UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAMARA T. KING on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 2:10-cv-06850-PBT
GENERAL INFORMATION SERVICES, INC.,	)	
Defendant.	)	

MEMORANDUM OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE CONSTITUTIONALITY OF § 1681c OF THE FAIR CREDIT REPORTING ACT

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INTRODUCTION

Consumer reporting agencies play a "vital role" in our economy by providing "[t]hose who extend credit or insurance or who offer employment . . . the facts they need to make sound decisions." *See* S. Rep. No. 91-517, at 2 (1969). But by assembling and disseminating volumes of information about individuals, consumer reporting agencies have the power unduly to invade individuals' privacy and to cause unfair harm by disclosing inaccurate information. *See id.* For over forty years, the Fair Credit Reporting Act (FCRA or Act) has mitigated these threats to individuals while also ensuring the "free flow" of information that businesses need. *See id.* at 1–2. This case involves one provision that balances these dual purposes of the Act, § 1681c—a provision that, with certain narrow exceptions, bars consumer reporting agencies from disclosing arrest records and other adverse items of information that are more than seven years old.

General Information Services (GIS) attempts to invalidate this longstanding FCRA protection by contending that a recent Supreme Court case, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), revolutionizes First Amendment jurisprudence such that FCRA is suddenly now unconstitutional. GIS is wrong. *Sorrell* does not change the settled First Amendment standards applicable to commercial speech, nor does it suggest that restrictions on the dissemination of data for commercial purposes must satisfy stricter standards. The test the Supreme Court established over thirty years ago in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), still applies to laws like § 1681c that restrict commercial speech. Section 1681c passes this test, and nothing in *Sorrell* suggests otherwise.

STATUTORY BACKGROUND

Congress passed the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in 1970 to curb abuses of the credit reporting industry, which had assumed a "vital role in assembling and

evaluating consumer credit and other information on consumers." Pub. L. 91-508, § 601, 84 Stat. 1128, 1128 (1970) (*codified at* 15 U.S.C. § 1681(a)(3)). The Act carefully balances businesses' "dependen[ce] upon fair and accurate credit reporting" and the "need to insure that consumer reporting agencies [(CRAs)] exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a).

The provision challenged here is one of the ways that Congress balanced these interests. In general, § 1681c provides time limits beyond which CRAs may not disclose adverse information about consumers, including information about bankruptcies, civil suits, civil judgments, paid tax liens, and accounts placed for collection. *Id.* § 1681c(a). As relevant here, the provision generally bars consumer reports from including arrest records that antedate the report by more than seven years—unless the governing statute of limitations has not yet expired—and other "adverse item[s] of information" that are more than seven years old. *Id.* § 1681c(a)(2), (5). Recognizing that businesses might have a greater need for older information in some circumstances, § 1681c allows CRAs to disclose such older adverse information in consumer reports used in certain "high stakes" situations—where a business is considering offering an individual a job paying $75,000 or more, or a loan or insurance policy worth $150,000 or more. *Id.* § 1681c(b). Older adverse information also may be disclosed in reports that do not qualify as "consumer reports" subject to the Act generally—*i.e.*, certain reports prepared by employment agencies for purposes of placing an individual in a job and reports given to an employer in connection with an investigation of suspected employee misconduct. *Id.* § 1681a(d)(2)(D), (o), (y).[1]

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[1] Section 1681a(d)(2)(D) exempts from the definition of "consumer reports" those communications "described in subsection (o) or (x) of this section." A 2010 conforming

The statute also allows consumer reports to disclose all criminal convictions—even those more than seven years old and even in lower-stakes situations. *Id.* § 1681c(a)(5). Congress appears to have allowed disclosure of conviction information because it would be important to employers considering applicants for certain jobs paying less than $75,000 a year, such as child care and elder care providers, educators, and school bus drivers. *See* 144 Cong. Rec. S11638, S11639 (daily ed. Oct. 6, 1998) (statement of Sen. Nickles); 144 Cong. Rec. H10218, H10219 (daily ed. Oct. 8, 1998) (statement of Rep. Leach).

In allowing CRAs to disclose convictions or other adverse public record information like recent arrest records, the statute protects consumers by requiring CRAs to comply with certain procedural safeguards. For example, if a CRA reports public record information that is "likely to have an adverse effect upon a consumer's ability to obtain employment," it must maintain strict procedures to keep the information complete and up to date, or it must inform the consumer that it is reporting that information. 15 U.S.C. § 1681k(a). CRAs are also generally required to "follow reasonable procedures to assure maximum possible accuracy of the information" on consumer reports. *Id.* § 1681e(b).

PROCEDURAL BACKGROUND

Plaintiff Shamara King sued GIS, a CRA, for violating § 1681c(a)(2) and (5) of FCRA by including on a consumer report dismissed criminal charges that were more than seven years old. GIS has moved for judgment on the pleadings on the ground that § 1681c violates the First Amendment under the Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct.

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amendment redesignated subsection (x) as subsection (y), but did not make a corresponding change to § 1681a(d)(2)(D). That provision should now exempt communications "described in subsection (o) *or (y)*" from the definition of "consumer reports" subject to the Act.

2653 (2011). (Docket No. 40, GIS Mot. for Judgment on the Pleadings ["MJP"].) Pursuant to 28 U.S.C. § 2403, the United States has intervened to defend § 1681c's constitutionality.

ARGUMENT

SECTION 1681c IS CONSTITUTIONAL.

Section 1681c need only satisfy *Central Hudson*'s well-established test for restrictions on commercial speech. The provision satisfies that test, and nothing in *Sorrell* suggests otherwise.

A. The Well-Established *Central Hudson* Test for Restrictions on Commercial Speech Applies To § 1681c.

1. Because § 1681c restricts only commercial speech, it need only satisfy the intermediate scrutiny established in Central Hudson.

The Supreme Court has made clear that consumer report information that is "of purely private concern" receives "less stringent" First Amendment protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60 (1985) (plurality op.); *accord Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (describing *Dun & Bradstreet* with approval). Following that case, and invoking the Supreme Court's commercial speech doctrine, the D.C. Circuit concluded that consumer reports produced by CRAs "merit[] only intermediate scrutiny." *Trans Union Corp. v. F.T.C.*, 267 F.3d 1138, 1141 (D.C. Cir. 2001) ("*Trans Union II*") (denying rehearing of 245 F.3d 809 ("*Trans Union I*")).

The extensive body of case law applying *Central Hudson*'s commercial speech doctrine provides the appropriate test for analyzing the "reduced constitutional protection" afforded consumer reports. To be sure, commercial speech in its most common form "does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). But *Central Hudson* recognizes that "expression related solely to the

economic interests of the speaker and its audience" can also constitute commercial speech. *Central Hudson*, 447 U.S. at 561.

Consumer reports are speech related solely to such economic interests. *See Dun & Bradstreet*, 472 U.S. at 762; *Trans Union II*, 267 F.3d at 1141. CRAs have an interest in providing the information contained in consumer reports because businesses are willing to pay for it, and businesses are interested in buying it because it is useful for making economic decisions. Moreover, as the Supreme Court confirmed just last year, a credit report "sent to only five subscribers . . . , who were bound not to disseminate it further" is "speech solely in the individual interest of the speaker and its specific business audience." *Snyder*, 131 S. Ct. at 1215–16 (describing with approval the Court's holding in *Dun & Bradstreet*). Like that credit report, the data at issue here is not disseminated to the public at large, but rather only to particular clients, who may use it only for particular economic purposes, and who may disseminate it further only in limited circumstances. 15 U.S.C. § 1681b (allowing consumer reports to be provided and used only for certain purposes); *id.* § 1681e(e) (limiting ability to resell consumer reports). Because consumer reports therefore relate solely to their buyers' and sellers' economic interests, they qualify as commercial speech protected by *Central Hudson*'s intermediate standard.

Other courts have confirmed that restrictions on the sale of data should be analyzed under *Central Hudson*'s commercial speech test. The Ninth Circuit, for instance, has held that selling information about recent arrestees to attorneys and others seeking new clients qualified as commercial speech protected under the *Central Hudson* test. *United Reporting Publ'g Corp. v. Cal. Highway Patrol*, 146 F.3d 1133, 1135, 1137 (9th Cir. 1998), *rev'd on other grounds sub nom. L.A. Police Dep't v. United Reporting Publ'g Corp*, 528 U.S. 32 (1999). The D.C. District

Court has similarly applied *Central Hudson* to a restriction on disseminating so-called "credit header" information—personally identifying information at the top of consumer reports. *Individual Reference Servs. Grp., Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 41 (D.D.C. 2001).

Like the laws at issue in those cases, § 1681c regulates communications of data that relate solely to the economic interests of the buyer and seller. *Central Hudson* therefore applies.

2. Nothing in* Sorrell *suggests that § 1681c must satisfy a stricter form of scrutiny.

Contrary to GIS's contention, *Sorrell* does not "mark[] a substantial shift in the protection afforded to commercial speech." MJP at 1. The decision does not purport to displace *Central Hudson* or to limit *Central Hudson*'s applicability to content- and speaker-based restrictions on commercial speech. On the contrary, the *Sorrell* Court endorsed and applied *Central Hudson*'s intermediate standard.

In *Sorrell*, the Supreme Court considered a First Amendment challenge to a Vermont law that "restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Sorrell*, 131 S. Ct. at 2659. In particular, the law generally prevented the "prescriber-identifying information" from being sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. *Id.* Vermont defended this law in part by arguing that only the most minimal First Amendment scrutiny applied because the prescriber-identifying information did not qualify as speech, but rather a "commodity." *Id.* at 2666. The Court rejected this argument, concluding that even if the prescriber-identifying information did not constitute speech, the law nonetheless burdened the speech of the pharmaceutical companies who wanted to buy this information to aid their marketing efforts. *Id.* at 2667. In particular, the law imposed a content- and speaker-based burden on purchasers' speech: It barred pharmaceutical manufacturers from using prescriber-

identifying information for marketing, "even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints." *Id.* at 2663. The law thus "disfavor[ed] marketing, that is, speech with a particular content" and "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." *Id.* Because the law imposed content- and speaker-based burdens on speech, it had to pass "heightened scrutiny." *Id.* at 2664.

This "heightened scrutiny," however, does not refer to some new, undefined level of scrutiny. Rather, as three aspects of *Sorrell* reveal, this "heightened scrutiny" can be either strict or intermediate, depending on the nature of the burdened speech. *See id.* at 2667. Where a law burdens only commercial speech, *Central Hudson*'s well-established intermediate standard applies.

First, the case's context indicates that "heightened scrutiny" simply refers to some level of First Amendment scrutiny that is "heightened" as compared to the minimal scrutiny that Vermont urged the Court to apply. In particular, Vermont had argued that only minimal First Amendment scrutiny applied because the law regulated the economic "conduct" of selling a "commodity" and imposed only "incidental burdens on speech." *See id.* at 2664-67. The Court brushed aside this argument and concluded that even if the prescriber-identifying information was not itself speech, the law still "imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information." *Id.* at 2667. Because the law thus limited certain speakers' access to information that made their speech more effective, it could be "compared with a law prohibiting trade magazines from purchasing or using ink." *Id.* Such a law triggers "heightened" First Amendment scrutiny.

Second, the opinion makes clear that "heightened scrutiny" includes the intermediate scrutiny traditionally given to commercial speech restrictions: The Court characterizes

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993)—a case applying the *Central Hudson* test for restrictions on commercial speech—as "applying heightened scrutiny." *Sorrell*, 131 S. Ct. at 2664.

Finally, the "heightened scrutiny" that *Sorrell* actually applies is *Central Hudson*'s intermediate test. *Id.* at 2667–68. After establishing that Vermont's law had to pass "heightened scrutiny," the Court considered what precise standard to apply. *Id.* at 2667. The state had argued that *Central Hudson*'s intermediate standard applied because the law at most burdened only commercial speech—marketing by pharmaceutical companies. *Id.* The Court declined to decide "whether all speech hampered by [the Vermont law] is commercial," because "the outcome is the same" regardless of the level of scrutiny. *Id.* Thus, the Court indicated that an intermediate "commercial speech inquiry" would apply to a content-based law that burdened *only* commercial speech, while "a stricter form of judicial scrutiny" would apply to a law that also burdened some fully protected, non-commercial speech. *See id.*

Thus, nothing in *Sorrell* suggests that content- and speaker-based restrictions on commercial speech must now pass a stricter form of scrutiny than the well-settled intermediate standard established under *Central Hudson*. By their very nature, restrictions on commercial speech are almost always content-based and are often speaker-based. For instance, the challenged agency order in *Central Hudson* barred certain speakers—electric utility companies—from engaging in speech with a particular content—speech "promot[ing] the use of electricity." *Central Hudson*, 447 U.S. at 558, 558–59; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001) (applying *Central Hudson* to regulations restricting tobacco advertisements); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 623 (1995) (rule preventing personal injury lawyers from sending certain solicitations was a restriction on commercial

speech); *Bolger*, 463 U.S. at 61, 68 (law prohibiting the mailing of unsolicited advertisements for contraceptives was a restriction on commercial speech). Thus, as the D.C. Circuit pointed out in *Trans Union II*, "given the Supreme Court's commercial speech doctrine, which creates a category of speech defined by content but afforded only qualified protection, the fact that a restriction is content-based cannot alone trigger strict scrutiny." *Trans Union II*, 267 F.3d at 1141–42; *accord Bolger*, 463 U.S. at 65 ("[R]egulation of commercial speech based on content is less problematic."). *Sorrell* does not change this. On the contrary, it confirms that *Central Hudson* supplies the appropriate standard for analyzing content- and speaker-based burdens on commercial speech. *Sorrell*, 131 S. Ct. at 2667–68.

In short, nothing in the Court's opinion suggests that FCRA § 1681c—or any other law restricting disclosure of data relating solely to the economic interests of the buyer and seller—must satisfy a stricter form of scrutiny than the intermediate scrutiny laid out in *Central Hudson*.

B. Section 1681c Satisfies *Central Hudson*'s Test.

Unlike the law struck down in *Sorrell*, § 1681c satisfies the *Central Hudson* test. Under *Central Hudson*, a restriction on non-misleading commercial speech concerning lawful activity passes First Amendment muster if it directly advances a substantial government interest and is "no more extensive than necessary" to serve that interest. *Central Hudson*, 447 U.S. at 566; *accord Sorrell*, 131 S. Ct. at 2667–68. Determining whether a law "directly advances" an interest in a way that is "no more extensive than necessary" essentially '"involve[s] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)). That "fit" between a legislature's goal and the means chosen to accomplish that goal need "not necessarily [be] perfect, but

reasonable," and the law's scope must be "in proportion to the interest served." *Bd. of Trs. of SUNY v. Fox*, 492 U.S. 469, 480 (1989) (internal quotations omitted). Section 1681c advances the substantial interest in protecting individuals' privacy in a way that "fits" that goal.

1. Section 1681c directly advances the substantial government interest in protecting individuals' privacy, and is no more extensive than necessary to serve that interest.

Section 1681c's restrictions on disclosing older adverse information serve the governmental interest in protecting individuals' privacy. *See* 15 U.S.C. § 1681(a)(4) (FCRA designed in part to "insure that consumer reporting agencies exercise their grave responsibilities with . . . a respect for the consumer's right to privacy"). As the D.C. Circuit has explained, there can be "no doubt" that FCRA's explicitly stated "interest—protecting the privacy of consumer credit information—is substantial." *Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 818 (D.C. Cir. 2001) ("*Trans Union I*"). Indeed, the Third Circuit has recognized that individuals' privacy interests can be not only substantial but compelling where disclosure of information could inflict serious reputational injury and even be "career ending." *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (affirming decision to deny the press access to a list of unindicted co-conspirators, concluding that protecting those individuals' privacy and reputations trumped the media's First Amendment right to access).

Sorrell confirms the importance of protecting privacy and recognizes that "[t]he capacity of technology to find and publish personal information . . . presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." *Sorrell*, 131 S. Ct. at 2672; *see also id.* (describing privacy as "a concept . . . integral to the person and a right . . . essential to freedom"). The Court acknowledged that the state could advance this important privacy interest with an appropriately tailored law. *See Sorrell*, 131 S. Ct. at 2668 (noting that Vermont could have advanced its privacy interest "through a more coherent policy" (quotations omitted)).

FCRA's provision barring consumer reports from including older adverse information is just such an appropriately tailored law. Section 1681c directly advances the goal of protecting privacy. By limiting the disclosure of potentially embarrassing or harmful information, the provision necessarily and automatically protects individuals' interest in keeping that information private. And it is appropriately drawn to serve that interest. In fact, "there is no possibility that some less-restrictive or nonspeech-related regulation could achieve the identified state interest" because "the speech itself (dissemination of . . . data) causes the very harm the government seeks to prevent" (invasion of privacy). *Trans Union II*, 267 F.3d at 1142. Contrary to GIS's arguments, neither the law's "underinclusiveness" nor the regulated information's availability in public records undermines this fit between § 1681c and the substantial interest in protecting privacy.

a. Section 1681c's purported "underinclusiveness" does not undermine the fit between the law and the substantial interest in protecting individuals' privacy.

GIS contends that there is not a proper fit between § 1681c and the government's asserted interest in protecting individuals' privacy because it is purportedly underinclusive. GIS bases this argument on § 1681c's allowance of disclosure of criminal convictions and more recent arrest records and its inapplicability to entities other than CRAs, to consumer reports made in connection with certain larger transactions, or to certain reports by employment agencies and reports made in connection with internal investigations of employee misconduct. MJP at 16–17; *see* 15 U.S.C. §§ 1681a(o), (y), 1681c.

But underinclusiveness is constitutionally problematic only if it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011);

see also City of Ladue v. Gilleo, 512 U.S. 43, 51–53 (1994); *Trans Union I*, 245 F.3d at 819; *Mariani v. United States*, 212 F.3d 761, 774 (3d Cir. 2000). The law in *Sorrell* had just that problem: It contained exceptions that "made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers." *See Sorrell*, 131 S. Ct. at 2668. As a result, the law did not actually materially advance the asserted privacy interest and instead burdened pharmaceutical marketing on the basis of its content and viewpoint.

FCRA does not share this fatal flaw. Section 1681c's exceptions are not so broad as to prevent the provision from meaningfully protecting privacy, nor do they disfavor certain speakers to suppress the content or viewpoint of their speech. On the contrary, § 1681c primarily serves the substantial interest in privacy, allowing "the information's sale or disclosure in only a few narrow and well-justified circumstances"—just the kind of "coherent policy" that the Court in *Sorrell* acknowledged would be permissible. *See id.*

Section 1681c's prohibition is not absolute because the provision, like FCRA as a whole, balances protecting individuals' privacy against businesses' competing interest in obtaining complete information about people to whom they might offer a loan, a job, or an insurance policy. The provision creates exceptions in circumstances where Congress determined that businesses' interest in full information outweighed individuals' privacy interests. For instance, the exception allowing CRAs to disclose older adverse information when an individual seeks a higher-paying job or a higher-value loan or insurance policy reflects Congress's judgment that, "because of the large amounts of money involved the user of the credit report has a right to go back beyond 7 years." 115 Cong. Rec. 33410 (1969) (statement of Sen. Proxmire); *see* 15 U.S.C. § 1681c(b). By the same token, Congress reasonably determined that businesses have a

greater interest in obtaining information about criminal convictions and more recent arrests, which may be more predictive of a person's future behavior. *See* 15 U.S.C. § 1681c(a); 115 Cong. Rec. 2412 (1969) (statement of Sen. Proxmire).

These exceptions do not undermine the law's effectiveness at protecting individuals' privacy: The law continues to protect the privacy of most adverse information in most circumstances. The exceptions also do not reflect any content- or viewpoint-preference: They do not favor certain speakers with certain messages, but rather strike a reasonable balance between businesses' interest in obtaining full information to make economic decisions and individuals' interest in keeping information about themselves private.

The fact that § 1681c applies only to consumer reporting agencies—and not to news organizations, public databases, and other potential sources of the information (MJP 17)—likewise does not reveal any content- or viewpoint-based discrimination or prevent the law from protecting privacy. FCRA does not single out CRAs because of the messages they convey, but rather because they assemble and disseminate such large amounts of information that they pose a particularly significant threat to individuals' privacy. *See* S. Rep. No. 91-517, at 2 (1969) (explaining that members of one major credit bureau trade association "maintain[ed] credit files on more than 110 million individuals and in 1967 . . . issued over 97 million credit reports"); *accord Trans Union I*, 245 F.3d at 819 ("[G]iven consumer reporting agencies' unique access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories, we think it not at all inappropriate for Congress to have singled out consumer reporting agencies for regulation." (internal quotations and citation omitted)). By regulating companies that pose a significant threat to individuals' privacy, § 1681c meaningfully advances the interest in protecting consumers' privacy—even though it leaves unregulated other potential

sources of the same information. The First Amendment does not require the government to "redress [a] harm completely." *Mariani*, 212 F.3d at 774; *see also Stretton v. Disciplinary Bd. of Supreme Court of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) (explaining that the government may, consistent with the First Amendment, "take steps, albeit tiny ones, that only partially solve a problem without totally eradicating it").

Nor do FCRA's exemptions for certain employment agency reports and reports made in connection with employee misconduct investigations render the provision impermissibly underinclusive. *See* 15 U.S.C. §§ 1681a(d)(2)(D), (o), (y). These provisions principally exempt reports on the results of employee reference checks and on the findings of investigations into suspected employee misconduct. *See* H. Rep. No. 103-486 (1994) (describing exemption for employment agency reports); H. Rep. No. 108-263, at 27, 52 (2003) (describing exemption for employee investigation communications). Because these reports are unlikely to contain older adverse information culled from public records in the first place, exempting them from FCRA does not undermine § 1681c's effectiveness at protecting privacy. Moreover, these exceptions do not favor anyone on the basis of their viewpoint or the content of their speech. Rather, employment agencies are subject to different rules because they are "in direct communication" with the individual. H. Rep. No. 103-486. And employee investigation reports are exempt from FCRA because employers would otherwise be deterred "from using outside investigators, which, because of their objectivity and expertise, are generally preferred, and in many cases, legally required." H. Rep. No. 108-263, at 27.

In short, the exceptions to § 1681c's general rule of non-disclosure are carefully crafted to serve the statute's stated interests. Those exceptions neither prevent the law from materially advancing the interest in protecting privacy nor reveal any content- or viewpoint-based

discrimination. Thus, unlike the law in *Sorrell*, § 1681c's purported "underinclusiveness" does not render it unconstitutional.

b. The regulated information's availability in public records does not undermine the fit between § 1681c and the substantial interest in protecting privacy.

The fact that the information regulated by § 1681c is a matter of public record also does not prevent the provision from passing constitutional muster. GIS suggests that the government's privacy interest "do[es] not appear to apply" to § 1681c—and that there is no proper fit between § 1681c and that interest—because the information whose disclosure § 1681c restricts is available in public records. *See* MJP at 16. This argument assumes that individuals suffer just as much harm to their privacy when embarrassing information is available in scattered public records as when a company compiles that information and gives it directly to someone with whom the individual wants to do business.

This assumption ignores reality. As the Supreme Court has made clear, there is a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[2] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989). Easily available compilations of potentially embarrassing information have a "power . . . to affect personal privacy that outstrips the combined power of the bits of information contained within." *Id.* at 765. Thus, even though information about past arrests and criminal charges is a matter of public record, an individual

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[2] Although *Reporters Committee* addresses privacy interests in the context of the Freedom of Information Act, not the First Amendment, *id.* at 751, this is of no moment. *Reporters Committee* resoundingly refutes the notion that individuals have no privacy interest in preventing widespread dissemination of compilations of data that are individually available in scattered public records.

retains a "privacy interest in maintaining the practical obscurity" of that information. *Id.* at 780. Section 1681c protects that privacy interest.

Contrary to GIS's contention, the First Amendment does not prevent the government from advancing that interest. GIS suggests that the Supreme Court has held that the First Amendment bars the government from restricting the dissemination of truthful information that is already in the public domain. MJP at 12–13. But the cases that GIS cites do not support such an unqualified rule. On the contrary, the most recent Supreme Court case that GIS cites expressly declines to "to hold broadly that truthful publication may never be punished consistent with the First Amendment" and makes clear that earlier cases "resolv[ed] this conflict [between speech and privacy] only as it arose in a discrete factual context." *The Florida Star v. B.J.F.*, 491 U.S. 524, 530, 533 (1989). Moreover, the cases that GIS cites deal with fully protected speech—the press's publication about matters of public significance. *See id.* at 536–37; *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). FCRA, by contrast, concerns private speech "solely in the individual interest of the speaker and its specific business audience." *See Dun & Bradstreet*, 472 U.S. at 762; *Trans Union I*, 245 F.3d at 818. That speech receives "less rigorous" First Amendment protection. *Snyder*, 131 S. Ct. at 1215.

2. GIS's arguments that § 1681c does not appropriately advance the government's relevancy and accuracy interests are irrelevant and in any event misunderstand those interests.

GIS also argues that § 1681c is unconstitutional because it does not appropriately advance either the government's relevancy or the government's accuracy interests. The Court need not even reach these arguments, but in any event they miss the mark.

a. The Court need not address GIS's relevancy and accuracy arguments because § 1681c appropriately advances the government's substantial interest in protecting privacy.

As an initial matter, GIS's contention that § 1681c does not appropriately advance the government's purported relevancy and accuracy interests is a red herring. Even if the law did not serve those interests, it would still pass First Amendment scrutiny because it appropriately advances the government's substantial interest in protecting individuals' privacy. So long as there is an adequate fit between a law and one substantial government interest that it serves, the law does not violate the First Amendment, even if it does not appropriately advance other interests underlying the law. *See Central Hudson*, 447 U.S. at 569–70 (concluding that an advertising ban did not directly advance one of two asserted government interests, but not invalidating the law on that basis); *cf. Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915–16 (2010) (explaining that, because one "interest alone [was] sufficient to justify application" of the law to certain speech, "it [was] not necessary to consider the Government's other asserted interests" before concluding that the law did not violate the First Amendment). This Court therefore need not consider GIS's contentions that the law does not appropriately advance the relevancy and accuracy interests. In any event, as we demonstrate below, GIS's arguments also misunderstand the government's relevancy and accuracy interests.

b. Section 1681c does not impermissibly advance any interest in preventing businesses from making "bad decisions" based on information Congress deemed "irrelevant."

Contrary to GIS's contention (MJP at 10–12), § 1681c does not serve an interest in preventing lenders, employers, and other users of consumer reports from making "bad decisions" based on information Congress deemed "irrelevant." To be sure, the bill's sponsor emphasized that this older adverse information was "irrelevant" and had little bearing on a person's

creditworthiness. 115 Cong. Rec. 2412 (1969). But it does not follow that § 1681c furthers a freestanding interest in preventing dissemination of "irrelevant" information. On the contrary, the provision balances an interest in protecting individuals' privacy against businesses' interest in obtaining complete information. Congress's relevancy concerns simply help explain where Congress struck that balance.

Because older information is less relevant in predicting future behavior, Congress appropriately deemed it fair to limit businesses' access to it. *See* 115 Cong. Rec. 2412 (1969) (statement of Sen. Proxmire). Indeed, before FCRA's passage, many CRAs had voluntarily agreed not to report adverse information after seven years. 115 Cong. Rec. 33410 (1969) (statement of Sen. Proxmire). Where, however, a transaction carries higher stakes, or where the information is potentially more predictive of a person's future behavior (as with criminal convictions), Congress determined that the businesses' interests in complete information trumped. *See* 115 Cong. Rec. 2412, 33410 (1969) (statements of Sen. Proxmire).

Thus, properly understood, the "relevancy" concerns underlying § 1681c do not present any of the First Amendment problems that led the Court to invalidate the law in *Sorrell*. That law attempted to reduce healthcare costs and promote public health by restricting speech that could persuade doctors to prescribe "brand-name drugs that are more expensive and less safe than generic alternatives." *Sorrell*, 131 S. Ct. at 2670. That was improper: Although the interests were legitimate, the First Amendment did not permit the state to limit speech to prevent people from making "bad decisions" or to "tilt public debate in a preferred direction." *Id.* at 2670–71 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

No such objectives can be found in § 1681c. Unlike the law in *Sorrell*, § 1681c does not impermissibly attempt "to achieve . . . policy objectives through the indirect means of restraining

certain speech" that would influence private decisionmaking. *Id*. at 2670. Nor does it attempt to "hamstring the opposition" in any public debate or to impose Congress's assessment of "the value of the information presented." *Id.* at 2671–72 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). FCRA does not attempt to skew the marketplace of ideas at all, but rather simply attempts to protect, through direct means, individuals' privacy. That privacy is important in part because it enables people to have a fresh start—and not to be denied credit or a job because of something negative in the distant past. But individuals have an interest in maintaining their privacy in and of itself. Section 1681c advances that interest directly and automatically, not by restricting access to information in order to influence third-party decisionmaking. The balance Congress struck between that interest and businesses' interest in the adverse information was entirely appropriate.

c. Section 1681c is not designed to advance a freestanding interest in accuracy.

GIS also contends that there is no proper fit between § 1681 and the government's "accuracy" interest because other FCRA provisions more directly promote accuracy in consumer reports. In other words, given all the more narrowly tailored provisions designed to ensure accuracy, § 1681c's restrictions on speech are far more extensive than necessary. Again, GIS's argument misunderstands the "accuracy" interest underlying § 1681c.

Section 1681c does not serve a freestanding interest in preventing dissemination of "inaccurate" information. Rather, accuracy concerns—like the relevancy concerns previously discussed—are simply one reason why Congress chose generally to protect individuals' privacy at the expense of businesses' ability to obtain complete information. Congress determined that the information regulated by § 1681c sometimes could not be kept accurate and up-to-date because "the correct information is simply not available." S. Rep. No. 91-517, at 4 (1969). As

the bill's Senate sponsor explained, "[a]ction following arrest is often dropped because of lack of evidence. Suits are dismissed or settled out of court. Judgments are reversed. However, these facts are seldom recorded." 115 Cong. Rec. 2410, 2412 (1969) (statement of Sen. Proxmire). As a result, the information may not accurately reflect the person's underlying actions, or may otherwise create a misleading impression. Individuals accordingly have a heightened interest in keeping that information private. Thus, Congress barred disclosure of such information in most cases, but created exceptions for when businesses' interests are greater—namely, when they are considering offering a high-value loan or insurance policy or a higher-paying job.

Properly understood, then, § 1681c does not advance a freestanding interest in accuracy, but rather an interest in privacy. It is therefore irrelevant that Congress could, and in fact did, promote accuracy through more narrowly tailored provisions. *See, e.g.*, 15 U.S.C. § 1681e(b) (requiring CRAs to "follow reasonable procedures to assure maximum possible accuracy"); *id.* § 1681k(a)(2) (requiring CRAs to "maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date"), *id.* § 1681i (requiring CRAs to reinvestigate information when a consumer disputes its accuracy). Those accuracy protections in no way diminish the fit between § 1681c and the interest in protecting privacy.

CONCLUSION

Sorrell does not purport to overrule the Supreme Court's well-established commercial speech jurisprudence. Nor does it break any new ground suggesting that, after forty years, § 1681c is now unconstitutional. On the contrary, after *Sorrell* as before, § 1681c satisfies the *Central Hudson* test for restrictions on commercial speech. The law directly advances the government's substantial interest in protecting individuals' privacy and is no more extensive than

necessary to protect that interest while also accommodating businesses' competing interest in obtaining complete information about people to whom they are considering offering a loan, an insurance policy, or a job.

The United States accordingly urges this Court to deny GIS's motion for judgment on the pleadings and to decline to invalidate an important FCRA provision that has protected individuals' privacy for over four decades.

Respectfully submitted,

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