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, 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

REPLY BRIEF

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REPLY BRIEF

Maine does not dispute that the decision below will usher in a patchwork of state credit-reporting regulation. Instead, Maine affirmatively embraces a return to the pre-1996 regime where states were free to impose their own policy views as to which debts were really worth reporting. That state-empowering construction defies FCRA's plain text, which broadly provides that "[*n*]*o requirement or prohibition* may be imposed under the laws of any State … with respect to *any subject matter* regulated under … section 1681c of [FCRA], *relating to* information contained in consumer reports." 15 U.S.C. §1681t(b)(1)(E) (emphases added). It also wholly frustrates Congress' evident intent in amending FCRA in 1996 to supplement a conflict-only preemption regime that had produced a patchwork of state requirements with a broader provision expressly preempting entire subject matters. And it squarely conflicts with other circuits' decisions giving FCRA's express preemption provisions an appropriately broad scope.

That trifecta confirms the need for review. Maine offers no compelling reason to the contrary. Its lead argument against certiorari—that the First Circuit's decision is interlocutory—is generally a makeweight when it comes to federal-court cases, and it is wholly unavailing here. That the First Circuit remanded for what amounts to a conflict-preemption analysis underscores that it has drained FCRA's broad, post-1996 express preemption clause of its intended effect, and highlights the conflict with other circuits that give FCRA a broad preemptive force without the need for the line-by-line inquiry the First Circuit requires.

Maine tries to minimize the circuit split, but it ultimately admits that the cases on the other side of the split approach §1681t(b)(1) in exactly the manner the First Circuit rejected. There is thus no getting around the fact that the First Circuit stands alone in construing FCRA to render the 1996 amendments essentially meaningless. Maine highlights that the CFPB agrees with the First Circuit's decision. But the CFPB has no special expertise in interpreting express preemption provisions, and the fact that a consumer-protection agency wants to shield state laws it views as providing greater consumer protection only underscores the conflict with Congress' judgment in revoking a sunset provision that would have excepted such state laws. In all events, CFPB's view only confirms the exceptional importance of the question presented. As petitioner and its amici have shown, the decision below will have a massive and immediate effect on the consumer reporting industry. This Court should grant plenary review.

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

Maine's effort to deny the conflict among the circuits fails on multiple levels. Maine tries to discount the cases on the other side of the split on the ground that "[n]one of [them] involve Section 1681t(b)(1)(E)." BIO.13. But as Maine admits, four "involve a similarly phrased provision[,] Section 1681t(b)(1)(F)," and a fifth involved §1681t(b)(1)(A), "[a]nother similarly phrased preemption provision." BIO.13, 17. Even that concession undersells the point. The various subparagraphs of §1681t(b)(1) are not just "similarly phrased"; they all share the same structure

and critical language: Each says that "no requirement or prohibition may be imposed under the laws of any State … with respect to any subject matter regulated under" a particular section of FCRA, "relating to" the subject matter that the referenced section addresses. Pet.6. There are thus only two textually available options: Either all of §1681t(b)(1)'s subparagraphs preempt the broadly defined *subject matters* regulated under the cross-referenced FCRA provisions, or they preempt only state laws that conflict with the specific requirements and prohibitions that Congress imposed *within* that general subject matter. The choice between those two interpretations should be clear given that Congress added all of these provisions to supplement FCRA's pre-1996 conflict-only preemption regime. It is thus no great surprise that the First Circuit stands alone in embracing the latter view.

Even Maine cannot really deny the conflict with *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (per curiam). There, the Second Circuit held state-law claims preempted by §1681t(b)(1)(A), which cross-references "subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports," because "Plaintiff's allegations 'relate[] to the prescreening of consumer reports.'" *Id.* at 105-06. The court did not look through to §1681b to examine whether it specifically regulates the exact factual basis of the plaintiff's claims ("trigger leads"); it was enough that the claims related to the subject matter addressed by the referenced provision. That is the opposite of how the First Circuit read §1681t(b)(1). Indeed, the First Circuit remanded for the district court to look through to the cross-referenced FCRA provision and perform a

line-by-line conflict-preemption analysis, BIO.12—an inquiry that no other circuit requires. That explains why Maine cannot help but "[a]dmit[]" the conflict. BIO.17.

To be sure, Maine meekly observes that "[i]t does not appear … that the issue of whether the 'regulated under' phrase limited the scope of preemption was before the court" in *Premium Mortgage*. BIO.18. But that is exactly the point. The Second Circuit definitively found preemption without construing the phrase "regulated under" in §1681t(b)(1) the way the First Circuit and Maine do. As a result, it had no need to parse §1681b to determine whether it specifically regulates the sharing of "trigger leads," which "themselves are not 'consumer reports.'" *Premium Mortg.*, 583 F.3d at 106.

Maine's attempt to waive away *Scott v. First Southern National Bank*, 936 F.3d 509 (6th Cir. 2019), fares no better. Maine asserts that "[t]he only real issue appears to have been whether Section 1681t(b)(1)(F) preempts just statutory claims or also common-law ones." BIO.16. That was *an* issue in the case, but certainly not the "only" one. *After* resolving that issue by holding that §1681t(b)(1) preempts both statutory and common-law claims, the Sixth Circuit addressed the "assert[ion] that because Plaintiffs' claims arise from First Southern's reporting obligations, the district court properly dismissed Plaintiffs' claims as preempted by the FCRA." 936 F.3d at 519. And in affirming that holding, the court explicitly determined that "[b]ecause these common law claims concern the same 'subject matter regulated under … section 1681s-2 of [FCRA],' *see*

§1681t(b)(1)(F), they are preempted." *Id.* at 519-20. The court reached that conclusion without performing a line-by-line review of §1681s-2 in search of a specific conflict—as Maine once again admits. BIO.16.

Maine tries to distinguish *Ross v. FDIC*, 625 F.3d 808 (4th Cir. 2010), by claiming that the Fourth Circuit "*did* examine the scope of Section 1681s-2." BIO.15. But the court did so only in service of noting that the "reporting of inaccurate credit information" is "an area regulated in great detail under §1681s-2(a)-(b)." 625 F.3d at 813. Nowhere did it "zero in" on §1681s-2, *see* Pet.App.17, to determine precisely *how* it regulates that subject matter. After all, as the Fourth Circuit emphasized, "[t]he purpose of [§1681t(b)(1)] was, in part, to avoid a patchwork system of conflicting regulations." *Ross*, 625 F.3d at 813; *accord CDIA v. King*, 678 F.3d 898, 900-01 (10th Cir. 2012); Pet.18-19. The line-by-line search for a specific conflict that the First Circuit adopted and Maine now embraces is antithetical to that purpose.

Against all of this, Maine clings onto *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437 (2d Cir. 2015). BIO.14-15. But the most that can be said about *Galper* is that it is unclear on which side of the split it falls. Pet.28-29. And if the Second Circuit is on both sides of the circuit split, that only strengthens the case for this Court's review.

II. The Decision Below Is Wrong.

The plain statutory text demonstrates that FCRA expressly preempts state laws that seek to regulate the subject matter of information included in consumer reports. Indeed, all of Congress' textual choices in §1681t(b)(1)—not to mention its whole point

in amending FCRA's pre-1996 conflict-only preemption regime—make clear that §1681t(b)(1) preempts expansively.

Section 1681t(b) begins: "No requirement or prohibition may be imposed under the laws of any State…." The lead phrase "'[n]o requirement or prohibition' sweeps broadly." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality op.); Pet.16. Paragraph (b)(1)—"with respect to any subject matter regulated under"—doubles-down on that broad sweep, as the phrase "with respect to" "generally has a broadening effect," "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); Pet.16-17. The word "any" likewise "has an expansive meaning." *Patel v. Garland*, 142 S.Ct. 1614, 1622 (2022); Pet.17. And "subject matter" in the context of a preemption provision signals the preemption of a defined field rather than the invocation of conflict-preemption principles or the preemption of only specific issues. *See Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 451 (2005) (describing the preempted field as "the subject matter of th[e] statutory provision").

Each subparagraph of §1681t(b)(1) underscores that breadth. Each starts by referencing a relevant FCRA provision and then uses "relating to" to broadly preempt the subject matter addressed in that section. This Court has "'repeatedly recognized' that the phrase 'relate to' in a preemption clause 'express[es] a broad pre-emptive purpose.'" *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95-96 (2017) (quoting

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)); Pet.17. Putting all those broadening phrases together, §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[.]" That text means what it says: FCRA preempts all state laws that regulate what must or must not be included in consumer reports.

Maine has no real answer to the breadth of the text. Instead, it claims that CDIA's reading renders the phrase "regulated under" surplusage. But those words are not superfluous; they work together with the "relating to" clause to identify the "subject matter" each subparagraph preempts. That is particularly true of subparagraph (b)(1)(E), where the "relating to" clause tracks the language from the referenced statute's heading—namely, "Requirements relating to information contained in consumer reports." 15 U.S.C. §1681c. The two clauses work hand in glove to define the preempted subject matter, with neither superfluous.

In all events, Maine's reading introduces a greater superfluity problem, depriving the entire phrase "relating to information contained in consumer reports" of any meaning—as Maine itself admits by dismissing the phrase as "purely descriptive." BIO.21 (citing Pet.App.10). Maine thus cannot deny that, under the decision below, the "relating to" clause does zero work not only in subparagraph (b)(1)(E), but throughout the entirety of §1681t(b)(1).

Maine has even less to say about how its view (and that of the First Circuit) can be reconciled with the evolution of FCRA's preemption provision. As originally enacted, FCRA included only a narrow conflict-preemption provision, 15 U.S.C. §1681t(a), which preempts state laws that are "inconsistent" with FCRA. The whole point of §1681t(b), which Congress added in 1996 after the conflict-only regime produced an untenable patchwork of state regulation, was to broaden FCRA's preemptive reach beyond conflict preemption to promote greater uniformity. Yet the First Circuit's decision eviscerates those amendments, as it leaves FCRA preempting only state laws that actually conflict with one of its provisions, which is exactly the regime Congress tried to inter by adding §1681t(b)(1) to supplement a statute that already included a conflict-preemption provision in §1681t(a).

And the problem with Maine's view does not end with the 1996 amendments. Maine spends page after page defending the many supposed pro-consumer benefits of its laws. *See* BIO.1-5. But while the benefits to consumers are debatable—after all, a non-disclosure rule hurts consumers who could establish their relative creditworthiness by the absence of the debts Maine makes non-disclosable for everyone, Pet.31—Congress' decision to not exempt pro-consumer laws from preemption is beyond debate. Congress' 2003 amendments expressly *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." Pub. L. No. 108-159, §711 (repealing 15 U.S.C. §1681t(d)(2) (1996)); *see* Pet.5, 19-20 (discussing 2003

amendments). Maine, like the First Circuit, never explains how its reading is consistent with that repeal.

Instead, Maine resorts to the argument that Congress *could* have written a clearer statute, which can be claimed in hindsight every time statutory text produces a circuit split. According to Maine, had Congress wanted to "achieve broad preemption," it would have simply declared that "State laws 'relating to information contained in consumer reports' are preempted." BIO.20. But like most of Maine's argument, that ignores the statutory evolution. If Congress had set out to write a broad preemption provision on a clean slate, it might have employed Maine's preferred syntax. But Congress instead supplemented an existing saving clause with a series of exceptions designed to eliminate the patchwork of state regulation that emerged under the pre-1996 conflict-only preemption provision. The resulting text may not be the platonic form of legislative drafting, but interpreting it to negate the evident intent of Congress in 1996 and in 2003, just because Maine hypothesizes a more concise alternative, is not a viable mode of statutory interpretation.

Maine next tries to find "support[]" in *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013), BIO.24, but that argument just repeats the First Circuit's errors. This Court has already made clear that "with respect to" is generally a broadening phrase that "ensur[es] that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar*, 138 S.Ct. at 1760. The phrase performed a narrowing function in *Dan's City* only because of unusual textual and structural features of the

provision there that §1681t(b)(1)(E) does not share. In particular, the "with respect to" phrase in *Dan's City* came at the end of the provision and qualified the preceding text. 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." In reality, the clause in §1681t(b)(1)(E) most analogous to the trailing with-respect-to clause in *Dan's City* is §1681t(b)(1)(E)'s final "relating to information contained in consumer reports"—but, for obvious reasons, Maine never suggests that its laws regulate something other than the information that must be included in consumer reports.

The fundamental problem with Maine's interpretation is that it renders the entirety of §1681t(b) toothless. According to Maine, unless Congress has specified in §1681c that a particular type of information must be included or excluded, states are free to impose their own rules "relating to information contained in consumer reports." But Congress would not have even needed to add §1681t(b) if that is all it wanted to accomplish. Section 1681t(a) and general implied conflict-preemption principles already would have preempted state laws that regulated the specific information addressed in conflicting ways. And Congress did not add §1681t(b) and all its subsections just to preempt state laws that duplicated provisions in §1681c (and the other cross-referenced provisions) without conflict. Instead, Congress enacted §1681t(b) to eliminate the untenable pre-1996 patchwork of state regulation that had undermined the utility and uniformity of consumer

reports. The position embraced by Maine and the First Circuit eviscerates Congress' effort.

III. The Question Presented Is Exceptionally Important, And This Is An Excellent Vehicle.

Maine does not dispute that the First Circuit's deeply flawed decision will initiate a massive shift in how consumer reports are compiled nationwide. Instead, it celebrates that manifold state-law approaches will be allowed to bloom. But that is precisely why "the decision below threatens the viability of our national consumer credit-reporting system." ACA.Amicus.Br.3. Congress acted in 1996 and again in 2003 to preserve that national system, which allows a business to extend credit to consumers from Maine to California by looking at a consumer report without the aid of a 50-state survey indicating what information is being withheld. The alternative regime ushered in by the decision below not only will cause administrative nightmares and drastically increase the costs of consumer reports, but will sap the reports of much of their utility and potentially "reduce[] access to credit." Chamber.Amicus.Br.14, 16-22.

Maine trumpets the fact that the CFPB has issued an interpretive rule that agrees with Maine and the First Circuit about the narrow scope of FCRA preemption. But the CFPB's view is hardly surprising, does nothing to strengthen Maine's position, and only magnifies the importance of this Court's review. Given the CFPB's mission, it is unsurprising that it would favor exempting state laws perceived to provide "greater protection to consumers" from FCRA's preemptive scope. But Congress made

the exact opposite decision in 2003 in repealing a proviso that would have done just that. Nor does the CFPB have any particular expertise in interpreting an express preemption clause. That is a job for this Court, and the CFPB is entitled to no deference, especially when it comes to a statute that pre-dates its existence by decades. Thus, the only significance of the CFPB's view is that it magnifies the need for this Court's review. The threat that the First Circuit's mistaken view of FCRA preemption will spread has only grown now that the CFPB has added accelerant to the fire. In green-lighting state laws "forbid[ding] consumer reporting agencies from including information about medical debt, evictions, arrest records, or rental arrears," 87 Fed. Reg. 41,042, 41,042 (July 11, 2022), the CFPB all but guarantees that the First Circuit's mistaken approach will spread beyond New England.

That said, the decision below has already eliminated the nationwide uniformity that Congress went out of its way to establish in 1996 and 2003. Someone picking up a consumer report anywhere in the nation can no longer assume that the absence of medical debt for a Maine resident reflects creditworthiness, rather than the effect of state law. That result cannot be squared with Congress' express judgments in 1996 and 2003. Only this Court can restore Congress' vision.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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