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January 31, 2023

Lisa Jacobs
Chair, Committee on Scope and Program
Uniform Law Commission
111 North Wabash Ave.
Chicago, IL 60602

Re: Objections to the creation of a drafting committee as proposed by the Study Committee on Tenant Information in Rental Decisions Committee

Dear Chair Jacobs:

I write on behalf of the Consumer Data Industry Association ("CDIA")[1] to respectfully request that the Uniform Law Commission ("ULC") *not* appoint a drafting committee as proposed by the Study Committee on Tenant Information in Rental Decisions Committee ("Study Committee"). Since the Study Committee has not met the ULC's New Project Criteria in several key places,[2] it is hard to see how any uniform or model act proposed by a drafting committee would meet most of the New Project Criteria. This letter (1) offers background on the ULC process, (2) summarizes tenant screening and observes that tenants expect and demand safe, reasonably affordable places to live, and (3) shows your committee and the Study Committee how a model or uniform act would run afoul of (a) the FCRA, (b) the First Amendment, and (c) other provisions of the New Project Criteria.

1. Background

In February 2021, the ULC authorized a study committee on the use of tenant information in rental decisions. This committee's stated purpose was to study the need for, and feasibility of a uniform or model law addressing landlords' use of tenant screening reports in rental decisions.[3] Citing concerns over the potential for inaccuracies in consumer reports,[4] the committee committed to "focus on identifying how widespread any problems may be and whether any act

[1] The Consumer Data Industry Association is the voice of the consumer reporting industry, representing consumer reporting agencies ("CRAs"), including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

[2] Uniform Law Commission, New Project Criteria, STATEMENT OF POLICY ESTABLISHING CRITERIA AND PROCEDURES FOR DESIGNATION AND CONSIDERATION OF UNIFORM AND MODEL ACTS, available at: https://www.uniformlaws.org/projects/overview/newprojectcriteria ("New Project Criteria").

[3] Uniform Law Commission, TENANT INFORMATION IN RENTAL DECISIONS COMMITTEE (2021), available at: https://www.uniformlaws.org/committees/community-home?communitykey=e1f08bf2-5fbb-412e-abec-ee4c6d42c731

[4] *Id.*

should be directed primarily at commercial providers of screening reports."[5] The ULC is now considering whether to move to drafting a proposed act on this issue. The weight of many factors points to why the ULC should not move to a drafting committee phase.

2. The role of tenant screening: Tenants expect and demand safe, reasonably affordable places to live

Landlords and property managers use tenant screening reports from tenant screening companies[6] to help assure the safety of their current tenants and their invitees and protect their property. Criminal record data can be used to estimate the potential risk of future criminal activity, and in CDIA members' experience, housing providers do not treat all offenses equally. Housing providers are rightfully more concerned about the presence of violent offenses in a criminal history than nonviolent—and less severe—crimes. Moreover, the length of time since the offense occurred is a relevant factor that is considered by the industry. The purpose for consideration of this information is the risk of harm created by someone likely to re-offend. The most recent study released by the federal Bureau of Statistics of the U.S. Department of Justice (July 2021) substantiates the concern regarding violent offenders, finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years."[7] "Violent offenses" include homicide, rape or sexual assault, robbery, assault, and other miscellaneous or unspecified violent offenses.[8]

Public housing authorities and property owners are often required to screen applicants and to prohibit certain applicants with disqualifying drug and other criminal offenses from residing on the property. Congress declared that "the Federal Government has a duty to provide public and other federally assisted housing that is decent, safe, and free from illegal drugs..." 42 U.S.C. §11901(1). To promote safe housing Congress and the Department of Housing and Urban Development ("HUD") created four discrete categories of criminal histories are grounds for denial of public housing: (1) persons subject to a lifetime registration requirement under state sex offender laws; (2) persons convicted of methamphetamine production on public housing property; (3) persons evicted from public housing for drug-related criminal activity in the three years before the application, unless the evicted individual completed an approved rehabilitation program; and (4) persons currently engaged in illegal drug use. 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661; 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

Beyond these mandatory bans, public housing authorities can develop more stringent screening policies and accept or deny prospective renters with records of other crimes. Federal guidelines instruct that public housing authorities may reject applicants who have engaged in any

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[5] *Id.*

[6] While commonly called tenant screening reports, those reports are legally referred to a consumer reports under the FCRA. 15 U.S.C. § 1681a(d) ("FCRA"). Similarly, while the companies that produce these reports are commonly known as tenant screening companies, these companies are legally called consumer reporting agencies under the FCRA. *Id.*, at § 1681a(f) Both consumer reports and consumer reporting agencies are heavily regulated by the FCRA and state versions of that law.

[7] *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2021-2017),* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf p. 12.

[8] *Id.* at 24.

of the following activities within a reasonable time before submitting their application: drug-related criminal activity, violent criminal activity, and other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing-agency employees. 42 U.S.C. § 13661(c). Providers of private housing should be allowed to screen for the same offenses to maintain the safety of their property and the persons living within them.

The dangers posed by failing to conduct criminal background checks on prospective tenants is well documented. Seattle's Fair Chance Housing Ordinance went into effect in February 2018. Seattle, Wash., Mun. Code (SMC) ch. 14.09 (Ordinance). One brave owner and operator (GRE Downtowner) of a Seattle apartment building (The Addison) described what happened when it stopped conducting criminal background checks in anticipation of and in compliance with the Fair Chance Ordinance. [9]

> ...[T]he number of 911 calls from the Addison more than doubled. Fights broke out in the lobby of the building; used needles, trash, and feces were left in stairways and hallways; fire alarms were set off repeatedly in the middle of the night. In response, the Addison's management installed cameras in the hallways on every floor and in other public areas, upgraded door hardware, installed a controlled access system for the elevator, gave residents fobs that allowed them access only to their respective floors, and replaced the main lobby door. It hired additional janitors and armed security guards. The new security measures greatly increased operating costs, but the problems continued, and the Addison's annual insurance deductible climbed from $5,000 to $100,000.[10]

This summary from the GRE Downtowner *Amicus* is just the beginning of the house of horrors cataloged in the brief. Sadly, the brief also notes that in comparing the two years preceding the Fair Chance with the two years after the Ordinance,

> negative social media reviews increased 186 percent; average occupancy declined over 5 percent; average monthly number of evictions climbed from 1.48 to 3.96 (168 percent); average monthly evictions expense per unit climbed from $1,442 to $2,983 (107 percent); average monthly total security costs climbed from $2,350 to $9,581 (308 percent); and average monthly non-recurring capital expenditures climbed from $4,573 to $15,704 (243 percent).
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> . . .

[9] "The Addison on Fourth (the Addison) is an apartment building located in Seattle's Chinatown-International District. Built in 1911 as a hotel, the building was closed in the early 1960s and then reopened in 1969 as housing for low-income residents. In 2012, GRE purchased the property for $12 million. It invested $27 million more in major renovations to convert the property to 254 apartment homes,3 artist lofts, and musician studios. GRE's goal with the renovations was to maintain the historic character of the building, while bringing the systems and finishes up to current code and standards." Brief of GRE Downtowner, LLC, as Amicus Curiae Supporting Petitioner, *Yim v. Seattle*, U.S.C.A. (9th Cir.) No. 21-35567, 2 (Nov. 5, 2021) ("GRE Downtowner Amicus").

[10] *Id.*, 6.

The City of Seattle's refusal to let private landlords screen applicants for criminal history, to ensure that new tenants will not threaten the health, safety, or right to peaceful enjoyment of the community by other tenants and will not threaten physical damage to property, imposed an unduly oppressive and irrational burden on GRE.[11]

3. An act on tenant information in rental decisions will invariably run counter to the ULC's New Project Criteria

Respectfully, the Study Committee has not demonstrated that a proposed act is appropriate under the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts.[12] Every ULC study committee must follow the criteria for an act, including whether there is a "need" for a national model, whether there is a "reasonable probability" that an act will be enacted "by a substantial number of states," whether uniformity will produce significant benefits to the public through improvements in the law, and whether the subject is appropriate for state legislation in view of the powers granted by the Constitution of the United States to Congress.[13] Because the proposal does not fit within these criteria, there should not be a drafting committee to address tenant information in rental decisions.

A. The ULC's proposal seeks to regulate conduct specifically reserved to federal regulation, and any act regarding the contents of consumer reports would be preempted.

The Statement of Policy provides that the subject matter of a proposed uniform act must be appropriate for state legislation and not impede on the powers granted to Congress by the Constitution of the United States. "If the subject matter falls within the exclusive jurisdiction of Congress, it is obviously not appropriate for legislation by the several states."[14]

The contents of tenant screening records are comprehensively addressed by federal law, and any uniform act on this subject would be preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq* ("FCRA"). Since 1971, the FCRA has served as a comprehensive framework for landlords and tenants alike to ensure maximum possible accuracy and has established far-reaching and substantial systems to correct any inaccuracies that may exist in consumer reports. The FCRA reflects a careful Congressional balancing of the public interest in the free flow of information with the need to protect the privacy and accuracy interests of consumers in the information furnished to consumer reporting agencies ("CRAs"). 15 U.S.C. § 1681. This national approach treats all consumers consistently, leveling the playing field to facilitate access to credit for all consumers nationwide, regardless of their state of residency.

The FCRA regulates "consumer reports" and "consumer reporting agencies," which include tenant screening reports and tenant screening companies. In its statement of purpose in enacting the FCRA, Congress stated:

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[11] *Id., at 10.*
[12] New Project Criteria.
[13] *Id.* at Section 1.
[14] *Id.* at Section 1(a).

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness credit standing, credit capacity, character, and general reputation of consumers.
(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a). To promote these objectives and preserve a nationally uniform regulatory approach to consumer reports, Congress imposed upon CRAs the obligation to "follow reasonable procedures to assure maximum possible accuracy of the information" they include in consumer reports about an individual. 15 U.S.C. § 1681e(b). All consumer reporting agencies, including those who provide the tenant reports at issue, are subject to these requirements.

The FCRA provides extensive protection for consumers. CRAs are required to maintain reasonable procedures to assure maximum possible accuracy of the information in consumer reports. 15 U.S.C. § 1681e(b). Other protections include:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.[15]
- All consumer reporting agencies must disclose to consumers, upon request, "clearly and accurately . . . all information in the consumer's file at the time of the request."[16]
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders and the law requires dispute resolution within 30 days (45 days in certain circumstances). If the information in dispute cannot be verified, that information must be removed.[17]
- A consumer reporting agency that violates federal law is subject to private rights of action, and enforcement by the Federal Trade Commission , the Consumer Financial Protection Bureau, and state attorneys general.[18]

In enacting the FCRA, Congress intended to protect the integrity of this national framework by explicitly preempting state laws that were either inconsistent with the FCRA, or which would interfere with key elements of the national credit reporting system. Congress initially established only a "conflict preemption" framework, preempting only state laws that were inconsistent with the FCRA. Pub. L. 90-321 (1968). *See* 15 U.S.C. § 1681t(a) (preempting state laws "to the extent that

[15] 15 U.S.C. §§ 1681s-2(a)(1)-(2).
[16] 15 U.S.C. § 1681g(a).
[17] 15 U.S.C. §§ 1681i(a)(1), (5).
[18] 15 U.S.C. §§ 1681n, 16810, 1681s.

those laws are inconsistent with any provision of [the FCRA]"). In 1996, with the passage of the Consumer Credit Reform Act, Congress added specific "subject matters" that were reserved to federal oversight by preempting state laws "related to" those subjects (within new subsection (b)), and preempted specific state laws relating to specific "conduct regulated by" the FCRA (within new subsection (c)). Pub. L. No. 104-208 (1996).

The "subject matters" Congress preempted included the "information contained in consumer reports." 15 U.S.C. § 1681t(b)(1)(E). Where Congress chose to broadly preempt a given subject matter, it identified the section or subsection of the FCRA by number, used the phrase "relating to," and described the subject matter to be preempted. Relevant here, the "subject matter preemption" provision provides that "[n]o requirement or prohibition may be imposed under the laws of **any** State…with respect to **any subject matter** regulated under . . . section 1681c of [the FCRA], **relating to information contained in consumer reports**[.]" 15 U.S.C. § 1681t (emphasis added.).[19]

These words have a broad scope and effect, and any state laws that attempt to regulate information contained in consumer reports are preempted. In the context of examining federal preemption of state law, the Supreme Court has determined that the phrase "relating to" has a "broad scope," and "an expansive sweep," noting it is "deliberately expansive," "broadly worded," and "conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 - 84 (1992) (holding state guidelines regarding airline fare advertising were expressly preempted by Airline Deregulation Act). As the Supreme Court explained:

> **The ordinary meaning of these words 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 held this language meant that state laws "having a connection with or reference to" the protected subject matters (rates, routes, or services) were therefore preempted. *Id.* at 384 (emphasis added). The Supreme Court reiterated the broad scope and effect of the phrase "related to" in 2008 when it held that the federal law regarding the deregulation of the trucking industry preempted two provisions of Maine's tobacco laws, which attempted to regulate the delivery of tobacco to consumers within the state. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 368 (2008). As the Supreme Court explained:

> "[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

[19] 15 U.S.C. § 1681t(b)(1)(E). This provision provides a limited exception for "any State law in effect on September 30, 1996[.]" Thus, no state may adopt laws after 1996 that attempt to regulate, by permitting or prohibiting, the information which may be included in consumer reports. If Congress had intended states to be able to adopt laws governing the content of consumer reports, this savings clause would not have been required.

> "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 ,. . .

Id. at 370 - 71 (emphasis in original) (internal citations omitted). Thus, to the extent that state laws "have a connection with or reference to" the information contained within consumer reports, such state laws are preempted.

The legislative history of the FCRA evidences a clear Congressional intent to establish a *uniform* national standard related to credit reporting with which states could not interfere. With regard to the "subject matter" preemption framework, Representative Thomas of Wyoming explained: "[W]e have 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). As U.S. Rep. Castle of Delaware, a sponsor of the legislation, put it, "[t]his Federal preemption **will allow businesses to comply with one law on credit reports rather than a myriad of State laws**." 140 Cong. Rec. H9797-05, H9815 (1994) (emphasis added). Taken as a whole, the legislative history clearly "reflect[s] an affirmative choice by Congress to set 'uniform federal standards' regarding the information contained in consumer credit reports."[20]

FCRA preemption was not without limit under the 1996 version; in fact, Congress carved out exemptions from the preemption provisions where the state law provided greater protections to consumers than the FCRA provides and also contained an eight-year sunset provision of the preemption provisions. 15 U.S.C. § 1681t (1998). 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). Rep. Castle explained:

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[20] While the Consumer Financial Protection Bureau recently promulgated an interpretative rule purporting to overturn Congress's preemption framework. Bureau of Consumer Financial Protection, 12 C.F.R. pt. 1022, THE FAIR CREDIT REPORTING ACT'S LIMITED PREEMPTION OF STATE LAWS (June 28, 2022), it is well settled that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995) (internal citations omitted). Moreover, the CFPB likely exceeded its limited rulemaking authority - both under the FCRA, 15 U.S.C. § 1681 *et seq*., and the Consumer Financial Protection Act, Title X of the Dodd Frank Act, 12 U.S.C. § 5481 *et seq*., in promulgating the rule, which renders the rule unenforceable under the Administrative Procedures Act and general Constitutional principles. *See* 5 U.S.C. § 706(2) (setting forth the scope of judicial review courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). In any case, the scope of preemption is not delegated to any agency to interpret or enforce; therefore, the issue is one to be resolved through the courts as it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

> 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).[21] This test of the "viability of a uniform national standard" was successful. Congress struck subpart (d)(2) in its entirety and as part of the 2003 FACT Act Amendments. 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 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 of the enumerated subject matters and conduct, even if the proposed state law would provide additional consumer protections. 15 U.S.C. §1681t. U.S. Rep. Mike Oxley of Ohio, the Chairman of the House Committee on Financial Services, explained, the intent of Congress at that time was that:

> under this new preemption provision, **no state or local jurisdiction may add to, alter, or affect the rules established by the statute or regulations thereunder in any of these areas. All of the statutory and regulatory provisions establishing rules and requirements governing the conduct of any person in the specified areas are governed solely by federal law, and any state action that attempts to impose requirements or prohibitions in these areas would be preempted**.

149 Cong. Rec. E2512 & P 2518 (2003) (emphasis added). *See also Ross v. FDIC,* 625 F.3d. 808, 812-813 (4th Cir. 2010) (citations omitted) (state laws that are "inconsistent with" the FCRA, or which attempt to regulate specific subject matters and specific regulated conduct were preempted by Congress in order to avoid a "patchwork of conflicting regulations.").

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[21] 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, for example, 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.

While there is a split of authority on whether section 1681t(b)(1) of the FCRA preempts state laws as broadly as CDIA suggests, all courts which have considered the question agree that some degree of federal preemption exists. [22] On the specific question of whether the FCRA preempts state law that attempts to limit the reporting of criminal record information, the sole court to have considered that question found that state law was preempted. *Simon v. DirecTV, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010). In *Simon*, the district court held that section 1681(b)(1)(E) preempted a Colorado law barring the reporting of criminal history information because section 1681c (formerly, § 605) provided that the FCRA already regulates the reporting of "records of convictions of crime which antedate the report by more than seven years." *Id.* at *4. FCRA § 1681c(a)(2) provides that all conviction records, regardless of their age, may be reported indefinitely; and other criminal records, such as arrests, may be reported for up to seven years. The district court held that the Colorado law limiting the reporting of conviction records to only seven years was preempted because it "concern[ed] the same subject matter," as FCRA § 1681c(a)(2); namely, "the type of information that can be legally disclosed in consumer reports." *Id.* at *4.[23]

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[22] *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (holding that § 16814t(b)(1)(A) preempts common law claims against a CRA related to its sale of reports for prescreening, explaining "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." (citations omitted)); *CDIA v. Swanson*, 2007 WL 2219389 at *9 (D. Minn. 2007) (in finding the FCRA preempted state laws regulating the sale of prescreening reports, the court stated that neither "Minnesota, nor any other state, may prohibit or regulate" what the FCRA permits); *Aleshire v. Harris*, 586 F. App'x. 668, *6 (7th Cir. 2013) ("we recently rejected the argument that section 1681t(b) should be read narrowly to apply only to state statutory claims, and we held that section 1681t(b)'s preemptive force applies equally to state common law claims"); *Sigler v. RBC Bank*, 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010) (referring to subject matter preemption as an "absolute immunity provision" and declaring state law preempted where the allegations all related to "prescreening of consumer reports" under §1681t(b)(a)(A)); *Pinson v. Equifax Credit Info. Services, Inc.*, 316 F. App'x. 744 (10th Cir. 2009) (unpublished opinion) (holding state law claims for negligence were barred by 15 U.S.C. § 1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 F. App'x. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. § 1681t(b)(1)(F)); *Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding claims related to inaccurate furnishing of data preempted by 1681t(b)(1)(F) stating "[the] extra federal remedy in § 1681s-2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges.") (relying on *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009)); *c.f. Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1 (1st Cir. 2022) (*reh'g denied*) (holding §1681t(b)(1)(E) should be read narrowly, not broadly, which only preempts state laws that regulate those specific items of information mentioned in 15 U.S.C. § 1681c, and remanding the case for further proceedings); and *Galper v. JP Morgan Chase*, 802 F.3d 437, 446 (2d Cir. 2015) (holding that section 1681t(b)(1)(F) should be read narrowly, and not broadly, but that nonetheless the FCRA preempted "those claims that *concern* the furnisher's responsibilities.").

[23] *CDIA v. Frey* is not inconsistent with the *Simon* court's reading of the FCRA. In *Frey*, the First Circuit declined to find that the FCRA's preemption provision 1681t(b)(1)(E) preempted all state regulation of the content of consumer reports; however, the court suggested in its opinion that where §1681c addressed the type of information the state law would regulate, the state law may be preempted. *See Frey,* 26 F.4th at 23-24 (where the court remanded back to the district court for further briefing).

Federal preemption of at least some, if not all, of the kind of information that any act would propose to regulate (criminal arrest data, criminal conviction data, landlord eviction proceedings, etc.), weighs in favor of the ULC not engaging in the drafting of a set of rules that may well invite more litigation and create more uncertainty.

B. Any restriction on the contents of consumer reports would also infringe on CDIA members' rights to free speech guaranteed by the First Amendment.

By restricting the right of consumer reporting agencies to include criminal history information in their reports, any state would be impermissibly interfering with the CRAs' right to free speech. In short, the "right to speak is implicated when information [one] possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 32 (1984). In *Sorrell*, the Supreme Court overturned a Vermont law that attempted to preclude pharmaceutical sales companies from using medical prescriber information for marketing purposes while allowing that information to be used and shared for other approved purposes by third parties. *Id.* at 558-559. By targeting who may use the information and their objectives, the law imposed content-based and speaker-based speech restrictions. *Id.* at 563-564. Ultimately, the state's concern over consumer and provider privacy did not justify the intrusion on speech. The court held that Vermont failed to sufficiently tailor the restriction given the clear burden on speech. *Id.* As the Supreme Court explained:

> The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. **Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects.** But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech.

Id. at 576-577 (emphasis added) (citations omitted).

Here, state bans on the dissemination and use of criminal record information would suffer from the same defects. Criminal history information is public record information and is available for use by the public. The information has value and is an important tool in assuring the safety of persons and properties in multi-family housing communities. Prohibiting certain members of the public (CRAs and landlords) from using this information for their desired purpose (the preparation of reports) would be subject to the same heightened scrutiny as the law in *Sorrell*.

It is important to keep in mind that the use of criminal history information in tenant screening is not *per se* discriminatory. The Department of Housing and Urban Development considered the potential risk of harm from *misuse* of such information that could form the basis of a violation of federal and state fair housing law, and did not ban the use of criminal history information in tenant screening.[24] Instead, HUD Guidance established clear requirements for the

[24] U.S. Dept. of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related*

responsible use of criminal history information. HUD requires housing providers to engage in an individualized assessment of the applicant, including information related to the criminal history and requires providers to adopt non-discriminatory policies regarding the use of criminal record information in screening that considers the nature, recency, and severity of the crime.[25] In this way, HUD balanced the risk for potentially discriminatory conduct by the users of such information against the need that housing providers have to protect their residents and employees. There is no need for the ULC to tread into this issue.

C. The remaining factors of the Statement of Policy do not weigh heavily in support of progressing to a drafting committee.

The remaining policy considerations also do not weigh in favor of progressing to a drafting committee at this time. The ULC's Statement of Policy further requires that "[e]very act drafted by the ULC should be guided by . . . [w]hether there [is] a need for an act on this subject"[26] and whether "there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly."[27] As explained above, the FCRA provides for a national, uniform standard of credit reporting, obviating the need for any law on the issue. Moreover, the ULC adopted or is in the process of various acts that may reach many of the same issues, including:

- The ULC Uniform Personal Data Protection Act ("UPDPA").[28] This act, adopted in 2020, purports to provide a comprehensive framework for managing consumer data and protecting consumer privacy.
- The ULC Criminal Records Accuracy Act ("CRAA").[29] This act, adopted in 2018, offers a process by which states could maintain and share public record information to improve the accuracy and completeness of criminal record background checks.
- The ULC Redaction of Personal Information from Public Records Committee.[30] Begun in 2022, a study committee is reviewing the need for and feasibility of a uniform law concerning the redaction of personal information from public records and other official public records to address safety concerns.

Transactions (Apr. 4, 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF ("Guidance").

[25] *See, gen, id.* at 6-7.

[26] STATEMENT OF POLICY, at Section 1(c)(1).

[27] *Id.* at Section 1(c)(2).

[28] Uniform Law Committee, UNIFORM PERSONAL DATA PROTECTION ACT, available at: https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=009e3927-eafa-3851-1c02-3a05f5891947&forceDialog=0

[29] Uniform Law Commission, CRIMINAL RECORDS ACCURACY ACT, available at: https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8736ef87-34ea-c751-44f3-2fcf51670c8a&forceDialog=0

[30] Uniform Law Commission, REDACTION OF PERSONAL INFORMATION FROM PUBLIC RECORDS COMMITTEE, available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=e38cf2a9-b7c2-43b1-8907-f4d36434de2f.

To date, no states have adopted the CRAA, and while some states have proposed legislation based on the UPDAA, none have adopted it.[31] Thus, there is no "reasonable probability" that an act will be enacted "by a substantial number of states."

Last week, the White House announced "new actions to increase fairness in the rental market and further principles of fair housing." This announcement is another factor against appointing a drafting committee on tenant information in rental decisions. The White House's announcement follows a "new *Blueprint for a Renters Bill of Rights* that the Administration…also release[ed]…The Blueprint lays out a set of principles to drive action by the federal government, state and local partners, and the private sector to strengthen tenant protections and encourage rental affordability." The White House also released a FACT SHEET.[32] Among other things, the White House said that "[t]he CFPB announced it will issue guidance and coordinate enforcement efforts with the FTC to ensure accurate information in the credit reporting system and to hold background check companies accountable for having unreasonable procedures."[33]

Finally, a uniform act here would be inappropriately controversial, weighing in favor of not proceeding to a drafting committee. Where the subject matter is controversial "because of disparities in social, economic, or political policies or philosophies among the states,"[34] drafting is disfavored. The subject matter for proposed legislation is a pure example of disparities in social, economic, and political philosophies among the states. Regulation of the contents of tenant screening reports is often, at its core, about whether and when a landlord should be able to access criminal records to conduct a background check on a prospective tenant. This issue involves contentious debate about race and opportunity on one hand and the need to protect public safety on the other.[35] *See, e.g., Yim v. City of Seattle*, 2018 WL 6650794 (W.D. Wash. 2018), *appeal docketed*, No. 21-35567 (9th Cir. argued May 17, 2022) (where landlords and CRAs challenged the legality of Seattle ordinance banning both the consideration of most criminal record information and a ban on a consumer reporting agency's inclusion of such information in consumer reports, on First Amendment and Due Process grounds. CDIA filed an *amicus* brief this matter.).[36]

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[31] *See* Uniform Law Commission, CRIMINAL RECORDS ACCURACY ACT, ENACTMENT MAP, available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=8cf49e06-b9e1-43b0-8bc1-56d459d47eb0.

[32] Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/.

[33] *Id.*

[34] *Id.* at Section 1(f)(2).

[35] *See, e.g.*, UNDERSTANDING THE FAIR CHANCE HOUSING ORDINANCE, Seattle City Council Insight (Aug. 24, 2017), available at: https://sccinsight.com/2017/08/24/understanding-fair-chance-housing-ordinance/ (discussing complexities and controversies surrounding Seattle Municipal Code section 14.09, referred to as the Fair Chance Housing Ordinance).

[36] *See also* Craig Clough, *Seattle Law Barring Tenant Checks Faces Tough 9th Circuit*, Law360 (May 17, 2022) (describing oral argument in this case before the Ninth Circuit, where the author described the justices as "skeptical" of the lower court's decision to uphold the ordinance).

Crafting legislation on this topic would involve making value judgments in an environment where the evidence supporting each policy option is not clear-cut, and more importantly, is a matter of balancing those interests, which HUD has already done. Such policy considerations are best left to HUD.

4. The inevitable conclusion: The ULC should not appoint a drafting committee on tenant information in rental decisions

In conclusion, Congress has already adopted a uniform national standard of consumer reporting in the United States within the Fair Credit Reporting Act. Therefore, the ULC should not appoint a drafting committee to create a model or uniform state law regulating the same, as any model rule would likely be preempted in part – if not in its entirety. Moreover, the Study Committee has not demonstrated that the proposal is appropriate under the considerations outlined in the ULC's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform Model Acts. CDIA, therefore respectfully suggests that a drafting committee not be created.

Sincerely,

Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

cc: The ULC Study Committee on Tenant Information in Rental Decisions