IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CONSUMER DATA INDUSTRY ASSOCIATION, *Plaintiff*, v. STATE OF TEXAS THROUGH KEN PAXTON, in his official capacity as ATTORNEY GENERAL OF THE STATE OF TEXAS, *Defendant*.	§ § § § § § § § §	No. 1:19-CV-00876-RP

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Consumer Data Industry Association ("Plaintiff") is a trade association that represents consumer credit reporting agencies. Plaintiff seeks injunctive and declaratory relief prohibiting the State of Texas from enforcing Section 20.05(a)(5) of the Texas Business & Commerce Code ("Section 20.05(a)(5)") on the grounds that it is preempted by the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. Dkt. 36 p. 12.

Defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(1) because this Court lacks jurisdiction to hear Plaintiff's claims due to issues of standing, ripeness, and sovereign immunity. Plaintiff's amended complaint fails to allege an Article III injury-in-fact that is both imminent and justiciable. *See* Dkt. 36. The Eleventh Amendment bars suit against both the State of Texas and the Attorney of General of Texas to the extent he is named as a party. Furthermore, the *Ex parte Young* exception is inappropriate here because the Attorney General of Texas lacks the requisite connection to the enforcement of Section 20.05(a)(5). Alternatively, should this Court determine it has subject-matter jurisdiction, Defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(6) because the FCRA does not preempt Section 20.05(a)(5).

LEGAL & FACTUAL BACKGROUND

I. The Fair Credit Reporting Act

The FCRA creates a uniform set of rules governing the rights and responsibilities of consumers, consumer reporting agencies, and furnishers of consumer information. 15 U.S.C. §§ 1681 *et seq*. One of the main purposes of the FCRA is to ensure "that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). The FCRA's general preemption clause makes clear that the FCRA does not preempt state consumer reporting laws, subject to specific exceptions. 15 U.S.C. § 1681t(a). *See infra*.

The exception to this general provision that Plaintiff invokes provides that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports[.]" 15 U.S.C. § 1681t(b)(1)(E). Section 1681c—titled "requirements relating to information contained in consumer reports"—establishes reporting periods and specifies certain information that must be included in and excluded from consumer reports provided by consumer reporting agencies. 15 U.S.C. § 1681c.

II. Texas Business and Commerce Code Chapter 20

Chapter 20 of the Texas Business and Commerce Code, entitled "Regulation of Consumer Credit Reporting Agencies," works alongside the FCRA to protect Texas consumers. Section 20.05 governs the circumstances under which "reporting of [consumer] information [is] prohibited." The Texas Legislature amended this section during the 2019 legislative session to add Section 20.05(a)(5)—the specific provision that Plaintiff challenges—which provides:

> Except as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to a collection account with a medical industry code, if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim.

TEX. BUS. & COM. CODE § 20.01(a)(5).

Subsection (b) provides exceptions to this prohibition if the information provided is in connection with a credit transaction or underwriting of life insurance for a face amount above $150,000, or employment of a consumer with an annual salary over $75,000. TEX. BUS. & COM. CODE § 20.05(b).

The Texas Business & Commerce Code provides that a consumer may sue to enforce an obligation of a consumer reporting agency as provided by the FCRA, and that such claims may be resolved through arbitration if all parties agree. *Id.* § 20.08(a). In addition, "[t]he attorney general may file a suit against a person for: (1) injunctive relief to prevent or restrain a violation of this chapter; or (2) a civil penalty in an amount not to exceed $2,000 for each violation of this chapter." TEX. BUS. & COM. CODE § 20.11(a).

III. Plaintiff's Allegations

Plaintiff argues that under 15 U.S.C. § 1681t(b)(1)(E) "any state law that attempts to regulate the content of consumer reports is preempted under the FCRA," and contends that Texas Business and Commerce Code § 20.05(a)(5) is one such law. Dkt. 36 ¶ 14. Plaintiff further asserts that "Plaintiff's members would have to make significant changes to their operations in order to come into compliance with the Texas Law." Dkt. 36 ¶ 20.

MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* When a court lacks statutory or constitutional power to adjudicate a case, the case must be dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015).

II. Arguments & Authorities

The Court lacks subject-matter jurisdiction for three reasons: (1) Plaintiff lacks standing; (2) Plaintiff's claims are unripe; (3) Plaintiff's claims are barred by Eleventh Amendment immunity.

1. Plaintiff lacks standing.

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant (causation); and (3) that is likely to be redressed by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three elements are "an indispensable part of the plaintiff's

case" and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

a. Plaintiff has not alleged that it (as an organization) has suffered an actual or imminent injury-in-fact.

An entity has standing to sue for an injury suffered by the organization itself—as opposed to an injury suffered by its members—if it satisfies the same well-known Article III requirements of injury in fact, causation, and redressability that apply to individuals. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 237 (5th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "[A]n organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources[.]'" *NAACP*, 626 F.3d at 237 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The injury in fact must be "concrete and demonstrable" and must constitute "far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp.*, 455 U.S. at 379. "[A]n organizational plaintiff must explain how the activities it undertakes in response to the defendant's conduct differ from its 'routine [] activities.'." *Def. Distributed v. United States Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018) (quoting *NAACP*, 626 F.3d at 238). Here, Plaintiff's First Amended Complaint does not make the requisite showing and thus does not demonstrate Plaintiff's standing to bring claims based an injury allegedly suffered by the organization itself.

b. Plaintiff has not alleged an actual or imminent injury in fact with respect to its members.

Plaintiff fails to allege an injury in fact on behalf of its members. An association has standing to bring a suit on behalf of its members when: (1) its members would otherwise have standing to

sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 129 F.3d 826, 827–28 (5th Cir. 1997)). The first prong of this test requires that Plaintiff plead injury, causation, and redressability with respect to its members. Here, Plaintiff cannot demonstrate that its members would have standing to sue in their own right and therefore cannot bring suit on their behalf.

Plaintiff alleges that its members "would have to make significant changes to their operations in order to come into compliance with Texas Law." Dkt. 36 ¶ 20. This allegation is the very sort of "generalized grievance" that does not amount to injury in fact. *E.g., Lujan*, 504 U.S. at 575. Hypothetical compliance does not meet the requirement that "'threatened injury must be certainly impending to constitute injury in fact.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (collecting cases); *see also Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."). And, significantly, Plaintiff's preemption challenge does not arise under the First Amendment, which would loosen the prudential limitations on standing and lighten Plaintiff's burden. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (discussing the First Amendment "concerns that justify a lessening of prudential limitations on standing"); *see also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) ("As the district court noted, '[t]he First

Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself.' ").[1]

In *Clapper*, human rights, labor, legal, and media organizations sued to enjoin a provision of the Foreign Intelligence Surveillance Act ("FISA") allowing government surveillance of communications with individuals outside the United States who were not "United States persons." 568 U.S. at 401. The plaintiffs claimed that they suffered "injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under [the FISA] at some point in the future." *Id.* at 401. But the Supreme Court rejected this notion, concluding that plaintiffs' "theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* (citing *Whitmore v. Arkansa*s, 495 U.S. 149, 158 (1990)).

The Court also found that the precautionary costs plaintiffs incurred did not establish standing because plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id*. at 416; *see also Zimmerman v. City of Austin, Tex.*, 881 F.3d 378, 390 (5th Cir. 2018) cert. denied (". . . while changing one's campaign plans or strategies in response to an allegedly injurious law can

[1] For example, in *EXI/Employee Sols., L.P. v. City of Dallas*, the case cited by this Honorable Court when determining that the proposed amendment was not futile, involved a pre-enforcement First Amendment challenge. Dkt. 35, 3 (citing *ESI/Employee Sols., L.P. v. City of Dallas*, 450 F. Supp.3d 700, 714 (E.D. Tex. 2020)). In *ESI/Employee Sols.*, the district court quoted and applied the standing analysis appropriate for a case under the First Amendment, involving conduct "affected with a constitutional interest, but proscribed by a statute." 450 F. Supp.3d at 714 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014)). Here, by contrast, Plaintiffs are not raising a First Amendment challenge and have not argued that their conduct is "affected with a constitutional interest."

itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law.").

Here, there are two potential mechanisms that Section 20.05(a)(5) could be enforced: by the Attorney General of Texas and by private parties. As for the former, just as the *Clapper* plaintiffs "ha[d] no actual knowledge of the Government's [FISA] targeting practices," Plaintiff has not alleged facts sufficient to create the reasonable inference that an enforcement action by the Attorney General is imminent or substantially likely and "can only speculate" that they might be subject to an enforcement action under Section 20.05(a)(5). *Id.* at 410–12. And as for the latter, the Attorney General has nothing to do with whether any individual pursues a private right of action against any Plaintiff member under Section 20.05(a)(5).[2] *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (holding that the plaintiffs lacked standing to challenge a statute that created a private civil cause of action by suing the Attorney General). As the Supreme Court ruled in *Clapper*, this Court should decline to find standing based on "a highly attenuated chain of possibilities." *Id.* at 410.

2. Plaintiff's claim is not ripe for review.

Plaintiff also has not demonstrated that their claim is ripe for adjudication. Under Article III of the Constitution, federal courts are confined to adjudicating "cases" and "controversies." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). "As a general rule, an actual controversy exists where "a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests." *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000)

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[2] Moreover, to the extent that Plaintiff asserts injury in connection with potential private causes of action, such injury is not traceable to the Attorney General, further defeating standing.

(citation omitted). "[I]n determining whether a justiciable controversy exists, a district court must take into account the likelihood that these contingencies will occur." *Id.* at 897.

Here, Plaintiff's claim that they may be subject to enforcement "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Tex. v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). Plaintiff references the Texas Attorney General's participation in a 31-state action—initiated in 2012 by Ohio Attorney General Mike DeWine—in which a number of CRAs voluntarily agreed to make consumer-friendly changes to their practices. Dkt. 36 p. ¶ 21-35. Plaintiff also identifies a 2017 lawsuit the Texas Attorney General filed against Equifax under Texas's Deceptive Trade Practices Act in connection with a data security breach. Dkt. 36 ¶35. But Plaintiff offers no basis for the Court to conclude that either of these matters involved Chapter 20 of the Texas Business and Commerce Code, let alone enforcement of § 20.05(A)(5). References to two unrelated enforcement actions is insufficient to establish a ripe dispute or that the threat of litigation "is specific and concrete." *See Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). Because Plaintiff has failed to allege a concrete, impending injury to a party, a dispute has not "matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).

3. The State of Texas and the Attorney General are entitled to Eleventh Amendment immunity from suit.

The Court also lacks subject-matter jurisdiction because Defendant enjoys Eleventh Amendment immunity from Plaintiff's claims. "The Eleventh Amendment strips courts of jurisdiction over claims against a state that has not consented to suit." *Pierce v. Hearne Indep. Sch. Dist.*, 600 F. App'x 194, 197 (5th Cir. 2015) (per curiam) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984)); U.S. CONST. amend. XI. "Federal courts are without

jurisdiction over suits against a state, a state agency, or a state official in his official capacity unless the State has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). Plaintiff's claims are barred by Eleventh Amendment immunity and, for the reasons set forth below, the *Ex parte Young* exception does not apply.

Ex parte Young is an exception to Eleventh Amendment immunity, which "rests on the premise—less delicately called a fiction—that when a federal court commands a state official to do nothing more than refrain from violating a federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). The Fifth Circuit recently provided guidance in the proper application of the *Ex parte Young* analysis in challenges to a state statute, such as in the instant case. *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019). When the state actor sued is "statutorily tasked with enforcing the challenged law," the court must determine both "whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" *and* "whether the official in question has a sufficient connection to the enforcement of the challenged act." *Id.*

In the *City of Austin* case, the Fifth Circuit held that the Texas Attorney General's prosecutorial authority is insufficient to fall within the *Ex parte Young* exception. 943 F.3d at 1002 (5th Cir. 2019); *see also Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) ("A general duty to enforce the law is insufficient for *Ex parte Young*."). Instead, to overcome Eleventh Amendment immunity, the plaintiff must show both that the Attorney General "has the authority to enforce" the challenged statue and that they are "likely to do [so] here." *City of Austin*, 943 F.3d at 1002. Enforcement has been defined "as typically involv[ing] compulsion or constraint."

Id. at 1000 (citation and quotation omitted).[3] While the Fifth Circuit has recognized that a specific threat can satisfy *Ex Parte Young*, it has only done so when the alleged threat "intimat[ed] that formal enforcement was on the horizon" based on a specific wrongdoer's conduct. *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392 (5th Cir. 2015).

Plaintiff's reference to two instances where the Attorney General has acted under statutes *other than* Section 20.05(A)(5) is not enough to establish that the Attorney General has the requisite enforcement authority and is "likely" to exercise that authority. Dkt. 36 at ¶¶ 21, 35. The Fifth Circuit already rejected Plaintiff's reasoning in a similar pre-enforcement challenge against the Attorney General. *See City of Austin*, 943 F.3d at 1002 ("[T]hat [the Attorney General] has chosen to intervene to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here."). Plaintiff has also not alleged that the Attorney General has issued statements "mak[ing] specific threat[s] or indicate[d] that enforcement was forthcoming." *See Texas Democratic Party*, 978 F.3d at 181 (holding that generalized statements by the Attorney General about the law that were not directed at the plaintiffs were insufficient to establish the "requisite connection to the challenged law" under *Ex parte Young*).

[3] The Fifth Circuit in *City of Austin v. Young* illustrated three examples of "specific enforcement actions" that invoked the *Ex Parte Young* exception. 943 F.3d at 999-1001. *See NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392 (5th Cir. 2015) (Letters sent by Attorney General to drug manufacturer threatening enforcement of the DTPA demonstrated his authority to enforce the statute and constraint of the manufacture's activities); *K.P. v. LeBlanc, 627 F.3d 115, 125* (5th Cir. 2010) (Board's role in determining whether a claim was statutorily excluded under the abortion statute and ultimately the board's decision whether to pay the claim demonstrated some enforcement authority of the challenged abortion statute); *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017) (State defendants' rate-setting authority and role in arbitrating fee disputes established a connection to the enforcement of the Texas Workers' Compensation Act).

In sum, the requirement that the named defendant have a connection to the challenged law "is designed to ensure [that the] defendant is not merely being sued 'as a representative of the state, and thereby attempting to make the state a party.'" *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 517 (5th Cir. 2017) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). Here, Plaintiff names "Defendant State of Texas through Attorney General Ken Paxton." Dkt. 36 ¶ 2. In other words, Plaintiff is suing the Attorney General as a representative of the State. This is exactly the type of action that the *Ex parte Young* exception does *not* authorize. Plaintiff's suit is barred by Eleventh Amendment immunity. *Pennhurst*, 465 U.S. at 102; *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974).

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. William*, 490 U.S. 319, 326 (1989) (citations omitted). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Id.* at 326–27. The issue under Rule 12(b)(6) is whether the Complaint alleges "enough facts to state a claim to relief that is plausible on its face," assuming that the allegations are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Notably, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555).

II. Arguments & Authorities

The foundation for the doctrine of preemption arises under the Constitution's Supremacy Clause, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the

Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Federal law preempts state law under the Supremacy Clause in three circumstances: (1) express preemption; (2) field preemption; and (3) conflict preemption. *E.g.*, *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016). Here, Plaintiff alleges that § 20.05(a)(5) "is expressly prohibited by the FCRA." Dkt. 36. ¶16. But because FCRA does not expressly preempt Section 20.05(a)(5) under the facts alleged, this case should be dismissed under Rule 12(b)(6). *See, e.g., Twombly*, 550 U.S. at 555.

1. Express preemption requires examination of the plain text of the FCRA.

Plaintiff's expansive interpretation of the FCRA's preemption clause conflicts with the plain language of the FCRA. When interpreting a preemption clause, courts first "must give effect to [its] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("Our analysis begins with the language of the statute.").

The Supreme Court has held that, "[w]hile the pre-emptive language" of an express preemption clause "means that we need not go beyond that language to determine whether Congress intended [] to pre-empt at least some state law, we must nonetheless 'identify the domain expressly pre-empted' by that language," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (citation omitted); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) ("our task is to identify the domain expressly pre-empted.")(citation omitted). "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

"Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Id.* A court's "analysis of the scope of the pre-emption statute must begin with its text," but "does not occur in a contextual vacuum," and is instead "informed by two presumptions about the nature of pre-emption." *Medtronic, Inc.*, 518 U.S. at 484-85 (citations omitted). "First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action," and "[s]econd, 'the purpose of Congress is the ultimate touch-stone' in every pre-emption case." *Id.* at 485 (citation omitted).

2. The plain text of 15 U.S.C. § 1681t(a) does not expressly preempt Texas Business & Commerce Code § 20.05(a)(5)

The plaint text of the FCRA's savings clause indicates Congress did not intend to generally preempt the entire field of consumer reporting state laws:

> Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C.A. § 1681t(a).
The exception Plaintiff relies upon contains a limited express preemption clause:

> "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports[.]"

15 U.S.C. § 1681t(b)(1)(E).

Plaintiff asserts that the "content of consumer reports" is preempted by section 1681t(b)(1)(E). Dkt. 36 ¶ 14. However, this conclusion would require the Court to assume

Congress preempted the entire field of consumer reports and disregard the FCRA's savings clause, section 1681c, and prevailing authority. Unlike field preemption, the inclusion of a preemption clause prompts examination of the language of the clause as discussed *supra*. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress pre-emptive intent.") *c.f. Arizona v. United States*, 567 U.S. 387, 401(2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

In this case, the prevailing authority requires analysis of whether state laws prohibiting the inclusion of certain types of medical debt fall within the "domain expressly pre-empted" by 1681t(b)(1)(E). *E.g.*, *Medtronic*, 518 U.S. at 484. Because section 1681t(b)(1)(E) defines the domain in terms of section 1681c, that section requires examination. Section 1681c mentions medical information contained in consumer reports in just two contexts. First, it provides that the identifying information of medical information furnishers must be excluded from most reports unless it is coded to avoid disclosing the nature of the provider and what was provided. 15 U.S.C. § 1681c(a)(6). Second, it provides that veterans' medical debts must be excluded from consumer reports in certain circumstances. 15 U.S.C. § 1681c(a)(7),(8). Given the plain meaning of section 1681c, the requirement to exclude this information is "the domain expressly preempted" by section 1681t(b)(1)(E). *E.g.*, *Lorillard Tobacco Co.*, 533 U.S. at 541. The presumption "that Congress does not cavalierly pre-empt state-law causes of action" underscores this result. *Medtronic*, 518 U.S. at 485.

The Supreme Court's rulings in *Altria Group v. Good* and *Dan's City Used Cars, Inc. v. Pelkey* demonstrate the application of express preemption clauses to specific state laws, and further support the result that section 20.05(a)(5) is not preempted. 555 U.S. 70; 569 U.S. 251, 261 (2013). *Altria* involved the Federal Cigarette Labeling and Advertising Act's express preemption provision: "[n]o requirement or prohibition *based on smoking and health* shall be imposed under State law *with respect to* the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." *Altria*, 555 U.S. at 78-79 (quoting 15 U.S.C. § 1334(b) (emphasis added)). The *Altria* plaintiffs sued cigarette manufacturers under Maine's unfair trade practices act, alleging that the manufacturers had falsely marketed "light" cigarettes as less harmful than regular cigarettes. *Id.* at 72. The manufacturers claimed that the Labeling Act's express preemption provision preempted the state statute, barring the state law claims. *Id.* at 80-88.

The question at issue was whether Maine's unfair trade practices act amounted to a state law "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes[.]" 15 U.S.C. § 1334(b). Giving this express preemption clause "a fair but narrow reading," the Court concluded that the claim was not preempted. *Altria*, 555 U.S. at 80 (citation omitted). The Court reasoned that the state law claim "alleged a violation of the manufacturers' duty not to deceive—a duty that is not 'based on' smoking and health." *Id.* at 81 (citation omitted). Thus, the state law claim was not preempted.

The Court in *Dan's City Used* Cars reviewed the interaction between New Hampshire's regulation of abandoned vehicles and the Federal Aviation and Administration Authorization Act's ("FAAAA") express preemption clause. 569 U.S. at 256. The examined clause prohibited

application of state laws "*related to* a price, route, or service of any motor carrier ... *with respect to* the transportation of property." *Id.* at 260 (citing 49 U.S.C. § 14501(c)(1) (emphasis added)). The Court cautioned that "the breadth of the words 'related to' does not mean the sky is the limit." *Id.* at 260. Additionally, the words "with respect to the transportation of property" in fact "massively limits the scope of preemption ordered by the FAAAA." *Id.* at 261. (quotation omitted) (citing *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)). "[F]or purposes of FAAAA preemption, it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id.* at 261 (citation omitted). The Court ultimately held that plaintiff's consumer-protection and common law claims seeking compensation for a car that was towed and sold without consent were not preempted by the FAAAA "because they are not 'related to' the service of a motor carrier 'with respect to' the transportation of property.'" *Id.* at 261.

Giving a "fair but narrow reading" to § 1681t(b)(1)(E)'s express preemption clause requires consideration of the *specific* "subject matter regulated under" section 1681c. *Altria*, 555 U.S. at 80; 15 U.S.C. § 1681t(b)(1)(E). The limiting language "with respect to" also supports a narrow examination of section 1681c. *Dan's City Used Cars,* 569 U.S. at 261.

Section 1681c only regulates medical information by prohibiting disclosure of identifying information from medical information providers unless coded to protect privacy, and certain veteran medical debts. 15 U.S.C. § 1681c(a)(6-8) Thus, it does not preempt Texas's broader law—section 20.05(a)(5)—which provides for the exclusion of medical debt information under circumstances not addressed by 15 U.S.C. § 1681c.

It is anticipated Plaintiff will attempt to urge the Court to stray from a narrow reading of the FCRA's preemption clause by citing *Consumer Data Indus. Ass'n v. Frey*.1:19-CV-00438-GZS, 2020 WL 5983881, at *7 (D. Me. Oct. 8, 2020) *appeal docketed*, No. 20-2064 (1st Cir. Nov. 10, 2020). This Court is not bound by a decision currently on appeal in the First Circuit. Additionally, this Court should refrain from relying on the *Frey* decision because it departs from prevailing precedent by foregoing careful examination of the plain text of the preemption clause. *E.g. See Dan's City Used Cars*, 569 U.S. at 260 ("we focus first on the statutory language . . . ").

In *Frey*, the District Court erroneously conducted a field preemption analysis and relied exclusively on the legislative history and amendments to the FCRA instead of analyzing the plain language of the FCRA's preemption clause. 2020 WL 5983881, at *8. In fact, the Maine court never clearly defined the scope of the preemption clause and instead focused on Congress's retitling of section 1681(c). *Id.*; *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (citing *United States v. Price* 361 U.S. 304, 313, (1960)) ("Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019)(citation omitted) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."). However, retitling of a subsection of a statute does not warrant the conclusion that the entire field of consumer reports has been preempted by Congress. *See DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (citation omitted) (finding preemption only when plaintiff demonstrates "complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress.'") Unlike the

Frey court, this Court should rely on existing precedent and analyze the plain language of the preemption clause. As set forth above, the language of section 1681c outlines the domain expressly preempted by section 1681t(b)(1)(E) of the FCRA—which does not preempt Texas's broader law, section 20.05(a).

3. The FRCA's structure supports a narrow construction of the FRCA's preemptive domain.

Consideration of FCRA provision—section 1681b(g)—also supports a narrow construction of the express preemption clause of the FCRA. This subsection, entitled "protection of medical information," imposes stricter requirements on consumer reports that contain medical information that are furnished for employment or credit purposes. Nevertheless, information about medical debts may still be included in such reports so long as it is coded so as not to identify the provider or what was provided, "as provided in section 1681c(a)(6)." 15 U.S.C. § 1681b(g)(1)(C). Since the main restrictions on including medical information in consumer reports are located not in section 1681c, which is the target of an express preemption clause, but in section 1681b(g), which is not such a target, it does not follow that Congress intended to expressly preempt Texas's limitation on disclosing this same information under other circumstances. *See, e.g., Medtronic*, 518 U.S. at 485 ("'the purpose of Congress is the ultimate touch-stone' in every pre-emption case.") (citation omitted).

CONCLUSION

For the forgoing reasons, this case should be dismissed.

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CERTIFICATE OF SERVICE

I certify that that on January 4, 2021 this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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