Nos. 11-434

In the Supreme Court of the United States

STEWART MORTENSEN,

Petitioner,

v.

ROBERT A. BROWN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION OF ACA INTERNATIONAL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

ALAN UNTEREINER*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

* *Counsel of Record*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, ACA International ("ACA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondents, however, has withheld consent.

ACA is a national association of credit, collection, and debt-purchasing professionals. Founded in 1939, and based in Minneapolis, Minnesota, ACA represents approximately 5,200 third-party collection agencies, asset buyers, attorneys, credit granters, and vendor affiliates. Its members range in size from small businesses to large, publicly held corporations. The association produces a wide variety of products and services for its members and the public. Among other things, ACA establishes ethical standards and educates its members and others on the rules governing debt collection practices, including compliance with the Fair Credit Reporting Act ("FCRA") and other statutes. ACA also files *amicus curiae* briefs in cases of importance to its membership.

This is such a case. ACA's members have a substantial interest in the proper resolution of the important preemption issue presented in this case. They also have a significant interest in having this Court grant review and dispel the pervasive confusion in the lower federal and state courts over the proper interpretation of 15 U.S.C. § 1681t(b)(1)(F), an express preemption provision that Congress added to the FCRA precisely in order

to protect those who voluntarily furnish credit information to the Nation's consumer reporting agencies (such as Experian, Equifax, and TransUnion) from the imposition of burdensome and divergent legal requirements by state governments.

Accordingly, ACA's motion for leave to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted.

ALAN UNTEREINER*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

* *Counsel of Record*

November 7, 2011

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes:

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities:

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

A. The Fair Credit Reporting Act and Its Preemption Clause

Congress enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, in order to ensure "fair and accurate credit reporting." *Id.* § 1681(a)(1). The statute, as amended, establishes standards for businesses' collection, use, and exchange of information on consumers, including information collected or used to determine a consumer's eligibility for credit, employment, or insurance. It also heavily regulates entities that engage in the business of assembling and selling consumer information (known as "consumer reporting agencies" ("CRAs")). The credit reporting regime established under the FCRA ensures fair treatment both to consumers and to

---

[1] Pursuant to S. Ct. Rule 37.2, ACA International ("ACA") states that the parties' counsel received timely notice of the intent to file this brief. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has withheld consent. Pursuant to S. Ct. Rule 37.6, *amicus* ACA states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

those who, on a purely voluntary basis, furnish credit information to CRAs ("furnishers").

The FCRA also establishes a detailed and comprehensive remedial and enforcement scheme. Among other things, it authorizes administrative enforcement of the FCRA not only by the Federal Trade Commission and multiple federal banking agencies but also by state agencies and regulators. See 15 U.S.C. § 1681s. It also creates limited private rights of action for civil liability (subject to certain caps on damages) for willful or negligent noncompliance with certain FCRA requirements. See 15 U.S.C. §§ 1681n, 1681o, 1681p. And it authorizes judicial enforcement by state officials in certain specified circumstances. See, *e.g.*, 15 U.S.C. § 1681s(c)(1).

In 15 U.S.C. § 1681s-2, Congress specified the "responsibilities of furnishers" of credit information to CRAs. Among other things, Congress set forth detailed duties of such furnishers – whose participation in the system is critically important but wholly voluntary – to (1) provide information free from errors; (2) correct and update consumers' information; (3) provide notices of disputes; (4) provide notices of closed accounts; and (5) provide notices of delinquent accounts. *Id.* § 1681s-2(a). Notably, these requirements with regard to furnishers are *not* subject to private enforcement; instead, they may be enforced *only* by federal and state officials. See *id.* § 1681s-2(c), (d). Private enforcement is permitted regarding only the "duties of furnishers" that arise following a "notice of dispute." *Id.* § 1681s-2(b). See generally *Gorman* v. *Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1014 & n.9

(9th Cir. 2009) (describing this carefully crafted enforcement scheme and explaining that "Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished") (internal quotation marks omitted).

The FCRA, as amended, includes an express preemption clause aimed specifically at protecting the furnishers of credit information. It provides:

> No requirement or prohibition may be imposed under the laws of any State (1) with respect to *any subject matter* regulated under . . . (F) section 623 [15 U.S.C. § 1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws . . . ; or (ii) with respect to section 1785.25(a) of the California Civil Code. . . .

15 U.S.C. § 1681t(b)(1)(F) (emphasis added).[2]

---

[2] Between 1970 when the FCRA was enacted and 1996, the statute did not impose any duties on the furnishers of information to CRAs and did not include the express preemption clause contained in Section 1681t(b)(1)(F). Both were added in 1996 when Congress passed the Consumer Credit Reporting Reform Act. See Pet. App. 10a-11a. Prior to 1996, the FCRA preempted only state laws that were "inconsistent with any provision of this Subchapter" (15 U.S.C. § 1681t(a)) – a preemption provision that continues in effect today but was supplemented by Congress in 1996 with the enactment of Section 1681t(b)(1)(F). Since 1970, the FCRA has also included in a separate provision (entitled "limitation of liability") containing certain protections for CRAs, furnishers of information, and others against certain state-law liability. See

Section 1681t(b)(1)(F) was added in 1996, along with a number of other preemption provisions targeting other areas of state law. See note 2, *supra*. The accompanying Senate Report makes clear that these new preemption provisions were intended to "establish[] the FCRA as the national uniform standard" and to "recognize[] the fact that credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry[] and competitive prices for consumers." S. REP. NO. 104-185, at 55 (1995). Although these preemption provisions were were originally subject to a sunset provision, Congress made them permanent in 2003 as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, § 711, 117 Stat. 1952, 2011 (2003). In taking that step, Congress reiterated its intent to establish uniform federal standards with respect to the duties of information furnishers.[3]

---

15 U.S.C. § 1681h(e) ("Except as provided in sections 1681n and 1681*o* of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, . . . or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title . . . except as to false information furnished with malice or willful intent to injure such consumer.").

[3] See S. REP. NO. 108-166 (2003), 2003 WL 22399643, at *5 ("[T]he authors of the 1996 Amendments sought to establish *uniform standards* in key areas in an effort to enhance the development of national credit markets. These measures include *national standards* for: . . . *furnisher responsibilities*. . . . State laws with respect to these issues were preempted.") (emphasis added).

B. The Proceedings in the Lower Courts

This case arises out of a dispute over a $600 bill for dental services. Petitioner Stewart Mortensen is a lawyer engaged in the business of debt collection. Respondent Robert Brown was a dental patient of Dr. Rolf Reinholds, who in July 2000 sent Brown the disputed bill for installing a permanent crown. After Brown declined to pay the bill, Dr. Reinholds referred the debt to petitioner Mortensen for collection.

After Brown requested that Mortensen provide proof of the debt, Mortensen sent him a copy of Brown's dental charts as well as the charts of Brown's two minor children. In response, Brown told Mortensen that he did not owe money to Dr. Reinholds and complained that the dental charges contained confidential medical information. Over the next several years, in order to verify that the debt was owed, Mortensen repeatedly furnished to the three national CRAs (Experian, Equifax, and TransUnion) the dental charts of Brown and his children as well as certain other information, including the Browns' names, address, phone number, dates of birth, and Social Security numbers. Throughout this period, Mr. Brown continued to dispute the debt and to object to Mortensen's disclosures as unauthorized. Brown also complained to the CRAs that the information furnished by Mortensen was inaccurate, which in turn prompted the CRAs to request more information from Mortensen.

Thereafter Brown, his wife, and their two minor children (all respondents here) filed suit against Mortensen and Dr. Reinholds in the Superior Court of California for Los Angeles County, alleging among

other things that Mortensen's furnishing of certain information violated California's Confidentiality of Medical Information Act ("Confidentiality Act"), Cal. Civil Code § 56 *et seq*. After the claims based on other statutes (and against Dr. Reinholds) were voluntarily dismissed, the trial court dismissed the complaint.

The Court of Appeal for the Second Appellate District unanimously affirmed, holding that the Browns' claims under the Confidentiality Act were expressly preempted by Section 1681t(b)(1)(F) of the FCRA. Pet. App. 46a. "The plain language" of that provision, the Court of Appeal explained, "preempts state law relating to the duties of furnishers of information to [CRAs]." Pet. App. 41a. "[W]hen [Confidentiality Act] claims such as those at issue here relate to the subject matter regulated under section 1681s-2 (i.e., the responsibilities of persons who furnish information to consumer reporting agencies)," the court reasoned, "those claims are preempted by the FCRA." Pet. App. 46a; see also Pet. App. 42a-45a (discussing and relying on the decisions of "multiple federal district courts" that had upheld preemption of state law claims involving the duties of such information furnishers).

The California Supreme Court reversed. Pet. App. 1a-31a. In contrast to the Court of Appeal's focus on the "plain language" of Section 1681t(b)(1)(F), the California Supreme Court began its analysis by invoking "the strong presumption against displacement of state law that applies in the preemption context." Pet. App. 15a. Next, the court purported to identify a potential ambiguity in the statutory text, explaining that "[t]he 'subject matter

regulated' under section 1681s-2 is ambiguous because the level of generality at which one is to characterize that subject matter is unclear. . . ." Pet. App. 13a. "Characterized most narrowly," the court reasoned, the provision "could . . . be read as preempting only state laws that attempt . . . to regulate a furnisher's duties with respect to *accuracy* or *the handling of disputes after receiving official notice*." *Ibid.* (emphasis added). Alternatively, "the subject matter of section 1681s-2 could be read more broadly as encompassing all '[r]esponsibilities of furnishers of information to consumer reporting agencies,' as the provision [*i.e.*, Section 1681s-2] is captioned," in which case the preemption provision nullifies any state laws that "impos[e] on furnishers duties additional to the two specific duties imposed by" Section 1681s-2. Pet. App. 14a.

The "strong" presumption against preemption, the California Supreme Court explained, required it to choose the narrower, anti-preemption reading of Section 1681t(b)(1)(F). The court recognized that many federal district courts had ruled that Section 1681t(b)(1)(F), by its plain terms, "total[ly]" preempts all state laws that seek to impose "requirement[s] or prohibition[s]" on furnishers based on their actions in supplying information to CRAs, but dismissed those cases with the observation, "we do not find these cases instructive." Pet. App. 17a.

SUMMARY OF ARGUMENT

This case represents a valuable opportunity for this Court to address serious conflicts and confusion in the lower courts over the preemptive scope of the FCRA. To begin with, this Court clearly has jurisdiction under 28 U.S.C. § 1257 to review the

California Supreme Court's erroneous decision under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Moreover, as petitioner exhaustively demonstrates (Pet. 10-38), the issue of Section 1681t(b)(1)(F)'s preemptive scope arises with great regularity in both the state and federal courts. As both courts and commentators have recognized, this important preemption provision has been the subject of no fewer than *three different interpretations* – to which the decision of the California Supreme Court has now added a fourth. An important federal statute intended in part to protect the voluntary furnishers of information under the Nation's credit information reporting system from unwarranted liability – as well as to create nationwide regulatory uniformity – should not be given divergent meanings and effect in different states and federal districts across the country. Only this Court can supply a uniform national answer to the interpretive question raised by this case.

Nor is this all. The importance of this case extends well beyond the FCRA preemption issue presented by the petition. In rejecting the preemption defense, the California Supreme Court relied (as it has repeatedly in the past) on a "strong" version of the so-called presumption against preemption. The validity of that presumption – even in a "weak" or "regular" form – is open to serious doubt in express preemption cases in light of this Court's recent decisions, see, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-80 (2011) (plurality), and this issue is directly implicated in a case currently pending before this Court, *National Meat Association* v. *Harris*, No. 10-224. Moreover, the California courts' repeated invocation of a "strong"

version of the presumption has made them among the most inhospitable venues for preemption arguments in the Nation. For this reason as well, further review (or at least a hold for *Harris*) is warranted.

Finally, the issue presented is exceedingly important not just for credit and collection professionals such as *amicus curiae* ACA International's thousands of members. It is also vitally important to the 30,000 to 40,000 businesses across the country that *voluntarily* supply credit information to the Nation's credit reporting agencies. These businesses depend on Section 1681t(b)(1)(F) of the FCRA for protection against burdensome state regulation and liability. Thus, the issue presented is both recurring and nationally important. The petition for certiorari should be granted.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE CALIFORNIA SUPREME COURT'S DECISION

The California Supreme Court reversed an intermediate appellate court decision upholding the dismissal of respondents' complaint on preemption grounds and "remand[ed] . . . for further proceedings." Pet. App. 31a. Despite the likelihood of further proceedings in the trial court on remand, this Court's jurisdiction to review the California Supreme Court's decision is well-established.

This Court's certiorari jurisdiction over decisions of the state courts is conferred by 28 U.S.C. § 1257, which authorizes review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." The Court has long

eschewed a "mechanical" interpretation of the requirement of "finality." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). Instead, the Court has applied an "intensely 'practical' approach" to determining "finality." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976); see also R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 145, 152-54 (8th ed. 2002).

In *Cox Broadcasting*, this Court took note of "at least four categories of . . . cases" in which, for practical reasons, it has elected to treat decisions of the state courts as "final" even though "there [we]re further proceedings in the lower state courts to come." 420 U.S. at 477. This case falls squarely within the fourth category recognized in *Cox Broadcasting*. That category consists of cases in which (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83.

Each of those conditions is satisfied here. *First*, the FCRA preemption issue was fully considered – and squarely resolved – in the decision below by the highest court of California. And, if review is denied, it is at least possible that petitioner Mortensen

eventually will prevail on the merits at trial on non-federal grounds.

Second, if this Court were to grant review and reverse the California Supreme Court by holding that Section 1681t(b)(1)(F) of the FCRA preempts respondents' Confidentiality Act claims, that decision would bring this litigation to an end.

Third, the federal policy underlying the FCRA and its preemption clause would be seriously undermined if this Court declines to exercise immediate review. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179 (1988) (explaining, in preemption case, that leaving state supreme court's interlocutory decision unreviewed would threaten to undermine vital federal policies).

In other settings that similarly involved issues of federal preemption, this Court has repeatedly applied *Cox Broadcasting* to grant immediate review. See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 356-57, 368-70 & n.11 (1988); *Goodyear Atomic Corp.*, 486 U.S. at 176-80; *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983); *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-51 (1963). It should do so here as well. Under the Court's "intensely 'practical' approach" to finality issues (*Mathews*, 424 U.S. at 331 n.11), the decision below is in every practical sense the final word of California's highest court.[4]

---

[4] This is not a case in which the highest court of a State has declined to entertain a discretionary interlocutory appeal, leaving in place the decision of an intermediate state appellate court

II. THE CONFLICTS IN THE LOWER COURTS ARE SERIOUS AND WARRANT THIS COURT'S ATTENTION

As petitioner exhaustively demonstrates (Pet. 10-38), the issue of Section 1681t(b)(1)(F)'s preemptive scope arises with great regularity in both the state and federal courts. Moreover, as the California Court of Appeal noted in unanimously upholding preemption in this case, "multiple federal district courts" have adopted a reading of Section 1681t(b)(1)(F) under which respondents' claims clearly would be preempted. Pet. App. 42a-43a. This Court should intervene now to ensure that this important and frequently invoked federal statute is not given vastly different effect in different state and federal courts across the country.

Like the Court of Appeal in this case (Pet. App. 41a, 46a), but in sharp contrast to the California Supreme Court, many federal courts have concluded that Section 1681t(b)(1)(F) preempts the entire field of state-law requirements imposed on those who furnish credit information to CRAs. See, *e.g.*, *Carruthers* v. *American Honda Finance Corp.*, 717 F. Supp. 2d 1251, 1254, 1257 (N.D. Fla. 2010); *Poulin* v. *The Thomas Agency*, 708 F. Supp. 2d 87, 90-91 (D. Me. 2010); *Buraye* v. *Equifax*, 625 F. Supp. 2d 894, 900, 901 (C.D. Cal. 2008); *Roybal* v. *Equifax*, 405 F. Supp. 2d 1177, 1181-82 (E.D. Cal. 2005); *Riley* v. *General Motors Acceptance Corp.*, 226 F. Supp. 2d 1316, 1322 (S.D. Ala. 2002); *Hasvold* v. *First USA Bank, N.A.*, 194 F. Supp. 2d 1228, 1234, 1238-39 (D.

---

that might be subject to review, and correction, by the state supreme court in some future appeal. Compare *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (per curiam).

Wyo. 2002). These decisions rest on the plain meaning of Section 1681t(b)(1)(F). See, *e.g.*, *Roybal*, 405 F. Supp. 2d at 1181 ("On its face, the FCRA precludes all state statutory or common law causes of action that would impose any 'requirement or prohibition' on the furnishers of credit information.").

These decisions also recognize that, in drafting Section 1681t(b)(1)(F), Congress chose deliberately broad language, specifying that "*[n]o* requirement or prohibition may be imposed under the laws of any State . . . with respect to *any subject matter* regulated under . . . (F) section 623 [15 U.S.C. § 1681s-2], *relating to the responsibilities of persons who furnish information to consumer reporting agencies*." 15 U.S.C. § 1681t(b)(1)(F) (emphasis added). Clearly, the "subject matter" Congress had in mind was requirements "relating to the responsibilities of persons who furnish information to consumer reporting agencies." Accord Pet. App. 46a (Court of Appeal noted that the "subject matter" regulated was "the responsibilities of persons who furnish information to consumer reporting agencies"). The only exceptions to that broad command were those specifically mentioned in the express preemption provision itself – "section 54A(a) of chapter 93 of the Massachusetts Annotated Laws . . . [and] section 1785.25(a) of the California Civil Code." 15 U.S.C. § 1681t(b)(1)(F). There is no exception for California's Confidentiality in Medical Information Act.[5]

---

[5] Many courts have relied on the enumeration of these two exceptions in Section 1681t(b)(1)(F) as a basis for rejecting *other* claimed exceptions – including for statutory provisions that are closely related to the enumerated statutes. See, *e.g.*, *Carvalho* v.

In declining to follow these federal decisions, the California Supreme Court noted that this line of decisions (adopting what it called the "total preemption" view) represents "but one of three approaches the federal courts have taken" to interpreting Section 1681t(b)(1)(F). Pet. App. 17a; see also Pet. 43-45 (discussing these three divergent approaches taken by courts); Mark Tyson, *State Law Furnisher Liability Claims And The FCRA – The State of Confusion*, 63 CONSUMER FIN. L. Q. REP. 19, 20-22 (2009) (same). But rather than endorsing any one of those competing approaches, the California Supreme Court elected *a fourth approach* to interpreting Section 1681t(b)(1)(F).

In the California Supreme Court's view, it was possible to locate an ambiguity in the text of Section 1681t(b)(1)(F) with respect to "the level of generality at which one is to characterize" the "'subject matter regulated' under section 1681s-2." Pet. App. 13a. "Characterized most narrowly," the court stated, the provision "could . . . be read as preempting *only* state laws that attempt . . . to regulate a furnisher's duties with respect to *accuracy* or *the handling of disputes after receiving official notice*." *Ibid.* (emphasis added). The court also purported to distinguish the

---

Equifax Information Services, LLC, 629 F.3d 876, 889 (9th Cir. 2010) ("Because [California Civil Code] section 1785.25*(a)* is the only substantive [California Code]. . . provision specifically saved by the FCRA, Carvalho's section 1785.25*(f)* claim is preempted.") (emphasis added). This stringent application of the interpretive canon "expressio unius est exclusio alterius" to the two exceptions to preemption set forth in Section 1681t(b)(1)(F) reflects an analytical approach that is *exactly the opposite* to the California Supreme Court's heavy reliance on a "strong" presumption *against* preemption.

"total preemption" cases on the ground that in them courts had grappled with the relationship between Section 1681t(b)(1)(F) and Section 1681h(e) (quoted above in note 2, *supra*). "Given the different preemption question at issue here," the court explained, "we do not find these cases instructive." Pet. App. 17a. That explanation is puzzling, to say the least. *All* of the federal cases that have embraced the "total preemption" approach turned on the proper interpretation of Section 1681t(b)(1)(F). That is *precisely* the same issue involved in this case. The California Supreme Court's effort to explain away this conflicting line of federal cases is wholly unpersuasive.[6]

Nor is this all. In adopting its fourth approach, the California Supreme Court used reasoning that sharply conflicts with the analysis used by many other courts. Specifically, the court below relied substantially on a so-called "strong" presumption against preemption, which it regarded as requiring the court to first scour the statutory text for ambiguity and then select the "narrower" of possible alternative readings. Pet. App. 15a-17a. Using that logic, the court determined that Section 1681t(b)(1)(F) was "ambiguous." Pet. App. 13a. But as petitioners point out, of the "more than a hundred federal courts" to have "ruled on preemption under section 1681t(b)(1)(F)," "[n]ot one of those courts characterized the statute as ambiguous or unclear." Pet. 39; cf. also note 5, *supra*. Nor have other courts

---

[6] In any event, as Judge Easterbrook recently explained for a panel of the Seventh Circuit, there is no inconsistency between Section 1681t(b)(1)(F) and Section 1681h(e). See *Purcell* v. *Bank of America*, 2011 WL 4634216, at *3 (7th Cir. Oct. 3, 2011).

relied on the "strong" presumption against preemption invoked by the California Supreme Court as a tool for interpreting Section 1681t(b)(1)(F). As next explained, this aspect of the lower court's analysis also merits this Court's attention.

III. REVIEW IS ALSO NEEDED TO ADDRESS THE LOWER COURT'S MISPLACED RELIANCE ON A "STRONG" PRESUMPTION AGAINST PREEMPTION

The California Supreme Court's decision rested substantially on the assumption that it was appropriate to apply not only a "presumption against preemption" but also a "strong" version of that interpretive principle. Pet. App. 8a-9a, 15a-16a. A "strong" presumption should be applied, the court explained, because the state statute at issue here – California's Confidentiality of Medical Information Act – involves a field of regulation "traditionally occupied by the states." Pet. App. 9a; see also *id.* at 8a ("State statutory and common law protection of interests in informational privacy long predates federal regulation."). The California Supreme Court not only relied on the presumption to choose the narrower of two assertedly possible readings of Section 1681t(b)(1)(F) but also invoked it as a reason to search for some ambiguity in the first instance. As explained above, other courts resolving issues of FCRA preemption have found no ambiguity in the phrase "subject matter regulated" nor have they applied the presumption against preemption (much less a "strong" variant of the presumption).

Further review is warranted to address the California Supreme Court's dispositive use of a "strong" presumption against preemption in this way.

In recent years, the presumption against preemption has been criticized by various Members of this Court as inappropriate in cases (such as this) involving the proper construction of an express preemption clause. See, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-80 (2011) (plurality) ("The *non obstante* provision of the Supremacy Clause indicates that a court need look no further than the ordinary meanin[g] of federal law, and should not distort federal law to accommodate conflicting state law.") (internal quotation marks omitted); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) ("Under the Supremacy Clause . . . our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."); *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 256 (2004) (observing that "not all Members of this Court agree" on the use of a "presumption against preemption").

Not surprisingly, in a number of cases in this Court (including the pending case of *National Meat Association* v. *Harris*, No. 10-224), national business groups have filed *amicus* briefs criticizing the so-called "presumption against preemption" on multiple grounds. See, *e.g.*, Br. of the Chamber of Commerce of the United States of America, at 8-23, *National Meat Association* v. *Harris*, No. 10-224 (Aug. 2011); Br. of the Chamber of Commerce of the United States of America, at 10-14, *Watters* v. *Wachovia Bank, N.A.*, No. 05-1342 (Nov. 2006); Br. of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the United States of America, *United States* v.

Locke, Nos. 98-1701 and 98-1706, 1999 WL 966527, at *4-12 (Oct. 1999). These briefs have persuasively demonstrated that the presumption is of only relatively recent vintage, has been applied by this Court in an inconsistent fashion,[7] suffers from a number of serious ambiguities, and is fundamentally at odds with central principles of preemption law – including that principle that Congress's *intent* determines the scope of express preemption.

Beyond these serious questions about its validity, the presumption against preemption has been the subject of widely divergent interpretations in the lower courts. Some courts have said it applies in "all" preemption cases; others, only in cases where the assertedly preempted state law involves an area of "traditional" state authority. See A. UNTEREINER, THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE 178-82 (2008). Still other courts – like the California Supreme Court – have applied an especially "strong" version of the presumption in areas of traditional state authority (or where no federal remedy exists). See *id.* at 180-81 (citing *Pinney* v. *Nokia*, 402 F.3d 430, 454 n.4 (4th Cir.), cert. denied, 546 U.S. 998 (2005)). And, of course, the lower courts have often struggled to define the relevant regulatory "area" for purposes of this inquiry. *Id.* at 180-81. In this case, for example, the regulatory area could be described as

---

[7] For example, in a number of recent cases involving express preemption, this Court made no mention of the presumption. See, *e.g.*, *Chamber of Commerce of the United States* v. *Whiting*, 131 S. Ct. 1968 (2011); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008); see also *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption).

"informational privacy" (as the California Supreme Court did) but it could also be described as consumer credit information reporting (which for more than 40 years has been regulated comprehensively at the federal level under the FCRA).

In this case, the "strong" presumption against preemption was dispositive. The California Supreme Court, moreover, has been a leading proponent nationally of applying a "strong" version of the presumption. See also *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (Cal. 2008) (referring presumption of preemption as "strong" and as applying "with particular force here"), cert. denied, 129 S. Ct. 896 (2009); *Bronco Wine Co.* v. *Jolly*, 33 Cal. 4th 943, 974 (Cal. 2004) (similarly applying a "strong" variant of the presumption), cert. denied, 544 U.S. 922 (2005). For that reason, this case is an excellent vehicle for reexamining the validity of – or at least clarifying – the presumption as applied in express preemption cases. At a minimum, the petition should be held for this Court's decision in *National Meat Association* v. *Harris*, No. 10-224, in which such a reexamination of the presumption has been urged.

IV. THIS CASE RAISES ISSUES OF PROFOUND IMPORTANCE TO THE DEBT COLLECTION INDUSTRY AND TO ALL WHO FURNISH INFORMATION TO THE NATION'S CREDIT REPORTING AGENCIES

The issue of FCRA preemption presented by the petition is of great importance to ACA International's national membership, which consists of thousands of credit, collection, and debt purchasing professionals.

But the significance of this case extends far beyond to every type of business that participates in the Nation's credit information system by furnishing information to Equifax, Experian, TransUnion, and other smaller regional CRAs. In addition to debt collection professionals, the "most common" types of furnishers of such information are "credit card issuers, auto dealers, department and grocery stores, lenders, utilities, . . . and government agencies." *Gorman* v. *Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1013 n.7 (9th Cir. 2009) (internal quotation marks omitted). As this case demonstrates, the issue also affects medical professionals and other providers of professional services who furnish credit information to CRAs. All told, there are some 30,000 to 40,000 furnishers of credit information nationwide that are affected by the FRCA preemption issue presented here.[8] And because California is a large and important state, the decision below, if left uncorrected, will have a significant effect on businesses with nationwide operations and on the overall system of credit information.

The impact on furnishers of credit information – and thus on the overall usefulness of the Nation's

---

[8] See *Sarver* v. *Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (Experian "gathers credit information originated by approximately 40,000 sources"); FEDERAL TRADE COMMISSION, REPORT TO CONGRESS UNDER SECTIONS 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 8-9 (Dec. 2004), available at http://www.ftc.gov /reports/facta/041209factarpt.pdf ("The three nationwide CRAs maintain files on approximately 200 million U.S. consumers and issue more than 1.5 billion reports a year in response to consumer applications for credit, employment, and insurance. The data in these files are provided on a voluntary basis by about 30,000 data furnishers.").

system of credit information – will be especially pronounced because the participation of furnishers is *voluntary*. Furnishers rely on the significant protections offered by Section 1681t(b)(1)(F) as a shield against burdensome and expensive state-law regulation and litigation that might otherwise arise out of their disclosures of information to CRAs. Furnishers also rely on the fact that, as explained above (at page 2), Congress has created very limited federal private rights of action with regard to furnisher conduct and liability. The California Supreme Court's extremely cramped reading of the FCRA's preemption clause relating to furnishers removes an important protection to furnishers and, if permitted to stand, may spur many businesses to simply refuse to provide credit information in the future (thereby diminishing the value of the entire system).

Finally, there can be no serious doubt that the issue presented in this case arises with great regularity in both the federal and state courts. The petition cites an extremely large number of cases in which the issue has arisen. See Pet. 10-38. And because many state decisions are unreported, the actual number of cases in which issues of Section 1681t(b)(1)(F)'s preemptive scope has arisen is doubtless far larger. This recurring issue, which has sharply divided the lower courts, is nationally important and amply deserving of this Court's attention.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted, or at least held for *National Meat Association* v. *Harris*, No. 10-224.

Respectfully submitted.

ALAN UNTEREINER*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

* *Counsel of Record*

November 7, 2011