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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED IN ACCORDANCE WITH LR 78-1

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page

Federal Cases

Snell & Wilmer
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Las Vegas, Nevada 89169
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TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Rules

Other Authorities

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I. INTRODUCTION

Defendants' motion to dismiss asserts two arguments: (1) plaintiffs' suit is unripe; and (2) defendant Ford is an improper defendant. The Court should deny the motion because each contention is groundless.

Plaintiffs' suit is constitutionally ripe. The present suit is ripe because SB 311 coerces plaintiffs' members into a dilemma of having to choose between violating state law or violating federal law. That is precisely the sort of dilemma the Declaratory Judgment Act was meant to ameliorate. The complaint also alleges that SB 311 harms the Nevada credit market and undermines the respective missions of plaintiffs' members, so there is a ripe controversy whether the defendants have enforced the statute or not.

Moreover, the defendants' motion overlooks the Ninth Circuit's most recent authority about standing in Fair Credit Reporting Act ("FCRA") cases. A few weeks ago, the Court held that a "concrete" injury exists when a third-party obtains a consumer's credit report for a purpose not authorized by the FCRA—the same harm that SB 311 requires creditors to inflict. "[E]very violation invades the consumer's privacy right that Congress sought to protect in passing the FCRA. As such, every violation of § 1681b(f)(1) offends the interest that the statute protects and the Plaintiff need not allege any further harm to have standing." *Nayab v. Capital One Bank USA*, 2019 U.S. App. LEXIS 32575 *11 (9th Cir. 2019) (emphasis added).

In any event, the case is ripe because there *is* a credible threat that SB 311 will be enforced, for at least five different reasons.

First, the threat is credible because a violation of SB 311 not a "someday" future intention, but rather, a legal certainty. The complaint alleges that complying with the FCRA necessarily *requires* plaintiffs' members to violate SB 311 by declining applicants' requests to deem their scores to be the same as non-applicant spouses or ex-spouses. So, the "concrete plan" to violate the statute in this case is mandated by Congress, not the result of some discretionary choice left to the plaintiffs.

Second, the threat is real because plaintiffs previously asked the Financial Institutions Division to issue a notice of non-enforcement before the statute took effect. It *declined*. Noticeably

absent from the motion to dismiss is a representation that the defendants will not enforce SB 311 in the future. That omission underscores the realistic threat of enforcement. So does the defendants' recent choice to oppose plaintiffs' motion for a preliminary injunction. If the defendants have no intention of enforcing SB 311, why fight the issuance of a preliminary injunction?

Third, the risk of enforcement is high because SB 311 is so new. The defendants insist that without any history of enforcement, there can be no credible threat. They have it exactly backwards. The absence of historical enforcement is relevant when a statute has existed for decades. But not when the statute is new. When new, the threat is higher, not lower.

Fourth, the likelihood of enforcement is intensified because the universe of potential complainants is not restricted to the defendants. Rather, SB 311 may be enforced by private individual plaintiffs too, thereby increasing the risk of enforcement and the need for a judicial determination.

Fifth, the Attorney General—to his credit—has made eliminating unlawful discrimination a top initiative for his office. He recently led a task force that prepared a detailed report explaining ways to eliminate sexual discrimination in Nevada. And since the Nevada legislature has expressly declared a state public policy of fighting marital discrimination, it is neither imaginary nor speculative to anticipate that the defendants will obey the legislature's command.

The defendants insist that agency regulations might resolve the inherent conflict between SB 311 and federal law. The contention is both irrelevant and wrong. It is irrelevant because the defendants filed a *facial* motion to dismiss under Rule 12(b)(1) in which they supplied no evidence, much less evidence showing what, if anything, the Financial Institutions Division intends to do to resolve the conflict. Nor have they explained why, if all problems might be solved through agency action, the Financial Institutions Division has done nothing about SB 311 in the six months that have passed since the Governor approved it. The contention is also wrong because resolving the conflict between SB 311 and federal law will not address the many other practical and privacy-related defects set forth in plaintiffs' complaint.

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Plaintiffs' suit is prudentially ripe as well. The complaint is "fit" for judicial review because it raises a question of *law*—whether federal law preempts Section 3 of SB 311. So, further factual development is unnecessary. Declining review would also cause significant "hardship" to the plaintiffs because absent review, plaintiffs' members would be forced into a Catch-22: comply with federal law and suffer the consequences of violating SB 311, or comply with SB 311 and suffer the consequences of violating federal law.

The defendants' remaining argument is easily jettisoned. The Attorney General is a proper defendant because he has the authority and duty to enforce Nevada's laws. That SB 311 envisions the Financial Institutions Division enforcing the statute does not preclude the Attorney General from doing so as well. Indeed, it would be an exceedingly odd result if Nevada's Attorney General were powerless to fight unlawful discrimination.

For these reasons, the Court should deny the motion to dismiss.

II. RELEVANT ALLEGATIONS

Plaintiffs are trade groups whose members provide banking and credit-related services in the Nevada financial services industry. *See* Compl. ¶¶ 6-9. They sued for a declaratory judgment that SB 311 is preempted by federal law. *See* Compl. ¶ 1.

Section 3 of SB 311 permits an applicant for credit who was married, but has no credit history, to request that a creditor deem the applicant's credit history to be identical to that of the applicant's spouse during their marriage. *See* Compl. ¶ 2. However, that section conflicts with, and is preempted by, the Fair Credit Reporting Act and the Equal Credit Opportunity Act. *See* Compl. ¶¶ 3, 21-22.

Plaintiffs' complaint alleged several facts showing the existence of a ripe case or controversy:

> If permitted to stand, SB 311 will *immediately and adversely* affect the credit market in Nevada to the detriment of both lenders and borrowers.

See Compl. ¶ 2 (emphasis added).

> Because plaintiffs' member institutions are *directly affected* by SB 311 and because Section 3 of the statute *undermines plaintiffs' respective missions*—namely, quality and cost-effective service, the

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> promotion of competition in the consumer finance industry, and the responsible delivery and use of credit—plaintiffs bring this action to enjoin enforcement of Section 3 of the statute.

See Compl. ¶ 11 (emphasis added).

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

See Compl. ¶ 12.

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

See Compl. ¶ 20 (emphasis added).

> There is no way for creditors to obtain from credit reporting agencies a credit report and/or credit score back-dated to a particular date, such as the date of the termination of the spousal relationship. Crucially, as a practical matter, this means that compliance with Section 3 would require creditors to make credit decisions based on information they know to be inaccurate with regard to the applicant.

See Compl. ¶ 24.

> 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.

See Compl. ¶ 29.

> Plaintiffs' members will thus be forced to choose between obeying SB 311 and foregoing rights and obligations created under federal law, or alternatively, violating SB 311 at the risk of severe penalties and monetary damage awards.

See Compl. ¶ 32.

III. LEGAL STANDARD

Rule 12(b)(1) allows defendants to seek dismissal of an action for a lack of subject matter jurisdiction. Dismissal is appropriate if the complaint fails to allege facts on its face that are sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984-85 (9th Cir. 2008). Attacks on jurisdiction pursuant to

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Rule 12(b)(1) can be either facial, confining the inquiry to the allegations in the complaint, or factual, permitting the court to look beyond the complaint. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003).

The present motion is a *facial* attack because the defendants submitted no evidence with their motion to dismiss. *See Luu v. Ramparts, Inc.*, 926 F. Supp. 2d 1178, 1180 (D. Nev. 2013). In a facial attack, the court assumes the truthfulness of the allegations, as in a motion to dismiss under Rule 12(b)(6). *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987).

IV. DEFENDANTS' RIPENESS ARGUMENT IS WITHOUT MERIT

A. Governing Principles

"Ripeness is peculiarly a question of timing, designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000), citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).

The ripeness inquiry has a constitutional component rooted in the "case or controversy" requirement of Article III, and a prudential component that focuses on whether the record is adequate to ensure effective review. *Id*. at 1139. As explained in further detail below, this suit satisfies both ripeness components.

B. This Suit Is Constitutionally Ripe

Constitutional ripeness is often treated under the rubric of standing because "ripeness coincides squarely with standing's injury in fact prong." *Id*. at 1138. The Constitution mandates that before a Court exercises its jurisdiction, there must exist a constitutional "case or controversy," and that the issues presented are "definite and concrete, not hypothetical or abstract." *Id*. at 1139.

This tenet of ripeness requires the Court to consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," or, by contrast, if the alleged injury is too "imaginary" or "speculative" to support jurisdiction. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). However, as the High Court

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observed nearly a century ago, "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

Here, the defendants urge the Court to follow the three part pre-enforcement test utilized by the Ninth Circuit in *Thomas*, 220 F.3d at 1138 to determine whether the present suit is unripe.[1] *See* Motion at 5:11-16. However, in the twenty years that have passed since *Thomas* was filed, both the Ninth Circuit and the High Court have supplied more recent guidance that should steer this Court's analysis.

Just a few weeks ago, the Ninth Circuit filed an opinion illustrating how low the bar of standing is in cases involving violations of the FCRA. In *Nayab*, the Court held that a consumer sustains a "concrete" injury when a third-party obtains her credit report for a purpose not authorized by the FCRA—the identical harm created by SB 311 if not enjoined. The Court explained:

> Rather, § 1681b(f)(1) is the central provision protecting the consumer's privacy interest: every violation invades the consumer's privacy right that Congress sought to protect in passing the FCRA. As such, every violation of § 1681b(f)(1) "offends the interest that the statute protects" and the Plaintiff "need not allege any further harm to have standing."

Nayab v. Capital One Bank USA, 2019 U.S. App. LEXIS 32575 *11, citing *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983-84 (9th Cir. 2017).

If a consumer's suit regarding an alleged violation of section 1681b(f)(1) is a ripe controversy, then surely a creditor's suit should be as well.

Recent cases from the U.S. Supreme Court also confirm that the present suit is not only ripe, but precisely the sort of dispute for which the Declaratory Judgment Act was designed. As Justice Scalia explained seven years after the Ninth Circuit's opinion in *Thomas*, pre-enforcement

[1] The *Thomas* test is (1) whether the plaintiffs have articulated a "concrete plan" to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; (3) and the history of past prosecution or enforcement under the challenged statute.

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challenges are ripe when the plaintiffs are effectively *coerced* into a dilemma between abandoning rights or risking prosecution by violating the subject statute:

> Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat--for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.
>
> ***
>
> As then-Justice Rehnquist put it in his concurrence, 'the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.'
>
> ***
>
> The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-29 (2007) (citations and quotations omitted; emphasis added).

The Supreme Court continued to build on *MedImmune* seven years later in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). There, a unanimous Court explained that a plaintiff could bring a pre-enforcement suit when there is (1) an intention to engage in a course of conduct arguably affected with a constitutional interest; (2) but proscribed by a statute; and (3) there exists a credible threat of prosecution thereunder. *Id*. at 160. Plaintiffs satisfy this criteria.

Plaintiffs' members are engaged in a course of conduct that is squarely affected with a constitutional interest. They provide credit in the consumer finance industry pursuant to federal law that preempts any conflicting state laws. *See* Compl. ¶¶ 6-10, 21-22.

Next, plaintiffs' course of conduct is proscribed by a statute. Plaintiffs cannot comply with both SB 311 and federal law. *See* Compl. ¶¶ 21-23. The FCRA, for example, confirms that there are no permissible purposes for obtaining a consumer's credit report except those identified in the FCRA. 15 U.S.C. § 1681b(a). Obtaining a report on a nonapplicant former spouse is not a permissible purpose under the FCRA. *Information on an Applicant's Spouse: Lack of Permissible*

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Purpose, 2 Federal Fair Lending and Credit Practices Manual (A.S. Pratt 2019) § 11.02 cmt. 604(3)(A)-5(B). But that prohibited conduct is precisely what section 3 of SB 311 requires. Declining an applicant's request under SB 311 is "proscribed by a statute" because section 3 requires creditors to deem an applicant's score to be the same as an ex-spouse's score during the marriage.

Moreover, there *is* a credible threat that SB 311 will be enforced, for at least five reasons.

First, plaintiffs' violation of SB 311 is not some speculative far-off possibility. The violation is inevitable because complying with the Fair Credit Act necessarily *requires* plaintiffs to violate SB 311. The "concrete plan" to violate SB 311 is mandated by Congress, not the result of a discretionary choice left to plaintiffs.

Second, the threat of enforcement is credible because plaintiffs requested—both in person and in writing—that the Financial Institutions Division issue a notice of non-enforcement before the statute took effect. It declined.

Tellingly, the defendants' motion does not represent that the defendants will not enforce the statute. As courts across the country have noted, a defendant's present lack of enforcement says nothing about the probability of what lies around the corner.[2] In fact, a defendant's silence about future enforcement is itself evidence suggesting a credible threat of enforcement.[3] Justice Thomas's opinion in Driehaus noted that "respondents have not disavowed enforcement" before concluding that the prospect of future enforcement was "far from imaginary or speculative." *Driehaus*, 573 U.S. at 165; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010).

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[2] *See e.g. Mobil Oil Corp. v. Attorney General of the Commonwealth of Virginia*, 940 F.2d 73, 76 (4th Cir.1991) (plaintiff has standing where "the Attorney General has not . . . disclaimed any intention of exercising her enforcement authority"); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 383 (2nd Cir. 2000) (although State lacks intention to sue, "there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation."); *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (interpretation of statute offered by Attorney General is not binding because he may "change his mind . . . and he may be replaced in office").

[3] The defendants' opposition to plaintiffs' motion for preliminary injunction further undermines their claim that there is no ripe threat of enforcement. If the defendants had no intention of enforcing the statute, a preliminary injunction enjoining enforcement would cause them no harm.

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Defendants suggest there is no ripe threat because the conflict between SB 311 and federal law might be cured by agency regulations. That contention is irrelevant because the defendants supplied no evidence to prove what, if anything, the agency is doing or will do about the conflict. *Savage v. Glendale Union High Sch.*, 343 F.3d at 1039 n. 2 (factual challenges to jurisdiction under Rule 12(b)(1) require evidence). The argument also ignores the chronology of events that have unfolded. SB 311 was approved by the Governor on June 1, 2019. In the ensuing six months that have passed since then, the Financial Institutions Division has taken *no* action to attempt to resolve the conflict between SB 311 and federal law. Defendants' motion does not contend otherwise. Moreover, resolving the conflict between SB 311 and federal law will not address the many other practical and privacy-related defects set forth in plaintiffs' complaint. *See* Compl. ¶¶ 23-25.

Third, the threat is real because the Attorney General has made anti-discrimination policies a top priority for his office. He recently chaired the Governor's task force on sexual discrimination in Nevada and prepared a comprehensive report with detailed recommendations about how to combat discrimination in Nevada.[4] Likewise, the Nevada legislature recently declared a public policy to eliminate unlawful discrimination, including marital discrimination, in Nevada. Nev. Rev. Stat. § 598B.020. With that context in mind, it is neither "imaginary" nor "speculative" to anticipate that either the Attorney General or the Financial Institutions Division will enforce SB 311 in the future. *Babbitt*, 442 U.S. at 298.

Fourth, there is a credible threat of enforcement because the statute is so new. Defendants insist that a lack of historical enforcement proves there is no realistic threat of enforcement. That might be true where an old statute has gone unenforced for many years. *See*, e.g. *Doe v. Bolton*, 410 U.S. 179 (1973). But not when the statute is new. As Judge Pro explained, "a *recently enacted statute* or one under which prosecutions have been pursued may give rise to a well-founded fear of prosecution." *ABC v. Heller*, 2006 U.S. Dist. LEXIS 80030 *22 (D. Nev. 2006), reversed on other

[4] *See* Ford, Aaron, Task Force on Sexual Harassment and Discrimination Law and Policy: Report and Recommendations (June 1, 2019), http://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Administration/2019-0807_FINAL_TF_on_Sexual_Harrassment_and_Discrimination_Law_Policy_Report_Recommendations.pdf.

grounds in *ABC v. Miller*, 550 F.3d 786, 787 (9th Cir. 2008) (describing the district court's order granting the preliminary injunction as "a thorough opinion consistent with circuit precedent.") (emphasis added).

Fifth, the credibility of the threat in the present case is heightened because enforcement of SB 311 is not limited to the defendants. Rather, private plaintiffs may also bring civil lawsuits for alleged violations of SB 311, Nev. Rev. Stat. § 598B.170, thereby increasing the need for immediate judicial guidance about the obvious conflict between SB 311 and federal law. Because, "the universe of potential complainants is not restricted to state officials…" there is a greater risk of enforcement. *Driehaus*, 573 U.S. at 164.

To be sure, plaintiffs alleged facts sufficient to satisfy constitutional ripeness whether SB 311 is actually enforced by the defendants in the future or not. Actual threat of enforcement is not always required to meet the "case and controversy" requirement because a statute's existence can sway behavior and cause harm whether it is enforced or not. *See* e.g. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[w]e are not troubled by the pre-enforcement nature of this suit. . . . a harm can be realized even without actual prosecution.").

Here, as plaintiffs' complaint illustrates, SB 311 has already caused harm whether or not the defendants intend to enforce the statute because it "puts plaintiffs' members in the impossible position of failing to comply with either federal law or Nevada law" and "will immediately and adversely affect the credit market in Nevada to the detriment of both lenders and borrowers." *See* Compl. ¶ 2. Likewise, SB 311 immediately harms plaintiffs by undermining plaintiffs' respective missions of "quality and cost-effective service, the promotion of competition in the consumer finance industry, and the responsible delivery and use of credit." *See* Compl. ¶ 11. Put simply, SB 311 is a statute squarely directed at plaintiffs' members—creditors—and requires them to make significant changes in their everyday business practices in a manner that violates federal law, or alternatively, forces them to become perpetrators of marital discrimination. That alone creates constitutional ripeness.

> [T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their

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> everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions. *If promulgation of the challenged regulations presents plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation, the controversy is ripe.* This is particularly true when the regulations are burdensome and immediate.

City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 (9th Cir. 2001), overruled on other grounds in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (emphasis added).

C. This Suit Is Prudentially Ripe

Evaluating the prudential aspects of ripeness is "guided by two overarching considerations: 'the *fitness* of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (emphasis added).

The present suit satisfies both prudential considerations.[5]

An issue is fit for judicial review when the relevant issues are sufficiently focused to permit judicial review without further factual development. *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179-1180 (9th Cir. 2010). Whether SB 311 is preempted by federal law is precisely such an issue. Further factual development would not aid the Court's ability to address the issue presented in plaintiffs' complaint because whether federal law preempts a state statute is a question of law, not facts. *Int'l Truck Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997); *FDIC v. Rhodes*, 336 P.3d 961, 964 (Nev. 2014). So, because the issue presented in this case is legal, and will not be clarified by further factual development, it is fit for judicial review. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985).

Hardship to the plaintiffs also supports a finding of prudential ripeness. "Hardship" means hardship of a legal kind or something that imposes a significant practical harm upon the plaintiff. *Colwell v. Dept. of Health & Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009). SB 311 has now

[5] As the Ninth Circuit recently noted, the Supreme Court has "cast doubt" on the "continuing vitality" of the prudential component of ripeness. *Safer Chems. v. United States EPA*, 2019 U.S. App. LEXIS 33976 *20 fn. 8 (9th Cir. 2019). Nonetheless, plaintiffs discuss prudential ripeness because the defendants raised the issue in their motion to dismiss.

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taken effect, thereby undermining the respective missions of plaintiffs' organizations and members. *See* Compl. at ¶ 11. Declining review would cause "significant practical harm" to plaintiffs' members by leaving them in a state of legal uncertainty about whether they should comply with federal law, thereby risking a violation of SB 311, or alternatively, attempt to comply with SB 311, thereby risking a violation of federal law. That is precisely the sort of dilemma that constitutes legal hardship. *ABC v. Heller*, 2006 U.S. Dist. LEXIS 80030 *23-24.

V. THE ATTORNEY GENERAL IS A PROPER DEFENDANT

A plaintiff invoking *Ex Parte Young* jurisdiction is not free to randomly select a state official to sue in order to challenge an unconstitutional statute. The defendant's connection must be "fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenge provision will not subject an official to suit." *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F2d 697, 704 (9th Cir. 1992).

The Attorney General insists he is an improper defendant because he does not have a "fairly direct" connection to enforcing SB 311. *See* Motion at pp. 7-8. He is wrong.

To be sure, SB 311 allows the Financial Institutions Division to enforce the statute by taking various administrative steps. But nothing within those provisions expressly or impliedly precludes the Attorney General from enforcing the statute as well. The defendants' contrary argument suggests that the Nevada Attorney General is somehow powerless to combat acts of supposed marital discrimination. That cannot be, and is not, the law.

The Attorney General's role in this case is not merely supervisory. He is authorized by statute to commence suit in any court to protect and secure the interest of the State. The relevant statute provides:

> …whenever the Governor directs or when, in the opinion of the Attorney General, to protect and secure *the interest of the State* it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General *shall* commence the action or make the defense.

Nev. Rev. Stat. § 228.170 (emphasis added).

So, the Attorney General has the authority to sue whenever he or the Governor decides that a lawsuit is necessary to protect the interests of Nevada. In this case, the interests of Nevada are

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unambiguous. The Legislature enacted a consumer protection statute expressly stating that Nevada's public policy is to eradicate discrimination in the application of credit. Nev. Rev. Stat. § 598B.020. And as the Attorney General's website makes abundantly clear, it is *under the Attorney General's direction* that Nevada's Bureau of Consumer Protection "enforces various consumer protection statutes, in particular deceptive trade and antitrust laws, through the filing of lawsuits on behalf of the State of Nevada and the public good."[6] SB 311 is one such consumer protection statute.

The Attorney General's authority to litigate in order to protect Nevada's interests and achieve a legislative goal is precisely the sort of self-deputizing power that creates a "direct connection" under *Ex Parte Young*, as the Ninth Circuit previously explained:

> That is, the attorney general may in effect deputize himself (or be deputized by the governor) to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have. That power demonstrates the requisite causal connection for standing purposes. An injunction against the attorney general could redress plaintiffs' alleged injuries, just as an injunction against the Ada County prosecutor could. For the same reasons, both defendants are properly named under *Ex parte Young*…

Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 920 (9th Cir. 2004); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748 fn. 1 (8th Cir. 2019) ("We agree that the connection here is 'strong enough' to make the Attorney General a 'proper defendant.'"); *Nat'l Ass'n for Rational Sexual Offense Laws v. Stein*, 2019 U.S. Dist. LEXIS 126617 *11-12 (M.D. N.C. 2019) ("*Ex parte Young* itself held that the state attorney general's duties, which included the right and the power to enforce the statutes of the state, sufficiently connected him with the duty of enforcement to make him a proper party to an action challenging a state statute's constitutionality.").

The defendants' motion cites two older opinions from the Ninth Circuit for the proposition that attorneys general are improper defendants under *Ex Parte Young: Southern Pacific*

[6] *See* Nevada Attorney General Aaron Ford, Bureau of Consumer Protection (last accessed November 20, 2019), http://ag.nv.gov/About/Consumer_Protection/Bureau_of_Consumer_Protection/

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Transportation Co. v. Brown, 651 F.2d 613, 614 (9th Cir. 1981) and *Long v. John Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). Neither opinion supports the Attorney General's argument.

As the defendants' motion concedes at p. 7:24-25, the attorney general in *Brown* "could not" prosecute a violation of the challenged act or compel the district attorneys to do so either. But the Attorney General, unlike the attorney general in *Brown*, does have the authority to enforce violations of SB 311, as explained above.

Long is unhelpful for the same reason. There, the Ninth Circuit remarked that "[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*." *Long v. John Van de Kamp*, 961 F.2d at 152. But the present case has nothing to do with Ford's general supervisory powers. Rather, it involves the Attorney General's self-enforcement and litigation powers, Nevada's stated policy of eliminating discrimination, and the Attorney General's proven record of fighting discrimination.

Finally, naming the Attorney General as a defendant was not only proper under *Ex parte Young*, but equally proper under Nevada state law as well. Because the present suit seeks declaratory relief that SB 311 is unconstitutional, and the subject of the suit—marital discrimination—is a topic in which Ford undoubtedly claims an interest, Ford's joinder was *required*. Nev. Rev. Stat. § 30.130.

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VI. CONCLUSION

For the foregoing reasons, the Court should deny the defendants' motion to dismiss. Alternatively, if the Court is inclined to grant the defendants' motion to dismiss, plaintiffs hereby request leave to amend their complaint so they have an opportunity to cure any perceived deficiencies.

Dated: November 22, 2019

SNELL & WILMER L.L.P.

By: */s/ Alex L. Fugazzi*

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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 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS** 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.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

■ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

DATED this 22nd day of November, 2019.

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

4842-1966-7629