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 MOTION TO DISMISS

Plaintiff Consumer Data Industry Association ("CDIA"), a trade association that represents consumer credit reporting agencies, seeks declaratory and injunctive relief against enforcement of Texas Business & Commerce Code § 20.05(A)(5) by Ken Paxton, in his official capacity as Texas Attorney General. Compl. (Dkt. 1) ¶ 31. CDIA states that § 20.05(a)(5) amends the Code's provisions governing consumer credit reporting agencies "to include requirements . . . relating to the content of consumer reports," and argues that this is expressly preempted by the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*. Compl. p. 1. Defendant requests dismissal of this case under Federal Rule of Civil Procedure 12(b)(1) because the Attorney General is not a proper party, and under Federal Rule of Civil Procedure 12(b)(6) because the FCRA does not preempt § 20.05(A)(5).

LEGAL AND FACTUAL BACKGROUND

I. The Fair Credit Reporting Act

The FCRA creates a uniform set of rules governing the content of consumer credit reports and imposes certain responsibilities and obligations upon consumer reporting agencies. 15 U.S.C. §§ 1681 *et seq*. Consumers may recover monetary damages for violations of the Act. 15 U.S.C. § 1681o (civil liability for negligent noncompliance); 1681n (civil liability for willful noncompliance). The FCRA's general preemption provision makes clear that the Act does not preempt state consumer reporting laws, subject to specific exceptions:

> Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a). The exception to this general provision that CDIA invokes provides that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports[.]" 15 U.S.C. § 1681t(b)(1)(E).

Section 1681c—titled "requirements relating to information contained in consumer reports"—establishes reporting periods and specifies certain information that must be included in and excluded from consumer reports provided by consumer reporting agencies. 15 U.S.C. § 1681c.

II. Texas Business and Commerce Code Chapter 20

Like many other states, Texas has state laws governing consumer reporting agencies. Texas Business & Commerce Code Chapter 20, "Regulation of Consumer Credit Reporting Agencies," works alongside and in tandem with the FCRA to protect Texas consumers. *See* TEX. BUS. & COM. CODE § 20.01 *et seq.*.[1] Section 20.05 governs the circumstances under which "reporting of [consumer] information [is] prohibited." The Texas Legislature amended this section during the 2019 legislative session to add § 20.05(a)(5)—the specific provision that CDIA challenges—which provides

> [e]xcept as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to 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 provider or a facility-based provider for an out-of-network benefit claim.

TEX. BUS. & COM. CODE § 20.01(a)(5).[2] [3]

Subsection (b) provides exceptions to this prohibition "if the information is provided in connection with a credit transaction with a principal amount that is or may reasonably be expected to be $150,000 or more; the underwriting of life insurance for a face amount that is or may reasonably be expected to be $150,000 or more; or the employment of a consumer at an annual salary that is or may reasonably be

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[1] *See, e.g.*, TEX. BUS. & COM. CODE §§ 20.01(4) (defining "consumer report" to include a report prepared for a "purpose authorized under [§§] 603 and 604 of the [FCRA]"); 20.02 (a)(3) (providing that a consumer reporting agency may furnish a consumer report for purposes authorized by the FCRA); 20.03(c) (incorporating the FCRA's consumer disclosure requirement).

[2] The amended law also adds definitions of "emergency care provider," "facility," "facility-based provider," and "health care practitioner." TEX. BUS. & COM. CODE § 20.01(d).

[3] Prior to its 2019 amendment, § 20.05(a) already provided that "[e]xcept as provided by Subsection (b), a consumer reporting agency may not furnish a consumer report containing information related to" five other categories of information not relevant here. TEX. BUS. & COM. CODE § 20.05(a)(1)-(4), (6).

expected to be $75,000 or more." TEX. BUS. & COM. CODE § 20.05(b).[4]

The Texas Business & Commerce Code provides that a consumer may sue to enforce an obligation of a consumer reporting agency as provided by the FCRA, and that such claims may be resolved through arbitration if all parties agree. *Id.* § 20.08(a). In addition, "[t]he 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).

III. CDIA's Allegations

CDIA argues that under 15 U.S.C. § 1681t(b)(1)(E) "any state law that attempts to regulate the content of consumer reports is preempted under the FCRA," and contends that Texas Business and Commerce Code § 20.05(a)(5) is one such law. Compl. ¶10. CDIA further asserts that § 20.05(a)(5) "will harm CDIA's member CRAs by impeding their ability to report accurate and predictive data relied on by their customers for credit underwriting and other legitimate purposes," and that "[c]reditors' inability to accurately assess credit risk will result in increased delinquencies and potentially increase the price, and decrease the availability, of consumer credit." Compl. ¶26. CDIA also alleges that its members might face private or Attorney General actions to enforce § 20.05(a)(5). Compl. ¶ 27.

[4] *See also* TEX. BUS. & COM. CODE § 20.11(c) ("A consumer reporting agency may not furnish medical information about a consumer in a consumer report that is being obtained for employment purposes or in connection with a credit, insurance, or direct marketing transaction unless the consumer consents to the furnishing of the medical information.")

ARGUMENT AND AUTHORITY

I. This case should be dismissed under Rule 12(b)(1) because CDIA lacks standing.

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). When a court lacks statutory or constitutional power to adjudicate a case, the case must be dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotation omitted). To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant (causation); and (3) that is likely to be redressed by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three elements are "an indispensable part of the plaintiff's case" and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Jurisdiction is "a threshold issue that must be resolved before any federal court reaches the merits of the case before it." *Perez v. U.S.*, 312 F.3d 191, 194 (5th Cir. 2002); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). CDIA fails the injury in fact prong of the standing analysis.

a. CDIA has not alleged an injury in fact in its own right.

An organization has standing to sue in its own right if it satisfies the same well-known Article III requirements of injury in fact, causation, and redressability

that apply to individuals. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 237 (5th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "[A]n organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources[.]'" *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

The injury in fact must be "concrete and demonstrable" and must constitute "far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. at 379. Thus, to establish standing, "an organizational plaintiff must explain how the activities it undertakes in response to the defendant's conduct differ from its 'routine [] activities.' The burden rests with the plaintiff to identify 'specific projects that [it] had to put on hold or otherwise curtail in order to respond to' the defendant's conduct." *Def. Distributed v. United States Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018) (quoting *NAACP v. City of Kyle, Tex.*, 626 F.3d at 238).

CDIA lacks standing to sue in its own right because it does not allege any impairment of its routine activities or drain on its resources, as it must to show injury in fact. *Cf. City of Kyle*, 626 F.3d at 237; *Def. Distributed v. United States Dep't of State*, 2018 WL 3614221, at *4. Rather, CDIA's predictions of "increased delinquencies" and the "potential[] increase [in] price, and decrease [in] availability[] of consumer credit" are—at most—"simply a setback to the organization's abstract

social interests." Compl. ¶26; *Havens Realty Corp.*, 455 U.S. at 397. *See also, e.g., Lujan*, 504 U.S. at 575 (noting that "generalized grievances" do not amount to injury in fact). Thus, CDIA does not claim injury sufficient to confer organizational standing.

b. CDIA has not alleged injury in fact with respect to its members.

Nor does CDIA allege injury in fact on behalf of its members.[5] CDIA alleges that § 20.05(a)(5) "will harm CDIA's member CRAs by impeding their ability to report accurate and predictive data," and that its members might face private or Attorney General actions to enforce § 20.05(a)(5). Compl. ¶ 27. The first of these allegations is the very sort of "generalized grievance" that does not amount to injury in fact. *E.g., Lujan*, 504 U.S. at 575. And neither allegation satisfies the requirement that "'threatened injury must be certainly impending to constitute injury in fact.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (collecting cases).

In *Clapper*, human rights, labor, legal, and media organizations sued to enjoin a provision of the Foreign Intelligence Surveillance Act ("FISA") allowing government surveillance of communications with individuals outside the United States who were not "United States persons." 568 U.S. at 401. The plaintiffs claimed that they suffered "injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under [the FISA] at some point in the future." *Id.*

[5] An association has standing to bring a suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 129 F.3d 826, 827–28 (5th Cir. 1997)).Thus, the first prong of this test requires that CDIA plead injury, causation, and redressability with respect to its members.

at 401. But the Supreme Court rejected this notion, concluding that plaintiffs' "theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* (citing *Whitmore v. Arkansa*s, 495 U.S. 149, 158 (1990)).

So, too, here. Just as the *Clapper* plaintiffs "ha[d] no actual knowledge of the Government's [FISA] targeting practices," CDIA has no knowledge of how the Attorney General determines what cases to pursue under the Business & Commerce Code, and "can only speculate" that they might be subject to an enforcement action under § 20.05(a)(5). *Id.* at 1148—49. Moreover, the Attorney General has nothing to do with whether any individual pursues a private right of action against any CDIA member under § 20.05(a)(5).[6] Thus, CDIA fails to establish "certainly impending" injury for the very same reasons the *Clapper* plaintiffs did. As the Supreme Court did in *Clapper*, this Court should "decline to abandon [the] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," and should conclude that CDIA lacks standing. *Id.* at 1150.

II. Even if CDIA had standing, this case should be dismissed under Rule 12(b)(6) because the FCRA does not preempt § 20.05(a)(5).

Federal Rule of Civil Procedure 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. William*, 490 U.S. 319, 326 (1989) (citations omitted). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with

[6] Moreover, to the extent that CDIA asserts injury in connection with potential private causes of action, such injury is not traceable to the Attorney General, further defeating standing.

needless discovery and factfinding." *Id.* at 326-27. The issue under Rule 12(b)(6) is whether the Complaint alleges "enough facts to state a claim to relief that is plausible on its face," assuming that the allegations are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Notably, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555). Thus, if the FCRA does not preempt § 20.05(a)(5), then this case should be dismissed under Rule 12(b)(6). *See, e.g., Twombly*, 550 U.S. at 555.

a. Preemption

Some context aids in analyzing CDIA's express preemption claim. Under the Constitution's Supremacy Clause, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Federal law preempts state law under the Supremacy Clause in three circumstances: (1) express preemption; (2) field preemption; and (3) conflict preemption. *E.g.*, *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016). As the Fifth Circuit recently summarized:

> Express preemption requires Congress to explicitly state its intent to preempt relevant state laws. Field preemption occurs when Congress intends to "occupy the field," taking over a field of law to the exclusion of state or local authority. Finally, conflict preemption takes two forms: (i) when compliance with both state and federal law is impossible, and

> (ii) when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (additional citations omitted). CDIA alleges that § 20.05(a)(5) "is expressly preempted by 15 U.S.C. § 1681t(b)(1)(E)." Compl. ¶21.

b. The FCRA does not expressly preempt § 20.05(a)(5).

In interpreting a preemption clause, courts "must give effect to [its] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). The Supreme Court has held that, "[w]hile the pre-emptive language" of an express preemption clause "means that we need not go beyond that language to determine whether Congress intended [] to pre-empt at least some state law, we must nonetheless 'identify the domain expressly pre-empted' by that language," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (citation omitted).

A court's "analysis of the scope of the pre-emption statute must begin with its text," but "does not occur in a contextual vacuum," and is instead "informed by two presumptions about the nature of pre-emption." *Id.* at 484-85 (citations omitted). "First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action,"

and "[s]econd, 'the purpose of Congress is the ultimate touch-stone' in every pre-emption case." *Id.* at 485 (citations omitted).

Under the plain text of its general preemption provision, the FCRA generally does not preempt state laws. 15 U.S.C. § 1681t(a). The exception CDIA invokes contains a limited express preemption clause: "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under section 1681c of this title, relating to information contained in consumer reports[.]" 15 U.S.C. § 1681t(b)(1)(E). The question, then, is whether—in enacting § 1681t(b)(1)(E)—Congress intended to preempt state laws such as Texas Business & Commerce Code § 20.05(a)(5). That is, whether state laws prohibiting the inclusion of certain types of medical debt fall within 'the domain expressly pre-empted'" by § 1681t(b)(1)(E). *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. at 484-85.

Because § 1681t(b)(1)(E) defines the domain expressly preempted in terms of § 1681c, that section requires examination. And § 1681c says very little about medical information contained in consumer reports, mentioning it in just two contexts. First, it provides that the identifying information of medical information furnishers must be excluded from most reports unless it is coded to avoid disclosing the nature of the provider and what was provided. 15 U.S.C. § 1681c(a)(6).[7] Second, it provides that veterans' medical debts must be excluded from consumer reports in certain

[7] "The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless--

> (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or
> (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance."

circumstances. 15 U.S.C. § 1681c(a)(7),[8] (8).[9] Given the plain meaning of § 1681c, the requirement to exclude this information is "the domain expressly preempted" by 1681t(b)(1)(E). *E.g.*, *Medtronic*, 518 U.S. at 484. The presumption "that Congress does not cavalierly pre-empt state-law causes of action" underscores this result. *Id.* at 485.

Though directly on-point caselaw is sparse, the Supreme Court's ruling in *Altria Group v. Good* illuminates the application of express preemption clauses to specific state laws, and further supports the result that § 20.05(a)(5) is not preempted. 555 U.S. 70. *Altria* involved the Federal Cigarette Labeling and Advertising Act's express preemption provision: "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." *Altria*, 555 U.S. at 78-79 (quoting 15 U.S.C. § 1334(b)). The *Altria* plaintiffs sued cigarette manufacturers under Maine's unfair trade practices act, alleging that the manufacturers had falsely marketed "light" cigarettes as less harmful than regular cigarettes. *Id.* at 72. The manufacturers claimed that the

[8] "With respect to a consumer reporting agency described in section 1681a(p) of this title, any information related to a veteran's medical debt if the date on which the hospital care, medical services, or extended care services was rendered relating to the debt antedates the report by less than 1 year if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act."

[9] "With respect to a consumer reporting agency described in section 1681a(p) of this title, any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act."

Labeling Act's express preemption provision preempted the state statute, barring the state law claims. *Id.* at 80-88.

Thus, the question was whether Maine's unfair trade practices act amounted to a state law "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes[.]" 15 U.S.C. § 1334(b). Giving this express preemption clause "a fair but narrow reading," the Court concluded that the claim was not preempted. *Altria*, 555 U.S. at 80 (citation omitted). The Court reasoned that the state law claim "alleged a violation of the manufacturers' duty not to deceive—a duty that is not 'based on' smoking and health." *Id.* at 81 (citations omitted). Thus, the state law claim was not preempted.

Giving a "fair but narrow reading" to § 1681t(b)(1)(E)'s express preemption provision requires consideration of the *specific* "subject matter regulated under section 1681c." *Altria*, 555 U.S. at 80; 15 U.S.C. § 1681t(b)(1)(E). And § 1681c only regulates medical information by prohibiting its disclosure in certain circumstances. *See supra*, nn. 7-9 and accompanying text. Thus, it does not preempt Texas's broader law—§ 20.05(a)(5)—which provides for the exclusion of *other* medical debt information under *other* circumstances. Section 1681t(b)(1)(E) does not expressly preempt Texas Business & Commerce Code § 20.05(a)(5)

c. The FCRA's structure confirms this result.

Consideration of another FCRA provision—15 U.S.C. § 1681b(g)—also supports this result. This subsection, entitled "protection of medical information," imposes stricter requirements on consumer reports that contain medical information

that are furnished for employment or credit purposes. Nevertheless, information about medical debts may still be included in such reports so long as it is coded so as not to identify the provider or what was provided, "as provided in section 1681c(a)(6)." 15 U.S.C. § 1681b(g)(1)(C). Since the main restrictions on including medical information in consumer reports are located not in § 1681c, which is the target of an express preemption provision, but in § 1681b(g), which is not such a target, it does not follow that Congress intended to expressly preempt Texas's limitation on disclosing this same information under other circumstances. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. at 485 ("'the purpose of Congress is the ultimate touch-stone' in every pre-emption case.") (citation omitted).

CONCLUSION

For the forgoing reasons, this case should be dismissed.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

(512) 463-2798 | FAX: (512) 320-0667
anna.mackin@oag.texas.gov

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that that on October 2, 2019, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General