UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON VICINAGE

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. ANDREW J. BRUCK, Acting Attorney General of New Jersey, Defendant.	Hon. Zahid N. Quraishi, U.S.D.J. Hon. Tonianne J. Bongiovanni, U.S.M.J. Civil Action No. 3:19-cv-19054-ZNQ-TJB **CIVIL ACTION** Motion Return Date: February 22, 2022

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56(c)

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PRELIMINARY STATEMENT

Society has become ever more dependent on credit for most financial decisions. As a result, a good credit history and strong credit rating are vital for many consumers. The information that is contained in a consumer's credit reporting file affects their access to home mortgages, car loans, credit cards, utility services, residential tenancies, employment, and insurance. In addition, it can control the rate at which consumers may obtain credit. Understanding the importance of consumer credit, Congress enacted a federal consumer protection statute, the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. §§ 1681 to 1681(x), in 1970. This Act ensures the accuracy and privacy of information contained in the files of nationwide consumer reporting agencies ("CRAs") by regulating the way that CRAs collect, access, use, and share the data they collect. New Jersey, also recognizing the importance of consumer credit, enacted the New Jersey Fair Credit Reporting Act (the "NJFCRA"), N.J. Stat. Ann. §§ 56:11-28 to -43, in July 1997. The legislation, which models the FCRA, also promotes accuracy, fairness, and consumer confidence and provides additional layers of consumer protection to New Jerseyans consistent with the requirements of the FCRA.

New Jersey has long been a diverse State in which a very substantial portion of residents do not call English their native tongue. In the years since the NJFCRA was originally enacted that trend has continued. Recognizing the nexus between the

importance of consumer credit and the demographic landscape in New Jersey, the NJFCRA was amended in July 2019 to ensure that New Jersey consumers who primarily speak languages other than English can obtain meaningful protection. These amendments, found in N.J. Stat. Ann. § 56:11-34, went into effect in October 2019. The statute directed the Director of the Division of Consumer Affairs ("DCA Director") to issue regulations that will require CRAs that compile and maintain files on consumers on a nationwide basis to make the information required to be disclosed per the FCRA available to consumers, upon request and after initial disclosure in English, in Spanish and in at least ten other languages that the DCA Director determines are the first language of a significant number of New Jersey consumers. These statutory changes make sure that New Jerseyans who primarily speak languages other than English share equally in all of the benefits of one of the key features of consumer protection law: the annual disclosure of credit information. This will not just allow New Jersey consumers to obtain the information in their credit reports in a language they are most comfortable with, it will enable consumers to make real use of that information—such as to confirm that their credit reports do not contain inaccurate or unfairly prejudicial information.

Nonetheless, the Consumer Data Industry Association ("CDIA"), an international trade association, contends that the NJFCRA is preempted by the FCRA. But that argument cannot prevail because Plaintiff misunderstands the

requirements of the NJFCRA and scope of preemption in this context. The NJFCRA is neither expressly nor impliedly preempted by the FCRA. Rather, the NJFCRA seeks to protect New Jersey residents with *additional* layers of consumer protection by requiring nationwide CRAs to issue the mandated file disclosures to consumers in Spanish and no fewer than ten other languages to be identified by the DCA Director, after the initial release of the information in English, upon request. Nothing in the FCRA says that New Jersey cannot exercise its well-established authority in the area of consumer protection in this manner, and there is no doubt that the CRAs can simultaneously comply with both state and federal law. Accordingly, N.J. Stat. Ann. § 56:11-34 is not preempted.

Plaintiff also contends that the NJFCRA impermissibly regulates commercial speech in violation of the First Amendment. This argument also lacks merit as the NJFCRA satisfies the four-prong test articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). As the NJFCRA directly advances a substantial government interest—to ensure that the benefits of consumer protection reach all New Jerseyans, regardless of their native language—and because the requirements of the NJFCRA are narrowly tailored to advance that vital interest, the NJFCRA legally regulates commercial speech.

The Court should grant summary judgment in favor of Defendant.

STATEMENT OF THE CASE

A. The FCRA.

The purpose of the FCRA is to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." Dkt. 22 at ¶¶ 6-7; *Safeco Ins. Co. of Am. v. Burr.*, 551 U.S. 47, 52 (2007) (citing 15 U.S.C. § 1681). It was enacted by Congress in 1970 to ensure that consumer reporting is undertaken in a way that is "fair and equitable to the consumer" with regard to the "confidentiality, accuracy, relevancy, and proper utilization" of consumer information. 15 U.S.C. § 1681; *Burr*, 551 U.S. at 52.

In 2003, the FCRA was amended by the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), in an effort, among other things, to "prevent identity theft . . . [a]nd make improvements in the use of, and consumer access to, credit information . . . ." 149 CONG. REC. H8122 (daily ed. Sept. 10, 2003) (statement of Rep. Michael Oxley). The FACT Act also provides consumers with the ability to obtain a free copy of their credit report annually from nationwide CRAs. 15 U.S.C. §§ 1681-1681(x).

The amendments required the Federal Trade Commission ("FTC") to adopt regulations regarding the establishment of a centralized source through which consumers could request a free annual file disclosure from CRAs. Free Annual File Disclosures, 69 Fed. Reg. 35,468 (June 24, 2004) (now codified at 12 C.F.R. §

1022.130). During this process, the FTC considered whether it should require CRAs to provide disclosures or instructions in languages other than English, that are spoken by a substantial number of consumers in the United States. *Id.* at 35,476. The FTC ultimately chose not to require CRAs, *at that time*, to provide the instructions in other languages. In doing so, the FTC advised that:

> Many consumer advocacy groups and a state official suggest that the centralized source be required to provide instructions in languages, other than English, that are spoken by a substantial number of consumers in the United States. These commenters point to the fact that a significant portion of the United States population communicates primarily in languages other than English. Having carefully considered these comments, the Commission has determined not to require instructions in other languages. The Commission believes that requiring multi-language translations of centralized source materials, including the centralized source website itself, would impose significant additional burden on the nationwide consumer reporting agencies at a time when they will already be responding to the multiple and varied new obligations that the FACT Act imposes upon them. Accordingly, the Commission declines, *at this time*, to require multi-language centralized source information and instructions. The Commission, however, intends to provide education and outreach to consumers concerning the final rule in Spanish—the language most commonly mentioned by commenters on this issue—and encourages other stakeholders in the centralized source, including the nationwide consumer reporting agencies, to do the same.
>
> [*Id.* at 35,476 (emphasis added).]

So while the FTC declined to require CRAs to provide annual disclosures in languages other than English, it still recognized—nearly two decades ago—that a

significant number of consumers in the United States primarily communicated in languages other than English and notably did not find that requiring CRAs to do so would be inconsistent with the FCRA. *Id.* On the contrary, the FTC encouraged CRAs to voluntarily provide required information in Spanish. *Id.* In sum, the FTC simply concluded that it was not prudent to require the dissemination of required information in languages other than English *simultaneously* with the implementation of the 2003 amendments to the FCRA.

B. The NJFCRA and its 2019 Amendments.

In 1997, New Jersey enacted the NJFCRA. *See* 1997 N.J. Sess. Law Serv. Ch. 172 (codified at N.J. Stat. Ann. §§ 56:11-28 to -43). The stated purpose of the legislation was to:

> [P]rovide additional consumer protection with respect to consumer credit reports and credit reporting agencies consistent with the provisions of the "Federal Fair Credit Reporting Act."
>
> [N.J. Stat. Ann. § 56:11-29(e).]

The NJFCRA was amended in July 2019. *See* 2019 N.J. Sess. Law Serv. Ch. 183 (codified as amended at N.J. Stat. Ann. § 56:11-34). The amended statute, N.J. Stat. Ann. § 56:11-34, is entitled "Disclosure to consumer" (the "2019 NJFCRA Amendments"). The 2019 NJFCRA Amendments require CRAs to make the information required to be disclosed under the FCRA available to consumers, upon request, in Spanish and in any other language that the Director of the Division of

Consumer Affairs (the "DCA Director") determines is the first language of a significant number of consumers in the State. *Id.* This determination is at the discretion of the DCA Director, but is to be based on statistics regarding New Jersey consumers for whom English and Spanish is not a first language or in a manner consistent with any regulations promulgated by the DCA Director for this purpose.[1] *Id.*

Moreover, N.J. Stat. Ann. § 56:11-34 directs the DCA Director to require that consumer reporting information be made available in at least the ten languages—other than English and Spanish—that are most frequently spoken as a first language by consumers in this State. *Id.* Further, the statute requires CRAs to provide notice of the availability of consumer reporting information in languages other than English on their websites in a clear and conspicuous location, in languages to be determined by the DCA Director. *Id.* Finally, the NJFCRA defines the term "reporting agency that complies and maintains files on consumers on a nationwide basis" to clarify that the responsibility of disseminating the required information in different languages falls on nationwide CRAs, such as Equifax, Experian, and TransUnion, and not on small, regional, or specialty reporting agencies.

In short, the NJFCRA requires nationwide CRAs to release disclosure

[1] The DCA Director has not yet proposed or promulgated any regulations pursuant to the 2019 NJFCRA Amendments.

information required by the FCRA in languages other than English and Spanish that are widely spoken in New Jersey, upon consumers' request and after the information is initially released in English, so that those consumers can more readily read and understand their credit reports. The stated legislative intent of the 2019 NJFCRA Amendments was to provide *additional* consumer protection to non-English speaking New Jerseyans by removing language barriers that could otherwise prevent these residents from meaningfully accessing and understanding their credit reports. *See* Press Release, New Jersey Assembly Democrats, Credit Reports Will Be Available in Spanish and Other Languages Under New Law Sponsored by Lopez, Holley and Schaer (July 19, 2019), https://bit.ly/33QiY6S.

C. The Instant Action[2]

On October 17, 2019, the same day that the 2019 NJFCRA Amendments became effective, Plaintiff filed its Complaint seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Dkt. 1.

Plaintiff asserts three primary theories. First, Plaintiff contends that the NJFCRA is expressly preempted by the FCRA. *See* Dkt. 1, Count I. Plaintiff says that N.J. Stat. Ann. § 56:11-34 seeks to regulate the CRAs' "conduct" regarding the

[2] To avoid repetition, and for the court's convenience, Defendant hereby incorporates by reference his "Statement of Material Facts Not in Dispute," and the parties' "Stipulated Facts for Purposes of Summary Judgment Motions." *See* Dkt. 22.

issuance of annual file disclosures. Dkt. 1 at ¶ 26. Plaintiff argues that the NJFCRA's requirement that CRAs disseminate the required information, at the request of consumers, in at least eleven languages other than English that the DCA Director determines are the first language of a significant number of New Jersey consumers, constitutes regulation of conduct already required by the FCRA. *Id.* According to Plaintiff, that amounts to a violation of 15 U.S.C. § 1681t(b)(5). *Id.*

Second, Plaintiff asserts that the NJFCRA is impliedly preempted by the FCRA because it conflicts with the federal statute. Specifically, Plaintiff contends that N.J. Stat. Ann. § 56:11-34, as amended in 2019, compels CRAs to issue a "translation and/or interpretation" of the information contained in a consumer's file, instead of the information "actually found" in the files. Dkt. 1 at ¶ 33. As such, Plaintiff argues that its members will not be able to comply with the NJFCRA without violating the FCRA, so the NJFCRA is preempted. *Id.* at ¶ 34.

Finally, Plaintiff argues that the NJFCRA impermissibly regulates commercial speech in violation of the First Amendment. *Id.* at ¶ 39. Plaintiff contends that the NJFCRA compels its members (1) to "speak" in at least eleven languages other than English by providing file disclosures in those languages, and (2) to promote these services on their websites. Plaintiff says this violates the First Amendment because the NJFCRA is not narrowly tailored enough to advance the admittedly important goal of ensuring that all New Jersey consumers are protected.

Defendant filed an Answer to the Complaint on February 14, 2020. Dkt. 7. The parties submitted "Stipulated Facts for Purposes of Summary Judgment Motions" on January 19, 2021, *see* Dkt. 22, and agreed by way of consent order to file cross-motions for summary judgment. Dkt. 33. Defendant's motion for summary judgment follows.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Carpenter v. Chard*, 492 F. Supp. 3d 321, 327 (D.N.J. 2020); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 482 (3d Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The standard does not change when the parties have filed cross-motions for summary judgment. *Ward v. Barnes*, 545 F. Supp. 2d. 400, 407-408 (D.N.J. 2008). In making this determination, the court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor. *Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mount Laurel*, 706 F.3d 527, 528 (3d Cir. 2013). At bottom, the "purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." *Goodman v. Mead Johnson & Co.*, 534 F.2d. 566, 573 (3d Cir. 1976).

ARGUMENT

I. THE 2019 NJFCRA AMENDMENTS ARE NOT PREEMPTED BY FEDERAL LAW.

The core of Plaintiff's case is their flawed theory that the FCRA either expressly or impliedly preempts the 2019 NJFCRA Amendments, specifically the requirement that CRAs provide New Jersey consumers with file disclosures in multiple languages other than English, *see* N.J. Stat. Ann. § 56:11-34. But Plaintiff seriously misapprehends that statute and the scope of preemption.

As Plaintiff's preemption theories plainly fail on their merits, Counts I and II of the Complaint must be dismissed.

A. The FCRA Does Not Expressly Preempt the 2019 NJFCRA Amendments.

Plaintiff cites to one provision of federal law in support of its argument, *see* Dkt. 1, Count I, that N.J. Stat. Ann. § 56:11-34 is expressly preempted: Section 625(b)(5) of the FCRA, which is codified at 15 U.S.C. § 1681t(b)(5).

Express preemption "arises when there is an explicit statutory command that state law be displaced." *St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't of the V.I.*, 218 F.3d 232, 238 (3d Cir. 2000). In interpreting a preemption case, two black letter rules apply. First, the intent of Congress is considered to be the "ultimate touchstone" of the analysis. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*,

505 U.S. 504, 516 (1992). Second, there is a presumption against preemption when Congress legislates in a field that the States have traditionally occupied. *Medtronic*, 518 U.S. at 485. In such cases, it is assumed that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). When the state statute pertains to a field that states have traditionally occupied, the federal statute will preempt that state's laws only when "that was the clear and manifest purpose of Congress." *Sprietsma v. Mercury Maine*, 537 U.S. 51, 63 (2002). Consumer protection is a field that the states have traditionally occupied. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41 (2d Cir. 1990). The Supreme Court has explained that:

> In interpreting the scope of a preemption clause, we generally presume that Congress has not intended to preempt state law, starting with the assumption that the historic police powers of the States are not to be superseded by federal legislation unless it is the clear and manifest purpose of Congress.
>
> [*Cipollone*, 505 U.S. at 516.]

Plaintiff's flawed argument is that the NJFCRA is preempted by the FCRA because N.J. Stat. Ann. § 56:11-34 seeks to regulate "conduct" of CRAs which is already regulated by the FCRA in violation of 15 U.S.C. § 1681t(b)(5).

The FCRA has two provisions which address preemption, both of which are contained in 15 U.S.C. § 1681t, which is entitled "Relation to State laws." The FCRA adopts the "general" rule, *see* 15 U.S.C. § 1681t(a), that state law is *not* preempted unless it is inconsistent with the FCRA or unless it is expressly preempted by the

specific provisions in 15 U.S.C. § 1681t(b). The general preemption clause, 15 U.S.C. § 1681t(a), effectively incorporates the concept of "conflict preemption" which provides that when a state law conflicts with federal law, the state law is preempted.[3] *Farina v. Nokia, Inc.*, 625 F.3d. 97, 115 (2010). Specifically, the "general" preemption rule under the FCRA states that:

> Except as provided in subsections (b) and (c), this title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, *except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency*.
>
> [15 U.S.C. § 1681t(a) (emphasis added).]

Hence, unless a state law attempts to regulate in the enumerated areas of 15 U.S.C. §§ 1681t(b) and (c), it is preempted only to the extent it is inconsistent with the FCRA. *Id.*

So while it is generally true under the FCRA that state law is not preempted unless it is in direct conflict with a provision of the FCRA, Congress provided several specific exceptions to this general rule. *See* 15 U.S.C. § 1681t(b) and (c). Plaintiff relies on the exception in 15 U.S.C. § 1681t(b), which provides, in relevant

[3] Put another way, a state law is in conflict with the FCRA when compliance with the state law would result in a violation of the FCRA. *Aghaeepour v. N. Leasing Sys., Inc.*, 378 F. Supp. 3d 254, 263 (S.D.N.Y. 2019).

part, that "[n]o requirement or prohibition may be imposed under the laws of any State—with respect to the conduct required by" twelve specific FCRA provisions enumerated in 15 U.S.C. § 1681t(b)(5)(A) through (I). The majority of these provisions relate to identity theft and other matters which the parties agree are not relevant here. *See* 15 U.S.C. §§ 1681t(b)(5)(A) to (I). However, Plaintiff invokes two sections in support of its express preemption arguments: (1) 15 U.S.C. § 1681t(b)(5)(B), citing responsibilities required by 15 U.S.C. § 1681c-1; and (2) 15 U.S.C. § 1681t(b)(5)(D), citing responsibilities required by 15 U.S.C. § 1681g(a)(1)(A). Both of these provisions are relevant to the obligation CRAs have under the FCRA to issue file disclosures to consumers in certain circumstances. Plaintiff asserts that the NJFCRA attempts to impose "requirements" with "respect to the conduct required by" these two provisions in violation of 15 U.S.C. § 1681t(b)(5)(B) and (D). *See generally* Dkt. 1, Count I. in viol in 1681t(b)(5).

As a general matter, 15 U.S.C. § 1681t(b)(5) must be interpreted to mean that the states cannot require anything that federal law prohibits or prohibit anything that federal law expressly allows under the FCRA. But N.J. Stat. Ann. § 56:11-34 does no such thing. If Plaintiff's interpretation of 15 U.S.C. § 1681t(b)(5) is correct, then states will be proscribed from enacting any laws that impose additional consumer protections that relate in any manner whatsoever to CRAs' file disclosure obligations under federal law, even if that state's rule is completely consistent with the FCRA.

This conclusion is inconsistent not only with the preemption provisions in the FCRA but with the well-established presumption against preemption that is a core principle of statutory interpretation. *See Medtronic*, 518 U.S. at 485. Certainly, Congress' intent was not to stop states from enacting consumer protection statutes as this is a field in which states have traditionally exercised expansive powers. *Gen. Motors Corp. v. Abrams*, 897 F.2d at 41. Additionally, the plain language of 15 U.S.C. § 1681t(b)(5), the best evidence of Congress' intent, indicates that the provision does not sweep broadly, as Plaintiff suggests, but is to be applied narrowly. The terms "with respect to," "conduct required by" and "the specific provisions of" contained in 15 U.S.C. § 1681t(b)(5) demand a limited preemption construction. As with any preemption provision, courts must construe 15 U.S.C. § 1681t(b)(5) narrowly because "each phrase" limits the ability of state action. *See Galper v. JP Morgan Chase Bank*, 802 F.3d 437, 445 (2d Cir. 2015). Applying these principles, it is clear that, in enacting 15 U.S.C. § 1681t(b)(5), Congress intended to preempt only those state laws that regulate conduct identical to that regulated by the FCRA in the statute's enumerated provisions.

That is not the case here. The NJFCRA simply does not seek to regulate conduct identical to that which is required by the FCRA. Rather, the NJFCRA regulates *additional* conduct, not "required by" any of the enumerated provisions, that incidentally affects CRAs. Specifically, N.J. Stat. Ann. § 56:11-34 requires

CRAs to issue the FCRA's required file disclosures to consumers in different languages upon the request of consumers, *after* the initial release of the file disclosure information in English. New Jersey's requirement codified in the NJFCRA is simply a supplement to the FCRA and designed to meet specific consumer protection needs in one of the nation's most diverse states where one third of residents speak a language other than English at home. Carla Astudillo & Disha Raychaudhuri, *About 2.6M people in N.J. don't speak English at home, new Census data shows*, NJ ADVANCE MEDIA FOR NJ.COM (Jan. 16, 2019, 2:18 PM), https://bit.ly/3qJ9L9s.

Given the construction of 15 U.S.C. § 1681t(b), and in light of Plaintiff's specific preemption theories, the question the court must ask is whether N.J. Stat. Ann. § 56:11-34 imposes a requirement with respect to the conduct required by 15 U.S.C. § 1681t(b)(5)(B) and (D). Begin with 15 U.S.C. § 1681t(b)(5)(B), which states that:

> [N]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the *specific* provisions of . . . [15 U.S.C. § 1681c-1] . . . .
>
> [15 U.S.C. § 1681t(b)(5)(B) (emphasis added).]

To begin with, the use of the term "specific" in this context clearly counsels in favor of a narrow construction of the preemption provision, meaning that only a state law requirement which imposes a requirement or prohibition with respect to the specific

conduct required by 15 U.S.C. § 1681c-1 can be preempted. The NJFCRA simply does not impose a requirement with respect to the conduct required by 15 U.S.C. § 1681c-1, which deals with "[i]dentity theft prevention[,] fraud alerts[,] and active duty alerts." The only portion of this provision that deals in any way with file disclosures by CRAs is 15 U.S.C. § 1681c-1(2), which provides, in pertinent part, that "[i]n any case in which a [CRA] includes a fraud alert in the file of a consumer pursuant to this subsection, the [CRA] shall" do two specific things: first, "disclose to the consumer that the consumer may request a free copy of the file of the consumer[,]" *see* 15 U.S.C. § 1681c-1(2)(A); and, second, provide to the consumer all [required disclosures], without charge to the consumer, not later than [three] business days after any request[,]" *see id.* § 1681c-1(2)(B). Put another way, in the context of identity theft protection and fraud alerts, the FCRA requires CRAs to notify consumers of their right to request a copy of their file and disclose that file to the consumer upon request within three days. N.J. Stat. Ann. § 56:11-34 does not interfere with this obligation in any way, and certainly does not impose any *requirement* with respect to the *conduct* that is required of CRAs under 15 U.S.C. § 1681c-1.

Next, the court must look to 15 U.S.C. § 1681t(b)(5)(D), which states:

> [N]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the *specific* provisions of . . . [15 U.S.C. § 1681g(a)(1)(A)] . . . .

[15 U.S.C. § 1681t(b)(5)(D) (emphasis added).]

15 U.S.C. § 1681g(a)(1)(A), which is entitled "Disclosures to consumers," provides, in the relevant part, that CRAs "shall, upon request, . . . clearly and accurately disclose to the consumer . . . all information in the consumer's file at the time of the request[.]" Again, the NJFCRA does not impose a requirement with respect to the conduct required by 15 U.S.C. § 1681g(a)(1)(A). This section, similar to 15 U.S.C. § 1681t(b)(5)(B) above, requires CRAs to issue annual credit reports at the request of consumers. The NJFCRA does not prohibit or impose any requirement which interferes with this responsibility. Again, the NJFCRA simply directs CRAs to provide required disclosures in a language requested by a consumer, after the initial release of the information in English. It is crystal clear that N.J. Stat. Ann. § 56:11-34 does not impose a requirement on the conduct that is required by the FCRA. The statute does not seek to regulate the content of the disclosures or the frequency of the disclosures which are required by the FCRA. The NJFCRA only directs that the information be provided in a manner that the consumer can comprehend. This is not preempted.

Plaintiff's preemption logic seems to be that, because 15 U.S.C. § 1681c-1 and 15 U.S.C. § 1681g(a)(1)(A) have anything at all to do with the disclosure of required information, the State is powerless to regulate anything about consumer files, period. But that incredibly broad view of the FCRA's preemption provisions

flies in the face of the plain language of the law and well-established principles of statutory interpretation. The NJFCRA does not impose requirements on any of the conduct required by the preemption provisions of the FCRA that Plaintiffs cite to support their express preemption theory. Rather, the NJFCRA aids and facilities the requirements of the FCRA to ensure that the goals of the FCRA are realized by all New Jersey residents. Plaintiff's interpretation of the FCRA would essentially render each of the fifty states powerless to regulate anything having to do with the consumer files that are maintained by CRAs, even though consumer protection is an area that states have traditionally occupied, regardless of the plain language of the FCRA that makes clear such laws are not expressly preempted, and even though the stakes for consumers are substantial. That cannot be permitted.

As indicated above, because the NJFCRA seeks to require additional actions on the part of CRAs—respecting conduct that is *not* required or prohibited under the FCRA—to meet New Jersey's unique consumer protection needs, the NJFCRA is not expressly preempted. Thus, this Court should grant summary judgment in favor of Defendant with respect to Count I of the Complaint.

B. The FCRA Does Not Otherwise Preempt the 2019 NJFCRA Amendments.

Because the FCRA does not expressly preempt the 2019 NJFCRA Amendments, Plaintiffs are left to argue that the FCRA somehow impliedly preempts the State's decisions regarding how best to protect New Jersey consumers.

See Dkt. 1, Count II. Plaintiffs rely upon "conflict preemption," under which a state law is preempted when it "stand[s] as an obstacle to the accomplishment and execution" of a federal law. *Arizona v. United States*, 567 U.S. 387, 399 (2012). Conflict preemption arises under narrow circumstances where a regulated entity cannot comply with both state and federal law. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Nothing less than an *actual* conflict must be identified. *English v. General Electric Co.*, 496 U.S. 72, 90 (1990). The mere existence of a potential or proposed conflict does not result in preemption. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

Plaintiff's Complaint says that N.J. Stat. Ann. § 56:11-34 runs afoul of Section 625(a) of the FCRA, codified at 15 U.S.C. § 1681t(a)—the "general" preemption provision discussed in Point I.A above[4]. But, more precisely, Plaintiff argues that the NJFCRA, by requiring the dissemination of information required to be disclosed by CRAs under the FCRA in different languages, compels these agencies to issue a "translation and/or interpretation" of the information in a consumer's file, rather than information "actually found" in the files. Dkt. 1 at ¶ 33. Plaintiff relies on the FCRA's definition of the term "file," which states:

[4] Parenthetically, the general preemption clause of the FCRA directs that if a state statute is determined to be inconsistent with the FCRA, preemption applies "only . . . to the extent of the inconsistency." 15 U.S.C. § 1681t(a). While the NJCFRA is clearly not preempted by federal law, if this court were to find otherwise, it should limit its decision as narrowly as possible to preserve the NJFCRA.

> [W]hen used in connection with information on any consumer, ["file"] means all of the information on that consumer recorded and retained by a consumer reporting agency *regardless of how the information is stored*.
>
> [15 U.S.C. § 1681a(g) (emphasis added).]

But, to the contrary, providing file information in a language other than English does not change the underlying information contained in the file. As such, CRAs can comply with the requirements of both the FCRA and the NJFCRA, so there is no preemption.

Plaintiff's entire theory of conflict preemption relies on the strange notion that translating information from one language to another somehow fundamentally alters the information itself. But, first and foremost, there is no requirement in the FCRA that consumer files be maintained in English (or in any other language, for that matter). Further, contrary to Plaintiff's contention, the translation of file disclosure materials into a different language does not change the information "actually found" or stored in the file. It only changes the language used to convey the information. The actual information being conveyed remains the same. Take Plaintiff's argument to its absurd conclusion: if translation from one language to another fundamentally changes the underlying information itself—as Plaintiff contends—then all manner of translations would be meaningless. But, of course, it is generally understood and accepted as a matter of common sense that translation changes the mode of

communication, but not the underlying message. No one would seriously dispute that, for example, the Constitution—if translated into Spanish—loses its meaning. The First Amendment and the Supremacy Clause have the same meaning, no matter what language they are conveyed in. The same is true here.

Along the same lines, it is already the case that CRAs must disseminate their file disclosures in a manner that is digestible for consumers, which inevitably requires some degree of alteration in style rather than substance. For example, when CRAs provide file information to a consumer, they do not reproduce that data in an exact carbon copy of the manner in which it is stored. It is likely "translated" in other ways—for example, for ease of understanding, branding, from hard copy to digital or vice versa, and presumably in other ways too. The information in the consumer files is synthesized and then presented to the consumer. This process is no different from translating that information into a different language. Plaintiff's interpretation would mean that the information would have to be produced in the same exact manner it is stored. This clearly is not the intent of the Congress.

As discussed previously, the NJFCRA imposes additional obligations on CRAs, namely requiring them to provide file disclosures to consumers in a language requested by the consumer, after the initial release of the information in English. This action does not preclude or conflict with compliance with federal requirements, but requires a second disclosure in another language, only upon request. It is true

that the NJFCRA requires the CRAs to take steps that the FCRA neither requires nor proscribes. But compliance with the NJFCRA in no way interferes with, or prevents, CRAs from complying with the obligations imposed by the FCRA.

Accordingly, because N.J. Stat. Ann. § 56:11-34 is not impliedly preempted by federal law, the court should grant Defendant summary judgment with respect to Count II of the Complaint.

II. THE 2019 NJFCRA AMENDMENTS DO NOT VIOLATE THE FIRST AMENDMENT.

Finally, Plaintiff erroneously contends that the 2019 NJFCRA Amendments amount to an unconstitutional "restriction of commercial speech" under the First Amendment, because N.J. Stat. Ann. § 56:11-34 compels its members to "speak in at least eleven different languages other than English by providing file disclosures [in] those languages, and to promote those services on its website." *See* Dkt. 1, Count III, ¶ 39. This argument fails as a matter of law.

Commercial speech is defined as speech that promotes at least some type of commerce. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-762 (1976). There is no dispute here that the First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from *unwarranted* governmental regulation. *Id.* But commercial speech is granted less protection than other forms of constitutionally-protected expression. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456-457 (1978). And

restrictions that are content-neutral are subject to less scrutiny than those that are content-based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-94 (1989). N.J. Stat. Ann. § 56:11-34 is indisputably content-neutral as it does not regulate the content of the CRA file disclosures; rather, it only requires that the files be disclosed in languages that are broadly spoken in New Jersey so that the State's consumers can readily *understand* the file content. As such, intermediate scrutiny is appropriate. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 62 (1995).

This analysis requires courts to follow the test laid out by the Supreme Court in *Central Hudson*, 447 U.S. 557. In *Central Hudson*, the Court set out a four-prong test to be utilized in determining whether government regulation of commercial speech is constitutional. *Id.* at 566. A statute will be upheld if it: (1) concerns lawful activity and is not misleading; (2) relates to a substantial governmental interest; (3) advances the substantial governmental interest; and (4) is not more extensive than is necessary to serve the governmental interest. *Id.*

It is undisputed in this case that N.J. Stat. Ann. § 56:11-34 satisfies the first two prongs of the *Central Hudson* test. There has been no suggestion by Plaintiff that the NJFCRA involves unlawful activity or is misleading. Focusing on the first prong of that test, the 2019 NJFCRA Amendments are clearly not misleading and undoubtedly concern lawful activity— namely, the disclosure of consumer reports. *Central Hudson*, 447 U.S. at 566.

Similarly, there is no real dispute as to the second *Central Hudson* factor, as N.J. Stat. Ann. § 56:11-34 clearly relates to New Jersey's substantial and important interest in protecting consumers, and specifically New Jerseyans for whom English is not a primary language. The parties seem to agree that New Jersey's interest in ensuring that its residents who have limited English proficiency have access to and the ability to understand their credit reports is substantial. So there is no serious dispute here as to the first two factors described in *Central Hudson*.

Plaintiff, however, contends that N.J. Stat. Ann. § 56:11-34 fails to satisfy both the third and fourth prong of the *Central Hudson* test. Dkt. 1 at ¶¶ 40-44. Simply put, Plaintiff is wrong. The third prong of the *Central Hudson* test asks whether the law at issue directly and materially advances the asserted governmental interest. *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 188 (1999). In *Greater New Orleans*, the Court concluded that this burden is not satisfied by speculation. *Id.* Rather, the Court explained:

> [A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.
>
> [*Id.* (citations omitted).]

The State has satisfied this element. New Jersey's goal in enacting the 2019 NJFCRA Amendments is crystal clear. N.J. Stat. Ann. § 56:11-34, by its plain language and on its face, seeks to guarantee that New Jerseyans with limited English

language proficiency have meaningful access to their credit information. It is a matter of common sense that credit information is more accessible to consumers when it is delivered in a language that they can fully understand.

And, in any event, even setting aside that the plain language of N.J. Stat. Ann. § 56:11-34 speaks for itself, there is ample evidence of the State's interest in enacting the 2019 NJFCRA Amendments. As members of the State Assembly stated, the law was intended to:

> [P]rovide additional consumer protection to non-English speaking citizens of New Jersey by removing barriers in order to ensure that these residents can access and understand their credit reports.
>
> [Press Release, New Jersey Assembly Democrats, *supra* page 8.]

Studies and news reports confirm that consumers who have limited English proficiency routinely encounter barriers to participating in the financial marketplace, including completing important financial documents, managing bank accounts, and accessing financial education. *See Spotlight on serving limited English proficient consumers*, Consumer Financial Protection Bureau (November 2017), https://bit.ly/33xljnB. Further, studies show that a lack of English-language skills also hinders their financial literacy, making it difficult to conduct every day financial affairs. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-518, CONSUMER FINANCE: FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED

ENGLISH PROFICIENCY (2010). The New Jersey Legislature, by enacting the 2019 NJFCRA, sought to assist its residents with limited English proficiency in removing these types of barriers relative to their access of consumer credit reports.

Simply stated, the NJFCRA ensures that New Jersey consumers can actually use the information that CRAs—as all parties agree—are required to disclose. The statute advances New Jersey's interest in seeking to reduce language-related barriers to access and comprehension of credit information for its residents. The harms those residents face are transparent: the inability to understand the all-important disclosures provided by CRAs can operate as a severe financial and economic limitation for many New Jerseyans. The effect of Plaintiffs' arguments, if accepted, would be to place consumers for whom English is not their first language at a disadvantage, in turn exposing them to possible victimization from fraud and scams, and all of the many economic consequences that inevitably flow from a reduced ability to monitor one's credit information.[5] Requiring that file disclosures be issued in languages other than English which are widely-spoken in New Jersey, upon request by individual consumers, will go a long way to assuage these harms.

Plaintiff also incorrectly asserts that the NJFCRA somehow fails to "advance" a substantial government interest because it is not clear to Plaintiff what specific

[5] Additionally, the elimination of a potentially expensive and time-consuming translation process for New Jersey consumers also clearly advances the State's interest in consumer protection.

interest, among an array of possible interests, the State sought to promote by enacting the 2019 NJFCRA Amendments. Plaintiff oddly claims that, because the State did not include a "statement of basis and purpose" in the legislation that gave rise to N.J. Stat. Ann. § 56:11-34, the law is somehow invalid. Dkt. 1 at ¶¶ 40-41. This argument has no merit. On the contrary, the First Amendment does not require a State, before enacting legislation, to "conduct or produce new studies or produce evidence independent of that already generated" by other States or entities to justify its legislation. *Renton v. Playtime Theatres*, 475 U.S. 41, 50 (1986). Rather, all that is required, according to the Supreme Court, is that whatever evidence the State ultimately relies upon must be "reasonably believed to be relevant to the problem" the State seeks to address. *Id.*; *see also Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mt. Laurel*, 706 F.3d 527, 533-535 (3d Cir. 2013). Just as New Jersey was not required to commission a study to address a commonsense and readily observable problem, it was not required to provide a "detailed statement of purpose" before the enactment of the 2019 NJFCRA Amendments. Publicly available data from the United States Census Bureau (the "Census"), to take one example, is relevant to the issue the State sought to address, as required by *Renton*, 475 U.S. at 50. The State can reasonably rely on such information when developing legislation to address the needs of its residents. Here, New Jersey did just that, and the requirement that credit disclosures be made available in different languages, at the request of consumers,

advances the State's substantial interest in consumer protection. Thus, the third prong of the *Central Hudson* test is satisfied.

The final prong of the *Central Hudson* test—requiring that the law at issue must be "narrowly tailored"— is also easily satisfied here. A statute is sufficiently tailored when the means of promoting the government's asserted interest are not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. And the State is not required to adopt the "least restrictive" regulation, but must instead simply demonstrate:

> [N]arrow tailoring of the challenged regulation to the asserted interest—"a fit that is not necessarily perfect, but *reasonable*; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."
>
> [*Greater New Orleans*, 527 U.S. at 188 (1999) (quoting *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. 469, 480 (1989) (emphasis added)).]

The question then is whether the requirements of N.J. Stat. Ann. § 56:11-34 are narrowly tailored to the State's interest. The answer is a resounding "yes." The 2019 NJFCRA Amendments require that CRAs disclose required information in the ten most commonly spoken languages in New Jersey after English and Spanish. As of 2018, the Census reported that of the total population of 8,882,190 residents in New Jersey, 22.2% (or 1,972,533 residents) were immigrants and/or refugees and 5.2% (or 462,202) New Jerseyans had limited English proficiency. *Minority and*

Multicultural Health—Language Access, New Jersey Department of Health, https://bit.ly/3KnYVxk (last visited Jan. 21, 2022). The Census also found that the ten most spoken languages in New Jersey homes after English were as follows:

Language	Number of Speakers	Percentage of the Population
Spanish	3,215,353	36.2%
Filipino/Tagalog	310,877	3.5%
Chinese	301,994	3.4%
Hindi	293,112	3.3%
Korean	293,112	3.3%
Gujarathi	284,230	3.2%
Portuguese	239,819	2.7%
Arabic	222,055	2.5%
Polish	186,526	2.1%
Russian	168,762	1.9%

[*Id.*]

These statistics confirm that New Jersey has a substantial population for which English is not their first language and demographic trends indicate that this number will continue to increase as time goes on. *New Jersey Population 2021*, WORLD POPULATION REVIEW, https://bit.ly/3qNRCrd (last visited Jan. 21, 2022).

Despite all of this, Plaintiff inappositely argues that N.J. Stat. Ann. § 56:11-34 is not narrowly tailored enough to the State's interest in protecting consumers for whom English is not their first language because it requires information be produced in eleven different languages. Dkt. 1 at ¶ 43. However, the truth is that the statute is

"narrowly tailored." To begin with, publicly available data suggests that the population of New Jersey will only continue to diversify, and even today thousands of New Jerseyans speak dozens more languages than the ten to be identified by the DCA Director.[6] Indeed, demographic information has identified at least twenty different languages spoken by New Jerseyans. *Languages in New Jersey*, STATISTICAL ATLAS, https://bit.ly/3rE29nL (last visited Jan. 21, 2022). N.J. Stat. Ann. § 56:11-34 requires the file disclosures to be made in the ten languages, other than English and Spanish, that are most commonly spoken as a first language by New Jersey consumers. It does not require disclosure in all—or even a majority—of the languages spoken in New Jersey. Plaintiff's idea of narrow tailoring in this case would seem to be limiting information disclosure to English only, or possibly English and Spanish[7], but it cannot possibly be true that tailoring requires the State

[6] While the statute theoretically *permits* the DCA Director to require disclosure in more than the ten "languages other than English and Spanish that are most frequently spoken as a first language by consumers in this State," *see* N.J. Stat. Ann. § 56:11-34 (providing that the DCA Director "shall" require the disclosures be made available in *at least* the ten languages), it only *requires* that the disclosures be made available in twelve total languages. The DCA Director has not yet promulgated regulations pursuant to the statute, and there is no indication that more than that number will be required.

[7] It is true that in the United States, CRAs do not *record* credit report information in any other language other than English, Dkt. 22 at ¶ 8, but it is important to note that CRAs generally make translation services available for Spanish-speaking consumers when requested, so there is precedent indicating that these entities are able to *provide* credit information in languages other than English. *See, e.g.*, Carmen

to hamstring itself so severely with respect to protecting its consumers. New Jersey has set reasonable boundaries for protecting its diverse consumer population. In this fundamental way, the statute is already "narrowly tailored" to the State's substantial interest in promoting consumer protection. And that is more than enough.

New Jersey satisfies all the elements described by the Supreme Court in *Central Hudson* and has therefore demonstrated that the 2019 NJFCRA Amendments do not violate the First Amendment rights of Plaintiff or its CRA members.

CONCLUSION

This Court should grant summary judgment in favor of Defendant and dismiss Plaintiff's Complaint with prejudice.

Respectfully Submitted,

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Dated: January 21, 2022

Reinicke, *Equifax will now offer credit reports in Spanish*, CNBC (Sept. 13, 2021, 8:01 AM), https://cnb.cx/3Iq82vC.