**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,

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

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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 Id.

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*

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[D 3 >>]TJ 5e.00(r)3(a)43(k[)oy a>BDTist[(th(a)6

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

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 the

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*

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, t

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

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 [illegible] high-value loan or

necessary to protect that interest while also accommodating businesses' competing interest in