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 SUR-REPLY TO PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendant respectfully submits this sur-reply to address two key problems with CDIA's reply in support of its objections to the report and recommendation of the United States Magistrate Judge, Dkt. 32 (Reply). Defendant's existing briefing already addresses the remaining issues with the Reply. *See* Dkts. 7, 10, 30.

First, the Reply argues that sovereign immunity and ripeness provide no basis to dismiss this case, on the theory that these arguments have not been adequately briefed. Dkt. 32 at 2, 8. But as set forth in Defendant's Response to CDIA's objections, Dkt. 30, as a jurisdictional prerequisite, courts "may raise ripeness *sua sponte*[.]" *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 90–91 (5th Cir. 2011). The same reasoning applies to sovereign immunity, as "it is well-settled that subject matter jurisdiction can be raised at any time or even *sua sponte* by the court." *Johnston v. United States*, 85 F.3d 217, 218, n.2 (5th Cir. 1996). *See also, e.g.*, *Cephus v. Tex. Health & Human Servs. Comm'n*, 146 F. Supp. 3d 818, 829 (S.D. Tex.

2015) ("[b]ecause [state] sovereign immunity deprives a court of jurisdiction, it may be raised at any time by any party or by the court *sua sponte*.") (citing *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); *Johnston*, 85 F.3d at 218 n. 2). Both sovereign immunity and ripeness are properly considered in dismissing this case.

Second, CDIA argues that the *Ex Parte Young* exception to immunity allows this case to proceed simply because CDIA alleges that federal law preempts Texas Business and Commerce Code § 20.05(A)(5). Dkt. 32 at 2-5. In support, CDIA relies upon four cases—none of which supports the contention that merely raising the specter of preemption vests a federal court with jurisdiction.

The first case has nothing to do with preemption, but merely stands for the unremarkable proposition that, "in determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citation omitted). Defendant does not dispute that principle, as far as it goes, but one of the key reasons why this court lacks jurisdiction is CDIA's failure to allege any "ongoing violation of federal law" in the first place. *See, e.g.*, Dkts. 7, 10, 30.

The Reply's second authority contains no discussion of immunity or *Ex parte Young* and is therefore unhelpful in resolving whether Defendant's immunity remains intact here. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

CDIA's third authority further undermines its position. In *NiGen Biotech, L.L.C. v. Paxton*, "the AG sent letters . . . intimating that formal enforcement was on the horizon for both NiGen and the retailers [that carried its products]," causing those retailers to pull NiGen's products from the shelves. 804 F.3d 389, 392 (5th Cir. 2015); *see also id.* at 397 (noting that "NiGen's retailers removed the products from their shelves only as a direct result of receiving the threatening letters from the Attorney General."). But here, there has not even been a suggestion of "enforcement" of the allegedly preempted provision—Texas Business and Commerce Code § 20.05(a)(5)—and there is certainly no evidence that such enforcement is "on the horizon." *Cf. NiGen*, 804 F. 3d at 392.

This is the key distinction recognized in *City of Austin v. Paxton*: to obtain a pre-enforcement injunction, a plaintiff must show *both* that the Attorney General "has the authority to enforce" the particular statute being challenged, *and* that they are "likely to do [so] here." 943 F.3d 993, 1002 (5th Cir. 2019); *see also* Dkt. 30 at 9-10 (discussing same). It is no answer for CDIA to claim that "this Attorney General, in the last five years alone, has brought multiple enforcement actions against CDIA member CRAs under the state's DTPA law related to their credit reporting practices." Dkt. 32 at 5. As Defendant has explained, the two specific actions CDIA references

did not involve Business and Commerce Code Chapter 20 in general or § 20.05(a)(5) in particular. Dkt. 30 at 4-5. This does not satisfy the requirement under *City of Austin* and *NiGen* that a plaintiff show a government official is "likely" to enforce the statute being challenged.

Finally, CDIA invokes *Green Valley Special Utility Dist. v. City of Schertz Texas*, 969 F.3d 460 (5th Cir. 2020). This case decisively undermines CDIA's position. *Green Valley* involved Texas Water Code § 13.2541(d), which provides for removal of land from "certificates of convenience and necessity," or "CCNs" (essentially, special permits giving the holder an exclusive right to provide water or sewer services to a particular area). *Id.* at 465. The utility district argued in district court that federal law preempted § 13.2541(d) and sought declaratory and injunctive relief against revocation of its CCNs under that law. *Id.* at 467. But the utility district later settled its claims related to CCN revocation under § 13.2541(d). *Id.* at 470. Nevertheless, on appeal, it argued that "notwithstanding its settlement, its preemption claim as to § 13.2541(d) survives . . . because 'those claims are directed at [Texas] Officials' prospective compliance with [the allegedly preemptive federal law] in any other § 13.2541 proceedings.'" *Id.* (citation omitted).

The Fifth Circuit rejected that argument and concluded that the case was moot. Its analysis is worth repeating here:

> . . . Green Valley does not challenge any other § 13.2541(d) decertification order *in this litigation*, nor does it point to any ongoing § 13.2541(d) proceeding in which it is involved. Any hypothetical future decertifications are not before us. Speculation that the [Texas regulators] *could* apply § 13.2541(d) against Green Valley sometime *in*

the future is not enough to prevent this case from being moot *today*. *Id.* (emphasis original). Similarly here—the theoretical possibility of future enforcement does not make Plaintiff's claim ripe *today*, especially without a showing that the governmental defendant is "likely" to enforce the particular law at issue against the Plaintiff in the case. *See, e.g. City of Austin*, 943 F.3d at 1002.

Indeed, like ripeness, mootness is a justiciability doctrine. "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary,* 501 U.S. 312, 320 (1991); *see also LeClerc v. Webb,* 419 F.3d 405, 413 (5th Cir. 2005). "The many doctrines that have fleshed out [Article III's] 'actual controversy' requirement—standing, mootness, ripeness, political question, and the like—are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 541–42 (5th Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

In citing *Green Valley*, CDIA merely emphasizes what the magistrate found and what Defendant has briefed: there is no justiciable claim before this Court. Just as Green Valley's preemption claim could not survive the mootness of the controversy there, CDIA's preemption claim cannot proceed absent any ripe dispute.

CONCLUSION

For the reasons in Defendant's Motion to Dismiss and Reply in Support; the Report and Recommendation of the United States Magistrate Judge; Defendants' Response to Plaintiffs' Objections to the Report & Recommendation; and those here, this case should be dismissed entirely.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that that on September 10, 2020, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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