No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BANKERS ASSOCIATION,
THE FINANCIAL SERVICES ROUNDTABLE, and
CONSUMER BANKERS ASSOCIATION,

Plaintiff-Appellants,

vs.

BILL LOCKYER, in his official capacity
as Attorney General of California, et al.

Defendant-Appellees.

On Appeal from the United States District Court
For the Eastern District of California

Case No. S-04-0778 MCE KJM

BRIEF OF AMICI CURIAE 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, SUPPORTING AFFIRMANCE

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I. INTRODUCTION AND STATEMENT OF INTEREST

This *amicus curiae* brief, in support of Appellees Bill Lockyer *et al.*, is submitted by Vermont Attorney General William H. Sorrell, Assistant Attorney General Julie Brill on the brief, and joined by the Attorneys General of the States of Arkansas, Colorado, Connecticut, Delaware, the 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 ("the Amicus States"). Collectively, the Amicus States have a strong interest in the general welfare of the citizens of their States, and have long played an important role in the area of consumer protection. An essential part of that role, in today's "information age," is protecting consumers' privacy. The Attorneys General therefore have taken an active role on privacy issues.

This appeal is a challenge to the district court's ruling that the affiliate-sharing preemption provision of the Fair Credit Reporting Act ("FCRA") does not preempt portions of California's financial information privacy law that require financial institutions to provide California residents with a right to opt out of having their personal information shared with the financial institution's affiliates. Noting that the overriding purpose of the FCRA is to regulate the use and dissemination of consumer reports, the district court found the preemption

provision, when read in context, does not preempt the right of States to enact general financial privacy standards more protective than those found in the federal Gramm-Leach-Bliley Act ("GLB").

In enacting GLB and FCRA, Congress set important basic standards of protection for consumers' personal information. However, with each of these federal enactments, Congress also created an important role for state regulation of consumers' personal information, including protecting its confidentiality and providing consumers with some control over that information. The Attorneys General have a strong interest in ensuring that the States' ability to protect consumers' privacy is maintained, and therefore submit this brief on behalf of their States and in support of appellees.

II. SUMMARY OF ARGUMENT

In the credit reporting and financial privacy arenas, Congress has created a dual regulatory structure: national baseline standards are supplemented by state laws that provide greater protections. The Amicus States urge this Court to affirm the district court's decision, which appropriately recognizes the States' clear authority to regulate affiliate sharing outside the specific confines of the explicit – and narrow – preemption provisions contained in the Fair Credit Reporting Act. The Amicus States join in the arguments of Appellee Bill Lockyer, which convincingly demonstrate that the district court's ruling was correct.

Contrary to the arguments of the Office of the Comptroller of the Currency and other federal banking regulators, Congress did not create a national uniform system for regulating credit reporting or sharing of information among corporate entities. Rather, Congress has created a thriving system of dual regulation, allowing the States a significant and important role in regulating information sharing. And, again contrary to the arguments of the federal banking regulators, the dual regulatory system has not resulted in increased costs of credit or other economic harms.

Finally, consumers need and want financial privacy protection beyond that provided by federal law. Congress has expressly preserved the right of the States to provide that protection.

III. CONGRESS HAS ESTABLISHED A DUAL REGULATORY SYSTEM FOR CREDIT REPORTING AND CORPORATE INFORMATION SHARING

A. The Federal Fair Credit Reporting Act, When Read Appropriately, Only Preempts States From Regulating Affiliate Sharing As Credit Reporting Activity.

There are two federal laws that specifically address information flow from and within a corporate affiliate group: the Gramm-Leach-Bliley Act (GLB),[1]

[1] Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102.

passed in 1999, and the Fair Credit Reporting Act (FCRA or federal FCRA),[2] originally passed in 1970[3] and amended in 1996[4] and 2003[5].

GLB made several fundamental changes to the laws governing the Nation's financial system, including expanding the types of financial institutions that may be affiliated with one another.[6] GLB also established some baseline rules governing the circumstances under which financial institutions may disclose personal information about their customers to other entities. GLB generally requires that a financial institution provide a clear and conspicuous notice of its privacy practices, an explanation of how consumers can "opt out" before sharing their non-public information, and the opportunity to opt out, unless certain exceptions apply.[7] Intending these protections from unbridled information sharing to be only a baseline standard, Congress adopted a provision within GLB that

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[2] 15 U.S.C. § 1681 *et seq.*

[3] Fair Credit Reporting Act of 1970, Pub L. No. 91-508, 84 Stat. 1136.

[4] Fair Credit Reporting Act of 1996, Pub. L. No. 105-107, 111 Stat. 2255 (hereinafter "1996 Amendments").

[5] Fair and Accurate Credit Transactions Act of 2003, 117 Stat. 1952 (Dec. 4, 2003) (hereinafter "FACTA" or "2003 Amendments").

[6] *See infra*, Section V.B.

[7] *See* 15 U.S.C. §§ 6801-6809.

explicitly allows States to adopt more protective standards with respect to information sharing:

> (b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter…."[8]

GLB also contains a "savings clause," indicating "nothing in [GLB] shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act."[9]

The federal FCRA sets standards for the collection, communication, and use of information that constitutes a "consumer report," generally defined as a communication of information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.[10] In 1996, Congress adopted amendments to the FCRA that, among other things, specifically exclude from the definition of a consumer report "any report containing information solely as to transactions or experiences between the consumer and the person making the report."[11] This "transaction and

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[8] 15 U.S.C. § 6807(b).

[9] 15 U.S.C. § 6806(c).

[10] 15 U.S.C. § 1681a(d)(1).

[11] 15 U.S.C. § 1681a(d)(2)(A)(i).

experience" information could include, for example, detailed information about a customer's purchases made on a credit card issued by the financial institution, as well as the customer's outstanding balance, the customer payment history, and the length of time a customer has held a credit card.[12] Under the federal standards set forth in the FCRA, "transaction and experience" information can be shared by a corporation with its affiliates and with unaffiliated third parties without any notice or choice to the consumer.

The 1996 Amendments also exempt from the definition of a "consumer report" the communication of *other* information among affiliated companies – that is, information other than transaction and experience information that would ordinarily be considered a consumer report – if certain conditions are met. Examples of categories of such *other* information include data:

- from a consumer's credit application, including income information;
- from a consumer's credit report, including credit scores and history;
- obtained by verifying representations made by a consumer; and
- provided by another entity regarding its employment, credit, or other relationship with a consumer.[13]

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[12] OCC Advisory Letter 99-3 (March 29, 1999).

[13] *See* 65 Fed. Reg. at 63,129.

In addition to income and credit information, "other" information can include employment history with others, marital status, and medical history.[14]

By exempting this "other" customer information from the definition of a "consumer report" so long as the consumer is given notice and an opportunity to opt out of the information sharing, financial institutions are permitted to freely share this *other* customer information among affiliated companies without being considered a "consumer reporting agency" for purposes of the FCRA.[15]

The 1996 Amendments preempted the States from enacting state laws:

> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated [as in effect on September 30, 1996].[16]

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[14] *See* 65 Fed. Reg. at 63,129.

[15] 15 U.S.C. § 1681a(d)(2)(A)(iii). Indeed, the Federal Reserve Regulatory Service has noted that the punishment for failing to comply with the conditions for affiliate sharing under the federal FCRA is a determination that the financial institution is a consumer reporting agency under the federal FCRA. S*ee Federal Reserve Regulatory Service*, Questions and Answers about the Fair Credit Reporting Act, The Financial Institution as a Consumer Reporting Agency, FRRS 6-1605 (noting that a consumer reporting agency is subject to various legal obligations to maintain and safeguard consumer information, including limitations on the purposes for which information can be sold or distributed, 15 U.S.C. § 1681b, and requirements to provide consumers an opportunity to review information maintained about them, as well as establish particular error resolution procedures and consumer complaint mechanisms).

[16] 15 U.S.C. § 1681t(b)(2).

However, because the legislative context of the affiliate sharing provisions is so limited, this preemption provision is similarly limited. The FCRA regulates only the compilation, dissemination, and use of "consumer reports," a term defined to include any communication by a "consumer reporting agency" of information bearing on specified characteristics used as factors in determining a consumer's eligibility for credit or other FCRA-authorized purposes.[17] "Consumer reporting agencies" are defined as persons regularly furnishing consumer reports to third parties.[18] The FCRA restricts the furnishing of consumer reports to recipients with a "permissible purpose" for the information, such as lenders.[19] If information does not constitute a consumer credit report, it is not governed by the FCRA – or by its preemption provisions.[20]

Nothing in the FCRA itself regulates or authorizes the sharing of information that is not a "consumer report," including information subject to

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[17] 15 U.S.C. § 1681a(d).

[18] 15 U.S.C. § 1681a(f).

[19] 15 U.S.C. § 1681b(a).

[20] *See Individual Reference Serv. Group, Inc., v. FTC*, 145 F. Supp. 2d 6 at 17 (D.D.C. April 2001) ("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.'").

GLB.[21] Section 603 of the FCRA, titled "Exclusions," states that "the term 'consumer report' does not include" – and therefore the Act does not regulate – the sharing of both transaction and experience information *and* affiliate sharing of "other" information where the consumer is given notice and opportunity to opt out.[22]

Section § 1681t(b)(2), the FCRA affiliate sharing preemption provision, simply confirms and extends to state *credit reporting laws* this exclusion of "the exchange of information among persons affiliated by common ownership or common corporate control."[23] That is, the subject matter of affiliate sharing is "excluded" from the requirements of all state credit reporting laws (except Vermont's), rather than immunized from regulation by other statutes outside the credit reporting arena. Thus, the FCRA's affiliate-sharing "preemption" provision extends as far as, and no further than, the scope of the rest of the FCRA – it affects only the regulation of "consumer reports" and "consumer reporting agencies."

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[21] *See* Privacy of Consumer Financial Information, 65 Fed. Reg. 33,646, at 33,668 (May 24, 2000) (codified at 313 C.F.R. pt. 313).

[22] 15 U.S.C. § 1681a(d)(2)

[23] 15 U.S.C. § 1681t(b)(2). Indeed, the Vermont law that is explicitly exempted from preemption, 9 V.S.A. § 2480e, is just such a credit-reporting statute.

Any interpretation of the FCRA's affiliate-sharing preemption provision must place the measure within the context of the rest of the statute.[24] Section 1681t(b)(2), taken out of context, may suggest broad preemptive scope: "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." But it is improper to attempt, as the federal banking agencies do in their *amicus curiae* brief, to remove this provision from its limited, credit-reporting context and assert that "the laws of any State" refers to any law, not just laws governing credit reporting.[25] After all, the provision at issue forbids state laws regulating the "exchange of information" among affiliates. If context plays no role, then the FCRA could be held to prohibit a state law limiting or regulating the exchange of *any* kind of confidential information under *any* circumstances, not just the type of information and activity regulated by the FCRA. Under such a strained reading, state statutes prohibiting conspiracy, dissemination of stolen trade secrets, defamation, and a host of other

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[24] *See FDA v. Brown & Williamson Tobacco Co.,* 529 U.S. 120, 133 (March 2000). (It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 at 1249 (C.A. 9, 2000).

[25] *See* Amicus Curiae Brief of the Office of Thrift Supervision, Office of the Comptroller of the Currency, *et al*.

types of "information" that could be "exchanged" would be preempted as applied to personal information.[26]

In 2003, Congress amended the FCRA by adopting the FACTA. Although FACTA significantly amended the FCRA by adding additional protections for consumers, including in the important area of identity theft, and also created additional areas of explicit preemption, it is significant that Congress did not alter the preemption provision that applies to affiliate sharing of credit information contained in 15 U.S.C. § 1681t(b)(2).

B. Congress Has Never Established A "Uniform National Regulatory Scheme" For Credit Reporting.

The *amicus curiae* brief filed by the Office of the Comptroller of the Currency and other federal regulatory agencies argues that Congress established a national uniform system for regulating credit reporting and affiliate sharing.[27] In reality, however, Congress continues to recognize the essential role played by the numerous and varied state laws in the Nation's dual regulatory scheme for financial privacy and credit reporting. Section 507 of GLB allows States to adopt

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[26] *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (cautioning courts to avoid "uncritical literalism"); *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (June 1998). ("Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute").

[27] *See* Amicus Curiae Brief of Office of Thrift Supervision, Office of the Comptroller of the Currency, *et al.*, at 2, 6, 12-14, 23.

financial privacy laws relating to sharing information that are more protective than GLB's requirements.[28] With respect to the FCRA, the basic rule that Congress established is one of ***non-preemption***, allowing States to enact laws so long as they are not inconsistent with any provision of the federal FCRA.[29]

The numerous and varied state laws that have long existed under Congress's system of federal and state regulation in the credit reporting arena belie the federal agencies' argument that our Nation is governed by a "uniform national regulatory scheme".

The Vermont Fair Credit Reporting Act is but one example of such laws.[30] This state law contains several important consumer protection provisions designed to address credit reporting problems that arose in Vermont the year before, including requirements for: free credit reports[31]; liquidated damages[32]; express consumer consent before a user can access a credit report[33], including from an

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[28] 15 U.S.C. § 6807.

[29] 15 U.S.C. § 1681t(a).

[30] 9 V.S.A. § 2480a *et seq.*; Act No. 246, 1991 (Adj. Sess.).

[31] 9 V.S.A. § 2480c(a)(1).

[32] 9 V.S.A. § 2480f(b).

[33] 9 V.S.A. § 2480e(a)(2).

affiliated corporate entity[34]; reasonable procedures by credit reporting agencies to assure maximum possible compliance with the consent provision[35]; credit reports accessibility by telephone[36]; and notification to consumers of their additional rights under state law.[37]

Legislatures in many states have determined that provisions in addition to those in the federal FCRA are necessary to ensure that credit reports are accurate and are used in an appropriate fashion.[38] The State Attorneys General have actively enforced these state law consumer protection provisions with respect to

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[34] 15 U.S.C. § 1681t(b)(2).

[35] 9 V.S.A. § 2480e(b).

[36] 9 V.S.A. § 2480b(b).

[37] 9 V.S.A. § 2480b(c).

[38] For descriptions of the breadth of state credit reporting laws, *see generally* National Consumer Law Center, Fair Credit Reporting, App. B.3 (State by State Summaries of Laws on Credit Reports and Identity Theft); Smith, Robert Ellis, *Compilation of State and Federal Privacy Laws*, Privacy Journal 2002; Hearing on Fair Credit Reporting Act: How It Functions for Consumers and the Economy, Before the Subcommittee on Financial Institutions and Consumer Credit, House Committee on Financial Services, 108th Cong., June 4, 2003, (Statement of Vermont Assistant Attorney General Julie Brill), available at http://financialservices.house.gov/media/pdf/060403jb.pdf .

both credit reporting agencies[39] and credit grantors[40] over the past ten years.

1. Enactment Of FACTA Did Not Alter Congress's Dual Regulatory Scheme.

Both the original FCRA and the 1996 Amendments specifically recognized the importance of the wide variety of state laws governing credit reporting,[41] and did not subject the majority of those laws to preemption.[42] Rather, in 1996

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[39] *See*, *e.g.*, State of Alabama et al. v. Trans Union Corporation, Civ. Action No. 92C 7101, (N.D. Ill. 1992) (multi-state action for multiple violations of the states' credit reporting laws); TRW v. Morales, et al., Civ. No. 3-91-1340-H (N.D. Tex. 1992) (same); In the Matter of Credit Bureau Services of Vermont, Inc., Docket No. 493-9-95 WnCV (Wash. Cty. Sept. 18, 1995) (violation of telephone number disclosure requirements); In the Matter of Equifax Credit Information Services, Inc., Docket No. 492-9-95 WnCV (Wash. Cty. Sept. 18, 1995) (same); In the Matter of TRW Inc., Docket No. 491-9-95 WnCV (Wash. Cty. Sept. 18, 1995) (same); In the Matter of Equifax Credit Information Services, Inc., Docket No. 51-1-00 WnCV (Wash. Cty. Jan. 27, 2000) (failure to institute reasonable procedures to ensure maximum possible compliance with Vermont's law requiring users to obtain consumer consent prior to using credit reports).

[40] Coburn and Feeley Property Management, (Wash. Cty. July 17, 1995) (property management firm obtained credit reports on tenants without tenants' consent); In the Matter of MCI Communications Corporation, Docket No. 171-4-98 WnCV (Wash. Cty. April 2, 1998) (telecommunications company failed to obtain consumer consent from over 12,000 Vermont consumers prior to using their credit report); In the Matter of Alliant Foodservice Inc., Docket No. 116-3-00 WnCV (March 1, 2000) (food service company failed to obtain consumer consent prior to using consumer credit report, and failed to have a permissible purpose under federal law); In the Matter of May Department Stores Company, Docket No. 605-11-01 WnCV (Wash. Cty. Nov. 15, 2001) (department store chains failed to adequately obtain consumer consent prior to using consumer credit report).

[41] *See supra*, note 38 and accompanying text.

[42] 15 U.S.C. §1681t(a).

Congress determined that only seven limited areas required some form of preemption, including the regulation of affiliation sharing as a credit reporting activity.[43] Even then, Congress decided that certain state laws affecting the seven limited areas that were in existence at the time of the 1996 amendments should be exempt from preemption.[44] In addition, Congress specifically did not preempt any settlements between the credit reporting agencies and any State Attorney General that were in existence prior to the effective date of the 1996 Amendments.[45]

In general, FACTA made significant changes and additions to the FCRA, but FACTA did not alter Congress's plan to have credit reporting and information sharing governed by a dual regulatory scheme, with the States continuing to play a significant role in regulation of credit reporting and sharing of nonpublic, personal information. FACTA provided additional consumer protections in the area of credit reporting, including free annual reports, improved standards for accuracy of information furnished to credit reporting agencies, strengthened adverse action

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[43] 15 U.S.C. §1681t(b) and (c).

[44] 15 U.S.C. §§1681t(b)(1)(B) (time periods for taking action required when a consumer disputes accuracy of a report); 1681t(b)(1)(E) (information contained in a credit report); 1681t(b)(1)(F) (Massachusetts and California laws relating to responsibilities of furnishers of information to credit reporting agencies); 1681t(b)(2) (Vermont law relating to affiliate sharing of information).

[45] 15 U.S.C. §1681t(d)(1). This includes the multi-state settlements with TRW, Equifax and Trans Union.

notices, and access to credit scores, sometimes for a reasonable fee. FACTA also added certain rights for identity theft victims and measures intended to prevent identity theft, including allowing consumers to place "fraud alerts" on their credit reports. However, States retain significant authority under the FCRA, as amended by FACTA, to continue to protect their residents with respect to credit reporting and sharing of corporate information.

After FACTA, States continue to be free to enact laws in areas that are untouched by the federal FCRA. States also retain the right to supplement most of the federal provisions contained in FACTA. For instance, "identity theft prevention and mitigation" has been added to the basic inconsistency rule contained in 15 U.S.C. §1681t(a). FACTA added to the scope of FCRA's preemptive reach by:

- Permanently extending the 1996 preemptions that were scheduled to sunset on December 31, 2003;
- Adding one identity theft provision and two non-ID theft provisions to the list of "subject matter regulated under" preemptive sections contained in 15 U.S.C. §1681t(b)(1);
- Adding two new preemptive sections contained in FACTA Sections 625(b)(3) and (4), related to free credit reports and disclosure of credit

scores, yet – significantly – exempting preexisting state laws with respect to these disclosures; and

- Creating a narrow preemption in FACTA Section 625(b)(5) with respect to certain new federal protections relating to identity theft.[46]

Outside of these areas, States continue to be free to adopt laws governing credit reporting, sharing of nonpublic, personal information, and identity theft. Thus, Congress's latest pronouncement on information sharing contained in FACTA continues to demonstrate that Congress intends that States play a significant role in the regulation of information sharing in this Nation.

IV. MORE PROTECTIVE STATE PRIVACY LAWS DO NOT ADVERSELY AFFECT THE ECONOMY

The *amicus curiae* brief filed by the Office of the Comptroller of the Currency and other federal regulatory agencies also argues that a national uniform system for regulating credit reporting ensures reduced costs of credit and other economic benefits for consumers.[47] In fact, nothing could be further from the truth.

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[46] See, generally, Hillebrand, Gail, "*After the Fact Act: What States Can Still Do To Prevent Identity Theft*" (Consumers Union 2004), available at http://www.consumersunion.org/pub/core_financial_services/000756.html

[47] *See* Amicus Curiae Brief of Office of Thrift Supervision, Office of the Comptroller of the Currency, *et al*. at 13-14.

As noted above, several States have aggressively protected consumers' privacy by enacting and enforcing numerous laws governing the sharing of financial information. Despite extensive regulation in this area by these States, the economies of these States have not been adversely affected. Indeed, consumers in these States enjoy some of the most favorable conditions for loans and other forms of credit in the country. Moreover, credit is readily and speedily available in States that have enacted more protective laws.

A. Like California, Vermont Extensively Regulates Privacy, Including Affiliate Sharing Of Personal Information.

Vermont is the only State that had a credit reporting law directly regulating affiliate sharing in 1996, and therefore has the only state credit reporting law on affiliate sharing that was exempted from preemption in the 1996 Amendments.[48] Vermont's Fair Credit Reporting Act "consent provision" requires that no "person" may obtain a credit report about a consumer unless the report is obtained pursuant to a court order or consumer consent.[49] This consumer consent requirement applies with equal force to credit reports shared among affiliates.

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[48] 15 U.S.C. §1681t(b)(2).

[49] 9 V.S.A. § 2480e(a)(1) and (2). "Person" is defined in Vermont law as including "any natural person, corporation, municipality, the state of Vermont or any department, agency or subdivision of the state, and any partnership, unincorporated association or other legal entity." 1 V.S.A. § 128.

In addition to its more protective fair credit reporting laws described above,[50] Vermont has also enacted more protective laws governing the sharing of nonpublic personal financial information, as allowed under Section 507 of GLB. In 1994, Vermont enacted a bank privacy opt-in law, prohibiting banks and other similar financial institutions from sharing nonpublic information unless the consumer consents.[51] In 2001, Vermont enacted regulations extending the opt-in requirements to the insurance and securities industry, and clarifying the regulations for the banking industry.[52] The Vermont insurance opt-in regulations were recently upheld in the face of a constitutional challenge by the industry.[53]

B. The Economies Of States With Financial Privacy Regulations Have Not Been Adversely Impacted.

In his testimony filed with the House Subcommittee on Financial Institutions and Consumer Credit in May 2003, Fordham University Law Professor Joel

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[50] *See supra,* notes 30-37 and accompanying text.

[51] 8 V.S.A. § 10201 *et seq*.

[52] The banking opt-in regulation can be found at: www.state.vt.us/atg/Insurance%20ADOPTED% 20rule.pdf. The insurance opt-in regulation can be found at www.state.vt.us/atg/Insurance%20ADOPTED%20rule.pdf . Vermont's opt-in regulations became completely effective on February 17, 2002.

[53] *American Council of Life Insurers, et al v. Vermont Department of Banking, Insurance, Securities, and Health Care Administration, et al*. Docket 56-1-02 Wncv (Washington Cty Feb. 12, 2004), available at http://www.atg.state.vt.us/admin/redirect.php?ID=758.

Reidenberg demonstrated that lenders make better credit decisions in Vermont, California, and Massachusetts, three of the States with more protective laws that were specifically "grandfathered" under the 1996 FCRA Amendments.[54] Vermont has the lowest level of consumer bankruptcies in the nation, Massachusetts is the next lowest with a rank of 49th, and California is below the national median with a rank of 27th.[55] Professor Reidenberg also notes that consumer interest rates are below the national median in all three of these States.[56]

In addition to the data cited by Professor Reidenberg, there are other data that demonstrate that the economies of Vermont, Massachusetts and California have not been harmed by enactment of more protective laws. Auto loan rates are similarly low in these three States: Vermont ranks 50th in the country, meaning

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[54] Hearing on the Importance of the National Credit Reporting System to Consumers and the U.S. Economy Before the Subcommittee on Financial Institutions and Consumer Credit, House Committee on Financial Services, 108th Cong., May 8, 2003, Statement of Prof. Joel Reidenberg, p. 3.

[55] *Id.*, citing American Bankruptcy Institute, U.S. Bankruptcy Filing Statistics: Households per filing, Rank (2003), available at www.abiworld.org/stats/housholdrank.pdf.

[56] Statement of Prof. Joel Reidenberg, *supra* note 54, at 3.

that its auto loan rates are next to the lowest; California ranks 31st in the country; and Massachusetts ranks 24th, just about at the national median.[57]

Moreover, credit is widely available in these States, and available without delay. Loan advertisements placed in Vermont's three major daily newspapers over the ten-day period of May 19 through May 29, 2003, demonstrate that "zero percent" financing and instant credit for mortgages, car loans, and personal loans are widely available in Vermont.[58] It is important not to overstate the relevance of this data. It cannot be said, for example, that the more protective laws in Vermont, California, and Massachusetts *cause* these more favorable economic conditions. As Professor Reidenberg notes, there may be other factors at play, such as state unemployment data for bankruptcy filings and non-interest transaction costs for mortgages.[59] However, these data demonstrate that the economies of these States have not been adversely affected by their more protective credit reporting laws. The absence of an apparent adverse impact upon Vermont's economy is

[57] 48-month new car loan rates as of May 2003, available at http://bankrate.com/brm/graphs/graph_trend.asp?product=1&prodtype=M&ad=mtg&nav=mtg30year_graph.

[58] See Statement of Vermont Assistant Attorney General Julie Brill, supra note 38, at Ex. 3, pp. 46-68 (samples of Vermont advertisements), available at http://financialservices.house.gov/media/pdf/060403jb.pdf .

[59] Statement of Prof. Joel Reidenberg, *supra* note 54, at 4.

particularly interesting because of the breadth of state laws governing credit reporting and financial privacy.

The federal agencies' economic arguments, contained in their *amicus curiae* brief, are belied by the facts: the States' more protective laws have not adversely affected their economy.

V. STATES NEED THE ABILITY TO ENACT MORE PROTECTIVE LEGISLATION LIKE SB 1 IN LIGHT OF MYRIAD PROBLEMS WITH THE FEDERAL SCHEME FOR REGULATING AFFILIATE SHARING.

The right of the States to enact privacy protections beyond those provided by federal law — a right expressly preserved by Congress — is especially necessary because the current federal scheme for regulating sharing of nonpublic financial information among affiliates does not adequately protect consumers. Consumers do not understand the broad array of institutions that are currently allowed to share information within a corporate group under federal law. Many financial institutions currently consist of thousands of corporate affiliates, involved in vastly disparate activities. Consumers have no knowledge of, and no choices with respect to, many types of information sharing among these vast corporate groups. Moreover, the torrent of information flowing among thousands of corporate affiliates has the potential to lead to consumer fraud and identity theft. Finally, to the extent that federal law requires notices to consumers about this information sharing, these notices are woefully inadequate.

A. Current Federal Law Does Not Provide Adequate Financial Privacy Protection.

Congress declined to provide an opt-out choice to consumers with respect to affiliate sharing in GLB, but did provide consumers with the ability to exercise a choice with respect to affiliate sharing through a consumer's selection of the financial institutions with which she chooses to do business. The purpose of the disclosure requirement was to allow consumers to make fully informed choices regarding the disclosure of their personal information, to affiliates as well as third parties.

Congress recognized during the GLB debate that an increasing amount of personal information was being collected and stored by financial institutions, and that "[c]onsumers have a reasonable expectation of confidentiality" with respect to that information. H.R. Rep. No. 106-74, pt. 3, at 117 [App. Exh. 13]. *See also id.* at 106-107 (1999) (the privacy of "personal financial information has become an increasingly significant concern of consumers"); and 145 Cong. Rec. H5313 (daily ed. July 1, 1999) (Rep. Gillmor) [App. Exh. 3] ("Consumers feel they have lost control . . .").

The GLB depends on a structure of notice and choice to give consumers some control, with the intent that consumers can take their business elsewhere if they are dissatisfied with their financial institutions' information practices as described in the mandatory annual notices. H.R. Rep. 106-74, pt. 3, at 118 (1999)

[App. Exh. 13] ("These requirements are designed to provide consumers with greater privacy protection through competition – as a result of the ability consumers will have to choose among the privacy policies disclosed by competing financial institutions . . ."); 145 Cong. Rec. H5310, at H5311 (daily ed. July 1, 1999) (Rep. Oxley) [App. Exh. 2] ("If they do not like that privacy policy or they think that they are having their information passed on, they can simply change companies and vote with their feet."). *See also*, 145 Cong. Rec. H5315 (statement of Rep. Oxley) [App. Exh. 4]. Consumers were thus intended to be able to make their own informed choices, based on the mandated privacy notices.

Those privacy notices have proven an inadequate basis for making the informed choices anticipated by Congress. Opt-out notices mailed by many financial institutions have been unintelligible and couched in language several grade levels above the reading capacity of the majority of Americans.[60] Mark Hochhauser, Ph.D., a readability expert, reviewed 60 GLB opt-out notices and determined that these notices were written at an average 3rd or 4th year college reading level, rather than the junior high level comprehensible to the general

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[60] *See* O'Harrow, Jr., Robert, *Getting a Handle on Privacy's Fine Print: Financial Firms' Policy Notices Aren't Always 'Clear and Conspicuous,' as Law Requires*, The Washington Post, June 17, 2001, at H-01.

public.[61] Surveys demonstrate that consumers either never see or read such complicated opt-out notices, or they don't understand them.[62]

The opt-out approach promulgated under GLB has proven so problematic that the federal agencies that administer the regulations under GLB convened an Interagency Public Workshop to address the concerns that have been raised "about clarity and effectiveness of some of the privacy notices" sent out under GLB.[63] The agencies noted that consumers have complained that "the notices are confusing and/or misleading and that the opt-out disclosures are hard to find."[64]

Most recently, the Treasury Department has completed the study of affiliate sharing mandated by section 508 of GLB (15 U.S.C. § 6808). That study concludes:

> The goals of GLBA for informing customers have not been adequately met. . . . although disclosures of policies on the use of nonpublic personal information are being provided, the format, length, and language are

[61] Hochhauser, Ph.D., Mark, "*Lost in the Fine Print: Readability of Financial Privacy Notices*," http://www.privacyrights.org/ar/GLB-Reading.htm (2001).

[62] *See* Comments of 44 Attorneys General to Federal Trade Commission Regarding GLB Notices, dated February 15, 2002, available at www.naag.org.

[63] Interagency Public Workshop, "*Get Noticed: Effective Financial Privacy Notices*," http://www.ftc.gov/bcp/workshops/glb/; see also Press Release, "*Workshop Planned to Discuss Strategies for Providing Effective Financial Privacy Notices*," www.ftc.gov/opa/2001/09/glbwkshop.htm (Sept. 24, 2001).

[64]*See* Joint Notice Announcing Public Workshop and Requesting Public Comment, "Public Workshop on Financial Privacy Notices," at 3.

> unfriendly. *Too many customers are unaware of their options* under current law with regard to the use of personal financial information, *and too many who are aware are daunted by the procedures for exercising them*."[65]

Where the vast majority of consumers do not even read opt-out notices, and those who read the notices cannot understand them, it cannot be said that they are able to understand their rights and exercise their choices intelligently. The Amicus States therefore believe it is critical that the States retain the right, preserved in Section 507 of GLB, to create additional privacy protections like those contained in SB 1, so that States can address the problems that arise under federal law.

B. Consumers Need Effective Choice With Respect To Corporate Affiliate Information Sharing Practices In Light Of The Huge And Amorphous Nature Of Corporate Affiliate Groups, And The Threat These Affiliate Groups Pose With Respect To Identity Theft.

The breadth and number of affiliates of some financial institutions is breathtaking, yet most consumers remain unaware of the existence or identity of their financial institutions' affiliates, and of the information flow among the vast corporate network. Consumers should be better protected from the potential harms associated with affiliate sharing by having an effective choice before credit-related information can be shared throughout a vast corporate complex.

Under the federal FCRA, consumers have no choice as to whether their transaction and experience information will be shared with their financial

[65] "Security of Personal Financial Information: Report on the Study Conducted Pursuant to Section 508 of the Gramm-Leach-Bliley Act of 1999 (June 2004) at 54 (emphasis added).

institution's corporate affiliates. Moreover, neither GLB nor the FCRA require corporate affiliate groups to give consumers any notice with respect to sharing information with marketing partners pursuant to a joint marketing agreement.[66] And once consumers are given a notice and opportunity to opt out, *all* information can also be shared with the corporate affiliate group. Thus information about the consumer's income, employment history, credit score, marital status, and medical history can be shared with ease among corporate affiliates under current federal law.

GLB greatly expanded the activities that were permissible under one corporate umbrella, as it allows insurance, securities, and banking institutions to affiliate with each other. Even prior to enactment of GLB, financial institutions were allowed to affiliate with a broad spectrum of companies. The list of activities that are identified by the Federal Reserve Board in its rulemaking as "financial" in nature or closely related to financial activities, and therefore permissible for inclusion within a financial holding company, goes well beyond traditional financial activities.[67]

Thus the types of businesses with which traditional financial institutions may now affiliate themselves, in addition to banking, insurance and securities

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[66] 15 U.S.C. § 6802(b)(2).

[67] *See* 12 U.S.C. § 4(k); 12 C.F.R. § 225.28; 12 C.F.R. § 211.5(d).

brokerage, include: mortgage lenders; "pay day" lenders; finance companies; mortgage brokers; account servicers; check cashiers; wire transferors; travel agencies operated in connection with financial services; collection agencies; credit counselors and other financial advisors; tax preparation firms; non-federally insured credit unions; investment advisors that are not required to register with the Securities and Exchange Commission; and certain retailers and automobile dealers.[68]

The number and breadth of affiliates currently associated with some of the country's major financial institutions is astounding. The corporate affiliate lists for Bank of America Corporation, CitiGroup, Inc., and KeyCorp,[69] serve as three examples of the level of affiliation at large- and mid-sized banking institutions in this country. Bank of America currently lists 1,896 corporate affiliates; CitiGroup lists 1,623 corporate affiliates; and KeyCorp lists 906. A perusal of these corporate affiliate lists demonstrates that these holding companies appear to be involved in the full breadth of disparate activities authorized under federal law. Some of these affiliate operations may, in the normal course of their business, gather highly

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[68] 16 C.F.R. §§ 313.1(b) and 313.1(k)(2).

[69] These lists, as well as other corporate affiliate lists for bank holding companies can be obtained at http://132.200.33.161/nicSearch/servlet/NICServlet?GRP=INSTHIST&REQ=MERGEDIN&MODE=SEARCH

personal information about consumers. A consumer holding a credit card with the lead bank or a property and casualty insurance policy with a major insurer in any of these affiliate groups would not expect that his or her transaction and experience information would be spread throughout the corporate affiliate structure for the purpose not of servicing the consumer better, but of marketing products to the consumer.

Moreover, unrestricted sharing of information by and within corporate affiliate groups likely facilitates one of the nation's fastest growing white-collar crimes: identity theft.[70] Many identity theft cases are "insider jobs," committed by employees who obtain access to and misuse individuals' personal information stored in their employers' databanks. According to recent comments submitted to the Federal Trade Commission,[71] researchers at Michigan State University studied over 1,000 identity theft cases and found that victims in 50% of the cases specifically reported that the theft was committed by an employee of a company

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[70] For information on the growing problem of identity theft, *see* U.S. General Accounting Office, *Identity Theft: Prevalence and Cost Appear to be Growing* (GAO-02-363 March 2002); U.S. Federal Trade Commission, *National and State Trends in Fraud and Identity Theft January – December 2002* (Jan. 22, 2003); U.S. General Accounting Office*, Identity Theft: Greater Awareness and Use of Existing Data Are Needed* (GAO-02-766 June 2002 (surveying state laws enacted to combat identity theft).

[71] *See* Comments of the Electronic Privacy Information Center to the Federal Trade Commission Workshop on Information Flows, FTC File No. P034102 (June 18, 2003), at 23.

compiling personal information on individuals.[72] Other reports note that many identity fraud cases stem from the perpetrator's purchase of consumers' personal information from commercial data brokers. Financial institutions' information-sharing practices contribute to the risk of identity theft by greatly expanding the opportunity for thieves to obtain access to sensitive personal information.

By offering California consumers greater control over their nonpublic personal information, SB 1 allows California consumers to better guard against harm from such scams.

VI. CONCLUSION

For the foregoing reasons – to give effect to the ordinary meaning of 15 U.S.C. § 1681t(b)(2) in its appropriate context, to recognize the dual regulatory structure that Congress has carefully crafted for information sharing by corporate entities, and to provide the States with their usual and customary police powers to protect their citizens with no concomitant negative impact on the economy – this Court must affirm the decision of the District Court and find that federal law does not preempt SB1 insofar as SB 1 purports to impose restrictions on information sharing among affiliates.

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[72] *Id.*, citing forthcoming study; results provided in email from Judith M. Collins, Ph.D., Associate Professor, Leadership and Management Program in Security School of Criminal Justice, Michigan State University to EPIC (Apr. 22, 2003, 18:13:35 EST) (on file with EPIC).

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Amici Curiae Brief filed herewith is proportionally spaced, has a typeface of 14 points, and contains 4,972 words.

Executed on September 10, 2004 in Montpelier, Vermont.

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