Supreme Court, U.S.
FILED

08-730 DEC 3 - 2008

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No. 08-______

IN THE

Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION, ET AL.,
Petitioners,

v.

EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1996 Congress established a uniform federal regime for the sharing of customer information among affiliated financial institutions by amending the Fair Credit Reporting Act (FCRA) to remove the statute's barriers to such sharing and to bar states from imposing any "requirement or prohibition" with respect to the "exchange of information" by such institutions. 15 U.S.C. § 1681t(b)(2), App. 76a-77a. The California Financial Information Privacy Act (known as SB1) imposes requirements and prohibitions on the sharing among affiliated financial institutions of a customer's "nonpublic personal information." Cal. Fin. Code § 4053(b)(1), App. 56a-57a. The question presented is:

Whether the requirements and prohibitions in SB1 imposed on the sharing of customer information among affiliated financial institutions are expressly preempted by the FCRA?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The following list provides the names of all parties to the proceedings below.

Petitioners include the American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association.

American Bankers Association is a non-profit trade group based in Washington, D.C. It has no parent corporation, and it has not issued shares or securities that are publicly traded.

The Financial Services Roundtable is a non-profit trade group based in Washington, D.C. It has no parent corporation, and it has not issued shares or securities that are publicly traded.

Consumer Bankers Association is a non-profit trade group based in Arlington, Virginia. It has no parent corporation, and it has not issued shares or securities that are publicly traded.

Respondents include Edmund G. Brown, Jr., in his official capacity as Attorney General of California; William S. Haraf, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California; Preston Dufauchard, in his official capacity as Commissioner of the Department of Corporations of the State of California; and Steve Poizner, in his official capacity as Commissioner of the Department of Insurance of the State of California.

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PETITION FOR A WRIT OF CERTIORARI

In 1996, Congress established a uniform federal regime under the Fair Credit Reporting Act (FCRA) that permits financial institutions to share customer information among their affiliates. As an integral part of the uniform federal scheme, Congress enacted an express preemption provision that broadly prohibits any state regulation of the "exchange of information" among the affiliates of financial institutions. Congress did so because it recognized that information sharing among affiliates is essential to financial institutions' ability to operate efficiently and to offer comprehensive banking, insurance, and securities products and services to their customers.

The Ninth Circuit fundamentally impaired the uniform federal regime by adopting a wholly unsupported—and unduly restrictive—interpretation of the term "information" in the preemption provision, such that financial institutions now must comply with cumbersome restrictions on affiliate information sharing enacted by California when doing business in the nation's most populous state. The Ninth Circuit departed from the plain meaning of the term "information" and instead adopted a counter-textual and insupportably narrow construction of the term, even though Congress explicitly narrowed the reach of other preemption provisions in the FCRA with qualifying language that it conspicuously omitted from the provision at issue here. The Ninth Circuit not only departed from the plain meaning of the preemption provision, but did so in the face of the uniform opposition of six federal agencies that enforce the FCRA: the Board of Governors of the

Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration.[1] The Ninth Circuit never mentioned the view of the federal agencies in either one of its opinions in this case. Instead, it adopted an interpretation of the preemption provision that undermines Congress's objective of establishing a uniform regime to govern the "exchange of information" among financial institutions and their affiliates.

Certiorari is warranted not only because the Ninth Circuit fundamentally erred in interpreting the preemption provision, but also because, in the words of the six federal agencies, the issue "is of enormous practical significance to the financial institutions." Federal Agencies Amicus Brief, 2004 WL 3830731, at *13. In the absence of a nationwide standard, financial institutions must divert resources to comply with burdensome state requirements and avoid enormous state penalties at a time when operational efficiency is critical to their safety and soundness. This Court's intervention is necessary to restore the uniform federal regime of information sharing among financial institutions and

[1] Amicus Curiae Brief of the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and the Federal Trade Commission in Support of Appellants American Bankers Association, et al., *American Bankers Association, et al. v. Bill Lockyer, et al.*, No. 04-16334, 2004 WL 3830731 (Federal Agencies Amicus Brief).

their affiliates that Congress carefully created and expressly forbade states from altering.

OPINIONS BELOW

The first opinion of the court of appeals (App. 1a-13a) is reported at 412 F.3d 1081. The second opinion of the court of appeals (*id.* at 14a-24a) is reported at 541 F.3d 1214. The orders of the district court (App. 25a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. App. 15a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the Constitution of the United States provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1681t(b)(2) of the Fair Credit Reporting Act, Title 15, United States Code, provides, in relevant part:

> No requirement or prohibition may be imposed under the laws of any State with respect to the exchange of information among persons

affiliated by common ownership or common corporate control[.]

The other relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, and the California Financial Information Privacy Act (SB1), Cal. Fin. Code Div. 1.2, are reproduced in the Appendix. App. 52a-79a.

STATEMENT OF THE CASE

1. The Fair Credit Reporting Act (FCRA). The FCRA, 15 U.S.C. §§ 1681-1681x, defines the rights and obligations of banks and other institutions that receive, use, collect, or exchange information about the creditworthiness of consumers and other consumer characteristics. The FCRA imposes varying levels of regulation on the exchange of different types of information.

The most stringent regulation is of "consumer reports." A "consumer report" is a communication that contains information bearing on one of seven characteristics of a consumer: (1) credit worthiness, (2) credit standing, (3) credit capacity, (4) character, (5) general reputation, (6) personal characteristics, or (7) mode of living. 15 U.S.C. § 1681a(d)(1), App. 65a. To qualify as a "consumer report," the communication must be used, expected to be used, or collected to determine the consumer's eligibility for: (1) credit or insurance to be used primarily for personal, family, or household purposes; (2) employment purposes; or (3) any other purpose authorized under Section 1681b. *Id.*

Any person that regularly collects and communicates "consumer reports" may be deemed a "consumer reporting agency," *id.* § 1681a(d), (f), App. 65a, 67a, a designation that imposes substantial obligations under the FCRA. *See id.* §§ 1681e, 1681i.

In 1996, Congress amended the FCRA to permit financial institutions and their affiliates to share customer information without becoming "consumer reporting agenc[ies]." First, Congress authorized financial institutions to share freely among their affiliates information that the financial institutions derive from their own dealings with customers ("experience information"). *See id.* § 1681a(d)(2)(A)(ii), App. 66a. Congress accomplished this by excluding such communications, when shared among affiliates, from the definition of "consumer report," *id.*, thereby eliminating the obstacles to sharing of such information.

Second, Congress permitted financial institutions to share other customer information ("non-experience information") among their affiliates provided that the financial institution first notifies its customers that this non-experience information might be shared among affiliates, and gives the customers an opportunity to opt out under a federal process. *Id.* § 1681a(d)(2)(A)(iii), App. 66a. Again, Congress excluded such communications from the definition of "consumer report." *Id.*

To further ensure that the affiliate-information-sharing regime would serve as a "national uniform standard" that would "promote[] operational efficiency for industry[] and competitive prices for

consumers," S. Rep. No. 104-185, at 55 (1995), Congress added an express preemption provision for affiliate information sharing. *See* 15 U.S.C. § 1681t(b)(2), App. 76a-77a. That provision sweeps broadly: it provides that states may impose "[n]o requirement or prohibition . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control." *Id.*

In sum, the 1996 amendments to the FCRA permit financial institutions to share "experience information" among affiliates without restriction, and "non-experience information" subject only to a federal opt-out regime. In addition, the preemption provision bars states from imposing any restriction on the "exchange of information" among affiliates.

2. The Fair and Accurate Credit Transactions Act (FACT Act). In 2003, Congress amended the FCRA by enacting the FACT Act, Pub. L. No. 108-159, 117 Stat. 1952. The FCRA's affiliate-sharing preemption provision was enacted in 1996 with a sunset date of January 1, 2004. *See* former 15 U.S.C. § 1681t(d)(2) (repealed by Pub. L. No. 108-159, § 711(3), 117 Stat. 1952, 2011 (2003)). The FACT Act eliminated this sunset provision and made the affiliate-sharing preemption provision permanent. *See id.*

The FACT Act also imposed a new restriction on the use for marketing purposes of information that affiliates share. *See* 15 U.S.C. § 1681s-3, App. 70a-76a. The FACT Act correspondingly expanded the scope of the FCRA's affiliate-sharing preemption provision to preempt state laws imposing requirements or prohibitions related to affiliates' use

for marketing purposes of information received from an affiliate. *Id.* § 1681s-3(c), App. 74a.

3. The Gramm Leach Bliley Act (GLBA). In Title V of GLBA, 15 U.S.C. §§ 6801-6809, enacted in 1999, Congress expanded financial institutions' ability to affiliate with, and operate through, securities and insurance companies. *See, e.g.*, 12 U.S.C. §§ 24a, 1843(k). In doing so, Congress imposed additional regulations on financial institutions' disclosure of customer information with nonaffiliated third parties, but left affiliated companies free to share customer information among themselves. *See* 15 U.S.C. § 6801 *et seq.* Congress explicitly provided that Title V of GLBA shall not "modify, limit, or supersede the operation of the [FCRA]." *Id.* § 6806, App. 78a.

4. California's SB1. The California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2, is known as "SB1" for the Senate bill on which it is based. SB1 prohibits a financial institution from sharing a consumer's "nonpublic personal information" with an affiliate unless the financial institution (1) has properly notified the consumer through a state prescribed process that it may so disclose the consumer's information and (2) has given the consumer an opportunity to direct that such information not be disclosed and the consumer has not so directed. Cal. Fin. Code § 4053(b)(1), App. 56a-57a.

SB1 defines "nonpublic personal information" to include "personally identifiable financial information (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the consumer or any service performed for the consumer, or

(3) otherwise obtained by the financial institution." *Id.* § 4052(a), App. 52a. "Personally identifiable financial information" is, in turn, broadly defined to include any "information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer." *Id.* § 4052(b), App. 52a-54a.

SB1 imposes requirements and prohibitions on affiliate information sharing that go beyond the federal regime. Section 4053(b)(1) requires notice and opt-out procedures under state law for a financial institution's inter-affiliate transfer of *all* customer information. App. 56a-57a. SB1's opt-out regime also requires institutions to provide a highly detailed notice and a 45-day opt-out period on an annual basis. *Id.* § 4053(d), App. 59a-61a.[2]

SB1 applies to all "financial institutions" "doing business in th[e] state [of California]" with "consumers," defined as "individual resident[s] of

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[2] SB1 exempts from its requirements and prohibitions the sharing of information between a financial institution and affiliates that use the same brand, operate within the same "line of business"—*i.e.*, "banking," "insurance," or "securities"—and have the same regulator. Cal. Fin. Code § 4053(c), App. 57a-59a. Thus, for example, banks can disclose information to their affiliated, commonly branded credit card banks, but not their insurance or securities affiliates, unless SB1's notice requirement is satisfied and the customer has not opted out.

th[e] state," to the extent they use financial products or service for their individual, family, or household needs. *Id.* § 4052(c), (f), App. 54a-56a.[3]

A financial institution that negligently discloses nonpublic personal information in violation of SB1 is subject to a civil penalty of $2,500 per individual violation, capped at $500,000 if a negligent violation results in the release of information about more than one individual. The penalty for knowing and willful violations is also $2,500 per individual violation, but there is no cap on the financial institution's liability. *See id.* § 4057, App. 62a.

On April 19, 2004, Petitioners filed suit seeking a declaratory judgment that the FCRA preempts SB1 because it imposes requirements and prohibitions on the exchange of customer information among affiliates that are more onerous than those imposed by federal law and can trigger substantial penalties. Petitioners also sought injunctive relief against the Respondent California public officials charged with enforcing SB1. Petitioners moved for summary judgment, and Respondents cross-moved for dismissal of the complaint and for summary judgment.

5. The District Court's Preemption Order. Petitioners argued before the district court that the FCRA's express preemption provision preempts the

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[3] An "individual resident" is defined, in turn, to mean "someone whose last known mailing address, other than an Armed Forces Post Office or Fleet Post Office address, as shown in the records of the financial institution, is located in this state." Cal. Fin. Code § 4052(f), App. 55a-56a.

affiliate-sharing provisions of SB1. On July 9, 2004, the district court rejected Petitioners' argument, ruling that the FCRA does not preempt SB1 in any respect. App. 40a.

The district court acknowledged that the FCRA's affiliate-sharing preemption provision "does indicate on its face that 'no requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control.'" *Id.* at 35a (quoting 15 U.S.C. § 1681t(b)(2)). The court ruled nevertheless that because Congress had excluded some communications among affiliates from the definition of "consumer report," Congress intended that such information sharing not be subject to the FCRA's requirements at all, including the FCRA's preemption provision. *Id.*

6. The Ninth Circuit's Preemption Decision. Petitioners appealed to the Ninth Circuit. Six federal agencies charged with enforcing the FCRA filed an amicus brief urging the Ninth Circuit to reverse the district court's decision and hold that SB1 is preempted by the FCRA. *See* Federal Agencies Amicus Brief, 2004 WL 3830731, at **1-23. The agencies advised the court that "[t]he district court's decision defeats Congress' objective" to "'ensure the operational efficiency of [the] national credit system,'" *id.* at *14 (quoting H.R. Conf. Rep. No. 108-396, at 66 (2003)), and "could encourage other states to enact laws that impose unique notice requirements or other limitations on the sharing of

information among affiliates, further frustrating Congress' objective," *id.*[4]

The Ninth Circuit reversed. In doing so, however, it held that, in the FCRA's affiliate-sharing preemption provision, the word "information" has a "restricted" meaning limited to the sort of information described in the definition of "consumer report" in 15 U.S.C. § 1681a(d)(1). App. 10a. The Ninth Circuit therefore concluded that the FCRA preempted SB1 only to the extent that SB1 regulates sharing of information "as that term is used in § 1681a(d)(1)." *Id.* at 12a-13a.

The Ninth Circuit declined to give effect to the FCRA preemption provision's "plain language," *id.* at 9a, because it asserted that a restrictive interpretation of "information" is supported by the structure of the FCRA. In doing so, the court relied without explanation on the FCRA provisions allowing affiliate information sharing, which are carved out as exclusions from the definition of "consumer report." *Id.* at 11a-12a. This led the court to assert that the references to "information" in the

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[4] Five states in the Ninth Circuit—Hawaii, Montana, Nevada, Oregon, and Washington—joined other states in an amicus brief stating that they "need" to enact legislation like SB1 if it is upheld by the courts. Amicus Curiae Brief of the States of Vermont, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee Washington, and Wisconsin in Support of Defendant-Appellees, *American Bankers Association, et al. v. Bill Lockyer, et al*, No. 04-16334, 2004 WL 2403000 (States Amicus Brief), at **22-30.

exclusions are to the type of information that would otherwise be regulated as a "consumer report." *Id.* The court further asserted that because the affiliate-sharing preemption provision "was added to the statute as part of the same 1996 package of amendments as [the affiliate-sharing exclusions]," it was "reasonable to construe the term 'information,' as it is used in the preemption clause, to have the same meaning as 'information' in the FCRA's [exclusion] provisions." *Id.* at 11a.

Finally, the Ninth Circuit relied on the 2003 FACT Act provisions limiting the use for marketing purposes of information shared among affiliates. The court noted that those requirements apply only to "'communication of information that would be a consumer report, but for [subsections §§ 1681a(d)(2)(A)(i)-(iii)], which exclude information shared among affiliates from the definition.'" App. 12a (quoting 15 U.S.C. § 1681s-3(a)(1)). The court pointed to another provision of the FACT Act that expands the FCRA's preemption provision to cover "'[r]equirements with respect to the use . . . of information [shared among affiliates].'" *Id.* (quoting 15 U.S.C. § 1681s-3(c)) (emphasis omitted). Again, without explanation, the court concluded that the simultaneous enactment of an affiliate-information-sharing requirement and a preemption provision was "compelling evidence that Congress saw the affiliate-sharing preemption clause as parallel and identical in scope to the FCRA's other affiliate information-sharing provisions." *Id.*

On this basis, the Ninth Circuit held that the FCRA's affiliate-sharing preemption provision "preempts SB1 insofar as it attempts to regulate the

communication between affiliates of 'information,' as that term is used in § 1681a(d)(1)," which defines a "consumer report." App. 12a-13a.

The Ninth Circuit remanded the case for a determination whether, applying its "restricted meaning of 'information,'" "any portion of the affiliate-sharing provisions of SB1 survives preemption, and, if so, whether it is severable from the portion that does not." App. 13a.

7. The District Court's Order On Remand. On remand, the district court determined that no portion of SB1's affiliate-sharing provision, Cal. Fin. Code § 4053(b)(1), App. 56a-57a, survived preemption. The district court explained that while "in theory" some types of information would fall outside the preemptive reach of the FCRA as construed by the Ninth Circuit (*e.g.*, information that is not "used, expected to be used or collected in whole or in part" for an FCRA-specified purpose), in practice it would be "conjecture" "[to] delineate in advance what information enjoys federal protection and which does not." App. 47a. The uncertainty financial institutions would face in trying to determine *ex ante* whether affiliate sharing of information was subject to restriction under SB1, the district court concluded, would create "the untenable situation of forcing California financial institutions to either risk violation of SB1 or comply therewith whether or not the information is for an FCRA authorized purpose." *Id.* The district court thus held that "no portion of SB1's affiliate sharing provision survives" preemption under the FCRA. *Id.* at 48a. The district court accordingly entered judgment in favor of Petitioners.

8. The Ninth Circuit's Severability Decision. A divided panel of the Ninth Circuit reversed. The majority did not address the district court's ruling that no portion of Section 4053(b)(1) could survive without frustrating the uniform federal regime Congress had sought to establish, and it never tried to reconcile its decision with the remand's requirement to determine whether "any portion of the affiliate-sharing provisions of SB1 survives preemption." App. 13a, 17a. Instead, the majority focused solely on the intent of the state legislature and held that a federal court may rewrite a state statute if it concludes that the state legislature would prefer such a course. *Id.* at 19a-22a.

Even though SB1's severability clause permitted only severance of "phrase[s], clause[s], sentence[s], or provision[s]" of the statute, not applications, the majority determined that the legislature would have preferred that the court rewrite the statute to narrow its applications rather than strike it down. *Id.* The court accordingly "narrow[ed]" Section 4053(b)(1) "to exclude the regulation of consumer report information as defined by the FCRA, 15 U.S.C. § 1681a(d)(1)," while permitting SB1's other applications.[5] *Id.* at 22a.

Judge Wallace dissented.

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[5] On October 27, 2008, the district court entered final judgment providing that "Cal. Fin. Code § 4053(b)(1) is preempted by 15 U.S.C. § 1681t(b)(2) of the [FCRA] 'insofar as it attempts to regulate the communication between affiliates of "information" as that term is used in [15 U.S.C.] § 1681a(d)(1)' of the [FCRA]." Final Judgment and Permanent Injunction, at 2 (quoting 412 F.3d 1081, 1087 (9th Cir. 2005)).

REASONS FOR GRANTING THE WRIT

Emphasizing the "enormous practical significance" of the preemption issue and the "[c]ongressional intent to eliminate the regulatory burden and confusion caused by multiple state laws" on affiliate information sharing, six federal agencies charged with enforcing the FCRA filed an amicus curiae brief concluding that, "on the plain meaning of the [FCRA's] text," SB1 is preempted by federal law. *See* Federal Agencies Amicus Brief, 2004 WL 3830731, at **12-13. The Ninth Circuit, without acknowledging the federal agencies' submission, held that the FCRA's affiliate-sharing preemption provision preempts SB1 only "insofar as it attempts to regulate the communication between affiliates of 'information,' as that term is used in [15 U.S.C.] § 1681a(d)(1)," which defines a "consumer report." App. 12a.

The Ninth Circuit's decision disregards the plain language of the FCRA's affiliate-sharing preemption provision, which broadly displaces state requirements with respect to the "exchange of information." *Id.* § 1681t(b)(2), App. 76a-77a. The court of appeals' decision frustrates Congress's creation of a uniform national standard to govern the sharing of information among affiliated entities. The Ninth Circuit's interpretation of the FCRA's affiliate-sharing preemption provision also disrupts Congress's federal regulatory regime because the line the court drew between preempted and non-preempted information sharing will often be unclear and difficult to discern. Financial institutions wary of enormous state penalties will be driven to comply with SB1's more stringent requirements, even with

respect to the sharing of information that falls within the definition of "consumer report" under Section 1681a(d)(1).

The Ninth Circuit's decision is extraordinarily important. As the six federal agencies advised the Ninth Circuit, a refusal to declare Cal. Fin. Code § 4053(b)(1) preempted in its entirety "could increase costs for institutions and consumers, promote inefficiency, expose institutions to uncertain civil liabilities, and undermine Congress' objective of achieving uniformity." Federal Agencies Amicus Brief, 2004 WL 3830731, at **15-16. Under the Ninth Circuit's approach, financial institutions seeking to share information must determine whether the information at issue is subject to the federal or state regime, an often complex exercise in line-drawing from which Congress sought to exempt financial institutions when it enacted a broadly worded preemption provision to preclude state requirements or prohibitions.

Unless this Court intervenes, the federal credit regime will be disrupted, as financial institutions doing business in California must comply with more onerous requirements when sharing information about California residents among their affiliates. As the federal agencies warned, "state-by-state regulation of affiliate information sharing and use could create inefficiencies and regulatory burdens on institutions, driving up the cost of financial services and harming both financial institutions and consumers." *Id.* at *15. The frustration of the uniform federal regime is especially problematic in the current economic environment.

THE NINTH CIRCUIT'S DECISION IS INCORRECT AND DISRUPTS CONGRESS'S UNIFORM FEDERAL REGIME.

A. The Ninth Circuit's Decision Disregards The Plain Language Of The FCRA's Affiliate-Sharing Preemption Provision.

1. In the FCRA, Congress broadly prohibited states from imposing any "requirement or prohibition . . . with respect to the exchange of information" among affiliated financial institutions. 15 U.S.C. § 1681t(b)(2). Despite Congress's enactment of this broadly worded express preemption provision, the Ninth Circuit ruled that Congress did not intend to preempt all state requirements governing information sharing among affiliates. Instead, the court ruled that Congress used the word "information" in the preemption provision in a "restricted sense" limited only to "information" that meets the FCRA definition of "consumer report" in 15 U.S.C. § 1681a(d)(1), with the result that states are free to impose their own, more onerous requirements on the sharing by affiliates of information that falls outside Section 1681a(d)(1)'s definition of "consumer report." App. 10a-11a. That holding is fundamentally flawed.

As this Court has explained, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see Morales v.*

Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (in determining preemption question, the Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quotation marks omitted).

The plain language of the express preemption provision is broad, prohibiting states from enacting any "requirement or prohibition . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C. § 1681t(b)(2), App. 76a-77a. The provision by its terms applies to the exchange of "information," without any qualification or limitation concerning the type of "information" exchanged. Nothing in the statutory text supports the Ninth Circuit's supposition that, when Congress used the word "information" without qualification, Congress meant only to encompass the subset of "information" meeting the statutory definition of "consumer report" in Section 1681a(d)(1). To the contrary, the breadth of the language contrasts with other FCRA preemption provisions enacted at the same time that are *expressly limited* to state regulation of "consumer reports" or "information contained in consumer reports." *See, e.g., id.* § 1681t(b)(1)(A) ("No requirement or prohibition may be imposed under the laws of any State—(1) with respect to any subject matter regulated under—(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports"), App. 76a; *see also id.* § 1681t(b)(1)(D), (E), (I) (limiting preemption to "consumer reports" or "information contained in consumer reports"), App. 77a. As the six federal

agencies explained, "[c]learly, Congress knew how to draft a preemption provision with limited scope; clearly, that, too, is *not* what it did here." Federal Agencies Amicus Brief, 2004 WL 3830731, at *19. The clear inference to be drawn from Congress's decision to use the general term "information" is that it did *not* intend to restrict the scope of the affiliate-sharing preemption provision to information contained in consumer reports. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Ninth Circuit drew the opposite inference and assigned a "restricted" meaning to the word "information" in the preemption provision. App. 10a. The Ninth Circuit looked to the provision defining "consumer report" and the provisions excluding certain information from that definition, and reasoned that "the term 'information' as it is used in the preemption clause [should] have the same meaning as 'information' in [those] other provisions relating to information and information sharing between affiliates." *Id.* at 11a. But the Ninth Circuit drew exactly the wrong lesson from those other provisions. Those provisions in no way adopt a narrow interpretation of the term "information." To the contrary, the term "information" retains its plain (and broad) meaning, and is qualified by additional language that focuses on particular types of "information."

In Section 1681a(d)(1), for instance, Congress defined a "consumer report" as "information . . . bearing upon" certain specified subjects and "used or expected to be used or collected" for certain specified "purpose[s]." Congress used no such qualifying language in the preemption provision, instead broadly preempting state restrictions on "the exchange of information" without qualifying language limiting the scope of preemption to "information bearing upon" certain subjects or "used" for certain "purposes." Accordingly, in both the preemption provision and the provision defining "consumer report," the word "information" retains its plain meaning—but whereas the provision defining "consumer report" expressly encompasses only particular types of "information," the preemption provision contains no such limitation. Congress demonstrated throughout the FCRA that it knew how to restrict or qualify the word "information" when it wanted to do so. It did not do so here.

In their amicus brief, the federal agencies set forth their view that the preemption provision applies to all categories of information, rather than merely a subset of information such as information that fits the definition of "consumer report" in Section 1681a(d)(1). The agencies explained that "[t]he type of information covered by th[e] preemption provision was not limited to 'consumer report' information," Federal Agencies Amicus Brief, 2004 WL 3830731, at *6, and pointed out that the provision "makes no reference to 'consumer report,'" *id.* at *17, and does not "even hint[] that its scope is limited only to state laws regulating consumer reports," *id.* at *19. The Ninth Circuit's contrary

interpretation squarely conflicts with the federal agencies' interpretation.[6]

2. Given Congress's recognition of the need for a national system to govern the treatment of consumers' personal financial information, the Ninth Circuit's refusal to read the word "information" according to its ordinary meaning contravenes Congress's purpose, which is "the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation marks omitted). Permitting states to establish their own disparate requirements with respect to sharing customer information that does not meet the federal definition of "consumer report" will create precisely the kind of regulatory burdens and confusion from which Congress sought to protect affiliated financial institutions by carving out exceptions from the definition of "consumer reports" and enacting the FCRA preemption provision.

The Ninth Circuit stated that it sought to "understand the [FCRA] 'as a symmetrical and coherent regulatory scheme.'" App. 10a (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Under the Ninth Circuit's approach, states cannot restrict

[6] The six federal agencies did not participate in the proceedings on remand or in the ensuing appeal. Those proceedings, which focused on the state-law question as to whether SB1 was severable, presented no occasion to revisit the Ninth Circuit's rejection of the Agencies' view that the term "information" in the preemption provision should be construed according to its plain meaning rather than in the "restricted" manner embraced by the Ninth Circuit in its initial opinion.

sharing of the kind of sensitive customer information that is encompassed within Congress's definition of "consumer report," but they are free to impose more onerous requirements on the sharing of *less* sensitive information.[7] It is highly unlikely that Congress intended such an illogical result.

The structure and history of the FCRA confirm that Congress intended to establish a uniform federal regime governing information sharing among affiliates, not the federal-state hybrid regime the Ninth Circuit imposed. The FCRA generally imposes no limitation on the sharing of customer information among affiliates. And while the FCRA restricts the disclosure to non-affiliates of information that constitutes a "consumer report," Congress in 1996 established that affiliates may share freely even such "consumer report" information if the information concerns their own transactions and experiences with customers. 15 U.S.C. § 1681a(d)(2)(A)(i)-(ii), App. 66a. Congress further provided that affiliated institutions may share other types of "consumer report" information so long as the customer receives notice and an opportunity to opt out. *Id.* § 1681a(d)(2)(A)(iii), App. 66a. Congress thereby sought to extend the preexisting immunity from federal regulation for affiliate sharing of non-

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[7] For example, preempted "consumer report" information includes information about a customer's "general reputation," "personal characteristics," "credit worthiness," and "mode of living." 15 U.S.C. § 1681a(d)(1), App. 65a. By contrast, the mere fact that a customer is a depositor of a particular bank may not be "consumer report" information, depending on the purpose for which that information is used by that institution.

"consumer report" information so that it encompassed the exchange of "consumer report" information as well.

To ensure a national, uniform approach to affiliate information sharing, Congress at the same time preempted any state "requirement or prohibition . . . with respect to the exchange of information among" affiliated institutions. 15 U.S.C. § 1681t(b)(2), App. 76a-77a. Reading that provision, as the Ninth Circuit has done, to preempt only those requirements or prohibitions that apply to information that falls within the FCRA's definition of "consumer report" ignores Congress's decision to refrain from imposing any federal restrictions on affiliate information sharing of information that falls outside the definition of "consumer reports." By enabling states to restrict or prohibit the exchange of information that falls outside the definition of "consumer report" in Section 1681a(d)(1) in the face of Congress's decision to allow the exchange of that information without restriction under the FCRA, the Ninth Circuit's reading of the preemption provision undermines the national uniformity that Congress sought to achieve.

3. That Congress intended the express preemption provision to be accorded broad effect in accordance with its plain language and Congress's goal of uniformity is further confirmed by the legislative history of the 1996 and 2003 Amendments to the FCRA. The 1995 Senate Banking Committee Report explained that Congress sought a "national uniform standard" because "a single set of Federal rules promotes operational efficiency for industry,

and competitive prices for consumers." S. Rep. No. 104-185, at 55 (1995).

In the course of debating the 2003 Amendments, which made the affiliate-sharing preemption provision permanent, the Senate considered an amendment offered by California's two senators—both of whom recognized that renewal of the FCRA affiliate-sharing preemption provision would preempt SB1—that would have made SB1's information-sharing requirements the national standard. *See* 149 Cong. Rec. S13848, S13860 (Nov. 4, 2003) (floor statements of Sen. Feinstein, reading letter from state sponsor of SB1 that renewal of FCRA preemption provision would "preempt California's standard on affiliate-sharing with a weaker one"); *id.* at S13,874 (floor statement of Sen. Boxer, stating that "California finds itself left out" if FCRA preemption is extended). The amendment was rejected by a 70-24 vote, thus confirming that Congress intended to preempt SB1. *See* Federal Agencies Amicus Brief, 2004 WL 3830731, at *20 ("[T]he legislative history of the FACT Act unambiguously supports the conclusion that the FCRA preemption provision, as amended by the FACT Act, is intended to preempt state laws limiting the sharing and use of information among affiliates, not just state laws dealing with 'consumer reports.'").

Congress imposed a uniform federal regime for the sharing of customer information among affiliated institutions. The Ninth Circuit's decision adopting a "restricted" reading (App. 13a) of the FCRA's affiliate-sharing preemption provision invites states to impose the type of burdensome requirements that

the FCRA amendments were designed to avoid. The decision is wrong and should be reversed.

4. There is yet another reason to read the word "information" in the preemption provision according to its plain meaning: construing the word narrowly, as the Ninth Circuit did, will frustrate the federal regulatory regime by pressuring financial institutions to comply with SB1's more restrictive regime even with respect to the sharing of information that the Ninth Circuit has held is federally protected.

By carving out affiliate information sharing from the FCRA's regulation of "consumer report[s]," 15 U.S.C. § 1681a(d), App. 65a, Congress relieved financial institutions sharing customer information among their affiliates of the need to monitor their "purpose" for collecting, using or intending to use such information to ensure that such information did not constitute a "consumer report." *Id.* § 1681a(d)(1) (whether certain specified information constitutes a "consumer report" depends on purpose for which that information "is used or expected to be used or collected"), App. 65a. Through the carve-out, Congress also relieved affiliated institutions from having to determine whether customer information fell within one of the seven categories of information specified in the definition of "consumer report" in Section 1681a(d)(1).

Under the Ninth Circuit's interpretation of the FCRA's affiliate-sharing preemption provision, however, SB1's restrictions on the sharing of a consumer's "nonpublic personal information" include both federally preempted "consumer report" information and information that is not federally

preempted. *See* Cal. Fin. Code § 4053(b)(1), App. 56a-57a. An example of the latter would be customer information that is not used or intended to be used for one of the purposes specified in the FCRA. The distinction between federally protected and non-federally protected information thus will often turn on the purposes for which such information is "used or expected to be used or collected." 15 U.S.C. § 1681a(d)(1), App. 65a. This line-drawing problem is precisely the predicament from which Congress sought to protect affiliated institutions when it enacted the affiliate information-sharing carve-outs from the FCRA's restrictions on "consumer reports."

As the district court recognized on remand, the lines will often be difficult to draw in practice, and disputes over a bank's intent could invite enforcement actions seeking enormous penalties. *See* Cal. Fin. Code §§ 4057(a) & (b), App. 62a. To avoid state enforcement actions, financial institutions will be under pressure to chart a cautious course that deprives them of the full range of preemption that Congress sought to establish. As the district court observed, permitting SB1 to apply to information that does not fall within the FCRA's definition of "consumer report" "creates the untenable situation of forcing California financial institutions to either risk violation of SB1 or comply therewith whether or not the information is for an FCRA authorized purpose." App. 47a.

Indeed, California stands poised to impose substantial penalties on financial institutions that share with their affiliates routine consumer information, such as a person's name, address, and telephone number. Brief of Appellants California

Attorney General Bill Lockyer and California Insurance Commissioner John Garamendi, *American Bankers Association, et al. v. Bill Lockyer, et al.*, No. 05-17206, 05-17163, 2006 WL 2630142, at **16-20. Regardless of whether such information falls within the definition of a "consumer report," exposing routine exchanges of such consumer information to state regulation and the possibility of substantial penalties severely hamstrings a financial institution's ability to function efficiently in the marketplace. The Ninth Circuit's decision also leaves states other than California free to impose materially different requirements with respect to the sharing of the same information, creating the very lack of uniformity that Congress sought to eliminate through the preemption provision.

The Ninth Circuit's approach is especially pernicious because the kind of information California seeks to regulate (*see id.*) plainly can be "consumer report" information in some circumstances, such as when it falls into categories based on credit limits or open dates of loan. A financial institution seeking to comply with California law, while still preserving the limited right to share information allowed by the Ninth Circuit, would therefore be required to devote substantial resources to monitoring whether the information can be deemed to fall within the definition of a "consumer report," with the attendant risk of being subjected to severe penalties for a mistaken judgment. By enacting a preemption provision that expressly and categorically takes the states out of the business of regulating the sharing of "information" among affiliates, Congress sought to

relieve financial institutions from this substantial burden.

This Court's recent decision in *Chamber of Commerce v. Brown* illustrates the error in the Ninth Circuit's narrow construction of the preemption provision. As explained in *Brown*, employers have a federal right under the National Labor Relations Act [NLRA] to use their own money to fight union organizing campaigns. 128 S. Ct. 2408, 2413-14 (2008). The California statutes at issue in that case barred employers from using state funds to support or oppose union organizing, which the state, in principle, had the right to regulate. *Id.* at 2411. This Court, however, held that the California statutes were preempted.

The California statutes required costly recordkeeping requirements and provided substantial penalties for statutory violations. *Id.* at 2416. This Court held that because the California legislature coupled its non-preempted restriction "with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds," the California statute "effectively reaches beyond the use of funds over which California maintains a sovereign interest," and was therefore preempted. *Id.* (quotation marks omitted). The Court explained that the state statute's "enforcement mechanisms put considerable pressure on an employer" to "refrain[] from conduct protected by federal labor law," *id.* at 2416-17 (quotation marks omitted), and thus "stands as an obstacle to the accomplishment and execution of the full

purposes and objectives of the NLRA," *id.* at 2417 (quotation marks omitted).

SB1's affiliate-information-sharing provision frustrates Congress's federal information-sharing regime in the same way. SB1's substantial penalties "put considerable pressure" on financial institutions to adhere to Section 4053(b)(1)'s requirements even for information sharing that remains federally protected under the Ninth Circuit's decision. Allowing states to regulate information that falls outside the FCRA's definition of "consumer report" "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal regime for affiliate information sharing, and supports reading the word "information" in the FCRA's affiliate-sharing preemption provision in the plain and broad way that Congress intended.

The Ninth Circuit's decision defeats Congress's objective of ensuring uniform treatment of affiliate information sharing and leaves other states within the circuit free to impose disparate notice requirements or other restrictions on affiliate information sharing. As the six federal agencies explained, such a result would "further frustrat[e] Congress' objective," because institutions could "face inconsistent or conflicting requirements" and "confront the prospect of civil liability under state laws that Congress specifically sought to preempt." Federal Agencies Amicus Brief, 2004 WL 3830731, at **14-15. State-by-state regulation of affiliate information sharing will also "create inefficiencies and increase regulatory burdens on institutions, driving up the cost of financial services and harming both financial institutions and consumers." *Id.* at

*15. The Ninth Circuit ignored the federal agencies' view and thereby erred. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) (placing weight upon agency view set forth in the government's brief that the petitioner's tort suit was preempted because it stood as an obstacle to the execution of federal safety objectives); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (views of an agency set forth in an amicus brief entitled to deference based upon the thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and the validity of its reasoning).

5. This is not the first time that the Ninth Circuit has upheld a California statute in the face of an express federal preemption provision by refusing to give effect to the plain meaning of the federal statute. In *Engine Manufacturers Association v. South Coast Air Quality Management District*, a California political subdivision enacted "fleet rules" that prohibited the purchase by various public and private fleet operators of vehicles that did not comply with stringent emission requirements. 541 U.S. 246, 248-49 (2004). The Engine Manufacturers Association sued, claiming that the fleet rules were preempted by Section 209 of the Clean Air Act, which prohibits the adoption or attempted enforcement of any state or local "standard" relating to the control of emissions from new motor vehicles or new motor vehicle engines. *Id.* at 251 (citing 42 U.S.C. § 7543(a)).

The Ninth Circuit held that the Clean Air Act's express preemption provision did not invalidate the fleet rules. To reach that conclusion, the Ninth Circuit determined that the term "standard" in the

Clean Air Act's preemption clause had a restricted meaning: it included only regulations that compelled manufacturers to meet specified emission limits, but not regulations governing the purchase of specified vehicles. *Id.* at 253. This Court granted certiorari to preserve the Clean Air Act's uniform application and preemption scheme, holding that the Ninth Circuit's restricted interpretation of the word "standard" had "[no] support in the text of § 209(a) or the structure of the [Clean Air Act]" and contravened the principle that "the ordinary meaning of th[e] [statutory] language accurately expresses the legislative purpose." *Id.* at 252 (quotation marks omitted). Because the Ninth Circuit's "restricted" reading (App. 13a) of Section 1681t(b)(2) similarly undermines the FCRA's uniform regulation of affiliate information sharing, this Court should grant review and reverse the Ninth Circuit here as well.

B. This Court Should Intervene To Maintain The Uniform Federal Regime That Congress Created.

The Ninth Circuit's decision is extraordinarily important because it defeats "the uniform nationwide standards Congress created for information sharing among affiliates through the preemption provision in § 1681t(b)(2)." Federal Agencies Amicus Brief, 2004 WL 3830731, at *23. The preemption issue "is of enormous practical significance to the financial institutions" and "could materially affect the way they do business." *Id.* at *13.

Unless this Court grants a writ of certiorari and reverses the Ninth Circuit's decision, financial

institutions that do business in California—essentially all major ones—will be required to comply with more onerous requirements imposed by California when sharing information about California residents among their affiliates. California's banking industry alone accounts for almost 11 percent of all money deposited in financial institutions throughout the United States. *See* Fed. Deposit Ins. Corp., *FDIC-Insured Institutions, State Totals as of June 30, 2008*, http://www2.fdic.gov/sod/sodSumReport.asp?barItem=3&sInfoAsOf=2008 (last visited Dec. 1, 2008) (showing that nearly 763 billion of 7 trillion dollars nationwide are deposited in financial institutions in California).

Moreover, the Ninth Circuit's decision paves the way for other states to enact laws restricting affiliate information sharing. Other states, including several within the Ninth Circuit, have stated that they "need" to enact precisely such legislation. States Amicus Brief, 2004 WL 2403000, at *22. Additional state laws would produce a patchwork of possibly "inconsistent or conflicting requirements, which could cause confusion among institutions and consumers alike," Federal Agencies Amicus Brief, 2004 WL 3830731, at *14, and "create inefficiencies and increase regulatory burdens on institutions, driving up the cost of financial services and harming both financial institutions and consumers," *id.* at *15. Because Congress enacted a broad affiliate-sharing preemption provision to prevent the regulatory costs and burdens that the Ninth Circuit's decision permits states to impose, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 3, 2008

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