No. S180862

IN THE
SUPREME COURT OF CALIFORNIA

ROBERT A. BROWN and SUSANA BROWN et al.,
Plaintiffs and Appellants,
vs.
STEWART MORTENSEN
Defendant and Respondent

After Appeal in the Court of Appeal, Second Appellate District, Division One, Case No. B199793, from the Superior Court of California, County of Los Angeles, The Honorable, Anthony Mohr, Judge Presiding Los Angeles Superior Court Case No. BC289546

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER, PUBLIC GOOD, PRIVACY RIGHTS CLEARINGHOUSE, PRIVACY ACTIVISM, THE WORLD PRIVACY FORUM AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLANTS

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Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as *amici curiae* in support of Petitioners, Robert A. Brown, *et al*.

This application is timely made within 30 days after the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. BACKGROUND OF *AMICI CURIAE*

The National Consumer Law Center ("NCLC") is a public interest, non-profit law office established in 1969 and incorporated in 1971, with its main office in Boston and a separate office in Washington, DC. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in financial services, wealth building and financial health; a stop to predatory lending and consumer fraud; and protection of basic energy and utility services for low income families. NCLC focuses on the impact of consumer issues on vulnerable populations, including immigrants, elders, homeowners, former welfare recipients, victims of domestic violence and military personnel.

NCLC is recognized nationally as an expert in consumer credit issues, including Fair Credit Reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is, among other roles and accomplishments, author of the widely praised eighteen-volume Consumer Credit and Sales Legal

Practice Series, which the American Bar Journal review described as "a monumental undertaking comparable to but more practical than the Restatement of Laws." Among the treatises in the Series is *Fair Credit Reporting* (6th Ed. 2006 and Supp.), the focus of which is the FCRA. Two of the undersigned counsel are principal authors of this volume, and both NCLC and counsel appear now before this Court in this role. In addition, NCLC has testified before Congress regarding the FCRA, regularly submits comments to regulators in FCRA rulemakings, and has issued special reports on credit reporting issues, including a report on the FCRA dispute process entitled *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (January 2009).

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for consumer protection, freedom of speech, and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. That includes keeping California's consumer laws accessible to the large and growing number of consumers who care deeply about the privacy of their personal medical and other information.

Privacy Rights Clearinghouse (PRC) is a nonprofit consumer organization with a two-part mission – consumer information and consumer advocacy. It was established in 1992 and is based in San Diego, California. PRC's goals include empowering consumers to control their personal information and advocating for consumers' privacy rights in public policy and legislative proceedings. PRC's interest in privacy issues extends to both the Fair Credit Reporting Act (FCRA) and the California Confidentiality of Medical Information Act (CMIA). PRC regularly provides advice to consumers on these statutes. PRC also submits

regulatory comments regarding FCRA to the Federal Trade Commission (FTC) and legislative support or opposition letters to the California legislature regarding CMIA. The question presented in this case, whether the FCRA preempts the CMIA where a health care provider improperly discloses confidential medical information to a third party, where that third party is a consumer reporting agency, is of vital interest to PRC's mission.

Privacy Activism is a California-based 501(c)(3) organization whose primary focus is on the collection and uses of personally identifiable data. Current areas of interest are the privacy issues raised by widespread adoption of social media and the push to adopt electronic health information exchange.

The World Privacy Forum ("WPF") is a non-partisan, non-profit public interest research and consumer education organization. Our focus is on conducting in-depth research and analysis of privacy issues, including issues related to health care. *See* http://www.worldprivacyforum.org. In 2008, WPF was appointed by the California Secretary of Health to the California Privacy and Security Advisory Board (CalPSAB) as a consumer representative in health care policy making regarding privacy and security issues. WPF is a co-chair of CalPSAB. The WPF has also researched and published numerous privacy studies in the area of health care, including a landmark report on Medical Identity Theft with corresponding consumer education materials.

The National Association of Consumer Advocates ("NACA") is a nationwide, nonprofit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its

Standards and Guidelines for Litigating and Settling Consumer Class Actions may be found at 176 F.R.D. 375 (1997), and www.naca.net at the bottom of the main page. About 150 of NACA's members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. Consistent with its goal of promoting justice for consumers, NACA has appeared as amicus curiae in a number of cases related to consumer reporting, consumer privacy and preemption of state authority to enact or enforce consumer protections. *See, e.g.*, *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009); *Wadley v. Experian Information Solutions, Inc.*, 241 Fed.Appx. 132, 2007 WL 2046858 (4th Cir. July 17, 2007); *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005); *American Bankers Ass'n. v. Gould*, 412 F.3d 1081, (9th Cir. 2005); *Hood v. Santa Barbara Bank & Trust*, 143 Cal.App.4th 526 (Cal.App. 2 Dist. 2006).

II. INTEREST OF *AMICI CURIAE*

The issues presented in this case implicate the interests of millions of American consumers whose sensitive personal information is regularly shared, often without their knowledge, among financial firms, insurance companies, landlords, employers and others. Some state legislatures have weighed the value of allowing this information to be shared in the marketplace against the potential costs to consumers in reputation, embarrassment, and potential for abuse or discrimination and have determined that certain kinds of information – for example, medical information, prescription records, certain categories of foreclosure activity and workers' compensation disputes – should not be shared, even though the information is true. However, these state law protections can be evaded

easily if the Court of Appeal's incorrect and overbroad reading of the Fair Credit Reporting Act's preemption provisions is allowed to stand.

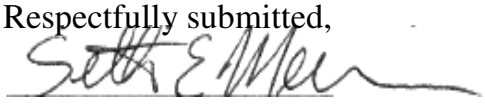
Amici have worked on behalf of low-income and other vulnerable consumers who struggle to gain fair access to the financial system. The outcome of this case will have a profound effect on states' ability to prevent disclosure of confidential information to consumer reporting agencies, and from them to numerous businesses and decision makers with the capacity to use the information in ways contrary to the interests of consumers. *Amici curiae* and their members and clients have an interest in protecting consumers from embarrassment, reputational damage and increased cost of credit and insurance resulting from the availability of information deemed confidential by state legislatures. More broadly, *amici* also have an interest in enforcing Congress' intent to make the Fair Credit Reporting Act a floor of basic consumer protections upon which states can build, rather than a ceiling.

III. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Chief Justice accept the accompanying brief for filing in this case.

Dated: September 1, 2010

Respectfully submitted,



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INTRODUCTION AND SUMMARY OF ARGUMENT

The Confidentiality of Medical Information Act (Cal.Civ.Code § 56 *et seq.*) ("CMIA") is the result of a policy decision by the California legislature that individually identifiable information regarding a patient's medical history, mental or physical condition, or treatment is confidential and should not be shared except in limited circumstances. The CMIA places the responsibility of maintaining patient confidentiality on providers of health care and imposes liability on them for improper use or disclosure of medical information. Cal. Civ. Code §§ 56.05, 56.06. The question presented here is whether the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*) ("FCRA") preempts the CMIA in instances in which a health care provider improperly discloses confidential medical information to a third party, where that third party happens to be a consumer reporting agency as defined by the FCRA. Contrary to the decision of the Court of Appeal, the applicable express preemption provision of the FCRA, 15 U.S.C. § 1681t(b)(1)(F), is narrow and does not apply in these circumstances.[1]

The consumer reporting industry, which gathers and sells detailed information about individual consumers used by creditors, insurers, employers and others, relies on data voluntarily provided by tens of thousands of businesses with contact with consumers. These furnishers of information include the largest national banks, but also local stores, debt collectors and other entities located in every state.

In the FCRA, Congress chose to impose only a few specific obligations on furnishers of information, largely relating to accuracy of information and procedures to deal with disputed accuracy or claims of

[1] For purposes of this brief, *Amici* assume that Respondent is a provider of health care as defined in the CMIA and that Respondent's disclosure of Appellant's dental records to Experian, Equifax and TransUnion would constitute a violation of the CMIA, in the absence of federal preemption.

identity theft. 15 U.S.C. § 1681s-2. With regard to preemption, the FCRA preempts state law only in instances of direct conflict between state and federal law (15 U.S.C. § 1681t(a)), or where the state law imposes requirements or prohibitions with regard to the same subject matter regulated by certain enumerated provisions of the FCRA, including the provisions dealing with furnishers (15 U.S.C. § 1681t(b)(1)(F)). The CMIA neither conflicts with the FCRA, nor regulates the subject matter addressed in 15 U.S.C. § 1681s-2. Thus, it should not be preempted.

The Court of Appeal erred in its reading of prior preemption cases. Although these cases reached largely correct conclusions with regard to FCRA preemption of the state laws at issue, they made overly broad pronouncements about the scope of 15 U.S.C. § 1681t(b)(1)(F) not necessary to their holdings and not supported by the statutory text or Congressional intent. The explicit language of the FCRA and the legislative history of its several amendments make clear that Congress intended the Act's preemptive effect to be read narrowly.

Congress has left to the states the task of deciding that certain information about individuals should not be shared, even though the information is true. A state may decide that its citizens are entitled to privacy regarding their medical procedures, workers' compensation disputes, or legal consultations and choose to stop dissemination of such information at its source. However, under the Court of Appeal's formulation of FCRA preemption, if a state-regulated business with sensitive consumer information happens to share it with an entity meeting the FCRA's definition of a consumer reporting agency, the exchange is suddenly outside the authority of state regulation (and yet still not regulated by federal law, in most cases). At that point, the genie is out of the bottle; once sensitive information is in the system, the consumer can do nothing to remove it. To avoid this circumstance, which was surely never intended by

Congress, the FCRA's preemptive effect must be limited to the confines of its express language.

BACKGROUND

I. Access to Personal Information is Valuable to Businesses and Potentially Costly to Consumers

Every piece of personal information that a financial company can collect about a consumer is valuable. The fact that a consumer visits a particular bar or purchases generic instead of name brand motor oil can be a signal to credit card companies that the consumer is at higher risk of default. *See* Charles Duhigg, *What Does Your Credit-Card Company Know About You?* N.Y. Times, May 17, 2009. Every piece of information has the potential to change the availability and price of credit, insurance and other products offered to that consumer. For example, credit card companies have been known to cut cardholders' credit lines when charges appear for pawnshops or marriage therapy because data indicate that those are signs of desperation or depression that might lead to job loss. *Id.* Similarly, insurance companies provide their customer records to a database called CLUE and may decline or cancel coverage based on consumer activity reported in the database as innocent as calling to inquire about coverage limits. *See* Privacy Rights Clearinghouse, *Fact Sheet 26: CLUE and You: How Insurers Size You Up*, Revised Sept. 2005, available at http://www.privacyrights.org/fs/fs26-CLUE.htm#3 (last visited Aug. 23, 2010).

Once personal information enters the credit reporting system, it is matched with other databases, public record information and even census data to create a frighteningly precise picture of the habits, tastes, health, family status and financial resources of an individual. Credit bureaus and other information resellers compete to offer the most detailed and

comprehensive consumer information to potential employers, landlords, insurers and financial companies. Equifax, for example, provides a product called Equifax Decision 360 (with the tag line "Will They Pay? Can They Pay? How Much?") that combines credit information with telephone and utility payment history, demographic data, verification of employment and custom modeling of data provided by the buyer of the reports (which could include purchase histories). Equifax, http://www.equifax.com/consumer/risk/en_us; Equifax Decision 360, http://consumer.equifax.com/?elqPURLPage=31 (last visited Aug. 23, 2010). Not to be outdone, Experian advertises that it "has been the voice of the American consumer for over 50 years" providing clients with "up-to-date information on what magazines their target consumers read, what television programmes they watch, what products they buy, and even how they feel about certain issues." Experian, *About Experian*, p12, June 24, 2010, available at http://www.experianplc.com/investor-centre/reports/investor-reports/2010.aspx (last visited Aug. 23, 2010).

Medical information can be particularly damaging, often in unexpected ways. The Secretary of the Department of Health and Human Services cited a number of troubling examples of egregious misuse of medical information in promulgating final rules under the Health Insurance Portability and Accountability Act, including the following:

- 35 percent of Fortune 500 companies admitted in a survey that they look at people's medical records before making hiring and promotion decisions;
- Johnson and Johnson marketed a list of 5 million names and addresses of elderly incontinent women;
- A Utah-based pharmaceutical benefits management firm used patient data to solicit business for its owner, a drug store;
- A banker who also sat on a county health board gained access to patients' records and identified several people with cancer and called in their mortgages; and

- A 30-year FBI veteran was put on administrative leave when, without his permission, his pharmacy released information about his treatment for depression.

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,467-68 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 & 164). The surest way to prevent such abuses is to limit the availability and dissemination of personal information.

II. Federal Restrictions on What Information Can be Shared are Minimal

The FCRA does not regulate what types of information can be provided or "furnished" to consumer reporting agencies by entities with direct contact with consumers (these "furnishers" of information will be discussed in more detail below). Nor does the FCRA generally restrict the types of information that a consumer reporting agency can include in consumer reports, with the exception of:

- recently enacted controls on medical information (15 U.S.C. § 1681b(g), Pub. Law No. 108-159, § 411 (2003)).[2]
- information that is inaccurate or obsolete (15 U.S.C. §§ 1681e(b) and 1681c(a))

In general, however, no particular topics are forbidden.

The FCRA's definition of a "consumer report" is broad, and anticipates that it could contain more than payment histories; the definition of consumer report includes communication of information "bearing on a consumer's credit worthiness, credit standing, credit capacity, *character,*

[2] 15 U.S.C. §1681b(g) provides, *inter alia*, that medical information cannot be reported by consumer reporting agencies in most circumstances without permission of the consumer. The provision was not in effect at the time of the events giving rise to this dispute, and therefore is relevant only as an example of the very limited controls on consumer report content, as opposed to accuracy. Furthermore, it specifically applies to consumer reporting agencies, not furnishers.

general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d) (emphasis added).

There are no comprehensive federal privacy laws to supplement the minimal restrictions in the FCRA:

> No single federal law governs the use or disclosure of all personal information by private sector companies. Similarly, there are no federal laws designed specifically to address all of the products sold and data maintained by information resellers.

U.S. Gov. Accountability Office, GAO-06-674, *Report to the Committee on Banking, Housing and Urban Affairs, U.S. Senate; Personal Information: Key Federal Privacy Laws Do Not Require Information Resellers to Safeguard All Sensitive Data*, p17 (2006). Instead, particular types of information under the control of particular types of entities are subject to a patchwork of federal provisions in the FCRA, the Gramm-Leach-Bliley Act (*see* 15 U.S.C.A. § 6802, applying only to information collected by or acquired from financial institutions) and the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d *et seq.*, applying only to medical information). *Id.* Thus, the FCRA does not prevent consumer reports from including all sorts of sensitive and confidential information, such as voting history or psychotherapy records.

III. The Role of Furnishers

A. Defining Furnishers and Consumer Reporting Agencies

The torrent of personal information available for purchase from commercial databases is assembled from the voluntary submissions of credit card issuers, auto dealers, department and grocery stores (through store cards or loyalty programs), lenders, auto dealers, utilities, insurers, collection agencies, and other entities with direct contact with consumers. *See, e.g.*, H.R. Rep. No. 108-263, at 24 (2003); Federal Trade Commission

and Board of Governors of the Federal Reserve System, *Report to Congress on the Fair Credit Reporting Act Dispute Process* 4 (Aug. 2006) ("FTC Report to Congress").

These sources of information are known as furnishers. The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA" or "the Act"), does not define the term furnisher. Instead, the FCRA merely references "a person that furnishes information to any consumer reporting agency," and similar phrases. *See*, *e.g.*, 15 U.S.C. § 1681s-2(a)(6). Courts have interpreted the term broadly to include any entity that reports information to a consumer reporting agency; no special attributes are required. *See, e.g.*, *Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496 (W.D. Tenn. 1999); *Gonzalez v. Ocwen Fin. Serv., Inc.*, 2003 WL 23939563, *2 (N.D.Cal. Dec. 2, 2003).

In order to identify furnishers, it is necessary to identify consumer reporting agencies. A consumer reporting agency, or CRA, is defined in the Act as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1681a(f). In short, CRAs are any entities that assemble and redistribute consumer information, while furnishers are any entities that provide information to a CRA.

CRAs include the three well known national credit bureaus – Experian, Equifax and TransUnion – but also myriad smaller, more specialized businesses, such as ChoicePoint (which compiles the insurance database CLUE), First American Registry (a nationwide tenant screening

company) and check writing history databases such as TeleCheck, SCAN and ChexSystems.

With so many companies qualifying as CRAs, there are even more entities that qualify as furnishers. According to data collected by the GAO, in 2003, there were more than 30,000 entities furnishing information to the three major CRAs. U.S. Gen. Accounting Office, GAO-03-1036T, *Statement for the Record Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate; Consumer Credit: Limited Information Exists On Extent of Credit Report Errors and Their Implications for Consumers*, p12-13, (July 31, 2003) ("GAO-03-1036T"). Those 30,000 furnishers provided more than 2 billion consumer records to the CRAs every month. *Id*. The actual number of furnishers is even larger, since some entities may furnish information only to the specialized CRAs.

B. Furnishing of Information to Consumer Reporting Agencies is Voluntary and Furnishers Have Few Obligations

Private companies' furnishing of information to CRAs is entirely voluntary; no law requires grocery stores, debt collection companies or dentist offices to share any information about their customers with CRAs. *See, e.g.*, GAO-03-1036T, p10 ("It is important to note that reporting information to the CRAs is voluntary on the part of data furnishers."). [3] Not surprisingly, since data furnishing is voluntary, different furnishers choose to participate in the system to a greater or lesser extent:

> [S]ome furnishers choose not to report at all, to report only negative information, or to omit a key element of data such as a credit limit. Others report data on some of their credit

[3] There are a few exceptions created by contract or specific regulation, such as Fannie Mae and Freddie Mac's requirements on mortgage companies to report "full file" status on GSE loans each month to each of the major CRAs, but the general rule is that furnishing is voluntary. FTC Report to Congress, p8.

> products and not others…. CDIA [a trade association of CRAs] reported that "some lenders omit the reporting of very elite customers out of concern that other lenders will attempt to compete for this market of consumers." Other lenders choose not to report their subprime portfolios for the same reason.

FTC Report to Congress, 9 (footnotes omitted);

> Some types of accounts are typically reported only when the payment history turns negative, such as when the debt is transferred to a debt collector. The most common examples of these accounts are those related to medical debts, telecommunications, and power companies.

Id. at 4.

As will be discussed below, Congress imposes minimal requirements on the tens of thousands of entities that regularly or occasionally furnish information to consumer reporting agencies. Some furnishers are subject to the oversight of federal agencies, because they are banks, thrifts or similar institutions. However, many more are regulated, if at all, only by state law and the single applicable section of the FCRA.

ARGUMENT

I. The FCRA Does Not Create Field Preemption and There Is No Conflict Between the FCRA and the CMIA Giving Rise to Conflict Preemption under 15 U.S.C. § 1681t(a).

The Court of Appeal was correct when it determined that "express preemption is at issue in this case" rather than field or conflict preemption. *Brown v. Mortensen*, 105 Cal. Rptr. 3d 462, 465 (Cal. Ct. App. 2010).

The FCRA provides that it "does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers or for the prevention or mitigation of identity theft." 15 U.S.C. § 1681t(a). Courts have consistently found that the

language of § 1681t(a) shows that Congress did not intend to comprehensively preempt states from regulating credit reporting, or from protecting the privacy and reputations of their residents. *See, e.g. Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004) ("FCRA makes clear that it is not intended to occupy the entire regulatory field with regard to consumer reports"); *Credit Data of Ariz., Inc. v. State of Ariz.*, 602 F.2d 195, 197 (9th Cir. 1979) (finding that provision demonstrates Congress did not intend to preempt the field).

The FCRA's general rule against preemption is only overcome when state laws are inconsistent with a provision of the FCRA (and then "only to the extent of the inconsistency") (15 U.S.C. § 1681t(a)), or where the state law imposes a requirement or prohibition "with respect to any subject matter regulated under" one of a list of specific FCRA provisions (15 U.S.C. § 1681t(b)).

State law is inconsistent with the FCRA, and thus preempted by § 1681t(a), only where the actor would violate the FCRA by complying with the state statute. *Cisneros v. U.D. Registry, Inc.*, 39 Cal.App.4th 548, 577 (1995). Neither party has suggested that compliance with both the FCRA and the CMIA is impossible, and indeed it is not. The CMIA limits the disclosure of individually identifiable medical information by providers of health care. Cal.Civ.Code § 56 *et seq.*. Some of the entities covered by the CMIA, including Respondent, voluntarily furnish information to consumer reporting agencies and are therefore subject to certain provisions of the FCRA. However, since the FCRA imposes no obligations on furnishers that require them to disclose individually identifiable medical information to a CRA, there is no conflict between the laws and no preemption under § 1681t(a).

II. 15 U.S.C. § 1681s-2 Does Not Regulate All Furnisher Behavior, but Instead Imposes Discrete Obligations with Regard to Accuracy, Disputes and Identity Theft.

When Congress employs express preemption in a federal act, the scope of the clause depends on its language, along with that of any savings clause in the act. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 63 (2002); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). When examining an express preemption clause, a court must focus on the plain wording of the clause, because that wording is "the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The plain language of § 1681t(b) provides in relevant part that "[n]o requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under" a series of enumerated provisions of the FCRA. The provision relevant to this case is § 1681s-2 and is referenced in § 1681t(b)(1)(F).[4] Although § 1681t(b)(1)(F) describes in shorthand the provisions of § 1681s-2 as "relating to the responsibilities of persons who furnish information to consumer reporting agencies," § 1681s-2, the statutory text itself does not address all furnisher

[4] Appellant has put forward an argument that the applicable preemption provision is §1681t(b)(1)(E) rather than (F). *See, e.g.*, Appellants' Opening Brief, 6. However, the FCRA section referenced by that provision – § 1681c – applies to *consumer reporting agencies*, not to *furnishers* and is therefore not applicable to the facts of this case. *Amici* agree with both parties that, if Respondent were a consumer reporting agency and §1681t(b)(1)(E) was the appropriate preemption provision, application of the CMIA would *not* be preempted, because it is explicitly exempted from the coverage of §1681t(b)(1)(E) as a "State law in effect on September 30, 1996." Appellants' Opening Brief, 6; Respondent Stewart Mortensen's Answer Brief on the Merits, p12.

responsibilities, but only a limited number largely related to accuracy and reinvestigation of disputes regarding accuracy.[5]

Prior to the passage of the Consumer Credit Reporting Reform Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996)), the FCRA imposed no obligations whatsoever on furnishers. *See* H.R. Rep. No. 103-486, at 56 (1994) ("This section imposes, for the first time under the Act, affirmative obligations on persons that furnish information to consumer reporting agencies.") (discussing an earlier version of the bill that passed in 1996). Data furnishing still was (and is) voluntary, but starting in 1996, furnishers were given affirmative duties in § 1681s-2 with regard to accuracy and reinvestigation of disputes regarding accuracy:

> Because furnishing consumer report information is voluntary under the FCRA, entities that decide to furnish may decide, at any time, to cease furnishing. Furthermore, furnishers can select the particular consumer reporting agencies to whom they supply information. When entities do furnish information, however, the FCRA imposes duties on them with respect to the accuracy of the information they supply and to investigate consumer disputes.

S. Rep. No. 108-166, at 5 (2003) (discussing the Fair and Accurate Credit Transactions Act ("FACTA") (Pub. L. No. 108-159, 117 Stat 1952 (Dec. 4, 2003)), which further amended the FCRA in 2003).

The specific requirements of § 1681s-2 do not encompass the entire range of responsibilities that might be imposed upon furnishers. Section 1681s-2 imposes obligations on furnishers to:

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[5] It is a well known rule of statutory construction that titles, headings and the like do not alter the unambiguous meaning of text. *See, e.g.*, *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947) ("Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner… As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.")

- furnish accurate information (15 U.S.C. § 1681s-2(a)(1)(A); 15 U.S.C. § 1681s-2(a)(1)(B));
- correct inaccurate information (15 U.S.C. § 1681s-2(a)(2));
- notify CRAs when an account is closed voluntarily (15 U.S.C. § 1681s-2(a)(4));
- specify the date of any delinquency reported to the CRAs (15 U.S.C. § 1681s-2(a)(5));
- investigate in response to disputes with regard to the completeness or accuracy of information (15 U.S.C. § 1681s-2(a)(1)(B); 15 U.S.C. § 1681s-2(a)(3); 15 U.S.C. § 1681s-2(a)(8); 15 U.S.C. § 1681s-2(b));
- respond appropriately to notice from the CRA of an identity theft (15 U.S.C. § 1681s-2(a)(6)); and
- notify CRAs if they are medical service providers (15 U.S.C. § 1681s-2(a)(9)).[6]

Furnishers that are financial institutions are also required to notify customers that they are furnishing negative information about the customer to a CRA. 15 U.S.C. § 1681s-2(a)(7).

There are many areas of furnisher behavior where the section is silent. For example, § 1681s-2 does not impose any obligations with regard to confidentiality, relevancy, or proper utilization of information by furnishers, which are the other goals of the FCRA identified by Congress in its Statement of Purpose. 15 U.S.C. § 1681. Furthermore, it does not impose any obligations with regard to the topic of the information furnished. Nor does § 1681s-2 speak to licensing or registration requirements, which some furnishers, such as debt collectors and insurance companies, are subject to under some state law. The Federal Trade Commission, which has authority over some entities which furnish information to CRAs, warns furnishers of the need to comply with

[6]Added in 2003 amendments, Pub.L. No. 108-159, § 412(a), 117 Stat 1952, 2002 (Dec. 4, 2003). The provision was not in effect at the time of the events giving rise to this dispute, and furthermore does not directly implicate the provisions of the CMIA.

applicable state laws. Federal Trade Commission, *Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA*, available at http://www.ftc.gov/os/2004/11/041119factaappg.pdf (last visited Aug. 23, 2010) ("These responsibilities [of furnishers] are found in Section 623 of the FCRA, 15 U.S.C. 1681s-2. State law may impose additional requirements on furnishers.")

Preemption of state laws through § 1681t(b)(1)(F) "with respect to the subject matter regulated under" § 1681s-2 is proper *only* with regard to the furnisher responsibilities specifically enumerated in that section.

III. The CMIA Does Not Regulate the Subject Matter Addressed in 15 U.S.C. § 1681s-2 and Should Not Be Preempted under § 1681t(b)(1)(F).

The CMIA is a law of general applicability that affects numerous entities, some of which happen to be furnishers of information to consumer reporting agencies under the FCRA. The elements of a violation of the CMIA are essentially disclosure of individually identifiable medical information to unauthorized persons or in an unauthorized manner. The CMIA includes *no* provisions related to the accuracy of the medical information, and no mechanisms for disputing the content of any records, the two subject matter areas that form the core of § 1681s-2. The CMIA does require that an entity disclosing medication information "communicate to the person or entity to which it discloses the medical information any limitations in the authorization regarding the use of the medical information," but this requirement bears no resemblance (and does not conflict with) the notifications from furnishers to consumer reporting agencies required by § 1681s-2. Thus, the CMIA's subject matter does not overlap that of § 1681s-2.

Most courts that have examined the issue have recognized the limited scope of § 1681s-2 and have refused to apply the associated preemption provision to all state laws affecting furnisher behavior. Instead, these cases properly limit § 1681t(b)(1)(F) preemption to where the state statute closely relates to the subject matter regulated by one of the enumerated provisions listed in § 1681s-2.

For example, in *Pasternak v. Trans Union*, 2008 WL 928840, at *4 (N.D. Cal. Apr. 3, 2008), the court held that the plaintiff's claim against a creditor for pursuing collection even after the plaintiff notified creditor that the debt had been incurred by an identity thief was not preempted by § 1681t(b). The court read the "subject matter" language narrowly, reasoning that the FCRA provisions related to the creditor's function as a furnisher to a consumer reporting agency, while the plaintiff's state law claim related to the direct relationship between the creditor and its customer. *Id.* Another federal court ruled that § 1681t(b)(1)(F) did not preempt claims based on the furnisher's improper opening of an account for an identity thief, because such an action is not "subject matter regulated by" § 1681s-2. *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000).

Similarly, in the case of *Carlson v. Trans Union, L.L.C.*, 259 F. Supp. 2d 517 (N.D. Tex. 2003), the court framed its analysis around the elements of the particular claims, and held that a consumer's defamation claim withstood preemption. The court reasoned that the proof required for each claim determined the scope of each claim's subject matter, notwithstanding that the same underlying acts gave rise to all the claims. *Id.* at 3. A claim under § 1681s-2 would require the plaintiff to show that the defendant violated a duty to thoroughly investigate the plaintiff's claim that his credit record was inaccurate while a defamation claim would require proof of publication of a defamatory statement that concerned the plaintiff, made with negligence. *Id*.

In determining the scope of § 1681s-2's subject matter, many courts focus on when the conduct that gave rise to the plaintiff's claim against the furnisher occurred, holding that § 1681s-2 regulates furnisher conduct only after one of its provisions has been triggered by the following:

- The furnisher has reported information with actual knowledge of errors (triggering § 1681s-2(a)(1)(A));
- The furnisher has received notice from a consumer that specific information is inaccurate (triggering § 1681s-2(a)(1)(B)); or
- A CRA has notified the furnisher that a reported item is in dispute (triggering § 1681s-2(b)).

See Aklagi v. Nationscredit Fin., 196 F. Supp. 2d 1186, 1195 (D. Kan. 2002) (holding that a defamation claim was preempted only to the extent that it was based on a furnisher's furnishing of inaccurate information to a CRA *after* the furnisher received notice that the consumer disputed the information; the portion of the plaintiff's claim that was based on information furnished by the furnisher after it made the loan but *before* it received notice of the consumer's dispute was not preempted, because it was not based on subject matter regulated under § 1681s-2.). *See also Harrison v. Ford Motor Credit Co.*, 2005 WL 15452, at *1 (D. Conn. Jan. 3, 2005) (finding that preemption will begin only when the furnisher receives the specific notice from the consumer reporting agency that § 1681i(a)(2) requires); *Mattice v. Equifax*, 2003 WL 21391679 (D. Minn. June 13, 2003) (adopting *Aklagi*'s reasoning in refusing to dismiss claim against furnisher). Accordingly, these courts construed the scope of the subject matter of § 1681s-2 narrowly, as covering only those events where the section directly applies.

To the extent that the CMIA applies to entities that are also furnishers under the FCRA, its requirements attach independently of – and prior to – any "trigger" event under § 1681s-2, and thus it regulates

different subject matter than that of § 1681s-2. Whether one looks at the type of activity regulated, the elements of the claims, or considers the presence or absence of "trigger" events to determine the precise limits of preemption under § 1681t(b)(1)(F), the CMIA is not preempted, since it does not regulate the same subject matter as § 1681s-2.

IV. The Court of Appeal Erred in its Reliance Upon Overly Broad Dicta in Prior Preemption Cases Rather than Focusing on the Nature of the State Law Requirements or Prohibitions.

The court below erred in its apparent conclusion that § 1681t(b)(1)(F) preempts all state law relating in any way to the duties or responsibilities of furnishers of information to consumer reporting agencies. The court's overly broad reading of § 1681t(b)(1)(F) is due in part to mistaken reliance on *Jaramillo v. Experian Information Solutions, Inc.*, 155 F. Supp. 2d 356 (E.D. Pa.2001) and the cases that cite it. The judge in *Jaramillo* recognized that his initial broad reading of the FCRA's preemption provisions was in error, and vacated the decision in relevant part. *Jaramillo v. Experian Info. Solutions, Inc.*, 2001 WL 1762626 (E.D. Pa. June 20, 2001) (vacating in part 155 F. Supp. 2d 356 (E.D. Pa. 2001)). One court that carefully read the original *Jaramillo* decision and its subsequent history concluded that the second case "can only be read as a summary reversal . . . . The Court therefore finds *Jaramillo I* and its total-preemption progeny wholly unpersuasive." *Sites v. Nationstar Mortgage, L.L.C.*, 646 F. Supp. 2d 699, 710 (M.D. Pa. 2009). The conclusion that *Jaramillo I* was erroneous is bolstered by the fact that if followed, it would effectively render superfluous furnishers' qualified immunity from tort claims found in another FCRA provision (15 U.S.C. § 1681h(e)) (because if § 1681t(b)(1)(F) preempted all state claims against furnishers, there would be no need for any qualified immunity from state tort claims).

Three of the cases relied upon by the Court of Appeal rely at least in part on *Jaramillo I*, casting doubt on their broad formulations of the scope of FCRA preemption. *Pirouzian v. SLM Corp.*, 396 F. Supp. 2d 1124, 1130 (S.D. Cal. 2005); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1144 (N.D. Cal. 2005); *Roybal v. Equifax*, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2005). Certainly the exceptionally broad scope of preemption enunciated in *Roybal*, with reference to *Jaramillo I*, cannot be supported by any careful reading of the FCRA: "On its face, the FCRA precludes *all* state statutory or common law causes of action that would impose *any* 'requirement or prohibition' on the furnishers of credit information." *Roybal* at 1181 (emphasis added).

Even if the decisions in these cases are correct, the nature of the claims subject to preemption makes them inapplicable to the present case, and makes their broad pronouncements about preemption mere dicta. All three cases involved disputes as to the accuracy of information reported by furnishers to credit reporting agencies and furnishers' obligations to correct it. *See Pirouzian* 396 F. Supp. 2d at 1130 ("Specifically, Plaintiff alleges that Defendant violated the CFDCPA by failing to communicate to the credit reporting agencies that Plaintiff's debt to Defendant was in dispute and by failing to correct the erroneous information."); *Howard* 371 F. Supp. 2d at 1142 (noting that plaintiff complained of "derogatory and inaccurate information" and defendants' failure to correct the information after he complained of its inaccuracy); *Roybal* at 1182 ("Because Plaintiffs State Claims arise solely from the allegation that Rickenbacker reported erroneous credit information to the national CRAs as a furnisher of credit, FCRA preempts Plaintiffs' State Claims in their entirety."). As discussed above, § 1681s-2 is specifically directed at furnishers' responsibility to report accurately and correct errors after receiving notice. The CMIA, in contrast, does not regulate conduct expressly included in the subject matter

of § 1681s-2. Thus, an appropriately narrow reading of the preemptive effect of § 1681s-2 based on its plain language would result in the same conclusion in the earlier cases and would also correctly reach the conclusion that the CMIA is not preempted.

V. The Explicit Language of the FCRA and the Legislative History of its Several Amendments Make Clear that Congress Intended the Act's Preemption Provisions to Be Read Narrowly.

The FCRA contains a strongly worded clause preserving state laws from preemption. The FCRA's general rule is that it:

> does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a).

The legislative history of successive amendments to the Act contains numerous assurances that Congress' intent is to keep preemption to a minimum. *See, e.g.*, S. Rep. No. 91-517, at 8 (1969) (stating – in the principal report in the Act's legislative history – that "no State law would be preempted unless compliance would involve a violation of Federal law"); S. Rep. No. 103-209, at 28-29 (1993):

> [T]he Committee understands that states have the power to protect their own citizens, including protection from abuses in the credit reporting industry. Therefore, the FCRA, as amended by the Committee bill will not infringe upon the rights of states to legislate more stringent requirements that fall outside the scope of those areas specifically preempted in this section to the extent that such provisions are not inconsistent with any provisions of the FCRA, and then only to the extent of the inconsistency.

(referring to an earlier session's version of what ultimately became the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208); H.R. Rep. No. 103-486, at 61 (1994):

> Section 624 sets out the general rule that the FCRA does not preempt any state law with respect to the collection, distribution, or use of any information on consumers, except to the extend that a state law is inconsistent with any provision of the FCRA and then only to the extent of the inconsistency. A state law is not inconsistent if it provides greater consumer protection than the FCRA.

(same).

The official commentary of the Federal Trade Commission is similarly clear that preemption is limited. *See* 16 C.F.R. pt. 600, App. § 622, ¶ 1 (1995) (stating the "basic rule" that "State law is pre-empted by the FCRA only when compliance with inconsistent state law would result in violation of the FCRA" and providing examples of laws that would or would not be preempted).

These sources confirm that the FCRA's preemption provisions should not be read broadly, to avoid frustrating Congress' purpose of ensuring that consumer information is handled with due regard to "the confidentiality, accuracy, relevancy, and proper utilization" of such information. 15 U.S.C. § 1681.

VI. An Overly Broad Reading of § 1681t(b)(1)(F) Would Result in the Preemption of State Laws Designed to Protect Privacy and Leave Sensitive Consumer Information Completely Unprotected

As discussed above, Congress has regulated only certain aspects of furnishers' behavior, which otherwise participate in the credit reporting system in the manner and to the extent they choose. Similarly, Congress has avoided any comprehensive legislation governing consumer privacy. With limited exceptions, the FCRA neither limits the type of information

that can be furnished to CRAs nor, for the most part, what they can include in the reports they sell. Congress has expressed no intent – explicit or implicit – to prevent states from legislating in these gaps.

Thus, Congress has left to the states the task of deciding that certain information about individuals should not be shared, even though the information is true. Many states have done so. Under the Court of Appeal's broad and incorrect reading of § 1681t(b)(1)(F), some of these state laws may be preempted.

For example, Arizona and Florida impose controls on disclosure of medical records, similar to those in the CMIA. Arizona's law limits disclosure by health care providers of "information contained in medical records or payment records" without the written authorization of the patient or as otherwise authorized by state or federal law. Ariz. Stat. Rev. § 12-2294. Florida's law limits the disclosure of "the content of any record of patient treatment" without express written consent of the patient. Fl. Stat. § 395.3025.

New Hampshire forbids the licensing, transfer, use, or sale of "records relative to prescription information containing patient-identifiable and prescriber-identifiable data:"

> for any commercial purpose, except for the limited purposes of pharmacy reimbursement; formulary compliance; care management; utilization review by a health care provider, the patient's insurance provider or the agent of either; health care research; or as otherwise provided by law.

N.H. Rev. Stat. § 318:47-f.[7]

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[7] This law recently withstood a First Amendment challenge in *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008). In upholding the law, the First Circuit noted the importance of the financial savings purposes served by it, stating "[f]iscal problems have caused entire civilizations to crumble, so cost containment is most assuredly a substantial governmental interest." Id at 55. The First Circuit also noted in upholding New Hampshire's law that "we must allow the state legislature some leeway to experiment with

There are also examples outside the realm of medical information. Iowa forbids mortgagees from reporting to a credit bureau that a mortgagor is delinquent on the mortgage, if the defaulting mortgagee agrees to a voluntary, non-judicial foreclosure process. The mortgagee is allowed to report the foreclosure. Iowa Code § 654.18. Missouri forbids health care providers from reporting to credit reporting agencies any failure by an employee to make payment for services rendered due to a work-related injury, when the health care provider has received written notice that a workers' compensation claim has been filed and the claim has not been denied. Mo. Stat. § 287.140. Similarly, California prohibits hospitals or owners of hospital debt (including collection agencies) from reporting adverse information on debts owed by uninsured patients to consumer reporting agencies until at least 150 days after initial billing. Cal.Health & Safety Code § 127425(d).

Restrictions on the furnishing of information can come from surprising places. Consider, for example, a Massachusetts state bar ethical opinion regarding the collection of fees. In the opinion of the Massachusetts Bar Association's Ethics Committee, when a client fails to pay a lawyer for services rendered, the lawyer may not report the failure to consumer reporting services even if the lawyer initiates proceedings to collect the debt. The indebtedness of the client is considered a confidential matter. Mass. Bar Ass'n, Comm. on Prof'l Ethics, Op. 3 (2000).

As all these laws show, states often determine that their citizens are entitled to privacy regarding their medical procedures, prescription drug histories, workers' compensation disputes, or legal consultations and choose to stop dissemination of such information at its source – the local

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different methods of combating a social and economic problem of growing magnitude." *Id.* at 58. Yet if the Respondent is correct, this same law could now be preempted by the FCRA.

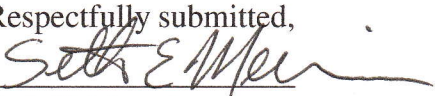
pharmacy or law firm. Yet, under the Court of Appeal's incorrect and massively broad reading of FCRA preemption, if the pharmacy or law firm with private information happens to share it with an entity meeting the FCRA's definition of a consumer reporting agency, the exchange is suddenly outside the authority of state regulation. At that point, the genie is out of the bottle; once private (but accurate) information is in the system, the consumer and the state are both powerless to remove it.

CONCLUSION

In enacting and amending the FCRA, Congress intended to enhance, not weaken state law consumer and privacy protections. The FCRA's preemptive effect is limited to the confines of its express language. The decision of the Court of Appeals, holding that § 1681t(b)(1)(F) of the FCRA preempts the CMIA, should be reversed. Preemption under the FCRA should be narrowly construed, as Congress intended, so that the states can make and enforce policy decisions about what information is too sensitive to enter the consumer reporting system.

Dated: September 1, 2010

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.204(c)(1), the enclosed BRIEF OF AMICI CURIAE contains 6,784 words, including footnotes and headings but exclusive of tables, signature block, this certificate of compliance, and declaration of mail service. Counsel derives this number from the word count provided by Microsoft Word word-processing software.

Dated: September 1, 2010

by:

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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to this action. My business address is 550 Kearny St, Suite 320; San Francisco, CA 94108.

On September 1, 2010, I caused the document

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER, PUBLIC GOOD, PRIVACY RIGHTS CLEARINGHOUSE, PRIVACY ACTIVISM, THE WORLD PRIVACY FORUM AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLANTS

to be served on the parties listed below by placing true and correct copies thereof in sealed envelopes and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 1, 2010 at San Francisco, California.

Dalibor Maksimovic

Dalibor Maksimovic