No. 21-51038

In the United States Court of Appeals for the Fifth Circuit

CONSUMER DATA INDUSTRY ASSOCIATION,
Plaintiff-Appellee,

V.

STATE OF TEXAS, THROUGH ATTORNEY GENERAL KEN PAXTON,
ACTING IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

APPELLANT'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, State of Texas, through Attorney General Ken Paxton, Acting in his Official Capacity, respectfully submits that oral argument is unnecessary because the legal arguments are adequately presented in the briefs and record. If, however, the Court finds that oral argument would aid it in reaching a decision in this case, Appellant is prepared to present argument.

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STATEMENT OF JURISDICTION

The State of Texas, through the Attorney General Ken Paxton, timely filed his notice of appeal in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure, ROA.641, and as indicated in the issues presented, Appellant now challenges the district court's denial of sovereign immunity. ROA.630.

Jurisdiction lies pursuant to the collateral-order doctrine and 28 U.S.C. § 1291. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The collateral order doctrine permits appeal of a district court's denial of the state's assertion of immunity from suit. *Planned Parenthood Gulf Coast, Inc. v. Phillips*, 5 F.4th 568, 575 (5th Cir. 2021); *City of Austin v. Paxton,* 943 F.3d 993, 998 (5th Cir. 2019), cert. denied, 141 S. Ct. 1047 (2021) (mem.). This Court also has jurisdiction to consider the standing issue, which has "significant overlap" with the *Ex parte Young* analysis. *See City of Austin*, 943 F.3d at 1002, 1002 n.3 (recognizing that "courts in this circuit have considered standing on interlocutory appeal in the past").

ISSUES PRESENTED

1. Whether Appellee CDIA has suffered an Article III injury in fact sufficient to merit pre-enforcement review of Section 20.05(a)(5) of the Texas Business and Commerce Code?

2. Whether the Attorney General of Texas has a sufficient connection to the enforcement of Texas Business and Commerce Code Section 20.05(a)(5) to invoke the *Ex parte Young* exception to Eleventh Amendment immunity?

3. Whether Appellee CDIA's fear of enforcement of Section 20.05(a)(5) of the Texas Business and Commerce Code renders the lawsuit sufficiently ripe to merit judicial review prior to an enforcement action?

STATEMENT OF THE CASE

The State of Texas has never commenced any enforcement action of its prohibition against credit reporting agencies (CRA)—Section 20.05(a)(5) of the Texas Business and Commerce Code, "Regulation of Consumer Credit Reporting Agencies" ("Section 20.05(a)(5)"). Nevertheless, Appellee, Consumer Data Industry Association, characterizes the danger of Texas enforcing Section 20.05(a)(5) against its members as "imminent," and files this lawsuit based on concern that its members will need to "make material changes to their day-to-day business operations to come into compliance with the Texas law." ROA.442-3, ¶10.

Consumer Data Industry Association ("CDIA") meets none of the requirements necessary for a pre-enforcement challenge. *Ex parte Young* requires strong reasons to waive jurisdiction—fines, imprisonment, millions of dollars of investment at risk—and CDIA gives none. *Ex parte Young*, 209 U.S. 123, 165 (1908).

CDIA has not plead facts from which it can reasonably be inferred that the Attorney General of Texas will initiate prosecutorial action against it, much less that such action is imminent. As such, any injury from CDIA's preventative measures is self-inflicted. Although Chapter 20 of the Texas

Business and Commerce Code allows individual consumers to bring claims, first through negotiation, then litigation or arbitration for likely minor sums—CDIA faces only civil fines and an injunction if negotiation with the State or individual litigants is not resolved.

On these facts, it was error for the district court to strip the State of sovereign immunity and to permit CDIA to seek pre-enforcement review of Section 20.05(a)(5). CDIA has faced no immediate injury in the three years since the Section 20.05(a)(5) was enacted. *Ex parte Young* plays no role here, except to illustrate why CDIA cannot rely upon its holding or principles on these facts.

STATEMENT OF FACTS

I. Chapter 20 of the Texas Business & Commerce Code.

In 2005, the Texas Legislature enacted Section 20.05 of the Texas Business and Commerce Code. TEX. BUS. & COM. CODE § 20.05 (2005). Section 20.05 ("The Act") governs the circumstances under which reporting of consumer information is prohibited. *Id.* From 2005 forward, the Act has prohibited credit reporting agencies from reporting information such as tax liens or criminal history pre-dating the consumer report by seven years. Tex. Bus. & Com. Code § 20.05(a). The Act further provides an exception for withholding of

information that would create a false statement in violation of 18 U.S.C. 1033. Tex. Bus. & Com. Code § 20.05(c). The Act also prohibits a CRA from providing medical information about a consumer that is obtained for employment purposes or in connection with a credit, insurance, or direct marketing transaction, unless the consumer consents. Tex. Bus. & Com. Code § 20.05(d).

A. Section 20.05(a)(5) is enacted to protect consumers from surprise medical debt reported on consumer credit reports.

Concerned about the damaging effects of credit of insured individuals whose medical bills appeared past-due based on no fault of their own, the State of Texas amended its Business and Commerce Code in 2019 to include Section 20.05(a)(5).[1]

Section 20.05(a)(5) was passed in 2019 as Senate Bill 1037, effective May 31, 2019. *Id.* The new provision, Texas Business & Commerce Code § 20.05(a)(5) ("Section 20.05(a)(5)") explicitly prohibits credit agencies from furnishing consumer reports based on:

> . . . 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,

[1] Texas Bill Analysis, S.B. 1037, 2019, available at ttps://lrl.texas.gov/scanned/TLCBillAnalyses/86-0/SB1037RPT.PDF

> 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 Ann. 20.05(a)(5); ROA.443.

Section 20.05(a)(5) prohibits a consumer reporting agency ("CRA") from furnishing a consumer credit report containing a collection account with a medical industry code if the consumer was covered by a health benefit plan at the time, and if the provider was an emergency care provider or a facility-based provider for an out-of-network benefit claim. *See* Tex. Bus. & Com. Code § 20.05(a)(5). Subsection (b) allows consumer reports with the medical information described in subsection (a) if it is "provided in connection with"

> (1) a credit transaction with a principal amount that is or may reasonably be expected to be $150,000 or more;
> (2) the underwriting of life insurance for a face amount that is or may reasonably be expected to be $150,000 or more; or
> (3) the employment of a consumer at an annual salary that is or may reasonably be expected to be $75,000 or more.

Tex. Bus. & Com. Code § 20.05(b).

B. Disputing a Consumer Credit Report.

Section 20.06 outlines the dispute procedure available for consumers if the information contained in a consumer credit report is in dispute. Tex. Bus. & Com. Code § 20.06. The consumer first musty notify the CRA of the dispute. Tex. Bus. & Com. Code § 20.06(a). After notice by the consumer, the CRA is

required to investigate the dispute within 30 business days after the CRA receives notice of the dispute. Tex. Bus. & Com. Code § 20.06(a). Within five days of receiving notice of the dispute, the CRA must also notify the provider of the information subject to dispute. Tex. Bus. & Com. Code § 20.06(b). The CRA has the option to terminate the consumer dispute if the CRA reasonably determines the dispute is frivolous or irrelevant. Tex. Bus. & Com. Code § 20.06(c). Within five business days of completing the investigation, the CRA must then provide written notice of the results to the consumer. Tex. Bus. & Com. Code § 20.06(f).

Section 20.07, Correction of Inaccurate Information, requires CRAs to provide a person who provides consumer credit information to the agency with procedures to correct inaccurate information. Tex. Bus. & Com. Code § 20.07.

C. Civil Liability under the Act.

Section 20.08 outlines the procedure for a consumer if they opt to seek relief for a violation of an obligation under the Act. Tex. Bus. & Com. Code § 20.08. Only after following the dispute procedures outlined in § 20.07, and following the notice procedures in § 20.06(f), a consumer may seek to enforce obligations by suit or arbitration. Tex. Bus. & Com. Code § 20.08(a). A decision by an arbitrator does not affect the amount of the debt owed. Tex. Bus. & Com. Code

§ 20.08 (b). If the consumer prevails in arbitration, the record must be stricken or removed in a timely manner, and if the information is not removed or stricken, the consumer may bring an action against the CRA. Tex. Bus. & Com. Code § 20.08(f).

Section 20.09 makes a CRA liable to a consumer only if the CRA willfully engages in action where consumer suffers losses of either $1,000, or three times the loss amount. Tex. Bus. & Com. Code 20.09(a). If a CRA negligently violates the chapter, it can be liable to the consumer for the actual amount of damages or $500. Tex. Bus. & Com. Code § 20.09(b).

The only act the Attorney General may take against a CRA is to file a suit for injunctive relief, a civil penalty "in an amount not to exceed $2,000 for each violation of the chapter." Tex. Bus. & Com. Code 20.11(a)(1), (2). A violation of the Act is considered to be a deceptive trade practice under Chapter 17 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 20.12.

II. Consumer Data Industry Association's November 17, 2020 Complaint.

Appellee Consumer Data Industry Association ("CDIA")'s members are consumer credit reporting agencies who collect, use, maintain, .and disseminate consumer report information of credit consumers. ROA.441. CDIA filed this lawsuit to obtain pre-enforcement review of Section 20.05(a)(5)

of the Texas Business & Commerce Code. ROA.592.

CDIA believes that some of the information it publishes—and has published since "the effective date of the SB 1037, 2019— would be viewed by the Texas Attorney General as prohibited by Texas law. ROA.445, ¶19. In CDIA's amended complaint filed on November 17, 2020, CDIA speculates that it will "have to make significant changes to their operations" in order to come into compliance with the Texas Law. ROA.445, ¶20.

CDIA alleges that the "Texas Attorney General has investigated multiple CDIA members related to their credit reporting business on at least two occasions in just the last five years." ROA.446, ¶ 21.

But the enforcement actions, as explained in CDIA's Amended Complaint, were actually carried out by 30 Attorneys General in 2015, where they alleged that Experian, Equifax, and Trans Union violated the FCRA "and related state laws." ROA.446, ¶22. The second investigation was initiated in 2017 following the Equifax data breach, involving 48 states, the FTC, the CFPB, DoC, and Puerto Rico were also involved. ROA.449, ¶35.

A. 2015 investigation.

The State Attorneys General claimed that three agencies violated federal and state law by furnishing credit reports that contained inaccurate

information. ROA.446, ¶ 23. The State Attorneys General also "noted that nearly 20% of consumer reports contained medical debt that resulted from involuntary, unplanned and unpredictable debt from medical services for which prices are rarely provided in advance." ROA.446, ¶23. The participants disclaimed any violation of state or federal law but agreed to implement changes to their credit reporting practices. ROA.446, ¶24.

As provided by the resulting settlement, the three reporting agencies agreed to:

> (1) prevent the reporting and display of medical debt identified and furnished by Collection Furnishers when the date of first delinquency is less than one hundred and eighty (180) days prior to the date that the account is reported to the CRAs; and (2) implement a process designed to remove or suppress known medical collections furnished by Collections Furnishers from files within the CRAs' respective credit reporting databases when such debt is reported either as having been paid in full by insurance or as being paid by insurance.

ROA.446, ¶ 25; (citing Assurance of Voluntary Compliance/Assurance of Voluntary Discontinuance).

CDIA relies on this prior voluntary agreement between Experian, Equifax, and Trans Union and the Attorneys General of 30 states to estimate a timeline for compliance with Section 20.05(a)(5). ROA.446. CDIA alleges Section 20.05(a)(5) would require CRAs to identify medical collection accounts where a consumer was covered by insurance at the time the account was due instead

of 180 days after delinquency, and identify collection accounts for an outstanding balance owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim, instead of only removing accounts reported to be been paid in full by insurance. ROA.447, ¶ 27.

CDIA alleges its members "do not have a way to easily identify which information they currently maintain that would fall within the scope of the Texas Law" ROA.448, ¶30. In the 2015 settlement, the participants agreed to create a new software code to identify covered medical debt. ROA.448, ¶31. Because the changes implemented by the 2015 settlement were not implemented until two years after the settlement, CDIA furthers an unsupported estimate that these additional changes would take "at least as long…" ROA.448, ¶33. However, CDIA has not articulated how its members intend to identify the data they claim is illegal under Section 20.05(a)(5), other than arguing that it won't be easy. ROA.448, ¶ 30.

B. 2017 investigation.

CDIA again accuses Texas of initiating an investigation into one CRA, Equifax, in 2017 following a data breach, before conceding that the Attorneys General of 48 states, the FTC, the CFPB, DoC, and Puerto Rico were also involved. ROA.449, ¶35. In 2019, Equifax agreed to implement a

comprehensive data security program, provide "certain other consumer benefits", and pay restitution. ROA.449, ¶35.

SUMMARY OF ARGUMENT

I. Article III standing, "serves to prevent the judicial process from being used to usurp the powers of the political branches" *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013), and "is not dispensed in gross'; a party must have standing to challenge each 'particular inadequacy in government administration.' " *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (internal citation omitted). "Article III, require[es] a real controversy with real impact on real persons to make a federal case out of it." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409. CDIA can meet none of these requirements.

First, CDIA cannot meet the Article III standing requirements because its members' injury is not *actual* or *imminent.* CDIA can articulate no injury that has occurred since Section 20.05(a)(5) was enacted in May of 2019. All CDIA has asserted is that generally its members will have to make "significant changes" to comply with Section 20.05(a)(5). ROA.445, ¶20. Nor is their injury *concrete* or *particularized.* The Act provides for enforcement by a consumer

after a lengthy dispute process that could ultimately be resolved by arbitration or settlement. And whether the Attorney General will enforce Section 20.05(a)(5) is purely speculative.

Second, CDIA's members' injury is not traceable to the challenged actions because the preparations they claim will have to occur to come into compliance with Section 20.05(a)(5) are completely self-inflicted.

Third, CDIA's injury is not redressable by enjoining the State Attorney General. Pursuant to Section 20.09, consumers can bring suit for money damages. Enjoining the State from enforcing the law will not prevent consumers from seeking redress under the statute.

II. Even if CDIA had standing to bring suit, CDIA has not established waiver of immunity under the *Ex parte Young* exception. Generally, States are immune from suit under the Eleventh Amendment and the doctrine of sovereign immunity. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 713 (1999). *Ex parte Young* provides a narrow exception in equity that allows certain private parties to seek judicial orders in federal court preventing State officials from enforcing state laws contrary to federal law. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002).

To overcome sovereign immunity, CDIA must plausibly allege the Texas Attorney General has sufficient connection to enforcement of the statute and is likely to enforce the statute. *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019), cert. denied, 141 S. Ct. 1047 (2021) (mem.). CDIA's reliance on settlements addressing state and federal laws other than the Texas Business and Commerce Code is not sufficient to waive immunity.

III. Finally, CDIA's claim is not ripe for review for the same reasons CDIA's members lack standing. CDIA members' injury is premised on a fear of enforcement that is not sufficiently likely to occur to justify judicial review prior to an actual enforcement action.

Few cases seem less appropriate for a pre-enforcement challenge than this. Permitting businesses to seek judicial review of disputes before an enforcement action is actually imminent or underway is the exact type of advisory opinion this Court generally seeks to avoid. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). This Court should reverse the district court's judgment and find CDIA has not established subject-matter jurisdiction of the district court due to lack of standing, waiver of immunity, or ripeness.

STANDARD OF REVIEW

"Whether sovereign immunity exists is a question of law which this Court reviews *de novo*." *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993); *Corn v. Miss. Dep't of Public Safety*, 954 F.3d 268, 273 (5th Cir. 2020) (noting that the State's sovereign immunity "pursuant to the Eleventh Amendment" is considered under de novo review, including when based on the pleadings). Likewise, this Court "review[s] questions of standing de novo." *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010).

ARGUMENT

I. CDIA Lacks Standing Under Article III.

The district court lacks jurisdiction over CDIA's claims because CDIA's members' alleged pre-enforcement injury is not sufficient to satisfy Article III. 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).

Not every dispute is entitled to judicial review. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes," as federal courts

"do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Put another way, "[f]ederal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *Id.* "And federal courts do not issue advisory opinions." *Id.*

The party invoking subject-matter jurisdiction bears the burden to plead facts essential to establish jurisdiction exists. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

A. CDIA's Pre-Enforcement Injury Is Not Justiciable under Article III.

An Article III injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409.

Here, CDIA has failed to plead facts that establish the district court's subject-matter jurisdiction because the injury CDIA alleges—"significant changes" its members will have to make *if* enforcement is sought—meets none of these requirements.

i. CDIA's alleged injury is not actual or imminent.

Under Article III the " 'threatened injury must be certainly impending to constitute injury in fact.' " *Clapper*, 568 U.S. at 410 (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."). As the Supreme Court explained in *California v. Texas*: "[O]ur cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened enforcement, whether today or in the future." 141 S. Ct. 2104, 2114 (2021) (citing cases). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Instead, a "threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* (citing *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979)).

CDIA has not cited any enforcement actions by the Attorney General of Texas or private citizens under Chapter 20 of the Texas Business and Commerce Code, or specifically Section 20.05(a)(5) that demonstrate enforcement is "certainly impending". *Whitmore*, 495 U.S. at 158. Nor has CDIA plead any current enforcement activities, or indication that prior enforcement activities led to any "chilling" of their members' behaviors.

The only examples CDIA can cite to are enforcement actions in 2015 against a subset of the CDIA by 30 Attorneys Generals regarding unidentified

violations of federal and state laws. ROA.277. One of the conclusions of these investigations was that nearly 20% of consumer reports contained medical debt that resulted from involuntary, unplanned and unpredictable debt from medical services for which prices are rarely provided in advance. ROA.277.

As a result, the parties agreed to "prevent the reporting and display of medical debt" pursuant to certain requirements. ROA.277. They agreed to "implement a process designed to remove or suppress known medical collections furnished by Collections Furnishers from files within the CRA's respective credit reporting databases when such debt is reported either as having been paid in full by insurance or as being paid by insurance." ROA.277.

Although CDIA emphasizes the changes some of them will allegedly have to make in response to Section 20.05(a)(5), they never identify the CDIA members who are not already obligated to make changes to their "reporting and display of medical debt" pursuant to the 2015 agreement. *See* ROA.230 ¶34. And while at this stage in the proceedings, courts must accept what the plaintiffs say as true, that maxim does not apply to statements that beggar belief—such as the fact that with all the accounting in place for identifying, tagging, and removing medical data, it will take over two years to implement any additional changes in that field. *See* ROA.270, ¶33.

The second and only other example of threatened enforcement is a 2017 investigation into one CDIA member (Equifax) following a data breach. ROA.280. As with the prior investigation, the end result was a settlement between the FTC, CFPB, and 48 Attorneys General regarding how to "implement and maintain a comprehensive data security program, provide certain other consumer benefits, and pay certain amounts in restitution and penalties." ROA.280.

CDIA offers no basis for the district court to conclude that either of these matters involved Chapter 20 of the Texas Business and Commerce Code, let alone enforcement of Section 20.05(a)(5). Moreover, CDIA has not identified what specific changes their individual members will have to make or costs their members will incur, in light of the changes they already made because of the 2015 and 2019 settlements. CDIA has never believably indicated what, if anything, it needs to do to prepare for the onslaught of litigation they believe will imminently appear.

CDIA has also not identified (1) the CRAs that were not included in the settlement; (2) what additional changes would be necessary following the settlements; or (3) what steps CRAs have taken to avoid enforcement that they would have taken aside from the settlements. Although CDIA has plead *past*

injuries its members have incurred due to *other* settlements, CDIA has not affirmatively plead that its members will suffer an *imminent* injury due to the enactment of Section 20.05(a)(5).

ii. CDIA has no concrete or particularized injury.

To establish standing, the plaintiff must show a concrete and particularized injury-in-fact. *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016)).

The Supreme Court "has always required proof of a more concrete injury and compliance with traditional rules of equitable practice" regardless of the constitutional interest at stake. *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 5855551, at *11 (U.S. Dec. 10, 2021). And "pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688–89 (1973). Instead, a "plaintiff must allege that he

has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *Id.*

Here, the Act provides for enforcement by a consumer after a lengthy dispute process that could ultimately be resolved by arbitration or settlement. Tex. Bus. & Com. Code § 20.08. And whether the Attorney General may enforce Section 20.05(a)(5) in the future is purely speculative. CDIA cites to "system changes" its members may take at some point in the future but ultimately fails to plead any actual concrete injury incurred by its members at present. ROA.448.

B. CDIA's self-imposed injury is not fairly traceable to the Attorney General.

CDIA also has not plausible alleged that its "fear" of enforcement has caused any actual injury other than a vague estimation that "system changes" to reach compliance if Section 20.05(a)(5) is enforced against its members may take two years to achieve. ROA.448. Any injury CDIA has incurred bracing itself for the hypothetical enforcement of Section 20.05(a)(5) is self-imposed and is therefore not traceable to any action by the Attorney General. CDIA is essentially "manufactur[ing] standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not

certainly impending." *Clapper*, 568 U.S. 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 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.").

CDIA 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). *Clapper*, 568 U.S. at 410–12. And as for private enforcement, the Attorney General has nothing to do with whether any individual pursues a private right of action against any plaintiff member under Chapter 20. *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); *Whole Woman's Health*, 2021 WL 5855551, at *7 (same).

CDIA cannot bootstrap the district court's subject-matter jurisdiction by declaring a self-inflicted injury based on pure speculation regarding enforcement.

C. CDIA's injury is not redressable.

CDIA's requested relief will not redress its "pre-enforcement" injuries because consumers seeking relief under the Act will not be restrained or enjoined from enforcing Section 20.05(a)(5). Redressability requires a plaintiff to show "it is *likely,* as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.* 528 U.S. at 181 (emphasis added).

Remedies "operate with respect to specific parties." *California v. Tex.*, 141 S. Ct. 2104, 2115 (2021) (internal citation omitted). Here, the remedies for violations of Chapter 20 are directed by consumers.

A consumer first must reach out to the CRA, attempt to reach a resolution, and only if that does not work, file suit against the CRA in any court or go to arbitration. Tex. Bus. & Com. Code § 20.08(a). Section 20.09 makes a CRA liable to a consumer only if the CRA willfully engages in action where consumer suffers losses of either $1,000, or three times the loss amount. Tex. Bus. & Com. Code § 20.09. If a CRA negligently violates the chapter, it can be liable to the consumer for the actual amount of damages or $500. Tex. Bus. & Com. Code § 20.09(b).

The district court lacks subject-matter jurisdiction to hear CDIA's suit because the court cannot redress injuries CDIA may incur due to enforcement of Section 20.05(a)(5) by consumers. *Whole Woman's Health* , 2021 WL 5855551, at *8 (internal citation omitted) ("But under traditional equitable principles, no court may 'lawfully enjoin the world at large, or purport to enjoin challenged laws themselves' ").

II. The Attorney General of Texas is Entitled to Sovereign Immunity Because He Lacks Sufficient Connection to the Enforcement of Texas Business and Commerce Code Section 20.05(a)(5).

The district court also lacks subject-matter jurisdiction because CDIA's claims are barred by Eleventh Amendment immunity. The *Ex parte Young* exception does not apply here because CDIA has not established that the Attorney General of Texas has the requisite connection to the enforcement of Section 20.05(a)(5).

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). But, when challenging a state law, the state official must have "the particular

duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi*, 244 F.3d at 416 (plurality opinion)). This requirement "is designed to ensure 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)). "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.[2] "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).

[2] "By its terms, the [Eleventh] Amendment does not apply. . . where a citizen sues his own State (or an agency of that State)." *Sullivan v. Texas A&M Univ. Sys.*, 986 F.3d 593, 596 n.1 (5th Cir. 2021). "Still, the Supreme Court has often used 'Eleventh Amendment immunity' as a synonym for the States' broader constitutional sovereign immunity." *Id.* "The phrase [Eleventh Amendment immunity] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713, (1999). As such, this brief consistently refers to the State's immunity as "sovereign immunity."

This Circuit has 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*, 943 F.3d at 998. 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.*; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (*Ex parte Young* permits enjoinment when officers "who threaten and are about to commence proceedings, either of a civil or criminal nature").

Enforcement has been defined "as typically involv[ing] compulsion or constraint." *City of Austin*, 943 F.3d at 1000 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010); *see Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017*)*.[3] While this Circuit

[3] The Court 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,

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). In *Morales v. Trans World Airlines, Inc.*, the Supreme Court aptly expressed the intersection between *Ex Parte Young*, Article III, and the immediacy of the threat of enforcement:

> *Ex parte Young* thus speaks of enjoining state officers "*who threaten and are about to commence proceedings,*" and we have recognized in a related context that a conjectural injury cannot warrant equitable relief[.] Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable.

504 U.S. 374, 382 (1992) (internal citations omitted).

For example, in the *City of Austin* case, this Circuit held that the Texas Attorney General's prosecutorial authority was 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), cert. denied, 141 S. Ct. 1124 (2021) ("A general duty to enforce the law is insufficient for *Ex*

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).

parte Young.") This Court rejected the City of Austin's contention that, because the Attorney had previously filed suits against municipalities to enforce the supremacy of *other* state laws—a "habit," as the City characterized it—therefore he was likely to do so with regards to a different law. *See City of Austin*, 943 F.3d at 1000–2.

There is no threat to commence proceedings here. As discussed above, CDIA's reference to two instances where the Attorney General has acted under statutes *other than* Section 20.05(a)(5) is not sufficient to establish that the Attorney General has the requisite enforcement authority and is "likely" to exercise that authority. ROA.446-9. The Fifth Circuit already rejected CDIA'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."). CDIA 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*).

In sum, without a specific threat of enforcement demonstrated by more than just the Attorney General's enforcement authority, CDIA cannot establish waiver of immunity under *Ex parte Young*. As the Supreme Court recently opined "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments." *Whole Woman's Health* , 21-463, 2021 WL 5855551, at *10. And the Supreme Court "has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court." *Id.*

III. CDIA's Lawsuit is Not Ripe Because the Threat of Litigation is Not Sufficiently Imminent.

CDIA's lawsuit has not "matured sufficiently to warrant judicial intervention" because CDIA'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).

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)). The doctrine of ripeness "separates those matters that are premature because the injury is speculative and may never occur from

those that are appropriate for judicial review." *Foster*, 205 F.3d at 857. "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) (quoting *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986)).

As the Fifth Circuit articulated in *Orix Credit All., Inc.*, 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)). "[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. "[E]ven where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." *Cent. & S. W. Services, Inc. v. U.S. E.P.A.*, 220 F.3d 683, 690 (5th Cir. 2000). Doctrines of ripeness and standing "often intersect because the question of whether a plaintiff has suffered an adequate harm is integral to both." *Prestage Farms, Inc. v. Bd. of Sup'rs of Noxubee County, Miss.*, 205 F.3d 265, 268 (5th Cir. 2000).

Here, CDIA's claim that its members 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) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–581 (1985)). Because the threat of enforcement is too speculative—and contingent on events initiated by consumers that have not yet occurred—CDIA cannot establish that its claim is sufficiently ripe to merit judicial intervention.

CDIA cannot circumvent the jurisdictional defects of this lawsuit by pleading generalized actions its members underwent in the past to comply with settlements that occurred before Section 20.05(a)(5) was even enacted. Standing, ripeness, and waiver of sovereign immunity must be anchored to more than just a fear of enforcement of Section 20.05(a)(5) without any actions taken towards compliance. Because this lawsuit does not present a case or controversy within the meaning of Article III, and because CDIA has not established a valid waiver of immunity or ripe dispute, this lawsuit should be dismissed for lack of subject-matter jurisdiction.

CONCLUSION AND PRAYER

For the foregoing reasons, the district court's denial of sovereign immunity should be reversed and the lawsuit dismissed because CDIA has not established a waiver of immunity, and in the alternative CDIA has failed to invoke the district court's subject-matter jurisdiction due to lack of standing and ripeness.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13: (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

I hereby certify that (1) required privacy redaction have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of Symantec Endpoint Protection and was reported free of viruses.

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because exclusive of the portions exempted by 5th Cir. R. 32.2 Microsoft Word reports that this brief contains 6,615 words, and complies with the 14 pt. typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it was prepared in Microsoft Word using a 14-point proportionally spaced typeface.

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