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

CONSUMER DATA INDUSTRY ASSOCIATION, *Plaintiff*,	§	
v.	§	No. 1:19-CV-00876-RP
STATE OF TEXAS THROUGH KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF TEXAS, *Defendant*.	§	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant respectfully submits this reply in support of his pending motion to dismiss, Dkt. 8. As explained there, this case should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because CDIA lacks standing to bring it, and under Federal Rule of Civil Procedure 12(b)(6) because CDIA has failed to state a preemption claim against TEX. BUS. & COM. CODE § 20.05(a)(5). Because CDIA's response, Dkt. 9, fails to rebut the showing in the motion to dismiss, Defendant respectfully requests that the motion be granted.

I. CDIA cannot overcome its failure to plead injury in fact.

CDIA cites two cases for the proposition that it has alleged injury in fact sufficient to confer Article III standing. Both are unhelpful—in part because each arises in the First Amendment context, where the injury in fact inquiry is unique.

Virginia v. American Booksellers Association, Inc., is distinct for at least two independently dispositive reasons. Dkt. 9 at 4 (citing 484 U.S. 383 (1998), *certified*

question answered sub nom. Commonwealth v. Am. Booksellers Ass'n, Inc., 372 S.E.2d 618 (1988)). First, CDIA cites *American Booksellers* for the proposition that standing exists where a "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." Dkt. 9 at 4 (quoting 484 U.S. at 394) (alteration in Dkt. 9). As CDIA acknowledges, Dkt. 9 at 4, to comply with the obscenity statute in *American Booksellers*, the bookseller plaintiffs had to take "significant and costly compliance measures" to prevent juveniles from accessing "between 5 and 25 percent of a typical bookseller's inventory." 484 U.S. at 392, 391;[1] *see also id.* at 391 (noting that "book retailers would face significant difficulty attempting to comply with the statute.")

CDIA, by contrast, does not allege that any member consumer reporting agency ("CRA") will have to take significant and costly compliance measures or face criminal prosecution under TEX. BUS. & COM. CODE § 20.05(a)(5). In fact, CDIA concedes that it "does not allege all facts detailing the precise manner in which member CRAs will be forced to comply with Texas law." Dkt. 9 at 7. This does not establish injury in fact under *American Booksellers*.

Second (and unique to the First Amendment context) *American Booksellers* found standing in part based upon the expressive rights of *others*. Where First Amendment rights are concerned—unlike under other circumstances— "the alleged danger…is, in large measure, one of self-censorship; a harm that can be realized even

[1] Plaintiffs would have had to "(1) create an 'adults only' section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store." *Id.* at 389.

without an actual prosecution." *Virginia v. Am. Booksellers*, 484 U.S. at 393. As the Supreme Court went on to note:

> Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.

Id. at 392-93 (cleaned up). This suit is not predicated upon First Amendment rights—not CDIA's, and not those of any nonparty.[2]

CDIA's reliance upon *Susan B. Anthony List v. Driehaus* is similarly misplaced, as that case also arose in the unique First Amendment context and concerned specific allegations of injury. Dkt. 9 at 4 (citing 573 U.S. 149 (2014)). In *SBA List*, the Supreme Court found that two plaintiffs had standing to challenge an Ohio statute criminalizing "false statements" about candidates during an election. *SBA List v. Driehaus*, 573 U.S. at 161. The Court set out the standard to establish Article III standing to bring such pre-enforcement challenges: "we have held that a plaintiff satisfies the injury in fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but

[2] CDIA characterizes *American Booksellers* as holding that, where a "'State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise[,] [w]e conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.'" Dkt. 9 at 4 (quoting 484 U.S. at 643 [*sic*]). It goes on to make the incredible (and incorrect) assertion that this is the Supreme Court's "view of injury with respect to challenges to state laws." Dkt. 9 at 4. Instead, as discussed in more detail below, this standard for pre-enforcement standing arises in the First Amendment context, where a plaintiff alleges more than a speculative possibility of future enforcement. *See, e.g., SBA List v. Driehaus*, 573 U.S. 149, 159 (2014).

proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 159 (citation omitted) (cleaned up).

Applying this standard, *SBA List* found that the plaintiffs there had adequately "alleged 'an intention to engage in a course of conduct arguably affected with a constitutional interest'" because each "pleaded specific statements they intend to make in future election cycles." *Id.* at 161 (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). The Court noted the uniqueness of the First Amendment context, stating, "[b]ecause [plaintiffs'] intended future conduct concerns political speech, it is certainly 'affected with a constitutional interest.'" *Id.* at 162 (quoting *Babbitt v. United Farm Workers*, 442 U.S. at 298; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office")).

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

Here, by contrast, we do not know whether any CDIA member has taken past action that violates TEX. BUS. & COM. CODE § 20.05(a)(5), nor do we know whether any member intends to do so in the future. CDIA has not pleaded that the Attorney General has taken enforcement action against any CDIA member in the past, nor has it alleged facts establishing impending future enforcement. And, it has not alleged that any such action is also subject to criminal penalties. Thus, on practically every basis related to Article III standing to bring a pre-enforcement challenge, CDIA is distinct from the *SBA List* plaintiffs.

As explained in the motion to dismiss, *Clapper v. Amnesty International* also supports this result. *See* Dkt. 8 at 7-8 (citing 568 U.S. 398 (2013)). CDIA attempts to distinguish *Clapper* as follows: "it is undisputed that CDIA members are subject to enforcement by this Defendant's Attorney General for alleged violations of Texas law, including § 20.05." Dkt. 9 at 5 [*sic*]. This further emphasizes CDIA's failure to appreciate the requirements of Article III standing. As an initial matter, Plaintiff has not named the State of Texas as the defendant in this lawsuit—nor could it, as such suits are barred by immunity. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (noting that the Eleventh Amendment to the United States Constitution bars suits in federal court against states and their agencies, regardless of the relief requested, by anyone other than the federal government or another state.) Thus, CDIA's reference to "this Defendant's Attorney General" makes it unclear to some extent whom CDIA believes it has sued in this case.

In any event, in *Clapper*, it was also "undisputed" that the challenged law, 50 U.S.C. § 1881a, gave the United States authority to surveil communications of foreign nationals believed to be outside the United States. *Clapper*, 568 U.S. at 401; *accord* Dkt. 9 at 5. Still, alleging that they communicated with foreign nationals subject to surveillance under § 1881a was not enough for the *Clapper* plaintiffs to show injury in fact, as it was "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* at 401 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). In fact, the Court suggested that—*if* such "hypothetical" surveillance were to occur—a plaintiff would be more likely to have standing to challenge § 1881a, because "[i]n such a situation, unlike in the present case, it would at least be clear that the Government had acquired the foreign client's communications using § 1881a-authorized surveillance." *Clapper*, 568 U.S. at 422.

So too here. Should the Attorney General pursue an action against one of CDIA's members, that member will be able to assert preemption as an affirmative defense. But CDIA's speculation that it might be subject to enforcement of § 20.05 is insufficient to confer standing—just as the *Clapper* plaintiffs' speculation that they might be surveilled under § 1881a was insufficient to confer standing in that case.

II. CDIA's claim that the FCRA preempts Texas Business and Commerce Code § 20.05 fails on the merits.

Whether CDIA has stated a claim for purposes of Rule 12(b)(6) turns upon whether TEX. BUS. & COM. CODE § 20.05(a)(5), prohibiting the inclusion of certain collection accounts with a medical industry code in consumer reports, falls within "the domain expressly pre-empted" by § 1681t(b)(1)(E). *See, e.g., Medtronic, Inc. v. Lohr*,

518 U.S. 470 484-85 (1996); Dkt. 8 at 8-13. Section 1681t(b)(1)(E) defines the domain expressly preempted by incorporating § 1681c, which addresses just two types of information: identifying information from medical information providers unless coded to protect privacy, and certain veteran medical debts. Dkt. 8 at 11-12; 15 U.S.C. § 1681c(a)(7), (8). As explained in the motion to dismiss, this does not expressly preempt § 20.05(a)(5), which specifically provides for the exclusion of *other* information under *other* circumstances. *See* Dkt. 8 at 11-13.

CDIA cites no authority for the proposition that, in prohibiting inclusion of *some* information in *certain* consumer reports, the FCRA preempts state laws that prohibit inclusion of *different* information. In fact, the response does not even discuss the substance of § 20.05. Instead, it cites a handful of non-controlling cases holding that some FCRA provision preempted some state law. *See* Dkt. 9 at 10-12. None of these cases supports the conclusion that 15 U.S.C. § 1681t(b)(1)(E) preempts TEX. BUS. & COM. CODE § 20.05(a)(5).

Of the five authorities CDIA cites in the response, none addresses § 1681t(b)(1)(E), and only one, *Simon v. DirecTV, Inc.*, addresses § 1681c. No. 09-CV-00852-PAB-KLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, 2010 WL 1452854 (D. Colo. Apr. 12, 2010); Dkt. 9 at 10 (citing same). But even if *Simon* were controlling (it is not), it would not support CDIA's preemption argument, because it considered CRA disclosure of criminal history information older than seven years—something that § 1681c itself *explicitly* addresses. Indeed, the FCRA expressly prohibits reporting of specifically enumerated

information, as well as "[a]ny other adverse item of information, *other than records of convictions of crimes which antedates the report by more than seven years*." 15 U.S.C. § 1681c(a)(5) (emphasis added). While FCRA § 1681c expressly excludes records of criminal convictions older than seven years from its prohibition on disclosure, the Colorado law at issue in *Simon* provided the opposite: that criminal convictions older than seven years must be excluded from consumer reports. *E.g.*, *Simon*, 2010 WL 1452853, at *4.

This stands in stark contrast to § 1681c's provisions related to "a collection account with a medical industry code," the sole subject of TEX. BUS. & COM. CODE § 20.05(a)(5). This is because the FCRA does not require or prohibit disclosure of collection accounts with a medical industry code. It simply imposes privacy protections upon reports containing "the name, address, and telephone number of any medical information furnisher," in the event it is already included in a report, and prohibits CRAs from disclosing certain veteran medical debt. 15 U.S.C. § 1681c(a)(6), (7). Because § 1681c governs criminal conviction information and medical information differently, *Simon* would not help CDIA, even if it were entitled to any weight.[3]

The other cases CDIA cites are plainly inapposite—most obviously because they address FCRA provisions unrelated to those here. For example, *CDIA v. Swanson* considered "[w]hether selling mortgage-trigger lists is explicitly authorized

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

by § 1681b(c)(1) (as CDIA argues) or explicitly forbidden by § 1681b(c)(3) (as Swanson argues)." No. 07-CV-3376-PJS-JJG, 2007 WL 2219389, at *4 (D. Minn. July 30, 2007)); Dkt. 9 at 10 (citing same). Here, by contrast, reporting the specific information TEX. BUS. & COM. CODE § 20.05(a)(5) addresses— "a collection account with a medical industry code"—is neither "explicitly authorized" nor "expressly forbidden" by FCRA.

Sigler v. RBC Bank is similarly unhelpful, as it considered yet another FCRA preemption provision, 15 U.S.C. § 1681t(b)(1)(F), and the impact of an explicit exception thereto, 15 U.S.C. § 1681h(e). 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010); Dkt. 9 at 11 (citing same). *Sigler* addressed preemption of state laws "with respect to any subject matter regulated under [§] 1681s–2 [], relating to the responsibilities of persons who furnish information to [CRAs]," given the additional provision that "no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against…any person who furnishes information to a [CRA]…except as to false information furnished with malice or willful intent to injure such consumer"). 15 U.S.C. §§ 1681t(b)(1)(F), 1681h(e).

But *Sigler*'s consideration of whether "state common law claims such as defamation are preempted by [§] 1681t(b)(1)(F)" given § 1681h(e) is irrelevant to whether § 1681t(b)(1)(E) preempts TEX. BUS. & COM. CODE § 20.05(a)(5). *See Dalton v. Countrywide Home Loans, Inc.*, 828 F. Supp. 2d 1242, 1253 (D. Colo. 2011) (citing *Sigler,* 712 F. Supp. 2d at 1269). And even if it were relevant, other courts presented with the same question have reached the *opposite* result that *Sigler* did. *See, e.g.*,

Dalton v. Countrywide Home Loans, Inc., 828 F. Supp. 2d at 1253 (noting that "there is a split in authority as to whether state common law claims such as defamation are preempted by [§] 1681t(b)(1)(F) based on an apparent conflict between this provision and [§] 1681h(e) of the FCRA.").

For the same reasons, the two other cases CDIA cites that consider whether § 1681s-2 preempts state tort and common-law claims do nothing to show that § 1681c preempts TEX. BUS. & COM. CODE § 20.05(a)(5). Dkt. 8 at 9 (citing *Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 427-29 (S.D.N.Y. 2010) ("The FCRA contains two provisions arguably relating to preemption of state tort claims brought against furnishers of credit information…"); *Cosmas v. American Exp. Centurion Bank*, 757 F. Supp. 2d 489, 499-500 (D.N.J. 2010) (holding that 15 U.S.C. § 1681s-2 preempted state-law based negligence and "malicious and retaliatory conduct" claims). *Premium Mortg. Corp. v. Equifax* is similarly unhelpful, as—in considering the FCRA's preemptive effect on state law claims—it concluded that some such claims were preempted, but explicitly declined to reach that same result with respect to other such claims. Dkt. 9 at 11-12 (citing 583 F.3d 103 (2d Cir. 2009)); *see Premium Mortg.*, 583 F.3d at 107 ("we decline to reach plaintiff's preemption argument as to [certain] causes of action and affirm the decision below on this properly preserved alternative ground [that these claims were inadequately pleaded].") (citation omitted).

CDIA contends that Defendant moves to dismiss "[w]ithout acknowledging any of the cases finding that the FCRA preempts state law." Dkt 9 at 13. But it does not matter whether FCRA preempts *some* state laws—it surely does. The issue that CDIA

has put to the Court is whether the FCRA preempts TEX. BUS. & COM. CODE § 20.05(a)(5). There is no compelling support for the proposition that it does, and as a result, its case should be dismissed under Rule 12(b)(6).

CONCLUSION

For the forgoing reasons and those in the motion to dismiss, Defendant respectfully requests that the Court grant that motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on October 23, 2019 this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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