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.

APPELLEE'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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*Consumer Data Industry Association ("CDIA") is an industry trade association, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others, many of which sell consumer reports in

Texas. CDIA states that the underlying case is an action for declaratory judgment, in which CDIA seeks an order of the court that a provision of Texas law is preempted by the Fair Credit Reporting Act, 15 U.S.C. Sec. 1681, *et seq*.

CDIA does not seek monetary damages; therefore, no member of CDIA will receive any portion of a monetary award. If CDIA is successful, the nature and extent of any "financial interest" will be the costs savings to the member consumer reporting agencies from not having to make changes to their business operations in order to comply with Texas Code § 20.05(a). At a minimum, the affected entities include the three nationwide consumer reporting agencies, Experian, TransUnion, and Equifax.

Dated: February 4, 2022

HUDSON COOK, LLP

By /s/ *Jennifer L. Sarvadi* _

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STATEMENT REGARDING ORAL ARGUMENT

Appellant is prepared to present oral argument to this Court, should the Court find it helpful.

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STATEMENT OF THE CASE

In 2019, the Consumer Data Industry Association ("CDIA") instituted the present action below on behalf of its consumer reporting agency members, seeking declaratory judgment that a (then) recently-enacted provision of Texas law (Texas Business & Commerce Code, §20.05(a)(5) (the "Statute"))[1] is preempted by the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). Additionally, CDIA sought an injunction from the court prohibiting the Attorney General of the State of Texas from enforcing the Statute against CDIA members. Record on Appeal ("ROA") 20.

The Statute prohibits consumer reporting agencies ("CRAS") from including a specific type of medical account information in consumer reports in Texas. Tex. Bus. & Com. Code § 20.05(a)(5). As explained below, certain CDIA members currently maintain medical account information in their files, and have included such information in consumer reports in Texas. Despite the Attorney General's apparent suggestion to the contrary, compliance with the Statute is not optional for CDIA members. If the law were not invalid due to the express preemption provision of the FCRA, CDIA members would be required to come into compliance with the law.

[1] The Attorney General's brief devotes much time to explaining the provisions of the larger Section of the Texas and Business Commercial Code related to consumer reporting agencies; however, most of what was cited is irrelevant to the case at hand. CDIA is only challenging §20.05(a)(5) as preempted by the FCRA. Other provisions, such as dispute handling, have no bearing on this case.

Thus, the harm CDIA members face stems from the changes they must make to their business in order to come into compliance with Texas law. If they do not, they face enforcement action from the Attorney General for a violation of that law, which can include not only injunctive relief ordering them not to violate the law, but also civil money penalties in the amount of up to $2,000 per violation. Tex. Bus. & Com. Code § 20.13. Thus, CDIA member's imminent harm is far from "self-inflicted."

This matter is presently before this Court on appeal of the District Court's Order [ROA.630], which properly denied the Attorney General's Motion to Dismiss CDIA's Amended Complaint. The District Court found that CDIA has standing under Article III to pursue this matter on behalf of its members, as the Amended Complaint adequately alleged injury, causality, and redressability. *Id* at 633. The District Court also properly held that CDIA's claim was ripe for decision, and that the Attorney General could not avoid the suit under the Eleventh Amendment. *Id.* at 636. In particular, the District Court found that this case falls well within the *Ex parte Young* exception to the Eleventh Amendment because: (i) CDIA named the Attorney General as a defendant in his official capacity; (ii) the allegation related to the preemption of the Statute presents an ongoing violation of federal law; and (iii) CDIA's relief requested is prospective relief in the nature of an injunction. ROA.637, Order, p. 8.

SUMMARY OF ARGUMENT

CDIA has standing under Article III to bring this declaratory judgment action on behalf of its members, which are consumer reporting agencies ("CRAs") that prepare consumer reports on consumers in Texas. Texas enacted a law in 2019 that prohibits the reporting of certain types of information in consumer reports, codified as Texas Business Code § 20.05(a)(5) (the "Statute"). CDIA member CRAs would be required to make material changes to their businesses in order to come into compliance with the Statute, except that the Statute is preempted by section 1681t(b)(1)(E) of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"), which reserves for federal regulation the content of consumer reports. CDIA challenged the Statute on preemption grounds, requesting that the trial court issue a declaration that the Statute is preempted by federal law and an injunction preventing the Attorney General from enforcing the same. The issue presented is a pure question of law, which is uniquely appropriate for declaratory judgment, and the case is ripe for adjudication by the District Court.

Moreover, this Attorney General is not immune from suit under the Eleventh Amendment, or the doctrine of sovereign immunity, as made clear by Supreme Court precedent issued just weeks ago in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021). The Attorney General is charged with enforcement of the Statute that

forms the basis for CDIA's request for injunctive relief below. Suits seeking a pre-enforcement declaratory judgment on the grounds that state law is preempted by or otherwise violates federal law may be brought against the state under the *Ex parte Young* exception to the Eleventh Amendment. This Court should affirm the District Court's denial of the Attorney General's Motion to Dismiss and remand the case for further proceedings.

ARGUMENT

Declaratory judgment actions serve an important role in our legal system, providing a mechanism for individuals to seek relief from laws that are unconstitutional or otherwise invalid. The law makes clear that a person who is or will be adversely affected by state law may challenge the enforceability of that state law on federal grounds and need not wait to see whether the state will enforce the law against them. *Whole Woman's Health v. Jackson,* 142 S. Ct. 522 (2021). CDIA brings such a claim on behalf of its members.

CDIA's Amended Complaint demonstrates that CDIA has standing to bring the case, and that the matter is ripe for adjudication. The Attorney General has acknowledged his statutory authority to enforce the challenged law. [*See* Appellant's Brief, p. 8.] The Attorney General, having statutory authority to enforce the challenged law, may not avoid the case on the basis of sovereign immunity, as the *Ex parte Young* exception clearly applies. The right to seek declaratory

judgments related to the enforceability of laws would be meaningless if one could not seek an order enjoining the state in circumstances such as these.

I. The Statute Regulates Consumer Report Content.

While the merits of the underlying preemption challenge are not before this Court,[2] a review of the Statute and its effects on CDIA members is relevant to this Court's analysis of the issues on appeal. Notably, CDIA challenges only a specific provision of Texas law, enacted in 2019, which prohibits CRAs from including a certain type of account information from being included in consumer reports.

S.B. 1037 amended Tex. Bus. & Com. Code 20.05, which states as follows:

> SECTION 1. Section 20.05, Business & Commerce Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:
>
> (a) Except as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to:
>
> (5) a collection account with a medical industry code, *if the consumer was covered by a health benefit plan at the time of the event giving rise to the collection and the collection is for an outstanding balance, after copayments, deductibles, and coinsurance, owed to an emergency care*

[2] In summary, CDIA alleges that the Fair Credit Reporting Act, in which Congress enacted a comprehensive preemption framework to preserve federal regulation of certain subject matters regulated by, and conduct governed by, federal law, by preempting state laws that might interfere with that federal regulation, preempts the Statute as an impermissible regulation of the content of consumer reports. *See, accord*, *Consumer Data Industry Ass'n v. Frey*, 1:19-CV-00438-GZS, 2020 WL 5983881 (D. Me. Oct. 8, 2020). In finding the Amended Complaint stated a claim for relief the District Court concluded that "CDIA thus has sufficiently alleged that the Statute is expressly preempted by Section 1681t(b)(1) because it concerns the same subject matter as Section 1681c of the FCRA: what medical debt information may be included in a consumer report." ROA.639, Order p. 10.

> *provider or a facility-based provider for an out-of-network benefit claim*[.]

See S.B. 1037, enrolled text (the prohibited information was then referred to as "Medical Account Information" in the Amended Complaint) (emphasis added). By its express terms, the Statute therefore prohibits the reporting by CRAs of a specific class of information in consumer reports in Texas, essentially regulating the contents of consumer reports, contrary to the FCRA. In particular, FCRA section 1681t(b)(1)(E) provides 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, . .

15 U.S.C. § 1681t(b)(1)(E). 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. In its preemption provisions, Congress reserved to federal oversight specific subject matters, including the contents of consumer reports.

Even though the Statute does not attempt to bar all types of medical debt from being included in reports, the Statute is preempted. <u>Any</u> regulation of whether medical account information may be reported – in any form or fashion – would be regulation of the very subject matter Congress reserved to federal oversight violation

of 1681t(b)(1)(E). *See CDIA v. Frey*, *supra*; *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 § 1681c, namely, "the type of information that can be legally disclosed in consumer reports").

To demonstrate its harm, CDIA explained the type and nature of remediation efforts CDIA members would be required to undertake to comply with the Statute in its Amended Complaint:

> 29. [Experian, Equifax, and TransUnion] and certain other member CRAs, and the companies that furnish information to those CRAs, utilize a specialized credit reporting format for the furnishing and reporting of credit report information, known as the Metro 2® Format, which is set forth in the Credit Reporting Resource Guide (the "CRRG"). . . .
>
> 30. Currently, the Metro 2® reporting format does not have a reporting field to indicate that the consumer was covered by a health benefit plan at the time that treatment was rendered by the medical provider. Nor does the Metro 2® reporting format have a reporting field to allow the furnisher to indicate that the consumer was seeking treatment for treatment that the health benefit plan would deem out of network. Thus, the CRAs that maintain medical information do not have a way to easily identify which information they currently maintain that would fall within the scope of the Texas Law.

See ROA.175-77, Am. Comp.¶ 29-30. CDIA further alleged that after undertaking a similar process to review and remove *other kinds of medical account information from their files*, ROA.174-75 Am. Comp. ¶25, 27, members believe that the process

to identify and remove the Texas Medical Account Information proscribed by the Statute would take as long as the that process - which was more than two years. ROA.176-77, Am. Comp.¶ 32-33. CDIA filed this lawsuit to protect its members from having to undertake these significant and costly compliance changes where federal law preempts state law.

II. CDIA Has Standing to Proceed in This Case.

CDIA's lawsuit seeks a declaration as to its members' obligations under the Statute, given that the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(1)(E) expressly preempts the 2019 amendment to Texas law insofar as the amendment resulted in the Statute here challenged. In Count II of the Amended Complaint, CDIA prays for an injunction to prevent the Attorney General from enforcing the Statute against its members.

While not challenging CDIA's ability to bring the case under the principles of associational standing,[3] the Attorney General challenges CDIA members' standing on the theory that they have not alleged a sufficiently concrete harm that is "traceable" to the Attorney General or that is sufficiently "imminent." [*See,*

[3] The District Court properly found that CDIA has standing to raise these claims on behalf of its member CRAs. [ROA.633-35]. An association, like CDIA, 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 547, 550 (5th Cir. 2010) (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

Appellant's Br. At 32, 41]. But the allegations in CDIA's Amended Complaint are clearly sufficient to support the District Court's Order denying the Attorney General's Motion to Dismiss below.

The District Court expressly relied on the following facts from the Amended Complaint:

- Some CDIA members currently include Medical Account Information in their reports that the Statute now prohibits. (Dkt. 36 ¶ 18.)
- The State has the authority to enforce the Statute and has never agreed not to enforce it against CDIA members. (*Id.* ¶¶ 7, 8.).
- Absent a declaration that the Statute is preempted by the FCRA, CDIA members will be forced to make material changes to their day-to-day business operations to comply with the Statute, including making changes to products currently provided in Texas. (*Id.* ¶¶ 10, 20, 28.)
- CDIA members which maintain Medical Account Information will have to undertake significant efforts and adopt processes to: (i) identify any information that would be implicated by the Statute; (ii) take steps to assure the removal of such data from their files or otherwise prevent such data from being included in consumer reports provided in Texas; and (iii) manage the collection of future Medical Collection Account information from furnishers in the future to prevent its reappearance. (*Id.* ¶¶ 28, 34.)
- Having undertaken a similar review and made changes to its files and reports in the past related to *different medical account information*, CDIA members know that 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. (*Id.* ¶¶ 30-33.)

ROA.634, Order Denying MTD, p. 5, *citing Susan B. Anthony, supra*, and *ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 714 (E.D. Tex. 2020).

It is well settled that for purposes of ruling on a motion to dismiss for lack of standing, a reviewing court "must accept as true all material allegations of the

complaint" and must "construe the complaint in favor of the complaining party." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979) (finding that where plaintiffs had alleged that city's zoning practices had begun resulting in changes affecting the housing market, they had established standing sufficiently to proceed beyond the pleadings stage). At the pleadings stage, general factual allegations of the plaintiff's injury resulting from the defendant's actions suffice. *United States v. Students Challenging Regul. Agency Procs. (SCRAP*), 412 U.S. 669, 687–89 (1973) (plaintiffs had standing at pleading stage to challenge a nationwide railroad freight rate increase where they alleged the increase "would directly harm them in their use of the natural resources of the Washington Metropolitan Area"). "[W]hen the plaintiff is himself an object of the action (or foregone action) at issue there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Meadowbriar Home for Child., Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) (citing *Feld v. Zale Corp.*, 62 F.3d 746, 751 n. 13 (5th Cir.1995)) (finding non-profit corporation had adequately pled standing to challenge local government restrictions on development of medical treatment center). *See also S. Christian Leadership Conf. v. Supreme Ct. of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (legal clinic and its clients sufficiently pled standing to challenge constitutionality of rule limiting circumstances under which unlicensed law students could engage in the practice of law).

Any argument by the Attorney General that the allegations of the Amended Complaint are insufficiently pled are easily rebutted by a straightforward reading of the Amended Complaint. The Amended Complaint adequately alleges injury, causality, and redressability. There is nothing beyond that needed to maintain standing at this stage.[4]

A. CDIA's Complaint Adequately Alleges Injury-in-Fact Under Article III.

CDIA clearly alleges that its members will suffer imminent injury resulting from the Statute. As consumer reporting agencies that operate in Texas, its members are required to make necessary operational changes to come into compliance with the law. If they do not, members risk enforcement of the Statute by this Attorney General, who has twice brought cases against members related to their credit reporting practices in the past several years.

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))

[4] Should the Attorney General wish to test the degree of any fact alleged, that is a matter he may pursue in discovery. And, while certainly not dispositive, it is worth noting that the Attorney General of Maine accepted as true CDIA's representations that member CRAs would be required to make similar material changes to their business operations to comply with a Maine law that attempted to prevent the inclusion of similar information in consumer reports. *See CDIA v. Frey*, *supra*, (where the United States District Court, D. Maine, held that the FCRA preempted a Maine law that similarly attempted to regulate the content of consumer reports).

(internal citations omitted). In *American Booksellers*, the petitioners alleged that a new Virginia law would prevent them from displaying certain kinds of books (those with "adult" content) in a way that would "substantially restrict access to adults because of the economically devastating and extremely restrictive measures booksellers must adopt to comply." 484 U.S. at 388-89. On appeal, the Supreme Court closely examined the petitioners' standing under Article III to pursue the claim and held that, in a pre-enforcement challenge, the "threatened or actual injury" element "…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 (emphasis added). Explaining further, the Court said:

> We are not troubled by the pre-enforcement nature of this suit. 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. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

Id. at 392.

The Supreme Court has reiterated that a plaintiff has standing to bring a pre-enforcement suit without waiting for affirmative action by the state to first enforce the law:

> 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). And as recently as a few weeks ago, the Supreme Court held that petitioners challenging state law on federal supremacy grounds have standing to maintain a pre-enforcement action - even where no enforcement action has even been threatened by the state:

> The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

Whole Woman's Health, 142 S. Ct. at 536-37.

CDIA members have every intention of complying with applicable law, when the law is not otherwise preempted or unenforceable. CDIA's Amended Complaint articulates the same Hobson's Choice for its members that affected the petitioners in *American Booksellers, Driehaus*, and *Whole Woman's Health*: namely, the members must either invest significant time and resources to make changes to their day-to-

day business operations (here, by removing Medical Account Information from their products offered in Texas), or face (yet another) enforcement action from the Attorney General's office.

The Attorney General repeatedly states that any concern that CDIA members have that he will enforce the Statute is purely "speculative" and thus CDIA cannot satisfy the injury-in-fact requirement, relying in part on *Clapper v. Amnesty Intern. USA,*568 U.S. 398 (2013). But *Clapper* does not advance Appellant's arguments here. The plaintiffs in *Clapper* were individuals who were not themselves within the scope of the law, which allowed for the recording of certain international phone calls involving persons under investigation by federal law enforcement. *Id.* at 405. The plaintiffs were attorneys, human rights groups, and media organizations that alleged 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 clients and sources were "likely targets of surveillance" under the law. *Id.* at 406.[5] The

[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.

Supreme Court held that such hypothetical circumstances amounted to speculation that was insufficient to establish standing under Article III. *Id.*

It is undisputed that this Attorney General has the express statutory authority under Tex. Bus. & Com. Code §20.11 to bring an enforcement action against CDIA members who sell reports containing the Medical Account Information that the Statute prohibits. The provision reads: "The attorney general may file a suit against a person for: (1) injunctive relief to prevent or restrain a violation of this chapter; or (2) a civil penalty in an amount not to exceed $2,000 for each violation of this chapter. Tex. Bus. & Com. Code §20.11(a). Additionally, under Texas law, any violation of the Statute is also a "false, misleading, or deceptive act or practice" under Subchapter E, Chapter 17 ("DTPA"). Tex. Bus. & Com. Code §20.12.

This Attorney General used this very DTPA authority to initiate the enforcement action against CDIA members that resulted in the settlement between the three nationwide consumer reporting agencies (Experian, Equifax, and Trans Union, (together the "NCRAs")) and this Attorney General, referred to as the "NCAP Settlement" as described in CDIA's Amended Complaint. ROA.174-77, Amended Complaint ¶¶ 22-34 and Exhibit 1 to Amended Complaint; *see also* Ken Paxton, "Attorney General Paxton Announces $6 Million Settlement with Credit Reporting Agencies," News Release (May 28, 2015).https://www.texasattorneygeneral.gov/news/releases/attorney-general-

paxton-announces-6-million-settlement-credit-reporting-agencies. As part of the NCAP Settlement the NCRAs made material changes to their consumer reporting businesses. *See* ROA.181, Exhibit 2 to Amended Complaint.[6] In the settlement documents, the parties agreed that "[t]he States have enacted a statute relating to unfair and deceptive acts and practices" and cited the Texas DTPA law - Tex. Bus. & Com. Code Ann. §§17.41 to 1763 - as the basis for Texas's authority to act. ROA.182, p. 2 of Exhibit 2 to Amended Complaint. Thus, while technically true that the Attorney General did not invoke § 20.11 as the basis for his statutory authority as against the NCRAs, he has used his DTPA authority to enforce Texas law against them with respect to their credit reporting activities.[7]

It is also not persuasive for Appellant to argue that enforcement of the Statute is purely speculative because his office has not yet initiated a suit to enforce § 20.05(e). Given that the Statute was only effective as of May 31, 2019, and the suit below was filed on September 19, 2019, there has been no limited opportunity for the Attorney General to initiate such an action prior to this suit being filed. Further,

[6] Available at https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-6-million-settlement-credit-reporting-agencies.

[7] The Texas Attorney General also initiated an investigation in 2017 into one of the NCRAs, Equifax, following a data breach reported by Equifax that year. Two years later, Equifax settled the investigation (and others), agreeing to implement changes to its business practices and to pay $175 million to the state attorneys general, of which $10.9 million was paid to Appellant's office. See Ken Paxton "AG Paxton Announces Historic $600 Million Data Breach Settlement With Equifax" https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-historic-600-million-data-breach-settlement-equifax.

the Attorney General has never affirmatively stated that his office will never initiate such an action. As the Supreme Court said in *American Booksellers*, "[t]he State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." 484 U.S. at 393. Such is the case here, especially given this Attorney General's record of prior enforcement actions against CDIA members.

Finally, the Attorney General inexplicably characterizes the costs of complying with applicable law as "self-inflicted" harm – "[a]ny injury CDIA has incurred in 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." [Appellant's Brief, p. 22.] It almost sounds as though the Attorney General suggests that compliance with the Statute is not required, unless and until the Attorney General decides to enforce the law. That is not the way that law works. This Court should find that CDIA has standing to pursue this matter and affirm the District Court's Order denying the Motion to Dismiss.

B. <u>CDIA's Injury Is Traceable to the Attorney General.</u>

The fact that consumers may initiate a cause of action against a CRA in Texas under Tex. Bus. & Com. Code § 20.08 is not only beside the but, it does not defeat standing where, as here, the relief requested is injunctive in nature in order to prevent *the state from enforcing the law. Okpalobi v. Foster*, relied on by the Attorney General, makes this clear. 244 F.3d 405 (5th Cir. 2001). In *Okpalobi*, the plaintiffs

lacked standing to challenge the law because the relief petitioners sought - namely, to foreclose litigation by consumers - could not be redressed by an order with respect to the named defendants. "The governor and attorney general have no power to redress the asserted injuries. In fact, under Act 825, no state official has any duty or ability to do *anything.* The defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit." *Id.* at 427.

It is undisputed the Attorney General has direct enforcement authority over CDIA members with respect to the Statute. In Count II of the Amended Complaint, CDIA prays for an injunction prohibiting the Attorney General from enforcing the Statute on federal preemption grounds. The relief requested is therefore entirely traceable to the Attorney General.

CDIA has clearly demonstrated that its members have an injury-in-fact sufficient to meet Article III's standing requirements, and the District Court's Order should be affirmed.

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

The District Court properly found that 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 Laboratories established a two-part test 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 Laboratories* 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.”). The District Court properly came to the same conclusion, finding CDIA’s claims ripe:

> CDIA’s claims involve the purely legal question whether the FCRA preempts the Statute. In addition, CDIA alleges that its members will face hardship if forced to implement measures to comply with the Statute or risk a state enforcement action. Accordingly, CDIA’s claims are ripe for adjudication.

ROA.636, Order p. 7.

As to the second factor of the ripeness test (*i.e.*, the hardship borne by the plaintiff), the *Abbott Laboratories* 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 Supreme 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 to expose petitioners to the risk of “serious criminal and civil penalties for the unlawful distribution of ‘misbranded’ drugs.” *Id*. at 152-53.

The issue in the case below is whether the FCRA preempts § 20.05(a)(5), a pure question of law that is ripe for review. CDIA is in the very same procedural posture as the *Abbott Laboratories* plaintiffs. Namely, suit was initiated after the law took effect, but before enforcement was pursued by the state. CDIA members are also similarly situated as compared to the *Abbott Laboratories* plaintiffs with respect to the second prong of the test. Again, they face 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 clearly ripe, and this Court should affirm the District Court's Order.

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

The Supreme Court has long recognized individual rights to "vindicate federal supremacy principles" against a state actor who is charged with enforcement of the challenged law, notwithstanding the Eleventh Amendment's sovereign immunity principles. *See, e.g., Whole Woman's Health, supra; 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). In *Ex parte Young*, 209 U.S. 123 (1998), the Supreme Court "recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary

to federal law." *Whole Woman's Health*, 142 S. Ct. at 532.

To satisfy the *Ex parte Young* requirements, a plaintiff must: (1) name the individual state official(s) as defendants in their official capacities; (2) "allege an ongoing violation of federal law," and (3) seek relief "properly characterized as prospective." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (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). Many courts have allowed challenges to laws or regulations to be brought against the state official charged with their enforcement.

Within recent weeks, in fact, the Supreme Court affirmed that the *Ex parte Young* exception permits a person to pursue a claim challenging the enforceability of state law against persons charged with enforcement of that state law. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021). In *Whole Woman's Health,* abortion providers sought a declaration that the Texas Heartbeat Act (Texas Senate Bill 8, 2021, (the "Heartbeat Act")) was unconstitutional under § 1983 and sought an injunction to prevent the state from taking action to enforce it. *Id.* at 530. The various defendants included: first, a state-court judge and clerk of court, who, by virtue of their roles, would allegedly facilitate the filing and prosecution of prospective private party lawsuits under the Heartbeat Act; second, the state licensing board members with authority to regulate the petitioner's medical licenses,

including suspension or termination for violation of any regulation passed under or incorporating the Heartbeat Act; third, this Attorney General on the theory that he has general enforcement authority with regard to other, unrelated provisions of Texas law; and fourth, an individual who allegedly intended to initiate a lawsuit under the Heartbeat Act. *Id.* The state actor defendants each challenged plaintiffs' right to bring the claims in a motion to dismiss, alleging that the claims were barred by the Eleventh Amendment.

The Supreme Court examined each of the state actors' roles and responsibilities under Texas law and found that: (i) the *Ex parte Young* exception does not apply to suits against the judiciary and its members; (ii) the *Ex parte Young* exception does not apply to permit a suit against a state actor who does not have authority to enforce the challenged law; but that (iii) the *Ex parte Young* exception applies to those state actors with authority to enforce the challenged law. *See, gen., id.* The Supreme Court found that the plaintiffs could maintain a suit against the licensing board members, each of whom the Court found "may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including [the Heartbeat Act]." *Id.* at 535. Relevant here, the Supreme Court found that the Attorney General had no enforcement authority under the law at issue and that dismissal was proper, finding "[w]hile *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws,

the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising." *Id.* at 534.

In this case, it is undisputed that, unlike the Heartbeat Act at issue in *Whole Woman's Health*, the Attorney General is expressly charged with enforcement of § 20.02(a)(5). Therefore, he is subject to suit in his capacity as Attorney General for the State of Texas under the *Ex parte Young* exception. *See, gen., id; see also 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*, 969 F.3d at 473 (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).

The *City of Austin v. Paxton* case, relied on by the Attorney General, does not change the outcome here, and - at most - should be understood to be limited to its unique facts. *See* 943 F.3d 993 (5th Cir. 2019). There, in arguing that the Attorney General should be subject to suit, the City of Austin cited to cases where the Attorney

General had *intervened* in other cases involving different municipalities and regulations – i.e., different parties and different legal grounds – 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 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.*

In comparing the facts of *City of Austin* from situations 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*,[8] the Fifth Circuit 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.

Under *Whole Woman's Health*, it is clear that CDIA has alleged sufficient facts to fit within the *Ex parte Young* exception, and thus the doctrine of sovereign

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[8] 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.").

immunity, and the Eleventh Amendment, do not bar this suit. The Supreme Court explained:

> The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, **this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.**

Whole Woman's Health, 142 S. Ct. at 536-537.

This matter is in the same procedural posture as the action in *Whole Women's Health*: an appeal from a ruling on a motion to dismiss. CDIA has alleged the Statute requires members to materially alter their day-to-day operations in order to comply with the law, as did those plaintiffs. Finally, CDIA has alleged that absent compliance, members are subject to enforcement actions from this Attorney General, who has brought enforcement actions against some of the same members in recent years. There can be no clearer case for permitting CDIA's suit under the *Ex parte Young* exception.

CONCLUSION

This case presents a straightforward question of law between two proper parties which is ripe for decision, having been pending for over two years. The courts need to determine whether the Statute conflicts with federal law. Delaying that process serves no purpose. It is time for the case to be decided. This Court

should affirm the District Court's Order denying Appellant's Motion to Dismiss and remand this case for further proceedings below.

Dated: February 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, a copy of the foregoing was served via CM/ECF on all counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th Cir. R. 32.2, this document contains 6,933 words.

This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and 5th Cir. R. 32.1, and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 4, 2022

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