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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

SANDY O'LAUGHLIN, in her official capacity as Commissioner of the Financial Institutions Division of the Nevada Department of Business and Industry, and AARON FORD, in his official capacity as Nevada Attorney General,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED IN ACCORDANCE WITH LR 78-1

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I. INTRODUCTION

Defendants repeat their refrain that this is a case without a controversy. They insist that Plaintiffs alleged some abstract dispute insufficient to fall within this Court's subject matter jurisdiction. They are wrong.

Plaintiffs' First Amended Complaint alleges specific facts illustrating how their members have incurred concrete harm as a result of SB 311. Their business operations have already been disrupted and they have incurred significant costs trying to develop policies, create compliance systems, and train employees to comply with a statute where compliance is a legal impossibility. *See* FAC ¶ 28. Their inability to establish reliably sound compliance management systems exposes Plaintiffs' members *right now* to increased legal and reputation risks and enforcement actions. This same exposure diminishes their business opportunities and their ability to expand. *See* FAC ¶ 33. SB 311 has put Plaintiffs' members' data furnishing contracts with credit reporting agencies in jeopardy, and obstructs their ability to securitize pools of loans. *See* FAC ¶¶ 29-31. And Plaintiffs' inability to comply with SB 311 puts them at significant risk of failing federal regulatory examinations. *See* FAC ¶¶ 31-32.

These are not legal conclusions. They are facts demonstrating present harm. And on this motion, the Court must presume those facts are true. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). Of course, Defendants are free to try and disprove the allegations by showing that Plaintiffs have *not* suffered these injuries or that there *is* a way for Plaintiffs to comply with both SB 311 and federal law. But those are triable issues for another day. The only question presented by Defendants' motion is whether this Court has jurisdiction. It does, because Plaintiffs' members have incurred real, present harm.

Defendants also insist the case is not ripe because there is no realistic threat that SB 311 will be enforced against Plaintiffs. That contention is irrelevant because Plaintiffs' members have suffered other direct and concrete commercial injury. So, Plaintiffs' claims are ripe whether Defendants enforce SB 311 or not. *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002).

But Defendants' no-threat-of-enforcement story is in any event belied by Plaintiffs' allegations. The odds of Defendants enforcing SB 311 against Plaintiffs' members is high because the Defendants have expressly refused to disavow enforcement. Moreover, Attorney General Ford recently stated that his office has a "sworn duty" to enforce Nevada's laws until a court instructs him otherwise – and will do so. And because private plaintiffs may enforce SB 311 as well, the risk to Plaintiffs is even greater.

The case is prudentially ripe as well. The case is fit for review because whether federal law preempts SB 311 is a question of law, not facts. And the hardship to Plaintiffs would be severe without this Court's review since Plaintiffs would be left unable to follow both SB 311 and federal law.

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.

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* FAC ¶¶ 6-9. They sued for a declaratory judgment that SB 311 is preempted by federal law. *See* FAC ¶ 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* FAC ¶ 2. However, that section conflicts with, and is preempted by, the Fair Credit Reporting Act and the Equal Credit Opportunity Act. *See* FAC ¶¶ 3, 22-23.

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

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pursuant to 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*, 813 F.2d at 1559.

IV. PLAINTIFFS ALLEGED A RIPE CONTROVERSY

The Defendants' motion to dismiss contends that Plaintiffs' claims are not justiciable because Plaintiffs alleged merely speculative harm and because there is no realistic threat of enforcement. *See* Motion at pp. 5-7. Both contentions are wrong.

A. The Case Is Constitutionally Ripe Because Plaintiffs Alleged Facts Showing Actual *Present* Harm

The FAC alleged specific facts illustrating that Plaintiffs' members have already suffered concrete harm and that the controversy surrounding SB 311 is ripe. For example, Plaintiffs alleged that their members have incurred significant financial costs in the hope of finding a way to comply with SB 311, but that compliance is impossible because the statute conflicts with federal law:

> Plaintiffs and their Members have incurred significant administrative costs in attempting to develop policies, create systems, and develop employee training and company procedures in the hope of complying with both SB 311 and federal law. However, compliance is impossible because there is no way to comply with both SB 311 and federal law.

See FAC ¶ 28.

Plaintiffs also alleged facts illustrating how SB 311 has interfered with their members' day-to-day business operations:

> Many of Plaintiffs' Members are furnishers of credit information, and consequently, are parties to data furnisher agreements with the various credit reporting agencies such as Experian, Transunion, and Equifax. Those agreements require Plaintiffs' Members to comply with federal law, and to refrain from pulling credit

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> information without having permissible purposes to do so. Because SB 311 requires Plaintiffs' Members to violate federal law by obtaining credit information without a permissible purpose, Plaintiffs cannot comply with SB 311 without violating their furnisher agreements with the credit reporting agencies.

See FAC ¶ 29.

> SB 311 has also caused harm to Plaintiffs' Members by obstructing their ability to conduct normal banking business, such as securitizing loan pools.

See FAC ¶ 30.

Plaintiffs also alleged specific facts showing that SB 311 exposes the bank to increased legal and reputation risks, enforcement actions, and diminishes the banks' business opportunities and ability to expand:

> SB 311 also forces Plaintiffs' Members to jeopardize their various licenses to do business because Plaintiffs' Members must certify and report to state and federal regulators that their respective business practices, policies, and procedures are—and will remain—compliant with state and federal law.

See FAC ¶ 31.

> SB 311 has also caused Plaintiffs' Members to be significantly more likely to fail an examination by the Consumer Financial Protection Bureau ("CFPB"). The CFPB Examination Manual provides that examinees must comply with federal credit reporting laws, and expressly forbids the use of consumer reports for impermissible purposes.

See FAC ¶ 32.

> Likewise, the Comptrollers' Handbook on Consumer Compliance confirms that the Office of the Comptroller of the Currency expects bank boards and managers to be responsible for the banks' compliance with all applicable laws and regulations. *The failure to establish a sound compliance management system* that addresses all applicable consumer protection-related statutes—which in the case of SB 311 is an impossibility—*exposes the bank to increased legal and reputation risks, enforcement actions, and diminishes the banks' business opportunities and ability to expand.* (See OCC Comptroller Handbook on Consumer Compliance at p. 4.)

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See FAC ¶ 33; emphasis added.

The foregoing "injuries in fact" easily demonstrate why this Court has Article III jurisdiction. *Nat'l Audubon Soc'y v. Davis*, 307 F.3d at p. 855 (finding ripe dispute where "the core of the trappers' injuries is not a hypothetical risk of prosecution but rather actual, ongoing economic harm"); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, the Ninth Circuit has repeatedly held that "economic injury is generally a legally protected interest" sufficient to invoke the Court's subject matter jurisdiction. *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 (9th Cir. 2013); see also *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013) ("The economic costs of complying with a licensing scheme can be sufficient for standing.").

Moreover, Plaintiffs' injuries are traceable to the Defendants because the Financial Institutions Division and the Attorney General are the ones responsible for enforcing the law[1], and those injuries are easily redressed by a finding that SB 311 is preempted by federal law. After all, when a plaintiff is the object of government action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at pp. 561-62.

The Defendants insist that Plaintiffs' claims are not ripe because there is no realistic threat of enforcement. *See* Motion at 5:16-18; see also *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)(identifying three-part test to ascertain likelihood of enforcement proceedings). But when a law creates an injury sufficient to create Article III standing, an actual arrest, prosecution, or other enforcement action is "not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). By focusing on the likelihood of enforcement, the Defendants make the same argument the Ninth Circuit rejected in *Nat'l Audubon Soc'y v. Davis*, 307 F.3d at 855 (9th Cir. 2002). The likelihood of enforcement is immaterial when, like here, the Plaintiffs have already incurred present harm. As the Ninth Circuit explains:

[1] *See* FAC ¶¶ 15-17 and NRS §§ 598B.090, 598B.150, 598B.160; compare also *Southern Pac. Transp. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (railroads' injury was *not* traceable where defendant lacked authority to prosecute under challenged statute).

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> The three-factor test applied in both *San Diego Guns* and *Thomas* was premised on the Plaintiffs' assertion that a "risk of prosecution" was the injury. The three factors of *San Diego Guns* and *Thomas* adequately ensure that courts will not decide cases in which a risk of prosecution is so remote that no "case or controversy" exists. For example, in *Thomas*, two landlords alleged risk-of-prosecution injury under Alaska housing laws based on their refusal to rent to unmarried couples. We held that the landlords lacked standing because they did not face a genuine threat of prosecution, given that they could not specify any past or planned refusals to rent to unmarried couples, that no complaint had ever been filed against them, and that the 25-year-old laws had never resulted in a criminal prosecution.
>
> In this case, however, the core of the trappers' injuries is not a hypothetical risk of prosecution but rather *actual, ongoing economic harm resulting from their cessation of trapping.* That is, the trappers allege direct financial loss caused by Proposition 4. *When such tangible economic injury is alleged, we need not rely on the three-factor test applied in Thomas and San Diego Guns*, for the gravamen of the suit is economic injury rather than threatened prosecution.

Nat'l Audubon Soc'y v. Davis, 307 F.3d at 855; emphasis added, citations omitted.

The same is true here. It is the present harm that matters, not the likelihood of enforcement. As explained above, SB 311 has already caused actual ongoing harm to Plaintiffs' members. The fact that Defendants have not yet sought to enforce the statute is beside the point.

Importantly, the Ninth Circuit is not alone in recognizing that a ripe controversy exists when a challenged statute causes immediate harm even when it has not yet been enforced. Other circuits across the country have likewise held that imminent enforcement is unnecessary when the challenged statute has already inflicted harm. *See e.g. Keller v. City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013)("the restrictions would likely cause him to lose some tenants and restrict the pool of prospective tenants, causing economic injury. We therefore agree with the district court that Keller will suffer sufficient concrete and imminent future injury to give him Article III standing to assert a pre-enforcement facial challenge to these provisions."); *NRA of Am. v. Magaw*, 132 F.3d 272, 285 (6th Cir. 1997)("[A]ctual or imminent enforcement is not always a prerequisite in non-First Amendment cases, if the statute creates a 'present harm,' such as substantial economic injury."); *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011)("The very existence of a

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statute implies a threat to prosecute, so pre-enforcement challenges are proper, because a probability of future injury counts as 'injury' for the purpose of standing.").

Not surprisingly, the foregoing authorities are also consistent with the High Court's precedent as well. The seminal case regarding pre-enforcement review outside the First Amendment context is *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), abrogated on other grounds by *Califano v. Sanders,* 430 U.S. 99 (1977). In *Abbott*, drug manufacturers challenged the validity the Pure Food, Drug, and Cosmetic Act, which imposed various labeling and advertising restrictions on Plaintiffs' products. The Supreme Court held that there was jurisdiction in the federal courts under the Declaratory Judgment Act because the manufacturers were placed in a dilemma: "Either they must comply with the [labeling] requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." *Id*. at 152 (internal quotation marks omitted). The Court elaborated:

> [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 everyday business practices*; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions.

Id. at 154; emphasis added.

Here, Plaintiffs alleged specific facts showing that SB 311 has caused their members to incur actual hard costs, that the statute is actively interfering with their ongoing business operations, and that it forces them into a dilemma of having to violate either federal law or state law. Accordingly, Plaintiffs alleged a controversy sufficient to trigger this Court's Article III jurisdiction.

B. Though Unnecessary, Plaintiffs Also Alleged Facts Showing A Realistic Threat Of Enforcement

Contrary to Defendants' assertions, there *is* a realistic threat that SB 311 will be enforced against Plaintiffs' members. As Plaintiffs alleged in the FAC, the Defendants declined to stay enforcement of SB 311 before the statute took effect. *See* FAC ¶ 37. They declined again after Plaintiffs filed this lawsuit. *See* FAC ¶ 39. A defendant's mere silence about its enforcement

intentions is enough to show a credible threat.[2] But the risk of enforcement is far greater here because Defendants are not merely silent; they *expressly* refuse to stand down.

Further, in January 2020, Attorney General Ford issued a statement indicating that his office has a sworn duty to enforce Nevada's laws until a Court instructs his office otherwise. *See* FAC ¶ 40. That statement echoes with particular force 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.[3] Likewise, the Nevada legislature recently declared a public policy to eliminate unlawful discrimination, including marital discrimination, in Nevada. Nev. Rev. Stat. Ann. § 598B.020. With that context in mind, it is neither "imaginary" nor "speculative" to anticipate that the Attorney General or the Financial Institutions Division will enforce SB 311 in the future. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Lastly, the risk of enforcement is heightened because SB 311 may be enforced by individual consumers as well. *See* FAC ¶ 41. As a result, there is a greater need for immediate judicial guidance about the 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.

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[2] *See* e.g. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) (enforcement was "far from imaginary or speculative" where "respondents have not disavowed enforcement"); *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] *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

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C. The Case Is Prudentially Ripe Too

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.

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). 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 taken effect, thereby undermining the respective missions of Plaintiffs' organizations and members. So, declining review would cause "significant practical harm" to Plaintiffs' members by leaving them in a state of legal uncertainty and force them into a dilemma of having to choose whether to follow federal law or SB 311. That is precisely the sort of dilemma that constitutes legal hardship. *ABC v. Heller*, 2006 U.S. Dist. LEXIS 80030 *23-24 (D. Nev. 2006).

D. The Defendants' Remaining Arguments Are Meritless

The Defendants' motion makes two additional jabs that warrant a response.

First, Defendants take Plaintiffs to task for not divulging specific instances in which Plaintiffs' members have denied consumers' requests for credit under SB 311. *See* Motion at 3:7-9; 7:10-11. But Article III does not require Plaintiffs to allege facts that would expose them to liability under the very law that Plaintiffs challenge. *MedImmune, Inc. v. Genentech, Inc.*, 549

U.S. 118, 128-29 (2007). Indeed, what sensible financial institution would volunteer facts showing that it engaged in conduct that Nevada deems to be marital discrimination? Instead, Plaintiffs alleged that the high volume of credit applications in Nevada to the many hundreds of financial institutions that comprise Plaintiffs' members, makes a violation of SB 311 an absolute certainty. *See* FAC ¶ 35. They also alleged that if any of Plaintiffs' members have not already violated SB 311, they will necessarily do so in the immediate future. *Id.* That is enough.

Second, Defendants assert that SB 311's meaning is not yet final and that this Court should not "deprive" the Financial Institutions Division of the opportunity to administer SB 311. *See* Motion at 7:9, 16-17. Nonsense. Allowing this case to proceed to the merits will deprive the Financial Institutions Division of nothing. Allowing the case to proceed to the merits will simply afford Plaintiffs the chance to obtain a remedy for the harm they have suffered thus far, and will continue to suffer, until a Court finds that federal law preempts Section 3 of SB 311.

In any event, there is no possible construction of SB 311 that the Financial Institutions Division might formulate to save the statute from federal preemption—a point made abundantly clear by the Defendants' decision to remain silent about the merits. The reason is simple: agencies cannot ignore legislative text that is plain. *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) ("an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). And the plain language of Section 3 of SB 311 requires Plaintiffs' members to perform acts that are squarely prohibited by federal law.

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 F.2d 697, 704 (9th Cir. 1992).

The Attorney General argues 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.

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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 implies that the 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. Ann. § 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 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. Ann. § 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."[4] 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:

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[4] *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/

> 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 one older opinion from the Ninth Circuit for the proposition that attorneys general are improper Defendants under *Ex Parte Young*: *Long v. John Van de Kamp,* 961 F.2d 151, 152 (9th Cir. 1992). That opinion does not support the Attorney General's argument. 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 the Attorney General undoubtedly claims an interest, his joinder was *required*. Nev. Rev. Stat. Ann. § 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: April 7, 2020

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' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** 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 7th day of April, 2020.

/s/ D'Andrea Dunn
An employee of SNELL & WILMER L.L.P.