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Via CM/ECF

Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit

Re: No. 21-51038 – *Consumer Data Industry Association v. State of Texas, Through Attorney General Ken Paxton, Acting in His Official Capacity*

Dear Mr. Cayce:

Appellant submits this supplemental letter brief in response to the Court's September 28, 2022, request to address the following questions before oral argument:

(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?

They do not. The two concepts are intertwined. Absent a credible threat of an enforcement action—whether by the Attorney General or someone else—making "necessary operational changes" is self-inflicted injury insufficient to support Article III standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 (2013). Indeed, CDIA admits as much by arguing that "its members are required to make necessary operational changes to come into compliance with [Texas Business & Commerce Code 20.05(a)(5)]," and "[i]f they do not, members risk enforcement of the Statute by this Attorney General." CDIA Br. 11. There is no "distinct risk of harm" associated with those operational changes because absent "a threat of certainly impending" enforcement of section 20.05(a)(5), the costs they incur to avoid enforcement are "simply the product of their fear [of enforcement]," which is "insufficient to create standing." *Clapper*, 568 U.S. at 417 (citing *Laird v. Tatum*, 408 U.S. 1 (1972)).

(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?

It would not. CDIA primarily sought a permanent injunction only against the Attorney General's enforcement of section 20.05(a)(5). ROA.452 (¶ 1). For a century, it has been established that an injunction is an *in personam* remedy that "enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Indeed, the Supreme Court reaffirmed just last year that any injunction the Court may order will not affect private lawsuits where individuals are empowered to bring their own actions. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021). Nor could it, as "[n]o court may 'lawfully enjoin the world at large.'" *Id.* (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930)). As a result, private consumers would still have the right to bring claims for violations of section 20.05(a)(5) either directly, *see* Tex. Bus. & Com. Code §§ 20.06-09, or through a claim under the Texas Deceptive Trade Practices Act (DTPA), *see id.* § 20.13.

The same problem exists with regard to CDIA's alternative request for the Court to "declare" four conclusions of law that would support its argument that section 20.05(a)(5) is preempted by the FCRA. ROA.451. Whether framed in terms of a declaration or injunctive relief, remedies "ordinarily operate with respect to specific parties . . . and do not simply operate on legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (quotation marks omitted). Thus, although this Court's ruling might have precedential effect in any future case brought by a consumer, that is insufficient to support justiciability because the judgment does no work to redress CDIA's harm. *See Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("Redressability requires that the court be able to afford relief *through the exercise of its power*," not its persuasiveness).

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

It would not redress any such injury because the relief CDIA seeks against the Attorney General would not prevent consumers who discover surprise medical billing in their consumer files from bringing suit. In particular, CDIA's members would still face potential litigation to enforce the DTPA, which would be unaffected by the requested relief and would presumptively create "a similar incentive to engage in many of the countermeasures" they assert can be avoided only if the court allows pre-enforcement review of section 20.05(a)(5). *Clapper*, 568 U.S. at 417.

If anything, matters subject to judicial notice reflect that CDIA's members have changed their business practices to identify out-of-network charges for individuals covered by health benefits plans for reasons unrelated to the allegedly improper conduct. For example, the Consumer Financial Protection Bureau issued a bulletin "remind[ing] furnishers and CRAs that the accuracy and dispute obligations imposed by the FCRA and Regulation V apply with respect to debts stemming from charges that exceed the amount permitted by the No Surprises Act," such as "information indicating that a consumer owes a debt arising from out-of-network charges for emergency services." Medical Debt Collection and Consumer Reporting Requirements in Connection With the No Surprises Act, 87 Fed. Reg. 3025, 3026 (Jan. 20, 2022). Any credible argument that enjoining *Texas's Attorney General* will allow CDIA's members to continue to operate as they did before section 20.05 was amended seems to have evaporated—along with federal court jurisdiction. *See Ellis v. Dyson*, 421 U.S. 426, 434-35 (1975).

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

It is not. Although the threat of enforcement by the Attorney General is the only injury that could support standing here, the *possibility* of enforcement is never an injury in itself; a future injury must be "imminent" to satisfy Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even in the First Amendment context, where standing requirements are at their most relaxed for pre-enforcement challenges, a plaintiff must show a threat of enforcement that is not "chimerical." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (quotation marks omitted). Instead, the "'threatened injury must be *certainly impending* to constitute injury in fact,' and . . . 'allegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). A "possibility" is not a "certainly impending" threat of enforcement.

In this instance, even the "possibility" of an enforcement action from the Attorney General under section 20.05(a)(5) is too hypothetical to be an injury-in-fact for Article III standing purposes. "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). The Attorney General has not threatened to enforce section 20.05(a)(5), and "that he has chosen to intervene to defend *different* statutes under *different* circumstances" is insufficient to show standing because it "does not show that he is likely to do the same here." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). That is particularly true here where CDIA members' interactions with the Attorney General are limited to the 2017 data breach investigation and the 2015 settlement. *See* ROA.446 (¶¶ 22-25), ROA.449 (¶ 35). This has been the state of play for years. Neither action had any relationship to the challenged statutes.

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

It is not. With respect to enforcement, CDIA alleges only that its suit seeks to prevent Texas "from undermining the accuracy, integrity, and reliability of consumer report information," a "harm . . . threatened by" section 20.05(a)(5). ROA.442 (¶¶ 5-6). But such "abstraction[s]" are "inadequate to support suit." *Texas v. United States*, 523 U.S. 296, 302 (1998).

Ultimately, CDIA has said little about what harm will result from an enforcement action beyond the operational changes that conforming to the law will require. And this case is unlike *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967), where the nature of the enforcement action—"the unlawful distribution of 'misbranded' drugs"—once revealed to the public, "might harm [the plaintiffs] severely and unnecessarily." CDIA has not alleged that the enforcement action itself will damage its public image or increase its operating costs. Rather, CDIA's concern is the inconvenience its members will experience altering their credit reporting processes if the statute is ever enforced. As a result, as discussed above and for the purposes of determining justiciability, any possible enforcement action and CDIA's decision to conduct "necessary operational changes" are inextricably intertwined.

Respectfully submitted.

/s/ Kathryn M. Cherry
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cc: All counsel of record (via CM/ECF)

Certificate of Service

On September 30, 2022, this motion 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.

/s/ Kathryn M. Cherry
Kathryn M. Cherry

Certificate of Compliance

This motion complies with: (1) the limitations in this Court's notice of September 28, 2022, because it contains 1,413 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kathryn M. Cherry
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