No. _____

In the
Supreme Court of the United States

CONSUMER DATA INDUSTRY ASSOCIATION,

Petitioner,

v.

AARON M. FREY, in his official capacity as ATTORNEY GENERAL OF THE STATE OF MAINE, WILLIAM N. LUND, in his official capacity as SUPERINTENDENT OF THE MAINE BUREAU OF CONSUMER CREDIT PROTECTION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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November 16, 2022

QUESTION PRESENTED

The Fair Credit Reporting Act ("FCRA") sets forth uniform standards governing the content of consumer reports throughout the country. To preserve that uniformity, FCRA expressly preempts state laws that impose additional requirements on the content of consumer reports. Congress was emphatic: "No 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). Despite that clear command, Maine enacted two laws imposing its own rules on whether and how certain types of debt may be reported. The district court had no trouble concluding that those laws are preempted by FCRA. The First Circuit disagreed, narrowly construing FCRA to preempt state laws only if they regulate the specific issues that Congress addressed in §1681c, rather than the subject matter addressed in that section—namely, "information contained in consumer reports." That cramped interpretation cannot be squared with the statutory text, this Court's preemption precedent, or the decisions of other circuits interpreting 15 U.S.C. §1681t(b)(1). And the decision re-opens the door for a patchwork of state regulation of reports that Congress wanted governed by uniform standards nationwide.

The question presented is:

Whether FCRA broadly preempts state laws "relating to" the "subject matters" expressly described in 15 U.S.C. §1681t(b)(1), or narrowly preempts state laws only to the extent they address the specific issues addressed in the cross-referenced provisions of FCRA.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellee below, is the Consumer Data Industry Association.

Respondents, defendants-appellants below, are Aaron M. Frey, in his official capacity as Attorney General of the State of Maine, and William N. Lund, in his official capacity as Superintendent of the Maine Bureau of Consumer Credit Protection.

CORPORATE DISCLOSURE STATEMENT

The Consumer Data Industry Association is an industry trade association with no parent company or subsidiaries; no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit:

- *Consumer Data Indus. Ass'n v. Frey*, No. 20-2064 (1st Cir. Feb.10, 2022); and
- *Consumer Data Indus. Ass'n v. Frey*, No. 1:19-cv-00438 (D. Me. Oct. 8, 2020).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's rule 14.1.(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Fair and accurate consumer reports are essential in today's society. And in our national economy, it is essential that reports follow uniform rules governing their content, so that whether information is reported turns on the nature of the data, not on the consumer's state of residence. Congress specifically confronted the difficulties created by a patchwork of differing state rules and amended the Fair Credit Reporting Act ("FCRA") to redress that discord. As initially enacted in 1970, FCRA permitted overlapping state legislation as long as it did not actually conflict with FCRA's specific terms. But the resulting tangle of rules rendered consumer reports less useful and made it more costly and time-consuming for consumers to obtain credit. To rectify those problems, Congress amended the statute both to significantly expand its substantive provisions and to add a broad preemption provision ensuring nationwide uniformity: "No requirement or prohibition may be imposed under the laws of any State … with respect to," among other things, "any subject matter regulated under … section 1681c of [FCRA], relating to information contained in consumer reports[.]" 15 U.S.C. §1681t(b)(1)(E).

Not satisfied with the national standards that Congress adopted, Maine passed two laws in 2019 instructing consumer reporting agencies how to report medical debt and debt resulting from economic abuse. Because these laws openly regulate in the teeth of FCRA, the district court had no trouble finding them preempted. But the First Circuit reversed, adopting a "narrow" construction of FCRA's preemption provision that not only defies Congress' evident intent and this

Court's preemption precedents, but conflicts with decisions from multiple other circuits.

The decision below embraces a reading of FCRA's preemption provision that defies statutory text and context, decisions from this Court and numerous circuits, and common sense. Under the First Circuit's decision, the scope of preemption is defined not by the "subject matter" addressed in FCRA and its express preemption provision—as the statutory text requires—but by the specific issues Congress has regulated *within* that subject matter. Thus, so long as Congress has not specifically said that particular information must or may not be "contained in consumer reports," states (and the District) are free to impose 50+ different sets of rules.

That decision not only conflicts with decisions from this Court and other circuits, but frustrates Congress' goal of creating uniform reports. Allowing states to impose unique reporting (or non-reporting) rules for all manner of information not explicitly prohibited or required by Congress will rob consumer reports of much of their utility and make credit more difficult to secure. Ensuring that credit reports comply with FCRA's requirements is already an undertaking, but having uniform reporting rules nationwide allows for the often-complicated information in consumer reports to be efficiently and uniformly conveyed. Forcing reporting agencies to comply with a patchwork of state rules will substantially increase the cost and complexity of reports. The resulting reports stand to be far less useful for businesses who will not be able to compare two consumers from different states to determine

their relative creditworthiness, and instead will have to try to account for varying state laws that could cause certain information to be suppressed in one state, but not in the other. Americans currently enjoy easy access to credit whether they go to buy a car across the street or across state lines. The decision below threatens to undo that salutary regime and to revitalize the very patchwork of state regulations that Congress amended FCRA to eliminate. That it does so by creating a conflict among the circuits and departing so substantially from the text of the statute and this Court's precedents makes the case for review clear.

OPINIONS BELOW

The First Circuit's opinion, App.1-25, is reported at 26 F.4th 1. The district court's opinion, App.28-48, is reported at 495 F.Supp.3d 10.

JURISDICTION

The First Circuit entered its judgment on February 10, 2022, App.1, and denied a timely petition for rehearing en banc on July 5, 2022, App.26-27. On September 23, 2022, the Chief Justice granted an application for an extension of time to file a petition for certiorari on November 2, 2022; on October 21, 2022, the Chief Justice granted a second application for an extension, to and including November 16, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides that the "Constitution, and the laws of the United States … shall be the supreme law of the land; … laws of any State to the contrary notwithstanding." U.S. Const.

art. VI, cl.2. FCRA's preemption provision, 15 U.S.C. §1681t, is reproduced at App.56-60. The two new Maine statutes are reproduced at App.61-63.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted FCRA "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). The statute "regulates the creation and the use of 'consumer report[s]' by 'consumer reporting agenc[ies]' for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334-35 (2016) (footnotes omitted).

It also broadly preempts state law—although that was not always the case. "As originally enacted, the FCRA generally permitted state regulation of the consumer reporting industry. With but few exceptions, the original preemption provision, 15 U.S.C. §1681t(a), preempted state laws only 'to the extent that those laws are inconsistent with any provision of [the statute].'" *Ross v. FDIC*, 625 F.3d 808, 812-13 (4th Cir. 2010) (quoting 15 U.S.C. §1681t(a) (1995)). But the patchwork of conflicting regulations that proliferated under that regime ultimately proved untenable and undermined the statute's basic aims. And so, in 1996, in addition to strengthening FCRA's substantive provisions, Congress "added a strong preemption provision, 15 U.S.C. §1681t(b)," to the statute, *id.* at 813, to ensure the creation of "uniform, national standards in the

area of credit reporting," *CDIA v. King*, 678 F.3d 898, 901 (10th Cir. 2012).[1]

The 1996 amendments contained a sunset provision, under which §1681t(b) would have ceased to preempt state laws that "give[] greater protection to consumers than is provided under this title" "after January 1, 2004." Pub. L. No. 104-208, §2419 (1996) (codified at 15 U.S.C. §1681t(d)(2)). But that sunset provision was never allowed to take effect. In 2003, Congress again amended FCRA, and in doing so it struck the sunset provision altogether. *See* Pub. L. No. 108-159, §711 (2003) (amending "§1681t" "by striking paragraph (2)" "in subsection (d)"). The net result is that FCRA's broad preemption provision is permanent and fully preempts state laws whether they purport to give greater or lesser consumer protection than FCRA itself. If a state law attempts to regulate a subject matter Congress determined must be left to federal regulation, then it is preempted under FCRA.

As amended, FCRA's preemption provision now begins, as it always did, with a savings clause that generally preserves state laws "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). But since 1996 that savings clause has been followed by a laundry list of "General Exceptions" set forth in the later-added

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[1] *See also* Chi Chi Wu, *Data Gatherers Evading the FCRA May Find Themselves Still in Hot Water*, Nat'l Consumer Law Ctr. (June 14, 2019), https://bit.ly/3fAF1ES (explaining that "preemption of state law requirements … was added in exchange for the 1996 Reform Act amendments that added accuracy and dispute investigation responsibilities").

§1681t(b), which provides: "No requirement or prohibition may be imposed under the laws of any State" (1) "with respect to any subject matter regulated under" various listed FCRA provisions; (2) "with respect to the exchange of information among persons affiliated by common ownership or common corporate control" (with certain exceptions); (3) "with respect to the disclosures required to be made under [§1681g(c)-(e), (g)], or [§1681g(f)] relating to the disclosure of credit scores for credit granting purposes" (with certain exceptions); (4) "with respect to the frequency of any disclosure under section 1681j(a) of this title" (with certain exceptions); and (5) "with respect to the conduct required by the specific provisions of" several listed FCRA provisions. *Id.* §1681t(b).

2. This case involves the first exception under §1681t(b), and subparagraph (E) of that provision in particular. Section 1681t(b)(1)(E) is structured identically to the other subparagraphs of §1681t(b)(1): All are introduced by the phrase "(b) [n]o requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under…." Each of the subparagraphs then cites a specific provision of FCRA and identifies the "subject matter" that it regulates. Subsection (E) is illustrative. In full, it reads: "No 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, except that this subparagraph shall not apply to any State law in effect on September 30, 1996[.]" *Id.* §1681t(b)(1)(E).

Section 1681c, the provision §1681t(b)(1)(E) references, "relat[es] to information contained in consumer reports" in the most literal sense: That is all it is about. Section 1681c is titled "Requirements relating to information contained in consumer reports," and, unsurprisingly, it dictates things that must or cannot go in consumer reports. Section 1681c(a) provides that consumer reports may not contain: information relating to bankruptcy cases more than ten years old (§1681c(a)(1)); information relating to civil suits, civil judgments, arrest records, and paid tax liens more than seven years old (§1681c(a)(2)-(3)); the name, address, or telephone number of furnishers of medical information (§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 (§1681c(a)(7)-(8)). Section 1681c(a) also adds 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 1681c(b) carves out certain things that fall within the text of §1681c(a)(1)-(5) but are nonetheless "exempted" from such exclusions. Section 1681c(c) establishes a limitations period and an effective date. Sections 1681c(e) and (f) set forth circumstances in which reporting agencies must "indicate" certain facts. And §1681c(d), titled "Information required to be disclosed," requires, *inter alia*, that any "report that contains a[] credit score" must "include in the report a clear and conspicuous statement that a key factor … that adversely affected such score … was the number of enquiries, if such a predictor was in fact a key factor

that adversely affected such score." *Id.* §1681c(d)(2). Section 1681c(b) thus addresses the subject matter of the content of consumer reports, establishes rules about what *must* be excluded and included with regard to specific issues, and leaves consumer reporting agencies free to include all other relevant information.

B. Factual Background

Notwithstanding the broad preemptive sweep of §1681t(b)(1), Maine enacted two statutes in 2019 that both self-evidently "impose[]" new state-law "requirement[s]" and "prohibition[s]" "with respect to … the information contained in consumer reports." *See* 15 U.S.C. §1681t(b)(1)(E).

The first law, "An Act Regarding Credit Ratings Related to Overdue Medical Expenses" (hereinafter "Medical Debt Act"), requires consumer reporting agencies to "comply" with "state-specific" requirements regarding the content of a "consumer report"—and, in a reversal of the Supremacy Clause, it explicitly purports to do so "[n]otwithstanding any provision of federal law." Me. Rev. Stat. Ann. tit. 10, §1310-H(4). Under the act, "[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). The act further provides that if a consumer reporting agency receives "reasonable evidence" that "a debt from medical expenses has been settled in full or paid in full," it "[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). And if a "consumer is making regular, scheduled periodic payments toward" a medical debt, the act requires that a reporting agency "shall report that debt" on the credit report "in the same manner as debt related to a consumer credit transaction." *Id.* §1310-H(4)(C).

The second law, "An Act to Provide Relief to Survivors of Economic Abuse" (hereinafter "Economic Abuse Debt Act"), likewise imposes state-specific requirements and prohibitions vis-à-vis the content of consumer reports. Under this act, "if a consumer provides documentation" to a consumer reporting agency that a debt "is the result of economic abuse," the reporting agency "shall reinvestigate the debt" and, if "the investigation" confirms the "economic abuse, … shall remove any reference to the debt … from the consumer's credit report." *Id.* §1310-H(2-A). For purposes of this act, "economic abuse" is defined to "includ[e]," *inter alia*, the "unauthorized or coerced use of credit or property." *Id.* tit. 19, §4002(3-B).

C. Procedural Background

1. Petitioner the Consumer Data Industry Association ("CDIA") is a trade association that represents consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check companies, and others. In September 2019, CDIA filed suit seeking a declaration that Maine's new credit-reporting acts are preempted and an injunction prohibiting their enforcement. The parties cross-moved for judgment on a stipulated record, and the district court ruled for CDIA, concluding that 15 U.S.C. §1681t(b)(1)(E) preempts both acts. Sections 1681t(b)(1) and 1681c,

the court explained, "reflect an affirmative choice by Congress to set 'uniform federal standards' regarding the information contained in consumer credit reports." App.45. "By seeking to exclude additional types of information, the [Maine acts] intrude upon a subject matter that Congress has recently sought to expressly preempt from state regulation." App.46.[2]

2. The First Circuit disagreed. The court did not dispute that Maine's new credit-reporting laws impose requirements with respect to information contained in consumer reports. Nor could it; both of Maine's acts declare explicitly that consumer reporting agencies "shall report" or "shall remove" certain types of information from consumer reports. Me. Rev. Stat. Ann. tit. 10, §1310-H(2-A), (4). The court likewise acknowledged that "[s]ection 1681c details specific information that must be excluded from consumer reports, … as well as information that must be disclosed in consumer reports." App.9. Yet the court still held that the new Maine acts are not preempted, on the theory that §1681t(b)(1)(E) preempts state laws *only* insofar as they impose requirements with respect to the specific categories of information that §1681c says must be excluded from, or included in, credit reports. In other words, the court effectively wiped out the 1996 FCRA amendments by holding that states may impose all manner of additional and disparate requirements regarding the content of consumer

[2] Given its conclusion on §1681t(b)(1)(E), the district court did not address CDIA's alternative argument that the Economic Abuse Debt Act is also preempted by §1681t(b)(5)(C), which preempts state laws "with respect to the conduct required by the specific provisions of … [§]1681c-2," relating to identity theft.

reports, so long as the state regulations address information that FCRA does not specifically mandate or exclude.

The court reached that counterintuitive conclusion in three steps. First, the court tried to justify its narrow construction on the ground that the Maine laws provide greater protection to consumers than FCRA provides. The court could not believe that Congress intended, "in providing some federal protection to consumers regarding the information contained in credit reports, to oust all opportunity for states to provide more protections." App.14. In so concluding, the court made no mention of the never-implemented sunset provision in the 1996 FCRA amendments, which would have converted FCRA's preemption provision into a one-sided provision allowing more protective state laws *had Congress not explicitly repealed it* in 2003, one year before it was slated to take effect. *See* p.5, *supra*.

Second, the court concluded that §1681t(b)(1)(E) could not be read to "preempt[] all state laws 'relating to information contained in consumer reports,'" App.9, because the syntax Congress chose is not, in the court's view, the simplest way of communicating that intent. "Had Congress intended the 'relating to' phrase alone to delimit the subject matter preempted," the court surmised, "it could have drafted the statute differently, with the 'relating to' clause directly following 'subject matter' and setting off references to statutory sections with a comma." App.10; *see also* App.13-14, 15-16. While the court recognized that the syntax of §1681t(b)(1)(E) follows the structure of all the subsections of (b)(1), it worried that reading the

"relating to" clauses in each subparagraph of (b)(1) to define each provision's scope would "make reference to all of the provisions listed in those [provisions] surplusage." App.10.

Third, the court posited that the broad phrase that cuts across each subparagraph of §1681t(b)(1)—"with respect to any subject matter regulated under"—actually *narrows* the scope of FCRA preemption. As support for that puzzling conclusion, the court relied on *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013), a case about the differently worded preemption provision of the Motor Carrier Act of 1980. Yet the First Circuit brushed the substantial textual distinctions between the two statutes aside, instead reading *Dan's City* to stand for the sweeping proposition "that the phrase 'with respect to' narrows the scope of preempted subject matter to its referent or referents" unless Congress clearly conveys otherwise. App.11.

Having generally limited the entirety of §1681t(b)(1) to cover only issues specifically regulated in the cross-referenced provisions, rather than the textually enumerated subject matters, the First Circuit then "zero[ed] in" on the provision cross-referenced in §1681t(b)(1)(E)—namely, §1681c. App.17. The court began with the first five provisions of §1681c(a), which it characterized as "regulating narrowly and with specificity," even while acknowledging that the "adverse information" excluded by §1681c(a)(5) could include information regulated by the Maine statutes. The court then turned to §1681c(a)(7) and (a)(8), which regulate how "veteran's medical debt" must be treated on consumer

reports. The medical debt regulated by Maine's statute obviously includes veterans' medical debt regulated by §1681c(a)(7)-(8), but the court found that insufficient to find the Maine statute preempted. Instead, it remanded for the district court to determine "whether or to what extent those sections partially preempt the Medical Debt Reporting Act." App.25.[3]

3. The First Circuit denied CDIA's petition for rehearing. App.26-27. After the mandate issued, the district court entered an order staying proceedings on remand pending the filing of a petition for certiorari. Dist.Ct.Dkt.54.

REASONS FOR GRANTING THE PETITION

The decision below embraces a reading of FCRA's preemption provision that defies statutory text and context, decisions from this Court and numerous circuits, and common sense. When Congress amended FCRA's preemption provision in 1996, it did so with a keen appreciation that a narrow conflict-only approach to preemption had failed to ensure the uniform national regulation of consumer reporting demanded by our national economy. To rectify that failure, Congress supplemented the statute's preexisting narrow extent-of-the-conflict preemption provision with a long list of "General Exceptions" that reserve regulation of broadly defined subject matters to the approach adopted by Congress in FCRA. Among those is any "requirement[s] and prohibition[s] …

[3] Like the district court, *see* n.2, *supra*, the First Circuit did not address CDIA's alternative argument that the Economic Abuse Debt Act is preempted by §1681t(b)(5)(C). App.23-25.

relating to information contained in consumer reports." 15 U.S.C. §1681t(b)(1)(E). The decision below effectively nullifies the 1996 amendments, leaving states free to impose all manner of rules regarding what may or may not be contained in consumer reports, so long as they do not regulate the precise issues that Congress has already addressed. The inevitable result is precisely what the 1996 and 2003 amendments were supposed to preclude: a patchwork of complex and potentially conflicting state-law regulation even within subject matters regulated by FCRA.

That result cannot be reconciled with the statutory text, which broadly preempts entire subject matters and conveys breadth at every turn—from its opening phrase "no requirement or prohibition," to its overarching "with respect to any subject matter" command, to its "relating to" formulation articulating the subject matters it covers. It cannot be reconciled with this Court's cases, which repeatedly confirm that phrases like "with respect to," and "any," and "relating to" are terms of expansion, not limitation. It affirmatively contradicts the statutory history, in which Congress abandoned a narrow conflict-only approach to preemption and later *repealed* a provision that would have allowed disuniformity as long as it purported to be more protective of consumers. And it conflicts with decisions of other circuits, which repeatedly have recognized that §1681t(b)(1) has a broad preemptive sweep over preempted subject matters and is not narrowly limited to the specific issues addressed in cross-referenced provisions of FCRA.

Left standing, the decision below threatens to upend the national credit industry, destroying the very uniformity that FCRA demands. And the patchwork of state regulation that the decision would resuscitate stands to harm not just reporting agencies, but users of reports and consumers.

I. The Decision Below Sharply Departs From Statutory Text And Structure And This Court's Precedents.

In the quarter-century since Congress added §1681t(b) to FCRA, every court of appeals to confront the statute (before the decision below) read it to broadly preempt the general subject matters that its text identifies, rather than to narrowly preempt only state laws that regulate in the teeth of specific requirements and prohibitions that Congress imposed *within* that general subject matter. The First Circuit broke sharply from that consensus here. The First Circuit is an outlier for good reason: Its cramped construction of the statute defies text, structure, history, and common sense, and is fundamentally inconsistent with this Court's precedents.

1. "Congress may preempt state authority by so stating in express terms." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983). When Congress does so, courts "do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). Thus, in express-preemption cases such as

this one, the preemption inquiry begins "with the language of the statute itself" and ends there as well if the "language is plain." *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

When Congress set out to remedy the patchwork of state regulation that had proliferated while FCRA contained only a narrow conflict-only preemption provision, it employed expansive terms. The result is a preemption provision that is clear and broad. While the preemption provision retains its traditional savings clause and extent-of-the conflict language, *see* 15 U.S.C. §1681t(a), since 1996 that clause is now immediately followed by a series of "General Exceptions" that reflect a far broader preemptive scope. The exceptions signal their expansive scope right off the bat, beginning: "No requirement or prohibition may be imposed under the laws of any State…." *Id.* §1681t(b). The phrase "'[n]o requirement or prohibition' sweeps broadly," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality op.) (alteration in original), reaching state laws of any kind.

The breadth of the opening language carries over to paragraph (b)(1), which announces a broad preemptive reach: "with respect to any subject matter regulated under." Each component of that clause conveys breadth. This Court has recognized that the phrase "with respect to" (or its cognate, "respecting") "generally has a broadening effect" when used "in a legal context," "ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1760 (2018); *see, e.g.*, *Morse*

v. Republican Party of Va., 517 U.S. 186, 207 (1996) ("The phrase 'votes cast with respect to candidates for public or party office' … is broad enough to encompass a variety of methods of voting ….'). And "[a]s this Court has 'repeatedly explained,' 'the word "any" has an expansive meaning.'" *Patel v. Garland*, 142 S.Ct. 1614, 1622 (2022) (quoting *Babb v. Wilkie*, 140 S.Ct. 1168, 1173 n.2 (2020)).

Breadth is reinforced in the language of the subparagraphs that follow. As the First Circuit noted, App.10, all of the subparagraphs in (b)(1) share the same structure: While each cross-references another provision of FCRA, each contains a "relating to" clause that specifically describes a preempted "subject matter" addressed in the cross-referenced FCRA provision. For example, §1681t(b)(1)(E) reads: "No 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[.]" What is preempted is plainly an entire "subject matter," as described in the text of the exception and as further elucidated by the cross-reference. Indeed, this Court has "'repeatedly recognized'"—including in cases decided before the 1996 amendments to FCRA—"that the phrase 'relate to' in a preemption clause 'express[es] a broad pre-emptive purpose.'" *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S.Ct. 1190, 1197 (2017) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)); *see also, e.g.*, *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). FCRA's preemption provisions thus convey

breadth—and an intent to preempt entire subject matters—at every turn.

2. All of Congress' textual choices in §1681t(b)(1) should have made clear that it preempts expansively. One broadening clause after another does not somehow add up to a narrow provision. Yet the decision below reached exactly the opposite conclusion. According to the First Circuit, rather than preempt all state laws that "impose[]" any "requirement or prohibition" "with respect to *any subject matter* regulated under … section 1681c …, *relating to* information contained in consumer reports," 15 U.S.C. §1681t(b)(1)(E) (emphases added), the statute "narrowly preempts" (App.25) only "those claims that concern" things specifically addressed in §1681c (App.11-12). *See* App.17-23. In other words, in the First Circuit's view, the subject matter preempted by §1681t(b)(1)(E) of FCRA is not requirements "relating to information contained in consumer reports," but only the specific issues regulated by §1681c. Under the decision below, unless Congress has already said that a particular type of information may not (or must) be included in a consumer report, states are free to impose their own rules "relating to information contained in consumer reports" and thereby defy the statutory text and revive the very patchwork of state regulation that the 1996 FCRA amendments were enacted to inter.

That reading defies common sense. The whole point of adding §1681t(b)'s "General Exceptions" to §1681t(a)'s conflict-only approach was to ensure that FCRA preemption would *not* remain confined to state laws that "are inconsistent with" specific provisions of

FCRA, 15 U.S.C. §1681t(a), but would instead preclude states from interfering with Congress' effort "to create uniform, national standards in the area of credit reporting," *King*, 678 F.3d at 901. Thus, in light of the statutory evolution reflected in the text of §1681t(b), FCRA's broad preemptive scope becomes clear: Far from "suggest[ing] that its 'relating to' preemption is limited to *inconsistent* state regulation," §1681t(b) plainly "displace[s] *all* state laws that fall within its sphere, even including state laws that are consistent with [FCRA's] substantive requirements." *Morales*, 504 U.S. at 386-87 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (first alteration in original) (emphasis added)). After all, there would be no point to adding §1681t(b) if it just reiterated the same conflict-preemption principle as §1681t(a). The First Circuit's approach thus renders both §1681t(b) and the 1996 amendments superfluous, with little or no practical effect.

The same can be said for the 2003 amendments, which the First Circuit never acknowledged. The 2003 amendments repealed the sunset provision that would have saved state laws that "give[] greater protection to consumers than is provided under this title" "after January 1, 2004." *See* Pub. L. No. 108-159, §711 (repealing 15 U.S.C. §1681t(d)(2) (1996)). Not only did the First Circuit give a green light to Maine's efforts to "give[] greater protection to consumers than is provided under [FCRA]," it went so far as to profess disbelief that Congress could have intended, "in providing some federal protection to consumers regarding the information contained in credit reports, to oust all opportunity from states to provide more

protections." App.14-15. But Congress did just that in the 2003 amendments by repealing the one-dimensional sunset provision before it could take effect. Neither the reasoning nor the result below can be reconciled with Congress' actions.

The First Circuit seemed to think that the canon against surplusage supports its crabbed construction of §1681t(b). In reality, it cuts sharply in the other direction. Not only does the First Circuit's reading deprive §1681t(b) as a general matter of much practical force; it leaves the express description of the preempted subject matter in the "relating to" clause in §1681t(b)(1)(E)—and the other §1681t(b)(1) subparagraphs—with zero work to do, as the cross-referenced FCRA provisions alone delimit the preemptive scope. The "relating to" clause is, by the court's own admission, "purely descriptive of the content of" §1681c, App.10—which is just another way of saying "superfluous."[4] And that surplusage problem is not confined to subparagraph (b)(1)(E); the same "relating to" construction appears in *all* of the subparagraphs of paragraph (b)(1), and it is left with

[4] *See, e.g.*, *United States v. Davis*, 961 F.3d 181, 189 (2d Cir. 2020) ("Because the phrase 'Federal criminal statute' merely restates descriptive information that is already supplied by the provision's focus on Sections 2 and 3 of the Fair Sentencing Act, the phrase would be superfluous if it did not independently contribute to the provision as a whole[.]"); *Carnine v. United States*, 974 F.2d 924, 929 (7th Cir. 1992) ("[I]f the date is indeed merely descriptive of the Ohio sentence, then it is also superfluous[.]"); *Schulenburg v. United States*, 137 Fed.Cl. 79, 91 (2018) ("Because deeds should be construed so that no part is superfluous, the argument that the language 'for Rail Road purposes of ___ County' is merely descriptive fails.").

no work to do in *any* of them. *See* App.10-11 (noting that "Congress used the same statutory structure … throughout Sections 1681t(b)(1)(A)-(K)," and thus reading each provision consistently).

Despite the seeming breadth of §1681t(b)(1)(E) and the general rule that "with respect to" is a broadening phrase, *Lamar*, 138 S.Ct. at 1760, the First Circuit insisted that this Court's decision in *Dan's City* compels the conclusion that the phrase "with respect to" somehow manages to *narrow* all the language that follows. App.11-12. *Dan's City* does not remotely suggest that "with respect to" is always a narrowing phrase. Instead, it simply found that the structure and context of the provision at issue there gave the clause introduced by "with respect to" a limiting function. That case concerned a statute in which a "with respect to" clause came at the *end* of a sentence, and was self-evidently *narrower* than the list that preceded it, and hence made sense *only* as serving a narrowing function. *See* 49 U.S.C. §14501(c)(1) ("a State … may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property"). Here, by contrast, "with respect to" is found in the overarching opening clause and is immediately followed by the equally broad phrase "any subject matter." Nothing in *Dan's City* justifies denying the broad language (and very different structure and context) here its evident breadth.

3. Correctly interpreted, the broad language of 15 U.S.C. §1681t(b)(1) plainly preempts Maine's two new credit-reporting statutes, as both explicitly impose

requirements relating to information contained in consumer reports. *See* 15 U.S.C. §1681t(b)(1)(E) ("No 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[.]"). Both new Maine statutes would eliminate the nationwide uniformity Congress envisioned with the 1996 (and 2003) amendments by requiring information that FCRA allows reporting agencies to include in consumer reports for everyone to be withheld from consumer reports for Maine residents.

The Economic Abuse Debt Act commands that consumer reporting agencies "shall remove … from the consumer's credit report" "any reference to [a] debt" confirmed to have arisen from, *e.g.*, identity theft. Me. Rev. Stat. Ann. tit. 10, §1310-H(2-A); *see id.* tit. 19, §4002(3-B). The Medical Debt Act not only prohibits consumer reporting agencies from "report[ing] 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.* tit. 10, §1310-H(4)(A), but requires them to "report," "in the same manner as [they report] debt related to a consumer credit transaction," any medical debt "toward" which a "consumer is making regular, scheduled periodic payments," *id.* §1310-H(4)(C). And lest there be any doubt that Maine has regulated in the teeth of FCRA, the Medical Debt Act explicitly requires consumer reporting agencies to "comply" with its new "state-specific" rules governing the content consumer reports "[*n*]*otwithstanding any provision of federal law*." *Id.* §1310-H(4) (emphasis added). Those are

unquestionably state laws "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).

Indeed, one would have thought Maine's new laws would be preempted even under the First Circuit's artificially narrow reading, as they not only regulate the content of consumer reports, but regulate aspects of consumer reports that *are* specifically addressed in §1681c. Subsections 1681c(a)(7) and (a)(8) regulate one species of medical debt. Likewise, §1681c regulates how to report disputed information, and §1681c-2 establishes how consumer reporting agencies must respond when a consumer claims a debt was the result of identity theft. On top of that, §1681c(a)(5) is a catch-all provision that prohibits the inclusion of other "adverse item[s] of information" only if they "antedate[] the report by more than seven years," *id.* §1681c(a)(5), and even the First Circuit recognized that that phrase "is broad enough to cover medical debt and debt resulting from domestic abuse." App.18. Nevertheless, the court refused to find preemption even under its cramped construction, instead suggesting that the question requires some further inquiry into "whether and how" Maines new credit-reporting laws "might trench on … the 'items of information' listed in Section 1681c(a)." App.20.

The First Circuit's inability to even say whether and to what extent Maine's laws were preempted under its cramped view of FCRA preemption is one further strike against its ruling. Petitioner's members collectively process millions of consumer reports each week; they need to know whether the content of

consumer reports is dictated by FCRA or Maine. They should not be left guessing. Instead, they should be entitled to the clear answer provided by the text of FCRA—namely, that the entire subject matter of the content of credit reports is governed by FCRA and FCRA alone.

II. The Decision Below Conflicts With Decisions From Other Circuits.

The First Circuit's decision not only departs from statutory text and this Court's precedent, but also conflicts with decisions from other circuits. Consistent with the plain text and this Court's cases interpreting similar expansive language, courts of appeals have repeatedly held that §1681t(b)(1) broadly preempts state laws that impose prohibitions or requirements relating to any of the subject matters that Congress textually identified in subparagraphs (b)(1)(A)-(K)—*i.e.*, the "relating to" clauses themselves. None of these circuits holds, as the First Circuit did here, that the preemptive scope of §1681t(b)(1) is narrowly limited to the specific issues addressed in the cross-referenced FCRA provisions, rather than laws that "relate to" the broader "subject matter[s]" Congress expressly described in §1681t(b)(1)(A)-(K).

The Second Circuit's decision in *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (per curiam), illustrates the point. There, a mortgage lender brought state-law business-tort claims against the large national credit bureaus challenging their "practice of permitting other lenders to purchase 'pre-screened' consumer reports, *see* 15 U.S.C. §1681b(c), (e), that, in essence, contain trigger leads" prepared by and allegedly proprietary to the

plaintiff.[5] 583 F.3d at 105. The credit bureaus argued that the claims were preempted by §1681t(b)(1)(A), and the Second Circuit agreed. Beginning (and ultimately ending) with the text of that provision, the court emphasized that it provides: "'[N]o requirement or prohibition may be imposed under the laws of any State … with respect to *any subject matter* regulated under … subsection (c) or (e) of section 1681b of this title, *relating to* the prescreening of consumer reports…." *Id.* at 106 (alterations in original). In the Second Circuit's view, it was enough to find preemption that "Plaintiff's allegations 'relate[] to the prescreening of consumer reports.'" *Id.* at 105-06. The court saw no need to look through to §1681b to determine whether it specifically regulates the sharing of "trigger leads," which "themselves are not 'consumer reports.'" *Id.* at 106. The plaintiff's claims were preempted simply because they related to the prescreening of consumer reports. *Id.* at 106; *see also, e.g.*, *Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45 (2d Cir. 2011) (per curiam) (applying a similar expansive reading to §1681t(b)(1)(F)).

The Fourth Circuit's decision in *Ross v. FDIC* is much the same. There, a consumer sued a bank for unfair business practices and unfair debt collection, claiming (among other things) that the bank reported false credit information. 625 F.3d at 810. The bank argued that the claims were preempted by

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[5] Trigger leads, which "are generated during the process by which mortgage brokers such as plaintiff evaluate consumer loan applications," show that "a particular individual [has] expressed a desire to [a] mortgage bank' to obtain a loan." 583 F.3d at 105 (alterations in original).

§1681t(b)(1)(F), *see id.* at 810-12, which preempts state laws "with respect to any subject matter regulated under ... section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." The district court sided with the bank, and the Fourth Circuit affirmed. With respect to both claims, the court relied on the fact that the plaintiff's claims "concern[the] reporting of inaccurate credit information to CRAs." *Id.* at 813, 817. The court did not look through to §1681s-2 to determine precisely what narrow issues it specifically addresses or what conduct it does or does not permit.

The Sixth Circuit's analysis in *Scott v. First Southern National Bank*, 936 F.3d 509 (6th Cir. 2019), is similar. There, the plaintiffs sued First Southern after it failed to extend additional loans to finance their commercial renovation project. *Id.* at 512. They brought three state-law claims, one for breach of the duty of good faith and fair dealing, one for tortious interference with business relationships, and one for fraudulent misrepresentations. *Id.* at 516. The bank argued, *inter alia*, that the first two state-law claims were preempted by §1681t(b)(1)(F). *Id.* The district court agreed, and the Sixth Circuit affirmed. The court of appeals started with the plaintiffs' good-faith-and-fair-dealing and tortious interference claims. Unlike the First Circuit, the Sixth Circuit did not perform an exhaustive, line-by-line review of the specific provisions of §1681s-2. Rather, like the Second Circuit in *Premium Mortgage* and the Fourth Circuit in *Ross*, it was enough for the Sixth Circuit that the state-law claims "concern [the] reporting of … credit information to consumer reporting agencies."

Id. at 522. "Because [the plaintiffs' state] common law claims concern the same 'subject matter regulated under … section 1681s-2 of [the FCRA],' *see* §1681t(b)(1)(F), they are preempted by the FCRA." 936 F.3d at 519-20.

More generally, the First Circuit's reasoning is at odds with the broad manner in which other circuits have recognized §1681t(b) must be interpreted. In *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011), for example, the plaintiff sued Bank of America, claiming it "told credit agencies that [she] is behind in payments on a loan, even though [it] knows that she isn't," in violation of state and federal law. *Id.* at 623. The bank argued that Purcell's state-law claims were preempted by §1681t(b)(1)(F), the same subparagraph at issue in *Ross* and *Scott*. The district court agreed, and the Seventh Circuit affirmed, refusing to "give[] [§1681t(b)(1)(F)] a narrowing construction" when the whole point of adding §1681t(b)(1) in the 1996 amendments (and keeping it in the 2003 amendments) was to broaden the statute's preemptive reach. *Id.* at 625; *accord Aleshire v. Harris, N.A.*, 586 F.App'x 668, 670-71 (7th Cir. 2013). The Seventh Circuit likewise gave an expansive reading to §1681t(b)(1) in *Aldaco v. RentGrow, Inc.*, 921 F.3d 685 (7th Cir. 2019). In the course of rejecting an effort to narrow the meaning of the word "conviction" in §1681t(b)(1)(E), the court reiterated that the 1996 amendments and the broader preemption they effect are designed to "establish[] uniform federal standards for contents of credit reports," *id.* at 688—an objective that would be profoundly frustrated if states were free to impose their own regulation on any subject matters that

Congress chose to leave reporting agencies free to include.

The Tenth Circuit has emphasized the breadth of preemption under §1681t(b)(1) as well. After New Mexico "enacted its own identity-theft requirements" in 2010 "for [consumer reporting agencies] operating in state," CDIA sued, "contending the law is preempted." *King*, 678 F.3d at 900-01. The district court dismissed the case for lack of standing, but the Tenth Circuit disagreed, and vacated and remanded. *Id.* at 902-07. In the course of its opinion, the court explained that "Congress set out to create uniform, national standards in the area of credit reporting," and stated emphatically that §1681t(b)(1) "leaves no room for overlapping state regulations." *Id.* at 901. Courts of appeals thus have routinely recognized that §1681t(b)(1) must be read to accomplish what Congress set out to do—namely, reserve regulation of the consumer reporting industry largely to Congress.

Against the weight of this authority, the First Circuit claimed that the Second Circuit's decision in *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437 (2d Cir. 2015), supports its cramped construction of the statute. *See* App.11-12. But *Galper* did not break with previous Second Circuit decisions and hold that only claims that regulate in the teeth of the specific requirements and prohibitions imposed by §1681s-2 are preempted. Quite the opposite: *Galper* reiterated that "§1681t(b)(1)(F) preempts any recovery for damages based on allegations of erroneous or otherwise improper furnishing—regardless of the particular statute or common law theory that plaintiff utilizes to advance her claim." 802 F.3d at 449; *see*

also id. at 446 (reiterating that §1681t(b)(1)(F) preempts all state-law "claims that concern a furnisher's responsibilities" (emphasis omitted)). In all events, to the extent there is any tension between *Galper* and other Second Circuit decisions, that would just reinforce the need for this Court to grant plenary review and resolve the disagreement among the lower courts.

III. The Question Presented Is Exceptionally Important.

The First Circuit's deeply flawed decision threatens to usher in a sea change in credit reporting nationwide. If states are truly free to require or prohibit any content that Congress has not specifically addressed, then it will not take long for other states to adopt their own custom-made requirements for the content of consumer credit reports. New York and California may prohibit things that Texas requires, and other states may impose a host of requirements and prohibitions unique to the peculiar interests of their residents and industries. The net result will be exactly what Congress amended FCRA to avoid: a "patchwork" of disparate state regimes. *Ross*, 625 F.3d at 813; *see* pp.4-6, *supra*.

That result would be devastating, not just for reporting agencies left to try to comply with myriad different (and often conflicting) regimes,[6] but for users

[6] One unintended but inevitable consequence of allowing states to regulate in the teeth of FCRA is that there will be far less room for the national consumer reporting agencies to adopt nationwide policies designed to benefit consumers. *See generally, e.g.*, *Equifax, Experian, and TransUnion Support U.S. Consumers With Changes to Medical Collection Debt Reporting* (Mar. 18,

of consumer reports and, ultimately, consumers. 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); *accord* S. Rep. No. 103-209, at 7, 1993 WL 516162 (1993). Erasing that component and allowing states to impose idiosyncratic reporting requirements on everything beyond the handful of categories of information specifically addressed in §1681c(a), as the First Circuit held below, would not just be an administrative nightmare; it would uproot the many on-the-ground benefits that flow from the existing national reporting system.

"Credit reports are used by creditors and others to make critical decisions about the availability and costs of various products and services, including credit, insurance, and employment." FTC, *Report to Congress Under Section 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, i (Dec. 2004), https://bit.ly/3TJQZK9 ("FTC Report"). They should be able to compare consumers from different states without a compendium of state laws that explains that medical debts may be missing for the Maine resident

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2022), https://bit.ly/3DXg9R6 ("The three nationwide credit reporting agencies … today announced significant changes to medical collection debt reporting to support consumers faced with unexpected medical bills. These joint measures will remove nearly 70% of medical collection debt tradelines from consumer credit reports, a step taken after months of industry research.").

while other critical data are not reported for residents in the other 49 states.

In addition to creating an administrative nightmare, allowing each state to impose its own rules for what may and may not appear in a credit report could also have devastating distributive effects. Under the decision below, a state could ban reporting agencies from including rental payments on a credit report on the theory that a missed or late payment could prevent a low-income individual from securing a lease. Or a state could ban utility payments from credit reports on the same theory. However well-intentioned such laws may be, they would end up hurting those most in need. Millions of Americans are "credit-invisible," *i.e.*, they do not have a mortgage, car payments, credit cards, or student loans. But most of those individuals make payments to things like rent and utilities on a monthly basis, and many if not most of them do so consistently in a way that signals creditworthiness. State laws regulating in the teeth of FCRA could thus sap consumer credit reports of much of their utility for those who need credit most.

That is no trivial concern. Indeed, it is because of consumer reports that creditors across the country can make quick and accurate consumer-lending decisions without needing prior experience with a borrower. The ability to access credit in a timely manner yields extraordinary benefits to consumers, which in turn boosts the economy. But that works only if consumers can "take [their] reputation with [them] as [they] travel around the country," which is possible only if lenders nationwide know what they are looking at when they see a credit report. S. Rep. No. 108-166, at

10, 2003 WL 22399643 (2003) (quoting Secretary of Treasury John W. Snow).

Those benefits will be lost if, as the decision below holds, each state is free to create its own rules governing the content of consumer credit reports. Uniformity is lost if the decision below is allowed to stand, and the confusion is only amplified by the conflict among the circuits and the First Circuit's inability to say with confidence how much of Maine's law is preempted. Neither petitioner's members nor users of consumer reports should be left to guess whether the absence of debts on a consumer report is a product of a clean credit record, state law, or circuit precedent. Congress promised uniformity, and the First Circuit has introduced costly discord. This Court should grant plenary review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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