UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CONSUMER DATA INDUSTRY ASSOCIATION,	§	
***Plaintiff*,**	§	
	§	
v.	§	**No. 1:19-CV-00876-RP**
	§	
STATE OF TEXAS THROUGH KEN PAXTON,	§	
IN HIS OFFICIAL CAPACITY AS ATTORNEY	§	
GENERAL FOR THE STATE OF TEXAS,	§	
Defendant.	§	

CONSUMER DATA INDUSTRY ASSOCIATION'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Consumer Data Industry Association ("CDIA") submits the following Response to Defendant's Motion to Dismiss CDIA's Amended Complaint [Dkt. 41] ("Motion"):

INTRODUCTION

CDIA's Amended Complaint seeks a declaration that the most recent modification to the Texas Bus. & Com. Code Chapter 20 (Regulation of Credit Reporting Agencies), in particular § 20.05(a)(5) prohibiting the reporting of certain medical collection account information ("§ 20.02(a)(5)"), is preempted by the Fair Credit Reporting Act ("FCRA"). 15 U.S.C. §§ 1681 *et seq*. CDIA brings these claims on behalf of the more than 200 consumer credit reporting agencies ("CRAs") and other specialized CRAs operating in the United States. Its members include the three nationwide CRAs, Equifax, Experian, and Trans Union, as well as other CRAs that furnish information concerning Texas consumers to consumer report users who have "permissible purposes" under the FCRA to receive such information. 15 U.S.C. § 1681b. Each of these member CRAs would be required to comply with § 20.05(a)(5) prohibiting the inclusion of medical

collection account information if the law were not preempted by the FCRA.[1]

SUMMARY OF THE ARGUMENT

To the extent it has not already done so, this Court should find that CDIA's Amended Complaint demonstrates that its members have suffered or will suffer injury sufficient under Article III standing principles and the case should proceed. The allegations of the Amended Complaint make clear that members would either need to modify their products for compliance with § 20.05(a)(5) or, without such modification, violate § 20.05(a)(5) and be subject to enforcement by the Attorney General. This Court should also deny the Motion because the preemption claim, which is a pure question of law, is ripe for adjudication, contrary to the arguments of the Attorney General. Moreover, this Attorney General is not immune from this matter under the Eleventh Amendment. The *Ex parte Young* doctrine recognizes an exception to sovereign immunity for cases just like the instant case, namely where pure questions of law exist that would prevent harm being born by the plaintiff.

Finally, as this Court will see, Congress expressly provided for federal preemption of state laws that interfere with key provisions of the nationwide credit reporting system it established pursuant to the FCRA. *See* 15 U.S.C. § 1681t. Relevant here, the FCRA preempts state laws – like § 20.05(a)(5) – that attempt to regulate information CRAs include in consumer reports. The Medical Account Information that § 20.05(a)(5) prohibits is not only permitted under the FCRA, but has been determined by Congress to be relevant, reportable information, subject to certain

[1] Under this provision of Texas law, Medical Account Information means that which is prohibited from being reported by CRAs under § 20.05(a)(5), namely "collection account [information] 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."

limitations. As set out more fully below, this Court should deny Defendant's Motion to Dismiss, find that § 20.05(a)(5) is preempted, and enter an order enjoining enforcement.

STANDARD OF REVIEW

When standing is challenged on the pleadings under Fed. R. Civ. P. 12(b)(1), the court must accept as true all material allegations of the complaint and construe the complaint in the light most favorable to the plaintiff. *Association of Am. Physicians and Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Pennell v. City of San Jose,* 485 U.S. 1, 7 (1988)). Further, when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citations omitted).

ARGUMENT

I. CDIA Has Standing to Proceed in This Case.

First and foremost, in its Order granting leave for CDIA to file its Amended Complaint, the Court effectively recognized CDIA's standing and the ripeness of its claims. [Dkt. 35.] Specifically, the Court found:

> Having reviewed Consumer Data's proposed amended complaint, the Court finds that amendment is not futile. A plaintiff can establish standing under the Declaratory Judgment Act if it shows "actual present harm or a significant possibility of future harm"…"even though the injury-in-fact has not yet been completed." *Bauer v. Texas,* 341 F.3d 352, 357–58 (5th Cir. 2003) (internal citations removed). The Supreme Court has stated that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."

[Dkt. 35 at 3] (citation omitted).

This Court should now deny Defendant's Motion and find that CDIA has articulated sufficient injury to establish Article III standing to pursue its preemption claim.

A. This Court Considered the Merits of CDIA's Amended Complaint and Found That Amendment Was Not Futile Because CDIA Demonstrated Standing to Proceed.

This Court considered all of the arguments raised by the Attorney General in reviewing the merits of CDIA's Amended Complaint when it ruled on CDIA's Motion for Leave to Amend [Dkt. 29], together with CDIA's Objection to the Magistrate's Report and Recommendation [Dkt. 28]. The Attorney General opposed both pleadings, arguing that the magistrate judge did not err in finding that CDIA lacked standing, that CDIA's claims were unripe, and that leave to amend would be futile. Under principles of federal civil procedure, an amendment is futile if it would fail to survive a Rule 12(b)(6) motion. *Briggs v. Mississippi,* 331 F.3d 499, 508 (5th Cir. 2003). Therefore, courts in this circuit must "review the proposed amended complaint under 'the same standard of legal sufficiency as applies under Rule 12(b)(6).'" *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014) (quoting *Stripling v. Jordan Prod. Co., LLC,* 234 F.3d 863, 873 (5th Cir.2000)) (internal citation and quotation marks omitted).

In its Order entered November 17, 2020 [Dkt.35], this Court held that CDIA's Amended Complaint was not futile because it articulated:

> detail regarding the "compliance measures the businesses would have to undertake" to comply with the Texas law it argues is preempted by federal law. (Dkt. 29, at 4). Because Consumer Data alleges that its member organizations "will be required to make substantial changes to their business operations," the Court finds that the proposed amendment is not futile.

[Dkt. 35 at 3] (citations omitted). If amendment is not futile for the reasons described, logic follows, then CDIA's Amended Complaint is sufficiently detailed to survive a motion to dismiss. This Court should now deny the Motion and allow the parties to proceed with the case.

B. The Amended Complaint Sufficiently Articulates That CDIA Has Standing to Sue.

As an association, CDIA has standing to raise these claims on behalf of its member CRAs. An association has standing to pursue claims as a representative of its members if: (a) its members

would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) neither the claim nor the relief requested requires the participation of individual members of the association in the lawsuit. *Texas Med. Bd.*, 627 F.3d at 550 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The Attorney General incorrectly asserts that CDIA's members do not have standing to sue, arguing that the Amended Complaint alleges only mere "generalized grievances" not actionable in a court of equity, and has not alleged sufficient facts to "create the reasonable inference that an enforcement action by the Attorney General is imminent or substantially likely." [Dkt. 41 at 6, 8]. As described more fully below, CDIA's Amended Complaint appropriately details its members' standing, and thus CDIA's standing to pursue its claims on behalf of members.

To establish Article III standing, the plaintiff must establish "at an irreducible minimum an injury in fact; that is there must be some 'threatened or actual injury resulting from the putatively illegal action ... .'" *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975)) (internal citations omitted). "The requirement is met [where] the law is aimed directly at [the] plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *American Booksellers*, 484 U.S. at 394. The mere fact that a suit is filed before any enforcement is initiated does not mean a plaintiff lacks standing. The Court explained "[the] State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Id.* at 393.

The Supreme Court again reaffirmed this view of injury with respect to challenges to state laws in 2014:

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. *See Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"). Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158-59 (2014) (emphasis added) (citations omitted). CDIA's Amended Complaint articulates the same Hobson's Choice for its members: they either invest significant time and resources to change their core products offered in Texas to remove the Medical Account Information, or face yet another enforcement action from the Attorney General's office.

The Attorney General's argument regarding the alleged lack of specificity of CDIA's allegations ignores the specific allegations of the Amended Complaint [Dkt. 36], and the inferences that flow therefrom, including:

- CDIA members currently include Medical Account Information that Tex. Bus. & Com. Code § 20.05(a) now prohibits. (Am. Compl. ¶ 18.)
- Defendant has authority to enforce 20.05(a) and has not agreed that the Attorney General's office will not enforce § 20.05(a) against CDIA members. (Am. Compl. ¶ 7, 8.).[2]
- Absent a declaration that § 20.05 is preempted, CDIA members will be forced to make material changes to their day-to-day business operations to come into compliance with the Law, including changes to the products they currently provide in Texas. (Am. Compl. ¶¶ 10, 20, 28.)
- In short, CDIA members will not be able to sell reports containing information that they were permitted to sell before the law was enacted. Members that maintain Medical Account Information will have to undertake significant efforts and adopt various processes in order to: (i) identify any information that would be implicated by § 20.05(a); (ii) take steps to assure the removal of such data from their files, or otherwise prevent such data from being included in

[2] In fact, Defendant admits in its Motion that the Attorney General has the authority to enforce § 20.05(a). [Dkt. 41 at 8].

consumer reports provided in Texas (i.e. suppression of the data); and (iii) manage the collection of such information from furnishers in the future to prevent its appearance. (Am. Compl. ¶¶ 28, 34.)

- These remediation efforts require material investments of time and resources. Similar undertakings regarding other changes to the credit reporting system took the members years to complete. (Am. Compl. ¶¶ 30-33.) [3]

Thus, CDIA has alleged far more than a "generalized grievance" on behalf of its members and has standing to proceed here.

With respect to the Attorney General's argument that any enforcement action by the office is "too speculative," again, the argument ignores the allegations in the Amended Complaint, which detail multiple enforcement actions over the last five years initiated by the Attorney General's office against CDIA members related to their core credit reporting businesses. *See* Am. Compl. ¶¶ 22-34. In particular, the Amended Complaint highlights the multi-state enforcement action from 2015 brought by several Attorneys General, including the Texas Attorney General, against Experian, Equifax, and Trans Union (which are all CDIA member CRAs) related to their credit reporting activities *including, but not limited to, the inclusion of medical information contained in consumer reports*. *See* Am. Compl., Exhibit B; *see also* Ken Paxton, "Attorney General Paxton Announces $6 Million Settlement with Credit Reporting Agencies," News Release (May 28, 2015).[4] Further, the Attorney General's motion to dismiss acknowledges this authority to "file a

[3] These costs are not "precautionary costs" as suggested by the Attorney General. [Dkt. 41 at 7]. CDIA members are not "inflicting harm on themselves" in an effort to confer standing. These are real operational costs that the members face if they must modify their business to come into compliance with § 20.05(a)(5).

[4] Available at https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-6-million-settlement-credit-reporting-agencies. The three CRAs denied wrongdoing, but nonetheless agreed to implement certain changes to their credit reporting practices set forth in the National Consumer Assistance Plan ("NCAP"). *See* Am. Compl. ¶¶ 22-34. Unlike NCAP, which was a voluntary settlement by three CRAs, § 20.05(a)(5) applies to all CRAs furnishing reports in Texas. Moreover, the credit reporting changes agreed to by the three nationwide CRAs participating in NCAP are not the same as the changes that all CRAs that have Medical Account Information must make to comply with § 20.05(a)(5).

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." *See* [Dkt. 35 at 3] (citing Tex. Bus. & Com. Code § 20.11(a)).

The cases cited by the Attorney General in support of his argument that CDIA's members lack standing are neither controlling nor illustrative here. Relying on *Clapper v. Amnesty Int'l USA, et al*, 568 U.S. 398 (2013), the Attorney General argues that CDIA's member concerns over an enforcement action are merely speculative and insufficient to establish standing. *Clapper*, however, was brought by a group of individuals who were themselves *not even the target of pending or potential investigation by one or more federal investigatory agencies.* *Id.* at 405. Instead, the plaintiffs (attorneys, human rights, and media organizations) were individuals who feared that "there [was] an objectively reasonable likelihood that their communications [would] be acquired under [the law permitting the recording of overseas communications] at some point in the future" because their sources were "likely targets of surveillance" under the law. *Id.* at 406.[5] Such attenuated speculation was deemed insufficient to establish standing under Article III. In contrast, it is undisputed that CDIA members are the very persons subject to enforcement by this Attorney General for suspected violations of Texas law, including § 20.05(a)(5). This is sufficient to establish threatened injury. *American Booksellers*, 484 U.S. at 394. The Attorney General's Motion must be denied.

[5] Similarly, Defendant's reliance on *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) is misplaced. *Munson Co.* considered whether a third party who demonstrated standing, but who was not directly injured by the offending statute, could bring a claim on behalf of another person who would be directly impacted, recognizing the doctrine of *jus tertii* standing. *Id.* at 956. As the Court explained, "[in] addition to the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear." *Id.* at 955-56 (emphasis added). Associational standing, pursuant to *Warth v. Seldin*, 422 U.S. 490, 512 (1977), on which CDIA relies, was not addressed.

II. CDIA's Claim Is Ripe for Judicial Review.

CDIA's claim is also ripe for judicial review. Ripeness "deals with the time, if any, at which a party may seek pre-enforcement review of a statute or regulation." *Triple G Landfills, Inc. v. Board of Comm'rs*, 977 F.2d 287, 288 (7th Cir. 1993) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)). "It seeks to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute's application are not certain." *Id*. at 288-89 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (abrogated on other grounds)).

Abbott Labs. established a two-part standard for determining the ripeness of a claim: "first, whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development; and second, whether the parties would suffer any hardship by the postponement of judicial action." *Triple G Landfills*, 977 F.2d at 289. The Fifth Circuit has adopted this two-part test, noting that:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." **A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.**

Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 895 (5th Cir. 2000) (quoting *Abbott Labs., supra)* (emphasis added).

Pure questions of law satisfy the first prong of the *Abbott Labs*. ripeness test. *Abbott Labs.*, 387 U.S. at 148; *see also Triple G Landfills*, 977 F.2d at 289 (where the Seventh Circuit explained that the first prong of the ripeness test is satisfied where the lawsuit "mounts a facial attack upon the validity of the [law] itself, not a challenge to a particular administrative decision reached thereunder. The issues posed are purely legal ... and would not be clarified by administrative

proceedings or any other type of factual development.").

As to the second factor of the ripeness test (i.e., the hardship borne by the plaintiff), the *Abbott Labs.* Court explained:

> …this is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. **These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the declaratory judgment act to ameliorate.** As the District Court found on the basis of uncontested allegations '**Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.'**

387 U.S. at 152 (emphasis added). In finding a sufficiently ripe claim, the Court explained the difficult choice left to the petitioners: costly investment to come into compliance with a rule that "they believe in good faith meets statutory requirements, but which clearly does not meet the regulation of the Commissioner" or risk "serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs." *Id*. at 152-53.

The issue before this Court is whether the FCRA preempts § 20.05(a)(5), a pure question of law that is ripe for review. Notably, CDIA is procedurally in the same posture as the *Abbott Labs.* plaintiffs; namely, suit was initiated after the law took effect, but before enforcement. Considering the second prong – the hardship suffered by the plaintiff – CDIA members are again similarly situated as the *Abbott Labs.* plaintiffs; again, facing the same Hobson's Choice: incur significant time and expense to change their products in order to comply with the law or wait for an enforcement action. The issue is ripe, and this Court should deny the Motion.

III. The Attorney General Is Subject to Suit Under the *Ex parte Young* Exception to Sovereign Immunity.

Although the Attorney General argues that the Eleventh Amendment to the Constitution

protects him from suit, the Supreme Court has long recognized the right of a person to sue a state actor who is charged with enforcement of a state law that the person alleges to be preempted by federal law. *See, e.g., Verizon Maryland, Inc. v. PSC*, 535 U.S. 635 (2002); *Pacific Gas and Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983). Known as the *Ex parte Young* exception, this principle "permits suits for prospective ... relief against state officials acting in violation of federal law" when the plaintiff: (1) names the individual state officials as defendants in their official capacities; (2) "allege[s] an ongoing violation of federal law," and (3) seeks relief "properly characterized as prospective." *Green Valley Special Util. Dist. v. City of Schertz*, 2020 WL 4557844, *6 (5th Cir. Aug. 7, 2020) (citations omitted). The reviewing court should "conduct a simple, 'straightforward inquiry'" but "not consider the merits of the underlying claims." *Id.* (citations omitted).

Applying this test, courts have allowed challenges to laws or regulations to be brought against the state official charged with their enforcement. *See Verizon Maryland*, 535 U.S. at 647-648 (Supreme Court held that a claim for declaratory and injunctive relief from an order of Maryland's Public Service Commission regarding the payment of certain fees on the basis that it violated the Telecommunications Act of 1996 satisfied the *Ex parte Young* exception, and that sovereign immunity did not bar the federal preemption claim); *see also Green Valley*, 2020 WL 4557844 at *8 (finding *Verizon Maryland* "instructive," and holding that where a plaintiff's complaint seeks injunctive relief to enjoin state officials from prospectively enforcing a state law that is preempted by federal law, the "straightforward inquiry" required by *Verizon Maryland* is satisfied, and the *Ex parte Young* exception applies). Here, it is undisputed that the Attorney General is charged with enforcement of § 20.02(a)(5).

The *City of Austin v. Paxton* case, relied on by the Attorney General, does not change the

outcome here. *See* 943 F.3d 993 (5th Cir. 2019). There, the City of Austin challenged a Texas state law that it claimed interfered with its local ordinance, which had been purportedly adopted consistent with federal law. *Id.* In attempting to demonstrate a likelihood of enforcement, the City of Austin cited to cases where the Attorney General had *intervened* in cases involving other ordinances enforced by municipalities – none of which had any "overlapping facts with [the City's] case or [were] even remotely related to the Ordinance [at issue]." *Id.* at 1001. Thus, the fact that the Attorney General had chosen to intervene in other, wholly unrelated matters as against other persons could not be said to bear at all on whether the Attorney General was likely to take any action with respect to the City of Austin's Ordinance. *Id.* Differentiating the case from those where injunctive relief was necessary to provide relief to parties who were required to come into compliance with law, such as the plaintiffs in *NiGen Biotech, LLC v. Paxton*,[6] the Fifth Circuit also noted that the City of Austin would suffer no harm absent court intervention. *Id.* ("the City of Austin 'faces no consequences if it attempts to enforce its Ordinance.'"). In sum, the Fifth Circuit explained that the *Ex parte Young* standard only "requires some scintilla of 'enforcement' by the relevant state official with respect to the challenged law." *Id*. at 1002.

There is more than a "scintilla of enforcement" by this Attorney General with respect to CDIA member CRAs' credit reporting activities. Under express provisions of Texas law, a violation of the Texas credit reporting laws, including § 20.05(a), is deemed "a false, misleading, or deceptive act or practice" in violation of Texas Deceptive Trade Practices Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code §§ 17.41 *et seq.* *See* Tex. Bus. & Com. Code § 20.12. Unlike the *City of Austin* case, which involved a question of whether the Attorney General would

[6] 804 F.3d 389, 398 (5th Cir. 2015) (where plaintiff required a legal determination as to whether federal law preempted state law in order to structure and operate its business) ("…if NiGen succeeds in enjoining the AG's conduct…NiGen could again conduct business as usual.").

choose to *intervene* in an action brought by the City, here it is the Attorney General who is charged with the responsibility of enforcing the challenged law. Tex. Bus. & Com. Code § 20.11.

Further, although the Attorney General argues that his office to date has not sued any CRA for a violation of the Texas credit reporting law (which includes § 20.05(a)(5)), the Attorney General does not contend that his office will *never* sue under this law in the future. Further, the Attorney General has brought cases against credit reporting companies, including cases under the state's DTPA law and a case involving medical credit reporting issues under the *federal* FCRA. The pattern of enforcement alleged in the Amended Complaint demonstrates more than a "scintilla" of the risk of enforcement of this particular law, and the *Ex parte Young* exception applies. This Court should deny the Motion.

IV. Amended Complaint States a Claim that Federal Law Preempts § 20.05(a)(5) of the Texas Business & Commercial Code.

The Attorney General additionally moves to dismiss under Rule 12(b)(6), arguing that CDIA has failed to state a claim because the FCRA does not preempt § 20.05(a)(5) as a matter of law. Although CDIA agrees that this case involves a pure question of law, namely, whether the FCRA preempts § 20.05(a)(5), the correct result, dictated by the language of the statute, legal precedent, and legislative history, is that § 20.05(a)(5) is preempted by the FCRA, and CDIA is entitled to judgment in its favor.

"[P]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. TWA*, 504 U.S. 374, 383 (1992). "The question, at bottom, is one of statutory intent, and we accordingly "'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Id.* (citations omitted).

The FCRA reflects a careful Congressional balancing of the "needs of commerce" and the "efficiency of the banking system" to ensure a "fair and accurate credit reporting" system with the need to protect the privacy interests of consumers related to the information about them provided by CRAs. *See* 15 U.S.C. § 1681. To assure the continued balance of all of these interests, Congress chose to preempt numerous state laws that might be disruptive to this national system. 15 U.S.C. §§ 1681t(b) and (c).

The FCRA provides for multiple forms of preemption of state law under 15 U.S.C. § 1681t. First, § 1681t(a) preempts any state law that is "inconsistent with any provision" of the FCRA. This "conflict preemption" rule codifies the longstanding approach to conflict preemption taken by the courts, in which state law is preempted when there is outright or actual conflict between federal and state law, or where compliance with both federal and state law is impossible. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

Further, with respect to state laws attempting to regulate the *contents* of consumer reports, such as section 20.02(a)(5), Congress expressly provided for a broad form of preemption. FCRA § 1681t(b)(1) expressly provides that "no requirement or prohibition may be imposed under the laws of any state *with respect to any subject matter*" specified in the enumerated subsections of FCRA § 1681t(b)(1). Relevant here, the FCRA mandates that:

> No requirement or prohibition may be imposed under the laws of any State -
> (1). with respect to any subject matter regulated under . . .
> (E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996[.]

15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

Congress has expressly considered, and already spoken on, the questions of whether, when, and what types of medical debt information may be included in consumer reports. In

exercising its judgment, Congress expressly chose to prohibit only *certain types of information related to consumer medical debt* from being reported and permitted the remainder to be included in consumer reports. There are two relevant provisions. First, under FCRA § 1681c(a)(6), a CRA may not include in a consumer report:

> The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless –
>
> (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or
>
> (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

The second key FCRA provision relating to medical information in consumer reports was added by Congress recently as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act, resulting in the adoption of § 1681c(a)(8). FCRA § 1681c(a)(8) prohibits the nationwide CRAs (all three of which are members of CDIA) from reporting:

> any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

Thus, Congress has considered more than once the question of whether and what types of medical information may be restricted from consumer reports, choosing only to prohibit very specific information, and enumerating those restrictions in § 1681c. Taking together the clear Congressional intent that the content of consumer report information must be free from state interference, as evidenced by § 1681t(b)(1)(E), and the specific Congressional directives addressing certain medical information debt in § 1681c, it is clear that § 20.05(a)(5) is preempted by the FCRA. Section 20.05(a)(5) of the Texas law and § 1681c of the FCRA clearly concern the

same "subject matter." The section into which the Texas legislature placed § 20.05(a)(5) is titled "Reporting of Information Prohibited," and § 20.05(a)(5) adds an additional category of prohibited information, Medical Account Information, that a CRA is prohibited from including in consumer reports in Texas.

In response to a challenge filed by CDIA to a similar state statute enacted in Maine, the Maine district court recently considered the applicability of the FCRA subject matter preemption provision to Maine's newly enacted laws that attempted to prevent the reporting of medical account and other information in consumer reports in Maine.[7] *See Consumer Data Industry Ass'n v. Frey*, 1:19-CV-00438-GZS, 2020 WL 5983881 (D. Me. Oct. 8, 2020) (appended hereto as Exhibit A). After a thorough analysis of the statutory language and relevant case law, the court determined that the Maine medical information law was preempted. In his brief, the Attorney General preemptively argues that this Court should not find the analysis in *Frey* persuasive, claiming that the decision "departs from prevailing precedent by foregoing careful examination of the plain text of the preemption clause." Motion, p. 18. Respectfully, a review of the court's decision demonstrates that nothing could be further from the truth.

The District Court of Maine carefully studied the evolution of the FCRA text in great detail, discussed principles of federal preemption, and considered how broadly to interpret §1681t(b). *Frey*, 2020 WL 5983881. Ultimately, the court found that the result of the 1996 Amendments to the FCRA, was that "§ 1681t(b)(1) now presents a list of eleven 'subject matter[s]' 'regulated under' other sections of the FCRA that are reserved to the federal

[7] Maine's Medical Bill Act attempted to exclude the reporting of unpaid medical accounts that were less than 180 days old, and any medical accounts that had previously been reported as delinquent but were later paid. 10 M.R.S.A. § 1310-H(4). It also attempted to dictate how accounts on which payments were being made should be reported. *Id.*

government." *Id.* * 8. Considering the changes to the FCRA preemption provisions, together with the re-titling of § 1681c, the court explained:

> Section 1681c was retitled "Requirements *relating to information contained in consumer reports*" (emphasis added), and § 1681c(a) was retitled "Information excluded from consumer reports." Via these retitlings, Congress appears to have deliberately clarified the subject matters encompassed by § 1681c(a) and each of its subsections in order to coordinate its operation with § 1681t. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("Congress may indicate pre-emptive intent through a statute's ... structure and purpose."). In the Court's reading, the amended language and structure of § 1681c(a) and § 1681t(b) **reflect an affirmative choice by Congress to set "uniform federal standards" regarding the information contained in consumer credit reports.**

Id. (emphasis added). The court concluded "[b]y seeking to exclude additional types of information, the Maine Amendments intrude upon a subject matter that Congress has recently sought to expressly preempt from state regulation." *Id.* * 13-14.

Moreover, it is clear from its choice of statutory language that Congress intended §1681t(b)(1) to have broad effect on state laws. In every subsection of 1681t(b)(1) where Congress chose to preempt a specific subject matter, it identified the section or subsection of the FCRA by number, used the phrase "relating to," and named the subject matter to be preempted (i.e., "[n]o requirement or prohibition may be imposed under the laws of any State … (1) *with respect to* any subject matter regulated under … (E) section 605 [§ 1681c], *relating to* information contained in consumer reports …") (emphasis added). As discussed below, both "relating to" and "with respect to" are construed broadly.

In examining the phrase "related to" in the context of federal preemption of state law, the Supreme Court found the phrase to have a "broad scope," and "an expansive sweep," noting it is "deliberately expansive," "broadly worded," and "conspicuous for its breadth." *Morales v. TWA*, 504 U.S. 374, 383-384 (1992) (internal citations omitted). In that case, the Court determined the scope of the Airline Deregulation Act's ("ADA") preemption provision by first looking to the

ordinary meaning of the phrase "relating to," stating:

> **The ordinary meaning of these words is a broad one**—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—**and the words thus express a broad pre-emptive purpose**.

Id. (emphasis added). The Court found that the language of § 1305(a)(1) of the ADA expressly preempts the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier ... ." *Morales*, 504 U.S. at 383. The Supreme Court held that state laws "**having a connection with or reference to**" the protected subject matters (rates, routes, or services) were preempted. *Id.* at 384 (emphasis added).

The Supreme Court reiterated the broad scope and effect of the phrase "related to" in 2008 when it held that the federal law regarding the de-regulation of the trucking industry preempted two provisions of Maine's tobacco laws, which attempted to regulate the delivery of tobacco to consumers within the state. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008).[8] Commenting on the use of the phrase "related to," the Supreme Court stated

> Congress similarly sought to pre-empt state trucking regulation. ... In doing so, it borrowed language from the Airline Deregulation Act of 1978 and wrote into its 1994 law language that says: "[A] State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); see also § 41713(b)(4)(A) (similar provision for combined motor-air carriers) ...

Id. at 368 (emphasis added). As the Supreme Court explained "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well."

[8] In holding Maine's tobacco laws to be preempted, the *Rowe* court found that the "Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands …" *Id.* at 372.

Id. at 994. The *Rowe* court went on to explain that *Morales* stands for the following propositions:

> that "[s]tate enforcement actions *having a connection with, or reference to,"* [the subject matters referenced] are pre-empted," …; (2) that such pre-emption may occur even if a state law's effect on [the subject matter] "is only indirect," …; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation, …; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' [substantive] and pre-emption-related objectives . . .

Id. at 995 (emphasis in original) (internal citations omitted).

The phrase "with respect to" has been held to have the same meaning as "relating to" in the context of analyzing the scope of the preemptive effect of the FCRA's statutory language. *Galper v. JP Morgan Chase*, 802 F.3d 437 (2d Cir. 2015). In *Galper,* the plaintiff alleged he was victimized by a Chase employee who opened an account in his name and sued to hold the bank liable. Construing the phrase "with respect to" from § 1681t(b)(1) "narrowly but fairly," the Second Circuit held the phrase meant the same as "relating to," relying on the Supreme Court's preemption analysis in *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260-261 (2013) (which analysis relied on the preemption principles in *Morales* and *Rowe, supra*). In the end, the Second Circuit held that § 1681t(b)(1)(F) preempts "those claims that *concern* a furnisher's responsibilities" including the state law at issue. *Galper*, 802 F.3d at 446.

When it enacted the relevant preemption provision here in the 1996 Amendments to the FCRA, Congress again borrowed the "relating to" language as well as the "with respect to" language from prior legislation. Several courts have thus construed § 1681t(b)(1) to have broad preemptive effect over state laws that attempt to regulate that which Congress reserved to the FCRA.[9] For example, the Seventh Circuit specifically declined to construe § 1681t(b) preemption

[9] *See Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45 (2d Cir. 2011) (citing *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011)); *Pinson v. Equifax Credit Info. Services, Inc.*, 316 Fed. Appx. 744 (10th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C.

narrowly, finding claims against a furnisher of information preempted by §1681t(b)(1)(F). *Aleshire v. Harris*, 586 Fed. Appx. 668, 671 (7th Cir. 2013) ("… we recently rejected the argument that section 1681t(b) should be read narrowly to apply only to state statutory claims, and we held that § 1681t(b)'s preemptive force applies equally to state common law claims"). *See also Ross v. FDIC*, 625 F. 3d 808 (4th Cir. 2010) (finding plaintiff's common law claim regarding inaccurate reporting of her account information "runs into the teeth" of §1681t(b)(1)(F) and was "squarely preempted" "[b]ecause Ross's [state law] claim seeks to use § 75-1.1 as a 'requirement or prohibition' under North Carolina law concerning 'subject matter regulated under § 1681s-2' ..."). [10]

As explained above, the FCRA expressly preempts any state law that attempts to prohibit or restrict the subject matter of § 1681c, namely, the content of consumer reports. Because the subject matter of §1681c is the content of consumer reports, any state law that seeks to govern the content of consumer reports is preempted, including § 20.05(a)(5). *See, e.g., Simon v. DirecTV, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010) (finding that the FCRA preempted Colorado law that concerned the same subject matter as

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§1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 Fed. Appx. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. § 1681t(b)(1)(F)); *Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding claims related to inaccurate furnishing of data preempted by 1681t(b)(1)(F) stating "[the] extra federal remedy in §1681s-2 was accompanied by extra preemption in §1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges.") (relying on *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009)).

[10] The Fourth Circuit explained: "As originally enacted, the FCRA generally permitted state regulation of the consumer reporting industry. With but few exceptions, the original preemption provision, §1681(t)(a), preempted state laws only to the extent ... are inconsistent with any provision of [the FCRA] ... . [Congress later] added a strong preemption provision, 15 U.S.C. § 1681t(b), to this comprehensive legislative framework. The purpose of this new subsection was, in part, to avoid a "patchwork system of conflicting regulations." *Id.* at 812-13.

§ 1681c, namely, "the type of information that can be legally disclosed in consumer reports"). Because it attempts to regulate the content of consumer reports, which Congress expressly reserved to federal regulation, § 20.05(a)(5) is preempted by FCRA § 1681t(b)(1)(E).

CONCLUSION

For the foregoing reasons, CDIA respectfully requests that this Court find CDIA has standing to bring this action, that its claims are ripe, and enter an order denying the Defendant's Motion to Dismiss, for other such relief as the Court deems just.

February 2, 2021

Respectfully submitted,

/s/ Rebecca E. Kuehn
Edward D. Burbach
Texas State Bar No. 03355250
Nanette K. Beaird
Texas State Bar No. 01949800
Foley & Lardner LLP
3000 One American Center
600 Congress Avenue
Austin, TX 78701
Phone: (512) 542-7070
Facsimile: (512) 542-7100
eburbach@foley.com

Rebecca E. Kuehn
Admitted Pro Hac Vice
Hudson Cook LLP
1909 K Street NW
4th Floor
Washington, DC 20006
Phone: (202) 715-2008
Facsimile: (202) 223-6935
rkuehn@hudco.com

Attorneys for Plaintiff
Consumer Data Industry Association

CERTIFICATE OF SERVICE

I certify that that on February 2, 2021, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel.

/s/ Rebecca E. Kuehn

Rebecca E. Kuehn