No. 20-2064

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CONSUMER DATA INDUSTRY ASSOCIATION,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

PETITION FOR REHEARING EN BANC

ON APPEAL FROM THE DISTRICT OF MAINE (CASE NO. 1:19-CV-438-GZS)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RULE 35(b)(1) STATEMENT 1

REASONS FOR GRANTING PETITION 2

I. The Panel's Interpretation is Inconsistent with Supreme Court Precedent, First Circuit Authority, and That of Various Other Circuits. 2

A. The FCRA Preemption Framework. 3

B. The Panel's Opinion. 5

C. The Panel's Interpretation Runs Afoul of Supreme Court and First Circuit Authority on Federal Preemption. 7

D. *Galper* Does Not Support the Panel's Interpretation of §1681t(b)(1). 11

II. The Panel's Interpretation is at Odds with Congress' Clear Intent to Preempt State Laws Like Maine's Laws. 12

III. The Panel's Reading Renders the "Relating To" Clauses Superfluous, Materially Alters Other Provisions of §1681t(b)(1), and is Thus Unworkable 13

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Aldaco v. RentGrow, Inc., 921 F.3d 685 (7th Cir. 2019).....4

CDIA v. King, 678 F.3d 898 (10th Cir. 2012) 4, 12

Galper v. JP Morgan Chase Bank, N.A., 802 F.3d 437 (2d Cir. 2015)..... 11, 12

Mass. Ass'n of Health Maint. Org. v. Ruthardt, 194 F.3d 176 (1st Cir. 1999) ..... passim

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 1, 3, 8

Ross v. FDIC, 625 F.3d. 808 (4th Cir. 2010).....3

Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364 (2008)..... 1, 8, 9

TRW Inc. v. Andrews, 534 U.S. 19 (2001).....7, 13

Statutes

15 U.S.C §1681t(b)(1) ..... passim

15 U.S.C. §1681t(b)(1)(B).....14

15 U.S.C. §1681t(b)(5). 2, 15

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

15 U.S.C. § 1681t(d) 13

15 U.S.C. §1681 3

15 U.S.C. §1681c 4

15 U.S.C. §1681t (1996). 12

15 U.S.C. §1681t(a). 5

Other Authorities

10 M.R.S.A. § 1310-H(2-A) 5

10 M.R.S.A. §1310-H(4) 5

140 Cong. Rec. H9797-05 6

140 Cong. Rec. H9815 6

RULE 35(B)(1) STATEMENT

The panel's interpretation of the subject matter preemption provision of the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(1)(E), is inconsistent with Supreme Court authority governing the construction of similar preemption provisions under other federal laws, is inconsistent with existing precedent in this Circuit and other circuit courts, and ignores Congress' intent to establish a uniform standard for credit reporting in this country. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-387 (1992), and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 367 (2008). *See also Mass. Ass'n of Health Maint. Org. v. Ruthardt*, 194 F.3d 176 (1st Cir. 1999). As such, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

In short, the panel interpreted the provision in such a narrow way as to cause the key phrase "relating to information contained within consumer reports" to be rendered nothing more than – by the panel's own description – "purely descriptive" text, violating a rule of construction of statutory text the panel hoped to avoid. *See* Opinion ("Op."), p. 12. The panel's narrow reading is contrary to the Supreme Court's repeated interpretation of the meaning of the phrase "related to" in the context of preemption provisions, which have a "broad scope," and "an expansive sweep," noting it is "deliberately expansive," "broadly worded," and "conspicuous for its breadth" *Morales*, 504 U.S. at 383-84 (citations omitted).

Such a narrow reading is also inconsistent with First Circuit authority interpreting the preemption provisions of other federal law. *See Ruthardt*, 194 F.3d at 179-80.

The panel's interpretation is unworkable as it renders the "relating to" provision *in each of the eleven subparagraphs of §1681t(b)(1)(A) - (K)* superfluous in their entirety. Moreover, applying the panel's construction to other subparagraphs of §1681t(b)(1) materially modifies the scope of preemption – despite Congress' stated intent - demonstrating that the interpretation is unworkable. Finally, Congress opted to include the phrase "relating to" in each of the subparagraphs of §1681t(b)(1), but did not use them to describe the scope of preemption under §1681t(b)(5). This is additional evidence that the phrases have a substantive effect on defining the scope of preemption under §1681t(b)(1). For all these reasons, this Court should grant this Petition and rehear this case en banc.

REASONS FOR GRANTING THE PETITION

I. The Panel's Interpretation is Inconsistent with Supreme Court Precedent, First Circuit Authority, and That of Various Other Circuits.

The panel's parsimonious reading of the statute, and its resulting interpretation of the phrase "relating to" in the context of §1681t(b)(1) sets the First Circuit well apart on issues related to statutory construction. This interpretation is in conflict with Supreme Court authority that "relating to" broadly defines the scope of preemption - a tool often wielded by Congress for such purpose. *See Morales, supra.* This interpretation is also inconsistent with existing

precedent within this Circuit on the meaning of the phrase "related to" as used in federal preemption provisions. *See Ruthardt, supra.*

A. The FCRA Preemption Framework.

Congress intended there to be a single, national credit reporting system to support the broader, national consumer banking system, 15 U.S.C. §1681, and it adopted a comprehensive preemption framework to preclude a multitude of state laws that would otherwise be disruptive. Congress chose to preempt specific subject matters and conduct to avoid a "patchwork of conflicting regulations." *Ross v. FDIC,* 625 F.3d. 808, 812-813 (4th Cir. 2010) (citations omitted).

In particular, Congress preserved to federal regulation a series of subject matters covered by the FCRA, as set out in 15 U.S.C. §1681t(b)(1), which begins:

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

What follows is a list of eleven subject matters (set forth in subparagraphs (A) – (K)) that are preempted, together with a reference to the FCRA section number in which those subject matters are found. These eleven subject matters are, in essence, specific fields of preemption. In particular, §1681t(b)(1)(E) provides:

> (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 the date of enactment of the [1996 Act]; . .

The "subject matter" preempted by §1681t(b)(1)(E) is therefore "information

contained in consumer reports," which §1681c regulates by prohibiting some information, and requiring other information. In this way, Congress created a national standard governing the information that is contained in consumer reports. 15 U.S.C. §1681c. As the Seventh Circuit observed, §1681t(b)(1)(E) "assures that the [FCRA] establishes uniform federal standards for contents of credit reports unless a state law in force in 1996 provides otherwise." *Aldaco v. RentGrow, Inc.*, 921 F.3d 685, 688 (7th Cir. 2019). The Tenth Circuit similarly held that:

> The FCRA creates a uniform set of rules governing the content of consumer reports and the responsibilities of those who maintain them. 15 U.S.C. § 1681 *et seq.* . . . **The FCRA leaves no room for overlapping state regulations.** Congress set out to create uniform, national standards in the area of credit reporting, and the 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).

CDIA v. King, 678 F.3d 898, 900-01 (10th Cir. 2012) (emphasis added). Notably, §1681t(b)(1) does not require the state law to be inconsistent with the FCRA requirement; any regulation of the subject matter is preempted.

Congress additionally protected certain conduct governed by the FCRA, preempting state laws "with respect to the conduct required by" the specific provisions of each enumerated subparagraph (A) – (I) of §1681t(b)(5). The subparagraphs of §1681(b)(5) do not contain the "relating to" clause found in §1681t(b)(1). With the exception of these special subject matters and regulated

conduct preserved by Congress to federal oversight, states may enact laws related to consumer reporting, except where the law is inconsistent with any provision of the FCRA, in which case, it too is preempted. *See* 15 U.S.C. §1681t(a).

B. The Panel's Opinion.

CDIA's Complaint alleged, and the district court found, that FCRA §1681t(b)(1)(E) preempts two Maine laws[1] that require CDIA members to include certain medical collection account information in consumer reports, and to exclude other medical and certain liability information from their consumer reports. The State appealed the district court's ruling.

In contrast to the findings of the Seventh and Tenth Circuits, the panel concluded that Congress intended no such national standard of credit reports; that, in fact, §1681t(b)(1)(E) only "narrowly preempts state laws that impose requirements or prohibitions with respect to the specific subject matters regulated under Section 1681c." Op., p. 29 (emphasis added). The panel explained:

> [t]he "relating to" clause 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". In either case, though, the effect is the same: the content of the statutory provision plays a functional role in defining the scope of the subject matter preempted.

Op., p. 12.[2] In other words, in the panel's view, preemption only exists to the

[1] *See* 10 M.R.S.A. §1310-H(4) (related to medical debt) and 10 M.R.S.A. § 1310-H(2-A) (related to debt resulting from economic abuse).

[2] The panel also found that this language was unambiguous (Op., p. 18) - despite

extent that the specific items of information are listed in §1681c as allowed or prohibited. Thus, the panel concluded, because §§1681c(a)(7) & (8) limit the reporting of veteran's medical debt, those sections do not preempt Maine's law "insofar as it regulates non-veterans' medical debt"[3] Op. 29.

There are several problems with the panel's approach. First such a narrow reading results in the "relating to" phrases being potentially reduced to "purely descriptive" text - as acknowledged by the panel (Op., p. 12) – contrary to the

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having identified two plausible meanings - and dismissed legislative history relied on by CDIA on brief that makes clear that Congress intended these provisions to have a broad, preemptive effect and preclude state laws that interfered with the national credit reporting structure created under the FCRA. *See, e.g.,* Appellee's Brief, p. 23, citing testimony of Rep. Castle of Delaware "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). The refusal to consider the legislative history was error because, as the *Ruthardt* court explained:

> while 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….[citing as relevant]. . "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" [and explaining]….in such circumstances, a court "must examine the [act's] language against the background of its legislative history and historical context."

194 F.3d at 179-80 (internal citations omitted).

[3] This tortured outcome demonstrates that the panel's interpretation of the provision must be incorrect. Even though the panel believes that the FCRA was never meant to preempt state consumer protection laws that offer more protection to consumers than the FCRA (*see* Op., pp.17-18) - the panel believes that states may enact laws to regulate medical debt of all consumers *except* veterans, who arguably require more protection than most consumers.

instruction found in *Morales*, *Rowe*, and *Ruthardt*, which held that this phrase actually defines the scope of federal preemption. Second, any construction that renders statutory text superfluous violates 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" and this reading renders each "relating to" clause in §1681t(b)(1) superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). Finally, as explained in Section III below, treating "relating to" as "purely descriptive" changes the meaning of other subsections of § 1681t(b)(1), in a way that is facially inconsistent with Congress' intent, making it unworkable. It is deliberately used in §1681t(b) where needed to define the scope of preemption.

C. The Panel's Interpretation Runs Afoul of Supreme Court and First Circuit Authority on Federal Preemption.

Contrary to the panel's view, the "relating to" phrases, which are used throughout every subparagraph of §1681t(b)(1), cannot be "purely descriptive;" they define the scope of FCRA preemption, and do so broadly. In *Morales*, the Supreme Court examined the preemption provision under the Airline Deregulation Act, which preempted state laws "relating to rates, routes, or services of any air carrier...." 504 U.S. at 383-84. The Supreme Court determined that the phrase "relating to" was the 'key phrase' to unlocking the scope of preemption, stating:

The ordinary meaning of ["relating to"] 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. at 383 (emphasis added). The Supreme Court then held that state laws "**having a connection with or reference to**" the protected subject matters were therefore preempted. *Id.* at 384 (emphasis added).

The Supreme Court similarly struck down a Maine law regulating tobacco delivery as preempted by the Federal Aviation Administration Authorization Act of 1994, because the law "related to" the subject matter preserved to federal regulation. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 367 (2008). Commenting on the use of the phrase "related to" as defining the scope of preemption, the Supreme Court noted that:

> 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."

Id. at 368 (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 370. Thus, the *Rowe* court explained, *Morales* stands for the proposition:

> …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 370-71 (emphasis in original) (internal citations omitted). The Maine tobacco law was preempted because it "produces the very effect that the federal [preemption] law sought to avoid, namely, a state's direct substitution of its own governmental commands…" for the standards established by Congress. *Id*. at 372.

The First Circuit has also held that the phrase "relating to" substantively defines the scope of preemption. *Ruthardt*, *supra*. The court 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 (**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** ") . . .

Id. at 179-180 (emphasis added) (citations and internal quotation marks omitted). There, the First Circuit examined the structure and text of the Balanced Budget Act (the "BBA"), in light of the legislative history related to its passage, and found that it preempted Massachusetts law. *Id.* The BBA contains a general statement that state laws are preserved except where they are inconsistent with the BBA, followed by specific instances where preemption would apply, namely, where state laws

'relate to' certain topics. *Id.* at 178. The BBA provides, in relevant part:

> **(B) Standards specifically superseded**
> State standards relating to the following are superseded under this paragraph: . . .

Id. (emphasis added). The First Circuit held that the text "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**. [text omitted] **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.**

Id. at 183 (emphasis added).

The same holds true for the FCRA's preemption provisions. The structure and text of §1681t(b) makes clear that Congress intended the FCRA to exclusively dominate the subject matters described in each subparagraph. Congress used the "relating to" phrase throughout §1681t(b)(1) to define what subject matters were preempted, while including a statutory reference to their location within the FCRA. The panel's reading of §1681t(b)(1)(E) in its narrow fashion–going so far as to state that the defining phrase "relating to" may be nothing more than "purely

descriptive" text – departs from this precedence and is error.

D. *Galper* Does Not Support the Panel's Interpretation of §1681t(b)(1).

In support of its narrow interpretation of §1681t(b)(1)(E), the panel cited *Galper v. JP Morgan Chase Bank, N.A.,* for the proposition that the FCRA only preempts state laws to the extent that they regulate specific items enumerated under §1681c; however, respectfully, the court in *Galper* said no such thing. 802 F.3d 437 (2d Cir. 2015). Instead, the *Galper* court found that, even reading the preemption provision "fairly but narrowly," any state law that "concerned" a furnisher's responsibilities was preempted under the FCRA. *Id.* at 445. The court explained that "[h]ere, the language of the provision expresses Congress's intent to preempt claims which are 'with respect to any subject matter regulated under ... section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies.'" *Id.* In sum, the court found that:

> … [section] 1681t(b)(1)(F) preempts only those claims that *concern* a furnisher's responsibilities. Put differently, § 1681t(b)(1)(F) does not preempt state law claims against a defendant who happens to be a furnisher of information to a consumer reporting agency within the meaning of the FCRA if the claims against the defendant do not also concern that defendant's legal responsibilities as a furnisher of information under the FCRA.

Id. at 446. Rightly so, the *Galper* court held that Chase Bank could not avoid a lawsuit alleging it to be vicariously liable for the actions of its employee who stole a customer's identity and used it to open fraudulent accounts – as those actions did

not in any way concern Chase's furnishing of information to CRAs. *Id.*

II. The Panel's Interpretation is at Odds with Congress' Clear Intent to Preempt State Laws Like Maine's Laws.

As described above, the panel's interpretation of §1681t(b)(1) is at odds with other circuit courts that have recognized Congress' intent to establish a national, uniform standard of credit reporting under the FCRA. *See Aldaco* and *CDIA v. King, supra.* The panel justified its interpretation on the presumption that the Maine Laws are consumer protection laws that provide greater protection to consumers than the FCRA explaining:

> [w]e see no reason to presume that Congress intended, in providing some federal protection to consumers regarding the information contained in credit reports, to oust all opportunity from states to provide more protections, even if those protections would not otherwise be preempted as "inconsistent" with the FCRA under 15 U.S.C. § 1681t(a).

Op., pp. 17-18. That, however, is precisely what Congress intended.

The subject matter preemption and conduct preemption provisions were included in the 1996 amendments to the FCRA, which previously only contained the inconsistency provision of §1681t(a). 15 U.S.C. §1681t (1996). After the 1996 Amendments, §1681t included new subparts (b), (c), and (d), which contained a "sunset provision" and an exception from the scope of FCRA preemption for state laws that were more protective of consumers than the FCRA:

> (d) Subsections (b) and (c) - -
> (2) do not apply to any provision of State law . . that

> (A) is enacted after January 1, 2004; . . .or
> (C) **gives greater protection to consumers than is provided under this title.**

15 U.S.C. § 1681t(d) (1998) (emphasis added). All of subpart (d)(2) was deleted by Congress in the 2003 FACT Act Amendments, evidencing a very clear intent that all state laws were intended to be preempted if they concerned the subject matters and conduct preserved under §§1681t(b) and (c) - even those that were more protective than the FCRA itself. Respectfully, the panel's interpretation was error.

III. The Panel's Reading Renders the "Relating To" Clauses Superfluous, Materially Alters Other Provisions of §1681t(b)(1), and is Thus Unworkable.

It 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*, 534 U.S. at 31 (citations omitted). Contrary to their intention to avoid this outcome, the panel's reading of "relating to" actually renders the provision superfluous - not only in (E), but in every other subparagraph of §1681t(b)(1) - with real consequences.

An interpretation that treats the phrase "relating to" as purely descriptive cannot be correct because it does not hold true when applied across other subparts of §1681t(b)(1). For example, removing the "relating to" phrase fundamentally changes the provision. In its current form, §1681t(b)(1)(B) provides:

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

> (B) section 611 [1681i], relating to the time by which a consumer reporting agency must take any action, including the provision of notification to ta consumer or other person, in any procedure related to the dispute accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on the date of enactment of [the Act]. . .

However, removing the "relating to" phrase, which limits the scope of preemption, §1681t(b)(1)(B) would read:

> (b) No requirement or prohibition may be imposed under the laws of any State
> (1) with respect to any subject matter regulated under
> (B) section 611 [1681i], except that this subparagraph shall not apply to any State law in effect on the date of enactment of [the Act]…

That is clearly not what Congress intended.

Applying the panel's instruction that the "content of the [cited] statutory provision plays a functional role in defining the scope of the subject matter preempted" (Op., p. 12), one turns to §1681i to determine the preempted subjects. Section 1681i specifies numerous steps in the consumer dispute and reinvestigation process. This means that states would be preempted from adopting any laws related to a CRA's dispute and reinvestigation processes. But that outcome is clearly not what Congress intended. By its own terms, §1681(b)(1)(B) only preempts state laws affecting the time periods established in §1681i.[4] The phrase beginning with

[4] Moreover, the panel's interpretation cannot be correct because, if §1681t(b)(1) preempts only laws that require or prohibit the exact same information, Congress would not have needed to add that form of preemption. States would have no reason to adopt laws that only mirror the FCRA; they would regulate differently, as happened here. In such case, there would be a conflict between the federal law and

"relating to," therefore, has to define the scope of preemption, not the content of the cited statutory provision.

Note further that Congress did not utilize the phrase "relating to" in any preemption provision under §1681t(b)(5). Instead, Congress merely listed the relevant sections of the FCRA that govern a party's conduct:

> (b) 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 –
> (A) section 605(g);. . .

If Congress' use of the "relating to" phrases from § 1681t(b)(1) were merely descriptive, instead of substantively modifying the phrase "subject matter regulated under," Congress would have continued to use the phrase throughout §1681t(b)(5) to describe the sections listed therein. Instead, such phrases are notably absent, because they would modify the phrase "with respect to the conduct regulated by" in §1681t(b)(5). By extension, the phrase's use throughout §1681t(b)(1) makes clear that it substantively modifies – by defining – the "subject matter regulated under" that benefits from federal preemption. Thus, the panel's interpretation of §1681t(b)(1)(E) was incorrect.

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the state law, and federal law would win, regardless of what the statute said – due to general principles of conflict preemption. Further, such a law would have been "inconsistent" with the FCRA under §1681t(a), and thus, preempted. Section 1681t(b) only makes sense as preempting subject matters beyond pure conflict preemption and beyond §1681t(a)'s inconsistency preemption.

CONCLUSION

The panel's decision in this case conflicts with Supreme Court precedent, as well as precedent from this Circuit, and is unworkable as applied to the FCRA. Accordingly, for all the reasons stated above, this Court should rehear this case en banc.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 3,524 words.

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Dated: March 10, 2022

HUDSON COOK, LLP

By: /s/ Jennifer L. Sarvadi
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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2022, the foregoing document was filed with the United States Court of Appeals for the First Circuit via CM/ECF system. I certify that all parties or their counsel of record are registered as ECF Filers and will therefore be served by the CM/ECF system.

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