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

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

**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

Defendant respectfully submits this reply in support of its pending Motion to Dismiss Plaintiff's Amended Complaint, Dkt. 41.

## I. ARGUMENTS AND AUTHORITIES

### A. Plaintiff cannot establish this Court's jurisdiction.

#### 1. Plaintiff's pre-enforcement injury does not satisfy Article III standing.

Plaintiff's fear of future enforcement does not satisfy the injury-in-fact standard because Plaintiff's contention that its members "would have to make significant changes to their operations in order to come into compliance with Texas Law" is based on pure speculation as to whether the Attorney General will enforce section 20.05(a)(5). Dkt. 36, ¶ 20. Moreover, Plaintiff's Response fails to acknowledge that the pre-enforcement injury standard upon which Plaintiff relies is predicated on First Amendment jurisprudence employing a unique and inapplicable standard. Dkt. 44, pp. 4-8; *see 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.' ").

First, Plaintiff cites *American Booksellers* for the proposition that an injury-in-fact is alleged when "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988), sub nom. *Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988); Dkt. 44, p. 5. However, the Supreme Court acknowledged in the context of a pre-enforcement suit where First Amendment rights are concerned—unlike under other circumstances—"the alleged danger . . . is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers*, 484 U.S. at 393. This suit is not predicated upon First Amendment rights—not Plaintiff's and not those of any nonparty.

Plaintiff's reliance upon *Susan B. Anthony (SBA) List v. Driehaus* is similarly misplaced, as that case also arose in the unique First Amendment context. Dkt. 44, p. 6 (citing 573 U.S. 149 (2014)). The Court in *SBA List* set out the standard to establish Article III standing to bring such pre-enforcement challenges: "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." *SBA List*, 573 U.S. at 159 (citation omitted) (cleaned up). The Court here also noted the uniqueness of the First Amendment context, stating, "[b]ecause [plaintiffs'] intended future conduct concerns political speech, it is certainly 'affected with a constitutional interest.'" *Id.* at 162 (quoting *Babbitt v. United Farm Workers*, 442 U.S. at 298; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office")).

The *SBA List* Court ultimately found that "the threat of future enforcement of the false statement statute [wa]s substantial" given that there was "a history of past enforcement" of the law at issue: by state regulators, against plaintiff SBA List, in connection with the *same* statements plaintiffs specifically alleged they wished to make in the future—*and* because the law also imposed criminal penalties. 573 U.S. at 164. The Court did not decide that the threat of regulatory enforcement "standing alone gives rise to an Article III injury." *Id.* at 166. Instead, noting that "[t]he burdensome [state regulatory] proceedings here are backed by the additional threat of criminal prosecution," the Court "conclude[d] that the combination of those two threats suffices to create an Article III injury under the circumstances of this case." *Id.*

In support of its argument that the threat of future enforcement is sufficient to support a finding of injury-in-fact, Plaintiff cites a multi-state settlement agreement from 2015—before Texas Business and Commerce Code 20.05(a)(5) was enacted. Dkt. 44, p. 7. Plaintiff admits that "the credit reporting changes agreed to by the three nationwide CRAs participating in the 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)." Dkt. 44, p. 7 n. 4. The cited settlement agreement is not comparable to the past enforcement actions alleged in *SBA List* because there is no constitutional interest at stake, no criminal penalties looming, and no past enforcement actions alleged by Plaintiff that involve Business and Commerce Code Chapter 20 or Business and Commerce Code section 20.05(a)(5).

Plaintiff's alleged pre-enforcement injury is not sufficient to satisfy Article III because the injury is not predicated on a constitutional interest nor based on a "credible threat" of enforcement. *SBA List v. Driehaus*, 573 U.S. at 159.

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

Plaintiff's Response does not establish that its claim has "matured sufficiently to warrant judicial intervention" because Plaintiff's injury is premised on a fear of enforcement that has not yet materialized. *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). The authority Plaintiff cites to support its contention that its claim is sufficiently ripe are not persuasive. First, *Triple G Landfills, Inc. v. Board of Commissioners*—is unhelpful because it is an out-of-circuit case and is therefore not controlling on this Court. Dkt. 44, p. 9-10 (citing 977 F.2d 287, 288 (7th Cir. 1993)). Next, Plaintiff relies on *Abbott Labs v. Gardner* and contends its claim is ripe because its members face the same decision as the *Abbot Labs* plaintiffs. Dkt. 44, p. 9-10 (citing 387 U.S. 136, 148 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977)). However, *Abbott Labs* is not analogous because the *Abbott Labs* plaintiffs challenged an administrative agency's "purport[edly] . . . authoritative interpretation of a statutory provision," which imposed greater requirements than the plaintiffs "in good faith" believed were necessary to "meet[] statutory requirements." *Id.* at 152-53. *Abbott Labs* did not involve a case like this, where an official "has the authority to enforce" a challenged statue, but has not construed, administered, interpreted, or enforced it as to the plaintiff. *Cf. City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) ("that [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.")

As the Fifth Circuit articulated in *Orix Credit All., Inc. v. Wolf*, the ripeness inquiry for an injury that is predicated on threat of litigation "'focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention.'" 212 F.3d 891, 897 (5th Cir. 2000) (citing *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

Here, Plaintiff fails to articulate that enforcement of *other* laws demonstrates that enforcement of the challenged statute is likely to happen here.

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

Plaintiff's bare assertion that the Attorney General's "responsibility of enforcing the challenged law" invokes *Ex Parte Young*—fails to consider the second step of the inquiry—whether the Attorney General has sufficient connection to the enforcement of section 20.05(a)(5). Dkt. 44, p. 13; *see 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*.").

Plaintiff's conclusion that the *Ex Parte Young* "standard" can be summed up by a showing of "'some scintilla of 'enforcement' by the relevant state official with respect to the challenged law'" ignores *any* analysis of whether the Attorney General has shown sufficient connection to enforcement via "compulsion or constraint." Dkt. 44, p. 12 citing *City of Austin*, 943 F.3d 993, 1002. 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." *Id.* at 1002. Plaintiff's Response fails to identify any alleged threat that "intimat[ed] that formal enforcement was on the horizon" based on the Attorney General's conduct. *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392 (5th Cir. 2015). Instead, Plaintiff continues to rely on two instances where the Attorney General has acted under statutes *other than* Section 20.05(A)(5). Plaintiff cites to no authority that establishes enforcement of *other statutes* can satisfy the requisite connection to the challenged law. Dkt. 44, pp. 10-13. *Ex parte Young* is not applicable here because Plaintiff has not demonstrated that the Attorney General is likely to enforce section 20.05(A)(5).

**B. Section 20.05(a)(5) of the Texas Business and Commerce Code is not preempted by the Fair Credit and Reporting Act**

Plaintiff's contention that the FCRA preempts the entire field of "the content of consumer report information" ignores the plain language of the statute and prior precedent. Dkt. 44, p. 15. *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).

First Plaintiff claims section 1681t is a "'conflict preemption' rule." *Id.* "[C]onflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citing *California v. ARC America Corp.,* 490 U.S. 93, 100 (1989)). However, this interpretation of section 1681t(a) is based on Plaintiff's paraphrasing of the clause. Dkt. 44, p. 14. The FRCA savings clause, section 1681t(a), acknowledges Congress did not intend the FRCA to preempt *all* state regulation "with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft." 15 U.S.C. §1681t(a) Instead only "[t]hose laws are *inconsistent* with any provision of this subchapter, and then *only to the extent of the inconsistency*" are preempted by the FCRA. Business and Commerce Code section 20.05(a) is not inconsistent nor conflicts with any provision of the FCRA. *Id.*; *See* Dkt 41, p. 17.

Next Plaintiff re-urges section 1681t(b)(1)(E) in conjunction with section 1681c evidences "clear Congressional intent that the content of consumer report information must be free from state interference [. . .] ." Dkt. 44, p. 15. This conclusion is oversimplified and would require the Court to assume Congress preempted the entire field of content of consumer reports and disregard the FCRA's savings clause, section 1681c, and prevailing authority. See *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."). 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). The requirement to exclude this information is "the domain expressly preempted" by section 1681t(b)(1)(E). Texas's law, section 20.05(a), does not invade the domain proscribed by section 1681c because it provides for the exclusion of medical debt information under circumstances not addressed by section 1681c.

Plaintiff also asks this court to adopt the Maine District Court's reasoning in *Consumer Data Industry Ass'n v. Frey*. Plaintiff admits that the Maine District Court focused heavily on the legislative history of the FRCA. *See* Dkt. 44, p. 16; 1:19-CV-00438-GZS, 2020 WL 5983881, at *8 (D. Me. Oct. 8, 2020). But legislative history is not the proper focus when an *express* preemption clause is at issue. Instead, the Court should direct its attention on the plain text of the statute. *See Dan's City Used Cars*, 569 U.S. at 260 ("we focus first on the statutory language . . . "); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("Our analysis begins with the language of the statute."). Plaintiff fails to cite any other authority that has adopted an express preemption analysis based purely on the legislative history of the statue. This Court is not bound by the opinion and should instead rely on binding precedent that explains how to proceed and analyze the plain language of the express preemption clause.

Plaintiff next tries to expand the scope of section 1681t(b)(1)(E) by showing that the phrase "relating to" demonstrates "Congress intended §1681t(b)(1) to have broad effect on state laws."

Dkt. 44, p. 17. Plaintiff's analysis strays from the plain language of the statute and does not consider the limiting phrase "with respect to" also included in section 1681t(b)(1)(E). Dkt. 44, p. 17. The case Plaintiff relies on to support its argument, *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), was decided before *Dan's City Used Cars*, 569 U.S. 251 (2013). The Supreme Court in *Dan's City Used Cars* analyzed the same express preemption provision of the Federal Aviation Administration Authorization Act ("FAAAA") analyzed by the *Rowe* Court. 569 U.S. at 261. However, the Court departed from the *Rowe* decision and highlighted the importance of the limiting phrase "with respect to" and found the "phrase 'massively limits the scope of preemption' ordered by the FAAAA." *Id.* (citing *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (SCALIA, J., dissenting).

Plaintiff additionally cites *Galper v. JP Morgan Chase*, for the proposition that the phrase "with respect to" has the same meaning as "relating to." 802 F.3d 437 (2d. Cir. 2015). The *Galper* decision is not binding on this Court and the preemption analysis involves different sections of the FCRA, specifically 1681t(b)(1)(F) and 1681s-2. However, the Second Circuit's analysis of the phrase "related to" is instructive because the court ultimately rejected the District Court's broad interpretation of the phrase and found it was not used to define the scope of preemption, but was a shorthand to summarize the subject matter of 1681s-2. *See Galper*, 802 F.3d at 447. Plaintiff's attempt to broaden the domain of 1681t(b)(1)(E) with the phrase "related to" is unavailing.

The other cases Plaintiff cites to establish the broad preemptive effect of 1681t(b)(1) are not useful because they address FCRA provisions unrelated to those in dispute here. *See* Dkt. 44, p. 19-20; 19 n. 9. For example, *Macpherson v. JPMorgan Chase Bank,* considered whether state common law claims of defamation and intentional infliction of emotional distress are preempted

by another FCRA preemption provision, 15 U.S.C. § 1681t(b)(1)(F), and the impact of an explicit exception, 15 U.S.C. § 1681h(e). 665 F.3d 45, 47 (2d Cir. 2011). The remaining cases cited, *Aleshire v. Harris* and *Ross v. FDIC*, also involve whether state common law claims are preempted by § 1681t(b)(1)(F) in relation to § 1681h(e). 586 F. App'x 668, 671 (7th Cir. 2013); 625 F.3d 808, 812 (4th Cir. 2010). However, this question is irrelevant to whether section 1681t(b)(1)(E) preempts Business and Commerce Code section 20.05(a)(5).[1] Whether § 1681s-2 preempts state tort and common-law claims does not show that section 1681c preempts Business and Commerce Code section 20.05(a)(5).

Finally, of the eight authorities Plaintiff cites, none addresses section 1681t(b)(1)(E), and only *Simon v. DirecTV, Inc.*, addresses section 1681c. No. 09-CV-00852-PAB-KLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, 2010 WL 1452854 (D. Colo. Apr. 12, 2010); Dkt. 9 at 10 (citing same). But even if *Simon* were controlling, it would not support Plaintiff's preemption argument, because it considered credit reporting agency disclosure of criminal history information older than seven years—something that section 1681c itself *explicitly* addresses. Indeed, the FCRA expressly prohibits reporting of specifically enumerated information, as well as "[a]ny other adverse item of information, *other than records of convictions of crimes which antedates the report by more than seven years*." 15 U.S.C. § 1681c(a)(5) (emphasis added). While section 1681c expressly excludes records of criminal convictions older

[1] Even if it were relevant, other courts presented with the same question have reached three different theories as to the proper analysis of the preemption provisions. *See, e.g.*, *Dalton v. Countrywide Home Loans, Inc.,* 828 F. Supp. 2d 1242, 1253 (D. Colo. 2011) (noting that "there is a split in authority as to whether state common law claims such as defamation are preempted by [§] 1681t(b)(1)(F) based on an apparent conflict between this provision and [§] 1681h(e) of the FCRA.").

than seven years from its prohibition on disclosure, the Colorado law at issue in *Simon* provided the opposite: that criminal convictions older than seven years must be excluded from consumer reports. *E.g.*, *Simon*, 2010 WL 1452853, at *4.

This stands in stark contrast to section 1681c's provisions related to "a collection account with a medical industry code," the sole subject of section 20.05(a)(5). This is because the FCRA does not require or prohibit disclosure of collection accounts with a medical industry code. It simply imposes privacy protections upon reports containing "the name, address, and telephone number of any medical information furnisher," in the event it is already included in a report, and prohibits CRAs from disclosing certain veteran medical debt. 15 U.S.C. § 1681c(a)(6), (7). Because section 1681c governs criminal conviction information and medical information differently, *Simon* would not help Plaintiff.[2]

The issue presented to this Court is not whether the FCRA preempts *some* state laws—it surely does. The issue that Plaintiff has put to the Court is whether the FCRA preempts Texas Business and Commerce Code section 20.05(a)(5). There is no compelling support for the proposition that it does, and as a result, its case should be dismissed under Rule 12(b)(6).

## II. CONCLUSION

For the forgoing reasons, this case should be dismissed.

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[2] That this cursory reasoning was summarily adopted—without objection to the report and recommendation and without further analysis—provides another basis to reject it. *See Eller v. Experian Info. Sols., Inc.*, No. 09-CV-00040-WJM-KMT, 2011 WL 3365955, at *18 (D. Colo. May 17, 2011), *report and recommendation adopted*, No. 09-CV-00040-WJM-KMT, 2011 WL 3365513 (D. Colo. Aug. 4, 2011) (Declining to adopt *Simon*'s reasoning).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that that on February 23, 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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