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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS' MOTION TO DISMISS

Defendants, Commissioner Mary Young and Attorney General Aaron Ford, in their official capacities, by and through their counsel, move for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This Court should dismiss Plaintiffs' complaint. Plaintiffs cannot gin up a case or

controversy before the agency empowered to administer a newly-enacted disputed law has an opportunity to implement the law to alleviate any perceived conflict with federal law. But, that is what Plaintiffs seek to do with this suit.

Section 3 of Nevada Senate Bill 311 became law little over a month ago. Plaintiffs never articulate that they are subject to an imminent threat of enforcement by Defendants or even an investigation by Defendants. Instead, they merely allege that the mere existence of a state law that requires their members, upon request, to deem a spouse's credit history or former spouse's credit history to be that of the applicant spouse creates an obstacle to privacy components of federal law. Plaintiffs are not free to disregard Article III and prudential ripeness requirements that recommend against this Court's subject matter jurisdiction until a credible threat of enforcement exists. Mere conclusory allegations of "imminent harm" are not an adequate ground when this Court's prudential ripeness case law requires actual hardship. The just application of the ripeness doctrine requires the dismissal of Plaintiffs' suit.

II. Background

Plaintiffs are three organizations, the American Financial Services Association, Nevada Credit Union League, and the Nevada Bankers Association. ECF No. 1 at ¶¶6, 8, and 9. The members of these organizations are allegedly subject to a Nevada law effective October 1, 2019, Senate Bill 311. *Id*. at ¶10-11.

Plaintiffs have brought a pre-enforcement *Ex parte Young* action. Plaintiffs attack section 3 of SB 311. ECF No. 1 at ¶11. Plaintiffs allege section 3 is inconsistent with the Fair Credit Reporting Act and the Equal Credit Opportunity Act. *Id*. at ¶¶21-22.

Nevada's legislature added Section 3 to create a new statute in Chapter 598B. **Ex. A**. It provides:

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

Id.

It is unclear why Plaintiffs have named the Attorney General of Nevada as a defendant in this suit. Chapter 598B entrusts enforcement to the Financial Institutions Division ("Division"). The enforcement steps the Division may undertake are as follows.

The Division may enforce Section 3 administratively. NRS 598B.150. The Division has the ability to investigate a complaint filed by "any person who has been injured" by a creditor's failure to comply with Chapter 598B. NRS 598B.140(1). The Division, upon receipt of a complaint, or *sua sponte*, can investigate the issue and resolve it through consultation with the creditor or through a public hearing. NRS 598B.150. Finally, the Division can file a civil action against a creditor who has refused to comply with the Division's cease and desist order after 20 days. NRS 598B.150(2).[1]

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

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

III. Legal standards

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A jurisdictional attack pursuant to Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack on subject matter jurisdiction, the court assumes the factual allegations of the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

IV. Legal discussion

A. Plaintiffs' case fails Article III and prudential ripeness standards

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

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

There is no imminent threatened future injury sufficient to meet the pre-enforcement test for ripeness. In considering the ripeness doctrine in pre-enforcement cases, the court has asked whether there was a "credible threat," or an "actual and well-

founded fear" that enforcement action would be taken against the plaintiff. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. American Booksellers Assn. Inc.*, 484 U.S. 383, 393 (1988). Here, Plaintiffs do not allege the Division has received a complaint from a consumer concerning Section 3 nor that the Division has opened an investigation *sua sponte*. Indeed, the required regulations have not been created or enacted. *See* NRS 598B.140 ("The complaint shall be made in such form and manner as the Division prescribes by regulation."). Plaintiffs merely allege that interim Commissioner Hightower did not issue a decision on Plaintiffs' request to stay enforcement of Section 3. ECF No. 1 at ¶2. There simply is no imminent threat that Defendants will enforce Section 3 against Plaintiffs members.

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

Plaintiffs' case is too conjectural at this point for them to articulate a concrete plan to violate Section 3. Plaintiffs concede in their complaint that Section 3 may be subject to further clarification via regulation. ECF No. 1 at ¶28. Nothing prevents the Division from adopting regulations that require a spouse or former spouse to consent to the release of their credit report to the requesting spouse. The mere existence of a statute that proscribes requirements is not sufficient, in and of itself, to meet the ripeness requirements of Article III. *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996).

The second factor, threat of enforcement, is also not met. Plaintiffs do not allege that the Division has received a complaint from a consumer, that the Division has opened an investigation or that that Plaintiffs' members are in receipt of a cease and desist order. Rather, Plaintiffs merely allege that, after a meeting with interim Commissioner Hightower, the Division did not immediately do what they requested - grant a stay of

enforcement. Plaintiffs' dispute is wholly imaginary at this point, as the Division has not even hinted that it will imminently enforce Section 3 against them.

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

This Court should also dismiss Plaintiffs' suit after evaluating the prudential ripeness factors. To evaluate the prudential component of ripeness, we weigh two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). "'A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir.1999), quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989). "'To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009), quoting *US West Commc'ns*, 193 F.3d at 1118.

This Court should refuse to adjudicate prematurely the constitutionality of Section 3. Plaintiffs concede that the meaning of Section 3 has not been finalized. ECF No. 1 at ¶28. The Division is empowered to create regulations to administer Section 3 that would be wholly consistent with federal law. *See* NRS 598B.090(1). Plaintiffs have not articulated any hardship. They merely allege in conclusory fashion that the mere existence of Section 3 causes them to "suffer immediate or threatened injury…." ECF No. 1 at ¶12. Prudential considerations counsel against this Court exercising subject matter jurisdiction.

Plaintiffs' request for a declaratory judgment also deserves dismissal. "The constitutional ripeness of a declaratory judgment action depends upon whether the facts alleged ... show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy ... [that] warrant the issuance of a declaratory

judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). Prudential ripeness requires the fitness of issues for judicial decision and the hardship to the parties if the court withholds consideration. *Braren*, 338 F.3d at 975. Again, Plaintiffs cannot hope to meet the immediacy requirement of Article III and prudential ripeness doctrine.

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

B. Being the Division's lawyer is not a "fairly direct" connection under *Ex parte Young* jurisprudence

Plaintiffs' naming of the Attorney General is divorced from the "fairly direct" connection standard necessary to invoke *Ex parte Young's* exception to the Eleventh Amendment immunity. The *Ex parte Young* exception will not apply if the state official does not have a "fairly direct" connection to enforcement of the law. *Bolbol v. Brown*, 120 F.Supp.3d 1010, 1017 (N.D. Cal.2015) (citation omitted); *Long v. John Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (citation omitted). When the state official has only a "generalized duty to enforce state law or a general supervisory power over the persons responsible for enforcing the challenged provision," the state official is immune from suit. *Bolbol,* 120 F.Supp.3d at 1017.

In *Southern Pacific Transportation Co. v. Brown*, 651 F.2d 613, 614 (9th Cir.1981) (as amended), though the Oregon Attorney General had authority to "consult with, advise and direct the district attorneys" he could not "prosecute a violation of the challenged act or compel the district attorneys to prosecute or refrain from doing so." This "connection with enforcement [was] insufficient[]" and immunity applied. In *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir.2002), "the Eleventh Amendment [did]

not bar suit against the Director of the California Department of Fish & Game, who [had] direct authority over and principal responsibility for enforcing Proposition 4."

Here, Chapter 598B spells out how it is to be enforced and by whom. The Division has the power to investigate discriminatory practices. NRS 598B.150(1)(a). The Division can call a public hearing and make a decision regarding its investigation. NRS 598B.150(c). The Division is empowered to issue subpoenas and seek to compel their enforcement with the District Court. NRS 598B.150(2). The Division may issue a cease and desist order to a creditor to halt a discriminatory practice and apply to the district court for an injunction to prevent its continuation. NRS 598B.160.

In contrast to the specific powers under Chapter 598B granted to the Division, the Attorney General is "the legal adviser[] on all state matters arising in the Executive Department of the State Government." NRS 228.110(1)(a). To be sure, the Attorney General has independent power to initiate lawsuits to secure and protect the state, but that general duty does not prevail over the specific grant of power the legislature granted to the Division under Chapter 598B. This case is like *Long v. Van De Kamp* where the Ninth Circuit wrote, "[w]e doubt that the general supervisory powers of the California Attorney General are sufficient to establish the connection with enforcement required by Ex parte Young." 961 F.2d at 152. Dismissal is warranted.

V. Conclusion

This Court should dismiss Plaintiffs' complaint. The *Ex parte Young* doctrine and the Declaratory Judgment Act should not be used prematurely to deny an agency the ability to administer a statute it is charged with interpreting and implementing through the promulgation of regulations. In pre-enforcement actions such as Plaintiffs' case, the federal

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judicial power should not be used aggressively to squelch an administrative agency's statutorily entrusted role in implementing the law to avoid any potential conflict with federal law. In addition, the Attorney General is immune from suit. For these reasons, this Court should dismiss Plaintiffs' case.

Dated: November 8, 2019.

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By: /s/ Vivienne Rakowsky
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing by using the CM/ECF system on the 8th day of November, 2019. I certify that participants in the case are registered electronic filing system users and will be served via this Court's CM/ECF system.

/s/ Marilyn Millam
an employee of the
Office of the Attorney General