No. 20-2064

In the United States Court of Appeals

FOR THE FIRST CIRCUIT

CONSUMER DATA INDUSTRY ASSOCIATION,
PLAINTIFF-APPELLEE,

v.

AARON M. FREY, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE, AND WILLIAM N. LUND, IN HIS CAPACITY AS SUPERINTENDENT OF THE MAIN BUREAU OF CONSUMER CREDIT PROTECTION
DEFENDANTS-APPELLANTS,

On Appeal From The United States District Court
For The District of Maine
Case No. 1:19-cv-438-GZS
The Honorable George Z. Singal, Judge

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Amicus American Financial Services Association is a not-for-profit membership organization; it is not a publicly held corporation and does not have a parent corporation. No publicly held corporation owns 10% or more of the stock of American Financial Services Association.

Amicus Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber of Commerce of the United States of America has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber of Commerce of the United States of America.

/s/ Misha Tseytlin
MISHA TSEYTLIN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes And Rules

Other Authorities

IDENTITY AND INTERESTS OF *AMICI CURIAE* [1]

Amici are the American Financial Services Association ("AFSA") and the Chamber of Commerce of the United States of America ("Chamber").

Founded in 1916, AFSA is the national trade association for the consumer-credit industry, with the mission of protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large, international financial-services firms to single-office, independently owned consumer-finance companies, each of whom must operate within the requirements of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* AFSA's over 420 members span the consumer-credit market and provide consumers with financial services and numerous kinds of credit—including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. Through these members' individual actions, they shape the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented in writing to the filing of this amicus brief. Pursuant to Rule 29(a)(4)(E), counsel for *Amici* states that no counsel for a party authored this brief in whole or in part and that no person, other than *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation for submission of this brief.

consumer-credit industry's direction and positions on a broad range of public-policy issues that affect the consumer-credit industry. AFSA routinely submits amicus briefs in important cases, like this one, concerning the Nation's financial-services community. *See, e.g.*, Br. of *Amicus* AFSA, *Williams v. Am. Honda Fin. Corp.*, No. 16-1275, 2017 WL 2889577 (1st Cir. Jun. 27, 2017).

Amicus the Chamber is the world's largest business federation. It represents approximately 300,000 members directly and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the Nation. The Chamber and its members benefit from federal rules that simultaneously advance important societal and statutory objectives, such as consumer-credit reporting, and provide a predictable and nationally uniform regulatory regime. The Chamber regularly files amicus briefs that offer its broader perspective on the importance of preemption in creating and sustaining a consistent, nationwide market. *See* Br. of *Amicus* Chamber, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016) (Nos. 15-233, 15-255), 2016 WL 791788; Br. of *Amici* American Benefits Council, America's Health Ins.

Plans, the ERISA Industry Committee, the HR Policy Ass'n, the Nat'l Busines Gr. On Health, and the Chamber, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (No. 14-181), 2015 WL 6347733; Br. of *Amicus* Chamber, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (No. 12-462); Br. of *Amicus* Chamber, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) (No. 10-224), 2011 WL 3821399; Br. of *Amicus* Chamber, *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011) (No. 08-1314), 2010 WL 3806513; Br. of *Amicus* Chamber, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (No. 09-152), 2010 WL 3017752; Br. of *Amicus* Chamber, *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (No. 07-562), 2008 WL 976409.

Here, Maine's attempts to inject state law into the Fair Credit Reporting Act's ("FCRA") uniform consumer-credit-reporting system negatively impact *Amici*'s members. Maine's imposition of state-specific requirements for the contents of consumer reports (*i.e.*, credit reports) and the conduct of consumer-reporting agencies will disrupt the FCRA's efficient, uniform, and nationwide system of consumer reporting. That standardized system is vital to this Nation's economy and to the daily operations of *Amici*'s members—which heavily rely on consumer reports

governed by the FCRA. Accordingly, *Amici* maintain a strong interest in preserving the district court's judgment below, which properly held that the FCRA expressly preempts Maine's efforts to undermine this uniform consumer-credit-reporting system. *See* Addendum to Br. of Defendants-Appellants, Doc. 00117694022 ("Add.") 16.

INTRODUCTION

Through the FCRA, Congress created and comprehensively regulated consumer credit reports and credit-reporting agencies. To ensure that this carefully calibrated, nationwide regime did not become hopelessly fragmented, Congress provided—in express terms—that the FCRA preempts states laws "relating to information contained in consumer reports," as well as certain "conduct" governed by the FCRA.

Maine violated the FCRA's express-preemption mandate by enacting the "Medical-Debt Provision" and the "Economic Abuse Provision." *See* Medical Bill Act, Legislative Document ("L.D.") 110; Economic Abuse Act, L.D. 748, *both codified at* Me. Rev. Stat. Tit. 10, § 1310-H (2019) (collectively, "Provisions"). These state-level Provisions purport to override federal law by imposing new requirements both on the contents of consumer reports and the conduct of consumer-reporting

agencies. As if to underscore its disregard for federal law, Maine made clear in the Medical-Debt Provision itself that this state law would apply "*[n]otwithstanding* any provision of federal law." Me. Rev. Stat. tit. 10, § 1310-H(4) (emphasis added). This gets the Supremacy Clause's operation precisely backwards. Indeed, a core design of the Supremacy Clause (and the Commerce Clause) is to remove state-level obstacles to a national market—like the Provisions here—thereby empowering Congress to regulate interstate commerce in a uniform manner.

If Maine's unlawful reverse-preemption strategy succeeds, it would be a disaster for the national consumer-reporting system. A patchwork of varying regulations may follow. Each State may select which categories of consumer debt belong on consumer reports issued within its borders, thus requiring consumer-reporting agencies to issue 50 different types of credit reports. Following Maine's lead, West Virginia might decide that it needs special consumer-reporting rules for debts owed by miners; New York may think that real-estate debt reporting deserves special treatment; Nevada and New Jersey may opt for special rules for gambling-related debt reporting; and so on across every State.

Such a lack of national uniformity would impose serious, practical consequences for consumer lenders, consumer borrowers, and the Nation's economy as a whole. Consumer lenders would either bear increased regulatory costs to continued operations in multiple States or exit the lending market in particular States altogether. Those costs would inevitably flow to consumer borrowers, who would either suffer increased interest rates on consumer loans or lose access to consumer credit. Congress passed the FCRA (and its express-preemption provision) to avoid this sort of inefficient regulatory scheme.

This Court should affirm the district court's judgment.

ARGUMENT

I. The FCRA Expressly Preempts Maine's Medical-Debt And Economic-Abuse Provisions

The FCRA contains a broad express-preemption mandate that prohibits States from imposing laws relating to: (1) the *content* of a consumer report, *see* 15 U.S.C. § 1681t(b)(1)(E); and (2) the *conduct* of consumer-reporting agencies in addressing identity theft, *see id.* § 1681t(b)(5)(C). Section 1681t(b)(1)(E) preempts both Maine's Medical-Debt and Economic-Abuse Provisions, which regulate the content of consumer reports. And Section 1681t(b)(5)(C) preempts the Economic-

Abuse Provision, which regulates the conduct of consumer-reporting agencies with respect to debt that is the result of economic abuse.

A. The FCRA Expressly Preempts Any State Law Regulating The Content Of Consumer Reports Or Certain Conduct Of Consumer Reporting Agencies

1. The Supremacy Clause provides, in relevant part, that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, "Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The Framers included the Supremacy Clause in the Constitution in part to remove state-imposed obstacles to a national market—indeed, a chief purpose of the Constitution more broadly was to empower the national government to impose a uniform regulation of interstate commerce. As James Madison explained, "[t]he defect of power in the existing [Articles of Confederation] to regulate the commerce between its several members [has] been clearly pointed out by experience." *The Federalist*, No. 42, at 263–64 (James Madison) (Clinton Rossiter ed., 2003). Before the Constitution was ratified, the "multiplicity of laws in [the] several States"

was one of the chief "evils . . . of our situation." James Madison, *Vices of the Political System of the United States* (1787).[2]

Congress may exercise its preemption authority by enacting "a federal statute [that] expressly preempt[s] state law" in the text itself. *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020).[3] When a statute contains such "an express pre-emption clause," the court determines the statute's preemptive sweep by simply "focus[ing] on the plain wording of the clause" itself. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (citations omitted). The plain text of the statute "necessarily contains the best evidence of Congress' pre-emptive intent." *Id.*; *see Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). When "the statute's language is plain," the court ends its "inquiry." *Franklin*, 136 S. Ct. at 1946 (citations omitted). Notably, the court "do[es] *not* invoke any presumption against pre-emption" when considering the

[2] Available at https://founders.archives.gov/documents/Madison/01-09-02-0187 (all websites last accessed March 3, 2021).

[3] Congress may also preempt state law impliedly. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–68 (2002). This type of preemption, not at issue here, occurs when the law "indicates that Congress intended federal law to occupy a field exclusively" (field preemption) or "conflict[s] with" state law (conflict preemption). *Id.* at 64–65 (citations omitted).

meaning and breadth of an express preemption clause—the plain text of the preemption clause alone controls. *Id.* (emphasis added).

2. This case turns on the proper interpretation of the FCRA's express-preemption provisions, specifically the preemption clauses in 15 U.S.C. § 1681t(b). With the FCRA, Congress established "uniform, national standards in the area of credit reporting," including standards for "the content of consumer reports and the responsibilities of those who maintain them." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 900–01 (10th Cir. 2012); *accord* S. Rep. No. 103-209, at 7, 1993 WL 516162 (1993). These consumer reports are a vital product of consumer-reporting agencies, 15 U.S.C. § 1681a(f), which provide the reports to creditors, employers, and others to assist in determining the "credit worthiness, credit standing, credit capacity, character, and general reputation" of consumers, 15 U.S.C. § 1681(a)(2)–(3).

Section 1681t(b) is an express preemption mandate within the FCRA. As other Circuits have recognized, this provision carries a "broad," *Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 47 (2d Cir. 2011) (per curiam), and "strong" preemptive effect, *Ross v. FDIC*, 625

F.3d 808, 813 (4th Cir. 2010). And it has two clauses that are especially relevant here: Sections 1681t(b)(1)(E) and 1681t(b)(5).

a. First, Section 1681t(b)(1)(E) broadly preempts any state law that purports to regulate the *content* of consumer reports. In doing so, it establishes a uniform, national standard for the reports' content. 15 U.S.C. § 1681t(b)(1)(E). This Section 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." *Id.* (emphases added). Section 1681c, in turn, details a list of content "required to be disclosed" in a consumer report, 15 U.S.C. § 1681c(d), as well as information "excluded from consumer reports," *id.* § 1681c(a).[4]

[4] For example, Section 1681c provides that consumer reports may not contain information relating to bankruptcy cases more than ten years old, 15 U.S.C. § 1681c(a)(1); civil suits, civil judgments, arrest records, and paid tax liens more than seven years old, *id.* § 1681c(a)(2)–(3); the name, address, or telephone number of furnishers of medical information, *id.* § 1681c(a)(6); or a "veteran's medical debt" that predates the report by less than one year or which has been fully paid or settled, *id.* § 1681c(a)(7)–(8). Section 1681c also contains a comprehensive catch-all provision forbidding the inclusion in a consumer report of "[a]ny other adverse item of information, other than records of convictions of crimes," that is more than seven years old. *Id.* § 1681c(a)(5).

Section 1681t(b)(1)(E)'s plain text has a broad preemptive reach, as evidenced by its use of the synonymous phrases "relating to" and "with respect to." The Supreme Court has held that the phrase "relating to" reflects a "broad" and "expansive" preemptive "sweep." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citations omitted); *see also Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370–71 (2008) (affirming and applying *Morales*); *accord Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) ("comprehensive"). This statutory language is "conspicuous for its breadth"—and "deliberatively" so—covering any state law that "*has a connection with or reference to*" the identified objects in the federal statute. *Morales,* 504 U.S. at 384 (citations omitted; emphasis added); *accord Dan's City*, 569 U.S. at 261 (defining phrase "with respect to" to mean "concern[ing]"). Moreover, this language applies whether the state law purports to regulate "about" the objects in the federal statute or seeks to regulate the objects "themselves" directly. *Rowe*, 552 U.S. at 372 (emphasis omitted).

So, Section 1681t(b)(1)(E) preempts any state law that *has a connection with or reference to* "any subject matter regulated under . . . section 1681c." And it defines "subject matter" as anything that *has a*

connection with or reference to "information contained in consumer reports." *Id.* § 1681t(b)(1)(E). In short, under the FCRA, state law cannot regulate anything connected with, or referring to, the content of a consumer report. *See, e.g.*, *Aldaco v. RentGrow, Inc.*, 921 F.3d 685, 688 (7th Cir. 2019) (Easterbrook, J.); *King*, 678 F.3d at 900–01; *accord Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 445–46 (2d Cir. 2015); *Ross*, 625 F.3d at 813.

b. The second preemption clause applicable here is Section 1681t(b)(5). It provides, in relevant part, that "[n]o requirement or prohibition may be imposed under the laws of any State . . . *with respect to* the conduct required by . . . section 1681c-2." § 1681t(b)(5)(C) (emphasis added). Section 1681c-2, in turn, requires "a consumer reporting agency [to] block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft," after the consumer-reporting agency receives a proper application from the consumer supporting the identity-theft allegation. 15 U.S.C. § 1681c-2(a). And under the FCRA, "identity theft" is "a fraud committed using the identifying information of another person." § 1681a(q)(3).

Here too, Section 1681t(b)(5)'s use of the phrase "with respect to" establishes a broad preemptive scope. This "with respect to" phrase means that this Section preempts any state law that "*has a connection with or reference to*" the conduct required by Section 1681c-2—namely, a consumer-reporting agency's blocking of consumer information allegedly stemming from identity theft. *Morales*, 504 U.S. at 383 (emphasis added); *accord Dan's City*, 569 U.S. at 261; *see generally California Tow Truck Ass'n Ass'n v. City & Cty. of San Francisco*, 807 F.3d 1008, 1021 (9th Cir. 2015) ("with respect to" synonymous with "relating to"). Thus, "the FCRA expressly preempts any state requirement or prohibition relating to . . . a [consumer-reporting agency's] duties in addressing reports of identity theft." *King*, 678 F.3d at 901. Section 1681t(b)(5) "leaves no room for overlapping state regulations" in this area. *Id.*

B. Maine's Medical-Debt And Economic-Abuse Provisions Fall Within The FCRA's Express Preemption Clauses And So Are Preempted

Proper application of Section 1681t(b)(1)(E) and Section 1681t(b)(5) leads to the straightforward conclusion that Maine's Medical-Debt and Economic-Abuse Provisions are preempted under these FCRA express-preemption clauses.

1. Section 1681t(b)(1)(E) preempts both Maine's Medical-Debt and Economic-Abuse Provisions because these Provisions regulate the *content* of consumer reports. That is, both Provisions "relat[e] to" and apply "with respect to" the content of consumer reports, § 1681t(b)(1)(E), which—under the Supreme Court's broad understanding of those terms—establishes these Provisions' impermissible "connection with or reference to" the content of consumer reports, *Morales*, 504 U.S. at 384; *Rowe*, 552 U.S. at 370–71; *accord Dan's City*, 569 U.S. at 261.

a. Maine's Medical-Debt Provision attempts to impose numerous regulations on the content of consumer reports, "[n]otwithstanding any provision of federal law." Me. Rev. Stat. tit. 10, § 1310-H(4). Each of the Medical-Debt Provision's requirements has a straightforward "relat[ion] to," or connection "with respect to," the content of consumer reports, § 1681t(b)(1)(E), and so has an impermissible "connection with or reference to" the content of consumer reports under Section 1681t(b)(1)(E), *Morales*, 504 U.S. at 384. The Provision's aspects include:

- "A consumer reporting agency may not report debt from medical expenses on a consumer's consumer report when the date of the first delinquency on the debt is less than 180 days prior to the date that the debt is reported." *Id.* § 1310-H(4)(A).

- Once a consumer-reporting agency receives "reasonable evidence" that a medical debt "has been settled in full or paid in full," the consumer reporting agency "[m]ay not report that debt" and "[s]hall remove or suppress the report of that debt . . . on the consumer's consumer report." *Id.* § 1310-H(4)(B)(1)–(2).

- Finally, if a consumer is "making regular, scheduled periodic payments" on the medical debt "as agreed upon by the consumer and medical provider," then the consumer-reporting agency "shall report that debt . . . on the consumer's consumer report in the same manner as debt related to a consumer credit transaction." *Id.* § 1310-H(4)(C).

Therefore, each of the Provision's requirements *directly* regulates consumer-report content by requiring consumer-reporting agencies either to remove medical-debt content from a consumer report, § 1310-H(4)(A)–(B), or to report medical-debt content in a particular manner, *id.* § 1310-H(4)(C), under certain conditions. Given this direct regulation of content, "[o]ne cannot avoid the conclusion" that the Medical-Debt Provision "'relate[s] to'" the content of consumer reports. *Morales*, 504 U.S. at 388; *Rowe*, 552 U.S. at 372; *accord Aldaco*, 921 F.3d at 688; *King*, 678 F.3d at 900–01.

This preemption conclusion is even more apparent in light of the Medical-Debt Provision's introductory phrase, which claims that these state-law requirements apply "*[n]otwithstanding* any provision of federal

law," Me. Rev. Stat. tit. 10, § 1310-H(4) (emphasis added). The "*notwithstanding*" word choice mimics the Supremacy Clause itself. U.S. Const. art. VI, cl. 2 (emphasis added). But Maine gets federal and state law precisely backwards: "*Congress* has the power to preempt state law," not the other way around. *Crosby*, 530 U.S. at 372 (emphasis added).

b. Maine's Economic-Abuse Provision likewise has a direct "relat[ion] to," or link "with respect to," the content of consumer reports, § 1681t(b)(1)(E), and so it too has an impermissible "connection with or reference to" the content of these reports under Section 1681t(b)(1)(E), *Morales*, 504 U.S. at 384. Like the Medical-Debt Provision, the Economic-Abuse Provision directly regulates the content of a consumer report by explicitly prohibiting consumer-reporting agencies from including particular content on a consumer report—debt that stems from economic abuse. § 1310-H(2-A).

The Economic-Abuse Provision provides that "if a consumer provides documentation to the consumer reporting agency . . . that [a] debt is the result of economic abuse," the agency "shall reinvestigate the debt" and "remove any reference" to it "from the consumer's credit report," if that investigation "determine[s] that the debt is the result of

economic abuse." Me. Rev. Stat. tit. 10, § 1310-H(2-A). The law further defines "economic abuse" to include causing "an individual to be financially dependent by maintaining control over the individual's financial resources . . . [via] unauthorized or coerced use of credit or property . . . or defrauding of money or assets." Me. Rev. Stat. tit. 19-A, § 4002(3-B); *see* Me. Rev. Stat. tit. 10, § 1310-H(2-A) (expressly incorporating this definition).

Just as with the Medical-Debt Provision, the Economic-Abuse Provision directly regulates the content of consumer reports. It thus "relat[es] to" or is "with respect to" the content of consumer reports, § 1681t(b)(1)(E), and is therefore preempted by Section 1681t(b)(1)(E) because it regulates in "connection with or reference to" the content of such reports, *Morales,* 504 U.S. at 384; *Rowe*, 552 U.S. at 372; *accord Aldaco*, 921 F.3d at 688; *King*, 678 F.3d at 900–01.

2. Section 1681t(b)(5) also independently preempts the Economic-Abuse Provision's requirement that consumer-reporting agencies must engage in "reinvestigat[ions]" of certain consumer debt. Me. Rev. Stat. tit. 10, § 1310-H(2-A). As explained above, Section 1681t(b)(5) preempts any state law that has "a connection with or reference to" consumer-

reporting-agency conduct blocking information stemming from identity theft from a consumer report. *Morales*, 504 U.S. at 384; *supra* Part I.A.2.b. This Provision attempts to regulate within that domain because it requires consumer-reporting agencies to reinvestigate debt resulting from "economic abuse." Me. Rev. Stat. tit. 10, § 1310-H(2-A).

First, the Provision purports to regulate the "conduct" of a consumer-reporting agency. § 1681t(b)(5). It mandates that these agencies conduct a "reinvestigat[ion]" into a debt of a consumer if the consumer alleges that the debt "is the result of economic abuse." Me. Rev. Stat. tit. 10, § 1310-H(2-A). Such a reinvestigation qualifies as the "conduct" of the consumer-reporting agency, under any reasonable definition of that term. *Compare* Conduct, *Black's Law Dictionary* (11th ed. 2019) ("Personal behavior, whether by *action* or inaction . . . ." (emphasis added)), *with* Investigation, *Black's Law Dictionary* (11th ed. 2019) ("The *activity* of trying to find out the truth about something . . . ." (emphasis added)).

Second, the reinvestigation mandated in the Economic-Abuse Provision has a "connection with or reference to," *Morales,* 504 U.S. at 384, a consumer-reporting agency's blocking of identity-theft information

from a consumer report, *see* § 1681t(b)(5) (referring to § 1681c-2(a)). Under the FCRA, "identity theft" is "a *fraud* committed using the identifying information of another person." § 1681a(q)(3) (emphasis added). And for the Economic-Abuse Act, "economic abuse" includes causing "an individual to be financially dependent by maintaining control over the individual's financial resources . . . [via] *unauthorized* or coerced use of credit or property . . . or *defrauding* of money or assets." Me. Rev. Stat. tit. 19-A, § 4002(3-B) (emphases added).

Thus, an individual causing a consumer to be financially dependent through the fraudulent, unauthorized use of a consumer's identifying information, and thereby obtaining something of value, would qualify both as "economic abuse" under the Economic-Abuse Provision and "identity theft" under the FCRA—triggering a consumer-reporting agency's duties under both laws. This suffices to establish the Economic-Abuse Provision's direct connection with or relation to this domain of the FCRA. *See Morales*, 504 U.S. at 384; *Rowe*, 552 U.S. at 372.

C. Maine And Its *Amici* Cannot Salvage The Medical-Debt And Economic-Abuse Provisions

AFSA and the Chamber agree with Plaintiff Consumer Data Industry Association's comprehensive refutation of the anti-preemption

arguments of Maine and its *Amici*. *See* Br. of Appellee CDIA, Doc. 00117710438. Accordingly, AFSA and the Chamber provide only four targeted responses to the efforts of Maine and its *Amici* to save the Medical-Debt and Economic-Abuse Provisions from preemption.

First, Maine and its *Amici* argue that "the Supreme Court has long recognized a presumption against federal preemption." Br. of Defendants-Appellants at 17–19, *CDIA v. Frey*, No. 20-2064, Doc. 00117694022 (2021) ("Maine Br."); *accord* Br. of *Amici Curiae* Nat'l Consumer Law Center et al. at 8–9, *CDIA v. Frey*, No. 20-2064, Doc. 00117697206 2021). This ignores the Supreme Court's more recent decision in *Franklin*, where the Court held that courts may "*not* invoke any presumption against pre-emption" when considering a statute with "an express pre-emption clause." 136 S. Ct. at 1946 (emphasis added); *supra* Part I.A.1. Because the case here turns on the FCRA's express preemption clause, no presumption against preemption applies. *See Franklin*, 136 S. Ct. at 1946. Indeed, at least four Circuits have interpreted *Franklin* to prohibit that presumption where, as here, "the statute contains an express preemption clause." *Dialysis Newco, Inc. v. Comm. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258–59 (5th Cir.

2019); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017); *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016); *accord Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018). *But see Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (applying presumption in favor of preemption only for the narrow, special category of preemption claims against "historic state regulation of matters of health and safety, such as [ ] products liability" (citation omitted)).

Even if this Court were to apply a presumption of preemption, Sections 1681t(b)(1)(E) and 1681t(b)(5) still would preempt Maine's Medical-Debt and Economic-Abuse Provisions. The text of these sections is broad, and they carry an expansive preemptive sweep. *See Morales*, 504 U.S. at 384; *Rowe*, 552 U.S. at 370–72; *accord Dan's City*, 569 U.S. at 260–61. They plainly preempt the Provisions at issue, given that those Provisions attempt to *directly* regulate the contents of consumer reports or the conduct of consumer-reporting agencies.

Second, Maine advocates for a "narrower" interpretation of Section 1681t(b)(1)(E) that "preempt[s] *only* those laws related to subject matter '*regulated under*' Section 1681c." Maine Br. 29 (first emphasis added);

accord Maine Br. 21–22. That is, in Maine's view, Section 1681t(b)(1)(E) preempts "only the aspects of credit report regulation on which Congress has chosen to regulate" in Section 1681c, not "the entire field of the content of credit reports." Maine Br. 29–30. That "limited" interpretation "simply reads the words 'relating to' out of the statute," and is thus legally wrong. *Morales*, 504 U.S. at 385.

But even under Maine's narrow, incorrect reading, Section 1681t(b)(1)(E) *still* would preempt these Provisions because they *do* regulate "aspects" of consumer reports specifically addressed by Section 1681c. For example, in its catch-all provision, Section 1681c forbids the reporting of "*[a]ny other* adverse item of information, other than records of convictions of crimes," that is more than seven years old. *Id.* § 1681c(a)(5) (emphasis added). That catch-all provision regulates the same "aspect" as both the Medical-Debt and Economic-Abuse Provisions—specifically, the circumstances in which a consumer-reporting agency may report *any other* adverse item of information not explicitly addressed in Section 1681c itself. Further, Section 1681c regulates "veteran's medical debt," which also addresses the same

"aspect" as Maine's Medical-Debt Provision: namely, the reporting of *medical debt* in a consumer report. *Id.* § 1681c(a)(7)–(8).

Third, and relatedly, Maine argues that the district court's interpretation of Section 1681t(b)(1)(E) would make the phrase "subject matter regulated under . . . section 1681c" superfluous. Maine Br. 20–22. In Maine's view, Congress would have simply stated that "[n]o requirement or prohibition may be imposed under the laws of any State relating to information contained in consumer reports"—with no reference to Section 1681c's subject matter—had it intended to preempt state laws regulating any of the content of a consumer report. Maine Br. 20–21. But this simply quibbles with Congress' choice of structure for Section 1681t(b), which ties each of its preemption clauses to a particular statutory provision in the FCRA. *See* § 1681t(b)(1)(A)–(K). That Congress' choice of structure perhaps yields some minor superfluidity—in only a few words, in only one clause—is of no moment. The "preference for avoiding surplusage constructions is not absolute," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2210 (2020) (citation omitted), and Section 1681t(b)(1)(E)'s broad language,

repeatedly interpreted by the Supreme Court, plainly encompasses the Provisions here, *supra* Part I.B.

Finally, Maine argues that Section 1681t(b)(5) does not preempt the Economic-Abuse Provision because "[t]here is little, if any, overlap between" economic abuse under the Economic-Abuse Provision and identity theft under the FCRA. Maine Br. 34. But there is a clear and significant overlap: causing a consumer to be financially dependent through the fraudulent, unauthorized use of that consumer's identifying information, and thereby obtaining something of value. *Supra* pp. 18–19. Given the wide preemptive breadth of Section 1681t(b)(5)—as evidenced in particular by that statute's use of the phrase "with respect to," *supra* Part I.A.2.b—the Economic-Abuse Provision falls within Section 1681t(b)(5)'s reach.

II. Adopting Maine's Position Would Undermine Congress' Goal Of Creating National Standards For Consumer Reports And Thus Unnecessarily Harm The National Economy

Allowing Maine to enforce the Medical-Debt and Economic-Abuse Provisions at issue here, despite the FCRA's express preemption, would frustrate the FCRA's goal of creating uniform, national standards for the consumer-reporting industry. That, in turn, would harm the national

economy, especially given the risk of other States following Maine's lead and imposing their own state-specific rules in this area.

With the FCRA, Congress enacted a "comprehensive legislative framework," *Ross*, 625 F.3d at 813, that "create[s] uniform, national standards in the area of credit reporting," *King*, 678 F.3d at 900–01. To achieve that goal of uniformity, Congress paired the FCRA's "host of requirements concerning the creation and use of consumer reports," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016), with the broad preemption provisions discussed at length above, *see* S. Rep. No. 103-209, at 7, 1993 WL 516162 (1993). Thus, "the FCRA expressly preempts any state requirement or prohibition relating to . . . the content of consumer reports" and "the responsibilities of those who maintain them," leaving "no room for overlapping state regulations" in this domain. *King*, 678 F.3d at 900–01; *accord Aldaco*, 921 F.3d at 688; *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1172 (9th Cir. 2009). In other words, the "purpose" of the FCRA's express-preemption clauses "was, in part, to avoid a patchwork system of conflicting regulations" by the States. *Ross*, 625 F.3d at 813 (citations omitted).

The FCRA's creation of uniform consumer-reporting standards through the "preemption of state laws" is a "critical component" to "preserving" a national "credit reporting system that support[s] widespread access to credit." Michael E. Staten & Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at i, 2 (2003);[5] *accord* S. Rep. No. 103-209, at 7, 1993 WL 516162 (1993).

The national credit reporting industry "has helped to make the United States the world leader in the development of competitive consumer and mortgage credit markets." Staten & Cate, *supra*, at i, 31. Before consumer reports were "widely available" across the United States, creditors relied primarily upon their own prior experience with a potential borrower when making consumer-lending decisions. *See* Consumer Financial Protection Bureau, *Taskforce on Federal Consumer Financial Law Report Volume 1* at 395 (Jan. 2021);[6] *accord* Staten & Cate, *supra*, at iv, 13. That reliance naturally limited consumer lending

[5] Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.111.3481&rep=rep1&type=pdf.

[6] Available at https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2021-01.pdf.

to a "local," rather than "national" sphere, resulting in comparably limited consumer-credit lending across the country. Federal Trade Commission ("FTC"), *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 6–7 (Dec. 2004) (hereinafter "*FTC 2004 Report*").[7] The introduction of nationwide consumer reports changed that dynamic by allowing creditors "to make sound [consumer-lending] decisions" without needing prior experience with a borrower. S. Rep. No. 91-517, at 2 (1969); Staten & Cate, *supra*, at iv–v, 11, 13. This spurred lending, yielding "extraordinary benefits" to individual consumers and the economy as a whole. Staten & Cate, *supra*, at ii, 4; *accord* 15 U.S.C. § 1681(a)(1), (3).

Consider just some of the "benefits to individuals and the economy" that "result from [the] national character" of the consumer-reporting industry. Staten & Cate, *supra*, at viii, 27. To begin, nationwide reporting caused the "amount of consumer credit extended [to] gr[o]w substantially," *FTC 2004 Report* at 7, providing "widespread access to

[7] Available at https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/041209factarpt.pdf.

credit across the age and income spectrum," Staten & Cate, *supra* at ii, 4. It "encourages entry by new lenders and greater competition" among existing lenders by "dramatically reduc[ing] the cost of assessing the risk of new borrowers." *Id.* at v, 15. And it allows for a "remarkably mobile" society, given "the ubiquitous availability of credit reports." *Id.* at viii, 27.

Allowing States to disturb this national consumer-reporting industry with state-specific standards "run[s] the risk of upsetting the carefully balanced interests under [the] FCRA," thus returning the industry to its limited, local focus that obtained generations ago. *Id.* at ii, 3, 25. Most prominently, "[t]he cost of determining which state law or laws applied, and of complying with those laws, could easily" compel a consumer lender to operate solely within a single State, or to exit the lending industry altogether. *See id.* at v, viii, 15, 28. Further, state regulations may "inhibit[ ] the assembly of comprehensive credit reports," *id.* at v, 25, "undermin[ing] the[ir] predictive value" and increasing lending risk, *id.* at viii, 25; 15 U.S.C. § 1681(a)(1) ("Inaccurate credit reports directly impair the efficiency of the banking system."). And individual state regulation would frustrate "consumers as they move, commute, and deal with business from across state lines." Staten & Cate,

supra, at viii, 28. All of these ill effects would reduce lending competition across the country, driving up interest rates for some consumers and foreclosing access to credit for others.

If Section 1681t(b) did not preempt Maine's Medical-Debt and Economic-Abuse Provisions, these negative effects would very likely result here. To comply with these state-law provisions, lenders like the members of *Amici* would have to create underwriting rules unique to Maine, requiring multiple workflows that increase both their costs of compliance and their risk of error. Additionally, these businesses will face disputes with individual consumers, with the threat of litigation over every misstep. For example: "Did a defaulted debt on a consumer file come from economic abuse, or some other kind of fraud?" "Is the consumer making 'regular, scheduled, periodic payments' on medical debt, such that it cannot appear on a consumer report?" "What if the consumer misses one of those payments on a medical debt?" "Why didn't the individual lender investigate all of this?" This is enough to drive these businesses out of Maine, or at least force them to raise interest rates on their consumer loans to recoup some of the compliance costs.

Of course, the problems would not stop with Maine. "To allow Maine" to enact its own "special" regulations surrounding consumer reports "would allow other States to do the same," inevitably leading to a 50-State "patchwork" of state-level regulations. *Rowe*, 552 U.S. at 373. While Maine expressed special solicitude for medical debt and debt arising from economic abuse, given its own policy views, other States may well choose to regulate other areas, in light of their policy preferences. For example, West Virginia might enact credit-reporting rules relating to debt owed by workers to mining companies,[8] while Massachusetts may create rules for student debt.[9] Connecticut, in turn, may require special care for reporting of insurance-industry debt,[10] and New York may think

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[8] *See generally* W. Va. Office of Miners' Health Safety & Training, *WV Coal Facts*, Minesafety.wv.gov, https://minesafety.wv.gov/historical-statistical-data/wv-coal-facts/; Chris Hamilton, *Coal Will Remain Major Part of W. Va. Economy*, The Intelligencer Wheeling News-Register (June 27, 2020), https://www.theintelligencer.net/opinion/local-columns/2020/06/coal-will-remain-major-part-of-w-va-economy/.

[9] *Accord* U.S. Public Interest Research Group, *MassPIRG Praises Passage Of Key Bill To Protect Student Loan Borrowers*, U.S. PIRG (Jan. 6, 2021), https://uspirg.org/news/map/masspirg-praises-passage-key-bill-protect-student-loan-borrowers.

[10] *See generally* Conn. Business & Indus. Ass'n, *Study: Health Insurance Industry's Major Impact on State's Economy* (May 22, 2019),

it better to adopt specific rules for reporting of real-estate debt.[11] And Nevada and New Jersey may have special concern for gambling-related debts.[12] And so on. Additionally, nothing in the FCRA prevents States from taking precisely contrary positions on exactly the same consumer-report content, under Maine's view. *See* Staten & Cate, *supra* at vii–viii, 25, 28, 30. That dizzying array of state laws is antithetical to the FCRA's goal of establishing uniform, nationwide standards for the consumer-reporting industry, but would be permissible under Maine's approach.

CONCLUSION

This Court should affirm the judgment of the district court.

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https://www.cbia.com/news/economy/health-insurance-industry-economic-impact/.

[11] *See generally* Jeff Andrews, *Rent? Buy? Run to the Burbs? Deciphering New York's Wild Real-Estate Market*, Curbed.com (Oct. 14, 2020), https://www.curbed.com/article/nyc-real-estate-housing-rent-buy-manhattan-brooklyn.html.

[12] *See generally* Kay Foley, *Betting on Nevada: Gaming Industry Outlook*, Nevada Business (Feb. 1, 2020), https://www.nevadabusiness.com/2020/02/nevada-gaming-industry-outlook/; Wayne Parry, *Another Month, Another Sports Betting Record in NJ With $931M Wagered in Nov.*, NBC 10 Philadelphia (Dec. 15, 2020), https://www.nbcphiladelphia.com/news/sports/sports-betting-record-new-jersey/2633462/.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g) and 29(a)(4)(G), I certify the following:

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Dated: March 4, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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