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Admitted in Maryland, Virginia, and the District of Columbia

September 30, 2022

VIA CM/ECF
Lyle W. Cayce
Clerk
United States Court of Appeals
Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: Consumer Data Industry Assoc. v. State of Texas, No. 21-51038 (5th Cir.)

Dear Mr. Cayce:

This letter responds to the Court's request that the parties submit letter briefs addressing five questions posed by the Court in advance of oral argument. Appellee Consumer Data Industry Association ("CDIA") respectfully responds as follows:

Question 1: Whether "necessary operational changes" and the possibility of an "enforcement action from the Attorney General" pose distinct risks of harm that require individual analysis for justiciability purposes?

Response: The risks of harm here are necessarily related, because consumer reporting agencies are faced either with making the necessary operational changes to comply with the Texas law or risking the possibility of an enforcement action

from the Attorney General if they do not make such changes. For this reason, this Court need not analyze the two separately for the purpose of determining the justiciability of this claim. So long as the Attorney General can enforce the statute and has not disclaimed any intent to do so, Appellee has suffered cognizable injury regardless of whether one views the injury as the costs attendant to necessary operational changes or the risk of costs attendant to an enforcement action. That follows directly from *Whole Woman's Health v. Jackson*, where the Supreme Court made clear that – at the motion to dismiss stage – a court need not determine the degree of probability that enforcement will occur. 142 S. Ct. 522, 536-37 (2021). Instead, where a petitioner alleges that a law requires it to alter its day-to-day operations, and state law imposes a duty on the defendant to enforce that law, that suffices to sustain a plaintiff's allegation that it must come into compliance to avoid an enforcement action. *Id.* This case is even easier than *Whole Women's Health*, as the Court allowed the claims there to proceed even though the Attorney General expressly disclaimed either the power or the intent to enforce the statute. *Whole Woman's Health v. Jackson,* 141 S. Ct. 2494, 2495 (2021). Here, by contrast, the Attorney General does not dispute that he has the power, and he has never disclaimed any intent to use it.

Appellant Attorney General argues that *Whole Woman's Health* is not on point on this issue because the Supreme Court found there that, the law had already caused injury to petitioner's business, whereas the harm to CDIA members purportedly has yet to materialize. *See* Appellant Reply Brief, p. 15. But Supreme Court jurisprudence does not require that the petitioner have already inflicted upon itself the very compliance costs injury it seems to avoid before seeking federal review of a statute, nor is a petitioner required to wait for the government to enforce the law. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Instead, where a person is faced with the dilemma of complying with the law or awaiting the consequences of noncompliance via some enforcement mechanism, the Supreme Court has repeatedly found the legal challenge to be justiciable. *See Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988); *Susan B. Anthony List v. Driehaus,* 573 U.S. 149 (2014); and *Whole Woman's Health; see also* Appellee Brief, pp. 11-13.

To the extent that the Court determines an individual analysis of whether "an enforcement action from the Attorney General" is warranted, the question is not whether the enforcement action is "imminent" from a real-time perspective, but rather whether the petitioner's conduct would be violative of a state requirement. The injury-in-fact requirement is satisfied where a plaintiff 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." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979). That is so because, in a pre-enforcement challenge, "[c]ourts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribound." *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2nd Cir. 2016).

Moreover, the Supreme Court has recognized that:

> …where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat--for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

MedImmune, Inc., 549 U.S. at 28-29 (emphasis added) (examining standing and ripeness in the context of a default judgment action involving a claim of patent infringement). The Court observed "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *Id.* (emphasis added), citing *Steffel v. Thompson*, 415 U.S. 452, 480 (1974). The choice not to engage in the illegal activity does not "preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced" by the government. 549 U.S. at 129.

Therefore, it is not correct to say that – for the purpose of assessing justiciability – that the threat of enforcement is too remote, or that any compliance

changes are self-inflicted harm. Rather than take a wait-and-see approach as to when an enforcement action might arise in which the preemption issue could be raised, CDIA promptly filed its Complaint, affirmatively challenging the law.

Question 2: Whether the relief that Appellee has requested would prevent private consumers from asserting any rights under section 20.08(a) of the Texas Business and Commerce Code?

Response: As a technical matter, the relief requested in the Amended Complaint would not prevent consumers from trying to invoke section 20.08(a) of the Texas Business and Commerce Code. While Appellee has asked the court for a declaration that section 20.05(a)(5) is preempted by section 1681t(b)(1)(E) of the Fair Credit Reporting Act ("FCRA"), Am. Comp. ¶¶ 36-42, CDIA has requested injunctive relief only against efforts by the Attorney General to enforce this provision. Am. Comp. ¶ 44.

That said, as a practical matter, a declaration that section 20.05(a)(5) is preempted by the FCRA would serve as persuasive (or, if ultimately affirmed by this Court, binding) authority in support of a preemption defense in the event private parties sought to sue after such a declaration issues.

Question 3: Whether relief that Appellee has requested would redress any injury in fact that arises from "necessary operational changes."

Response:

The relief sought by Appellee, if granted, would remove the most serious consequences that could result from alleged noncompliance with the law – enforcement by the Attorney General, and as discussed above, as a practical matter, effectively eliminates any meaningful risk from consumer litigation. Texas law not only permits the Attorney General to enjoin future conduct related to credit reporting, but allows recovery of a penalty in the amount of $2,000 per violation, for retroactive conduct, noting "[e]ach day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section." Tex. Bus. & Comm. Code §§ 20.11(a) & (c). If the law provision were declared preempted, and this threat of enforcement were enjoined, CDIA members would be in a much stronger position to continue furnishing consumer reports without making substantial and expensive changes to their businesses. This satisfies the question of redressability, where "[a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (finding a court order to return detained immigrant children to their home country was sufficient to satisfy redressability requirement despite fact that not all relevant government actors with authority over the children were parties to case).

Question 4: Whether the possibility of an "enforcement action from the Attorney General" is an independent injury in fact?

Response: The threat of enforcement is not in a necessary injury in fact here as CDIA members have demonstrated more than the required "scintilla of enforcement by the relevant state official with respect to the changed law," *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019), in the compliance changes they would be required to make if the law were not preempted.

Question 5: Whether the possibility of an "enforcement action from the Attorney General" is an independent hardship for ripeness purposes?

Response: Yes, the possibility of an enforcement action is a sufficient hardship for ripeness purposes. Indeed, the prospect of that the government will enforce its laws is a classic form of hardship ripeness. *See Abbott Labs v. Gardner*, 387 U.S. 136 (167).

Standing and ripeness can sometimes "boil down to the same question." *MedImmune,* 549 U.S. at 128. And where the challenged action requires an "immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance," the court will recognize a hardship. David Floren, Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship, 80 Or. L. Rev. 1107, 1111 (2001), *citing Abbott Labs*, 387 U.S. 136 at 153.

Sincerely,

Rebecca E. Kuehn
Counsel for Consumer Data Industry Association

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, a copy of the foregoing was served via CM/ECF on all counsel of record.

Dated: September 30, 2022

HUDSON COOK, LLP

By /s/*Rebecca E. Kuehn*
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of the Court's notice of September 28, 2022 because this document contains 1477 words, excluding the parts exempted by the Rules.

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: September 30, 2022

HUDSON COOK, LLP

By /s/ *Rebecca E. Kuehn*
Attorney for Appellee