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12 *Attorneys for Plaintiffs American Financial Services*
Association, Nevada Credit Union League, & Nevada
13 *Bankers Association*

14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

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

19 Plaintiffs,

20 vs.

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

24 Defendants.
25

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

26 **I. INTRODUCTION**

27 1. Plaintiffs bring this action seeking declaratory and injunctive relief to prevent the
28 enforcement of Section 3 of Nevada’s Senate Bill 311 (“SB 311”).

1 2. SB 311 seeks to prohibit discriminatory practices against a person seeking credit—
 2 a laudable overall goal, which plaintiffs and their members certainly share. However, Section 3 of
 3 the legislation is unworkable, because it purports to create requirements inconsistent with federal
 4 law that preempts it, and puts plaintiffs’ members in the impossible position of failing to comply
 5 with either federal law or Nevada law. Section 3 permits an applicant for credit who was married,
 6 but has no credit history, to request that a creditor deem the applicant’s credit history to be identical
 7 to that of the applicant’s spouse during their marriage. That provision conflicts with, and is
 8 preempted by, federal law. If permitted to stand, SB 311 will immediately and adversely affect the
 9 credit market in Nevada to the detriment of both lenders and borrowers.

10 3. This Court should issue a declaratory judgment indicating that Section 3 of SB 311
 11 is preempted by federal law, including but not limited to the Fair Credit Reporting Act, the Equal
 12 Credit Opportunity Act, various federal regulations, and federal mortgage guidelines. Further, the
 13 Court should enjoin Nevada state officials from enforcing Section 3 on the grounds that it conflicts
 14 with, and creates an obstacle to, to the accomplishment and execution of the full purposes and
 15 objectives of Congress.

16 II. JURISDICTION AND VENUE

17 4. This Court has subject matter jurisdiction because this action arises under the
 18 Constitution, including the Supremacy Clause, and the laws of the United States. U.S. CONST. art.
 19 VI, cl. 2; 28 U.S.C. § 1331. Under *Ex parte Young*, 209 U.S. 123, 159–60 (1908), a federal court
 20 has jurisdiction to enjoin the conduct of state officials if it conflicts with the Constitution or
 21 congressional statutes. *Id.* at 155–56; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381
 22 (1992) (authorizing offensive use of preemption arguments in federal suits seeking declaratory and
 23 injunctive relief under *Ex parte Young*); *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 848 (9th
 24 Cir. 2002) (extending *Ex parte Young* to claims for declaratory relief).

25 5. Venue is proper because a substantial part of the events giving rise to the claims
 26 occurred in this judicial district, and the defendants maintain offices, work, and reside in this
 27 judicial district.

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III. PARTIES

The Plaintiffs

6. The American Financial Services Association (“AFSA”) is a non-profit trade association incorporated in the District of Columbia. AFSA is the nation’s largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA’s mission is “to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with quality and cost-effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit and credit-related products.” Moreover, AFSA monitors national, state, and local legislation that purports to have an impact on its members’ rights and obligations.

7. AFSA represents approximately 360 companies operating more than 10,000 offices engaged in extending \$200 billion, or approximately 15 to 20 percent of all consumer credit in the United States. AFSA members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies. They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, unsecured personal loans, home mortgage loans, home equity loans, retail installment financing, and automobile and mobile home financing and lines of credit.

8. The Nevada Credit Union League (“NCUL”) is the trade association for Nevada’s credit unions. NCUL works in partnership with the California Credit Union League, the trade association for California’s credit unions, to provide advocacy, information, education and business solutions for the benefit of its members. There are currently fifteen credit unions headquartered in Nevada with over \$5.3 billion in assets serving more than 363,500 members. Approximately ten of those credit unions are NCUL members. As fully regulated financial institutions, credit unions are subject to the state and federal laws and regulations that govern these transactions, including the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Nevada Equal Credit Opportunity Law.

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1 9. The Nevada Bankers Association (“NBA”) is a Nevada-based industry association
2 representing Nevada banks and banking professionals. The NBA and its members are dedicated to
3 providing the best financial products, services and resources to drive and support economic growth,
4 job creation and prosperity throughout the state of Nevada. Approximately thirty banks and/or
5 financial institutions operating in Nevada are NBA members. As fully regulated financial
6 institutions, these NBA members are subject to the state and federal laws and regulations that
7 govern these transactions, including the Equal Credit Opportunity Act, the Fair Credit Reporting
8 Act, and the Nevada Equal Credit Opportunity Law.

9 10. Plaintiffs’ members include institutions and furnishers of credit reporting
10 information which make, service, and report on many types of secured and unsecured loans in
11 Nevada. Consequently, plaintiffs’ member institutions are subject to SB 311. Those member
12 institutions could bring suit in their own right.

13 11. Because plaintiffs’ member institutions are directly affected by SB 311 and because
14 Section 3 of the statute undermines plaintiffs’ respective missions—namely, quality and cost-
15 effective service, the promotion of competition in the consumer finance industry, and the
16 responsible delivery and use of credit—plaintiffs bring this action to enjoin enforcement of Section
17 3 of the statute.

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

21 13. Plaintiffs’ claims and requests for declaratory and injunctive relief do not require
22 the participation of the individual members of plaintiffs.

23 ***The Defendants***

24 14. Defendant Mary Young is the Commissioner of the Financial Institutions Division
25 of the Nevada Department of Business and Industry. She is responsible for administering the
26 provisions of SB 311, as well as assisting all public and private organizations that carry on programs
27 to prevent or eliminate discrimination in credit practices.
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1 15. Defendant Aaron Ford is the Nevada Attorney General and, as the State’s chief law
2 enforcement officer, has the primary responsibility of enforcing SB 311.

3 16. Defendants, together and separately, have the requisite enforcement power to apply
4 the provisions of SB 311 to AFSA’s members.

5 **IV. RELEVANT BACKGROUND ABOUT SB 311**

6 17. June 1, 2019, Governor Sisolak signed SB 311 into law. The law is set to go into
7 effect on October 1, 2019. A true and correct copy of SB 311 is attached hereto as Exhibit A.

8 18. SB 311 was intended to fix the problem faced by a person who has no credit history
9 because he or she has been married and their spouse has handled the couple’s credit during the
10 marriage in such a way that the person’s spouse, but not the person, is the only one of the married
11 couple to have a credit history. As the statute’s sponsors explained:

In this case, the person may not be able to obtain credit, even though
the person contributed to the development of the couple’s credit
history, because the credit history is entirely in the spouse’s name.

The intent of this proposed conceptual amendment is to address this
problem by providing a new requirement that a creditor deem the
credit history of an applicant for credit to be identical to the credit
history of that person’s spouse under certain circumstances.

17 *Minutes Re: Proposed Conceptual Amendment for Senate Bill No. 311 (Proposed by Senator Parks,*
18 *Senator Harris, and Assemblywoman Tolles),* May 1, 2019, available at
19 [*https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/*](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/)

20 [*OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf*](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43261&fileDownloadName=0515SB311_work%20session.pdf)
21 . A true and correct copy of these minutes is attached hereto as Exhibit B.

22 19. As enacted into law, SB 311 provides a procedure by which an applicant for credit
23 may compel a creditor to deem the applicant’s credit history to be identical to that of the applicant’s
24 spouse during their marriage. Specifically, Section 3(1) of SB 311 provides as follows:

- If an applicant for credit:
- 26 (a) Has no credit history;
 - 27 (b) Was or is married;
 - 28 (c) Requests that the creditor deem the credit history of the
applicant to be identical to the credit history of the

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1 applicant’s spouse which was established during the
 2 marriage referenced in paragraph (b); and
 3 (d) If requested by the creditor, provides, with regard to the
 4 marriage referenced in paragraph (b), evidence of:
 5 (1) The existence of the marriage; and
 6 (2) The date of the marriage and, if applicable, the date
 7 the marriage ended,
 8 The creditor must deem the credit history of the applicant to be
 9 identical to the credit history of the applicant’s spouse which was
 10 established during the marriage referenced in paragraph (b).

11 20. The consequences of failing to comply with the foregoing section are severe. Section
 12 3(2) of the bill provides that “[v]iolation of this section by a creditor shall be deemed to be
 13 discrimination based on marital status.”

14 **V. SB 311 IS PREEMPTED, TRAMPLES PRIVACY RIGHTS, AND IS UNWORKABLE**
 15 **IN PRACTICE**

16 21. The Fair Credit Reporting Act (“FCRA”)¹ prohibits a creditor from accessing a
 17 consumer report unless the consumer provides consent or there is a permissible purpose to obtain
 18 the credit report. 15 U.S.C. § 1681b. The FCRA supplies a list of “permissible purposes” for which
 19 a consumer report may be issued, but the statute makes clear there is “no other” permissible purpose
 20 beyond those identified in statute. 15 U.S.C. § 1681b(a). SB 311, in contrast, necessarily requires
 21 creditors to violate the provisions the FCRA by forcing creditors to access and use a consumer
 22 report without a permissible purpose, and to do so even if the consumer—the applicant’s spouse or
 23 ex-spouse—has not provided consent.

24 22. Under the Equal Credit Opportunity Act (“ECOA”)² and its implementing
 25 regulation, Regulation B, creditors are generally prohibited from requesting information
 26 concerning the spouse or former spouse of an applicant. 12 C.F.R. § 1002.5(c)(1). In direct contrast,
 27 Section 3 of SB 311 *requires* creditors to obtain information about a non-applicant spouse or ex-
 28 spouse, solely based on the applicant’s request. There is no mention of obtaining the non-applicant
 spouse’s consent, nor even a requirement that they be notified.

¹ 15 U.S.C. §§ 1681–1681x.

² 15 U.S.C. §§ 1691–1691f.

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2 23. Section 3 of SB 311 requires creditors to invade longstanding privacy rights by not
3 only obtaining, but also disseminating, private financial information about an applicant's spouse or
4 former spouse without the spouse's knowledge or consent.

5 24. Section 3 is also hopelessly unworkable, and impossible to comply with in
6 practice—especially in the context of ex-spouses. One important illustration of that—though not
7 the only one—is how it operates in the context of ex-spouses. Credit reports are a snapshot of the
8 present moment in time. Even if a creditor had a way of legally obtaining a credit report for an ex-
9 spouse in order to comply with Section 3 (which it does not), the information in the credit report
10 would be accurate as to the ex-spouse as of the date the report is obtained; but it would *not* be
11 accurate as to the applicant seeking credit, since the report would reflect account activity
12 accumulated since the termination of the marriage. For example, the credit report might reflect
13 account closures, new account openings, negative and positive payment performance on old and
14 new accounts, and other information arising out of events that occurred after the termination of the
15 marriage. Also, the ex-spouse's credit score would be calculated based on information as of the
16 date of the credit report; and this would not necessarily be accurate as to the applicant spouse,
17 whose participation in the activities reflected in the credit report would have terminated with the
18 spousal relationship. There is no way for creditors to obtain from credit reporting agencies a credit
19 report and/or credit score back-dated to a particular date, such as the date of the termination of the
20 spousal relationship. Crucially, as a practical matter, this means that compliance with Section 3
21 would require creditors to make credit decisions based on information they *know* to be inaccurate
22 with regard to the applicant. In addition to these problems, the statute itself does not even define
23 what it means for a person to have “no credit history,” thereby leaving it open to question which
24 applicants are entitled to rights under Section 3 and which are not.

25 25. SB 311 violates longstanding privacy and data security rules and practices by
26 requiring creditors to invade a consumer's private information and disclose it to an applicant
27 without the consumer's knowledge or consent.

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VI. CAUSES OF ACTION

First Cause of Action—Declaratory Relief

26. Plaintiffs incorporate herein the allegations of the foregoing paragraphs as though fully set forth herein.

27. The Nevada Legislature has enacted SB 311 and Governor Sisolak has signed the legislation into law, set to take effect on October 1, 2019.

28. An actual and substantial controversy has arisen and now exists between plaintiffs and defendants relative to their respective rights and duties. Further, plaintiffs and defendants have adverse legal interests. Plaintiffs previously wrote to interim Commissioner Rickisha Hightower on behalf of their members in order to highlight the significant legal barriers, preemption issues, and other problems raised by SB 311’s enactment. Representatives of plaintiffs have also met in person with Hightower to discuss those concerns, and to request that enforcement of the law be stayed until SB 311 is amended or other guidance is issued that would eliminate the multiple legal barriers set forth in this complaint. To date, neither Hightower nor anyone else from the Department of Financial Institutions has agreed to stay enforcement of Section 3 of SB 311 or provide any guidance that would resolve the present controversy.

29. 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.

Second Cause of Action—Injunctive Relief

30. Plaintiffs incorporate herein the allegations of the foregoing paragraphs as though fully set forth herein.

31. Nevada’s regulation of the credit application and review process duplicates and contradicts federal law.

32. Defendants are empowered to enforce Section 3 of SB 311 unless enjoined by this Court. Plaintiffs’ members will thus be forced to choose between obeying SB 311 and foregoing

1 rights and obligations created under federal law, or alternatively, violating SB 311 at the risk of
2 severe penalties and monetary damage awards.

3 33. Plaintiffs and their members will be irreparably harmed if defendants are not
4 restrained from enforcing Section 3 of SB 311. Plaintiffs and their members have no adequate
5 remedy at law against the harm likely to be caused by enforcing Section 3 of SB 311.

6 34. Plaintiffs request that this Court immediately issue a preliminary injunction and
7 issue a permanent injunction after trial, restraining defendants from enforcing Section 3 of SB 311.

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VII. PRAYER

Wherefore, plaintiffs seek relief as follows:

1. For preliminary and permanent injunctions restraining the defendants from enforcing Section 3 of SB 311;
2. For a judicial declaration that Section 3 of SB 311 is preempted by federal law, invalid, and void;
3. For costs;
4. For such other and further relief as this Court deems just and proper.

Dated: October 1, 2019

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By: /s/ Alex L. Fugazzi

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