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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. MATTHEW J. PLATKIN, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY, Defendant.	Civil Action No. 3:19-cv-19054-BRM-TJB

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Consumer Data Industry Association ("CDIA"), submits this Memorandum of Law in Opposition to the Motion for Summary Judgment of Defendant State of New Jersey ("State") (ECF No. 43-1), pursuant to this Court's scheduling orders dated May 3, 2021, July 14, 2021, and March 1, 2022, and in accordance with Federal Rule of Civil Procedure ("Fed. R. Civ. P") 56 and the Local Civil Rules for the District of New Jersey ("LCR").

ARGUMENT

While "preemption is strong medicine," "when Congress speaks, courts charged with the delicate work of statutory construction should listen." *Mass. Ass'n. of Health Maint. Org. v. Ruthardt*, 194 F.3d 175, 178, 185 (1st Cir. 1999). CDIA's Complaint seeks a declaration that the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.* ("FCRA"), preempts New Jersey's 2019 amendments to N.J.S.A. §56:11-34(e) ("Revised 56:11-34"). Specifically, Revised 56:11-34 requires nationwide consumer reporting agencies ("NCRAs") to provide file disclosures to consumers, upon request, in at least eleven languages other than English, or as many as may be determined in the discretion of the Director of the Division of Consumer Affairs (the "Director"), in contrast to file disclosures under the FCRA, provided in English.

Much of the State's argument that the FCRA does not preempt Revised 56:11-34 is based upon its erroneous presumption that Congress did not intend to preempt such state consumer protection laws. However, a review of the legislative

history and the evolution of the FCRA's preemption framework demonstrates that is precisely what Congress had intended to do, and what it, in fact, did.

In disregard of Congress' clear intent to broadly preempt state law, the State argues for a "limited" reading of the FCRA's conduct preemption provision (15 U.S.C. § 1681t(b)(5)), claiming that it does not preempt Revised 56:11-34 because the New Jersey law does not prohibit what the FCRA permits, nor does it permit what the FCRA prohibit. [*See* ECF No. 38-1, p. 14.] The State claims that "Congress intended to preempt only those state laws that regulate conduct identical to that regulated by the FCRA in the statute's enumerated provisions." [ECF No. 38-1, p. 15.] This interpretation of the conduct-based preemption provision cannot withstand scrutiny. First and foremost, that is not what the statute says. Second, such a reading renders §1681t(b)(5) meaningless, i.e., no more than a duplicative conflict preemption provision that would add nothing to the larger FCRA preemption framework. In such case, either §1681(a) or §1681t(b)(5) would be utterly superfluous. Hence, the State's reading of the provision cannot be the correct one.

The State's argument next takes an unnecessary detour through a maze of "implied" preemption theories, which simply are not relevant to the case at hand. CDIA is not arguing that the challenged provisions of New Jersey law are preempted under any implied theories of preemption. Rather, CDIA argues that the conflict

preemption provision of 15 U.S.C. §1681t(a) expressly preempts Revised 56:11-34 because the law is "inconsistent with" the FCRA for the reasons argued in CDIA's Motion for Summary Judgment [ECF No. 42-4, pp.16-20].

This Court also should deny the State's Motion for Summary Judgment with respect to CDIA's claim arising under the First Amendment because the challenged law unlawfully restricts CDIA's members' rights to free speech. The State has the ultimate burden to justify any law that restricts the First Amendment rights of CDIA's members. The State has failed to meet its burden to justify such intrusion – even under the lower *Central Hudson* test - because Revised 56:11-34 is not narrowly tailored to survive judicial scrutiny. While not considered by the legislature in enacting the law, the data cited in the State's brief suggests that while only 5.2% of New Jersey residents have some degree of limited English proficiency, the law requires that the NCRAs provide these services, at no cost, to any New Jersey resident - including many of the estimated 22% of current residents who are immigrants or refugees - even if the consumer is not challenged with reading or understanding English. In short, New Jersey is not only disrupting the well-developed national credit reporting system, without any consideration of the effect it would have on the national credit reporting system, but is placing the cost of this perceived public problem on the backs of three companies who happen to do business in the state, even when the file disclosures they already provide in

accordance with federal law are provided at no charge to consumers. As stated, Revised 56:11-34 is a law compelling speech and is not narrowly tailored to justify the interference with the NCRAs' First Amendments rights.

I. THE RELEVANT PROVISIONS OF REVISED 56:11-34.

As a preliminary matter, the State's brief inaccurately characterizes several requirements of New Jersey's 2019 amendment to the New Jersey FCRA ("Revised 56:11-34"). Revised 56:11-34 provides as follows:[1]

> [A] reporting agency that compiles and maintains files on consumers on a nationwide basis shall make the information subject to disclosure pursuant to this section available to a consumer upon the consumer's request in Spanish or any other language that the Director of the Division of Consumer Affairs determines is the first language of a significant number of consumers in the State. This determination shall be, at the discretion of the director, based on the numerical percentages of all consumers in the State for whom English or Spanish is not a first language or in a manner consistent with any regulations promulgated by the director for this purpose. The director shall require that the information is made available in at least the 10 languages other than English and Spanish that are most frequently spoken as a first language by consumers in this State.
>
> A reporting agency that compiles and maintains files on consumers on a nationwide basis shall provide notice, in any language as determined

[1] The 2019 Amendments added Revised 56:11-34 to the existing provision titled "Disclosure to consumers." N.J.S.A. §56:11-34. Other than these new foreign language disclosures required by the 2019 amendment, with few exceptions, New Jersey law adopted the federal FCRA requirements in their entirety. New Jersey statute §56:11-34 begins with "[e]very consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer . . ." This introduction is followed by paragraph (a) – the first paragraph of (e), each of which lists the items of information that must be included in a file disclosure and is currently provided in the file disclosures produced today.

> by the director, on its Internet website in a clear and conspicuous location, of the availability of information subject to disclosure pursuant to this section in languages other than English.

N.J.S.A. §56:11-34(e), and Statement of Material Facts Not in Dispute ("SOF") [ECF No. 42-3, ¶¶ 10-11] (emphasis added).

The State argues that Revised 56:11-34 does not require the NCRAs to modify what they are required to give consumers as the file disclosures governed by 15 U.S.C. § 1681g(a). Rather, the State argues that Revised 56:11-34 requires the NCRAs to provide something else in addition to the federal file disclosures. In particular, the State argues that a second copy is to be provided "upon the request of the consumers, *after* the initial release of the file disclosure information in English." [ECF No. 43-1, p. 16.] That, however, is not what the statute says. A straightforward reading of Revised 56:11-34 makes clear that the statute requires that the NCRAs "make the information subject to disclosure" available to consumers "upon the consumer's request in Spanish or any other language" required by the Director. N.J.S.A. §56:11-34(e) (emphasis added). It does not contemplate a second copy of a file disclosure *after* the initial disclosure. *Id.* Even if that were the case, the State is modifying the conduct preserved by the FCRA.

Additionally, at times, the State suggests that Revised 56:11-34 requires NCRAs to only disclose "information in the ten most commonly spoken languages in New Jersey after English and Spanish" [ECF No. 43-1, p. 29], as if

there is a limit on the number of languages that the Director may require. However, as acknowledged in a footnote at the very end of the State's brief, this number is a floor, not a ceiling. The statute permits the Director to require file disclosures be provided in an unlimited number of languages. *See* N.J.S.A. §56:11-34(e), *see also* [ECF No. 43-1, p. 31, n.6]. In fact, this number of required languages could continue to grow, as the State acknowledges "publicly available data suggests that the population of New Jersey will only continue to diversify . . ." [ECF No. 43-1, p. 31.]

Finally, the State suggests that the Director is required to *only* select languages based upon demographic data regarding consumer representation across the State, but Revised 56:11-34 contains no such limitation. [ECF No. 43-1, p. 7.] Rather, Revised 56:11-34 provides the Director with unfettered discretion to determine these languages and the manner in which they are selected. *Compare* [ECF No. 43-1, p. 2] ("The statute directed the Director . . . to issue regulations that will require [the NCRAs] to make information required to be disclosed per the FCRA available to consumers . . . 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."), *with* SOF ¶11 ("“The determination of the additional languages (other than Spanish) is left to the discretion of the Director."); Revised 56:11-34 (the Director may base the determination on numerical

percentages or "in a manner consistent with any regulations promulgated by the director for this purpose"). Therefore, the Director could conceivably require the NCRAs to speak in dozens of languages. The chaos described above is precisely what Congress intended to prevent.

II. CONGRESS INTENDED THAT THE FCRA BROADLY PREEMPT STATE LAWS LIKE REVISED 56:11-34.

Congress intended there to be a national credit reporting system to support the broader, national consumer banking system and it adopted a comprehensive preemption framework to preclude a multitude of state laws that would otherwise be disruptive. *See* 15 U.S.C. §1681. Congress chose to preempt state laws that are "inconsistent with" the FCRA, or which attempt to regulate specific subject matters and specific regulated conduct in order to avoid a "patchwork of conflicting regulations." *Ross v. FDIC,* 625 F.3d. 808, 812-813 (4th Cir. 2010) (citations omitted). Notwithstanding this backdrop, the State argues that "[c]ertainly, Congress' intent was not to stop states from enacting consumer protections statutes as this is a field in which states have traditionally exercised expansive powers." [ECF 43-1, p. 15.] As such, the State argues, the terms "with respect to", "conduct required by" and "the specific provisions of" demand a "limited preemption construction." *Id.* In studying the text of the FCRA preemption provisions, its evolution over time, and Supreme Court authority construing similar preemption provisions, Congress' intent to preempt exactly such state laws is clear.

A. The FCRA Evinces a Clear Intent to Preempt State Laws Through its Express Preemption Framework.

Initially, Congress adopted the FCRA with only limited preemption of state laws; namely, state laws that were "inconsistent with" the FCRA. 15 U.S.C. §1681t (1996). After the 1996 Amendments, at the same time Congress added additional consumer protections to the FCRA, it preserved to federal regulation a series of subject matters and specific conduct governed by the FCRA, by carving out exceptions to §1681t(a), set forth in the new subsection (b). 15 U.S.C. § 1681t (1998). Section 1681t(b)(1) begins:

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

What follows is a list of eleven subject matters (set forth in subparagraphs (A) – (K)) that are preempted, together with a reference to the FCRA section number in which those subject matters are found. These eleven subject matters are, in essence, specific fields of preemption, and are referred to as "subject matter preemption."

Congress additionally protected specific conduct regulated by the FCRA by preempting state laws "with respect to the conduct required by the specific provisions of . . ." each enumerated subparagraph (A) – (I) of §1681t(b)(5). As explained below, any state law that "concerns" "relates to" or "references" the conduct required by those enumerated FCRA sections is preempted. Notably, neither §1681t(b)(1) nor §1681t(b)(5) require the state law to be *inconsistent with*

the FCRA requirement; any regulation of the designated subject matter or conduct is preempted.

The 1996 Amendments to §1681t also included a new subpart (d), which contained a "sunset provision" of the subject matter and conflict preemption provisions and a broad exception from the scope of FCRA preemption of those state laws that were more protective of consumers than the FCRA. *Id.* Subpart (d) read:

> (d) Subsections (b) and (c) - -
> (2) do not apply to any provision of State law . . that
> (A) is enacted after January 1, 2004; . . .or
> (C) gives greater protection to consumers than is provided under this title.

15 U.S.C. § 1681t(d) (1998) (emphasis added). In this way, Congress initially left room for the states to enact legislation that concerned the same subject matters and conduct if the State chose to provide more protection to the consumer than the FCRA provided. With regard to this expansion of the preemption framework, Representative Thomas of Wyoming explained that while the amendments imposed a number of additional requirements that would benefit consumers, at real cost to consumer reporting agencies, Congress "…compromised on the preemption issue so companies will not have to comply with a patchwork of state laws." 140 Cong. Rec. H9797-05, H9811 (1994) (emphasis added). Representative Castle of Delaware, one of the bill's sponsors, explained:

> In addition, H.R. 1015 gives industry an 8-year Federal preemption of State laws. This compromise provision is the product of a careful effort

> to balance industry's desire for nationwide uniformity with States' vital interest in protecting their citizens. . . . I would have preferred that there be no Federal preemption in this bill. **Federal law usually sets a floor, not a ceiling, for consumer protection-allowing States to adopt added measures to protect their citizens. Nevertheless, the 8-year preemption mandated by this bill will test the viability of a uniform national standard.** If after 8 years the Federal law is not adequately protecting consumers, then I would expect States to step in once again and do the job.

Id. at H9810 (emphasis added).[2]

This test of the "viability of a uniform national standard" was clearly successful, and as part of the 2003 FACT Act Amendments Congress struck subpart (d)(2) in its entirety. This action removed the sunset provision and the savings clause that exempted state laws from the scope of FCRA preemption under subpart (b) - even when those state laws were more protective of consumers than the FCRA. Fair

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[2] Congress knows how to use preemption language to establish a floor, and not a ceiling, with respect to state laws. *See, e.g.*, 15 U.S.C. §6807. The preemption provision of the Gramm Leach Bliley Act, enacted in 1999, the preemption provision establishes a minimum standard for consumer protections, which allows states to continue to regulate in this area if the state provides more protection to consumers:

> a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Bureau of Consumer Financial Protection, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

and Accurate Credit Transactions ("FACT") Act of 2003, Pub. L. 108-159, §211(d), 117 Stat. 1952, 1970 (2003). By this change, Congress explicitly foreclosed any further state regulation if the enumerated subject matters and conduct, regardless of the state law provides additional consumer protection. 15 U.S.C. §1681t.

Indeed, when it enacted its mini-FCRA, of which Revised 56:11-34 is a part, the New Jersey legislature recognized that the federal FCRA preempted state laws with respect to these subject matters and conduct provisions. In the legislative findings and declarations section enacted in 1998 as part of New Jersey's Fair Credit Reporting Act, the state legislature acknowledged:

> While the amendments to the federal "Fair Credit Reporting Act" contained in the "Consumer Credit Reporting Reform Act of 1996" specifically preempt states from establishing requirements or prohibitions with respect to the provisions of certain sections of the federal "Fair Credit Reporting Act," the provisions of the other sections of that act are left subject to actions by states as long as the provisions enacted in state law are not inconsistent with federal law . . .

N.J.S.A. 56:11-29(d).

Against this backdrop, it is clear that the State's presumption that "[c]ertainly, 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" is a faulty one. [ECF No. 43-1, p. 15.] In fact, Congress intended to do just that, and "specifically preempt[ed] states from establishing requirements or prohibitions with respect to the provisions of certain sections of the

federal 'Fair Credit Reporting Act,'" as the New Jersey legislature acknowledged. N.J.S.A. 56:11-29(d).

In its brief, the State attempts to change the narrative and spends much time arguing that Revised 56:11-34 is not preempted under theories of implied preemption or common law conflict preemption. *See* [ECF No. 43-1, pp. 19-23.] However, as established in its Motion for Summary Judgment and below, CDIA is not pursuing a theory of implied preemption; rather, Revised 56:11-23 is preempted pursuant to the express provisions in the FCRA found at 15 U.S.C. §§1681t(a) and 1681t(b)(5)(B) and (E). *See* [ECF No. 42-4, pp. 16-28.] Both the conduct preemption rule of §1681t(b)(5) and the conflict preemption rule of §1681t(a) preempt Revised 56:11-34.

B. The Phrase "With Respect to Conduct Required By" Is Not a Limiting Phrase as the State Suggests.

The ultimate goal of a statutory construction is to give effect to Congress's intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) ("the purpose of Congress is the ultimate touchstone in every pre-emption case") (internal citations omitted). As explained in detail in CDIA's opening brief, courts examining a question of federal preemption of state laws look to the text of the statutes at issue to determine the intent of Congress to restrict the state's right of action. "[P]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its

structure and purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The State urges that this Court give a "limited" reading here of the preemption provision based on the incorrect assumption that Congress did not intend to preempt state laws that were more protective of consumers. Reviewing §1681t(b)(5), both on its own, and in the context of the larger FCRA framework, it is clear that the State's reading is not the correct one.

The Supreme Court in *Morales* determined that the phrase "relating to" was the 'key phrase' to unlocking the scope of preemption, stating:

> **The ordinary meaning of ["relating to"] is a broad one**—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—**and the words thus express a broad pre-emptive purpose**.

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

The Supreme Court has repeatedly interpreted the phrase "related to" in the context of preemption provisions as having a "broad scope," and "an expansive sweep," noting it is "deliberately expansive," "broadly worded," and "conspicuous for its breadth" *Morales*, 504 U.S. at 383-84 (citations omitted). The Supreme Court has explained that *Morales* stands for the following propositions:

> that "[s]tate enforcement actions *having a connection with, or reference to,"* [the subject matters referenced] are pre-empted," …; (2) that such

> **pre-emption may occur even if a state law's effect on [the subject matter] "is only indirect,"** …; (3) **that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation,** …; and (4) **that pre-emption occurs at least where state laws have a "significant impact" related to Congress' [substantive] and pre-emption-related objectives** . . .

Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 370 (2008).[3]

Notwithstanding the foregoing authority, the State argues that §1681t(b)(5) should be interpreted in a "limited" fashion, particularly the phrases "with respect to," "conduct required by" and the "specific provisions of" the FCRA. [ECF No. 43-1, p.15.] Trying to escape the inevitable, the State urges this Court to interpret §1681t(b)(5) to mean only "…that the states cannot require anything that federal law prohibits or prohibit anything that federal law expressly allows under the FCRA." [ECF No. 43-1, p. 14.] As explained by the Supreme Court in *Rowe*, where there is express preemption "with respect to" state laws, preemption may occur where the state's law has an effect on the subject matter preempted - even when that effect "is only indirect" – but will occur "at least" where the state law has a "significant impact" on Congress' stated preemptive intent. Here, a requirement that the NCRAs provide at least eleven types of file disclosures has more than an indirect impact on the federal preemption Congress intended; it eviscerates it.

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[3] In holding Maine's tobacco laws to be preempted, the *Rowe* court found that the "Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands …" *Id.* at 372.

In support of its argument for a limited reading, the State cites to *Galper v. JP Morgan Chase Bank, N.A.,* which does not advance the State's argument. 802 F.3d 437 (2d Cir. 2015). The *Galper* court found that, even reading §1681t(b)(1)(F) "fairly but narrowly," any state law that "concerned" a furnisher's responsibilities was preempted under the FCRA. *Id.* at 445. The *Galper* court considered Supreme Court precedent that makes clear that a claim is "with respect to" a preempted subject matter when it "concerns" that subject matter. *Id.* at 446 *citing Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251 (2013). As a result, the *Galper* court found that:

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

Id. at 446 (emphasis in original). Rightly so, the *Galper* court held that, under the facts presented, Chase Bank could not avoid a lawsuit alleging it to be vicariously liable for the actions of its employee who stole a customer's identity and used it to open fraudulent accounts – as those actions did not in any way concern Chase's furnishing of information to CRAs. *Id.* Given the foregoing, §1681t(b)(5) clearly cannot be read in the limited fashion as urged by the State, and summary judgment in favor of the State is not appropriate here.

C. Revised 56:11-34 Regulates "Conduct" Reserved to Federal Regulation.

The FCRA's conduct preemption provision, 15 U.S.C. § 1681t(b)(5),

provides 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" the FCRA, including §§1681c-1 and 1681j(a). These two FCRA sections proscribe requirements, i.e., they govern the NCRA's conduct, when providing annual file disclosures to consumers including "what, how, and how often" they must be provided. In particular, §1681c-1 requires the NCRAs to "provide to the consumer (affected by possible identity theft) *all disclosures required to be made under section 609,* without charge to the consumer, within three business days…" 15 U.S.C. §1681c-1 (emphasis added). Section 1681j(a) further governs the NCRAs' conduct by prohibiting the charging of any fees – the NCRAs must " . . . make *all disclosures pursuant to section 609"* available for free once per year online through the centralized source. 15 U.S.C. §1681j(a) (emphasis added). Both statutes require the NCRAs to do something; namely, to provide "*all disclosures required by"* §1681g, not some other form of a disclosure, not different information, and not a second copy of the file disclosure – just *the* file disclosure required under §1681g.

"Conduct" is defined as "personal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds. . ." *Conduct,* Black's Law Dictionary (11th ed. 2019). A law that requires one to take an action is quintessentially the regulation of the person's

"conduct." Sections 1681c-1 and 1681j(a), therefore, clearly regulate the NCRA's conduct.

The State admits that Revised 56:11-34 regulates conduct. "It is true that [Revised 56:11-34] requires the [NCRAs] to take steps that the FCRA neither requires nor proscribes." [ECF No. 43-1, p. 23]; *see also* "[Revised 56:11-34] regulates *additional* conduct, not "required by" any of the enumerated provisions, that incidentally affects [NCRAs]."[4] [ECF No. 43-1, p. 15] (emphasis in original). The State argues, however, "[Revised 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." [ECF No. 43-1 p. 18] (emphasis added). Therefore, the State argues, the law is not preempted.

In fact, however, Revised 56:11-34 does govern the same conduct that is governed by sections 1681c-1 and 1681j(a) – and in particular, it does "regulate

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[4] CDIA contests that the requirements of Revised 56:11-34 only "incidentally" affects its NCRA members. The undertakings required by the new law will substantially affect the NCRAs' business, as the NCRAs have developed particularized systems to comply with the FCRA relating to, among other purposes: ". . .2) how and when file disclosures must be provided to consumers, including the development and maintenance of a centralized source through which consumers may request their annual file disclosures from the NCRAs; . . and 4) the accurate transmission of the information to users in consumer reports, which includes the ability to store the information provided by furnishers of consumer information." (SOF ¶7.)

the content of the disclosures" to be provided. Whether it does so by requiring a second copy – an after-the-fact translation of the original file disclosure (as suggested by the State in its brief), or by requiring the NCRAs to provide the file disclosures themselves in those eleven or more languages in real time (as the statute provides) – Revised 56:11-34 dictates the NCRAs' conduct with respect to that activity. Revised 56:11-34 clearly regulates the NCRAs' conduct on a proscribed matter and is therefore preempted under § 1681t(b)(5).

D. Requiring the NCRAs to Translate Their Data into the New Languages Is Another Way Revised 56:11-34 Regulates Conduct with Respect to Providing File Disclosures.

Simply put, the State makes CDIA's point for it when it concedes that Revised 56:11-34 "imposes additional obligations on [NCRAs], 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 [and]… It is true that [Revised 56:11-34] requires the [NCRAs] to take steps that the FCRA neither requires nor proscribes." [ECF No. 43-1, pp. 22-23.] As explained in more detail in CDIA's opening brief, this requirement to take information that is exclusively collected, stored, and maintained in English (SOF ¶ 8) and to translate it into eleven other languages, upon request, is inconsistent with the credit reporting system regulated by the FCRA. The FCRA specifically requires that the NCRAs provide a complete copy of their "file" to the consumer upon request – and defines what

information constitutes "file" information. 15 U.S.C. §1681g(a). Congress directed the FTC to adopt regulations related to these free annual file disclosures, and the FTC considered whether to require the file disclosures to be translated into Spanish or other languages, and the FTC declined to do so. 69 Fed. Reg. 35,468 at 35,476 (June 24, 2004). Attempting to require them to do so under state law is therefore inconsistent with the FCRA.

The State argues that Revised 56:11-34's requirement to provide a second file disclosure to consumers in at least eleven other languages is "no different" from the output of data that the NCRAs already provide when they take electronic information and provide it to the consumer in a way that a human can read. [ECF No. 43-1, p. 22.] The argument ignores the fact that the existing systems that NCRAs built are designed to collect, maintain, and deliver information in English and to output that into a human readable form in English. *See* Declaration of Eric Ellman, ¶¶ 7-11 [ECF No. 42-001, pp. 2-3.] That process is very different from taking existing file information and building new databases of information in various other languages, or from providing real-time translators to translate every item of information in the file (including, at times, consumer's personal statements permitted under 15 U.S.C. § 1681i(b)) into the consumer's chosen language. Declaration of Eric Ellman, ¶11 [ECF No. 42-001, p. 3.] And, of course, this is all to be provided at no charge to the consumer, but at potentially great cost to the

NCRAs. In short, Revised 56:11-34 impermissibly conflicts with the rules regarding the delivery of file disclosures to consumers, and is preempted.

E. Section 1681t(b)(5) Should Not Be Read as Another Form of Conflict Preemption.

Trying to escape the inevitable result that Revised 56:11-34 is preempted, the State urges this Court to interpret §1681t(b)(5) "…to mean that the states cannot require anything that federal law prohibits or prohibit anything that federal law expressly allows under the FCRA." [ECF No. 43-1, p. 14.] This cannot be the correct interpretation, as it is tantamount to another form of conflict preemption and renders either §1681t(b)(5) or §1681t(a) superfluous.

It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). The State urges that §1681t(b)(5) only preempts laws that are directly in conflict with the requirements of the FCRA – and only where the law prohibits what the FCRA permits or permits what the FCRA prohibits. [ECF No. 43-1, p. 14.][5] That construction, however, renders §1681t(b)(5) to nothing more

[5] Even the panel of the First Circuit, which held that 15 U.S.C. § 1681t(b)(1)(E) did not preempt all state laws that "concerned" the subject matter of consumer report content, based on the same incorrect presumption as the State advances here (that Congress did not intend to preempt state laws that were more protective of consumers than the FCRA), did not go so far as to hold that the state law must rise to the level of outright conflict with the FCRA provision in order to be preempted.

than a conflict preemption provision that would be meaningless within the overall preemption framework of §1681t.

If §1681t(b)(5) means only that "states cannot require anything that federal law prohibits or prohibit anything that federal law expressly allows" it serves no purpose. This interpretation would be the epitome of an inconsistency between state and federal law. Ergo, if this were the correct interpretation, §1681t(b)(5) would mean the same, and have precisely the same effect on state law, as §1681t(a), which expressly prohibits states laws that are "inconsistent with" the FCRA. Because one must read provisions of a statute in such a way that avoids the text becoming "superfluous, void, or insignificant," *TRW, supra,* the State's construction cannot be the correct one. Section 1681t(b)(5) must mean something more.

It is also worth noting that Congress chose to separately preempt the *frequency* with which NCRAs must provide these annual free file disclosures. Section 1681t(b)(4) provides that state laws are preempted "with respect to the frequency of any disclosure under section 612(a). . . [with exceptions for existing laws not relevant here.]" After removing the 'frequency' requirement of §1681j(a), what remains is preempted under conduct preemption - the very conduct proscribed:

Consumer Data Indus. Ass'n v. Frey, 26 F.4th 1 (1st Cir. 2022) (reversing the district court's ruling that the FCRA preempted two Maine laws but remanding for further briefing the issue of whether the subject matters of Maine's laws were the same as the specific subject matters addressed within § 1681c) (petition for rehearing filed).

that NCRAs must "*provide all disclosures pursuant to section 609,*" and they must do so without charge to the consumer. Taking all of the foregoing together, it is clear that Congress intended to preempt state laws that might "concern," "relate to," or "refer to," the provision of file disclosures by NCRAs to consumers. Revised 56:11-34 is such a law and is therefore preempted.

III. REVISED 56:11-34 INFRINGES ON THE NCRAS' RIGHT TO FREEDOM OF EXPRESSION, GUARANTEED BY THE FIRST AMENDMENT.

Under any heightened standard of review, the Court should find that Revised 56:11-34 impermissibly burdens CDIA's members' free speech rights. For the reasons explained in CDIA's memorandum in support of its own Motion for Summary Judgment, the Court should apply strict scrutiny to Revised 56:11-34. [ECF No. 42-4, pp. 28-29.] Specifically, the Court should follow long-established Supreme Court precedent that heightened scrutiny is appropriate for laws that impose content and speaker-based restrictions on truthful, accurate, and non-misleading information, regardless of whether the speaker has a commercial purpose. *See Sorrell v. IMS Health Inc.,* 564 U.S. 552, 572-73 (2011); *Va. State Bd. of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

The State argues that Revised 56:11-34 is merely commercial speech, and thus entitled to only intermediate scrutiny review under *Central Hudson Gas &*

Electricity Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Even under the *Central Hudson* test, the State's analysis fails to reckon with relevant case law, relies on unsupported factual assertions, and mischaracterizes CDIA's arguments.

In *Central Hudson*, the Supreme Court set out four criteria for applying intermediate scrutiny to commercial speech. *Id.* at 564. Under this framework, the court must determine whether: (1) the speech concerns lawful activity and is not misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction "is not more extensive than is necessary to serve that interest." *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 140 (3d Cir. 2020), *citing Central Hudson,* 447 U.S. 557.

The State mistakenly asserts that Revised 56:11-34 "satisfies the first two prongs of the *Central Hudson* test" because the law itself is not misleading and undoubtedly concerns lawful activity. [ECF No. 43-1, p. 24.] However, the first issue under *Central Hudson* is not whether the challenged law is misleading, but rather *whether the regulated speech* is misleading or related to unlawful activity. *Central Hudson*, 447 U.S. at 564 ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."). In this case, the State does not assert that the underlying credit reporting activity is

inaccurate, misleading, or related to unlawful activity. As a result, CDIA members' speech—including communications they are compelled to make under the FCRA—is protected by the First Amendment from being unreasonably burdened by government action. *See id*. at 564, 566.

The State bears the burden of justifying the law's restrictions under the next three parts of the *Central Hudson* analysis. *Greater Phila. Chamber*, 949 F.3d at 133 ("In First Amendment cases the initial burden is flipped. The government bears the burden of proving that the law is constitutional . . ."); *see also Greater New Orleans Broadcasting Ass'n v. United* States, 527 U.S. 173, 183 (1999); *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Specifically, New Jersey must justify the heavy costs that Revised 56:11-34 imposes on CDIA members by demonstrating that the remaining three *Central Hudson* criteria are met:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. *Moreover, the regulatory technique must be in proportion to that interest.* The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the states interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Central Hudson, 447 U.S. at 564 (emphasis added). Further, the four parts of this analysis "are not entirely discrete" but rather "interrelated: each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the [others]." *Greater New Orleans*, 527 U.S. at 183-84. Contrary to New Jersey's assertion, *see* [ECF No. 43-1, pp. 24-25], CDIA disputes that Revised 56:11-34 satisfies any of these criteria.

The State argues that Revised 56:11-34 satisfies the second part of the *Central Hudson* analysis—whether the asserted governmental interest is substantial—because it "clearly relates to New Jersey's substantial and important interest in protecting consumers, and specifically New Jerseyans for whom English is not primary language." [ECF No. 43-1, p. 25.] Although CDIA acknowledges that consumer protection may be a substantial governmental interest, New Jersey is not operating on a blank canvas. In evaluating the substantiality of the governmental interest, it is appropriate for the Court to consider the challenged law in the context of other existing legislation. *See Greater New Orleans*, 527 U.S. at 173 ("we cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses [the asserted substantial interest]").

New Jersey residents, like all Americans, enjoy the rights and benefits conferred by the FCRA—the nationwide credit reporting system that Congress has enhanced several times since its creation. As discussed above, Congress explicitly

preempted state regulation of certain consumer file disclosures, having determined that the costs of state regulations, even if they did not explicitly conflict, would not be justified by any incremental benefit. *See* 15 U.S.C. § 1681t(b)(5); *see also Greater New Orleans.*, 527 U.S. at 189 (explaining that the relevant law "and its attendant regulatory regime [was] so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"). Subsequently, the Federal Trade Commission—acting pursuant to a Congressional delegation of authority and balancing the concerns of both the consumer and industry—declined to require the NCRAs to provide file disclosures in a language other than English. *See* [ECF No. 42-4, pp. 11-13.] In light of this history, the Court should conclude that New Jersey does not have a substantial interest in regulating the content and delivery of consumer file disclosures.

In order to satisfy the third part of the *Central Hudson* analysis—whether the burden on speech "directly and materially advances the asserted governmental interest"—the State must offer more than mere speculation. *Greater New Orleans*, 527 U.S. at 188. Rather, the State has the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* New Jersey acknowledges this burden, but its brief avoids grappling with the standard required to meet it. Instead, New Jersey relies on stray language from the Supreme Court's decision in *City of Renton v. Playtime Theatres,*

Inc., 475 U.S. 41 (1986), to suggest that the State is only required to demonstrate that it relied on evidence that the government "reasonably believed to be relevant to the problem that the [law] addresses." *Id.* at 51-52. In fact, New Jersey relied on nothing in passing the law. *See, infra,* pp. 27-28.

The State's invocation of this language is misplaced and highlights the State's failure to determine whether Revised 56:11-34 "directly and materially" advances a government interest. *Renton* arose from a challenge to the city's zoning ordinance for adult theatres. The Supreme Court's analysis—which, notably, did not apply the *Central Hudson* framework—assumed that adult theatres create "admittedly serious problems" and focused on whether the city should have been required to conduct its own studies of these effects or whether it could rely on the evidence developed by other jurisdictions. *Renton*, 475 U.S. at 51-52 ("We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance."). Given the subject matter, it is unsurprising that the Court held the city could consider evidence developed by other jurisdictions in evaluating the effects of similar legislation.

The current case could hardly be less analogous to *Renton*. CDIA members participate in one of the most meticulously regulated industries in the country and—by the State's own account—provide an essential function in the modern economy. 15 U.S.C. § 1681. Far from presuming that the relevant industry

has "undesirable secondary effects" like the pornographic theatres in *Renton*, the State seeks to ensure that all of its residents can enjoy the benefits of the NCRAs' services. In light of the balance that Congress has already struck in this space, The State must offer some factual support for its argument that Revised 56:11-34 will directly and materially advance a substantial government interest *and that "the regulatory technique chosen is in proportion to that interest*." *Central Hudson*, 447 U.S. at 565 (emphasis added).

The record does not reflect that New Jersey actually considered *any* evidence in evaluating whether Revised 56:11-34 advances a substantial government interest, or to assure that the law was sufficiently tailored to address such interest. In its brief, the only legislative history the State offers is limited to the plain language of the statute and a single press release issued by the bill's three sponsors in New Jersey's General Assembly. [ECF No. 43-1, pp. 25-26.] The other support cited by the Sate includes cursory citations to studies by two federal agencies - notably, without any declaration or representation that this information was relied on in passing Revised 56:11-34) - and a rough analysis of census data, as discussed below. [ECF No. 43-1, pp. 25-27.] Without citing <u>any authority or evidence</u> from <u>any source</u>, New Jersey confidently asserts that Revised 56:11-34 will protect New Jersey residents from "fraud and scams" and other "consequences that inevitably flow" from the nationwide *status quo* under the FCRA. [ECF No. 43-1, p. 27.] The

resources relied by the State *ex poste* raise real questions about the likely effects of Revised 56:11-34 on any perceived problem.

For example, the State's brief cites a CFPB presentation titled *Spotlight on serving limited English proficient consumers* (November 2017).[6] While this report details difficulties faced by people with limited English proficiency, it does not discuss "fraud and scams" or other "consequences that inevitably flow" from a limited English proficiency. [ECF No. 43-1, p. 27.] Moreover, the report summarizes serious limitations on the effectiveness of providing translated financial materials, including that (a) translations cannot always account for cultural differences, (b) requiring translations will not necessarily ensure that "materials are written at a reading level that is accessible to the average U.S. adult regardless of the language used," and (c) "the number of certified financial interpreters and translators is low and the availability of translation services with the capacity to handle high volumes of translation work is limited, particularly for languages other than Spanish." *Spotlight on serving limited English proficient consumers,* Consumer Financial Protection Bureau 9 (2007), https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf. The GAO Report that the State cited in its brief raises

[6] Available at https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf (last accessed on Mar. 23, 2022).

similar concerns.[7] The State does not offer any evidence that the New Jersey legislature considered these facts before passing Revised 56:11-34, much less that it attempted to determine—or, even now, can estimate—the directness and materiality of the law's likely impact. Instead, it assures the Court that Revised 56:11-34 "will go a long way to assuage these harms." [ECF No. 43-1, p. 27.] This is simply not enough to force these companies to speak in languages they do not conduct business in today.

The Supreme Court has described the fourth part of the *Central Hudson* analysis—whether the suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the substantial government interest—as the "critical" inquiry. *Sorrell*, 447 U.S. at 569-70. Revised 56:11-34 fails that "critical" inquiry, particularly in light of the State's ill-defined asserted interest and failure to determine the magnitude of the law's supposed benefits and the significant costs to the NCRAs.

Revised 56:11-34 compels the NCRAs to produce disclosures in no fewer than eleven languages other than the language in which it conducts its business on a daily basis. The law instructs the Director the Division of Consumer Affairs to require that the information be "made available in at least the 10 languages other

[7] U.S. Gov't Accountability Off., GAO-10-518, *CONSUMER FINANCE: Factors Affecting the Financial Literacy of Individuals with Limited English Proficiency* (2010).

than English and Spanish that are most frequently *spoken as a first language by consumers in this State*." N.J.S.A. §56:11-34(e), *and* SOF ¶ 10-11 (emphasis added). The law does not require that the Director assess whether consumers are unable to speak or read English to any degree, therefore, it is unable to articulate the potential benefits of this law as compared against the significant costs that the NCRAs will have to incur to comply. *Id.* The law further gives the Director unfettered discretion to require the NCRAs to speak in an unlimited number of foreign languages. *Id.* The combination of these factors practically dictate that the effects of the law will not be narrowly tailored.

Further, nothing in the legislative history or the State's brief justifies the assumption that file disclosures must be provided in at least eleven new languages in order to address the needs of New Jersey's population. New Jersey's brief cites statistics relating to the different languages spoken by New Jersey's population, but it takes no care to distinguish between (a) people who speak languages other than English, and (b) people who cannot understand disclosures in English. For example, in support of its conclusion that "New Jersey has a substantial population for which English is not their first language," the State cites a report that 22% of the State's residents—an estimated 1.9 million people—are immigrants or

refugees.[8] [ECF No. 43-1, pp. 29-30.] However, in the same sentence, the State notes that only 5.2%—fewer than 500,000—of New Jersey residents have limited English proficiency. *Id.*

Similarly, the State's brief includes a chart of the "ten most spoken languages in New Jersey homes after English," which is borrowed from a report by the nonprofit group New American Economy. *New Jersey Language and Demographic Data Report* ("New American Economy Report").[9] The same New American Economy Report also provides a list of the top-10 "Language Access Needs" in the state, which differs in important ways from the chart provided in the State's brief.

Most notably, the New American Economy Report found that nearly two-thirds (66.2%) of "language access needs" are attributable to Spanish-speaking New Jersey residents. *Id.* Taking this as true for the purpose of this argument, only about 1.75% of New Jersey's population requires support in a language other than

[8] The State does not address at all whether these consumers even have credit files within the U.S.-based NCRAs.

[9] Available at https://research.newamericaneconomy.org/wp-content/uploads/sites/2/2020/12/NJ_Language-and-Demographic-Report_Dec-2020.pdf (last accessed Mar. 23, 2022). The State's brief suggests that the analysis in this report was prepared by the Census Bureau; however, a careful review reveals that New American Economy, a New York-based nonprofit organization, prepared the report based on data from the Census Bureau's 2018 American Community Survey data.

English or Spanish.[10] In addition, some of the languages cited in the chart in New Jersey's brief are not included in the same report's list of "Top 10 Language Access Needs." The State has not even considered the difference between residents who speak languages other than English, and those that cannot understand English. As a result, it failed to narrowly tailor Revised 56:11-34.[11]

Finally, the overbreadth of Revised 56:11-34 is apparent in comparison to other New Jersey laws that require disclosures in foreign languages. Most businesses that operate in New Jersey are not required to speak, or possible services in any language other than English. CDIA is not aware of any other industry—including others that help New Jersey residents function in the "financial marketplace"—that New Jersey requires to communicate in a pre-determined range of languages at the customer's request. In the limited circumstances where the State has previously imposed foreign-language disclosure requirements, the obligations

[10] If 5.2% of the state's population have "limited English proficiency," and 66.2% of the language access needs in the state are attributable to Spanish-speakers, then about 3.4% of New Jersey's population have limited English proficiency and need access in Spanish. Accordingly, the total percentage of New Jersey's population who may require access in another language corresponds to approximately 1.8% of the state's population.

[11] Ominously, data in the State's brief suggests that the NCRAs could be compelled to provide disclosures in "at least twenty different languages spoken by New Jerseyans." [ECF No. 43-1, p. 31.] This statement, which further demonstrates the State's failure to consider whether each incremental burden on CDIA's members is justified by real-world benefits, should also remind the Court that Revised 56:11-34 may allow the State to impose substantially greater burdens on the NCRAs than the statue minimally requires.

are generally triggered by the business's choice to communicate with potential customers in a particular language. *See, e.g.,* N.J.S.A. 17:16C-100(d) ("A home repair contractor who in the ordinary course of business regularly uses a language other than English in any advertising or other solicitation" is required to deliver receipts in that other language.); N.J.S.A. 56:8-176(e) (concerning packaging of prepaid calling cards). Unlike those persons subject to these provisions, the NCRAs are not affirmatively marketing their products and services in those other languages.

In sum, the State has failed to clearly articulate the need that Revised 56:11-34 is designed to address with any degree of particularity that would allow this Court to conclude that it narrowly tailored the law to address a substantial government interest sufficient to survive judicial scrutiny, even under *Central Hudson, supra*. New Jersey's own arguments and data demonstrate that the law is far from narrowly tailored; rather it seeks to require that the NCRAs provide services to consumers who may speak another language but do not need assistance in understanding English. In this way alone, Revised 56:11-34 is clearly overbroad and cannot survive.

CONCLUSION

For the foregoing reasons, the Consumer Data Industry Association respectfully requests that this Court deny Defendant's Motion for Summary Judgment, and grant judgment in favor of CDIA on its Motion for Summary Judgment.

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Respectfully submitted,

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