UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CONSUMER DATA INDUSTRY ASSOCIATION,

Plaintiff,

v.

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

Defendants.

Case No. 1:19-cv-00438-GZS
Judge George Z. Singal

BRIEF AMICUS CURIAE OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE RECORD

INTRODUCTION

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, created a national framework for regulation of the contents of consumer credit reports and credit reporting agencies' duties to consumers who claim inaccuracy in those reports. To ensure comprehensive regulation of this field, Congress provided uniform rules and expressly preempted any state law either "inconsistent with" the FCRA's terms or explicitly preempted by any of its provisions.[1] This suit involves Maine's direct violation, however well intentioned, of those preemption provisions.

Congress' decision to limit state action on these subjects makes sense. It would be intolerable for credit reporting agencies to be forced to issue up to fifty different credit reports on the same consumer, trying to comply with a variety of content requirements of the states.

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[1] 15 U.S.C. §§ 1681t(a) and (b).

It would also be intolerable for those who rely upon those credit reports, such as American Financial Services Association ("AFSA") members, to navigate that non-uniform morass. Allowing the states to impose their own distinct requirements on these reports would make compliance unduly, if not impossibly, burdensome—creating obstacles and costs only the largest creditors could afford.

It is contrary to the FCRA's core goals and preemptive provisions to permit individual states to make state-specific policy choices as to the content of credit reports.

Maine has singled out categories of debt (medical debt, debt resulting from economic abuse) and provided special rules for those categories, applicable in just one state. While Maine's goals are understandable and sympathetic in the context of Maine's state-specific policy aims, Congress has chosen a different course. It explicitly barred the states from interfering with its overarching national policy of uniform credit-report regulation, including report contents.

AFSA asks this Court to honor Congress' intent and ensure a workable, uniform, national credit reporting scheme.

INTEREST OF AMICUS CURIAE[2]

Founded in 1916, AFSA is the national trade association for the consumer-credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large, international financial-services firms to single-office, independently owned consumer finance companies. AFSA's over 420 members span the consumer-credit market and provide consumers with financial services and numerous kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

[2] No counsel for a party to this matter authored this brief in whole or in part, and no one other than AFSA, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Through their individual actions, these members shape the consumer-credit industry's direction and positions on a broad range of public-policy issues that affect the consumer-credit industry. AFSA routinely submits amicus briefs in important cases, like this one, involving issues of concern to the nation's financial-services community. Here, Maine's attempts to inject state law into the otherwise-uniform federal system negatively impacts AFSA's members—who rely upon consumer credit reports in their daily operations—by imposing state-specific reporting requirements that disrupt the efficient and uniform nationwide system of credit reporting under the FCRA. Accordingly, AFSA maintains a strong interest in the proper resolution of this case.

ARGUMENT

I. The FCRA's Preemption Provisions Make Clear That Congress Has Mandated A Uniform, Nationwide Regulation Of The Content Of Credit Reports And The Conduct Of Credit Reporting Agencies

A fundamental principle underlying the Constitution's Supremacy Clause is that "Congress has the power to preempt state law," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), and can do so by stating the preemption in express terms, *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). When Congress preempts state law expressly by statute, a court's only remaining "task is to identify the domain expressly pre-empted." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citation omitted). In such instances, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent," *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted), including as to "the substance and scope" of such preemption, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Typically, the ordinary meaning of the statutory language accurately expresses Congress' purpose. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

With the FCRA, Congress invoked its constitutional authority to ensure uniform, nationwide regulation of credit reports, in order both to "protect consumer privacy" and to

"promote efficiency in the Nation's banking system." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). To achieve these twin aims, the FCRA "imposes a host of requirements concerning the creation and use of consumer reports," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016), with its core concern being how credit reporting agencies maintain accurate credit reports and investigate allegations of inaccuracy, *see id.* §§ 1681c, 1681e(b), 1681i. Congress thus "create[d] a uniform national standard for credit reporting." *Catanzaro v. Experian Info. Sols., Inc.*, 671 F. Supp. 2d 256, 260 (D. Mass. 2009); *see also* S. Rep. No. 103-209, at 7 (1993) (noting the preemption provision reveals Congress' "[r]ecogni[tion of] the national scope of the consumer reporting industry and the benefits of uniformity").

The FCRA's national standards comprise a singular, consistent "set of rules governing [both] the content of consumer reports and the responsibilities of those who maintain them," "leav[ing] no room for overlapping state" control. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 900 (10th Cir. 2012). The purposes of the FCRA animate this comprehensive scheme and are reflected in the procedures that consumer reporting agencies must adopt (namely, "reasonable procedures to assure maximum possible accuracy of the information" in a consumer report), 15 U.S.C. § 1681e(b), what information can and cannot be included in consumer credit reports, *id.* § 1681c, how consumer reporting agencies must prevent and respond to instances of identity theft, *id.* §§ 1681c-1, 1681c-2, requirements on users of consumer reports, *id.* § 1681m, and so on. This promotes predictability for both those who produce credit reports, and those, like AFSA's members, who regularly rely upon such reports in their daily operations and have independent duties as furnishers of credit information. *See id.* § 1681s-2.

Most relevant here, the FCRA's broad preemption provisions prohibit individual states from doing precisely what Maine has sought to accomplish: regulating the consumer-credit

industry in ways inconsistent with these federal requirements, especially regarding the contents of the actual credit reports. The FCRA expressly preempts any state laws that "are inconsistent with any provision of" the FCRA, while also noting a general understanding that the FCRA does not "annul, alter, affect, or exempt any person subject to" the FCRA "from complying with the laws of any State." *Id.* § 1681t(a). Congress then went beyond that broad, but somewhat vague, language by explicitly preempting any state law "with respect to any subject matter regulated under . . . section 1681c of this title, relating to information contained in consumer reports." *Id.* § 1681t(b)(1)(E). Section 1681c, in turn, expressly regulates *both* "[i]nformation excluded from consumer reports," *id.* § 1681c(a), and "[i]nformation required to be disclosed" in those reports, *id.* § 1681c(d). For example, the FCRA explicitly provides that no consumer report may contain information relating to bankruptcy cases more than ten years old, *id.* § 1681c(a)(1); civil suits, civil judgments, arrest records, and paid tax liens more than seven years old, *id.* § 1681c(a)(2)–(3); the name, address, or telephone number of furnishers of medical information, *id.* § 1681c(a)(6); a veteran's medical debt that predates the report by less than one year or which has been fully paid or settled, *id.* § 1681c(a)(7)–(8); and more, including a comprehensive catch-all provision forbidding the inclusion of "[a]ny other adverse item of information, other than records of convictions of crimes," more than seven years old, *id.* § 1681c(a)(5). Further, and independently, the FCRA also provides that states may not impose any "requirement[s] or prohibition[s] . . . with respect to the *conduct* required by," § 1681c-2, among other sections. *Id.* § 1681t(b)(5)(C) (emphasis added).

In all, Congress concluded that the states would undermine the FCRA's uniform regulation of the consumer-credit industry if they apply fifty different sets of standards to the contents of reports. *See TRW Inc.*, 534 U.S. at 23; S. Rep. No. 103-209, at 7. Competing standards, coming

from various states, would undermine the FCRA's efficient, nationwide regime, thereby increasing the time and cost associated with consumer financial reporting and disrupting the businesses of numerous credit and financial services providers, like AFSA's members, who rely on such reports.

II. The Maine Laws Challenged Here Contravene The Broad, Express Preemption Provisions In Section 1681t Of The FCRA

In 2019, the Maine Legislature enacted two relevant amendments to Section 1310-H of Title 10 of the Maine Revised Statutes, within Maine's own Fair Credit Reporting Act. These amendments implemented new requirements and limitations on consumer-credit reporting through the Medical Bill Act, L.D. 110, and the Economic Abuse Act, L.D. 748. Maine's Medical Bill Act, codified at Section 1310-H(4), expressly precludes a consumer reporting agency from "report[ing] debt from medical expenses on a consumer's consumer report" if the delinquency is less than 180 days old when the debt is reported. Me. Rev. Stat. tit. 10, § 1310-H(4)(A). And once a consumer reporting agency receives "reasonable evidence" from a consumer, creditor, or debt collector that a medical debt has been settled or paid in full, the consumer reporting agency may not report such debt and must "remove or suppress" that medical-expense debt from the consumer report. *Id.* § 1310-H(4)(B)(2). Maine's Economic Abuse Act, codified at Section 1310-H(2-A), requires consumer reporting agencies to reinvestigate a debt if a consumer provides documentation "that the debt or any portion of the debt is the result of economic abuse." *Id.* § 1310-H(2-A). And if the reinvestigation reveals the debt "is the result of economic abuse," the consumer reporting agency must remove any reference to the debt from the consumer report. *Id*.

A. Maine's laws here fall squarely within the FCRA's preemption provisions.

The Medical Bill Act impermissibly precludes consumer reporting agencies from disclosing medical debt less than 180 days old on consumer credit reports, imposing an intolerable lack of uniformity in the contents of credit reports, as applied to just a single state. *See* Me. Rev.

Stat. tit. 10, § 1310-H(4). The Medical Bill Act strikes at the heart of the FCRA's coverage. The core concern of the FCRA is the contents and regulation of consumer credit reports. *TRW, Inc.*, 534 U.S. at 23. Yet, the Medical Bill Act explicitly provides what medical information cannot be included in consumer reports—namely, any medical debt less than 180 days old. Me. Rev. Stat. tit. 10, § 1310-H(4). This is regulation of "subject matter" and "conduct" governed by the FCRA, 15 U.S.C. § 1681t(b), as the FCRA comprehensively regulates the contents of credit reports, buttressed by the catch-all "[a]ny other adverse item of information" more than seven years old, *id.* § 1681c(a)(5). Maine was apparently aware of this conflict with the FCRA, as the Medical Bill Act expressly requires consumer reporting agencies to bar medical debt from consumer reports *in spite of* federal law. Me. Rev. Stat. tit. 10, § 1310-H(4) ("*Notwithstanding* any provision of federal law . . ." (emphasis added)). The medical-debt information that the Medical Bill Act prohibits agencies from disclosing in consumer reports falls squarely within such "adverse item[s] of information," meaning that the FCRA expressly preempts the Medical Bill Act.

The Economic Abuse Act fares no better. Just as with the Medical Bill Act, the Economic Abuse Act impermissibly precludes consumer reporting agencies from disclosing certain adverse information in consumer reports, a subject matter covered and expressly preempted by the FCRA, *see* 15 U.S.C. § 1681c(a)(5), causing impermissible disuniformity in credit-reporting requirements, as applied to just one state. In particular, the Economic Abuse Act requires consumer reporting agencies to "remove any reference to [a] debt" that is "determined to be the result of economic abuse." Me. Rev. Stat. tit. 10, § 1310-H(2-A). But, again, the FCRA already regulates what information must be excluded from consumer reports and broadly preempts any state-law "requirement[s] or prohibition[s]" on the "subject matter" of consumer-report contents. 15 U.S.C.

§ 1681t(b)(1)(E). In this manner, the Economic Abuse Act "runs into the teeth of the FCRA preemption provision." *Ross v. F.D.I.C.*, 625 F.3d 808, 813 (4th Cir. 2010).

Further and independently, the Economic Abuse Act is also preempted by the FCRA's "conduct" preemption provisions in § 1681t(b)(5). Under this subsection, states may not impose any "requirement[s] or prohibition[s] . . . with respect to the conduct required by," among other sections, § 1681c-2. *Id.* § 1681t(b)(5)(C). Section 1681c-2, in turn, requires consumer reporting agencies to "block the reporting of any information" in a consumer's file that the consumer "identifies as information that resulted from an alleged identity theft"—defined as "a fraud committed using the identifying information of another person," *id.* § 1681a(q)(3)—after the consumer provides certain proof and information supporting the allegation. *Id.* § 1681c-2(a). Maine's Economic Abuse Act, similarly, requires consumer reporting agencies to "reinvestigate" any debts that a consumer alleges to be the result of "economic abuse"—defined to include "unauthorized or coerced use of" another's credit or property and "stealing from or *defrauding* of money or assets." Me. Rev. Stat. tit. 19-a, § 4002(3-B) (emphasis added). If that investigation determines that "economic abuse" caused the debt, the consumer reporting agency must "remove any reference to th[at] debt" in the consumer credit report. Me. Rev. Stat. tit 10, § 1310-H(2-A). Thus, the Economic Abuse Act will have serious effects on the operations of AFSA's members. Credit providers will undoubtedly be pulled into such disputes over allegedly fraudulent debt and will be required to expend additional time and resources to investigate disputed debts of which they have no real knowledge. This is despite the fact that the FCRA already governs the "conduct" of consumer reporting in the context of identity theft, and therefore already preempts Maine's Economic Abuse Act.

B. More broadly, provisions of the type that Maine adopted here undermine the FCRA's core goals and, if adopted by other states, will inevitably lead to exactly the type of non-uniform situation that Congress adopted the FCRA's preemptions to prohibit.

Under Maine's model, each state can determine for itself the contents of credit reports for its citizens, based upon its state-specific policy concerns. Maine's brief in this case makes various policy arguments in favor of what it believes should (and should not) be in credit reports, different from the policy views that Congress embodied in the FCRA. Maine asserts that reporting certain types of credit is "unfair," "prejudicial," and not "appropriate," Dkt. 166, at 1, but other states may have other policy views and industry-specific concerns. Under Maine's model, West Virginia could enact special credit-reporting rules relating to debt owed by workers to mining companies, and Massachusetts could create special rules relating to student debt. Connecticut, in turn, may have special concerns relating to the insurance industry debt, and New York may think it better public policy to adopt specific rules for reporting of debt related to real estate. Nevada and New Jersey may have special concerns relating to gambling-related debts, and so on and so forth. Worse, the states could take precisely contrary positions on exactly the same subject matter.

A patchwork of state regulations would drive most lenders to be state-specific, reducing competition and innovation, and harming consumers. To comply with the new regime, lenders like AFSA's members would have to create underwriting rules that are unique to each state, requiring multiple workflows that increase the costs of compliance and risk of error. They may well be drawn into disputes with individual creditors—did the defaulted debt on the credit come from economic abuse? Why didn't you, the individual lender, investigate this? The result would be that only the largest lenders, those that can afford the additional processes, will be able to provide products across state lines under this non-uniform credit-reporting system.

CONCLUSION

By purporting to prohibit reporting of information allowed by the FCRA, Maine has confronted, and flouted, Congress' express preemption regarding credit reporting. As a result, this Court should conclude that L.D. 110 and L.D. 748, amending Section 1310-H of Title 10 of the Maine Revised Statutes, are preempted by the FCRA and unenforceable.

Dated this 27th day of April, 2020.

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**pro hac vice* motion pending

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2020, a true and accurate copy of the foregoing Brief Amicus Curiae Of The American Financial Services Association In Support Of Plaintiff's Motion For Judgment On The Record was served via the Court's CM/ECF system upon all counsel of record.

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