

AARON FORD  
Attorney General  
David J. Pope (Nevada Bar No. 8617)  
Chief Deputy Attorney General  
Vivienne Rakowsky (Nevada Bar No. 9160)  
Deputy Attorney General  
State of Nevada  
Office of the Attorney General  
555 E. Washington Avenue, Suite 3900  
Las Vegas, NV 891  
(702) 486-3420  
(702) 486-3768 (fax)  
dpope@ag.nv.gov  
vrakowsky@ag.nv.gov

*Attorneys for Defendants*

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' REPLY IN SUPPORT  
OF MOTION TO DISMISS**

Defendants, Mary Young<sup>1</sup> and Attorney General Aaron D. Ford, in their official capacities, by and through their counsel, reply supporting their motion to dismiss.

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<sup>1</sup> Plaintiffs have described Ms. Young as the Commissioner of Nevada's Department of Financial Institutions. She isn't. Ms. Young is Deputy Commissioner. <http://fid.nv.gov/About/STAFF/> (last visited on 12/6/19). This Court can take judicial notice of data on a government website under Federal Rule of Evidence 201. *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 999 (9th Cir. 2010).

**MEMORANDUM OF POINTS AND AUTHORITIES****I. Introduction**

Plaintiffs' opposition does nothing to counter the rule of law that dooms their complaint; the long-settled principle that an Article III case or controversy cannot solely rest on the existence of a proscriptive statute. *California Tow Truck Assoc. v. City and Cty. of San Francisco*, 693 F.3d 847, 866 (9th Cir. 2012); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1999); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996).

Plaintiffs write that *Thomas* and like cases show their age, but nobody told the Ninth Circuit. The Ninth Circuit approvingly cited *Thomas* two weeks ago. *Safer Chemicals, Healthy Families v. United States Environmental Protection Agency*, \_\_\_F.3d\_\_\_, No. 17-72260, No. 17-72501, No. 17-72968, No. 17-73290, No. 17-73383, No. 17-73390, WL 5997404, 9\* (9th Cir. November 14, 2019). Plaintiffs' action cannot be reconciled with the bedrock principle of constitutional law described by *Thomas*. They cite no factual allegations showing a threat of enforcement, an investigation of them, that they are in receipt of an order to show cause demanding compliance, or even a customer request to their members.

*Worse still*, Plaintiffs suit is so premature that it has been overtaken by events that are public record. Mary Young is not the Director of Nevada's Financial Institutions Divisions—Governor Sisolak has appointed Commissioner Sandy O'Laughlin.<sup>2</sup> Plaintiffs never explain how their allegations apply, or even could apply, to Commissioner O'Laughlin. Plaintiffs request leave to amend. But, Plaintiffs failed to comply with Local Rule 15-1(a). They never attached a proposed amended complaint to their request.

Plaintiffs describe ripeness as a "low bar." ECF No. 18 at 6:9-10. Even if their characterization were accurate, they have not risen to it. Dismissal is warranted.

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<sup>2</sup> <http://fid.nv.gov/About/STAFF/> (last visited on December 6, 2019). This Court can take judicial notice of information on a government website under Federal Rule of Evidence 201. *Daniels-Hall*, supra.

## II. Re-stated background because of Plaintiffs' Opposition

In their motion, Deputy Commissioner Young and General Ford pointed out the following:

- The Division had not received a complaint by a consumer under Section 3 (ECF No. 13 at 5:24-26);
- The Division had not opened any investigations regarding Section 3 (*Id.*);
- The Division had not sent a cease and desist order to any of Plaintiffs' members threatening action against them; (*Id.*)
- There is no history of enforcement of Section 3 by the Division (*Id.* at 6:3-4);
- No private lawsuit has been filed against Plaintiffs seeking any relief under Section 3 that would violate the FCRA (*Id.* at 3 n.1) and
- Plaintiffs conceded in paragraph 28 of their complaint that Section 3 may be subject to further clarification via regulation. (*Id.* at 5:18-19 (citing ECF No. 1 at ¶28).

Plaintiffs offer nothing but conclusions in response.

**First**, Plaintiffs state that they are required to “violate SB 311 by declining applicants’ requests...” ECF No. 18 at 1:22-24. But, Plaintiffs fail to cite a single factual allegation that any consumer has made such a request. Necessarily then, Plaintiffs also do not cite any request that would actually threaten to cause them to violate the FCRA. ECF No. 18 at 1:22-24.

**Second**, Plaintiffs then attempt to rewrite their own complaint to create a controversy with Nevada’s Financial Institutions Division where none exists. Plaintiffs write that the FID “declined” to issue a notice of non-enforcement. (*Id.* 1:27-28). Plaintiffs misstate their own allegations. Plaintiffs in their complaint merely allege that “[t]o date, neither Hightower nor anyone else from [FID] has agreed to stay enforcement of Section 3 of SB 311 or provide any guidance that would resolve the present controversy.” ECF No. 1 at ¶28. Plaintiffs cite no facts showing the FID declined to issue a notice of non-enforcement.

1           **Third**, Plaintiffs insist that the risk of private enforcement is high. ECF No. 18 at  
2 2:11-12. Plaintiffs, of course, fail to cite to a single private individual who has even made  
3 a request under Section 3. *Id.* Plaintiffs certainly fail to cite any facts in their complaint  
4 showing that a private lawsuit is imminently threatened against them.

5           **Fourth**, Plaintiffs write that “defendants insist that agency regulations *might*  
6 resolve the inherent conflict between SB 311 and federal law.” *Id.* at 2:19-20 (emphasis  
7 added). Plaintiffs’ statement ignores the language in their own complaint, and highlights  
8 its speculative nature. It was Plaintiffs who conceded in their complaint at paragraph 28  
9 that the FID could promulgate “guidance that would eliminate the multiple legal barriers  
10 set forth in this complaint.” ECF No. 1 at ¶28. Plaintiffs simply seek to thwart the FID  
11 from doing so by suing its former Commissioner on the day Section 3 took effect.

12           **Fifth**, Plaintiffs fail to cite any allegations in their complaint showing a nexus  
13 between General Ford and any imminent threat of enforcement of Section 3. Amazingly,  
14 Plaintiffs admit to having sued General Ford because “[he] has made eliminating unlawful  
15 discrimination a top initiative for his office.” ECF No. 18 at 2:14-15. Plaintiffs’ lawsuit is  
16 a unique way of praising General Ford by suing him.

### 17 **III. Legal argument**

18           This Court can only hear “cases and controversies” under Article III. *Cardinal*  
19 *Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 95 (1993). A case is ripe for adjudication only  
20 if it presents “issues that are ‘definite and concrete, not hypothetical or abstract.’” *Clark v.*  
21 *City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quoting *Bishop Paiute Tribe v. Inyo Cty.*,  
22 863 F.3d. 1144, 1153 (9th Cir. 2017)). To be sure, the difference between an abstract  
23 question and a “case or controversy” is one of degree. *Md. Cas. Co. v. Pac. Coal & Oil Co.*,  
24 312 U.S. 270, 273 (1941). But, accepting Plaintiffs’ construction of a case or controversy  
25 would unmoor that phrase from its legal meaning.

26           Here, Plaintiffs do not allege that their members have received a single inquiry  
27 regarding Section 3, let alone a request from a consumer or threat of suit to enforce Section  
28 3. Regulations implementing the law have not yet been promulgated. There is no history

1 of administrative enforcement. Plaintiffs do not indicate that the FID has ever indicated  
2 it will enforce Section 3 against their members. Plaintiffs do not indicate the FID is  
3 conducting an investigation under Section 3 of their members. Plaintiffs have not received  
4 an order to show cause threatening administrative enforcement. Plaintiffs do not indicate  
5 that General Ford has indicated he will enforce Section 3. This matter is not ripe.

6 Plaintiffs argue that the case or controversy requirement is a “low bar” where  
7 violations of the FCRA are concerned. ECF No. 18 at 6:9-10. This Court should not  
8 countenance Plaintiffs’ attempt to meet the case or controversy requirement by eroding  
9 meaning from the doctrine. The doctrines of justiciability, *i.e.* standing and ripeness, are  
10 irreducible constitutional requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560  
11 (1992) (standing); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993) (“[The]  
12 ripeness doctrine is drawn both from Article III limitations on judicial power and from  
13 prudential reasons for refusing to exercise jurisdiction.”)

14 Plaintiffs suggest that because the consumer in *Nayab v. Capital One Bank, USA*  
15 had standing where an unauthorized third party had in fact gained unauthorized access to  
16 the consumer’s private information, Plaintiffs must also. ECF No. 18 at 6:9-20 (citing  
17 *Nayab v. Capital One Bank, USA*, 942 F.3d 480 (9th Cir. 2019). *Nayab* is easily  
18 distinguishable. *Nayab* is a standing case, not a ripeness one. *Id.* at 489 (citing *Spokeo,*  
19 *Inc. v. Robins (Spokeo II)*, — U.S. —, 136 S. Ct. 1540, 1550, 194 L.Ed.2d 635 (2016)).  
20 The consumer in *Nayab* also raised an injury based on a substantive right personal to the  
21 consumer, which was analogous to a traditional harm, *i.e.* intrusion on the right of  
22 seclusion. *Id.* at 490-91.

23 In contrast to *Nayab*, Plaintiffs’ lawsuit is not founded on a substantive right created  
24 to benefit Plaintiffs’ members in FCRA. Plaintiffs also do not and cannot analogize their  
25 lawsuit to any common law right of action, unlike *Nayab* where the court at least found  
26 some similarity to the common law right of seclusion. Moreover, in *Nayab* the release of  
27 private information in violation of FCRA actually had occurred, which made the putative  
28 injury concrete, not speculative. *Nayab* is not on point.

1 Plaintiffs clumsily tried to avoid *Thomas* and its progeny by saying that twenty years  
2 have passed since *Thomas* was decided, but wholly decline to address its substance and  
3 implications. ECF No. 18 at 6:4-5. As already explained, Plaintiffs' argument lacks merit  
4 as *Thomas* was cited approvingly about 2 weeks ago. *Safer Chemicals, Healthy Families*,  
5 \_\_\_ F.3d \_\_\_, No. 17-72260, No. 17-72501, No. 17-72968, No. 17-73290, No. 17-73383, No.  
6 17-73390, WL 5997404, at 9\*. The Ninth Circuit reiterated in that case that a prescriptive  
7 statute alone does not create a ripe controversy. *Id.* In *Safer Chemicals, Healthy Families*  
8 the court wrote, "we have recognized that "[n]either the 'mere existence of a proscriptive  
9 statute' nor a 'generalized threat of prosecution' satisfies the 'case or controversy'  
10 requirement." *Id.* (citing *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (quoting  
11 *Thomas*, 220 F.3d at 1139). Without a legal basis to distinguish or exclude *Thomas*,  
12 Plaintiffs instead derisively point to its age and otherwise ignore it.

13 Contrary to Plaintiffs' arguments, this is not the type of case that the Declaratory  
14 Judgments Act was designed to enable. Plaintiffs are not on the horns of the dilemma, *e.g.*  
15 compliance with FCRA versus compliance with Section 3. Plaintiffs do not allege any facts  
16 to support their legal conclusion that they are being coerced into abandoning rights or  
17 risking prosecution. ECF No. 18 at 7:1-2. Absent concrete factual allegations, Plaintiffs  
18 cannot hope to meet their burden to show they face a "*realistic danger* of sustaining a *direct*  
19 injury as a result of the statute's operation or enforcement." *Clark v. City of Seattle*, 899  
20 F.3d 802 (9th Cir. 2018) (emphasis in original) (quoting *Babbitt v. United Farm Workers*  
21 *National Union*, 442 U.S. 289, 298 (1979)).

22 Plaintiffs cannot rewrite their own complaint in order to create the illusion of danger  
23 of direct injury where it does not actually exist. Plaintiffs concede in their complaint that  
24 Section 3 that the FID could give guidance eliminating their concerns. ECF No. 1 at ¶28.  
25 There is nothing in Plaintiffs complaint to show that FID declined their request. Plaintiffs  
26 also ignore that the person to whom they requested guidance was an interim Commissioner  
27 (not even the person Plaintiffs sued). Plaintiffs never explain how their allegations against  
28 a former interim Commissioner apply to the current Commissioner, Ms. O'Laughlin.

1 Plaintiffs mistakenly write that their members are engaged in a course of conduct  
2 on a collision course with Section 3 and that their conduct is proscribed by statute. ECF  
3 No. 18 at 7:21-25. Again, their own complaint belies their argument. ECF No. 1 at ¶28.  
4 The meaning of Section 3 has not been interpreted by the FID in the manner Plaintiffs'  
5 fear. Plaintiffs concede they merely asked for guidance from an interim Commissioner. *Id.*  
6 Plaintiffs have not been the subject of any complaint by the FID even hinting that it would  
7 enforce Section 3 in a manner inconsistent with FCRA.

8 Plaintiffs fare no better by speculating that “there is a credible threat that SB 311  
9 will be enforced...” ECF No. 18 at 8:6. Plaintiffs’ use of passive voice is noteworthy since  
10 they fail to identify from whom this threat is coming. Plaintiffs cite no facts supporting a  
11 realistic danger of enforcement from the FID, General Ford, or any consumer.

12 Plaintiffs’ heavy reliance on Justice Thomas’ opinion in *Susan B. Anthony List v.*  
13 *Driehaus* and similar case is not persuasive. See ECF No. 18 at 7:16-20 and 8:14-20 (citing  
14 *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014). In isolating language from  
15 Justice Thomas’ opinion, Plaintiffs make the same error that the plaintiff did in *City of*  
16 *Seattle*. Plaintiffs ignore the surrounding language, which says that a plaintiff in a pre-  
17 enforcement action must show that “threatened enforcement sufficiently imminent.”  
18 *Driehaus*, 573 U.S. at 159; compare *City of Seattle*, 899 F.3d at 813. As discussed above,  
19 Plaintiffs’ bare, conclusory allegations do not meet the certainly impending, or sufficiently  
20 imminent, requirement.

21 Finally, even analyzing the three factors cited by Plaintiffs, dismissal is warranted.  
22 Plaintiffs and their members have not described a concrete plan to engage in proscribed  
23 conduct. ECF No. 18 at 7:21-23. Plaintiffs merely rely on the mere existence of Section 3  
24 and their provision of credit services, which is not enough under *Thomas* to meet the  
25 ripeness test. The FID and General Ford have not given voice to any intent to penalize  
26 Plaintiffs or their members. *City of Seattle*, 899 F.3d at 813. There has also been no history  
27 of enforcement of Section 3. *Id.*

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1 Plaintiffs' prudential ripeness arguments are not persuasive. Courts resolve  
2 questions of prudential ripeness "in a twofold aspect," evaluating "both the fitness of the  
3 issues for judicial decision and the hardship to the parties of withholding court  
4 consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

5 To be sure, whether federal law preempts state law is a question of law. But, that  
6 does not mean that this case is fit for judicial review. The FID has a new Commissioner.  
7 The statute recently came into effect on October 1. No regulations have been passed as of  
8 yet. Plaintiffs certainly do not indicate that the FID has voiced any interpretation of  
9 Section 3 that would conflict with FCRA. The bedrock principle of avoiding constitutional  
10 questions augurs in favor of dismissal here to allow the FID time to evaluate this nascent  
11 law with its new Commissioner. *See generally Ashwander v. TVA*, 297 U.S. 288, 345–47,  
12 (1936) (Brandeis, J., concurring).

13 Plaintiffs never explain their "practical hardship." The fact that a law is new is not  
14 a hardship that is meaningful for prudential ripeness considerations. Accepting Plaintiffs'  
15 argument would eviscerate this Court's jurisprudence that the mere existence of a  
16 proscriptive statute is not sufficient to create a case or controversy. *California Tow Truck*  
17 *Assoc.*, 693 F.3d at 866; *Thomas*, 220 F.3d at 1138; *San Diego Gun Rights Comm.*, 98 F.3d  
18 at 1126-27.

19 General Ford is not a proper party. General Ford's laudable efforts to combat  
20 discrimination generally have no nexus to Section 3 specifically. Plaintiffs never point to  
21 factual allegations where General Ford has indicated he intends to bring any action under  
22 Section 3 against them or their members. "Absent a real likelihood that the state official  
23 will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment  
24 bars federal court jurisdiction." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.1992).

25 Finally, this Court should not grant Plaintiffs leave to amend. They violated Local  
26 Rule 15-1(a) by not attaching a copy of their proposed pleading. LR 15-1(a). Plaintiffs also  
27 fail to explain how any amendment would cure the deficiencies that General Ford and Ms.  
28 Young have described.



1 **III. Conclusion**

2 For these reasons, dismissal is warranted.

3 Dated: December 6, 2019.

4 AARON FORD  
5 Attorney General

6  
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

12 **CERTIFICATE OF SERVICE**

13 I certify that I am an employee of the Office of the Attorney General, State of Nevada,  
14 and that on December 6, 2019, I filed the foregoing document via this Court's electronic  
15 filing system. Parties are registered with this Court's EFS and will be served electronically.

16 /s/ Marilyn Millam  
17 An employee of the office of the  
18 Nevada Attorney General  
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