No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BANKERS ASSOCIATION, et al.,
Plaintiffs and Appellants,

v.

BILL LOCKYER, *et al.*
Defendants and Appellees.

On Appeal from the United States District Court
for the Eastern District of California,
Case No. Civ S 04-0778 MCE
The Honorable Morrison C. England, Jr., U.S. District Judge

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.*

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I. INTRODUCTION AND STATEMENT OF INTEREST

This *amicus curiae* brief, in support of Appellants American Bankers Association, *et al.*, is submitted on behalf of the Office of Thrift Supervision (OTS), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System (FRB), the National Credit Union Administration (NCUA), and the Federal Trade Commission (FTC) (the Agencies). Collectively, the Agencies have regulatory responsibility with respect to a wide range of financial institutions and their affiliates. Of particular note for this case, Congress has entrusted the Agencies with authority to interpret and apply the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (FCRA),[1] the Fair and Accurate Credit Transactions Act of 2003, 117 Stat. 1952 (FACT Act), which amended FCRA, and Title V of the Gramm Leach Bliley Act (concerning protection of consumers' nonpublic personal information), 15 U.S.C. §§ 6801-6809 (Title V of GLBA),[2] with respect to the institutions within their jurisdiction.

In FCRA, the FACT Act, and Title V of GLBA, Congress carefully crafted a national system to govern the accumulation, dissemination and use

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[1] 15 U.S.C. § 1681s.

[2] 15 U.S.C. § 6805.

of a consumer's personal financial information. In 1995, Congress recognized the need for this national system, noting 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. 104-185, at 55 (Dec. 14, 1995). In these three statutes, Congress struck an appropriate balance to ensure that personal financial information may be used to promote affordable financial services while protecting against unwanted invasions of privacy and the misuse of this private personal information.

Within this federal system, Congress has specified the areas in which states may enact laws with different requirements. Information sharing among affiliates of financial institutions is <u>not</u> one of those areas. In fact, Congress has expressly <u>denied</u> states the authority to impose restrictions on the sharing of information among affiliated companies. The decision of the district court below fundamentally misunderstood this statutory framework in which federal law clearly preempts state laws imposing requirements or prohibitions on information sharing among affiliates.

A. The Federal Statutes At Issue

1. FCRA and The FACT Act

FCRA establishes standards for the collection, communication, and use of information for business purposes such as determining a consumer's eligibility for credit, employment, insurance, or a license. These standards have broad scope, applying to information that bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. 15 U.S.C. §§ 1681-1681x. Unless otherwise specified by FCRA, a communication of such information constitutes a "consumer report," and any person that regularly collects and communicates this information to third parties may become a "consumer reporting agency."[3] 15 U.S.C. § 1681a(d), (f).

FCRA creates substantial obligations for a "consumer reporting agency." For example, a consumer reporting agency may furnish consumer

[3] "Consumer report" and "consumer reporting agency" are statutorily defined terms that are broader than the day-to-day meaning of "credit report" as a report prepared by credit bureaus. *See* 15 U.S.C. § 1681a(d), (f). Whether a communication is a "consumer report" depends not only on the nature of the information provided, but factors such as the identity of the parties to the communication and the purposes for which the information was collected or communicated. Accordingly, the statute uses the terms "consumer report" and "consumer reporting agency" to regulate a far wider range of communications containing information about consumers than credit reports of credit bureaus.

reports only for certain permissible purposes, and must maintain high standards for ensuring the accuracy of information in consumer reports and resolving customer complaints. 15 U.S.C. §§ 1681e, 1681i.

Initially, when it enacted FCRA in 1970, Congress included only limited exclusions from the definition of "consumer report." As relevant in this case, FCRA permitted a person (including a financial institution) to share with any other person (including an affiliate) information about its own dealings with its customers. This information, which is referred to as "transaction and experience information," could be freely exchanged without triggering the statutory definition of "consumer report" (and the extensive requirements associated with consumer reports). Thus, the exclusion allowed lenders to provide this information to credit bureaus and others. However, an affiliate that received transaction and experience information from another affiliate could fall within the definition of a "consumer reporting agency" if it, in turn, shared that information with a third affiliate, and that information was used to make eligibility decisions about consumers.

In view of the narrowness of this exclusion from the definition of "consumer report," information sharing among affiliates was quite limited after FCRA was enacted. Predictably, to avoid the obligations that FCRA imposes on consumer reporting agencies, many institutions avoided making

any communications to affiliated companies that could constitute consumer reports.

The restrictions on affiliate information sharing were eased in 1996 when Congress amended FCRA and substantially expanded the circumstances in which an institution may share information with affiliates without becoming a "consumer reporting agency." Under the 1996 amendments, Congress permitted affiliated companies (including financial institutions) to share among themselves the "transaction and experience" information of all affiliates that would otherwise constitute "consumer reports." 15 U.S.C. § 1681a(d)(2)(A)(ii). Equally important, in the 1996 amendments, Congress also permitted an institution to share "other information" among its affiliates without the information being deemed a "consumer report" – and thus triggering "consumer reporting agency" status for the transferring institution — if the institution gave the consumer appropriate notice and an opportunity to prohibit the information sharing, and the consumer did not prohibit the sharing. 15 U.S.C. § 1681a(d)(2)(A)(iii). The term "other information" includes information, other than transaction and experience information, that could otherwise constitute a consumer report if shared (*e.g.*, credit bureau reports and information from consumer applications).

At the same time that it established the federal criteria that enabled affiliates to share a broad range of consumer information without becoming consumer reporting agencies, the 1996 legislation also expressly preempted state laws that impose requirements or prohibitions "with respect to the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C. § 1681t(b)(2). The type of information covered by this preemption was not limited to "consumer report" information. The combined effect of these provisions was to set national, uniform requirements for the sharing of consumer information among affiliates. The 1996 legislation effectively imposed an expiration date of December 31, 2003 on this preemption provision by specifically providing that it would not preempt state laws enacted after January 1, 2004 that express an intent to supplant FCRA and that give greater protections to consumers. 15 U.S.C. § 1681t(d)(2) (repealed by Section 711(3) of the FACT Act, 117 Stat. 2011).

Significantly, in the recently enacted FACT Act, Congress once again addressed the issue of uniform national rules concerning information sharing among affiliates and expressly prohibited states from enacting laws that would interfere with the federal regulatory scheme for this activity. First, the FACT Act made permanent the preemption provision in Section

1681t(b)(2), *i.e.*, the prohibition against state laws that impose requirements or prohibitions on information sharing among affiliates.[4] Second, the FACT Act amended FCRA by adding a new Section 624 that restricts the use for marketing of information that affiliates share. 15 U.S.C. § 1681s-3, codifying Section 624 of FCRA as added by Section 214 of the FACT Act, 117 Stat. 1980. The new provision specifically applies to information shared among affiliates that would be a "consumer report" except for the statutory exclusions in FCRA. Under the amendment, an institution cannot use this information for marketing purposes unless the consumer is given notice of the intended use of the information for that purpose and the consumer is given the right to prevent the use of the information for making solicitations to that consumer.[5]

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[4] 15 U.S.C. § 1681t(d), as amended by Section 711 of the FACT Act, 117 Stat. 2011, repealed a prior provision of FCRA (15 U.S.C. 1681t(d)(2)) that limited the preemption provision to laws passed before January 1, 2004.

[5] Congress has instructed the Agencies, in consultation and coordination with each other, to issue regulations implementing this new notice and opt-out provision. 15 U.S.C. §1681s-3 note. In accordance with the statutory directive, the OCC, FRB, FDIC, NCUA and OTS have issued proposed regulations. 69 Fed. Reg. 42,502 (July 15, 2004). The FTC published its proposed rule on June 15, 2004 (69 Fed. Reg. 33,324). The Securities and Exchange Commission (SEC) is also required to issue regulations under new section 624 in consultation and coordination with the Agencies and published its proposal on July 14, 2004 (69 Fed. Reg. 42,302).

Thus, in FCRA and as reaffirmed by the FACT Act, Congress deliberately and expressly preempted state law in order to establish a scheme of uniform requirements regulating the sharing and use of consumer information among affiliates, including information sharing specifically excluded from the definition of "consumer report."

2. GLBA

Title V of GLBA, 15 U.S.C. §§ 6801-6809, also applies to the disclosure of information about consumers. Specifically, it requires institutions to give notice of the manner in which nonpublic personal information is disclosed to affiliates and nonaffiliates.[6] It also establishes standards under which financial institutions may disclose a consumer's nonpublic personal information to nonaffiliated third parties, and it directs the Agencies to issue regulations implementing these provisions (GLBA

[6] Section 6809 provides: "The term 'nonpublic personal information' means personally identifiable financial information – (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution * * * [and includes] any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information." 15 U.S.C. § 6809(4).

Privacy Regulations).[7] Title V of GLBA, however, does not impose any restrictions on information sharing among affiliates.

This statutory overlap, of course, raised the prospect that both GLBA and FCRA might apply to an institution's disclosure of information about a consumer. Congress specifically addressed this by explicitly stating that the requirements of Title V of GLBA shall not "modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. § 6806.[8]

B. The California Statute At Issue

In 2003, prior to passage of the FACT Act, the California legislature enacted the California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2, commonly referred to as "SB1." This statute prohibits a financial institution from sharing a consumer's nonpublic personal information with

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[7] *See* 65 Fed. Reg. 35,162 (June 1, 2000) adding regulations concerning privacy of nonpublic consumer financial information issued by the OCC, 12 C.F.R. Part 40, FRB, 12 C.F.R. Part 216, FDIC, 12 C.F.R. Part 332, and OTS, 12 C.F.R. Part 573; 65 Fed. Reg. 36,782 (June 12, 2000) NCUA consumer privacy regulation, 12 C.F.R. Part 716; *and* 65 Fed. Reg. 33,677 (May 24, 2000), FTC privacy regulation, 16 C.F.R. Part 313.

[8] Sec. 6806 provides: "Except for the amendments made of subsections (a) and (b), nothing in this chapter shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act, and no inference shall be drawn on the basis of the provisions of this chapter regarding whether information is transaction or experience information under section 603 of such Act." (The amendments to subsections (a) and (b) authorize the Agencies to issue regulations to carry out the provisions of FCRA.)

an affiliate unless the financial institution (1) has properly notified the consumer 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.[9] FCRA allows financial institutions to share this information subject only to the requirements specified by FCRA rather than the separate notice and opt-out requirements of SB1.

While SB1's scope is broad, it does not encompass all information sharing among affiliates. In particular, it does not purport to regulate "consumer reports" as defined in FCRA and it provides certain exceptions to its requirements, such as exempting information sharing among affiliates engaged in the same line of business (e.g., banking, insurance or securities).

C. The District Court Decision

The ABA argued before the district court that the FCRA/FACT Act preemption provision in section 625 of FCRA, codified at 15 U.S.C.

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[9] SB1 thus treats a financial institution's inter-affiliate transfers of all information, including transaction and experience information, the way the FCRA treats inter-affiliate transfers of non-experience information, such as credit reports. Moreover, SB1 requires notice and a 45-day opt-out period on an annual basis. In addition, SB1 requires a financial institution to obtain express permission from a consumer before it can disseminate the consumer's nonpublic personal financial information to a non-affiliated third party. That latter requirement is not at issue in this case.

§ 1681t(b)(2), preempts the inter-affiliate sharing provisions of SB1. On June 30, 2004, the district court rejected the ABA's analysis, ruling that FCRA, as amended, does not preempt SB1.[10]

In reaching this result, the court reasoned as follows. First, it concluded that since Congress had excluded certain communications among affiliates from the definition of "consumer report," Congress intended that such information not be subject to FCRA's standards at all. Slip op. at 9. The court went on to conclude: "it makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so." Id. at 11. For this reason, the Court concluded that "the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of consumer reports among affiliates." Id. (footnote omitted; emphasis in original). This perception of the framework established by FCRA was flatly wrong.

The court then turned its attention to GLBA. It found that GLBA, "which sets forth basic privacy protections that must be provided to

[10] The court issued an Amended Memorandum and Order on July 9, 2004 that contains minor modifications of the June 30 decision. All references in this brief to the court's ruling are to the July 9 Memorandum and Order.

consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case." Slip op. at 11. Looking to GLBA, the court based its decision on a provision that preserved certain state laws from preemption by Title V of GLBA, 15 U.S.C. § 6807. It concluded that this anti-preemption provision explicitly preserves the ability of the states to give consumers more protection than GLBA provides. It found that in this case, SB1 offers more rigorous consumer protection, and therefore, SB1 is not preempted. This conclusion both misreads the section of GLBA on which it relies and ignores other key provisions of that statute.

D. Interest of the Agencies

The Agencies have an interest in this case because they administer FCRA, GLBA and the FACT Act with respect to the financial institutions and other entities under their respective jurisdictions, which comprise all creditors covered by FCRA. It is, therefore, important to the Agencies that the statutes be interpreted in a manner consistent with Congressional intent to eliminate the regulatory burden and confusion caused by multiple state laws in this area while protecting consumer privacy interests. In this case, the district court's ruling is contrary to the Agencies' interpretation, based on the plain meaning of the statute's text, that FCRA preempts SB1.

The issue is of enormous practical significance to the financial institutions that certain of the Agencies supervise and could materially affect the way they do business. Thus, the Agencies also have a regulatory and supervisory interest in the outcome of this case.

The legislative hearings on the FACT Act — in 2003 — clearly evidence the consequences of retaining FCRA's express preemption of state laws that would impose 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).[11] Among the benefits of a uniform national standard that hearing witnesses identified were reduced costs of credit,[12] greater credit availability to underserved

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[11] *See, e.g., Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Financial Services*, 108th Cong. (2003) ("H.R. Hrg. 108-33"); *H.R. 2622—Fair and Accurate Credit Transactions Act of 2003, Hearing Before the House Comm. on Financial Services*, 108th Cong. (2003) ("H.R. Hrg. 108-47").

[12] *See, e.g.,* H.R. Hrg. 108-47, at 9, Statement of Hon. John W. Snow, Secretary, Department of the Treasury ("FCRA * * * makes possible the most extensive and widely available credit at the best rates anywhere in the world. And it simply wouldn't be possible without that broad sharing of information.").

consumers,[13] and the resulting increases in economic activity.[14] In the end, Congress acted "to ensure the operational efficiency of [the] national credit system by creating a number of preemptive national standards," H.R. Conf. Rep. No. 108-396, at 66 (2003), including the preemptive national standard for information sharing among affiliates found in 15 U.S.C. § 1681t(b)(2), the provision at issue here. *See* H.R. Conf. Rep. No. 108-396, at 66 (2003) (referring to 15 U.S.C. § 1681t(b)(2)).

The district court's decision defeats Congress' objective, 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. As a result, institutions could face inconsistent or conflicting requirements, which could cause confusion among institutions and consumers alike. And institutions could confront the

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[13] *See, e.g.*, H.R. Hrg. 108-47, at 9, Statement of Hon. John W. Snow (noting estimates that "without the national standards, 280,000 home mortgage applications that are now approved each year would be denied").

[14] *See, e.g.,* H.R. Hrg. 108-33, at 13-14, Statement of Joseph Smith, North Carolina Commissioner of Banks on behalf of the Conference of State Bank Supervisors (recognizing that the "technology-based credit system has benefited consumers and our economy, and that it depends on reliable information and a consistent environment, CSBS adopted a policy * * * to support the permanent extension of the 1996 FCRA preemptions" noting that "the benefits of uniformity to our credit granting system and the value of this system to consumers and our economy outweigh" CSBS's general objections to preemption of state laws).

prospect of civil liability under state laws that Congress specifically sought to preempt.

Further, state-by-state regulation of affiliate information sharing and use could create inefficiencies and increase regulatory burdens on institutions, driving up the cost of financial services and harming both financial institutions and consumers. The Agencies are well aware of this prospect, and Congress was alerted to this risk. During the congressional hearings on the FACT Act's preemption provision, a senior FRB official testified that "[t]he FCRA's affiliate-information sharing provisions enable bank holding companies and other large financial enterprises to efficiently manage and use consumer information across multiple account relationships."[15]

Because the amici include federal agencies with responsibility for the examination, supervision and regulation of federally-insured institutions and their affiliates, and all the Agencies are responsible for the implementation of FCRA, Title V of GLBA and the FACT Act for these institutions and other entities, the Agencies are appropriately concerned about the emergence of incorrect judicial precedent that could increase costs for institutions and

[15] H.R. Hrg. 108-33 at 9, Testimony of Dolores S. Smith, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System.

consumers, promote inefficiency, expose institutions to uncertain civil liabilities, and undermine Congress' objective of achieving uniformity.

For these reasons, the Agencies believe that it is in the public interest to file this *amicus curiae* brief supporting the ABA's argument that FCRA, as amended by the FACT Act, preempts pertinent provisions of SB1. Although the ABA has submitted a comprehensive brief addressing this issue, the Agencies offer this *amicus* brief to assist the Court in understanding the important Federal policy and legal interests at stake in this case.

II. ARGUMENT

In FCRA, Congress prohibited states from affecting information sharing among affiliates by providing: "No requirement or prohibition may be imposed under the laws of any State * * * with respect to the exchange of <u>information</u> among persons affiliated by common ownership or common corporate control." 15 U.S.C. § 1681t(b)(2) (emphasis supplied). The court below erred by failing to give effect to the plain meaning of this statutory language preempting state laws, such as SB1, that impose requirements on the exchange of information among affiliates.

The district court rested its erroneous decision on a fundamental misperception of the framework and scope of FCRA. The court incorrectly

concluded that FCRA and the FACT Act amendments to FCRA apply only to information constituting "consumer reports." Based on this faulty understanding, the court limited the scope of the FCRA preemption provision to state laws that prohibit or restrict the sharing of "consumer reports." Since SB1 regulates information sharing activities that are excluded from the definition of "consumer report," the court found that the FCRA preemption provision is inapplicable to SB1. In so finding, the court improperly disregarded the plain meaning of the preemption provision, which makes no reference to "consumer report."

A brief review of the pertinent provisions of the 1996 FCRA amendments and the recent FACT Act amendments to FCRA shows that the court's reasoning was simply wrong. Contrary to the district court's conclusion, the scope of FCRA's substantive provisions is not restricted to communications that constitute "consumer reports." First, as noted above, the 1996 FCRA amendments substantially expanded the scope of the exclusion from the definition of "consumer report" for transaction and experience information when shared among affiliates. This allowed affiliates greater freedom to share transaction and experience information among themselves without becoming "consumer reporting agencies." *See* 15 U.S.C. § 1681a(d)(2)(A)(ii). The 1996 amendments also explicitly

provided that affiliate sharing of non-transaction and experience information would not trigger the definition of "consumer report," provided consumers were given notice and an opportunity to prohibit such information sharing. 15 U.S.C. § 1681a(d)(2)(A)(iii). Thus, in both of these changes, Congress accomplished its regulatory purpose by excluding information from the definition of "consumer report" when shared among affiliates.

Second, new Section 624 of FCRA (added by the FACT Act) expressly imposes specific procedures that must be followed before an affiliate may <u>use</u> for marketing purposes certain shared information—including information that is not a "consumer report" under FCRA. 15 U.S.C. § 1681s-3 (applying marketing restrictions to information that "would be a consumer report" but for the exclusions in section 1681a(d)(2)(A)).[16] Thus, FCRA, as amended, indisputably establishes requirements for the sharing and use of information among affiliates that Congress has explicitly excluded from the definition of a "consumer report."

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[16] Yet another example that demonstrates that FCRA applies to information that is not a "consumer report" is section 604(g)(2) (added by section 411 of the FACT Act), which applies to "medical information" derived from a health care provider or consumer, regardless of whether the information also constitutes a consumer report. This information may not be shared among affiliates except as authorized under the FACT Act. *See* 15 U.S.C. § 1681a(d)(3).

Nothing in the text of the FCRA preemption provision at issue even hints that its scope is limited only to state laws regulating consumer reports. By its terms, that provision expressly preempts any "requirement or prohibition [that] 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 * * *." Section 625(b)(2) of FCRA; 15 U.S.C. § 1681t(b)(2). Indeed, the term "consumer reports" does not even appear in this provision.

This is in sharp contrast to other preemption provisions found in FCRA. In particular, Congress limited the scope of preemption of state laws elsewhere in Section 625 to state laws affecting consumer reports or consumer reporting agencies. *See, e.g.,* 15 U.S.C. § 1681t(b)(1)(A), (B), (D), (E), (F), and (I). Clearly, Congress knew how to draft a preemption provision with limited scope; clearly, too, that is <u>not</u> what it did here. In short, the language of this preemption clause is plain and unambiguous, and applies to SB1: it specifically encompasses state laws limiting the "exchange of information" among affiliates, not merely state laws limiting the exchange of "consumer reports."

In addition to making § 1681t(b)(2) permanent, the FACT Act explicitly regulates the <u>use</u> of information obtained from an affiliate that

would otherwise be a "consumer report" but for an exclusion under FCRA. 15 U.S.C. § 1681s-3(c). Again, Section 624 shows that there is no reason to limit the scope of preemption to information that constitutes a "consumer report," nor is the FCRA preemption provision so limited.

Moreover, the 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." As the ABA brief explains, ABA Brief at 34-35, during the debates over the FACT Act, U.S. Senators Boxer and Feinstein both recognized that renewal of the preemption clause would result in preempting SB1. For this reason, these Senators proposed an amendment that would have extended SB1's requirements nationwide, but that amendment was rejected by the Senate.[17] A similar amendment was proposed and defeated

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[17] *See* 149 Cong. Rec. S13860 (Nov. 4, 2003) (Floor statements of Sen. Feinstein, reading letter from state sponsor of SB1 that renewal of FCRA preemption clause at issue here would "preempt California's standard on affiliate sharing with a weaker one"); *id.* at S13874 (floor statement of Sen. Boxer, stating that "California finds itself left out" if FCRA preemption renewal adopted).

The Senate manager of the 2003 FCRA Amendments also opined on the Senate floor that Congress was relying on the fact that SB1 was preempted by § 1681t(b)(2) when it enacted the new affiliate-sharing restrictions of § 1681s-3. *See* 149 Cong. Rec. § 13873 (Nov. 4, 2003)

in the House.[18] The defeat of these proposed amendments in the Senate and the House clearly demonstrates that Congress rejected the standard in SB1 as the national standard, and the debates show that Congress fully understood that FCRA preempted SB1.

Finally, the district court reached its erroneous conclusion by relying on GLBA's anti-preemption clause. Its reliance was misplaced for two reasons. First, the anti-preemption clause simply saves state laws from being preempted by specific provisions of GLBA (the provisions of Title V, Subtitle A of GLBA). 15 U.S.C. § 6807(a). It says nothing about preemption by other federal statutes, such as FCRA. Since the GLBA anti-preemption clause is silent about FCRA, it cannot save state law from preemption by FCRA. This Court has applied this same reasoning with respect to a similar anti-preemption clause in the Electronic Fund Transfer Act (EFTA), and there is no basis on which to distinguish the logic of that

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(Statement of Sen. Shelby) ("With respect to the part of SB-1 [*i.e.*, the affiliate-sharing requirements] that conflicts with the [FCRA], the California law was preempted, making it unenforceable when it was enacted.").

[18] *See* 149 Cong. Rec. H8145-8146 (Sept. 10, 2003) (statements of Rep. Oxley, opposing a similar amendment introduced in the House, observing that "grandfathering California law and future laws in other States guts our national uniform standards and harms consumers across the country, could cause an increase in interest rates, inability to get credit, precisely the opposite of what we are trying to do in this legislation.").

ruling from this case. *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 565 (9th Cir. 2002) ("Because the EFTA's anti-preemption provision is limited to the EFTA, it does not save the Ordinances against preemption by the HOLA and the National Bank Act.").

Second, if there were any question of whether the anti-preemption clause, 15 U.S.C. § 6807, found in Title V of GLBA overrode FCRA, Congress explicitly laid that issue to rest when it provided that nothing in Title V of GLBA "shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. § 6806. This categorical directive protects the FCRA preemption provisions to the same extent that it applies to other provisions of the FCRA.

The plain language of FCRA prohibits states from enacting requirements on information sharing among affiliates. Application of the statutory language results in the preemption of SB1. This result is fully consonant with the overall statutory framework and federal scheme by which Congress has regulated inter-affiliate information sharing. Through legislation, Congress excluded from the definition of consumer report (and the regulatory regime for consumer reports) broad categories of information shared among affiliates and mandated federal standards to govern these information sharing activities. At the same time that it imposed federal

notice and opt-out requirements for the sharing of certain consumer information among affiliates and the use of that information for marketing by affiliates, Congress ensured that those federal standards remained uniform nationwide by barring states from imposing their own requirements or prohibitions on the sharing and use of consumer information among affiliates. Thus, the decision of the district court must be reversed to give effect to the plain language of the statute, and to preserve the uniform nationwide standards Congress created for information sharing among affiliates through the preemption provision in § 1681t(b)(2).

III. CONCLUSION

For the foregoing reasons, to give effect to the plain language of 15 U.S.C. § 1681t(b)(2), and to preserve the uniform nationwide standards Congress created for information sharing among affiliates effected by that provision, this Court must reverse the erroneous decision of the district court and find that Federal law preempts SB1 insofar as SB1 purports to impose restrictions on information sharing among affiliates.

August 11, 2004 Respectfully submitted by:

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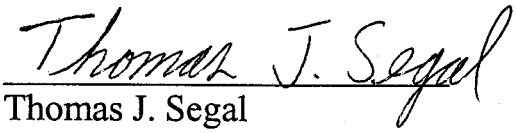

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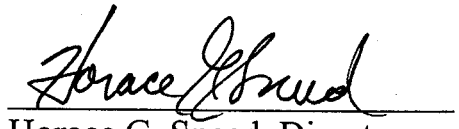

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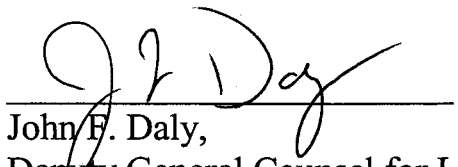

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 5,603 words.

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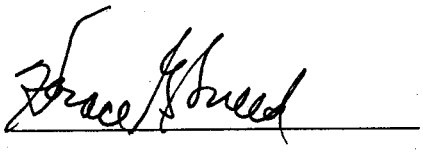

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