UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AMERICAN FINANCIAL SERVICES ASSOCIATION, et al., Plaintiffs v. SANDY O'LAUGHLIN AND AARON D. FORD, Defendants.	Case No.: 2:19-cv-01708-APG-EJY **Order Granting the Defendants' Motion to Dismiss** [ECF No. 39]

Plaintiffs American Financial Services Association, the Nevada Credit Union League, and the Nevada Bankers Association sue for declaratory and injunctive relief from enforcement of Section 3 of Nevada's Senate Bill (SB) 311. I previously dismissed the plaintiffs' claims without prejudice and granted leave to amend. ECF Nos. 29; 30 at 26. After the plaintiffs filed their first amended complaint, defendants Sandy O'Laughlin, Commissioner of the Financial Institutions Division of the Nevada Department of Business and Industry, and Aaron Ford, Nevada's Attorney General, moved to dismiss, arguing that the controversy is unripe for judicial review and that Attorney General Ford is not a proper party. ECF No. 39. Because the plaintiffs have again failed to plead sufficient facts that make their claims ripe for review, I grant the defendants' motion to dismiss without leave to amend and direct the clerk of court to close the case.

I. BACKGROUND

Section 3 of SB 311 was enacted "to fix the problem faced by a person who has no credit history because [the person] has been married and their spouse has handled the couple's credit during the marriage in such a way that the person's spouse, but not the person, is the only one of

the married couple to have a credit history." ECF No. 33 at ¶ 19. Section 3(1) "provides a procedure by which an applicant for credit may compel a creditor to deem the applicant's credit history to be identical to that of the applicant's spouse [or ex-spouse] during their marriage." *Id.* at ¶ 20. Section 3(2) states that a creditor's violation of Section 3 is "discrimination based on marital status." *Id.* at ¶ 21. The bill delegates administrative and investigative authority to the Commissioner of Financial Institutions through the Division of Financial Institutions of the Department of Business and Industry (FID). Nev. Rev. Stat. §§ 598B.070, 598B.090. Any person injured, or person with reasonable grounds to believe they will be injured, by a creditor's violation of SB 31l can file a complaint with FID "in such form and manner as [FID] prescribes by regulation" to seek an administrative remedy. *See id.* § 598B.140. Additionally, individuals "injured by a discriminatory credit practice . . . may apply directly to the district court for relief." *Id.* § 598B.170(1). The bill took effect on October 1, 2019. ECF No. 33 at ¶ 28.

The plaintiffs are trade and banking associations who collectively represent thousands of members. *Id.* at ¶¶ 6-10. Their members are market-funded providers of financial services, Nevada credit unions, Nevada banks, and other financial institutions. *Id.* They include institutions and furnishers of credit reporting information who are responsible for making, servicing, and reporting on secured and unsecured loans in Nevada. *Id.* at ¶ 10. Thus, they are subject to SB 311 and federal laws pertaining to creditors. *Id.* at ¶¶ 22-23. Specifically, they must comply with the federal Fair Credit Reporting Act (FCRA) and the Equal Credit Opportunity Act (ECOA). *Id.*

FCRA prohibits creditors from accessing a consumer's report without his or her consent or without a "permissible purpose," and it provides an exhaustive list of permissible purposes. *Id.* at ¶ 22. The plaintiffs allege that none of these permissible purposes encompasses a Section 3

request. *Id*. Additionally, ECOA and its implementing regulation (Regulation B) "generally prohibit" requests for credit reports belonging to a credit applicant's spouse or former spouse. *Id*. at ¶ 23. The plaintiffs assert that because Section 3 fails to mention that applicants must obtain their spouse or former spouse's consent before accessing their report, a Section 3 request would be prohibited by ECOA. *Id*. They thus allege that federal law preempts Section 3. *Id*. at ¶¶ 22-23.

The plaintiffs claim that compliance with Section 3 is "hopelessly unworkable, and impossible to comply with in practice" because there is no way to isolate only the credit history accrued during a marriage, or to otherwise back-date a credit score. *Id*. at ¶ 25. The plaintiffs allege they "incurred significant administrative costs" attempting to comply with Section 3 but found "no possible way to interpret the plain language of Section 3 of SB 311 in a way that complies with federal law." *Id*. at ¶ 28. Because of this, they claim they are unable to meet several obligations which require their compliance with state and federal law, thus causing them immediate harm. *Id*. at ¶¶ 29-33. They maintain that the following immediate harms are "concrete" absent a stay of enforcement, creating "an actual and substantial controversy[.]" *Id*. at ¶¶ 34-35.

- First, compliance with Section 3 will force their members to breach data furnishing agreements. *Id*. at ¶ 29. Many of the plaintiffs' members are parties to these agreements with credit reporting agencies such as Experian, Transunion, and Equifax. *Id*. These agreements require compliance with federal laws such as FCRA. *Id*.
- Second, the conflict between federal law and Section 3 obstructs their members' "ability to conduct normal banking business, such as securitizing loan pools." *Id*. at ¶ 30. Their members can no longer make good-faith representations to bondholders

about their on-going compliance with state and federal law, which standard securitization requires. *Id*.

- Third, their members' inability to comply with both Section 3 and federal law will "jeopardize their members' various licenses to do business." *Id*. at ¶ 31. These licenses require the plaintiffs' members to certify and report to regulators that their "business practices, policies, and procedures are—and will remain—compliant with state and federal law." *Id*.
- Fourth, their members' failure to "comply with federal credit reporting laws[,]" which expressly forbid "the use of consumer reports for impermissible purposes[,]" will make them "significantly more likely to fail an examination by the Consumer Financial Protection Bureau." *Id*. at ¶ 32 (emphasis omitted).
- Fifth, their banking members' inability to comply with both state and federal law "exposes [them] to increased legal and reputation risks, enforcement actions, and diminishes [their] business opportunities and ability to expand." *Id*. at ¶ 33. They will be unable to establish necessary "management system[s]" which require compliance with "all applicable laws and regulations." *Id*.

The plaintiffs do not claim that any Section 3 requests have been made by a credit applicant since SB 311's enactment. *Id*. at ¶¶ 28-35. Rather, they allege that "if [their members] have not already violated SB 311, they will necessarily do so in the immediate future." *Id*. at ¶ 35. And they allege that when a Section 3 request is made, their members will be left in an impossible situation, necessarily bringing about the harms they allege. *Id*. This includes being branded a "perpetrator of marital discrimination." *Id*. at ¶ 36.

Finally, the plaintiffs stress that the threat of SB 311's enforcement and subsequent reputational harm is "particularly real" because the defendants are currently empowered to enforce SB 311. *Id*. at ¶¶ 36-45. Specifically, the plaintiffs claim that:

- First, despite good-faith efforts to explain the impossibility of compliance to FID's interim commissioner, the commissioner denied the plaintiffs' request to stay enforcement. *Id*. at ¶ 37. The plaintiffs also asked the Attorney General to "stay enforcement of SB 311—at least temporarily—because federal law preempted the statute[,]" but the Attorney General's office declined their request. *Id*. at ¶ 39.
- Second, the defendants opposed the plaintiffs' motion for preliminary injunction, demonstrating their intention to enforce SB 311. *Id*. at ¶ 38.
- Third, the Attorney General recently expressed his "general enforcement position about newly-enacted legislation," demonstrating that anticipation of enforcement is "neither imaginary nor speculative[.]" *Id*. at ¶ 40. Specifically, he stated that "[l]aws are presumed to be constitutional, and law enforcement agencies are by definition charged with executing and enforcing the laws of our State. [The Attorney General's office has] a sworn duty to do so until a Court instructs us otherwise." *Id*. (emphasis omitted).
- Fourth, the plaintiffs describe the problem Section 3 is intended to fix as prevalent enough to necessitate "a cure." *Id*. at ¶ 41. On this basis they deduce that "SB 311 will impact many thousands of Nevadans" and that the "threat of enforcement is particularly real" because these "private citizens may enforce SB 311 as well." *Id*.

The defendants move to dismiss the amended complaint, arguing that the dispute is unripe for review and that Attorney General Ford is not a proper party. ECF No. 39. The

plaintiffs respond that the suit is ripe because there is a genuine threat of enforcement and the statute has caused them actual, present harm. ECF No. 40.

II. DISCUSSION

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction Standard

A complaint must be dismissed if the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). A jurisdictional attack under Federal Rule of Civil Procedure 12(b)(1) "may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack like this one, "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In resolving a facial attack, I must "assume [the plaintiffs'] allegations to be true and draw all reasonable inferences in [their] favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Because the plaintiffs are invoking the court's jurisdiction, they bear the burden of proving that the case is properly in federal court. *In re Ford Motor Co./Citibank (S. Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).

B. Ripeness

Article III empowers me to "adjudicate live cases or controversies," not "issue advisory opinions nor declare rights in hypothetical cases." *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 959 F.3d 341, 348 (9th Cir. 2020) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). Standing and ripeness doctrines "help [me] adhere to that role." *Id.* To have standing, a plaintiff must establish an "injury in fact." *Id.* at 349. Ripeness "is primarily temporal in scope" and focuses on where that injury in

fact exists "on a timeline." *Thomas*, 220 F.3d at 1138. Ripeness is "designed to prevent [me], through avoidance of premature adjudication, from entangling [myself] in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Skyline*, 959 F.3d at 349 (quotations and alterations omitted). A "ripeness inquiry contains a constitutional and a prudential component." *Thomas*, 220 F.3d at 1138 (quotation omitted).

1. Constitutional Ripeness

To determine if a pre-enforcement claim is constitutionally ripe, I "consider whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the challenged statute's operation or enforcement." *Thomas*, 220 F.3d at 1139 (quotation omitted). "[A] genuine threat of imminent prosecution" must exist. *Id*. I apply a three-part test, examining: (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, and (3) the history of past prosecution or enforcement under the challenged statute. *Id.* (quotations omitted).

a) Concrete Plan to Violate SB 311

To warrant judicial review, a plaintiff must articulate a concrete plan to violate the challenged statute. *Id.* "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Id*. "Because the Constitution requires something more than a hypothetical intent to violate the law, plaintiffs must articulate . . . details about their [plan] such as when, to whom, where, or under what circumstances [the violation will

occur].” *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) (quotations and alterations omitted).

In *Thomas*, the Ninth Circuit found a pre-enforcement claim challenging a state’s antidiscrimination law constitutionally unripe. 220 F.3d at 1137. The plaintiffs expressed their intent to violate the challenged statute “in the future, [but could not] specify when, to whom, where, or under what circumstances.” *Id*. They also claimed they may have previously violated the statute, but again they could not “specify when, to whom, where, or under what circumstances.” *Id*.

Here, the plaintiffs contend their first amended complaint includes sufficient specific facts, making their claims ripe for review. But as in their original complaint, the plaintiffs do not allege that any of their members have been forced to violate state or federal law. They express only their intent to violate SB 311 on some uncertain day in the future when a Section 3 request is made. They claim that if their members have not already violated SB 311, they will “necessarily do so in the immediate future.” ECF No. 33 at ¶ 35. But like the *Thomas* plaintiffs, they fail to specify when, where, and under what circumstances any prior violations have happened or any future violations will occur. *Id*. The plaintiffs were given time to confer with their “many hundreds” of members, yet still do not allege that any Section 3 requests have been received. *Id*.; *see also* ECF No. 30 at 23. Thus, the plan to violate Section 3 is merely hypothetical and does not rise to the level of an articulated, concrete plan under the *Thomas* test.

b) Specific Warning or Threat of Enforcement

In addition to articulating a concrete plan, the plaintiffs must be aware of a specific warning or threat to enforce the challenged statute that is “credible,” not “imaginary or speculative.” *Thomas*, 220 F.3d at 1140. “Neither the mere existence of a proscriptive statute,

nor a generalized threat of prosecution" is enough. *Id.* at 1139; s*ee also Rincon Band of Mission Indians v. San Diego Cty.*, 495 F.2d 1, 5 (9th Cir. 1974) (threats made by government officials to enforce laws they are charged to administer are general threats).

In *Thomas*, the Ninth Circuit found the threat of enforcement was "beyond speculative" because it depended "on a future violation which may never occur." 220 F.3d at 1140. Because the *Thomas* plaintiffs could not identify anyone turned away in violation of the statute, and no formal or informal complaints had ever been made to the state, no "specific threat or even hint of future enforcement" could have existed. *Id.*; *see also San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1128 (9th Cir. 1996) (finding, at most, the possibility of eventual prosecution failed to show a specific threat of prosecution).

Here, the plaintiffs allege that the threat of enforcement is "particularly real" because SB 311 can be enforced by both the defendants and private citizens. ECF No. 33 at ¶ 41. But as in *Thomas*, there are no allegations that either the state or private citizens have specifically threatened to initiate proceedings against the plaintiffs' members. The Attorney General's enforcement statement was no more than a generalized threat to enforce all newly-enacted legislation. Similarly, the defendants' denials of the plaintiffs' requests to stay enforcement do not create a credible, specific threat of enforcement. SB 311 merely continues to exist. As in *Thomas*, enforcement depends on a future violation which may not occur. Thus, there is no specific, credible threat of Section 3's enforcement at this time.

c) The History of Past Prosecution or Enforcement

The final constitutional ripeness factor to consider is the history of SB 311's enforcement. *Thomas*, 220 F.3d at 1140. A plaintiff's "inability to point to any history of prosecutions undercuts their argument that they face a genuine threat of prosecution." *Reno*, 98

F.3d at 1128. In *Thomas*, the Ninth Circuit acknowledged that "active enforcement" of a statute may render a plaintiff's fear of prosecution reasonable. 220 F.3d at 1140. But because that statute's past enforcement was "limited, was civil only, not criminal, and . . . each [of those limited enforcement actions was] precipitated by potential tenants filing complaints," the statute's past prosecution factor was, at most, neutral. *Id*. at 1141.

Here there is no allegation of any prior enforcement of Section 3. *Id*. at ¶ 35. The lack of enforcement history undercuts the plaintiffs' argument and weighs more heavily towards allowing FID time to issue implementing regulations.

Under the *Thomas* test, the plaintiffs have not alleged facts plausibly showing a genuine threat of prosecution under Section 3. They did not articulate a concrete plan to violate Section 3 nor demonstrate a specific threat of Section 3's enforcement. Further, no enforcement history has been presented. Thus, they fail to plead a live case or controversy. Because the plaintiffs' claims are not constitutionally ripe, this dispute is not justiciable at this time. I need not, and do not, address whether the suit is prudentially ripe for review.

2. Ripeness Based on Actual, Present Harm

In an attempt to escape the conclusion mandated by the *Thomas* factors, the plaintiffs argue that their members have alleged facts showing actual, present harm. Specifically, they argue that their members have incurred administrative costs, face exposure to legal and reputational risks, have been forced to violate data furnishing agreements, and have been obstructed in their ability to conduct normal banking business.

The plaintiffs compare this case to *National Audubon Society v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002), *opinion amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002). In that case, fur trappers challenged enforcement of a measure banning the use of certain traps and poisons.

Id. at 843. The Ninth Circuit held that the *Thomas* test did not apply because the trappers alleged "actual, ongoing harm from their cessation of trapping." *Id*. at 855. The facts here are distinguishable because a consumer must make a Section 3 request before the plaintiffs' members are forced to choose between violating state or federal law. In contrast, the measure in *Davis* required trappers to cease certain trapping activities, causing them economic harm. *Id*. at 856. The plaintiffs' harms are future harms, unlike the ongoing harms in *Davis*.

Application of the framework used in *Davis* confirms that the plaintiffs' alleged harms are insufficient. Under *Davis*, the plaintiffs must allege injury that is (1) actual, discrete, and direct, (2) fairly traceable to SB 311's enactment and (3) redressable. *Id*. The Ninth Circuit found that the trappers' economic injury was fairly traceable because of: "(1) the newness of the statute; (2) the explicit prohibition against trapping contained in the text of [the statute]; (3) the state's unambiguous press release mandating the removal of all traps banned under [the statute]; (4) the amendment of state regulations to incorporate the provisions of [the statute]; and (5) the prosecution of one private trapper under [the statute]." *Id*. The *Davis* court specifically distinguished the Fifth Circuit's decision in *Shields v. Norton* because that plaintiff's "claim that he stopped pumping water from the aquifer in response to threats of litigation might establish a controversy, if not for [the threats'] emptiness exposed by years of inactivity since the alleged 'threats' were made and the lack of evidence that a threat was in fact made." *Id*. (alterations omitted) (quoting 289 F.3d 832 (5th Cir. 2002)).

Here, the defendants have not issued any specific threats or warnings of enforcement, the implementing regulations are pending, and the plaintiffs do not allege they have received any requests under Section 3. The plaintiffs' allegations more closely resemble the empty, if not

nonexistent, threats in *Shields* than the measure in *Davis*. Thus, the plaintiffs' alleged harms are not fairly traceable to Section 3. So I grant the defendants' motion to dismiss.[1]

C. Leave to Amend

The plaintiffs request leave to amend, but do not address the standard or provide any analysis. I previously granted leave to amend based on the plaintiffs' representation that they would poll their members and determine whether they could satisfy ripeness standards. Having done that and failing to plead a ripe injury, any further amendment would be futile at this time. So I deny leave to amend and close this case without prejudice to the plaintiffs filing a new complaint under a new case number should their claims later become ripe. *See Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1118 (9th Cir. 2013).

III. CONCLUSION

I THEREFORE ORDER that defendants' Sandy O'Laughlin and Aaron Ford's motion to dismiss **(ECF No. 39) is GRANTED**. The plaintiffs' amended complaint is dismissed without prejudice to the plaintiffs filing a new complaint under a new case number should their claims later become ripe. The clerk of court is directed to close this case.

DATED this 26th day of June, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

[1] Although not addressed in the briefs, to the extent the plaintiffs assert standing on the basis of administrative costs, self-inflicted harms are not "fairly traceable" to a challenged statute. *See Skyline*, 959 F.3d at 350; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (finding a lack of standing based on costs incurred in avoidance of a speculative risk of harm by the Government because "a plaintiff cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is certainly not impending").