No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMERS BANKERS ASSOCIATION,
Plaintiffs and Appellants,

vs.

BILL LOCKYER, in his official capacity as Attorney General of California, **HOWARD GOULD**, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, **WILLIAM P. WOOD**, in his official capacity as Commissioner of the Department of Corporations of the State of California, and **JOHN GARAMENDI**, in his official capacity as Commissioner of the Department of Insurance of the State of California,
Defendants and Appellees.

Appeal from the United States District Court
for the Central District of California
No. CIV. S 04-0778 MCE KJM (Hon. Morrison C. England, Jr.)

BRIEF OF APPELLEES CALIFORNIA ATTORNEY GENERAL BILL LOCKYER AND CALIFORNIA INSURANCE COMMISSIONER JOHN GARAMENDI

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INTRODUCTION

The states' exercise of their police power to protect consumers' privacy is of paramount importance. Indeed, the right to privacy has been elevated to the status of an express constitutional right in California, making all the more clear California's obligation to safeguard its residents from violation of that right. Cal. Const. art. I, § 1.

In 2003, California enacted the California Financial Information Privacy Act, California Financial Code sections 4050-4060 (popularly known as "SB1," after the Senate Bill that enacted it). SB1's purpose was to supplement the basic financial privacy standards ensured by the Gramm-Leach-Bliley Act of 1999 ("GLBA"), 15 U.S.C. §§ 6801-6809, by providing consumers greater privacy protections, consistent with the congressional intent evident in the GLBA's savings clause. 15 U.S.C. § 6807(a)-(b).

Plaintiffs/Appellants American Bankers Association, the Financial Services Roundtable and Consumer Bankers Association (collectively "the Associations") and their amici now challenge this important consumer protection statute, alleging that the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681- 1681x, expressly preempts the portion of SB1 that regulates information sharing among affiliates. To support the overly broad scope of preemption they propose, the Associations and amici focus solely on these quoted words, ignoring both the context of the FCRA and the legislative history of the 1996 amendments that added section

1681t(b)(2). Supreme Court precedent, however, requires that words be examined in the context of the statute and legislative scheme as a whole, with the purpose of discerning congressional intent. Applying these principles of statutory construction, with the view toward preserving the states' rights to legislate within their historic police power to protect consumers, the trial court correctly held that the FCRA provision's preemptive effect does not extend beyond the domain of consumer reporting, and so does not invalidate SB1, a financial privacy law that regulates financial institutions' disclosure of their customers' personal information.

The trial court also appropriately disregarded the Associations' attempts to muddy the waters of congressional intent with references to the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which amended the FCRA. The FACT Act's only impact on the FCRA preemption provision was to make it permanent; it would otherwise have sunsetted at the beginning of 2004. The wording of the affiliate-sharing preemption provision itself remains the same today as when enacted in 1996. Moreover, comments by members of Congress in 2003 during hearings on the FACT Act, and failed legislative proposals considered during those hearings are legally and logically irrelevant in discerning the intent of Congress when it added the affiliate-sharing preemption provision to the FCRA in 1996.

The Associations and amici also mischaracterize the FCRA, as amended by the the FACT Act, as a broadly applicable scheme for the regulation of affiliate sharing, and as evidence of a claimed congressional intent to provide "uniform national standards" for information sharing among affiliates. There is no such regulatory scheme; the FCRA is a consumer reporting law and regulates affiliate sharing within that context. By contrast, SB1 is a financial privacy law that regulates disclosures of consumers' personal information by financial institutions. Its only federal counterpart is Title V of the GLBA, which also regulates such disclosures. In Title V, congressional intent is expressed clearly and unequivocally; the federal standard is a floor, leaving the states free to enact more protective privacy laws.

Finally, the Associations and amici rely on the claimed benefits of unregulated affiliate sharing to mischaracterize SB1 as a threat to financial institutions' ability to serve their customers. To the contrary, SB1 simply allows those consumers, whose personal financial information is at stake, to decide whether to permit this sharing, rather than leaving this decision in the hands of financial institutions. This result is precisely what Congress intended when it included a provision in the GLBA to ensure "that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future", leaving the states "free to enact stronger privacy safeguards if they

deem it appropriate." 145 Cong. Rec. S13788, at S13789 (Nov. 3, 1999) (statement of Sen. Sarbanes). Addendum of Federal and State Legislative Materials ("Add.") AG2.

STATEMENT OF ISSUES

Does the Fair Credit Reporting Act, which regulates the collection, use and dissemination of consumer reports, preempt those portions of the California Financial Privacy Information Act, a financial privacy law, that address the sharing of information among affiliates?

STATEMENT OF FACTS

I. CONGRESS ENACTS THE FCRA TO REGULATE THE COLLECTION, USE AND DISTRIBUTION OF CONSUMER REPORTS.

In 1970, Congress enacted the FCRA in an attempt to protect consumers from unfair or inaccurate credit reporting.[1] Among other things, the FCRA guarantees consumers access to, and the right to correct, their consumer reports; regulates what may be included in consumer reports; and prohibits their dissemination except for specified permissible purposes. 15 U.S.C. §§ 1681g, 1681i, 1681c, and 1681b. The FCRA places restrictions and obligations on

1. Although "credit reporting" is in the title of the FCRA and is a commonly used term, the FCRA deals with more than "credit" in the sense that a "consumer report" is defined as a communication, bearing on specified characteristics, that is used or expected to be used as a factor in establishing the consumer's eligibility for insurance or employment, as well as credit. 15 U.S.C. § 1681a(d).

consumer reporting agencies, the entities that create and distribute consumer reports, as well as on those who furnish information for, and those who use, consumer reports.

The scope of the FCRA is thus limited to "consumer reports," as defined in the statute:

> The term "consumer report" means any written, oral, or other communication of 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 --
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
> (B) employment purposes; or
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1). Thus, the main characteristics of a "consumer report" are that it comprises information bearing on one or more of the seven attributes listed above, and that the information is used or expected to be used or collected to serve as a factor in determining a consumer's eligibility for one of the specified purposes.

In 1996, this definition was amended to exclude from "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)(ii). Accordingly, such communication, even if it meets the two requirements above, is not subject to the FCRA's requirements.[2]

The 1996 amendments to the FCRA also added a 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, 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) . . . .

15 U.S.C. § 1681t(b)(2).

It is this provision (referred to herein as the "preemption provision") that the Associations claim preempts SB1. As shown below, however, Congress intended this 1996 amendment to prevent information sharing among affiliates from being regulated by *state consumer reporting* laws, and not to broadly preempt *all* state laws concerning the disclosure of information among affiliates, whatever the purpose or context. This conclusion is confirmed by the fact that the Vermont law explicitly exempted from preemption is a consumer reporting law. *See* Vt. Stat. Ann. tit. 9, § 2480e (2004).

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2. As discussed below, the amendments also excluded from the definition non-experience information shared among affiliates, subject to a notice and opt-out opportunity. 15 U.S.C. § 1681a(d)(2)(iii).

II. CONGRESS AND THE STATE OF CALIFORNIA ENACT COMPLEMENTARY LEGISLATION TO SAFEGUARD CONSUMERS' FINANCIAL PRIVACY.

A. Congress Enacts the Gramm-Leach-Bliley Act of 1999.

In 1999, Congress enacted the GLBA, eliminating the barriers to mergers and affiliations among banks, insurance companies, securities firms, and other financial services providers. With the disappearance of these barriers, concern grew regarding the giant databases that could be compiled among the component companies of the anticipated new financial "supermarkets." Thus, 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) (Add. AG57-58) ("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.").

Congress therefore added Title V to the GLBA in recognition of "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 (Add. AG58); 15 U.S.C. § 6801(a). Title V sets forth 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). Recognizing the importance of the states' rights to provide privacy protections for their citizens beyond the floor of federal protection, Congress expressly provided that states could enact more protective financial privacy statutes. 15 U.S.C. § 6807.

B. California Enacts SB1.

In 2003, the California Legislature enacted SB1 to provide "greater privacy protections" than those in the GLBA. Cal. Fin. Code §§ 4051(b) (Deering's 2004). The Legislature determined that the GLBA provisions were "inadequate to meet the privacy concerns of California residents." Cal. Fin. Code § 4051.5(a)(3) (Deering's 2004). Thus, 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) (Deering's 2004).

The California Legislature recognized the importance of making compliance as easy as possible for businesses. Cal. Fin. Code § 4051.5(b)(5) (Deering's

2004). 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 (Deering's 2004), *with* 15 U.S.C. § 6809. In addition, all the exceptions in the GLBA are repeated in SB1, thus entirely 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 (Deering's 2004), *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) (Deering's 2004). As noted above, a number of disclosures are entirely exempt from these requirements. Cal. Fin. Code § 4056) (Deering's 2004).

SUMMARY OF ARGUMENT

The trial court correctly granted Appellees Bill Lockyer, John Garamendi, William P. Wood and Howard Gould's motions for summary judgment, holding that the FCRA does not preempt SB1. As a threshold matter, consumer protection statutes such as SB1 are within the states' historic police powers. As such, there is a strong presumption against preemption.

The scope and subject matter of the FCRA is consumer reporting. Consequently, the FCRA does not preempt every state law that restricts disclosures among affiliates, but only those that regulate consumer reporting. The Associations and amici grossly mischaracterize the reach of the FCRA's express preemption provision, which must be read in context.

Neither the text nor legislative history of the 2003 FACT Act has any bearing on the meaning and intent of the 1996 amendments to the FCRA that added the preemption provision at issue. The FACT Act's amendments to the FCRA did not change the preemption provision substantively, and do not regulate the sharing of information among affiliates outside the consumer reporting context.

Finally, the 1999 GLBA definitively states the policy of Congress with respect to state privacy laws regulating disclosures by financial institutions. To enable the states to supplement the GLBA's basic protections, Congress expressly preserved the ability of the states to enact consumer protection statutes providing greater privacy protection. 15 U.S.C. § 6807(b). This is precisely what California did in enacting SB1. Cal. Fin. Code § 4051(b).

The Associations and amici argue that the "plain meaning" of section 1681t(b)(2) is not limited to consumer reports. "Plain meaning" analysis, however, requires that the words of a statutory provision be read in the context of

the act as a whole. When the preemption provision is viewed in context, it is apparent that it does not have the unlimited scope that the Associations' "plain meaning" argument mandates.

Indeed, the Associations themselves do not adhere to the literal interpretation they advocate. The Associations and amici implicitly read in limitations to the preemption provision by assuming it only preempts state laws regulating the exchange of consumer information among affiliated financial institutions. In fact, the clause itself, if read literally and in isolation, would preempt *all* state laws regulating the exchange of *any* information -- financial, consumer or otherwise -- exchanged among any affiliated persons, and not just financial institutions. The Associations and amici thus implicitly acknowledge that words in a statute must be read in context.

The Associations and their amici also claim the FCRA regulates affiliate sharing in general, and not just consumer reporting. Appellants' Opening Brief ("AOB") at 31-32; Amicus Curiae Brief of the Office of Thrift Supervision, et al. ("Agencies' Brief") at 17; Brief of Amici Curiae Investment Company Institute, et al. ("Investment Co. Brief") at 18, citing various provisions in the FCRA. The Associations' cited FCRA provisions, however, arise in the context of consumer reporting and do not amount to a comprehensive regulation of affiliate sharing.

The Associations and amici claim regulations such as SB1 deprive the industry of access to consumers' valuable personal information and deprive consumers of products they want at lower prices. SB1, however, does not ban affiliate sharing. It simply provides consumers -- rather than financial institutions who are motivated by the revenue streams such information provides -- with the choice of whether to permit the disclosure of their personal information.

The Associations and amici further contend that both Congress and the California Legislature recognized that SB1 would be preempted. They rely, however, on statements by members of Congress during the FACT Act debate. Statements made in 2003 cannot be used to discern a prior Congress's intent in passing the FCRA preemption provision. Morever, statements attributed to the California Legislature are factually incorrect, as well as irrelevant to the question of congressional intent.

Finally, arguments asserted by the federal banking agencies as amici should be afforded no deference when raised, as here, in the context of a preemption challenge. The Court, and not administrative agencies, has the expertise and the power to determine the constitutional issue of preemption.

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION IS HEIGHTENED WHEN ANALYZING CONSUMER PROTECTION STATUTES ENACTED PURSUANT TO THE STATES' HISTORIC POLICE POWERS.

A. Congressional Intent To Preempt State Law Must Be Unambiguous.

In determining whether federal law preempts state law, the court's sole task is to ascertain the intent of Congress. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 557-558 (9th Cir. 2002). State law is preempted only if there is a clear congressional intent to supersede state law. *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." (Frankfurter, J.).)

The party claiming Congress intended to preempt state law bears the burden of proving it. *Elsworth v. Beech Aircraft Corp.*, 37 Cal. 3d 540, 548 (1984). This burden is high, as courts are reluctant to infer preemption. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

> [B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Medtronic, Inc., v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 313 U.S. 218, 230 (1947)). Accord *Oxygenated Fuels v. Davis*, 331 F.3d 665, 668 (9th Cir. 2003). Thus, the "starting presumption" is that Congress has not intended to preempt state law. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

In areas traditionally regulated by the states, such as consumer protection, establishing preemption is more difficult still. *Medtronic*, 518 U.S. at 485; *Nat'l Warranty Ins. Co. v. Greenfield*, 214 F.3d 1073, 1077 (9th Cir. 2000). In such cases, the courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). This presumption requires a "narrow reading of [the federal law provision]." *Id.*

B. California Enacted SB1 Pursuant to Its Historic Police Powers, Heightening the Presumption Against Preemption.

The states' historic police powers extend to the field of consumer protection, which includes statutes such as SB1. *See e.g., Smiley v. Citibank*, 11 Cal.4th 138, 148 (1995) ("The 'historic police powers of the States' extend to consumer protection.") (citations omitted). Accordingly, the improper preemption of SB1 that the Associations advocate here would threaten California's long-standing right to enact consumer protection laws, including statutes that protect consumers from violations of their financial privacy.

The Associations do not appear to dispute that the presumption against preemption applies in the field of consumer protection, that SB1 is just such a consumer protection law, or that they seek to prevent the State's law enforcement officials from enforcing SB1 on behalf of the public. Amicus Clearinghouse Association ("Clearinghouse") contends, however, that "the presumption against preemption is not triggered when there has been a significant federal presence in the area the State is attempting to regulate." Clearinghouse Brief at 20.

Clearinghouse misapprehends the area in which SB1 regulates. SB1 is a financial privacy law, regulating disclosures of personal information by financial institutions. Congress spoke clearly and definitively in the GLBA with respect to national standards on financial privacy, which is the sole subject of SB1. The only national standard is a floor, with the states free to enact more protective legislation. 15 U.S.C. § 6807(b).

C. The Purpose and Effect of SB1 Are To Protect Consumers' Fundamental Right to Privacy, Not To Ban Affiliate Sharing.

As discussed above, SB1 falls squarely within the states' historic police powers to protect their citizens. Its purpose and effect are to protect a consumer's fundamental right to privacy, by giving consumers a voice in deciding whether to have their highly sensitive personal information disclosed to affiliates of financial institutions.

Nonetheless, the Associations and amici mistakenly and repeatedly claim SB1 will prevent affiliate sharing. In fact, SB1 merely provides consumers with the right to decide whether their personal information may be disclosed. Unless a consumer affirmatively forbids such disclosure, the information may be freely disclosed to all affiliates. In addition, disclosures for purposes such as fraud prevention, risk control, and other functions are entirely exempt from SB1. Cal. Fin. Code § 4056(b).

In seeking to divest consumers of control over their personal information, the Associations and amici adopt a paternalistic approach that purports to know what is best for consumers and elevates profit over privacy. They argue affiliate sharing benefits the economy and consumers, but fear that consumers will not make the "right" decision to permit financial institutions to trade on consumers' information. If, however, affiliate sharing is good for consumers, as the Associations and amici contend, surely consumers can be trusted to choose to participate in the benefits of information sharing.

The benefits of affiliate sharing, even if they are as claimed by the Associations and amici, may raise policy issues but cannot provide a basis for overcoming the presumption against preemption or broadening the applicability of the FCRA preemption provision beyond its intended scope. Morever, even those who argue the value of information sharing recognize the importance of privacy.

See, e.g., *Financial Privacy: Hearings Before the Subcomm. on Fin. Insts. and Consumer Credit of the House Comm. on Banking and Fin. Servs.*, 106th Cong. (July 21, 1999) (statement of Federal Reserve Board Governor Edward M. Gramlich) at 2 ("As market processes evolve, there is evidence that consumers have come to value both economic efficiency and privacy."); Letter from Chairman Alan Greenspan to Representative Edward J. Markey (July 28, 1998) at 1 ("The appropriate balancing of the increasing need for information in guiding our economy to ever higher standards of living, and essential need of protection of individual privacy in such an environment, will confront public policy with one of its most sensitive tradeoffs in the years immediately ahead.")

II. THE FCRA'S PREEMPTION PROVISION PREEMPTS ONLY STATE LAWS THAT REGULATE CONSUMER REPORTING.

As the district court correctly found, the preemption clause at issue only applies in the context of consumer reporting. This is apparent from an examination of the statutory scheme, which deals exclusively with consumer reporting, and from the legislative history of the preemption clause itself, which was concerned with placing information shared among affiliates outside the reach of federal and state credit reporting laws.

A. The Legislative History of the 1996 Amendments Confirms That Congress Intended To Preempt Only State Laws Regulating Consumer Reporting, and Not State Financial Privacy Laws.

The 1996 amendments to the FCRA were the culmination of several years of congressional work revising various provisions in the FCRA. This work demonstrates that Congress's intent in enacting the 1996 amendments to the FCRA was to exclude affiliate sharing from the requirements of the FCRA and state credit reporting laws, and not to immunize such sharing from any and all regulations.

1. The Legislative History of Senate Bill 783.

In 1993, the Consumer Reporting Reform Act of 1994 was introduced in Congress and included amendments to the definition of "consumer report." Sen. Bill 783, 103d Cong. (1993) ("S. 783"). Although that legislation did not pass, the language in S. 783, which excluded information shared among affiliates from the definition of a consumer report, became law in 1996. Testimony presented during hearings on S. 783 is therefore relevant here and confirms that the overriding concern of Congress and those who testified -- including the Associations -- was to ensure that information sharing among affiliates would *not* be treated as a consumer report, thereby triggering all the requirements and restrictions of the

FCRA, and that such information sharing would not be subject to state consumer reporting laws.[3]

For example, in testimony presented before the Senate Banking, Housing and Urban Affairs Committee regarding S. 783 in 1993, Appellant American Bankers Association and others expressed this concern:

> The definition of "consumer report" included in the FCRA, which would be amended by S. 783, has created considerable uncertainty regarding the permissibility of sharing information among related entities. Generally, any communication of information bearing on a consumer's creditworthiness or other specified consumer characteristics may be covered by the definition of consumer report. *The entity furnishing such a communication runs the risk of becoming a consumer reporting agency and being subject to all applicable requirements of the FCRA.* On the one hand, it is clear that information shared among departments or divisions of the same legal entity is not covered by the definition of consumer report because the information is not communicated to a third party. On the other hand, it is less clear whether communications of information among separate affiliates of the same organization are covered. In this regard, separate but affiliated legal entities have been deemed to be third parties for purposes of the FCRA. As a result, organizations, such as bank holding companies, which are required by law to operate through separate legal entities in some contexts, such as interstate banking, are placed at a disadvantage when compared to organizations that are free to operate through departments or

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3. Amicus America's Community Bankers ("ACB") argues that the original version of the bill, proposed in 1992, preempted specifically only state laws regulating credit reporting. ACB Brief at 3, citing H.R. Rep. No. 102-692, at 74 (1992). ACB deems it significant that later versions of the bill omitted that limitation. However, courts can draw no inferences from previous amendments to a bill, if the final enacted version differs from the original version. *Solid Waste Agency v. U.S. Army Corp of Engineers*, 531 U.S. 159, 169-170 (2001) ("'[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." (citation omitted)).

divisions of the same legal entity. Similarly, organizations that choose to operate through separate legal entities for sound business and legal reasons are also disadvantaged.

The Associations believe that this disparity should be addressed in any federal legislation to amend the FCRA.

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, S. Hrg. 103-247 at 78, 103d Cong. (1993) (statement of Robert D. Hunter) (emphasis added) (Add. AG35).

The definition of "consumer report" was therefore amended to exclude communications among affiliated entities (15 U.S.C. § 1681a(d)(2)(A)(ii)-(iii)) to ensure that the provisions of the FCRA did not apply to affiliate sharing: "The Committee . . . 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. 103-209 at 9 (1993) (emphasis added) (Add. AG29). The Report further summarizes the amendments' impact on affiliate sharing:

> The Committee bill liberalizes the requirements that would otherwise apply to entities related by common ownership or affiliated by common corporate control *in connection with consumer reports*. Generally, under current law, when information concerning a consumer is shared, that information is deemed a "consumer report" under the FCRA, and the entity provided the information is considered a "consumer reporting agency," thereby triggering the requirements and consumer protections under the FCRA. The Committee bill specifies certain circumstances involving the sharing of

> information among affiliates where the permissible purpose and other provisions of the FCRA are inapplicable.

S. Rep. 103-209 at 5 (emphasis added) (Add. AG28).

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. 103-209 at 27-28 (Add. AG30-31). The preemption provision thus was linked to the amendment that excluded information sharing among affiliates from the definition of "consumer report." The amendments, taken together, were intended to ensure that the exchange of information among affiliates would be free from regulation under state or federal credit reporting laws.

2. The Legislative History of Senate Bill 650.

In 1995, Congress considered 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 further 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. 104-185 at 18-19 (1995) (Add. AG37-38).

The Associations' amici cite a portion of this report to argue that the FCRA sets forth a national uniform standard with respect to affiliate information sharing. *See, e.g.*, Agencies' Brief, at 2, quoting S.Rep. 104-185 at 55 (Dec. 14, 1995). This report, however, confirms that Congress's overriding purpose was to establish a national standard for *consumer reporting*:

> 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. 104-185 at 54-55 (emphasis added) (Add. AG40), 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. 104-185 at 54-55 (Add. AG40.)

The legislative history of S. 783 and S. 650 thus 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 state consumer reporting laws. Further, the Associations have not cited anything in the legislative history of the 1996 amendments supporting their interpretation that Congress intended the FCRA to reach beyond the scope of consumer reporting to void state financial privacy laws like SB1. Accordingly, states are free, as contemplated by the GLBA, to regulate such information sharing, provided they do not attempt to regulate it as a consumer report.

3. The FCRA's Findings Provision.

In its decision, the district court cited the findings provision of the FCRA, which states the purpose of the FCRA is to regulate consumer reporting agencies and to ensure the accuracy and fairness of consumer reporting [ER 85] 15 U.S.C.§ 1681. The Associations argue these findings are no longer relevant because of the 1996 and 2003 amendments to the FCRA. They do not, however, offer any factual or legal authority to support this proposition. Congress has not amended or repealed section 1681. Absent such action, the findings Congress initially enacted remain valid indicia of congressional intent.

B. The Proper Application of Statutory Construction Principles Confirms That the FCRA's Preemption Clause Is Limited to the Context of Credit Reporting

In arguing that all sharing of information among affiliates is included within the scope of the FCRA preemption provision, the Associations focus on the "plain language" of the provision, which preempts 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). Statutory construction, however, goes far beyond the myopic focus on isolated words and phrases in a statute, which can result in just the type of distorted interpretation the Associations propose here. Rather, words and phrases

must be examined to determine how Congress intended them to function within the statutory scheme. This analysis -- which, as discussed below, the Supreme Court has repeatedly endorsed -- results in a more narrow interpretation of the preemption provision than its "plain language" suggests at first glance. When the provision is examined in context, as the law requires, it is apparent the FCRA preemption provision does not extend beyond the scope of consumer reporting, and cannot reach a financial privacy law like SB1.

1. The Preemption Provision Must Be Construed Within the Context of the FCRA and with the Goal of Discerning Congress's Intent.

Any interpretation of the FCRA's preemption provision must place the measure within the context of the rest of the statute. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1249 (9th Cir. 2000) ("In interpreting the intent of Congress it is essential to consider the statute as a whole.") *See also Sink v. Aden Enter.*, 352 F.3d 1197, 1200 (9th Cir. 2003) ("The language of a statute must be interpreted in its context to effectuate legislative intent.") In particular, where, as here, federal law threatens to displace state laws that are within the states' historic police powers, evidence of congressional intent to preempt must be clear and manifest, and the federal preemption provisions must be construed narrowly. *Cipollone*, 505 U.S. at 518, 523; *Medtronic*, 518 U.S. at 484-485.

As the Supreme Court stated in *Medtronic,* 518 U.S. at 484, while the existence of an express preemption provision means that Congress intended to preempt "at least some state law," the court "must nonetheless identify the domain expressly pre-empted by that language." *Id.* (internal quotations and citations omitted). Further, while the analysis of the scope of the preemption statute begins with its text, "[the court's] interpretation does not occur in a contextual vacuum." *Id.* at 485. It must be informed by two presumptions about preemption. First, the presumption against preemption of state police power regulations "support[s] a narrow interpretation of such an express command [of preemption]." *Id.* Second, the analysis of the scope of the express preemption clause must rest on a "'fair understanding of congressional purpose'":

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Id. at 486 (internal quotations and citations omitted).

At issue in *Medtronic* was whether the federal Medical Device Amendments' express preemption of state laws that imposed "requirements" in addition to, or different from, the federal requirements for medical device safety

preempted plaintiff's state common law causes of action against a manufacturer of medical devices. Defendant had argued that the word "requirement" included state common law causes of action because they alter the incentives and duties imposed on manufacturers.

The Court rejected this broad interpretation. "[W]e cannot accept Medtronic's argument that by using the term 'requirement,' Congress clearly signaled its intent to deprive States of any role in protecting consumers from the dangers inherent in many medical devices." *Id.* at 489. The Court noted that Congress was "primarily concerned with the problem of specific, conflicting state statutes and regulations rather than general duties enforced by common-law actions." *Id.* This was confirmed by the legislative history, which contained nothing supporting the broad interpretation urged by defendant. *Id.* at 491. The Court concluded that "few, if any, common-law duties have been pre-empted by this statute," and held that none of plaintiff's common law claims was preempted. *Id.* at 502-503.

In *Department of Revenue of Oregon v. ACF Industries,* 510 U.S. 332 (1994), railroad car lines challenged an Oregon state law that imposed an ad valorem tax on railroad property; that law exempted certain business property, but did not exempt railroad equipment. The rail lines argued that the state law violated the federal "Railroad Revitalization and Regulatory Reform Act" ("4-R

Act"), which prohibited states from imposing certain types of discriminatory taxes on rail lines. Specifically, the rail lines argued that the Oregon tax fell within an apparent catchall provision in the 4-R Act which mandated that a state "may not . . . impose 'another tax' that discriminates against a rail carrier . . . ." 510 U.S. at 336 (quoting 49 U.S.C. § 11503(b)(4)). The Court of Appeals agreed, and enjoined the state from levying the tax, holding that "the 'most natural reading' of the provision dictates that '*any* exemption given to other taxpayers but not to railroads' is forbidden. . . ." *Id.* at 338.

The Supreme Court reversed. The Court noted that "the Carlines' reading of subsection (b)(4), while plausible when viewed in isolation, is untenable in light of § 11503 as a whole." *Id.* at 343. The Court found section 11503 primarily concerned the prohibition of discriminatory tax *rates*, not tax *exemptions* like those in the Oregon law. *Id.* Accordingly, while Oregon's tax law disfavored rail lines and was therefore a tax that discriminated against rail carriers, it was not the type of discriminatory tax that fell within the scope of the federal statute. Indeed, the Court noted that the 4-R Act's legislative history manifested Congress's general concern with the discriminatory taxation of rail carriers; nothing in the legislative record suggested that Congress had any particular concern with property tax exemptions, or that Congress intended to prohibit exemptions in subsection (b)(4). *Id.* at 345.

Moreover, the Court emphasized that "[p]rinciples of federalism support, in fact compel, our view." *Id.* "When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope." *Id.* The Court's narrow construction of the federal statute was in keeping with these principles. *Id.* at 345-346.

Similarly, the Supreme Court's decision in *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19 (1988), demonstrates the necessity of narrowly construing a state law preemption clause within a federal statute. In *Shell Oil,* plaintiffs claimed that a federal statute, the Outer Continental Shelf Lands Act ("OCSLA"), preempted Iowa's apportionment taxation formula as applied to the sale of oil and gas from the outer Continental Shelf.

Plaintiffs had argued that the express language of the OCSLA evidenced a clear congressional intent to ban states from including in their apportionment formulas income arising from the sale of outer Continental Shelf oil and gas. Specifically, plaintiffs looked to the following text from the OCSLA:

> *State taxation laws shall not apply to the outer Continental Shelf.* . . . The provisions of this section for adoption of State law as the law of the United States *shall never be interpreted as a basis for claiming any interest in* or jurisdiction on behalf of any State for any purpose over the seabed and

> subsoil of the outer Continental Shelf, *or the property and natural resources thereof or the revenues therefrom.*

488 U.S. at 24-25 (quoting 43 U.S.C. §§ 1333(a)(2)(A) and (a)(3)).

The Supreme Court rejected plaintiffs' interpretation and affirmed the lower courts' rulings that there was no preemption, based upon a review of the text and history of the federal statute. The Court explained that "the meaning of words depends on their context." 488 U.S. at 25. "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 . . . .'" *Id.* at 25, n.6 (citations omitted).

Looking at the entire section in which the text relied on by plaintiffs appeared, the Court found Congress's intent was more narrow than the wide-sweeping preemption plaintiffs advocated:

> Reading the statutory provisions in the context of the *entire* section in which they appear, we therefore believe that in enacting subsections 1333(a)(2)(A) and 1333 (a)(3), Congress had the more limited purpose of prohibiting adjacent States from claiming that it followed from the incorporation of their civil and criminal law that their tax codes were also directly applicable to the OCS.

488 U.S. at 26.

Principles of statutory construction also demonstrate the importance of looking at the problem the legislation addressed and the prior history of congressional action regarding the problem. With such an examination, the Court may "'reconstitute the gamut of values current at the time when the words were uttered.'" *Nat'l Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612, 620 (1967) (quoting Letter of Judge Learned Hand, quote in Lesnick, The Gravamen of the Secondary Boycott, 62 Col. L. Rev. 1363, 1393-1394, n. 155 (1962)).

> 'Before the true meaning of a statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation.'

Id. at 620, n. 5 (quoting 2 Sutherland, Statutory Construction 321 (Horack ed. 1943)). "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'" *Id.* at 619 (citation omitted).

The Supreme Court has confirmed that taking the literal meaning of a provision within a statute out of context may fly in the face of Congress's intent in passing the statute. In *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), for example, the Court reversed the Fourth Circuit's dismissal of a retaliation claim brought by a former employee pursuant to Title VII of the Civil Rights Act of

1964. The statute made it unlawful for an employer to discriminate "against any of his employees or applicants for employment" in retaliation for using or assisting others in using the protections of Title VII. The employer alleged -- and the Fourth Circuit agreed -- that only *current* employees could sue under Title VII. *Id.* at 339. The Supreme Court reversed, holding that the retaliation provision within Title VII must be analyzed in the context of the statute as a whole. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341 (citations omitted).

Thus, even though the language of the retaliation provision "at first blush" appeared limited to those having an existing employment relationship with the employer, such a reading did not comport with the context of the statute as a whole. *Id.* Accordingly, even though Congress *could* have specifically identified both former and current employees, instead of referring only to "employees," the fact that Congress chose not to do so did not mean that Congress intended the statute to apply to current employees only. *Id.* at 342. In sum, it was only through examination of the statutory scheme as a whole that the provision at issue could be interpreted.

These principles should inform the analysis here, which requires viewing the statutory scheme holistically and with due respect for the principles of

federalism and congressional purpose. The proper interpretation requires a reading of the preemption provision in the context of the FCRA and the problem Congress was addressing, as well as application of the same hesitation to extend a federal statute beyond its scope as demonstrated by the Supreme Court in the cases cited above. As the testimony of the banking representatives and the Senate Report on S. 783 demonstrate, the intent of Congress in enacting the 1996 amendments was to ensure that information sharing among affiliates *not* be subject to state credit reporting laws. Given the absence of evidence to support the Associations' overly broad interpretation, they cannot demonstrate that it was the clear and manifest intent of Congress to preempt state privacy laws that regulate disclosures among affiliates.

2. The Associations and Amici's Cited Authority Does Not Support Their Proposed Method of Statutory Construction.

The cases cited by the Associations and amici to support their literal "plain meaning" analysis in fact confirm that a preemption clause within a statute must be viewed in the context of the subject matter it seeks to regulate. In *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994), for example, the Secretary of Transportation, purporting to construe the federal Vehicle Information and Cost Savings Act, which mandated odometer disclosures,

promulgated a regulation exempting large trucks from the odometer disclosure requirement.

The Court held the Secretary exceeded his authority in promulgating the regulation. *Id.* at 436. The Court noted it would have been proper "to construe the statutory language 'to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress,'" but that the Court would have been "writing a different statute, not just construing it" by creating an exemption not authorized by Congress. *Id.* (citation omitted). In this case, unlike in *Orca Bay*, the Court is called upon not to re-write a statute but to construe it, which is proper and, indeed, necessary.

In *In re Transcon Lines v. Sterling Press*, 58 F.3d 1432 (9th Cir. 1995), the bankruptcy statute at issue did not produce an absurd result when taken literally. Here, the language within section 1681t(b)(2) requires analysis against the backdrop of the statute as a whole because the preemption provision, read literally, would result in an absurd, overly broad result.

In *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir. 2002), the Court construed the scope of a provision of the Federal Aviation Administration Authorizing Act ("FAAA"), which preempted state regulation of motor carriers transporting "property." The issue was whether the provision precluded state regulation of transporters of garbage.

The Court stated: "To determine Congress' intent on preemption, we begin with the 'text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.'" *Id.* at 1328 (citation omitted). The Court further noted that Congress had not defined the term "property," and the meaning of the term was not "perfectly clear" from the context of the statute. "So, to interpret this statute in accord with Congress' intent, it is appropriate that we look beyond the text of the statute to determine Congress' purpose in enacting this statute." *Id.* at 1329.

The legislative history showed that the major purpose of the legislation was to level the playing field between air and motor carriers and showed no intent to preempt state and local regulation of garbage collection. The Court concluded that "[a]bsent a 'clear and manifest' purpose, if not an explicit instruction from Congress, we decline to divest states and local governments of this area of regulation, crucial to health and safety." *Id.* at 1330.

Similarly, Congress failed to define "information" in the FCRA preemption provision. The legislative history and context, however, show that the intent was to prevent states from regulating information exchanged among affiliates as a consumer report, and not to divest states of the ability to protect the privacy of consumers.

C. Adherence to a Literal Interpretation of the FCRA Preemption Provision Would Lead to Absurd Results.

The Associations and amici's primary assault on SB1 is to demand that the FCRA preemption provision be read literally and in isolation, without reference to context. Read literally, however, the preemption provision would invalidate any state law regulating the disclosure between *any* affiliates of *any* information. Neither the term "information" nor the phrase "exchange of information" is defined in the FCRA. "Person" is defined in the FCRA and includes "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b).

Read literally, this would declare off limits to state regulation a number of areas of vital interest to the states, in addition to the financial services industry. For example, such a literal reading of section 1681t(2)(b) would invalidate state laws regulating disclosures by professional licensees, such as tax preparers, real estate agents, law firms, and health care professionals, as well as medical privacy statutes, as applied to disclosures among affiliated persons.[4]

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4. See e.g., Cal. Bus. & Prof. Code § 17530.5 (prohibiting disclosure of information obtained during tax preparation, without the consumer's consent or other limited circumstances); Cal. Revenue & Tax Code § 7056.6 (same); Cal. Civil Code § 56.10 (prohibiting disclosure by provider of health care, health care service plan, or contractor of medical information regarding a patient of the health care provider or an enrollee or subscriber of a health care service plan without patient consent except in limited circumstances); Cal. Civ. Code § 1799.1 (prohibiting

There is no viable policy rationale -- and the legislative history of the FCRA is barren of any reasoning or intent -- for giving *any* entity or individual carte blanche to share all information with affiliates, free from any regulation by state law. Indeed, courts should interpret statutes so as to avoid absurd results. As the Ninth Circuit explained, in rejecting the literal meaning of a statutory provision in favor of the purpose of the statute:

> Ordinarily, if the language of the statute is clear and unambiguous, there is no need to resort to the indicia of the intent of the legislature. [citation] However, this "plain meaning" rule "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." [citation] "It is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [citation] "The intent prevails over the letter, and the letter will, if possible, be so read so to conform to the spirit of the act." [citation]

Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1301 (9th Cir. 1997) (applying California law). The United States Supreme Court has reasoned:

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a business entity that performs bookkeeping services from disclosing records absent written consent, subject to narrow exceptions); Cal. Civ. Code § 1799.1a (prohibiting the disclosure of information obtained from a federal or state income tax return in connection with a financial or other business-related transaction without the consumer's written consent or in other limited circumstances); Cal. Civ. Code § 1799.3 (prohibiting the disclosure of personal information by a person providing video cassette sales or rental services to any person without the consumer's written consent, subject to limited exceptions); Cal. Code Civ. Proc. § 1985.3 (requiring a litigant seeking personal records to provide notice to the consumer whose records are being sought to give the consumer an opportunity to object to that production); Cal. Ins. Code § 791.13 (prohibiting an insurance institution, agent, or insurance-support organization from disclosing any personal or privileged information about an individual collected or received in connection with an insurance transaction without written consent, with certain exceptions).

> `There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, 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 Company, 383 U.S. 392, 400 (1966), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940). See also *United States v. Romero-Bustamente*, 337 F.3d 1104, 1110 (9th Cir. 2003) (rejecting the plain meaning of the word "dwelling" and instead, with the aid of legislative history, interpreting "dwelling" to include backyard for purposes of Fourth Amendment search and seizure challenge).

Here, the result of adhering to a strict plain meaning analysis is both absurd and at variance with the underlying policy of the FCRA. Indeed, the Associations do not themselves adhere to this literal interpretation. Instead, they implicitly construe the preemption provision as invalidating state laws that regulate the sharing of *"customer"* or *"consumer" information* by affiliates of *financial institutions*. *See, e.g.,* AOB at 8-9, 11, 24, 34; Agencies' Brief at 6; Clearinghouse Brief at 9-10, 21. Thus, the Associations' implicit limitation of the preemption provision confirms that the provision cannot be read as broadly as its "plain

language" would suggest. Unlike the interpretation offered by the State, however, which limits the scope of the provision to consumer reporting consistent with the Act's purpose and legislative history, the Associations' construction is their own invention designed to suit their purposes in this litigation.[5/]

D. Congress Has Not Established National Standards Regulating Affiliate Sharing Generally.

The Associations and amici cite what they claim are examples in the FCRA of provisions regulating the sharing among affiliates of information that is not a "consumer report." These examples are cited both as a means of challenging the district court's ruling that the FCRA, including its preemption provision, is limited to consumer reporting and as evidence of an alleged congressional intent to establish uniform national standards for disclosure of information among affiliates. AOB at 27-28, 33; Agencies' Brief at 5-7, 17-19; ACB Brief at 2; Clearinghouse Brief at 20-21; Brief of Amicus Curiae Citizens for a Sound Economy ("Citizens Brief") at 5-6.

The provisions cited, however, do not support the Associations' conclusion, because they are all anchored to the definition of a consumer report; the sole

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5. Recognizing that literal construction would create an absurd result, the district court in *Bank of America v. City of Daly City*, 279 F.Supp.2d 1118 (N.D. Cal. 2003) interpreted the FCRA preemption provision as limited to "consumer" information. Again, this limitation does not comport with the plain meaning espoused by the Associations. Moreover, even the *Daly City* court's interpretation does not eliminate absurd results, in that all the state privacy laws cited in footnote 4 apply to "consumer" information. This Court dismissed the *Daly City* appeal as moot and simultaneously vacated the judgment.

purpose of each is to subject the disclosure at issue to the provisions of the FCRA. Morever, two of the provisions regulate only the *use* of information obtained from an affiliate, and not the *disclosure*. Thus, the context of the FCRA preemption provision, which the court is required to consider in determining its scope, remains that of consumer reporting, and not a general regulation of the disclosure of information among affiliated entities.

1. The FCRA Regulates the Compilation, Dissemination and Use of "Consumer Reports".

"Consumer report" is defined to include any communication by a consumer reporting agency of information bearing on enumerated attributes which is used or expected to be used or collected in whole or part as a factor in determining a consumer's eligibility for credit, insurance, employment, or any other of the specified permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA regulates "consumer reporting agencies," defined generally as persons regularly engaged in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. 15 U.S.C. § 1681a(f).

The Associations and amici cite 15 U.S.C. §§ 1681a(d)(2)(i) - (iii) and 1681a(d)(3) as evidence that the FCRA regulates affiliate sharing of information that is not a "consumer report." AOB at 32; Agencies' Brief at 17-18; Investment

Co. Brief at 18; Citizens Brief at 7. Significantly, these provisions apply *only* to information that would be a consumer report but for the exclusion of information communicated among affiliates.

Section 1681a(d)(2)(iii) governs communications among affiliates of information other than information as to transactions or experiences between a consumer and the person making the report. Such communications are excluded from the "consumer report" definition and thus from the operation of the FCRA so long as the consumer is given the opportunity to opt out of such communications. Section 1681a(d)(3) was added by the FACT Act to provide that the exclusion of affiliate sharing from the "consumer report" definition does not apply to some medical information shared among affiliates.

These sections apply *only* to information that would be a "consumer report" but for the exclusion of affiliate sharing from that definition. The provisions thus do not constitute evidence of regulation of disclosures among affiliates beyond the context of consumer reporting, or of a comprehensive set of national standards regulating disclosures among affiliates.

Two other provisions relied on by the Associations do not regulate the disclosure of information shared among affiliates at all. The FACT Act added a new section 624 to the FCRA (15 U.S.C. § 1681s-3) to provide that certain information received from an affiliate may not be used "to make a solicitation for

marketing purposes . . . " unless the consumer is given an opportunity to prohibit such solicitations. 15 U.S.C. § 1681s-3(a)(1).

This provision does not restrict, condition or prohibit the *disclosure* of information among affiliates in any fashion; it simply gives consumers the choice of opting out of marketing solicitations. Section 624 therefore functions like other laws or regulations that allow consumers to protect themselves from unwanted marketing, such as the Federal Trade Commission's do-not-call rule (16 C.F.R. § 310.4(b)(1)(iii)) or the FCRA provision that allows consumers to block some unsolicited credit offers (15 U.S.C. § 1681b(e)). Neither these provisions nor section 624 regulates the disclosure of information among affiliates.[6]

The section of the FCRA governing adverse action notices likewise regulates only use and not disclosure. As part of the 1996 amendments to the FCRA, 15 U.S.C. § 1681m(b)(2) imposes certain duties on persons who take an adverse action with respect to a consumer, based in whole or in part on information received from an affiliate that bears on the credit worthiness, credit standing, or one of the other attributes listed in the definition of a consumer

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6. The FACT Act also provides that requirements with respect to the use by a person of information received from an affiliate, such as the requirements of section 624, constitute requirements with respect to the exchange of information among affiliates within the meaning of section 1681t(b)(2). 15 U.S.C. § 1681s-3(c). Contrary to the Associations' assertions, this does not demonstrate a congressional intent to preempt all state disclosure laws that affect affiliate sharing. Section 624, including its preemption provision, regulates *use*, not *disclosure*, and therefore cannot provide a basis for preempting SB1, a financial privacy disclosure law which does not regulate use.

report[7] (see 15 U.S.C. § 1681a(d)(1)). Nothing in section 1681m(2) prohibits or restricts the disclosure of information by an affiliate; only when a person uses the information as a basis for an adverse action do the requirements of section 1681m(b)(2) apply.

Moreover, both provisions apply only where the information being shared meets the basic definition of a consumer report. This limitation is explicit with respect to section 1681s-3, which applies only to information "that would be a consumer report" but for the exclusion from that definition for information shared among affiliates. 15 U.S.C. § 1681s-3(a)(1). Section 1681m(b)(2) likewise applies to consumer report information; namely, information that bears on one of the enumerated attributes set forth in section 1681a(d)(1) that is used for one of the purposes listed in section 1681a(d)(1). 15 U.S.C. § 1681m(b)(2)(B) and (C)(i)(II). Since the provisions cited, in substance and purpose, occur within the context of consumer reporting, and in some cases apply solely to use and not disclosure, they cannot serve as a basis for the broad reading of the FCRA preemption provision posited by the Associations and amici.[8]

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7. The adverse action notice requirement does not apply where the information furnished by the affiliate consists of information solely as to its transactions or experiences with the consumer or information in a consumer report. 15 U.S.C. § 1681m(b)(2)(C).

8. Although the Associations do not explicitly argue field preemption, their analysis and argument based on the alleged existence of a set of national standards seems to suggest this. The provisions discussed above and relied on by the Associations fail to demonstrate that Congress intended to occupy the field of information disclosures among affiliates.

2. Legislative History Relied on by Amici Also Relates to Consumer Reporting.

The Agencies cite several congressional reports as evidence of the existence of a "national system to govern the accumulation, dissemination and use of a consumer's personal financial information." Agencies' Brief at 1-2. In fact, the references relied on are specifically related to credit reporting and do not provide evidence of a congressional intent to mandate uniform national standards with respect to affiliate sharing in general, or financial privacy in particular.

The Agencies quote a Federal Reserve Board official who testified that the FCRA's affiliate-sharing provisions allow large financial enterprises to manage and use consumer information efficiently. Agencies' Brief at 15. That topic of the statement, however, was the use of information in connection with credit reporting, not affiliate sharing generally. The very next sentence in the statement reads: "A key consideration in an examination of federal preemption is the impact that different *state laws on credit reporting* could have on the availability and cost of consumer credit." *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"), at 9 (emphasis added).[9]

While the material cite by the Agencies may provide evidence of a congressional intent to establish a preemptive national standard with respect to some aspects of credit reporting and credit granting, it does not demonstrate an intent to establish such standards with respect to disclosures among affiliates generally. It would be contrary to the rules of statutory interpretation and the principles of federalism clearly established in the cases discussed in Part II.B.1. to find that the FCRA preempts a state privacy law that is unrelated to credit reporting.

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9. The Agencies cite additional congressional material that also relates to credit reporting and granting, and not to disclosures among affiliates in general: S. Rep. 104-185 (Dec. 14, 1995) (Agencies' Brief, at 2) ("*credit reporting and credit granting* are, in many aspects, national in scope, . . ." *Id.* at 55 (emphasis added)); H.R. Hrg. 108-33 (Agencies' Brief, at 13-15) (testimony on behalf of the Conference of State Bank Supervisors that "the benefits of uniformity to our *credit-granting system* and the value of this system to consumers and our economy" outweigh CSBS's objections to preemption. *Id.* at 13-14 (emphasis added)); and *Fair and Accurate Credit Transactions Act of 2003, Hearing Before the House Comm. on Financial Services*, 108th Cong. (2003) (Agencies' Brief, at 13-14) (testimony of Treasury Secretary Snow concerning benefits of national standards with respect to credit granting and prevention and correction of identity theft. *Id.* at 9-10.)

E. <u>Omission of the Phrase "Consumer Reports" from Section 1681t(b)(2) Does Not Demonstrate that Congress Intended the Affiliate-Sharing Provision to Extend Beyond the Scope of the FCRA</u>.

To support their reading of section 1681t(b)(2), the Associations contend that references to consumer reports in other preemption provisions in the FCRA demonstrate Congress intended to preempt the states from regulating *all* information sharing by affiliates, and not just information sharing in the context of consumer reporting. Specifically, the Associations note that limiting references, such as "consumer reports" and "consumer's files," appear in other preemption clauses in section 1681t(b)(1). AOB at 25-26. The Associations reason that the absence of such phrases in the affiliate-sharing provision demonstrates Congress's intent that the affiliate-sharing provision not be limited to consumer reporting. The Associations cite *Russello v. United States*, 464 U.S. 16 (1983), to support this claim. AOB at 26 (quoting *Russello*, 464 U.S. at 23 ("[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 presumption, however, is appropriate only in limited circumstances, and cannot be mechanically applied. Indeed, the Supreme Court has repeatedly found application of the so-called *Russello* presumption to be inappropriate, as it is here. For example, in *City of Columbus v. Ours Garage and Wrecker Service,*

536 U.S. 424 (2002), the Court addressed a federal preemption provision that prohibited "a State [or] political subdivision of a State" from enacting certain regulations governing motor carriers. *Id.* at 428 (quoting 49 U.S.C. § 14501(c)(1)). As an exception to this general rule of preemption, Congress provided that "the preemption directive shall not restrict the safety regulatory authority *of a State* with respect to motor vehicles." *Id.* at 428 (quoting 49 U.S.C. § 14501(c)(2)(A)) (emphasis added). Tow truck operators challenged a municipal regulation on the grounds of preemption. Relying on *Russello,* the plaintiffs contrasted the inclusion of "political subdivisions of a State" in the preemption clause with the absence of that phrase from the savings clause. *Id.* at 433-434.

The Court observed that "§ 14501(c)'s 'disparate inclusion [and] exclusion' of the words 'political subdivisions' support an argument of some force . . . ." *Id.* at 434. Nevertheless, the Court held the municipal regulation fell within the savings clause. Upon examination of the statute as a whole "and with a view to the basic tenets of our federal system . . . we conclude that the statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* (citations omitted).

The Court similarly refused to apply the *Russello* presumption in *Field v. Mans*, 516 U.S. 59, 60 (1995) where the Supreme Court examined the Bankruptcy Code's provision that debts induced by a fraudulent misrepresentation are not

dischargeable. *Id.* (citing 11 U.S.C. § 523(a)(2)(A) ("section 2(A)")). The issue was what level of reliance was required to exempt the debt from discharge under section 2(A). The creditors made a "negative pregnant argument," which is the "rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." *Id.* at 67 (citing *Russello,* 464 U.S. at 23). The creditors argued that section 2(A) required only "actual reliance"; they claimed that the inclusion of a reasonable reliance requirement in another subsection (section 2(B)) meant that it was deliberately excluded from section 2(A). 516 U.S. at 66. The Court rejected the "negative pregnant argument," observing that it "should not be elevated to the level of interpretive trump card." *Id.* at 67, 75 (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 preemption provision far beyond its intended reach.

The Associations' reliance on the absence of "consumer report" or similar phrase in the affiliate-sharing preemption provision is misplaced for another reason. The preemption clauses from section 1681t(b)(1) upon which the Associations rely cite specific sections in the FCRA that contain substantive regulations relating to the subject matter referred to in the preemption clause. For example, section 1681t(b)(1) preempts state law with respect to any subject matter

regulated under section 1681b(c) or (e), relating to the prescreening of consumer reports; section 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 section 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 for the simple reason that 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.

III. NEITHER THE TEXT NOR THE LEGISLATIVE HISTORY OF THE FACT ACT IS RELEVANT TO THE FCRA PREEMPTION PROVISION AT ISSUE HERE.

The Associations contend the FACT Act of 2003 dispositively establishes that the FCRA preemption provision preempts state laws such as SB1. AOB at 32. The Associations, however, misconstrue the intent and impact of the FACT Act.

The FACT Act did not substantively alter the affiliate-sharing preemption provision, nor does the legislative history of the FACT Act provide any support for the Associations' overly expansive interpretation of that provision.

A. The FACT Act Did Not Impact the FCRA Preemption Provision.

The Associations contend that the 2003 FACT Act amendments "confirmed preemption, once and for all, by further regulating affiliate sharing, broadening § 1681t(b)(s), and making it permanent." AOB at 32. Their federal agency amici also claim that when Congress passed the FACT Act to ensure the efficiency of the "national credit system by creating a number of preemptive national standards" (citing H.R. Conf. Rep. No. 108-396, at 66 (2003)), those standards included the "preemptive national standard" for affiliate sharing in 15 U.S.C. § 1681t(b)(2).

Contrary to these assertions, the preemption provision relied on by the Associations reads the same now as it did prior to enactment of the FACT Act. 15 U.S.C. § 1681t(b)(2). The FACT Act merely deleted the sunset clause, which provided that the preemption provisions in section 1681t(b) would not apply to state laws enacted after January 1, 2004, that gave greater protection to consumers than the FCRA. Former 15 U.S.C. § 1681t(d)(2). The deletion of this sunset clause, however, had no effect on the substance of the affiliate-sharing preemption provision, which remained unchanged. Morever, whether the sunset clause was deleted or permitted to remain could have no effect on SB1, because SB1 was

enacted in August 2003, not "after January 1, 2004" as required by the sunset clause. See former 15 U.S.C. § 1681t(d)(2)(A).[10]

B. The Legislative History of the 2003 FACT Act Is Not Probative of Congress's Intent in 1996 in Enacting the FCRA Preemption Provision.

1. Comments From Members of Congress Regarding Failed Legislation in 2003 Have No Bearing on Congress's Intent in Enacting the FCRA Amendments in 1996.

The Associations argue that Congress's failure in 2003 to impose SB1-type standards nationally should be construed as "providing the clearest possible confirmation that SB1 was intended to be preempted." AOB at 34. Congressional inaction on the national level, however, is not equivalent to a prohibition of action on the state level. If anything, the failure to impose a national standard could suggest that Congress *endorsed* state regulation in the area.

Because such conflicting inferences can be drawn from congressional inaction, the Supreme Court has made clear that it is unwise to draw *any* inferences from failed legislation. "'[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency*, 531 U.S. at 169-170 (citations

10. Discussion of other provisions of the FACT Act relied on by the Associations and amici is in Part II.D.1. above.

omitted). See also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (congressional inaction lacks "persuasive significance" because "several equally tenable inferences" may be drawn from such inaction).

2. Opinions of Subsequent Congresses on the Intent of Previously Enacted Legislation Are Not Relevant to Legislative Intent.

The Associations and amici cite statements by Senators Feinstein and Boxer during the FACT Act debate as evidence of their belief that SB1 was preempted.[11] Statements in 2003 by any member of Congress regarding the meaning of the FCRA's preemption provision and its impact on state financial privacy laws should be accorded no weight, for they cannot be used to illustrate a prior Congress's intent in passing the 1996 preemption provision.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Supreme Court rejected an interpretation of the 1967 Age Discrimination in Employment Act ("ADEA") that was based on comments in a 1978 committee report accompanying amendments to the ADEA. The Court emphatically stated that the 1978

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11. One of the statements is not a quote from Senator Feinstein, but rather is a letter the Senator read into the record from Jackie Speier, the California legislator who introduced SB1 in the California Legislature. The Associations take Senator Speier's quote out of context. Senator Speier was commenting on the contrary positions advocated by banking industry representatives, who she contends supported SB1 enthusiastically and without reservation. The gravamen of Senator Speier's letter was to chide these industry representatives who now criticized Boxer's and Feinstein's amendment to the FACT Act that would have imposed opt-out requirements similar to SB1 nationally. Thus, Senator Speier remarked on their marked change in position: "Now the story is different, as industry sees a political opportunity to preempt California's standard on affiliate sharing with a weaker one." 149 Cong. Rec. S13680 - S13681 (Nov. 4, 2003) (statement of Sen. Feinstein) (Add. AG23-24).

committee report "was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations . . . are in no sense part of the legislative history.' 'It is the intent of Congress that enacted [the section] . . . that controls.'" 441 U.S. at 758 (citations omitted, alteration in original). *See also United States v. X-Citement Video*, 513 U.S. 64, 77, n.6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight [citations] . . . .")

To paraphrase the Supreme Court, legislators' comments during the 2003 debate on the FACT Act "are in no sense part of the legislative history" of the 1996 amendments to the FCRA and should not be considered. Indeed, to interpret a law based on the opinions of legislators expressed years after the law's passage would create perpetual uncertainty as to the law's meaning. Thus, as a matter of law and logic, legislators' opinions expressed seven years after the fact about what the 1996 amendments to the FCRA were intended to, or did, accomplish should be disregarded.

The Associations and amici rely heavily on an article written by an attorney who worked for the House Committee on Banking and Financial Services at the time of the 1996 amendments. AOB at 30; ACB Brief at 3, quoting Joseph L. Seidel, *The Consumer Credit Reporting Reform Act: Information Sharing and Preemption*, 2 N.C. Banking Inst. 79, 90-91 (1998). This article, written by

someone who was not a member of Congress, cannot be considered in determining Congress's intent in enacting the preemption provision at issue. *Cf. Oscar Mayer & Co.*, 441 U.S. at 759 ('[subsequent] [l]egislative observations . . . are in no sense part of the legislative history.'' ''It is the intent of Congress that enacted [the section] . . . that controls.'"). Mr. Seidel's comments cannot be viewed, even in the most favorable light, as observations by a legislator. Accordingly, his post hoc opinion about Congress's intent should be disregarded.

Morever, Mr. Seidel's opinions should not be viewed as unbiased and objective because, at the time the article was published, he was employed as a lobbyist representing the interests of various financial institutions. For example, in 1997 and 1998, Mr. Seidel was a lobbyist for Aegon USA, Inc., an insurance company. Also in 1998, Mr. Seidel was a lobbyist for the Ad Hoc Coalition of Commercial and Investment Banks, as well as the Securities Industries Association, one of the amici in this case.[12/]

3. Statements by Opponents of Legislation Should be Accorded No Weight.

Any doomsday statements by Senators Boxer and Feinstein regarding the consequences if Congress did not pass their amendment -- or did pass the FACT Act, which the Senators opposed -- must be disregarded. Statements by

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12. See http://williamsandjensen.com.

opponents of a bill are of limited value in ascertaining legislative intent. *Shell Oil Company*, 488 U.S. at 29 ("This Court does not usually accord much weight to the statements of a bill's opponents. '[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' [citations]"(alteration in original)). As the Supreme Court has explained, in rejecting the use of statements by a bill's opponents, "'in their zeal to defeat a bill, they understandably tend to overstate its reach.'" *Bryan v. United States,* 524 U.S. 184, 196 (1998) (citation omitted). *See also Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 639-640.

C. Congressional Intent Cannot Be Discerned from State Legislative Materials.

Comments of California legislators concerning SB1 cannot be probative of *Congress's* intent in enacting the FCRA amendments in 1996; opinions expressed in state legislative committee reports prepared by staff are of even less interest, yet amici rely on them. *See e.g.*, Clearinghouse Brief at 13-14, 19; Investment Co. Brief at 22-25. These amici have not cited, nor could they cite, any authority for the proposition that state legislative materials discussing the effect of a federal preemption provision are relevant in ascertaining congressional intent. Moreover, legislators are presumed not to engage in idle acts. *Shoemaker v. Myers*, 52 Cal.3d 1, 22 (1990). Accordingly, if California legislators had believed SB1 would be preempted, they would not have engaged in the futile exercise of enacting it. Most important, the Associations are factually and legally incorrect in

arguing that California legislators believed SB1 was preempted, but for the FCRA sunset clause.

1. The California Legislature Did Not Believe the FCRA Preempted SB1.

Amici refer to committee reports on SB1 to argue that the California Legislature assumed SB1 would be preempted by the FCRA if the sunset provision were rescinded, making the preemption provision permanent. Clearinghouse Brief at 13, quoting Sen. Comm. on Judiciary, Analysis of SB1, at 13-14 (Feb. 18, 2003); Investment Co. Brief at 22-23 (same). The amici speculate that the Legislature delayed the operative date of SB1 until July 1, 2004,[13] in order to fall within the confines of the sunset clause, which provided that the preemption provision did not apply to laws enacted after January 1, 2004.

This speculation is without basis. As a threshold mater, the sunset provision applies to laws *enacted* after January 1, 2004 (see former 15 U.S.C. § 1681t(d)(2)(A)); SB1 was *enacted in August 2003.* Accordingly, the sunset provision could have no impact on SB1. Moreover, SB1's predecessor, SB773, provided it would become operative *July 1, 2002* -- the same six-month delay provided for by SB1 -- well in advance of the FCRA sunset date of January 1,

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13. A California statute normally becomes operative on January 1 of the year following its enactment. Cal. Const. art. IV, § 8(c). For SB1, that would have been January 1, 2004.

2004. SB773, as amended July 14, 2001 (Add. AG86). The delayed operative effect in both bills was to allow time for compliance, and not for any other purpose.

Although the delayed operative date included in SB773 was not in SB1 as introduced, it was inserted later as a result of a compromise reached with the financial services industry. *See* Assembly Judiciary Comm. Analysis of SB1 (Aug. 18, 2003), at 10 (revising the operative date from January 1, 2004, to July 1, 2004, as a result of the compromise) (Add. AG 98-99).

An amicus further contends that the Legislature acknowledged the preemptive effect of the FCRA preemption provision on SB1. Clearinghouse Brief at 14. However, the legislative history demonstrates the Legislature received conflicting opinions. For example, one committee analysis for SB773 described the effect of the FCRA preemption provision as follows:

> While the statutory language seems broad, and appears to explicitly state that the FCRA preempts any state or local laws dealing with affiliate information sharing, Congressional intent remains arguably murky, and the true breadth of this express language untested. Given that the purpose of the FCRA is to require consumer reporting agencies to adopt procedures relating to the use and disclosure of consumer reports, the Act's affiliate sharing provision should not be interpreted to extend beyond affiliates of those entities already subject to the FCRA, i.e., consumer reporting agencies.

Assembly Comm. on Judiciary, Analysis of SB 773 (Aug. 21, 2001), at 10-11 (Add. AG86).

Similarly, another committee analysis for SB1, even while acknowledging the *Daly City* opinion, stated it was unclear what actions Congress might take in the future. *See* Assembly Committee on Banking and Finance, Analysis on SB1 (Aug. 18, 2003), at 12 (Add. 107). This analysis also emphasized the importance of giving consumers the right to control disclosures among affiliates. *Id.* at 9-10 (Add. AG104-105). Moreover, in an analysis provided to the author of SB1 and SB 773, the Legislative Counsel opined that the FCRA did not limit the state's ability to restrict the disclosure of nonpublic personal information by financial institutions. *Nonpublic Personal Information: Federal Preemption of State Restrictions*, Legislative Counsel of California (Aug. 26, 2002), at 6-9 (Add. AG 92-95).

2. <u>The California Legislature Believed the GLBA Savings Clause Was Relevant to SB1</u>.

Amici claim the Legislature understood the GLBA could not save the affiliate sharing provision of SB1 from preemption by the FCRA. *See e.g.*, Clearinghouse Brief at 7; Investment Co. Brief at 24. They support this contention by taking a comment from the California Senate Judiciary Committee's analysis out of context. "'The GLB Act does not restrict the sharing of nonpublic

information between affiliates.'" Investment Co. Brief at 24, quoting Sen. Comm. on Judiciary Analysis of SB1 (Feb. 13, 2003); Clearinghouse Brief at 7 (same). Amici's conclusion, however, does not flow from this statement. Indeed, when read in context, the statement confirms that the Legislature considered SB1 to be expressly permitted by the GLBA, because the GLBA set the floor, not the ceiling, on financial privacy protections:

> The GLB Act does not restrict the sharing of nonpublic customer information between affiliates. It also permits the sharing of nonpublic customer information with unaffiliated third parties except when a consumer has opted out of such sharing. ***The Act expressly provides, however, that states may enact greater consumer protections than those provided by the Act.***

Sen. Comm. on Judiciary Analysis of SB1, at 1-2 (Feb. 13, 2003) (emphasis added) (Add. AG101-102).

D. Comments by Federal Agencies as Amici Are Not Probative of the Preemptive Effect of a Federal Statute.

Federal banking agencies and the FTC (collectively "Agencies") argue as amici in support of the Associations' preemption challenge. The Agencies contend that Congress has entrusted them with "authority to interpret and apply" the FCRA and GLBA.[14/] The ordinary deference that would apply to agencies

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14. In fact, the Agencies overstate their role vis a vis the FCRA and GLBA. While they have enforcement and regulatory power to ensure compliance with these statutes (15 U.S.C. § 1681s and 15 U.S.C. §§ 6804 and 6805), Title V of the GLBA does not refer to interpretive authority. Moreover, the only interpretive authority in the FCRA, which provided "the Board

that enforce state or federal statutes, however, does not apply when a statute is challenged on preemption grounds.

Under certain circumstances, the court may defer to agency interpretations, typically set forth in a regulation, in which an agency construes the statute that the agency is charged with administering. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) (deferring to Environmental Protection Agency regulations construing term used in Clean Air Act). The rationale for this *Chevron* deference is that agencies are believed to possess expertise in the subject area of the laws they administer. *Id.* at 844 (deference due where regulatory interpretation "has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations").

In *Chevron*, the Court noted that environmental regulations require the making of policy choices between the competing goals of pollution reduction and economic growth, but that "[j]udges are not experts in the field" and that the responsibilities to make such policy choices "are not judicial ones." *Id.* at 865-66.

By contrast, where the issue is preemption, it is the courts -- and not the agencies -- that are the "experts in the field." *Chevron* deference may be appropriate where the agency construes the *substantive* meaning of a statute that

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of Governors of the Federal Reserve System may issue interpretations . . .," was removed by Congress in 1999 when it replaced the previous section 1681s(e) with a new subdivision referring only to regulatory authority.

the agency administers, but is not due where an agency construes the *preemptive effect* of a statute.

The Supreme Court recognized this limitation in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), in which the Court addressed whether the judiciary should defer to a regulation of the Office of the Comptroller of the Currency ("OCC") defining "interest" as used in the National Bank Act to include late fees. This construction resulted in the preemption of state law concerning late fees. Although the Court deferred to the OCC's interpretation of substantive provisions of the National Bank Act, the Court expressly declined to accord deference to an agency regulation purporting to preempt state law expressly:

> Petitioner's argument [against according *Chevron* deference to the Comptroller's regulation] confuses the question of the substantive (as opposed to preemptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts.

Id. at 744. *See also Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (refusing to defer to agency's interpretation that statute it administers preempts state law; "a preemption determination involves matters of law -- an area more within the expertise of the courts than within the expertise of the Secretary of Transportation . . . Therefore, . . . we independently review the legal issue of preemption").

Moreover, the Agencies' argument regarding the impact and meaning of the FACT Act amendments to the FCRA is contradicted in their commentary published with proposed regulations implementing section 624. There, the Agencies note, "to promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas of regulation *regarding consumer report information.*" 69 Fed. Reg. at 42503-4; 69 Fed. Reg. at 33325 (emphasis added). Moreover, financial institutions stressed in their comments on the proposed regulations that "Section 624 only restricts marketing solicitations. It does not restrict sharing of information among affiliates."[15]

IV. THE LEGISLATIVE HISTORY OF THE GLBA CONFIRMS THAT CONGRESS INTENDED TO ALLOW STATES TO ENACT MORE PROTECTIVE PRIVACY LAWS.

A. The GLBA Savings Clause Preserves States' Rights.

The Associations and amici argue the 2003 amendments to the FCRA are evidence of Congress's intent to establish uniform national standards regarding affiliate sharing. The FACT Act, however, regulates consumer reporting, including the use by affiliates of information that would be a credit report but for

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15. Comments of Bank of America at 2; see also, Comments of VISA at 6 ("Section 624 does not limit the sharing of information.... In effect, section 624, like the FTC Telemarketing Sales Rule, gives consumers the ability to opt out of certain marketing practices . . ."); Comments of MBNA at 3; and Comments of Wells Fargo at 3; all available at http://www.ftc.gov/os/comments/affiliate%20marketing/index.htm.

the exclusion of affiliate sharing from the definition of "consumer report." By contrast, SB1, like the GLBA, is a financial privacy law governing the disclosure of personal information. Thus, any uncertainty about congressional intent regarding states' ability to enact financial privacy laws was removed by enactment of Title V of the GLBA, which expressly allows such undertakings. 15 U.S.C. § 6807.

Both the text and the context of the GLBA demonstrate that Congress intended to allow states to enact financial privacy measures more protective than those set forth in the federal statute. The specific language of the state-law savings clause in the GLBA is unambiguous. It expressly permits states to enact financial privacy laws that provide greater protection than that provided by Title V of the GLBA:

> (a) This subtitle and the amendments made by this subtitle shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.
>
> (b) For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subtitle if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subtitle and the amendments made by this subtitle . . .

15 U.S.C. § 6807. The Associations' interpretation -- that states are powerless to enact financial privacy laws regulating affiliate sharing -- would violate the fundamental rule of statutory construction that a statute must be construed to give effect to each of its provisions. *Boise Cascade Corp. v.* EPA, 942 F.2d 1427, 1432 (9th Cir.1991) (statutes must be interpreted "as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute . . . superfluous.").

The GLBA's legislative history demonstrates that Congress intended to permit states to enact more stringent laws regarding the privacy of consumer financial information held by financial institutions. According to Senator Sarbanes – author of the GLBA savings clause -- "[o]n privacy, States can continue to enact legislation of a higher standard than the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4, 1999) (statement of Sen. Sarbanes) (Add. AG17). Senator Sarbanes further explained the state-law savings provision in the GLBA:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate.

145 Cong. Rec. S13788, at S13789 (Nov. 3, 1999) (statement of Sen. Sarbanes) (Add. AG2).

As Senator Grams emphasized, the savings clause of the GLBA "preserves all existing and all future State privacy protections above and beyond the national floor established in this bill." 145 Cong. Rec. S13889, at S13890 (Nov. 4, 1999) (statement of Sen. Grams) (Add. AG10). Senator Grams further noted that the GLBA represents "the establishment of a national floor of privacy protections." *Id.* at S13889 (Add. AG9).

Members of the House interpreted the GLBA savings clause the same way. Representative LaFalce, for example, unequivocally stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. 8, 1999) (statement of Rep. LaFalce, Ranking Member, House Banking & Fin. Svces. Comm.) (Add. AG21). Representative Vento further explained that "[w]e were successful in improving upon the House provisions by agreeing to allow states to give even more privacy protection to consumers at their discretion." 145 Cong. Reg. H11539, at H11540 (Nov. 4, 1999) (statement of Rep. Vento) (Add. AG6). Senator Kerry noted:

> The conference report gives customers of financial services companies only limited control over their personal financial information. . . . Fortunately, the conference report does not preempt stronger state privacy laws.

145 Cong. Rec. S13903, at S13905 (Nov. 4, 1999) (statement of Sen. Kerry) (Add. AG14). Representative Roukema also confirmed that "[s]tricter State privacy laws are not preempted." 145 Cong. Rec. H11515, at H11516 (Nov. 4, 1999) (statement of Rep. Roukema) (Add. AG9).

The Secretary of the Treasury expressed the same understanding, noting that "[t]he bill also expressly preserves the ability of states to provide stronger privacy protections." 145 Cong. Rec. S13915 (Nov. 4, 1999) (statement of Lawrence H. Summers, Secretary of the Treasury) (Add. AG18). It is therefore clear Congress intended states to play a role in the area of consumer financial privacy by preserving the rights of the states to adopt statutes that are more protective than the GLBA.

The Associations and amici attempt to counter this clear expression of congressional intent by arguing that the purpose of the GLBA was to enhance competition in the financial services industry and allow customer access to other financial products from affiliates. Even if this accurately describes the purpose of the GLBA, that is not inconsistent with a congressional intent to allow states to protect consumers' financial privacy.

At the same time that Congress debated the GLBA, which would allow the development of financial "supermarkets," Congress was keenly aware of the potential peril to consumer privacy this would create, particularly with the creation

of mega-databases, whereby financial institutions and their affiliates would have unfettered access to highly sensitive personal information. Thus, Congress enacted Title V of the GLBA, which was intended to be the *floor*, not the ceiling, for privacy protection.

Moreover, SB1 in no way hinders the establishment of financial supermarkets or combinations permitted by the GLBA, nor does it prohibit customer access to financial products from affiliated entities. Rather, SB1 furthers the purpose of the GLBA's privacy provisions by permitting consumers, not financial institutions, to determine whether or not they wish their personal information to be disclosed. SB1 is thus wholly consistent with the purpose of the GLBA.

B. The FCRA Exclusion Clause in the GLBA Does Not Limit the State-Law Savings Clause.

In addition to the GLBA's state-law savings clause, Title V also includes a provision that "nothing in this title [Title V] shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act." 15 U.S.C. § 6806. This provision was intended to maintain the FCRA's specific protections with respect to consumer reporting, not to limit the GLBA's explicit preservation of states' rights to enact financial privacy laws.

The FCRA exclusion clause [16] was added in conference to "clarify the relation between Title V's privacy provisions and other consumer protections already in law." H.R. Conf. Rep. No. 106-434 at 171 (1999) (Add. AG65). The potential problem the exclusion clause addressed was raised in testimony by the FTC, expressing a concern that the GLBA might otherwise be read as weakening the consumer reporting protections of the FCRA. *Financial Privacy: Hearings Before the House Subcommittee on Financial Institutions and Consumer Credit, Comm. on Banking and Financial Services*, 106th Cong. (July 21, 1999). Chairman Pitofsky explained:

> [The GLBA's] broad definition of "nonpublic personal information," . . . can include the type of information that would otherwise constitute a credit report; in fact, it could even include credit reports obtained from credit bureaus. . . . . If construed to supersede the FCRA, the [GLBA] privacy provisions would be a major retreat in privacy protections for consumers. . . . The Commission believes it essential to eliminate the potential for such an interpretation by adding a savings clause indicating that, notwithstanding any provisions of [the GLBA], the full protections of the FCRA continue to apply where applicable.

Id. at 437-438 (Add. AG54-55).

Concern that the provisions of the GLBA might displace the more stringent requirements of the FCRA was magnified by the fact that consumer reporting

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16. Section 6806 is sometimes referred to as the FCRA "savings" clause. To avoid confusion with the state-law savings clause set forth in section 6807, the savings clause referring to the FCRA will be referred to as the "FCRA exclusion clause."

agencies are themselves "financial institutions" and therefore subject to the GLBA. *Trans Union LLC v. FTC*, 295 F.3d 42, 48-49 (2002). The FCRA exclusion clause simply made it clear that Title V does not supplant the protections of the FCRA, where those provisions apply, i.e., to consumer reporting.

The *Trans Union* court's analysis of the FCRA exclusion clause also supports the conclusion that activities not regulated by the FCRA may be regulated under other laws, such as SB1. In that case, Trans Union contended that the FCRA exclusion clause precluded the FTC from regulating a consumer reporting agency's disclosure of consumer report information under Title V of the GLBA. 295 F.3d at 49, n.4. This argument was based on the assertion that because the FCRA authorizes a consumer reporting agency to provide consumer reports, the FTC could not, pursuant to the GLBA, restrict the consumer reporting agency's disclosure of consumer report information. 295 F.3d at 49, n. 4.

The Court of Appeals rejected this argument, noting that the FCRA "limits a [consumer reporting agency's] authority to furnish reports to specific, enumerated types of information, see 15 U.S.C. § 1681a(d), and to specific, enumerated 'circumstances *and no other*,' 15 U.S.C. § 1681b(a)." 295 F.3d at 49, n.4 (emphasis added). Thus, the provisions of the FCRA do not limit the ability of the

FTC to regulate disclosure of *other* "unenumerated types of information" or under *other* "unenumerated circumstances." *Id.*

A similar analysis applies here. Regulation of certain subject matter by the FCRA does not limit the ability to regulate other subject matter, or to regulate under different circumstances. Neither the preemption provision in the FCRA nor the FCRA exclusion clause in the GLBA alters the right of the states to enact more protective financial privacy laws.

The Associations and amici also miscast the district court's argument concerning the impact of the GLBA savings clause, arguing that the district court concluded that the GLBA's savings clause trumps other federal statutes, including the FCRA. AOB at 37; Agencies' Brief at 21; ACB Brief at 3-4. The court did not, however, conclude that the GLBA savings clause permits states to avoid preemption by the FCRA. Rather, as the court correctly found, financial privacy laws such as SB1 are not preempted by the FCRA but are fully within the scope of the GLBA.

CONCLUSION

There is a strong presumption against preemption where a state exercises its historic police powers to protect consumers. Applying appropriate principles of statutory construction, the district court correctly held that SB1, a state financial

privacy law, is not preempted by the FCRA, which regulates consumer reporting. Neither the FCRA nor the FACT Act demonstrates that Congress intended to establish uniform national standards with respect to all affiliate sharing. Indeed, the only clear and unequivocal expression of congressional intent with respect to financial privacy laws such as SB1 is in the GLBA, where Congress explicitly preserved the right of the states to enact more protective laws. The judgment should therefore be affirmed.

DATED: September 1, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 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, Appellees' Brief filed herewith is proportionally spaced, has a typeface of 14 points, and contains 16,601 words.

Executed on September 1, 2004 in San Diego, California.

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CATHERINE Z. YSRAEL

CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

Bank of America, et al. v. City of Daly City, et al., Docket Nos. 03-16682 and 03-16689, which raised the same issue as this case, is no longer pending because the Court dismissed the appeal as moot and vacated the district court judgments, by order dated May 14, 2004. In an abundance of caution, the State lists the case here.

Executed on September 1, 2004, in San Diego, California.

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