No. 08-730

In The
Supreme Court of the United States

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

Petitioners,

v.

EDMUND G. BROWN JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; STEVE POIZNER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF INSURANCE; PRESTON DuFAUCHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF CORPORATIONS; and WILLIAM S. HARAF, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF FINANCIAL INSTITUTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS EDMUND G. BROWN JR. AND STEVE POIZNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress passed the Fair Credit Reporting Act to compel consumer reporting agencies that use and disclose consumer reports to do so in a way that would ensure the confidentiality, accuracy, relevancy, and proper utilization of the information contained in these reports. As part of this regulatory scheme, Congress amended the FCRA in 1996, adding a preemption provision prohibiting states from imposing any "requirement or prohibition" with respect to the "exchange of information among persons affiliated by common ownership or common corporate control."

Did the Ninth Circuit Court of Appeals correctly construe the word "information" in the FCRA's affiliate-sharing preemption provision to mean information described in the FCRA's definition of a "consumer report," as opposed to *any* information shared by a person with an affiliate, even information unrelated to consumer reporting?

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STATEMENT OF THE CASE

1. The Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, regulates the activities of consumer reporting agencies in issuing and using information found in a consumer report. A "consumer report" is defined as

> any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or part for the purpose of serving as a factor in establishing the consumer's eligibility . . .

for credit, insurance, employment or other limited purposes authorized by the FCRA. 15 U.S.C. § 1681a(d)(1). In order to be a "consumer report," the information must thus meet both a "scope" prong (the seven characteristics listed in the definition of a "consumer report") and a "purpose" prong.

In 1996, Congress amended the FCRA to exclude from the definition of "consumer report" any communication "among persons related by common ownership or affiliated by corporate control" of information consisting solely of transactions or experiences ("experience" information) between the consumer and the entity making the report. 15 U.S.C. § 1681a(d)(2)(A)(i)-(ii). The amendments also excluded from the definition of "consumer report" non-experience information shared among affiliates, if consumers are first given notice and the opportunity to opt out of such sharing. 15 U.S.C. § 1681a(d)(2)(A)(iii). Additionally, Congress

added a preemption provision that no requirement or prohibition could be imposed under state law with respect to the subject matter regulated under select provisions of the FCRA, or "with respect to the exchange of information among persons affiliated by common ownership or common corporate control," with the exception of a Vermont credit reporting statute. 15 U.S.C. § 1681t(b)(2).

In 2003, Congress amended the FCRA again through the Fair and Accurate Transactions Act (FACTA). FACTA eliminated the sunset clause that previously existed for the 1996 preemption provision. It also added a section 624 to the FCRA (15 U.S.C. § 1681s-3) to provide that information received from an affiliate that would otherwise be a consumer report, but for the exclusions in 15 U.S.C. § 1681a(d)(2)(A)(i)-(iii), may not be used "to make a solicitation for marketing purposes . . ." unless the consumer is given notice and an opportunity to prohibit such solicitations. 15 U.S.C. § 1681s-3(a)(1).

2. Independent of the FCRA and FACTA, Congress enacted the Gramm-Leach-Bliley Act of 1999 (GLBA), 15 U.S.C. §§ 6801-6809. The GLBA eliminated the barriers to mergers and affiliations among banks, insurance companies, securities firms, and other financial services providers. While Congress enabled companies in the banking, insurance and securities industries to combine, it also recognized consumers' increased vulnerability to the widespread dissemination of their financial information among such companies. H. R. Rep. No. 106-74, pt. 3, at 106-107 (1999) ("As a result of . . . the expansion of

financial institutions through affiliates and other means . . . the privacy of data about personal financial information has become an increasingly significant concern of consumers.").

In Title V of the GLBA, Congress recognized

> the importance of providing consumers with the ability to prevent, if they choose, their personal financial information from being bartered to affiliated parties of a financial institution or unaffiliated third parties or otherwise used in ways that are unrelated to the purpose for which the consumer has provided that information.

Id. at 107; 15 U.S.C. § 6801(a). Title V sets the basic level of financial privacy protection provided by federal law. Among other things, it requires that financial institutions (1) provide an annual notice describing their information-sharing practices with both affiliates and nonaffiliated third parties; and (2) allow consumers to opt out of disclosures to most nonaffiliated third parties. 15 U.S.C. §§ 6802(b), 6803(a). Congress also provided that Title V of the GLBA shall not "modify, limit, or supersede the operation of the [FCRA]." *Id.* at § 6806, App. 78a.

Recognizing the states' interests in protecting their citizens' privacy, however, Congress expressly provided that states could enact more protective financial privacy statutes. 15 U.S.C. § 6807.

3. In response to this invitation, in 2003 the California Legislature enacted the California Financial Information Privacy Act, commonly referred to as

"SB1," to provide "greater privacy protections" than those in the GLBA. Cal. Fin. Code § 4051(b). The Legislature determined that the GLBA provisions were "inadequate to meet the privacy concerns of California residents." Cal. Fin. Code § 4051.5(a)(3). SB1's purpose was to give consumers control over the manner in which financial institutions share and disclose consumers' personal information. In order to prevent "unwarranted intrusions into [Californians'] private and personal lives," the Legislature provided consumers "with the ability to prevent the sharing of financial information among affiliated companies." Cal. Fin. Code § 4051.5(a)(1), (b)(3).

The California Legislature recognized the importance of making compliance as easy as possible for businesses. Cal. Fin. Code § 4051.5(b)(5). SB1 is therefore similar to the GLBA in fundamental respects. SB1's definitions are virtually identical to those in Title V of the GLBA. *Compare* Cal. Fin. Code § 4052, *with* 15 U.S.C. § 6809. In addition, the exceptions in the GLBA are repeated in SB1, thus excluding disclosures for purposes such as effecting and enforcing transactions, detecting and preventing fraud, and responding to process or to law enforcement from the restrictions of SB1. *Compare* Cal. Fin. Code § 4056 *with* 15 U.S.C. § 6802(e).

SB1 requires that financial institutions obtain a consumer's express consent before disclosing his or her information to any nonaffiliated third party, and provide consumers with an opportunity to opt out of disclosures to affiliates, except those that are in the same line of business and that meet other specified

requirements. Cal. Fin. Code §§ 4052.5, 4053(a)-(c). A number of disclosures are entirely exempt from these requirements, including all disclosures that constitute "consumer reports" within the meaning of the FCRA. Cal. Fin. Code § 4056.

4. In 2004, Petitioners challenged the constitutionality of SB1's affiliate-sharing provision. The district court ruled that the FCRA did not preempt the state law.

5. The Court of Appeals for the Ninth Circuit reversed. The court determined that the FCRA's preemption provision applies to "the sort of information described in the definition of 'consumer report' in § 1681a(d)(1)." *ABA v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005), App. 10a. Accordingly, SB1's affiliate-sharing provision is preempted to the extent it regulates information that meets the "purpose" and "scope" criteria in the FCRA's definition of a "consumer report." The Ninth Circuit thus defined the term "information" in the FCRA's affiliate-sharing preemption provision to mean information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" credit, insurance, employment, or other limited defined purposes. *Id.*, App. 11a.

The Ninth Circuit remanded the case to the trial court to determine if any information regulated by SB1 survived preemption and, if so, whether the statute could be severed so as to preserve its constitutionality.

6. On remand, the trial court found that the statute could not be severed and held that the entirety of SB1's affiliate-sharing provision was preempted.

7. The California Attorney General and the Commissioner of the California Department of Insurance (State Respondents) appealed to the Ninth Circuit.[1] In 2008, the Ninth Circuit reversed the district court, holding that California law permitted the reformation of a state statute in order to preserve its constitutionality.

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[1] Petitioners initially sued the California Attorney General, the Commissioner of the California Department of Financial Institutions, the Commissioner of the California Department of Corporations, and the Commissioner of the California Department of Insurance. Only the California Attorney General and Commissioner of the California Department of Insurance appealed the Ninth Circuit's second decision, and they are the only Respondents opposing Petitioners' petition for certiorari. The Commissioners of the California Departments of Corporations and Financial Institutions waived their response to the petition. For ease of reference, the California Attorney General and California Insurance Commissioner are referred to as "State Respondents."

8. The district court entered judgment consistent with this ruling, holding that SB1 was preempted to the extent it attempted to regulate the sharing of "information" of the sort described in the FCRA's definition of "consumer report." As reformed, SB1's affiliate-sharing provision thus requires financial institutions, before sharing nonpublic personal information of consumers with their affiliates, to give consumers notice and the opportunity to opt out of such sharing, unless the information meets the FCRA's definition of "consumer report" in § 1681a(d)(1).

ARGUMENT

Congress enacted the FCRA to protect consumers from unfair or inaccurate consumer reporting. Recognizing this, the Ninth Circuit reasonably construed the word "information" in the FCRA's preemption clause to mean the "information" set forth in the FCRA's definition of "consumer report." The Ninth Circuit reached this conclusion by applying settled principles of statutory construction and preemption, which require considering the plain meaning of the statute's language in the context of the scope and purpose of the statute as a whole. The legislative history of the FCRA's 1996 amendments confirms that Congress sought to preclude states from enacting consumer reporting laws that would regulate information shared among affiliated financial institutions as a consumer report, rather than precluding all

consumer protection laws regarding informational sharing among affiliates.

Petitioners' interpretation of the preemption clause is overbroad. Petitioners contend that the FCRA creates a national standard for information sharing between affiliates that has nothing to do with the subject matter of the FCRA, i.e., consumer reports. Under Petitioners' reading of the statute, states could not regulate any information sharing, of any kind, between any entities and their affiliates. Such a reading would allow entities to skirt a myriad of privacy and other consumer protection laws that are wholly unrelated to the FCRA's purpose.

Moreover, complying with the notice and opt-out provisions that survived preemption is neither impossible nor onerous because financial institutions already must scrutinize information they receive to determine if it meets the criteria set forth in the FCRA's definition of "consumer report" so as to warrant FCRA compliance, even for certain information shared with affiliates.

Finally, the specter raised by Petitioners of a patchwork of state regulations infringing upon the FCRA is illusory. Rather than review the first and only decision that applies the preemption provision to a state law – a decision that held much of the challenged provision preempted – the Court should wait to see if other cases develop in which the preemptive scope of the FCRA is at issue. If the preemption provision is as broad as Petitioners claim, the issue

could arise in a variety of contexts that would give the courts an opportunity to consider its scope more fully.

I. THE NINTH CIRCUIT REASONABLY CONCLUDED THAT THE FCRA'S AFFILIATE-SHARING PREEMPTION CLAUSE DID NOT APPLY TO ALL "INFORMATION" SHARED AMONG AFFILIATED FINANCIAL INSTITUTIONS.

A. The Ninth Circuit Did Not Err in Defining "Information" in the FCRA's Affiliate-Sharing Preemption Provision to Mean "Information" As That Term Is Used in the FCRA's Definition of a "Consumer Report."

The FCRA's affiliate-sharing preemption provision preempts any state law "with respect to the exchange of information among persons affiliated by common ownership or corporate control," with the exception of a Vermont credit reporting statute. 15 U.S.C. § 1681t(b)(2). Petitioners contend that the word "information" in § 1681t(b)(2) should be construed to mean all information, without limitation.

The court below reasonably construed the preemption provision in the context of the statute in which it is contained. The word "information" is used in various places in the FCRA, including in the definition of "consumer report" (§ 1681a(d)(1)), as well as in the exclusions to this definition (§ 1681a(d)(2)(A)(i)-(iii)),

and in the FACTA additions to the FCRA with respect to the use for marketing purposes of "information" that would otherwise be a consumer report but for the exclusions (§ 1681s-3). Using the word "information" in the definition of a "consumer report" as a starting point, the court determined that this meaning also applied to the word "information" contained in other provisions of the FCRA. The court deemed it "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 other provisions relating to information and information sharing between affiliates." *ABA v. Gould,* 412 F.3d at 1087, App. 11a.

In arriving at this conclusion, the court applied settled principles that require courts to exercise caution and to focus on Congress' purpose when interpreting a preemption provision. This Court recently reiterated the preemption principles relied upon by the Ninth Circuit:

> When addressing questions of express or implied pre-emption, we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading,

> courts ordinarily "accept the reading that disfavors pre-emption."

Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (citations omitted); *see ABA v. Gould*, 412 F.3d at 1086, App. 11a. Ultimately, "the purpose of Congress is the ultimate touchstone in every preemption case." *Altria Group v. Good,* 129 S. Ct. at 543, citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotations omitted).

The Ninth Circuit similarly followed well-settled rules of statutory construction in looking at the statute's context, rather than viewing the preemption provision in isolation. "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *ABA v. Gould,* 412 F.3d at 1086, App. 9a. Numerous Supreme Court decisions support this approach. *See, e.g.*, *Dep't of Revenue of Oregon v. ACF Industries*, 510 U.S. 332, 335-336 (1994); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25, n. 6 (1988), ("[T]he meaning of words depends on their context. . . . As Judge Learned Hand so eloquently noted: 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used. . . .' ").

At the time of its enactment, Congress stated that the FCRA's purpose was

> to require that consumer reporting agencies adopt reasonable procedures for meeting the

> needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

15 U.S.C. § 1681(b). Congress has not amended or repealed § 1681 since that time, or otherwise stated that the purpose of the FCRA has changed.

Given that the overarching purpose of the FCRA is to regulate consumer reporting agencies and consumer reports, the Ninth Circuit did not err in giving the word "information" in the preemption provision the same meaning as the word "information" in the definition of a "consumer report." The Ninth Circuit's construction of the language in the preemption provision, which comports with the overall purpose of the FCRA, does not deviate from this Court's prior decisions. *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).

Petitioners cite *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), in which this Court reversed the Ninth Circuit's decision limiting the preemption clause in the federal Clean Air Act (CAA). At issue in *Engine Manufacturers* was whether the CAA preempted state rules requiring fleet operators of vehicles to purchase or lease alternative-fueled vehicles. *Id.* at 250-251. Section 209(a) of the CAA 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." 541 U.S. at 251, citing 42 U.S.C. § 7543(a). The district court and the Ninth Circuit construed the word "standard" to prohibit state rules governing the sale, but not the purchase or lease, of such vehicles, and concluded that the CAA did not preempt the fleet rules. *Id.* at 251-252.

This Court reversed, stating that construction of "standard" as including both purchases and sales was consistent with that term's use in other provisions of the CAA, whereas the Ninth Circuit's construction made "no sense" because the right to sell federally approved vehicles would be meaningless in the absence of a purchaser's right to buy them. *Id.* at 254-256. The Court thus "declined to read into § 209(a) a purchase/sale distinction that is not to be found in the text of § 209(a) or the structure of the CAA." *Id.* at 255.

The text and structure of the CAA thus did not support a limited definition of "standards." By contrast, the text and structure of the FCRA do support construing the word "information" in the affiliate-sharing preemption provision to mean information that meets § 1681a(d)(1)'s definition of "consumer report." This is because the purpose of the FCRA is to regulate consumer reporting, and not to regulate all information shared among affiliates.

Petitioners note that limiting references such as "consumer reports" appear in other preemption clauses in § 1681t(b)(1). Pet. Brief 18. Petitioners

reason that the absence of such phrases in the affiliate-sharing provision demonstrates Congress' intent that the affiliate-sharing provision not be limited to consumer reporting. Pet. Brief 19, citing *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.").

That argument, however, is appropriate only in limited circumstances. This Court has repeatedly found application of the so-called *Russello* presumption to be inappropriate. *See, e.g.*, *City of Columbus v. Ours Garage and Wrecker Service, Inc.,* 536 U.S. 424, 432-436 (2002) (viewing a federal statute as a whole, Court declined to attribute significance to the fact that the statute's preemption clause applied to "a State [or] political subdivision of a State" while the statute's savings clause applied only to "a State"); *Field v. Mans*, 516 U.S. 59, 60, 67, 75 (1995) (limiting the *Russello* presumption in contrasting one provision of Bankruptcy Code, which required "actual reliance," with another provision that required reasonable reliance, noting that "the negative pregnant rule of construction 'is not illegitimate, but merely limited' "). Likewise, this limited rule of construction should not be applied here to expand the scope of the FCRA's preemption provision far beyond its intended reach.

There is another reason the words "consumer report" or similar phrases are absent from the FCRA's

affiliate-sharing preemption provision. The preemption clauses from § 1681t(b)(1) upon which Petitioners rely cite specific sections in the FCRA that contain substantive regulations relating to the subject matter referred to in the preemption clause. For example, § 1681t(b)(1) preempts state law with respect to any subject matter regulated under § 1681b(c) or (e), relating to the prescreening of consumer reports; § 1681m(d), relating to the duties of persons who use a consumer report in connection with a credit transaction that is not initiated by the consumer; and § 1681c, relating to information contained in consumer reports. 15 U.S.C. § 1681t(b)(1)(A), (D), and (E).

Such reference to subject matter regulation could not have been included in the affiliate-sharing preemption provision because the FCRA, as a whole, does not regulate communication of information among affiliates. Although the FCRA imposes extensive requirements and restrictions on subject matter such as prescreening, content of and access to consumer reports, and duties of users and furnishers, the 1996 amendments excluded communication of information among affiliates from the definition of "consumer report." Thus, Congress could not refer to substantive regulation of affiliate sharing in the preemption provision because the FCRA does not

regulate information sharing; it regulates consumer reporting.[2]

B. Ignoring the Context and Purpose of the FCRA's Preemption Provision Would Lead to Unintended Results.

Petitioners contend that the FCRA's affiliate-sharing preemption provision should be read in isolation, without reference to its context. The preemption provision prohibits any state law "with respect to the *exchange of information* among *persons* affiliated by common ownership or common corporate control, except that this paragraph shall not apply to [a certain Vermont credit reporting statute]." 15 U.S.C. § 1681t(b)(2) (emphasis added). Ignoring the context in which it appears, as Petitioners urge, the FCRA's affiliate-sharing provision would preempt *any* state laws prohibiting the exchange of *any* information between *any* entities and their affiliates, in *any*

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[2] The State Respondents submit the Ninth Circuit construed the preemption clause too narrowly. Congress intended for the preemption clause to apply only to state laws regulating consumer reporting, to ensure that states not enact laws requiring financial institutions to treat information shared with affiliates as a consumer report. 15 U.S.C. § 1681t(b)(2). Nevertheless, although the State Respondents believe the Ninth Circuit should have construed the preemption clause more narrowly, the error does not warrant further review because, at most, the court below misapplied settled principles of law to a single state statute.

industry. The court below reasonably rejected this absurd construction.

Under Petitioners' approach, Congress intended to declare off-limits to state regulation a number of areas of vital interest to, and traditionally regulated by, the states, independent from the financial services industry. Read literally and in isolation, the preemption clause would invalidate state laws regulating disclosures to affiliates by professional licensees, such as tax preparers, bookkeepers, real estate agents, law firms, and health care professionals, as well as medical privacy statutes, far beyond the context of "financial institutions." *See, e.g.*, Cal. Bus. & Prof. Code § 17530.5 (making it a misdemeanor to disclose any information obtained in the business of preparing federal or state income tax returns or assisting taxpayers in preparing those returns); Cal. Rev. & Tax. Code § 7056.6 (same); Cal. Civ. Code § 56.10 (prohibiting the disclosure by a health care provider of consumer's medical information except under specified conditions); Cal. Civ. Code § 1799.1 (prohibiting disclosure by bookkeeper of contents of any records prepared or maintained by bookkeepers to any person other than subject of record without consent); Cal. Civ. Code § 1799.3 (prohibiting any person providing video cassette sales or rental services from disclosing any personal information or the contents of any record to any person other than the subject of record without consent); Cal. Code Civ. Proc. § 1985.3 (specifying notice procedures and giving consumer opportunity to object before complying with

a request for consumer information held by, among others, physicians, dentists, hospitals, schools, banks, public utilities, and insurance companies); Cal. Ins. Code § 791.13 (prohibiting insurance company from disclosing any personal or privileged information about an individual collected or received in connection with an insurance transaction except under limited circumstances). The literal interpretation urged by Petitioners would have ludicrous results and would result in the preemption of myriad state consumer protection statutes that are wholly unrelated to consumer reporting, financial information or financial institutions.

Even if the provision is limited to affiliates of financial institutions, as Petitioners suggest,[3] it would overturn traditional state regulations far outside the traditional realm of banking. This is because the GLBA significantly expanded the activities that a financial institution could engage in under one corporate umbrella, well beyond traditional financial activities. *See* 12 U.S.C. § 1843(k); 12 C.F.R. § 225.28. The amicus curiae brief submitted by 27

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[3] Petitioners are inconsistent on this point. They claim the word "information" in § 1681t(b)(2) should mean "information" of any kind, yet they limit the word "persons" in that provision to mean "financial institutions." "Person" is defined in the FCRA to include "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b). "Financial institution" is defined in the FCRA at § 1681a(t), yet is not used in the affiliate-sharing preemption provision at § 1681t(b)(2).

states and the District of Columbia in support of the State Respondents in the first Ninth Circuit proceeding vividly demonstrates the breadth of activities and businesses whose information-sharing practices would be immune from regulation if Petitioners' reading of § 1681t(b)(2) were correct.[4] As the States' Amicus Brief notes, traditional financial institutions may now affiliate themselves with travel agencies operated in connection with financial services, collection agencies, mortgage lenders and brokers, "pay day" lenders, finance companies, account servicers, check cashers, wire transferors, 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. States' Amicus Brief, 2004 WL 2403000, at 28; 16 C.F.R. §§ 313.1(b) and 313.3(k)(2). In addition to the disparate variety of businesses that may be included within the umbrella of a financial institution's holding company, the sheer volume of affiliates of these companies is astounding. *See, e.g.*, States' Amicus Brief, 2004 WL 2403000, at 29 (Bank of America Corporation listed 1,896 corporate affiliates in 2004). Given the breadth, scope and number of entities whose information-sharing practices would be immune from state regulation under Petitioners'

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[4] Amicus Curiae Brief of the States in Support of Respondents in *American Bankers Association, et al. v. Bill Lockyer, et al.*, No. 04-16334, 2004 WL 2403000 (States' Amicus Brief).

approach, it is unfathomable that Congress intended such consequences, far beyond the reach of consumer reporting.

Accordingly, construing the word "information" to mean all information, of any kind, is at variance with the underlying purpose of the FCRA, which was to ensure the integrity of the credit reporting process. 15 U.S.C. § 1681(b). "Frequently . . . even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966), quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Petitioners point to no evidence that Congress intended to give businesses carte blanche to share all information of any kind with affiliates, free from traditional regulation by states. The Ninth Circuit properly harmonized the preemption provision with the purpose of FCRA.

C. The Ninth Circuit's Decision Does Not Disrupt a Uniform Federal Standard.

Petitioners claim that Congress imposed a "uniform federal regime" under the FCRA that "permits financial institutions to share customer information among their affiliates." Pet. Brief 1. In fact, however, the FCRA regulates only consumer reporting, and does not create a comprehensive regulatory scheme for the sharing of information

among financial institutions. Moreover, even with respect to consumer reporting, Congress contemplated a dual regulatory scheme, with state laws coexisting with federal laws. Congress intended only to preclude state laws that required information shared with affiliates to be treated like a "consumer report," with the attendant requirements of such a designation. The 1996 and 2003 amendments do not alter the original purpose of the FCRA, nor do they establish a national uniform standard for the sharing of "any" information among affiliates of any "person."

The FCRA's legislative findings explain that the purpose of the FCRA was to regulate consumer reporting, as opposed to the sharing of "information" among affiliated "persons" generally. *See, e.g.*, 15 U.S.C. § 1681(b). The legislative history of the 1996 amendments to the FCRA confirms that the purpose of the 1996 amendments was not to create a national uniform standard for affiliate information sharing, but rather to ensure that information shared with affiliates not be treated as a consumer report. The definition of a "consumer report" was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681a(d)(2)(A)(i) and (ii). The general preemption section of the FCRA was amended at the same time, to add the affiliate-sharing preemption provision at issue here. 15 U.S.C. § 1681t(b)(2).

These amendments responded to a concern raised in Congress by banks that information sharing among affiliates could be construed as a consumer report and thus be made subject to all the requirements and prohibitions contained in consumer reporting laws. Testimony from banks in connection with Senate Bill 783 (S. 783), a predecessor to the 1996 amendments, noted that while it was clear that divisions within the same company could share information without triggering the requirements of the FCRA, the result might not be the same for information sharing among separate but affiliated legal entities. *To Correct Abuses Involving Credit Reporting Systems, Denying Consumers Jobs, Credit, Housing, and the Right to Cash a Check: Hearing on S. 783 Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 103d Cong. 70 (May 27, 1993).

The definition of "consumer report" was therefore amended to exclude information communicated among affiliated entities. The purpose of this amendment was to ensure that the provisions of the FCRA did not apply to such information sharing among affiliates:

> The Committee does not intend to broaden the type of information that is currently exempted from the definition of consumer report, but rather intends to permit the sharing of that information among a broader range of affiliated entities without triggering the conditions governing the *sharing of consumer reports under the FCRA*.

S. Rep. No. 103-209, at 9 (1993) (emphasis added).

Having ensured that sharing of information among affiliates would not be subject to the requirements of the federal credit reporting law, Congress added the affiliate-sharing preemption provision to the FCRA to ensure that the federal policy would not be altered by state law:

> Section 116 preempts any state law related to the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that this provision will be applied to the modifications made by [other provisions] of the Committee bill which amend section 603 of the FCRA pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates.

S. Rep. No. 103-209, at 27. The preemption provision was thus intended to apply to information shared among affiliates that would otherwise be covered by the FCRA.

Petitioners rely extensively upon an amicus curiae brief submitted by several federal agencies (Agencies) in the first appeal in 2004. Citing the Agencies' brief, Petitioners claim that, through the 1996 amendments to the FCRA, Congress intended to establish a national uniform standard with respect to affiliate information sharing. *See* Agencies' Brief, at 2, quoting S. Rep. No. 104-185, at 55 (Dec. 14, 1995).

The report referenced in the Agencies' brief refers to Senate Bill 650 (S. 650), another predecessor bill

to the 1996 amendments. Like the preemption provision in S. 783, the language in S. 650 is substantively identical to the language enacted in 1996. The legislative history of S. 650 demonstrates that the 1996 amendments were intended to exclude affiliate information sharing from the requirements of the FCRA, which otherwise would have applied. The report on S. 650 explains:

> Title IV will clarify that affiliates within a Holding Company structure can share any application information (last year's bill was limited to credit applications) and consumer reports, consistent with the FCRA. Under current law, such information can be deemed a "consumer report" and the information sharing entity can be deemed a "consumer reporting agency," thereby implicating all the restrictions of the FCRA. The affiliate sharing provisions of this Title will allow affiliates to share such information *without being deemed a consumer reporting agency.*

S. Rep. No. 104-185, at 18-19 (1995) (emphasis added).

This report confirms that Congress' overriding focus was on credit reporting, noting:

> By preempting state and local provisions *relating to the subject matter regulated by these provisions of the FCRA,* section 624 establishes the FCRA as the national uniform standard in these areas. This section recognizes the fact that credit reporting and credit granting are, in many aspects, national in

> scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers.

S. Rep. No. 104-185, at 55 (emphasis added), cited in Agencies' Brief, at 2.

The subject matter regulated by the "provisions" referenced in the Senate Report is consumer reporting. These provisions include: sections 604(c) and (e) (prescreening); section 611 (time period for reinvestigations); section 615(a), (b), (d) and (e) (duties of a person taking adverse action and duties of a person who used a consumer report in connection with any direct marketing transaction not initiated by the consumer); section 605 (information contained in consumer reports); 609(c) (required disclosures); and section 623(b)(2) (affiliate sharing). S. Rep. No. 104-185, at 54-55.

This legislative history demonstrates that the purpose of the 1996 amendments, in keeping with the purpose of the FCRA as a whole, was not to preclude all state regulation of information sharing among affiliates, but rather to ensure that such information sharing would not be regulated by laws regulating consumer reporting.

II. COMPLYING WITH CALIFORNIA'S LAW WILL NOT PLACE AN IMPOSSIBLE BURDEN ON FINANCIAL INSTITUTIONS BECAUSE THEY ALREADY CATEGORIZE INFORMATION THEY COLLECT.

Petitioners contend that complying with SB1's affiliate-sharing provision places a burden on financial institutions that impairs their ability to share federally protected information with affiliates. They claim that trying to determine which information is subject to SB1 will, in practice, require difficult line drawing. Pet. Brief 26.

Petitioners' claimed burdens of complying with SB1's affiliate-sharing provision are speculative at best, and unsupported by the record below. Moreover, under the FCRA, financial institutions already must scrutinize and categorize information shared with affiliates, and thus SB1 does not add any significant burden.

First, certain medical information – even if it is from a financial institution's experience with a consumer – is not exempted from the definition of a consumer report. 15 U.S.C. § 1681a(d)(3)(A). Therefore, a financial institution still must analyze and segregate such information and treat it as a consumer report if it meets the "scope" and "purpose" prongs of the definition. The review required by SB1 – determining whether such information meets the

"purpose" and "scope" prongs and is thus preempted – is no different than this analysis, which financial institutions must already do.

Second, experience information – which is exempted from the definition of a "consumer report" and thus may be freely shared with affiliates without having to treat it as a consumer report – must be scrutinized and categorized if financial institutions seek to share such information with affiliates for purposes of soliciting consumers. 15 U.S.C. § 1681s-3(a). Similar to the notice and opt-out required by SB1, financial institutions need to give consumers notice of and the opportunity to opt out of use of such information for solicitation purposes.

Third, under the FCRA, financial institutions already analyze non-experience information to determine if it meets the "purpose" and "scope" prongs of the consumer report definition. Financial institutions do not have to treat such information like a consumer report and are permitted to share such information with affiliates, but only if they first give notice and the opportunity to opt out of this sharing. 15 U.S.C. § 1681a(d)(2)(iii). This "other" information includes experience information a financial institution receives from other financial institutions (i.e., information obtained by the consumer's transaction with the other bank). Again, this is an example where financial institutions already have to review information they wish to share with affiliates and must provide notice and opt-out opportunity before such

disclosure, similar to SB1's requirements for non-preempted information.

Financial institutions necessarily have to categorize information – to determine whether it needs to be treated as a consumer report, whether it is to be used for marketing purposes, whether it is medical information and the like – to determine whether the consumer must be given notice and the opportunity to opt out. Because financial institutions already review certain information before sharing such information with affiliates, the requirements imposed by SB1 are not additional burdens.

Finally, the GLBA already imposes notice requirements that are similar to SB1. The GLBA requires financial institutions to provide notices to consumers regarding their information-sharing practices with their affiliates. 15 U.S.C. § 6803(a). Accordingly, the additional obligation placed upon financial institutions by SB1's affiliate-sharing provision with respect to its notice requirement is not substantial.

III. REVIEW OF THE PREEMPTIVE SCOPE OF THE FCRA IS PREMATURE.

This Court should decline to grant review because it is premature. The Ninth Circuit's construction of the word "information" in the FCRA's affiliate-sharing preemption provision is based upon its review of one state statute. Petitioners point to no conflict in the appellate courts regarding the interpretation and preemptive scope of the FCRA's

preemption provision. Indeed, Petitioners do not identify any state financial privacy statutes that have been challenged as preempted by the FCRA. States may choose not to enact statutes regulating the information-sharing practices of affiliated financial institutions similar to what is left of SB1's affiliate-sharing provision, now that the court below held much of that provision preempted. In any case, if indeed the FCRA's affiliate-sharing preemption provision is as broad as Petitioners claim, it would affect many more types of regulations than SB1, as explained above. This Court should wait for the lower courts to develop the law and choose a suitable vehicle if a split among the circuits materializes.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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