NO. 20-2064

United States Court of Appeals
For the First Circuit

CONSUMER DATA INDUSTRY ASSOCIATION,
Plaintiff/Appellee

- v. –

AARON M. FREY, in his capacity as Attorney General of the State of Maine;
WILLIAM N. LUND, in his capacity as Superintendent
of the Maine Bureau of Consumer Credit Protection
Defendants/Appellants

On Appeal from the United States District Court for the District of Maine
Case No. 1:19-cv-00438-GZS

BRIEF OF APPELLEE CONSUMER DATA INDUSTRY ASSOCIATION

Ryan P. Dumais, Esq.
Eaton Peabody
77 Sewall Street #3000
Augusta, ME 04330
Phone: (207) 622-3747
rdumais@eatonpeabody.com

Rebecca E. Kuehn, Esq.
Jennifer Sarvadi, Esq.
Hudson Cook LLP
1909 K Street NW, 4th Floor
Washington, DC 20006
Phone: (202) 715-2008
rkuehn@hudco.com
jsarvadi@hudco.com

Attorneys for Plaintiff/Appellee Consumer Data Industry Association

CORPORATE DISCLOSURE STATEMENT

Plaintiff Consumer Data Industry Association, by and through its counsel of record, hereby makes the following disclosure pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

Consumer Data Industry Association ("CDIA") is an industry trade association that has no parent corporation, and no publicly held corporation owns 10 percent or more of CDIA's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF THE ISSUES

The District Court properly held that the Fair Credit Reporting Act Section 1681t(b)(1)(E) preempts relevant portions of Maine's Medical Bill Act and the Economic Abuse Law that attempt to proscribe the information a consumer reporting agency may, or may not, include in consumer reports, a subject reserved to exclusive federal regulation.

Although not decided by the District Court below, the Fair Credit Reporting Act Section 1681t(b)(1)(5)(C) also preempts relevant provisions of the Economic Abuse Law when the basis for economic abuse alleged by the consumer amounts to a claim of identity theft.

SUMMARY OF THE ARGUMENT

The District Court did not err in finding that the challenged portions of Maine's Medical Bill Act and Economic Abuse Law (together, the "Maine Laws") are preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). The District Court correctly construed, and conducted a thoughtful and thorough analysis of, the relevant FCRA provisions, their legislative histories, and the language of each of the Maine Laws in finding that they were both preempted by the FCRA Section 1681t(b)(1)(E).

Congress enacted, and subsequently amended, the FCRA to create a nationwide system of credit reporting that would balance the interests of the three

key groups affected by the system: consumers, users of consumer reports, and the consumer reporting agencies that prepare them. This national approach treats all consumers consistently, levelling the playing field to facilitate access to credit for all consumers, regardless of their state of residency. In order to preserve this national system, Congress expressly prohibited states from enacting laws that would undermine this uniformity, crafting a set of interconnecting preemption rules in Section 1681t.

In particular, Congress not only preempted state laws where there is inconsistency between the FCRA and state law (§1681t(a)), but also, the entire "subject matter" of various aspects of consumer reporting rights and obligations (§1681t(b)(1)). Congress preserved to federal regulation certain "conduct" required under the FCRA §1681t(b)(5). State laws, such as the Maine Laws, that "relate to" the subject matter regulated by the FCRA (here, the content of consumer reports) are preempted, and therefore cannot survive.

Further, state laws that attempt to govern certain conduct regulated by the FCRA, such as the Economic Abuse Law, are preempted by §1681t(b)(1)(C). Congress chose to separately preempt state laws that regulate the "conduct" required by the FCRA, which, relevant here, requires a CRA to undertake specific conduct when faced with a claim of identity theft from a consumer. In light of the statutory language, evidencing a "clear and manifest" intent that the FCRA preempt all state

regulation on the subject of the content of consumer reports, and where the conduct is proscribed by the FCRA, this Court should find the Maine Laws preempted, and affirm the judgment entered in favor of Appellee below.

ARGUMENT

The district court did not commit reversible error in finding that the Maine Laws are preempted by the FCRA. The court carefully examined the evolution of the FCRA text in detail, considered fundamental principles of federal preemption, and considered how to interpret its provisions. *See gen.*, Add. 1. The district court did not err in concluding that the result of the 1996 Amendments to the FCRA was that "§ 1681t(b)(1) now presents a list of eleven 'subject matter[s]' 'regulated under' other sections of the FCRA that are reserved to the federal government." *Id.* *12. In fact, Congress's clear intent was to avoid a "patchwork of state laws" in favor of a national standard. Upon review of the FCRA and the Maine Laws, the court concluded that "[by] seeking to exclude additional types of information, the Maine Laws intrude upon a subject matter that Congress has recently sought to expressly preempt from state regulation." *Id.* *13-14. As explained more fully below, the District Court's analysis was correct, and in reviewing the matter de novo here,[1] this Court should affirm the judgment below.

[1] *Thompson v. Cloud*, 764 F. 3d 82, 90 (1st Cir. 2014).

Because it found the Economic Abuse Law preempted under Section 1681t(b)(1)(E), the District Court did not reach the question of whether it was also preempted by Section 1681t(b)(5)(c) of the FCRA. Again, the text of the FCRA makes clear that state laws that attempt to regulate the conduct of consumer reporting agencies ("CRAs") in responding to claims of identity theft are preempted. The Economic Abuse Law contemplates at least one form of identity theft in its definition of "economic abuse;" therefore, the law is also preempted under FCRA Section 1681t(b)(1)(c). [2]

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE FCRA PREEMPTED THE MAINE LAWS PURSUANT TO SECTION 1681t(b)(1)(E).

Questions of the scope of express federal preemption must always begin at the beginning; namely, the text of the federal law which establishes the preemption,

[2] Appellant did not assign error to the court's finding below that Appellee has satisfied the requirements of associational standing, although subject matter jurisdiction may be independently raised by a court at any time, *Elgin v. United States Dep't of the Treasury*, 641 F.3d 6, 9 (1st Cir. 2011). Appellee's Complaint established Article III standing because it has demonstrated sufficient imminent harm that will be suffered by all of its members with regard to coming into compliance with laws that will affect the operation of their businesses. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 394 (1988) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (providing that associational standard requirements are met where "the law is aimed directly at [the] plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution").

followed by an examination of the challenged state law. *See, e.g. Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) ("[we] 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'"). A review of the relevant provisions of the FCRA, together with the Maine Laws, lead to the conclusion that they are both preempted by Section 1681t. The Supreme Court and the First Circuit have both examined the very language employed by the FCRA in its preemption provisions, and found the language has a broad effect in creating federal preemption. Following this precedent, the district court carefully examined the provisions consistent with these rules and correctly determined that the Maine Laws are preempted by the FCRA. This Court should affirm the judgment below.

A. The Fair Credit Reporting Act and Its Preemption Provisions.

As the District Court noted, the FCRA was enacted by Congress to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." Add. 1, *2, citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) (citing 15 U.S.C. § 1681). To assure the continued balance of all of these interests, Congress preempted state laws that might be disruptive in a comprehensive preemption scheme through Section 1681t.

The FCRA preempts state law in three ways. First, Section 1681t(a) generally preempts any state law "inconsistent with any provision" of the FCRA.[3] The two remaining preemption provisions that follow expressly cover regulated topics.

Section 1681t(b)(1) expressly preempts states from regulating by "requirement or prohibition…*with respect to any subject matter"* specified in the enumerated subsections that follow. This is referred to as the FCRA's "subject matter preemption." Relevant here, the FCRA mandates that:

> No requirement or prohibition may be imposed under the laws of any State
> (1) with respect to any subject matter regulated under . . .
> (E) 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[.]

15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

Finally, the FCRA's "conduct preemption" rule preempts state laws that interfere with conduct governed by the FCRA. In particular, the FCRA states:

> No requirement or prohibition may be imposed under the laws of any State . . . (5) with respect to the conduct required by the specific provisions of – . . . (C) section 605B . . .

[3] This "conflict preemption" rule codifies the longstanding approach to conflict preemption taken by the courts, in which state law is preempted when there is outright or actual conflict between federal and state law, or where compliance with both federal and state law is impossible. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

15 U.S.C. § 1681t(b)(5)(C) (emphasis added). Because they attempt to govern that which Congress preserved to the FCRA, both Maine Laws are clearly preempted.

B. Maine's Medical Bill Act and Economic Abuse Law.

Appellee's Complaint below alleged that two amendments to Maine's Fair Credit Reporting Act were preempted by the federal FCRA. *See gen.*, App. p. 7-14. The first is titled "An Act Regarding Credit Ratings Related to Overdue Medical Expenses" (the "Medical Bill Act"). *See* 2019 Me. Laws 266, P.L. 2019, ch. 77. It states:

> **Reporting of medical expenses on a consumer report.** Notwithstanding any provision of federal law, a consumer reporting agency shall comply with the following provisions with respect to the reporting of medical expenses on a consumer report.
>
> **A.** 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.
>
> **B.** Upon the receipt of reasonable evidence from the consumer, creditor or debt collector that a debt from medical expenses has been settled in full or paid in full, a consumer reporting agency:
>
> > **(1)** May not report that debt from medical expenses; and
> >
> > **(2)** Shall remove or suppress the report of that debt from medical expenses on the consumer's consumer report.
>
> **C.** As long as 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 medical provider, the consumer reporting agency shall report that debt from medical expenses on the consumer's consumer report in the same manner as debt related to a consumer credit transaction is reported.

10 M.R.S.A. §1310-H(4).

In short, the Medical Bill Act attempts to regulate the contents of consumer reports by: (i) prohibiting all CRAs selling reports on Maine consumers from reporting any medical account information in a credit report until the debt is more than 180 days old; (ii) requiring CRAs to remove medical debts upon proof presented that the debt has been paid in full or settled (as opposed to allowing the CRA to continue to report the debt but marking it as "paid in full"); and (iii) so long as the consumer is making "periodic payments [an undefined term] in the statute as agreed upon by the consumer and the medical provider," requiring the CRA to include the debt on its consumer reports.

The second amendment to the Maine Fair Credit Reporting Act was part of legislation titled "An Act to Provide Relief to Survivors of Economic Abuse" (the "Economic Abuse Law"). *See* 2019 Me. Laws 1062, P.L. 2019, ch. 407. Under the Economic Abuse Law, a CRA must investigate claims of "economic abuse"[4] and

[4] The law defines "economic abuse" extremely broadly as:

> 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.

19-A M.R.S.A. § 4002(3-B).

remove "any reference to" debts or portions of debts determined to be the result of "economic abuse" 10 M.R.S.A. §1310-H(2-A). Specifically, the Economic Abuse Law provides, in relevant part:

> Except as prohibited by federal law, if a consumer provides documentation to the consumer reporting agency as set forth in Title 14, section 6001, subsection 6, paragraph H that the debt or any portion of the debt is the result of economic abuse as defined in Title 19-A, section 4002, subsection 3-B, the consumer reporting agency shall reinvestigate the debt. If after the investigation it is determined that the debt is the result of economic abuse, the consumer reporting agency shall remove any reference to the debt or any portion of the debt determined to be the result of economic abuse from the consumer's credit report.

10 M.R.S.A. § 1310-H(2-A). The Economic Abuse Law therefore imposes two new requirements on CRAs. The first is to adjudicate a consumer's claim that a debt or portion of a debt results from "economic abuse" through review of evidence presented in support of that claim.[5]

[5]The information a consumer may rely on is *not* limited to a court order or finding of actual economic abuse; even mere allegations of unlawful conduct are sufficient. *See* 14 M.R.S.A. § 6001(6)(H). Existing Maine law related to economic abuse permits the adjudication of claims of economic abuse in state court, upon full notice to both parties. 14 M.R.S.A. § 4005(1) and (5). If the court finds that the complainant is the victim of economic abuse, the court may impose a number of remedies, including "ordering payment of monetary relief to the plaintiff for losses suffered as a result of the defendant's conduct; and "entering any other orders determined necessary or appropriate in the discretion of the court." 14 M.R.S.A. § 4007(K) and (M), respectively. What the law does not contemplate in that process is the adjudication of the legal obligation of the consumer to the creditor, who is not a party to that action. Requiring a CRA to determine if the amount should be reflected on a consumer's credit report is tantamount to such a determination.

C. The FCRA's "Relating To" Language Gives Broad Effect to Its Preemption Provisions Consistent with Precedent from the Supreme Court and This Circuit.

The district court properly held that both Maine Laws were preempted under the "subject matter" preemption provision of the FCRA. In crafting the language of the FCRA at issue here, Congress used the phrase "related to the subject matter" to describe the preemptive effect that the FCRA would have on state laws that attempted to regulate that which Congress intended to preserve to itself. 15 U.S.C. § 1681t(b)(1). As construed by the Supreme Court and this Court, these words have a broad scope and effect, and any state laws that attempt to regulate information contained in consumer reports are preempted. Appellants urge, on the other hand, that the overall effect of the statutory scheme amounts only to a specific list of items about which states were preempted from regulating, and that to hold otherwise would render other language in these provisions to amount to mere "surplusage." The District Court ultimately found Appellee's reading of the FCRA preemption provisions to be the proper one, rejecting the narrow interpretation urged by the Appellants, in part because it would lead to "untenable" results. Add. 1 *14.

The FCRA's preemption provisions begin with the codification of conflict preemption in Section 1681t(a), followed by the specific circumstances under which preemption is expressly provided for in section 1681t(b), both for certain subject matters and for conduct regulated by the FCRA. In every subsection of 1681t(b)(1),

where Congress chose to preempt a specific subject matter, it identified the section or subsection of the FCRA by number, used the phrase "relating to," and described the subject matter to be preempted (i.e., "[n]o requirement or prohibition may be imposed under the laws of any State…(1) with respect to any subject matter regulated under…(E) section 605 [§ 1681c], relating to information contained in consumer reports…"). With respect to conduct preemption, Congress provided that "[n]o requirement or prohibition may be imposed under the laws of any State. . . (5) with respect to the conduct required by…(C) section 605B [§ 1681c-2]." As discussed below, both "relating to" and "with respect to" are construed broadly.

The law is clear that whether a federal statute preempts state law is dictated by Congressional intent.[6] "Pre-emption may be either express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales*, 112 S. Ct. at 2037. In the context of examining federal preemption of state law, the Supreme Court has determined that the phrase "related to" has a "broad scope," and "an expansive sweep," noting it is "deliberately expansive," "broadly worded," and "conspicuous for its breadth." *Id.* (internal citations omitted). As the Supreme Court explained:

[6] Appellants clearly acknowledge in their brief that Congressional intent is critical to any analysis of federal preemption. *See* App. Brief, pp. 17-19. It is therefore perplexing that Appellants assign error to the District Court for its "placing undue weight on Congress' alleged intent to impose national standards on credit reports." *Id.* p. 28.

> **The ordinary meaning of these words is a broad one**—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—**and the words thus express a broad pre-emptive purpose**.

Id. (emphasis added). The Supreme Court held this language meant that state laws "**having a connection with or reference to**" the protected subject matters (rates, routes, or services) were therefore preempted. *Id.* at 2037 (emphasis added).

The Supreme Court reiterated the broad scope and effect of the phrase "related to" in 2008 when it held that the federal law regarding the de-regulation of the trucking industry preempted two provisions of Maine's tobacco laws, which attempted to regulate the delivery of tobacco to consumers within the state. *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989, 993 (2008). Commenting on the use of the phrase "related to," the Supreme Court stated:

> Congress similarly sought to pre-empt state trucking regulation. ... In doing so, it borrowed language from the Airline Deregulation Act of 1978 and wrote into its 1994 law language that says: "[A] State ... may not enact or enforce 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); see also § 41713(b)(4)(A) (similar provision for combined motor-air carriers). . .

Id. (emphasis added). As the Supreme Court explained, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Id.* at 994. The *Rowe* court went on

to explain that *Morales* stands for the following propositions:

> …that "[s]tate enforcement actions *having a connection with, or reference to,"* [the subject matters referenced] are pre-empted," …; (2) that such pre-emption may occur even if a state law's effect on [the subject matter] "is only indirect," …; (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation, …; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' [substantive] and pre-emption-related objectives ,. . .

Id. at 995 (emphasis in original) (internal citations omitted).

In holding Maine's tobacco laws to be preempted, the *Rowe* court found that the "Maine law thereby produces the very effect that the federal law sought to avoid, namely, a state's direct substitution of its own governmental commands…" for the regime established by Congress in the Act, even though the method of intrusion was less "direct" because it regulated shippers' conduct and not that of the carrier itself. *Id*. However, the "effect" of the regulation was such that the law directed the person subject to federal law (i.e., the carrier) to behave differently than it was permitted to act under federal law, and thus the law was preempted. *Id.*[7]

[7] As Appellants argue here, Maine argued that the public policy behind the tobacco law was an important one (protecting minors from obtaining cigarettes) and that the federal law does not preempt the State's effort to protect the health of its citizens. The Supreme Court declined to create such an exemption, stating "[d]espite the importance of the public health objective, we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt. The Act says nothing about a public health exception." *Id*. at 996-997. In this case, the only exception was to preserve laws in place in 1996. 15 U.S.C. §1681t(b)(1)(E).

This Court also has reviewed questions of federal preemption through the lens of Congressional intent. As the First Circuit explained,

> [W]hile the scope determination must be anchored in the text of the express preemption clause, congressional intent is not to be derived solely from that language but from context as well. *See id.* at 486, 116 S. Ct. 2240 (**acknowledging as "relevant" data "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. .** "

Mass. Ass'n. of Health Maint. Org. v. Ruthardt, 194 F.3d 176, 179-180 (1st Cir. 1999) (emphasis added) (citations and internal quotation marks omitted) (citing *Medtronic Inc. v. Lohr*, 116 S. Ct. 2240, 2251 (1996)).

In *Ruthardt*, the First Circuit examined the structure and text of the Balanced Budget Act of 1997 (the "BBA"), as well as the legislative history related to its passage, and found that it preempted Massachusetts law. *Id.* *Ruthardt* is illustrative because the BBA and the FCRA preemption schemes are similarly structured and utilize the same key language - preempting state "relating to" the federal subject matter. *See id.* at 178. The BBA contained both a general statement reflecting the "conflict preemption" doctrine[8] followed by specific instances where preemption would apply; namely, where state laws "relat[ed] to" certain topics. *Id.* Congress

[8] The provision reads "[the BBA] shall supersede any State law or regulation (including standards described in subparagraph (B)) with respect to Medicare + Choice plans . . . to the extent such law or regulation is inconsistent with such standards." *Id.* at 178.

reserved the following areas of regulation to the BBA:

> **(B) Standards specifically superseded**
> State standards relating to the following are superseded under this paragraph:
> **(i)** Benefit requirements.
> **(ii)** Requirements relating to inclusion or treatment of providers.
> **(iii)** Coverage determinations (including related appeals and grievance processes).

Id. (emphasis added).[9] The First Circuit held that the phrase, "state standards relating to the following are superseded…," reflected "an unqualified congressional desire to preempt state standards relating to, inter alia, benefit requirements." *Id*. at 180. The court explained:

> Subparagraph (B) goes a step further. It says in unqualified terms that state standards relating to three enumerated areas "are superseded under this paragraph." **In context, we think this means that state standards concerning these three enumerated areas are deemed to be per se inconsistent with *any* federal regulation**. **. . . Subparagraph (B) thus makes explicit what might well have been implied: the anticipation that, once promulgated, federal regulations will dominate these particular fields, leaving no room therein for state standard-setting.**

[9] Massachusetts argued that because it was providing *additional* benefits to those under federal law, state law was not "inconsistent with" the BBA and thus not preempted. *See id.* This is essentially the same argument advanced by Appellant here; that the Maine Laws are more protective and are not preempted because: (i) the FCRA allegedly "only" regulates medical debt of *veterans*, and (ii) Section 1681c does not regulate economic abuse at all because it is not mentioned by name. As the court in *Ruthardt* noted, however, such a reading of the statutes would render the relevant provisions merely "to a list of examples – a role that the text and context of the subparagraph belie." *Ruthardt*, 194 F.3d at 181. As the District Court noted, however, the regulation of *veterans'* medical debt is the regulation of medical debt.

Id. at 183 (emphasis added). Here, the district court below considered the FCRA's language, and its structure and purpose, to properly find that Congress similarly left "no room" for states to set their own standards regulating the content of consumer reports.

The phrase "with respect to" has been held to have the same meaning as "relating to" in the context of analyzing the scope of the preemptive effect of the FCRA's statutory language. *Galper v. JP Morgan Chase*, 802 F.3d 437 (2nd Cir. 2015). Even construing Section 1681t(b)(1) "narrowly but fairly," the Second Circuit held that, for the purpose of federal preemption, the phrase meant the same as "relating to." *Id.* at 446, citing *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778-79 (2013) (which analysis relied on the preemption principles in *Morales* and *Rowe, supra*). In the end, the Second Circuit held that section 1681t(b)(1)(F) preempts "those claims that *concern* the furnisher's responsibilities." *Id.* at 446.

Given the clear direction from the Supreme Court in *Morales* and *Rowe* that the phrase "relating to" demonstrates it is "deliberately expansive," and means that state laws "having a connection with or reference to" the enumerated subject matters of 15 U.S.C. § 1681t(b), this Court should find that the Maine Laws are preempted.

Further, this construction, contrary to the arguments of Appellant, does not result in "surplusage" of text. A careful review of the statute demonstrates that "any subject matter" is a descriptive phrase, not a limiting one. In every subsection of

1681t(b)(1), Congress chose to describe the scope of preemption by reference to the FCRA Section that governs the topic described.

This is demonstrated by 1681t(b)(1)(A) in which Congress wrote "with respect to any subject matter regulated under: (A) subsection (c) or (e) of section 604 [§ 1681b], relating to the prescreening of consumer reports." Section 1681b(c) establishes that creditors or insurers have a permissible purpose to obtain a consumer report even when the consumer has not applied for credit or insurance. Section 1681b(e) establishes a process that creditors and insurers must maintain regarding the consumer's right to 'opt-out' of such lists. Section 1681t(b)(1)(A) does not iterate those individual requirements, but instead, broadly refers to these provisions collectively as "relating to prescreening of consumer reports." Faced with this language, courts have found that the FCRA preempts state laws on all aspects of prescreening.[10]

D. The District Court's Interpretation of the FCRA's Preemption Provision Is Aligned with Many Courts.

In analyzing other "subjects" listed under 1681t(b), other circuit courts have construed the FCRA's preemption provisions as the lower court did, finding that

[10] This provision has been held to preempt all state laws that attempt to regulate prescreening. *See, e.g., CDIA v. Swanson*, 2007 WL 2219389 (D. Minn. 2007) (FCRA preempts state prohibition on use of a particular form of prescreening); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2nd Cir. 2009) (where state law claims related to the sale of reports sold for prescreening were held to be preempted by section 1681t(b)(1)(A)).

state laws that "concern" or "relate to" the subject matter are preempted. The Seventh Circuit specifically declined to construe section 1681t(b) preemption narrowly, finding claims against a furnisher of information preempted by §1681t(b)(1)(F). *Aleshire v. Harris*, 586 Fed. Appx. 668, *6 (7th Cir. 2013) ("we recently rejected the argument that section 1681t(b) should be read narrowly to apply only to state statutory claims, and we held that section 1681t(b)'s preemptive force applies equally to state common law claims"). *See Purcell v. Bank of Am.*, 659 F.3d 622 (7th Cir. 2011) (finding claims related to inaccurate furnishing of account data preempted by 1681t(b)(1)(F) stating "[the] extra federal remedy in §1681s-2 was accompanied by extra preemption in §1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges.") (relying on *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (where claims for misappropriation of trade secrets, unfair competition and unjust enrichment were held preempted by section 1681t(b)(1)(A)).[11]

The Fourth Circuit held North Carolina's unfair and deceptive trade practices act claims related to the obligations of an individual furnisher to be preempted under

[11] These state law claims are not mentioned anywhere in the FCRA, yet courts continue to hold them preempted by the 'subject matter' preemption provision of section 1681t(b)(1).

§1681(t)(b)(1). *Ross v. FDIC*, 625 F. 3d 808 (4th Cir. 2010). Finding plaintiff's common law claim

> runs into the teeth of the FCRA preemption provision. Her claim concerns a furnisher's reporting of inaccurate credit information to CRAs, an area regulated in great detail under §§ 1681s-2(a)-(b). Because Ross's [state law] claim seeks to use § 75-1.1 as a "requirement or prohibition" under North Carolina law concerning "subject matter regulated under section 1681s-2," it is squarely preempted by the plain language of the FCRA. 15 U.S.C. § 1681t(b)(1)(F).

Id. In support of its holding, the Fourth Circuit explained:

> As originally enacted, the FCRA generally permitted state regulation of the consumer reporting industry. With but few exceptions, the original preemption provision, §1681(t)(a), preempted state laws only to the extent... are inconsistent with any provision of [the FCRA]. . . . [Congress later] added a strong preemption provision, 15 U.S.C. § 1681t(b), to this comprehensive legislative framework. The purpose of this new subsection was, in part, to avoid a "patchwork system of conflicting regulations."

Id. at 812-813 (citations omitted). *See also Macpherson v. JP Morgan Chase Bank, N.A.*, 665 F.3d 45 (2d Cir. 2011) (citing *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011)); *Pinson v. Equifax Credit Information Services, Inc.*, 316 Fed. Appx. 744 (10th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. §1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 Fed. Appx. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. § 1681t(b)(1)(F)). Thus, the clear weight of authority has interpreted the relevant provisions as this Court has done.

E. The Cases Relied Upon by Appellants Are Not Instructive.

Appellants admit that "there is no dispute, though, that Section 1681c addresses the content of credit reports." App. Brief., p. 29. It also appears that there is no dispute that the Maine Laws "relate to" or concern the subject of whether such information may be included into a consumer report, as Appellant describes the laws on brief as laws that prohibit CRAs from reporting information in a consumer report, and generally refers to each of them as a "Reporting Law." Brief, pp. 1-2. Appellants argue, however, that the Maine Laws are not preempted because Section 1681c must be read as a precise list that preempts only that which is specifically enumerated in Section 1681c. Under this theory, Section 1681c does not regulate the inclusion of medical debt in consumer reports because it *only* deals with the reporting of medical debt of *veterans*. Further, the phrase "economic abuse" is never mentioned in Section 1681c; therefore, Appellants argue, Congress never meant to regulate that topic at all. Appellants' arguments are not persuasive.

First, as the District Court properly concluded, Appellants' interpretation of the FCRA would lead to untenable results. Add. 14. The court explained that:

> §1681c(a)(3) prohibits the reporting of "[paid] tax liens which, from date of payment, antedate the report by more than seven years. Under the [Appellants'] interpretation, where regulation of the part does not imply the regulation of the whole, a state could still exclude paid tax liens generally. The Court declines to adopt this interpretation and thereby rejects the [Appellants'] limited view of preemption.

Add. 14-15.

Appellants rely on two cases out of California for the proposition that the preemptive scope of section 1681t(b)(1)(E) should be read more narrowly than the majority of courts have read it. *See Mortenson v. Brown*, 51 Cal. 4th 1052 (2011) and *Gottman v. Comcast Corp.*, 2018 WL 1071185 (E.D. Cal. 2018). Neither case is persuasive here and, at most, should be limited to their very different, and extremely narrow, facts.

In *Mortenson*, plaintiff sued under California's medical privacy law related to the allegedly unlawful disclosure of his family's private medical information that occurred when his family dentist provided full copies of the family's dental records to the CRAs in response to Mortensen's dispute over the accuracy of a bill (and its appearance in the CRA's file). *Id.* at 1058. The defendant argued that the claim was preempted by 1681t(b)(1)(F) because it related to the furnishing of information to the CRA. *Id.* The Supreme Court of California disagreed, noting that HIPAA[12] was enacted just one month before the 1996 amendments to the FCRA, as a result,

> Congress never intended in section 1681t(b)(1)(F) to preempt state laws regulating medical privacy and thereby to relieve entities otherwise obligated to maintain confidentiality of the duty to do so when reporting credit information.

Id. at 1065. The claims, the court explained, "having as their gravamen issues neither of accuracy nor of credit dispute resolution, do not involve the same subject

[12] 42 U.S.C. §1320d *et seq.*

matter as section 1681s–2 and are not preempted." *Id.* at 1072. Thus, *Mortensen* has no applicability here.

Gottman's facts are equally distinct. In *Gottman*, the plaintiff alleged a violation of state law requiring users to verify the accuracy of information provided to the user of the report. *Id.**1. The defendant pointed to certain verifications steps required by the FCRA upon receipt of an "address discrepancy alert" and argued preemption applies. *Id.* *3. However, it was undisputed that the CRA never provided an address discrepancy alert and the FCRA provisions were never triggered. *Id.* The court ultimately found that "the statutes differ as to who is required to take additional steps…and under what circumstances…verification of the information is required." *Id.* *4. Thus, the court found that the FCRA and the California law did not address the same subject matter for the purpose of a preemption analysis. *Id.* Here, by contrast, the Maine Laws involve what information may or may not be included in a consumer report, the precise subject matter covered by Section 1681c, and *Gottman* has no real application here.

II. CONGRESS'S INTENT REGARDING FCRA SUBJECT MATTER PREEMPTION WAS "CLEAR AND MANIFEST."

Answering the question of how "Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law," *Ruthardt*, at 179-180, the legislative history of Section 1681t makes clear that the

FCRA was intended to establish a uniform national standard related to credit reporting with which states could not interfere.

Originally, Section 1681t was enacted with only a version of what is now the conflict preemption rule of subpart (a), and contained a sunset provision, which would cause the statute to automatically expire eight years after adoption. Pub. L. 90-321 (1968). With regard to the expansion of the preemption framework in 1996, Representative Thomas of Wyoming explained "…we have compromised on the preemption issue so companies will not have to comply with a patchwork of state laws." 140 Cong. Rec. H9797-05, H9811 (1994) (emphasis added). The eight-year sunset of the preemption provision was "a product of a careful effort to balance industry's desire for nationwide uniformity with States' vital interest in protecting their citizens, the viability of a uniform national standard." *Id*. at H. 9810 (statement of Representative Kennedy). Representative Castle of Delaware stated that:

> State and Federal authorities will be able to sue furnishers of credit information that knowingly produce inaccurate information. Consumers will be protected without exposing legitimate businesses to excessive lawsuits... . **This Federal preemption will allow businesses to comply with one law on credit reports rather than a myriad of State laws.**

140 Cong. Rec. H9797-05, H9815 (1994) (emphasis added).

Moreover, Congress chose to address even further the issue of the impact on state laws – and protected from the preemptive reach of 1681t(b)(1) only those state laws which were in existence at the time:

> No requirement or prohibition may be imposed under the laws of any State. . . (2) with respect to any subject matter regulated under . . .
>
> > (E) 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[.]

15 U.S.C. § 1681t(b)(1)(E) (emphasis added). Thus, no state may adopt laws after 1996 that attempt to regulate, by permitting or prohibiting, the information which may be included in consumer reports. If Congress intended states to be able to adopt laws governing the content of consumer reports as Appellants suggest, this savings clause would not have been required.

In 2003, Congress amended the FCRA again, and instead of permitting §1681(t) to expire as originally intended, Congress repealed the sunset provision and expanded the preemptive scope of the FCRA, adding additional provisions of the FCRA to which preemption applied. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 149 Cong. Rec. H8122 (2003). As Representative Oxley explained, the intent of Congress at that time was that:

> under this new preemption provision**, no state or local jurisdiction may add to, alter, or affect the rules established by the statute or regulations thereunder in any of these areas**. All of the statutory and regulatory provisions establishing rules and requirements governing the conduct of any person in the specified areas are governed solely by federal law, and any state action that attempts to impose requirements or prohibitions in these areas would be preempted.

149 Cong. Rec. E2512 & P 2518 (2003) (emphasis added).

Although it may argue something different here, *see* Amicus Brief, p. 10, even the National Consumer Law Center ("NCLC"), an *amicus* in this case, has acknowledged that the preemptive effect of 1681t(b) is clear and "expansive":

> furnishers of information to FCRA's have the benefit of the expansive preemption of state law in §1681(t)(b)(1), which preempts any state law "with respect to any subject matter regulated under… (F) §1680(1)(s)(2) of this title, relating to the responsibilities of furnishers." This latter provision preempts state law claims for furnisher in accuracy, as well as for unfair and deceptive acts and practices (UDP) against furnishers.

Chi Chi Wu, *Data Gatherers Evading the FCRA May Find Themselves Still in Hot Water* (NCLC June 14, 2019), library.nclc.org. According to NCLC, preemption was

> part of the grand legislative bargain of the original passage of the FCRA in 1970….[and later] on, preemption of state law requirements with respect to furnishers was added in exchange for the 1996 Reform Act amendments that added accuracy and dispute investigation responsibilities for furnishers under the FCRA.

Id.

Taken as a whole, the evidence is overwhelming that Congress's "clear and manifest" purpose was that the FCRA preemption provisions of Section 1681t(b)(1) were intended to be broad and even "expansive" in order to establish a uniform national standard with which CRAs are required to comply, and which the States are proscribed from affecting by enacting laws of their own "in the specified areas" that include the "subject matter" regulated under 1681t(b)(1) and "conduct" governed by

1681t(b)(5).[13] As the district court explained:

> the amended language and structure of § 1681c(a) and § 1681t(b) reflect an affirmative choice by Congress to set "uniform federal standards" regarding the information contained in consumer credit reports.

Add. 13. "And when Congress speaks, courts charged with the delicate work of statutory construction should listen." *Ruthardt*, 194 F.3d at 185.

III. THE ECONOMIC ABUSE LAW IS ALSO PREEMPTED BY VIRTUE OF CONDUCT PREEMPTION.

Although the District Court below declined to reach the question of whether the Economic Abuse Law is also preempted by Section 1681t(b)(c), Appellants here argue that this Court should find it is not. To the extent, however, that the Economic Abuse Law requires a CRA to reinvestigate allegations of what amounts to identity theft and block reporting of that information, it is in fact preempted.

Congress created an exclusive federal uniform process that all CRAs must follow in response to such claims of identity theft. 15 U.S.C. § 1681c-2(a) (Section

[13] The problems created by a patchwork of state laws are illustrated clearly in the brief of the American Financial Services Association ("AFSA") below. In its amicus brief, AFSA noted that under the theories espoused by Defendants, each state could "determine for itself the contents of credit reports for its citizens, based upon its state-specific policy concerns" that "would drive most lenders to be state-specific, reducing competition and innovation, and harming consumers." AFSA Brief, Document 36, at p. 9. This type of regulation would require lenders to "create underwriting rules that are unique to each state, requiring multiple workflows that increase the costs of compliance and risk of error." *Id.* As noted by AFSA, a patchwork of regulation is "intolerable" for its lender members who rely on credit reports. *Id.* at p. 2.

605B of the FCRA) requires a CRA to "block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from *an alleged* identity theft" if the consumer provides proof of identity, a copy of an identity theft report, and "a statement by the consumer that the information is not relating to any transaction by the consumer." 15 U.S.C. § 1681c-2(a). Importantly, the FCRA provides a mechanism by which the furnisher of the information, generally a creditor, is informed of the block,[14] and also provides the CRA with the authority to decline or rescind a block if the block was requested in error, the block was placed based on a material misrepresentation of fact by the consumer, or the consumer obtained possession of goods, services, or money as the result of the blocked transactions. 15 U.S.C. §§ 1681c-2(b) and (c).[15]

[14] The furnisher (account holder) then must fulfill its responsibilities under the FCRA related to the account. *See* 15 U.S.C. § 1681s-2(a)(6). Notably, if the furnisher determines that the consumer is ultimately responsible for the debt, the furnisher is permitted to furnish the account to the CRA again. *Id*. § 1681s-2(a)(6)(B).

[15] The balancing act reflected in section 1681c-1 acknowledges the limited ability of a CRA to adjudicate the rights and responsibilities of parties to accounts. *See, e.g.*, *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 69 (1st Cir. 2008) (recognizing that "whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA"). The Economic Abuse Law disrupts this careful balance, forcing the CRA to become the adjudicator of claims between the furnisher and the consumer; a role best left to the courts.

The FCRA preempts all requirements and prohibitions "under the laws of any State . . . with respect to the conduct required by the specific provisions of . . . [§ 1681c-2]." The Economic Abuse Law requires the CRA via its dispute process to engage in a fact-finding adjudication of the *truth* of the consumer's allegations (i.e. whether a debt or portion of a debt results from economic abuse) and only then block the reporting of the account on a permanent basis (precisely the type of conduct required under section 1681c-2 only without conducting a reinvestigation). Under the Economic Abuse Law's definition of "economic abuse," debts that result from economic abuse include "unauthorized or coerced use of credit or property" and "stealing from or defrauding of money or assets." Under the FCRA, "identity theft" means "a *fraud* committed using the identifying information of another person . . . " 15 U.S.C. § 1681a(q)(4) (emphasis added). Both the FCRA and the Economic Abuse Law address debts resulting from fraudulent activities. Accordingly, to the extent that the Economic Abuse Law attempts to govern the CRA's response to a report of identity theft, it is preempted by § 1681t(b)(5)(C) of the FCRA.

IV. WHETHER THERE ARE VALID POLICY CONCERNS ADDRESSED BY THE MAINE LAWS DOES NOT AFFECT THE PREEMPTION ANALYSIS.

Appellants and amici focus on the justness of the policies underlying the Maine Laws and the concerns which these laws were intended to remediate. In the

end, however, the law is clear; policy justifications do not save them from preemption.

With respect to the economic abuse provisions, amici NCLC, Maine Equal Justice, and the Maine Coalition to end Domestic Violence argue that debt that was incurred as the result of 'economic abuse' as defined by the Economic Abuse Law, is "inaccurate" and "questionable" and harmful to the consumer. Amicus Brief, p. 23. This is an issue best left to Congress. As the District Court noted,

> [s]ince 2019, nearly twenty bills have been introduced to further amend § 1681c. One House bill contains both restrictions on the reporting of medical debts and a procedure for removing debts that were the product of "financial abuse" from credit reports.

Add. 5, fn. 3 (citations omitted).

As to determining whether the consumer actually owes the debt that allegedly resulted from economic abuse to the creditor, only a court of law, upon a case properly pleaded with all affected parties present, may adjudicate the rights of the abuse victim as against her creditor. In a recent case in the Seventh Circuit, *Denan v. Trans Union, LLC*, the court held that the accuracy responsibilities of the FCRA do not require, and nor should they require, CRAs to adjudicate questions of the legal validity of debts through their dispute handling processes; explaining that such decisions should be left to the courts. 2020 WL 2316680 (7th Cir. 2020). In this way, the Seventh Circuit joined the First, Ninth, and Tenth Circuits in holding that

"collateral attacks" under the FCRA are impermissible. *DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008); *Carvalho v. Equifax Information Services LLC*, 629 F.3d 876, 892 (9th Cir. 2010); *Wright v. Experian Information Systems, Inc.*, 805 F. 3d 1232, 1242 (10th Cir. 2015). The same is true for the debt resulting from "economic abuse" – victims may avail themselves of the judicial process to seek relief from their accusers and/or their creditors, as appropriate, but CRAs should not become the judge or jury as to whether any particular debt arises from "economic abuse" and whether the debt should be owed by, and attributed to, the victim.

Notwithstanding all the valid policy reasons for some action to protect victims of economic abuse or to help those struggling with medical debts, these policy arguments do not affect the outcome of this Court's preemption analysis. As the First Circuit in *Ruthardt* stated, "Where, as here, a fair reading of the statutory text does not contradict any overriding legislative goal, the push and pull of competing policies is best left to Congress." *Ruthardt*, 194 F.3d at n. 8.

CONCLUSION

For the foregoing reasons, Appellee, the Consumer Data Industry Association, respectfully requests that this Court find that the Medical Bill Act and relevant provisions of the Economic Abuse Law (found at 10 M.R.S.A. §1310H(4) and 10 M.R.S.A. § 131H(2-A)) are preempted by the FCRA, and affirm the judgment of the District Court below.

February 25, 2021

Respectfully submitted,

/s/ Ryan P. Dumais
Ryan P. Dumais
Eaton Peabody
77 Sewall Street #3000
Augusta, ME 04330
Phone: (207) 729-1144 ext. 3810
Fax: (207) 729-1140
rdumais@eatonpeabody.com

Rebecca E. Kuehn
Jennifer L. Sarvadi
Hudson Cook LLP
1909 K Street NW
4th Floor
Washington, DC 20006
Phone: (202) 715-2008
Facsimile: (202) 223-6935
rkuehn@hudco.com
jsarvadi@hudco.com
Attorneys for Plaintiff and Appellee
Consumer Data Industry Association

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2021, I electronically filed the foregoing Brief of Appellee with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

John J. Aromando, Esq.
jaromando@pierceatwood.com

Andrea E. Bopp Stark, Esq.
astark@nclc.org

Christopher C. Taub, Esq.
Christopher.C.Taub@maine.gov

Frank P. D'Alessandro
frank@mejp.org

Rebecca Everett Kuehn, Esq.
rkuehn@hudco.com

Jennifer Sarvadi, Esq.
jsarvadi@hudco.com

/s/ Ryan P. Dumais
Ryan P. Dumais, Esq.