No. 22-471

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, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In enacting the Fair Credit Reporting Act ("FCRA"), Congress recognized that States would continue to play an important role in the regulation of consumer reporting. Subject to some exceptions, FCRA expressly preserves State laws unless they are inconsistent with the federal law. This savings clause enables States to address emerging consumer reporting issues affecting their citizens. Maine's legislature did just that – it enacted two laws restricting the reporting of certain types of prejudicial information that have little bearing on a person's creditworthiness or fiscal responsibility. Petitioner does not claim that these laws are inconsistent with FCRA. Rather, it argues that the Maine laws are preempted pursuant to a FCRA provision prohibiting States from imposing requirements or prohibitions "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). According to Petitioner, this provision preempts all State laws relating to information contained in consumer reports. But that argument reads out of existence the clause referencing "subject matter regulated under . . . section 1681c." As both the First Circuit and the federal Consumer Financial Protection Bureau correctly recognized, Congress, by including that clause, made plain that preemption is limited to only those State laws concerning subject matter regulated by Section 1681c.

The question presented is:

Whether 15 U.S.C. § 1681t(b)(1)(E) broadly preempts all State laws relating to information

QUESTION PRESENTED – Continued

contained in consumer reports or only those State laws respecting subject matter regulated under 15 U.S.C. § 1681c.

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STATEMENT OF THE CASE

A. The Maine Laws

Consumer reports can have a profound impact on a person's life. They can determine whether, and on what terms, a person may obtain a mortgage, a student loan, a credit card, or other financing. They may also affect whether a person can get rental housing, a job, or even basic utilities. To help ensure that consumer reports do not unfairly include prejudicial information that may have no real bearing on a person's credit worthiness or fiscal responsibility, Maine's legislature enacted two laws amending Maine's Fair Credit Reporting Act, Me. Rev. State. Ann. tit. 10, §§ 1306-1310-H. These laws address the reporting of debt incurred because of medical expenses and economic abuse.

1. Medical Debt. In early 2019, L.D. 110, "An Act Regarding Credit Ratings Related to Overdue Medical Expenses," was introduced to the First Regular Session of the 129th Maine legislature. The bill was subsequently amended and enacted as Maine Public Laws 2019, ch. 77 and codified at Me. Rev. Stat. Ann. tit. 10, § 1310-H(4). As enacted, this law prohibits consumer reporting agencies from reporting "debt from medical expenses on a consumer credit 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." Me. Rev. Stat. Ann. tit. 10, § 1310-H(4)(A) (hereinafter "Medical Debt Act"). Once 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." *Id*. And if "the consumer is making regular, scheduled periodic payments toward the debt from medical expenses reported to the consumer reporting agency as agreed upon by the consumer and the medical provider, the consumer reporting agency shall report that debt . . . in the same manner as debt related to a consumer credit transaction is reported." *Id*. The bill's sponsor, Representative Chris Johansen, explained the purpose of the law:

> This bill was written to protect people from the ramifications of sometimes hard to avoid bad credit reports associated with medical bills. Medical bills are unique in that they are usually an unplanned for expense. You can have insurance but sometimes not enough. The debt I have acquired for my car or home is planned for usually with the help of my lender.

Stipulated Record in *CDIA v. Frey*, No. 1:19-cv-00438-GZS (D. Me. Jan. 17, 2020) (hereinafter "Stip. Rec."), ECF No. 13-3, at PageID 41.

There was good reason for the legislature to give special treatment to medical debt. "Even one single medical bill can keep someone from receiving credit at a desirable rate, or perhaps from receiving credit at all." Elizabeth D. De Armond, *Preventing Preemption: Finding Space for States to Regulate Consumers' Credit Reports*, 2016 B.Y.U. L. Rev. 365, 378 (2016). Moreover, "no one has demonstrated a clear link

between financial competence and medical debt, and it is not intuitively obvious that such a link exists, as few people voluntarily or frivolously take on expensive medical care." *Id*. Research by the Consumer Financial Protection Bureau "demonstrate[d] that a large portion of consumers with medical debts in collections show no other evidence of financial distress and are consumers who ordinarily pay their other financial obligations on time." *Consumer Credit Reports: A Study of Medical and Non-Medical Collections*, Report of the Consumer Financial Protection Bureau, December 2014, at p. 38;[1] *see also Data Point: Medical Debt and Credit Scores*, Report of the Consumer Financial Protection Bureau, May 2014, at p. 5 (finding that medical and non-medical collections are not equally predictive about the subsequent respective credit performance of consumers).[2]

2. Economic Abuse Debt. Also in early 2019, L.D. 748, "An Act to Provide Relief to Survivors of Economic Abuse," was introduced to the First Regular Session of the 129th Maine legislature. The bill was amended and enacted as Maine Public Laws 2019, ch. 407. The Act requires a credit reporting agency to reinvestigate a debt if the consumer provides documentation that the debt is the result of economic abuse.

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[1] Available at https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf, *accessed on* Jan. 4, 2022.

[2] Available at http://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf, *accessed on* Jan. 4, 2022.

Me. Rev. Stat. Ann. tit. 10, § 1310-H(2-A) (hereinafter "Economic Abuse Debt Act").[3] In the event the credit reporting agency determines that the debt is the result of such abuse, it must remove any reference to the debt from the consumer report. *Id*.

According to the primary sponsor of the bill, Representative Jessica Fay, one in four women and one in nine men experience domestic abuse, and the vast majority of domestic abuse cases include economic abuse. Stip. Rec., ECF No. 13-4, at PageID 50. "Power and control is at the root of domestic violence and controlling finances is another very effective way for an abuser to achieve that." *Id*., at PageID 51. She also explained that an abuser's control of finances can make it difficult for the victim to leave. *Id*.; *see also id*., at PageID 52-53 (publication from the National Coalition Against Domestic Violence stating that 94-99% of domestic violence survivors also experienced economic abuse and that 21-60% of domestic violence victims lose their jobs as result of the abuse).

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[3] "Economic abuse" is defined to mean

> causing or attempting to cause an individual to be financially dependent by maintaining control over the individual's financial resources, including, but not limited to, unauthorized or coerced use of credit or property, withholding access to money or credit cards, forbidding attendance at school or employment, stealing from or defrauding of money or assets, exploiting the individual's resources for personal gain of the defendant or withholding physical resources such as food, clothing, necessary medications or shelter

Me. Rev. Stat. Ann. tit. 19-A, § 4002(3-B).

Citing to a recently completed report, a representative of the Maine Coalition to End Domestic Violence noted that 81% of domestic abuse survivors cited economic abuse as an obstacle to separating from their abusers. Stip. Rec., ECF No. 13-4, at PageID 55. She explained:

> With respect to the credit report relief, the reasoning is simple: credit ratings that have been tarnished by economic abuse, and coerced debt in particular, result in longer shelter stays, victims returning to their abusers, or victims calculating that they can't afford to leave their abuser in the first place. Employers, landlords and utility companies make extensive use of credit histories in screening potential employees, tenants and customers. Credit abuse is a tactic that abusers use to maintain control over their victim, because abusers understand that without a job, rental housing, reliable transportation and basic utilities (all of which are hard to accomplish with damaged credit), it is almost impossible for a survivor to be economically stable, secure, and independent.

Id., at PageID 57. Various survivors of domestic abuse explained how the accompanying economic abuse had damaged their credit scores and made it more difficult to create stable lives for themselves after leaving their abusers. *Id*., at PageID 60-66.

B. Fair Credit Reporting Act

Recognizing that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," Congress enacted FCRA in 1970 to ensure "reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681. As originally enacted, FCRA had a savings clause broadly preserving State authority:

> This title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.

Pub. L. No. 91-508, § 622 (codified at former 15 U.S.C. § 1681t). In 1996, Congress amended this savings clause by carving out certain areas in which States would be precluded from regulating. The current version of the savings clause states:

> Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on

> consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a). So, unless a state law falls within one of the exceptions in subsections (b) or (c) of Section 1681t, it is preempted only to the extent that it is inconsistent with FCRA.

Petitioner makes no claim that the Maine laws at issue are inconsistent with FCRA but instead argues that the laws are preempted by the exception set forth in Section 1681t(b)(1)(E). All of the exceptions to the savings clause found within Section 1681t(b)(1) follow the same pattern. The section begins by stating that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . " 15 U.S.C. § 1681t(b)(1). Each of the subsections that follow then cites a specific FCRA provision along with a "relating to" clause describing aspects of the provision's scope of regulation. 15 U.S.C. § 1681t(b)(1)(A)-(K). Subsection 1681t(b)(1)(E), the exception at issue here, prohibits States from imposing requirements or prohibitions "with respect to any subject matter regulated under . . . section 1681c of this title, relating to information contained in consumer reports."[4] As a result of

[4] There is a savings clause for state laws in effect on September 30, 1996, but that does not apply to the Maine laws at issue, which, as discussed above, were enacted in 2019. But the existence of the savings clause undercuts Petitioner's claim that

amendments made by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, Section 1681c does not relate solely to information contained in consumer reports. It also 1) prohibits persons who accept credit or debit cards from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder," and 2) requires a consumer reporting agency to notify a person requesting a consumer report if the address the person has for the consumer "substantially differs" from the addresses in the consumer's file. 15 U.S.C. § 1681c(g), (h).

C. Procedural History

In September 2019, Petitioner, a trade association representing consumer reporting agencies, filed suit in the District of Maine alleging that the Medical Debt Act and the Economic Abuse Debt Act (hereinafter referred to collectively as the "Debt Acts") are preempted by FCRA. In April 2020, the parties filed cross-motions for judgment on a stipulated record. On October 8, 2020, the district court entered an order concluding that both Debt Acts are preempted by 15 U.S.C. § 1681t(b)(1)(E). Pet. App. 48. The court did not reach Petitioner's alternate argument that the Economic Abuse Debt Act is separately preempted by 15 U.S.C. § 1681t(b)(5)(C), which preempts state laws respecting "conduct required by the specific provisions of . . .

Congress intended to ensure national uniformity with respect to the content of consumer reports.

section 1681c-2," a provision addressing the obligations of a consumer reporting agency in responding to claims of identity theft. Pet. App. 48.

The First Circuit vacated the order and remanded the matter for further proceedings. Pet. App. 2. Because the "language of the statute is unambiguous," Pet. App. 15, the court rejected Petitioner's argument that Section 1681t(b)(1)(E) preempts all State laws regulating the content of consumer reports, regardless of whether the law intrudes on matters regulated by Section 1681c:

> That is not the most natural reading of the statute's syntax and structure. Congress drafted the line breaks in the statute so that a sentence describing what was preempted as well as the phrase "subject matter regulated under" would be completed by reference to a statutory section or subsections, suggesting that it wanted to give the statutory references a functional role in describing the regulated "subject matter."

Pet. App. 9. In other words, "the preemption clause necessarily reaches a subset of laws narrower than those that merely relate to information contained in consumer reports." Pet. App. 12. The court recognized that Petitioner's interpretation would render the "regulated under" phrase surplusage. Pet. App. 10. According to the court, if Congress had intended to preempt all state laws relating to information contained in consumer reports, it easily could have said so. Pet. App. 13-14. "Instead, it inserted the phrase 'regulated under' to

delimit the operative range of preemption." Pet. App. 15.

Having concluded that the Debt Acts are preempted only if they relate to subject matter regulated under Section 1681c, the First Circuit next examined the scope of that provision. Pet. App. 17. The court noted that Section 1681c(a)(1)-(5) regulates the reporting of various types of adverse information, such as bankruptcies, civil judgments, and accounts placed for collection, with a "catch-all" provision prohibiting the reporting of "[a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years." Pet. App. 18.[5] Because Petitioner had not developed any argument regarding the extent to which the Debt Acts might encroach on Section 1681c(a)(1)-(5), the First Circuit remanded that issue to the district court. Pet. App. 20.

Section 1681c(a)(7)-(8) regulates the reporting of medical debt incurred by veterans. The First Circuit concluded that while these provisions "have no preemptive effect for nonveterans' medical debt, the scope of their partial preemptive effect on the [Medical Debt Act] as it applies to veterans' medical debt is less obvious." Pet. App. 22. In the absence of briefing on that

[5] The court noted that there is a "scrivener's error" in this provision – there should be a comma after "convictions of crimes." Pet. App. 18 n.5; *see also Moran v. Screening Pros*, LLC, 943 F.3d 1175, 1183 n.6 (9th Cir. 2019).

issue, the court remanded it to the district court. Pet. App. 22-23.

Finally, the First Circuit acknowledged Petitioner's argument that the Economic Abuse Debt Act is preempted by Section 1681t(b)(5)(C). This provision states that "no requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the specific provisions of . . . section 1681c-2 of this title." 15 U.S.C. § 1681t(b)(5)(C). Among other things, Section 1681c-2 requires consumer reporting agencies to, within a specified timeframe, "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." 15 U.S.C. § 1681c-2(a). Recognizing that the parties disputed the extent to which economic abuse is synonymous with identity theft, and because the district court had not addressed the issue given its holding that both Debt Acts were preempted by Section 1681t(b)(1)(E), the court remanded the issue to the district court. Pet. App. 25.

The First Circuit denied Petitioner's petition for rehearing. Pet. App. 26-27. On remand, the district court stayed its proceedings pending the filing of a petition for a writ of certiorari. ECF No. 54.

REASONS FOR DENYING THE PETITION

I. The First Circuit's Decision Does Not Finally Resolve the Case.

While the First Circuit rejected Petitioner's argument that Section 1681t(b)(1)(E) preempts all state laws regulating the content of consumer reports, it did not decide the extent to which that provision preempts the Debt Acts. Rather, the court held that whether the Debt Acts are preempted turns on the extent to which they encroach on subject matter regulated by Section 1681c(a)(1)-(5), which addresses obsolete "adverse item[s] of information." The court remanded the matter so that the district court could decide that issue. The First Circuit also remanded to the district court the issue of the extent to which the Medical Debt Act, as applied to veterans' medical debt, encroaches on Section 1681c(a)(7)-(8). Finally, because the district court did not address Petitioner's argument that Section 1681t(b)(5)(C) preempts the Economic Abuse Debt Act, the First Circuit remanded that issue, as well.

In short, there is still much in this case that is left to be decided. A subsequent ruling from the district court on remand, followed potentially by First Circuit review, may obviate the need for review by this Court. At the very least, the issues for potential review may be narrowed. Further, if the Court were to take the case now and affirm the First Circuit's ruling, the Court may later be again asked to take the case depending on how the lower courts decide the remaining

issues. In other words, there is a potential for piecemeal appeals.

Accordingly, even if the Court determines that the issue presented is worthy of review, it should defer until there is a final judgment completely resolving the case. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

II. There Is No Conflict Among the Circuits.

According to Petitioner, "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," and the First Circuit "broke sharply from that consensus." Pet. 15. To the contrary, in not one case cited by Petitioner did the court expressly read the statute in the way that Petitioner claims, and in many of the cited cases the court expressly acknowledged the need to consider the subject matter regulated by the referenced provision, as the First Circuit did.

None of Petitioner's cases involve Section 1681t(b)(1)(E), the preemption provision at issue here. Four of them, though, involve a similarly phrased provision – Section 1681t(b)(1)(F). This provision preempts state laws respecting "any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish

information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F). In *Galper v. JPMorgan Chase Bank, N.A.*, 802 F.3d 437 (2d Cir. 2015), the Second Circuit did not, as Petitioner claims, find that Section 1681t(b)(1)(F) "preempts all state-law 'claims that concern a furnisher's responsibilities.'" Pet. 28-29. In the portion of the opinion referenced by Petitioner, the court was considering the scope of matters regulated by Section 1681s-2, and it held that Section 1681b(1)(F) "preempts only those claims that concern a furnisher's responsibilities." *Galper*, 802 F.3d at 446 (first emphasis added). Claims that do not concern a furnisher's responsibilities under FCRA are not preempted, but the court never said, as Petitioner suggests, that all claims concerning a furnisher's responsibilities are preempted. Indeed, the court expressly stated that the provision "must be read to preempt only those claims against furnishers that are 'with respect to' the subject matter regulated under § 1681s-2." *Id.*, at 445-46 (emphasis in original). The court rejected the defendant bank's argument that Section 1681t(b)(1)(F) "preempts all claims 'relating to the responsibilities' of furnishers in any way," concluding that "[t]his broad argument overlooks the language of the statute." *Id.*, at 447. The court recognized that "the phrase 'relating to' is not used to describe the scope of preemption" but instead "exists as a shorthand reference to describe the subject matter governed by § 1681s-2." *Id.*; *see also id.*, at 441 (stating that Section 1681t(b)(1)(F) "preempts state law claims for identity theft if they are 'with respect to' subject matter regulated by 15 U.S.C. § 1681s-2, a statute that 'relat[es] to

the responsibilities of persons who furnish information to consumer reporting agencies.' "). "If Congress had intended to preempt claims that relate in any way to someone furnishing information to a consumer reporting agency, it could easily have drafted the statute to say that state laws 'relating to the furnishing of information to consumer reporting agencies are preempted.' " *Id*.

Section § 1681t(b)(1)(F) was also at issue in *Ross v. F.D.I.C*., 625 F.3d 808 (4th Cir. 2010). According to Petitioner, the Fourth Circuit "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," but instead "relied on the fact that the plaintiff's claims 'concern [the] reporting of inaccurate credit information to [consumer reporting agencies].' " Pet. 26. Contrary to Petitioner's claim, the court of appeals did examine the scope of Section 1681s-2, noting that it imposes on furnishers of information a duty to provide accurate information and correct mistakes and to take certain actions upon receiving a notice of dispute as to the accuracy of the information, including conducting an investigation. *Ross*, 625 F.3d 813. Further, Petitioner omits a key part of the court's conclusion. In full, the court determined that plaintiff's claims "concern[the] reporting of inaccurate credit information to [consumer reporting agencies], an area regulated in great detail under § 1681s-2(a)-(b)." *Id*. (emphasis added). The court went on to state that because the plaintiff's claim sought to enforce a provision of state law "concerning 'subject matter regulated

under section 1681s-2,' it is squarely preempted by the plain language of FCRA." *Id*.[6]

Section 1681t(b)(1)(F) was again at issue in *Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 46 (2d Cir. 2011) (per curiam). There, the plaintiff alleged that a bank maliciously provided false information to a consumer reporting agency, and the bank argued that the claims were preempted by 15 U.S.C. § 1681t(b)(1)(F). The court expressly noted that the plaintiff "acknowledges that his allegations of false reporting concern conduct regulated by § 1681s-2." *Macpherson*, 665 F.3d at 47.

Finally, Section 1681t(b)(1)(F) was at issue in *Scott v. First Southern National Bank*, 936 F.3d 509 (6th Cir. 2019), where one of the plaintiff's claims was that a bank reported false information to consumer credit bureaus. The only real issue appears to have been whether Section 1681t(b)(1)(F) preempts just statutory claims or also common-law ones. *Scott*, 936 F.3d at 519-22. The court held that it preempts both. *Id*., at 522. And while the Sixth Circuit "did not perform an exhaustive, line-by-line review of the specific provisions of § 1681s-2," Pet. 26, the court explained that because plaintiff's "common law claims concern the same 'subject matter regulated under . . . section

[6] In addressing an unfair debt collection claim, the court held that to the extent it was based on reporting false information to consumer reporting agencies, it was similarly preempted. *Id*., at 817.

1681s-2 of [the FCRA],' they are preempted by the FCRA." *Id*., at 520.

In sum, in all four cases cited by Petitioner – *Galper*, *Ross*, *Macpherson* and *Scott* – the courts recognized that the relevant inquiry is whether a claim concerns subject matter regulated by the referenced statute. It is impossible to see how any of those four decisions conflicts with the First Circuit's decision here.

Another similarly phrased preemption provision – 15 U.S.C. § 1681t(b)(1)(A) – was at issue in *Premium Mortgage Corp. v. Equifax, Inc*., 583 F.3d 103 (2d Cir. 2009) (per curiam). The plaintiff challenged consumer reporting agencies' practice of selling "prescreened" consumer reports containing mortgage "trigger leads."[7] The Second Circuit held that many of plaintiff's claims were preempted by Section 1681t(b)(1)(A), which preempts State laws respecting "any subject matter regulated under . . . subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports." 15 U.S.C. § 1681t(b)(1)(A). Admittedly, the court did not consider the scope of regulation under the referenced statute – Section 1681b(c) and (e) – and simply stated that "[p]laintiff's allegations 'relate[] to the prescreening of consumer reports.'" *Premium*

[7] Mortgage trigger leads are generated when individuals apply for mortgages and the prospective lenders purchase consumer reports. The consumer reporting agencies can deduce from this who is in the market for mortgages and sell to competing lenders pre-screened consumer reports containing these mortgage trigger leads.

Mortgage Corp., 583 F.3d at 106. It does not appear, though, that the issue of whether the "regulated under" phrase limited the scope of preemption was before the court. Rather, the plaintiff's arguments were that "trigger leads" are not themselves "consumer reports" and that there is a distinction between statutory and common-law claims for purposes of preemption. *Id*., at 106-07. Moreover, as one district court held, "the 'subject matter' of mortgage-trigger lists is unquestionably regulated by § 1681b(c)." *Consumer Data Indus. Ass'n v. Swanson*, No. 07-CV-3376 PJSJJG, 2007 WL 2219389, at *4 (D. Minn. July 30, 2007). So, *Premium Mortgage Corp*. would have come out the same had the Second Circuit examined the scope of the referenced statute.

Petitioner argues that the First Circuit's reasoning is "[m]ore generally . . . at odds with the broad manner in which other circuits have recognized § 1681t(b) must be interpreted." Pet. 27. Even with Petitioner's "more generally" and "broad manner" qualifiers, this argument does not withstand scrutiny. At issue in *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011) and *Aleshire v. Harris, N.A*., 586 F. App'x 668 (7th Cir. 2013) was whether "the laws of any State" as used in Section 1681t(b) is limited to State statutes or also includes State common law. Both courts held that it is the latter. The *Purcell* court did not otherwise discuss the scope of preemption, and the *Aleshire* court expressly stated that because plaintiff's claims arose out of a bank's reports to consumer credit reporting agencies, they "relate to a matter regulated under

section 1681s-2." *Aleshire*, 586 F. App'x at 670. *Aldaco v. RentGrow, Inc*., 921 F.3d 685 (7th Cir. 2019) did not involve preemption at all. The plaintiff alleged that a consumer reporting agency violated FCRA when it disclosed her criminal history to a landlord, and the issue was what constitutes a "conviction" for purposes of 15 U.S.C. § 1681c(a)(5). Finally, in dicta, the Tenth Circuit in *Consumer Data Industry Association v. King*, 678 F.3d 898, 901 (10th Cir. 2012) stated that FCRA "leaves no room for overlapping state regulations" and that "Congress set out to create uniform, national standards in the area of credit reporting." The court cited no support for this proposition, though. More importantly, and what Petitioner ignores, is that similar to the First Circuit decision here, the court went on to state that FCRA "expressly preempts any state requirement or prohibition relating to, among other things, matters regulated under § 1681i (concerning the time by which CRAs must take certain actions) and § 1681c (concerning the content of consumer reports and a CRA's duties in addressing reports of identity theft)." *Id*., at 901. In sum, the First Circuit's decision does not conflict with a decision from any other court of appeals.

III. The First Circuit's Decision is Correct.

The First Circuit correctly held that Section 1681t(b)(1)(E) preempts only those State laws that concern subject matter regulated by Section 1681c. If Congress had intended to preempt all State laws relating to information contained in consumer reports, it would have said so.

Congress certainly knows how to achieve broad preemption of State law. For example, in the Federal Aviation Administration Authorization Act of 1994, Congress prohibited States from enacting laws "relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker." 49 U.S.C. § 14501(b)(1). Congress has prohibited States from enacting laws "related to a price, route or service of an air carrier that may provide air transportation. . . ." 49 U.S.C. § 41713(b)(1). The Employee Retirement Income Security Act of 1974 preempts State laws that "relate to any employee benefit plan" covered by the Act. 29 U.S.C. § 1144(a); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

Following these models, Congress could have declared that State laws "relating to information contained in consumer reports" are preempted. Congress did not do this. Instead, it inserted a clause limiting preemption to laws respecting "subject matter regulated under . . . section 1681c." 15 U.S.C. § 1681t(b)(1)(E). This Court has recognized that when Congress easily could have worded a statute to achieve a particular result, its decision to not use such wording indicates that it did not intend to achieve that result. *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (when drafters did not adopt "obvious alternative" language, "the natural implication is that they did not intend" the alternative).

Moreover, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to

be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also Stapleton*, 137 S. Ct. at 1659 (presuming that "each word Congress uses is there for a reason"). Because Petitioner's argument is premised on its contention that the "regulated under" clause is surplusage, it must be rejected.

Applying the principle that an interpretation making language surplusage is to be avoided, the First Circuit correctly ruled that the phrase "relating to information contained in consumer reports" "can be plausibly read either as purely descriptive of the content of the statutory provisions or as modifying 'subject matter' jointly with 'regulated under section 1681c.'" Pet. App. 10; *see also Galper*, 802 F.3d at 447 ("In this statutory context, the phrase 'relating to' is not used to describe the scope of preemption. Instead, the phrase exists as a shorthand reference to describe the subject matter governed by § 1681s-2."). Indeed, Section 1681c is entitled "Requirements relating to information contained in consumer reports." 15 U.S.C. § 1681c. The same convention is used throughout Section 1681t. For example, state laws are preempted if they relate to subject matter regulated under 1) "subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;" 2) "subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;" 3) "section 1681s-3 of this title, relating to

the exchange and use of information to make a solicitation for marketing purposes;" and, 4) "subsections (i) and (j) of section 1681c-1 of this title relating to security freezes." 15 U.S.C. § 1681t(b)(1)(A), (C), (H), (J).

In other words, Section 1681t's overall approach is to define the scope of preemption by reference to matters regulated by specific statutes, followed by a "relating to" phrase that describes or narrows the scope of the referenced statutes. It is hard to imagine that Congress intended the "relating to" phrase to define the scope of preemption. And again, that would make references to the statutes surplusage.

In addition, the Consumer Financial Protection Bureau (the "Bureau"), the agency to which Congress granted general rulemaking authority over FCRA, 15 U.S.C. § 1681s(e)(1), fully agrees with the First Circuit's conclusion. Five months after the First Circuit's decision, the Bureau issued an interpretive rule "clarify[ying] the preemptive cope of 15 U.S.C. 1681t(b), with a particular focus on 15 U.S.C. 1681t(b)(1) and (5)" and citing with approval the First Circuit's decision. *See* The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41,042, 41,043 (July 11, 2022). The Bureau began by recognizing that some States have enacted statutes "provid[ing] protections to consumers that go above and beyond the requirements of the FCRA," and that these statutes "exist alongside the FCRA." *Id*., at 41,042. The Bureau then turned to the eleven subsections of 15 U.S.C. § 1681t(b)(1), each of which "preempts State laws 'with respect to any subject matter regulated under' an

enumerated part of the FCRA (e.g., section 1681c)," followed by "a parenthetical phrase beginning with 'relating to' that describes or further narrows the section that has just been enumerated." *Id*., at 41,043. "Preemption under section 1681t(b)(1) thus depends on the meaning of both the 'with respect to' and 'relating to' clauses." *Id*. The Bureau concluded that a State law is not preempted unless it is both " 'with respect to any subject matter regulated under' the enumerated sections of the FCRA" and "falls within the description in the 'relating to' parenthetical." *Id*.; *see also id*., at 41,044 ("Thus, if a State law does not 'concern' the subject matters regulated under the FCRA sections specified in section 1681t(b)(1), it is not preempted by that clause.").

Turning to Section 1681t(b)(1)(E), the Bureau concluded that "State laws would not be preempted unless they are 'with respect to any subject matter regulated under section 1681c.' " *Id*., at 41,043.[8] The Bureau noted that the regulatory scope of Section 1681c is narrow. For example, it limits how long certain adverse items of information may appear on consumer reports, but, with two limited exceptions, "does not provide any

[8] The Bureau considered, and rejected, Petitioner's argument that Section 1681t(b)(1)(E) preempts any State law "relating to information contained in consumer reports," finding this "would render the 'with respect to' clause surplusage." *Id*., at 41,043-044. The Bureau noted that Congress "knows how to broadly preempt State laws that are 'related to' fields or topics," but in FCRA it instead "made clear that a State law is not preempted by section 1681t(b)(1) unless it falls within the 'with respect to' clause." *Id*., at 41,044.

general restrictions on the content of a consumer report." *Id*. "States therefore retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens." *Id*.

The First Circuit's decision is also supported by this Court's opinion in *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013). At issue there was a provision in the Federal Aviation Administration Authorization Act of 1994 prohibiting states from enacting or enforcing a law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The Court held that the phrase "with respect to the transportation of property" "massively limits the scope of preemption." *Pelkey*, 569 U.S. at 261. Thus, a State law is not preempted unless it both relates to a price, route or service of a motor carrier and concerns the carrier's "transportation of property." *Id*.

Petitioner attempts to distinguish *Pelkey* by arguing that the statute at issue there ended with a clause ("with respect to the transportation of property") that was "self-evidently narrower than the list that preceded it." Pet. 21 (emphasis in original). Whether it really is narrower, though, is subject to debate. Moreover, Petitioner has not shown that the ordering of the statutory clauses has significance. The point is that when there are two clauses in a statute, it is not enough to satisfy just one. Petitioner's argument fails because, among other things, it is premised on ignoring the clause in Section 1681t(b)(1)(E) limiting preemption to

State laws relating to matters regulated under section 1681c.[9] The First Circuit's decision is correct because it gave meaning to the plain language of that clause.

CONCLUSION

For the above reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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[9] Petitioner claims that "[o]ne broadening clause after another does not somehow add up to a narrow provision." Pet. 18. But while "with respect to" and "relating to" might, on their own, be broad, the fact remains that when both conditions must be satisfied, the scope of preemption under FCRA narrows.