ability to investigate a complaint filed by “any person who has been injured” by a
5 creditor’s failure to comply with Chapter 598B. NRS 598B.140(1); NRS 598B.150(1). The
6 Division, upon receipt of a complaint, or *sua sponte*, can investigate the issue and resolve
7 it through consultation with the creditor or through a public hearing. NRS 598B.150(1).
8 Finally, the Division can file a civil action against a creditor who has refused to comply
9 with the Division’s cease and desist order after 20 days. NRS 598B.160.¹

10 Chapter 598B does not mention the Attorney General, let alone grant him specific
11 powers to enforce its provisions. To be sure, the Attorney General has the independent
12 power to commence or defend a lawsuit “to protect and secure the interest of the State...”
13 NRS 228.170(1). But, the legislature specifically granted the Division the power to initiate
14 actions to enforce Chapter 598B after a creditor has ignored an order to show cause issued
15 by the Division.

16 **C. Plaintiffs’ confusing and conclusory allegations and arguments of**
17 **imminent irreparable harm**

18 Plaintiffs do not allege any factual allegations of irreparable harm in their pleading.
19 Plaintiffs first assert that it is “impossible” to comply with Section 3 and federal law. ECF
20 No. 1 at ¶2. In the next paragraph, plaintiffs assert that Section 3 merely “creates an
21 obstacle” to Congress’ objectives. *Id.* at ¶3. Plaintiffs’ uncertainty as to the meaning of
22 Section 3 and a potential conflict with federal law is not surprising. Plaintiffs concede at
23 paragraph 28 that it is possible that the Division could issue regulations or guidance that
24 would “eliminate the multiple legal barriers” they allege. *Id.* at ¶28. No court has
25 interpreted Section 3 in the fashion Plaintiffs’ suggest to cause a conflict with federal law.
26

27 ¹ A private plaintiff can bring a civil lawsuit, but only if they suffer an injury resulting from
28 a discriminatory practice. NRS §598B.170. But, Plaintiffs in their complaint do not allege
that they have been served or even threatened by a civil lawsuit.

1 Plaintiffs' motion is approximately 14 pages long. Irreparable harm garners barely
2 a mention. ECF No. 7 at pgs. 10-11. First, a constitutional violation is always irreparable
3 harm supporting a preliminary injunction. *Id.* at 10:16-21. Second, damages cannot be
4 recovered against state employees for past violations of federal law. *Id.* at 10:22-28 and
5 11:1-2. Third, absent a preliminary injunction, Plaintiffs will be labeled as "perpetrators
6 of marital discrimination [,]" which will cause them to lose business good will. *Id.* at 11:3-
7 11. Plaintiffs' first 2 legal arguments lack merit and the third is not supported by evidence.

8 Noticeably absent from Plaintiffs' complaint and their motion is the following.
9 Plaintiffs offer no evidence that any person has made a request under Section 3 of S.B. 311.
10 Plaintiffs do not demonstrate that any enforcement action has been taken against them or
11 has been threatened against them by the Division. Plaintiffs' never explain why the
12 Division should be stripped of its power to administer Chapter 598B to alleviate any
13 potential conflict with federal law through regulations. In sum, Plaintiffs offer this Court
14 nothing but conclusory argument, rather than evidence, to justify extraordinary relief.

15 **III. Legal standards**

16 A preliminary injunction is an "extraordinary remedy never awarded as of right."
17 *Winter v. NRDC*, 555 U.S. 7, 24, (2008) (citation omitted). To prevail, the moving party
18 must show: (1) a likelihood of success on the merits; (2) a likelihood that the moving party
19 will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities
20 tips in the moving party's favor; and, (4) that an injunction is in the public interest. *Winter*,
21 555 U.S. at 20. In considering the four factors, the Court "must balance the competing
22 claims of injury and must consider the effect on each party of the granting or withholding
23 of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). "Because it is a threshold
24 inquiry, when a plaintiff has failed to show the likelihood of success on the merits, we need
25 not consider the remaining three *Winter* elements." *Garcia v. Google, Inc.*, 786 F.3d 733,
26 740 (9th Cir. 2015) (internal citations and quotations omitted). Because Plaintiffs fail to
27 meet their burden on the first two elements, it is unnecessary to consider the remaining
28 two.

1 **IV. Legal argument**

2 **A. Plaintiffs are not likely to succeed on the merits**

3 Plaintiffs do not have a reasonable likelihood of success on the merits because this
4 Court lacks subject matter jurisdiction. Plaintiffs' request for declaratory relief and
5 injunctive relief are not ripe. This is true under Article III and prudential standards.

6 This Court only has power to hear "cases or controversies." *See* U.S. Const. art. III,
7 §2, cl. 1. A case and controversy is a prerequisite to all federal actions, including those for
8 declaratory or injunctive relief. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83,
9 95 (1993). The ripeness doctrine rests on Article III, but also prudential concerns. *See*
10 *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir.2009), *cert. denied*, 558 U.S. 1158, 130
11 S.Ct. 1139, 175 L.Ed.2d 991 (2010).

12 Plaintiffs' requests for injunctive relief and declaratory relief are not ripe under
13 Article III. Plaintiffs are alleging a future injury, *i.e.*, that their members may be subject
14 to enforcement actions by the Division and the Attorney General's office. ECF No. 1 at ¶32.
15 Plaintiffs' lawsuit ignores the United States Supreme Court's and this Circuit's ripeness
16 jurisprudence.

17 In considering the ripeness doctrine in pre-enforcement cases, the court has asked
18 whether there was a "credible threat," or an "actual and well-founded fear" that
19 enforcement action would be taken against the plaintiff. *Holder v. Humanitarian Law*
20 *Project*, 561 U.S. 1, 15 (2010); *Virginia v. American Booksellers Assn. Inc.*, 484 U.S. 383,
21 393 (1988). Here, Plaintiffs do not allege the Division has received a complaint from a
22 consumer concerning Section 3 nor that the Division has opened an investigation *sua*
23 *sponte*. Indeed, the required regulations have not been created or enacted. *See*
24 NRS 598B.140 ("The complaint shall be made in such form and manner as the Division
25 prescribes by regulation."). Plaintiffs merely allege that interim Commissioner Hightower
26 did not issue a decision on Plaintiffs' request to stay enforcement of Section 3. ECF No. 1
27 at ¶28. There simply is no imminent threat that Defendants will enforce Section 3 against
28 Plaintiffs members.

1 The Ninth Circuit considers three factors in determining whether a suit is ripe in
2 the pre-enforcement context. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134,
3 1139 (9th Cir. 2000). The factors are: (1) Whether the plaintiff has a concrete plan to violate
4 the state law in question; (2) Whether the prosecuting authorities have articulated a
5 specific warning or threat of starting proceedings against the plaintiff; and, (3) The history
6 of past enforcement. *Id.*

7 Plaintiffs in their complaint merely allege in conclusory fashion that the mere
8 existence of Section 3 causes them to “suffer immediate or threatened injury...” ECF No.
9 1 at ¶12. The mere existence of a statute that proscribes requirements is not sufficient, in
10 and of itself, to meet the ripeness requirements of Article III. *San Diego Gun Rights Comm.*
11 *v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996). Plaintiffs’ case is too conjectural. Plaintiffs
12 concede in their complaint that Section 3 may be subject to further clarification via
13 regulation. ECF No. 1 at ¶28. Nothing prevents the Division from adopting regulations
14 that require a spouse or former spouse to consent to the release of their credit report to the
15 requesting spouse.

16 The second factor, threat of enforcement, is also not met. Plaintiffs do not allege
17 that the Division has received a complaint from a consumer, that the Division has opened
18 an investigation or that that Plaintiffs’ members are in receipt of a cease and desist order.
19 Rather, Plaintiffs merely allege that, after a meeting with interim Commissioner
20 Hightower, the Division did not immediately do what they requested - grant a stay of
21 enforcement. Plaintiffs’ dispute is wholly imaginary at this point, as the Division has not
22 even hinted that it will imminently enforce Section 3 against them.

23 There is also no history of past enforcement. Section 3 has barely been on the books
24 for a month. There is no history of enforcement relevant here. Plaintiffs never explain why
25 this Court should strip the Division of time to evaluate Section 3 to consider regulations
26 that alleviate the Plaintiffs’ concerns.

27 This case is also not ripe under prudential ripeness jurisprudence. To evaluate the
28 prudential component of ripeness, we weigh two considerations: “the fitness of the issues

1 for judicial decision and the hardship to the parties of withholding court consideration.”
2 *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). “A claim is fit for decision if the issues
3 raised are primarily legal, do not require further factual development, and the challenged
4 action is final.” *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th
5 Cir.1999), quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989).
6 “To meet the hardship requirement, a litigant must show that withholding review would
7 result in direct and immediate hardship and would entail more than possible financial
8 loss.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009), quoting *US West*
9 *Commc'ns*, 193 F.3d at 1118.

10 For the same reasons, Plaintiffs’ request for a declaratory judgment is not ripe. “The
11 constitutional ripeness of a declaratory judgment action depends upon ‘whether the facts
12 alleged ... show that there is a substantial controversy, between parties having adverse
13 legal interests, of sufficient immediacy ... [that] warrant the issuance of a declaratory
14 judgment.’” *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). Prudential ripeness
15 requires the fitness of issues for judicial decision and the hardship to the parties if the court
16 withholds consideration. *Braren*, 338 F.3d at 975. Again, Plaintiffs cannot hope to meet
17 the immediacy requirement of Article III and prudential ripeness doctrine.

18 Plaintiffs in their complaint never articulate a reason why the Division should
19 immediately be denied the opportunity to administer Section 3. In *Public Service*
20 *Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 246, 73 S.Ct. 236, 241 (1952), the
21 Supreme Court stated that “the declaratory judgment procedure will not be used to
22 preempt and prejudice issues that are committed for initial decision to an administrative
23 body . . .” This Court should not deny the Division of any ability to administer Section 3.

24 **B. No threat of imminent irreparable harm**

25 By relying on their pleadings, Plaintiffs have not met their burden to prove the
26 essential element of irreparable harm. “Speculative injury does not constitute irreparable
27 injury sufficient to warrant granting a preliminary injunction. . . . A plaintiff must do
28 more than merely allege imminent harm sufficient to establish standing; a plaintiff must

1 *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive
2 relief.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation
3 omitted) (emphasis in original). However, that is what plaintiffs have done. Plaintiffs do
4 not provide any evidence supporting their theory that they will suffer a reputational injury
5 causing harm to their business goodwill. ECF No. 7 at 11:3-11. Plaintiffs’ speculative
6 injury does not meet this Circuit’s standards for injunctive relief.

7 Plaintiffs’ legal argument that any constitutional violation is per se irreparable harm
8 fares no better. Plaintiffs are not put to a Hobson’s choice by Section 3 of S.B. 311.
9 Plaintiffs offer no evidence that any consumer has made a request, under Section 3, of
10 them. Plaintiffs also do not assert that they have been threatened with a lawsuit by any
11 consumer under Section 3.

12 Plaintiffs also offer no evidence that they are in imminent danger of an
13 administrative enforcement action either. The contrast between cases such as *Morales v.*
14 *Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992) could not be starker. In
15 *Morales*, attorneys general from seven states indicated that they would immediately
16 enforce state laws through civil enforcement proceedings against the airlines. *Id.* at 381.
17 As that court noted, “[the airlines] were faced with a Hobson's choice: continually violate
18 the Texas law and expose themselves to potentially huge liability; or violate the law once
19 as a test case and suffer the injury of obeying the law during the pendency of the
20 proceedings and any further review.” *Id.* at 381, 2035 (citations omitted). In contrast,
21 neither the Attorney General nor the Division has indicated that it intends to bring an
22 enforcement action against Plaintiffs’ members.

23 **V. Conclusion**

24 Plaintiffs failed to articulate any need for extraordinary relief. The mere passage of
25 a statute is not irreparable harm. This Court should avoid the temptation to unnecessarily
26 interpret a newly enacted state law into conflict with federal laws. There is no public
27 interest in courts offering advisory opinions; especially, in the instance where the State’s
28 regulatory body has not had an opportunity to administer the statute through appropriate

1 regulations, which may alleviate any potential conflict with federal law. For these reasons,
2 this Court should deny Plaintiffs' motion for preliminary injunction.

3 Dated: November 12, 2019.

4 AARON FORD
5 Attorney General

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7 By: /s/ VIVIENNE RAKOWSKY
8 Vivienne Rakowsky (Bar No. 9160)
9 Deputy Attorney General
10 David J. Pope (Bar No. 8617)
11 Chief Deputy Attorney General
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on November 12, 2019, I filed the foregoing document via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

/s/ Michele Caro

An employee of the office of the
Nevada Attorney General

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EXHIBIT “A”

EXHIBIT “A”

Senate Bill No. 311—Senators Parks, D. Harris,
Brooks; Spearman and Woodhouse

Joint Sponsors: Assemblymen Jauregui,
McCurdy, Spiegel and Tolles

CHAPTER.....

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

Legislative Counsel's Digest:

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

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

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

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

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

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

(a) Has no credit history;

(b) Was or is married;

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



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

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

(1) The existence of the marriage; and

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

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

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

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

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

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

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

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

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

1. Administer the provisions of this chapter;

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

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

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

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



- 3 -

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

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