UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

ILLINOIS BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, and ILLINOIS CREDIT UNION LEAGUE, *Plaintiffs*, v. KWAME RAOUL, in his official capacity as Illinois Attorney General, *Defendant*.	Case No. 1:24-cv-07307 Hon. Virginia M. Kendall

JOINT SUPPLEMENTAL BRIEF REGARDING PLAINTIFFS' ARGUMENTS FOR PREEMPTION UNDER THE FEDERAL CREDIT UNION ACT AND 12 U.S.C. 1831a(j)

Plaintiffs Illinois Bankers Association ("IBA"), American Bankers Association ("ABA"), America's Credit Unions ("ACU"), and Illinois Credit Union League ("ICUL"), and Defendant Kwame Raoul, in his official capacity as Illinois Attorney General, respectfully submit this joint supplemental brief in response to the Court's December 20, 2024 order directing additional briefing on Plaintiffs' claims that the Federal Credit Union Act ("FCUA") and 12 U.S.C. § 1831a(j) ("§ 1831a(j)") preempt certain applications of the Illinois Interchange Fee Prohibition Act ("IFPA"). *See* Dkt. No. 104 at 27, 32. In particular, the Court asked whether the statutes create a private right of action upon which Plaintiffs can rely. As the parties explain below, they agree that no private right of action under the FCUA or § 1831a(j) is necessary for Plaintiffs' preemption claims to proceed to a merits determination.

PROCEDURAL BACKGROUND

On August 15, 2024, Plaintiffs filed a complaint against the Attorney General asserting that several different sources of federal law preempt the IFPA. *See* Dkt. No. 1. Plaintiffs allege,

among other things, that the FCUA preempts application of the IFPA as to federal credit unions, *see id.* at ¶ 220, and that § 1831a(j), in conjunction with the National Banking Act, preempts application of the IFPA as to banks that are chartered by states other than Illinois, *see id.* at ¶ 206. Plaintiffs bring their claims in equity under the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). *See* Dkt. No. 1 at ¶ 20.

On August 20, 2024, Plaintiffs filed a preliminary injunction motion seeking to preclude the Attorney General from enforcing the IFPA while this case is pending, relying in relevant part on their FCUA and § 1831a(j) preemption claims. *See* Dkt. No. 15; Dkt. No. 24 at 27, 29-32. The Attorney General opposed and filed a motion to dismiss. *See* Dkt. No. 75; Dkt. No. 76.

On December 20, 2024, the Court issued its order on Plaintiffs' preliminary injunction motion and the Attorney General's motion to dismiss. *See* Dkt. No. 104. The Court granted each motion in part. *See id.* at 1. The Court did not, however, reach the merits of Plaintiffs' arguments that the FCUA and § 1831a(j) preempt the IFPA in certain circumstances. As to each of those federal statutes, the Court raised the issue of whether the statute created a private right of action upon which Plaintiffs can rely. *See id.* at 25 ("There is a threshold question, however, which neither party explicitly raised, pertaining to the FCUA—whether a private right of action exists for [Plaintiffs] to bring their FCUA claim."); *id.* at 32 ("Like the FCUA, however, there also does not appear to be a private right of action under [§ 1831a(j)]."). The Court stated that, "because this issue was not briefed by either party, the Court requires additional briefing on whether FCUA provides a private right of action." *Id.* at 27; *see also id.* at 32 (similar as to § 1831a(j)). As to each statute, the Court directed Plaintiffs to "submit a brief of no more than 10 pages" by January 15, 2025, and gave the Attorney General until January 22, 2025 to "file a response of no more than 10 pages." *Id.* at 27 (FCUA); *Id.* at 32 (§ 1831a(j)). The Court indicated that after receiving this

supplemental briefing, it will proceed to resolve these aspects of Plaintiffs' preliminary injunction motion on the merits. *See id.* at 27, 32.

Because Plaintiffs and the Attorney General agree that no private right of action under the FCUA or § 1831a(j) is necessary for Plaintiffs' preemption claims to proceed, the parties respectfully submit this joint brief in response to the Court's order.

APPLICABLE AUTHORITY

Plaintiffs' cause of action to argue that the FCUA and § 1831a(j) preempt the IFPA arises in equity. As the Supreme Court held in *Armstrong v. Exceptional Child Center*, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. 320, 327 (2015). *Ex parte Young* is the seminal decision recognizing the existence of this equitable cause of action. *See* 209 U.S. at 148 (holding that a federal court had the "power" in equity to "grant a temporary injunction" preventing Minnesota's attorney general from enforcing a state law setting maximum railroad rates that contravened federal law).

The Seventh Circuit has confirmed that it is "long recognized" that "if an individual claims federal law immunizes him from state regulation, the [federal] court may issue an injunction upon finding the state regulatory actions preempted." *Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 346 (7th Cir. 2018) (citing *Armstrong*, 575 U.S. at 327). "The district court's authority in this respect" is equitable and need not be based on a separate "implied right of action read into the Supremacy Clause." *Id.*; *see also Int'l Union of Op. Eng'rs v. Vill. of Lincolnshire*, 905 F.3d 995, 999 (7th Cir. 2018) ("Although the Supremacy Clause does not create a freestanding private right of action, a plaintiff may 'sue to enjoin unconstitutional actions by state and federal officers' in violation of supreme federal law by invoking courts' equitable powers or through the

comparable mechanisms provided by the Declaratory Judgment Act." (citing *Restoration Risk Retention Grp.*, 880 F.3d at 346, and *Armstrong*, 135 S. Ct. at 1384)), *judgment vacated as moot*, 139 S. Ct. 2692 (2019).

Here, the parties agree that Plaintiffs' arguments that the FCUA and § 1831a(j) preempt the IFPA fit within this *Armstrong* and *Ex parte Young* framework and that, accordingly, no private right of action under the FCUA or § 1831a(j) is separately required. *See* Dkt. No. 1 at ¶¶ 20-21 (invoking *Armstrong*, *Ex parte Young* and the Declaratory Judgment Act). In that respect, these arguments are like those raised and resolved on the merits in other cases asserting that these same federal statutes preempt state laws. *See, e.g.*, *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1022 (E.D. Cal. 2002) (granting permanent injunction against California Attorney General's enforcement of state law that was preempted by the FCUA); *Wells Fargo Bank Tex., N.A. v. James*, 184 F. Supp. 2d 588, 591 (W.D. Tex. 2001) (granting permanent injunction against Texas Banking Commissioner's enforcement of state law that was preempted by § 1831a(j) and other federal statutes), *aff'd*, 321 F.3d 488 (5th Cir. 2003).

The parties further agree that this case is unlike those noted in the Court's December 20, 2024 order in which courts dismissed claims under the FCUA or § 1831a(j) on the ground that there was no applicable private right of action. In those cases, one private party sought relief against another private party on the basis of a right or duty allegedly grounded in the federal statute. *See, e.g.*, *Sly v. DFCU Fin. Fed. Credit Union*, 443 F. Supp. 2d 885 (E.D. Mich. 2006) (credit union members seeking injunction under FCUA against credit union to remove all nine directors of board); *Hicks v. Resolution Tr. Corp.*, 767 F. Supp. 167, 171 (N.D. Ill. 1991) (former vice president seeking money damages or civil penalties under § 1831a for wrongful discharge against savings and loan association), *aff'd*, 970 F.2d 378 (7th Cir. 1992). Plaintiffs make no such claim.

Accordingly, the parties agree that no private right of action under the FCUA or § 1831a(j) is required here. The parties maintain their respective positions on the merits of the remaining aspects of Plaintiffs' request for a preliminary injunction.

Dated: January 15, 2025

Respectfully submitted,

/s/ *Bethany K. Biesenthal*

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CERTIFICATE OF SERVICE

I hereby certify that, on January 15, 2025, a copy of the foregoing was filed using the CM/ECF system, which will effectuate service on all counsel of record.

/s/ *Bethany K. Biesenthal*

Attorney for Illinois Bankers Association, American Bankers Association, America's Credit Unions, and Illinois Credit Union League