Nos. 04-16334 & 04-16560

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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-Appellees.

On Appeal From the Final Judgment and Denial of Injunction of the
United States District Court for the Eastern District of California
Case No. S-04-0778 MCE KJM

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES, LEGISLATIVE MATERIALS, AND REGULATIONS

STATE STATUTE

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

INTRODUCTION

There is no statutory text, legislative history or case law support for the district court's holding that the preemption clause at issue here, 15 U.S.C. § 1681t(b)(2), which preempts state laws "with respect to the exchange of information" among affiliates, applies only to the exchange of "consumer reports." The Court should apply the plain, express language used by Congress. Here, the term "information" is plain, and both the context in which it is used, as well as its legislative history, show that it includes all consumer information exchanged between affiliates, not just consumer reports. This conclusion is fortified by the amici brief of all six federal agencies that have responsibility for applying the FCRA. Nothing in the Appellees' ("California Defendants") briefs alters this conclusion. Therefore, SB1 is explicitly preempted under § 1681t(b)(2) and the district court's decision must be reversed.[1]

---

[1] As used in this brief, "OpBr" refers to the Associations' opening brief; "CAAG__" refers to the California Attorney General's Appellee Brief; "DOC__" refers to the Appellee Brief of the California Commissioners of Corporations and Financial Institutions; "FedAmici" refers to the amicus brief of the six federal agencies; "ICI/SIA Br." refers to the amicus brief of the Investment Company Institute and the Securities Industry Association, *et al.*; "ACB" refers to the amicus brief of America's Community Bankers; "States' Br." refers to the states' amicus brief; and "EPIC__" refers to the amicus brief filed by EPIC, *et al.*

I. THE CALIFORNIA DEFENDANTS OFFER NO SUPPORT FOR THE DISTRICT COURT'S HOLDING THAT THE FCRA'S AFFILIATE-SHARING PREEMPTION CLAUSE EXTENDS ONLY TO "CONSUMER REPORTS" INSTEAD OF "INFORMATION"

A. The Statutory Text Compels Reversal of the District Court

The FCRA affiliate-sharing preemption clause, § 1681t(b)(2), applies "with respect to the exchange of **information** among persons affiliated by common ownership or common corporate control" (emphasis added). The California Defendants' argument, that when Congress used the term "information" in that clause it really meant "consumer reports," is wholly implausible.

The FCRA defines the term "consumer report" in a way that carefully distinguishes between the limited scope of that term and the broader scope of "information." Section 1681a(d)(1) provides that "consumer report" means "any . . . communication of any **information** [1] by a consumer reporting agency bearing on a consumer's credit worthiness [and other characteristics] [2] which is used or expected to be used or collected . . . as a factor in establishing the consumer's eligibility for" [3] three enumerated "purposes" (emphasis added). This definition clearly shows that the term "information" is much broader than the term "consumer report," which § 1681a(d)(1) circumscribes by [1] the source of the information, [2] its expected use, and [3] the purposes for which the information is used. It clearly shows that Congress could not have mistakenly used the term "information" in § 1681t(b)(2) instead of "consumer report."

The California Defendants' argument that Congress, in enacting § 1681t(b)(2), meant only to preempt state laws regarding "consumer reports" when it used the broader term "information" is also refuted by the other subsections of § 1681t, in which the affiliate-sharing preemption clause is located. The preemption clause in § 1681t(b)(2) is an "exception" to the savings clause in § 1681t(a) (emphasis added):

> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person . . . from complying with the laws of any State with respect to the collection, distribution, or use of **any information on consumers**, except to the extent that those laws are inconsistent with any provisions of this subchapter . . . .

Plainly, this savings clause's use of the term "any information on consumers" means "any" such "information," not just "consumer reports." The same is true of the use of the term "information in § 1681t(b)(2)'s preemption clause. *See National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("similar language contained within the same section of a statute must be accorded a consistent meaning").[2]

---

[2] The fact that the savings clause of § 1681t(a) uses the term "information on consumers" shows that the Associations and the federal agencies did not dream up the phases "customer information" or "consumer information," as argued by the California Attorney General ("CAAG"). CAAG38.

The savings clause in § 1681t(a) also answers the state amici's argument that, under the Associations' interpretation, state laws prohibiting conspiracy, theft

(continued...)

The "[g]eneral exceptions" to this savings clause – providing that "[n]o requirement or prohibition may be imposed under the laws of any State" – § 1681t(b), are then divided into two categories:

(1) § 1681t(b)(1) describes "subject matter regulated under" six specific provisions of the FCRA, all of which concern consumer reports. In these six parts of § 1681t(b)(1), Congress made clear that, because it was regulating consumer reports in certain ways, states were preempted from regulating those matters differently.

(2) § 1681t(b)(2), the affiliate-sharing preemption clause, broadly preempts state laws "**with respect to** the exchange of **information** among" affiliates (emphasis added). *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 521 (1992) (preemption clause providing that "[n]o requirement or prohibition . . . shall be imposed under State law **with respect to** the advertising or promotion of any cigarettes" "sweeps broadly") (emphasis added). That section is not limited

---

(footnote continued)

of trade secrets, and the like, would be preempted. States' Br. 10-11. Obviously, the "information" referred to in § 1681t(a)'s savings clause and in § 1681t(b)(2)'s express preemption clause is "information on consumers," not information exchanged by conspirators or contained in trade secrets.

to "subject matter regulated under" the FCRA as a "consumer report."[3] This refutes the entire premise of the district court's decision (ER85-89) and the California Defendants' arguments, *see* CAAG18-33; DOC26-34, that the preemption clause is limited only to matters that are so regulated. Section 1681t(b)(2) uses the same broad term "information" that appears in § 1681t(a)'s savings clause, and is not limited to "consumer reports."[4] As the Associations argued in their opening brief, pp. 23-24, the plain language of § 1681t(b)(2) is controlling here, citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

B. The Legislative History Compels Reversal of the District Court

Only the "most extraordinary showing of contrary intentions" in legislative history could justify departure from a statute's plain language. *Salinas v. United States*, 522 U.S. 52, 57 (1997) (citation omitted). The California Defendants fail to make such an "extraordinary showing." Indeed, the very

---

[3] The states argue that the "basic rule" under the FCRA is "non-preemption." States' Br. 12. But § 1681t(b)(2) is a broadly worded, explicit "exception" to that "rule."

[4] The distinction between "consumer reports" "regulated under" the FCRA and state laws "with respect to" "information" in § 1681t goes far beyond cases like *City of Columbus v. Ours Garage and Wrecker Serv.*, 536 U.S. 424, 428 (2002), relied upon by the CAAG, CAAG46-47. There, the Court rejected the "strong argument" that because a preemption clause used the phrase "state [or] political subdivision of a state," while a savings clause used only the term "state," local law was not saved from preemption. Here, § 1681t from start to finish distinguishes between "consumer reports" "regulated under" the FCRA, and all matters "with respect to information," leaving no doubt that Congress intended preemption to extend to all consumer "information."

legislative history that they acknowledge confirms that § 1681t(b)(2) applies to all "information" on consumers, not just "consumer reports."

Congress considered and rejected a version of the FCRA's affiliate sharing preemption clause that was written just as the California Defendants would now have this Court interpret the very different version that Congress enacted. As America's Community Bankers ("ACB") show in their amicus brief, the affiliate-sharing preemption clause proposed in 1992 applied only to state "credit reporting" laws, "leaving states free to enact laws 'to address . . . privacy . . . .'" ACB3, quoting H.R. Rep. No. 102-692, at 74 (1992). However, in subsequent bills leading to the 1996 FCRA amendments, affiliates were allowed to exchange consumer information (subject to FCRA regulation), and the preemption clause was put into its present, broader form. Both Senate and House reports thereafter described the clause as "preempt[ing] **any** state law related to the exchange of information among persons affiliated by common ownership or common corporate control." ACB3, quoting S. Rep. No. 103-209, at 27 (1993) ("1993 Senate Report"); H.R. Rep. No. 103-486, at 55 (1994).

The CAAG attempts to dismiss Congress's rejection of the narrower 1992 preemption clause as involving "failed" legislation, CAAG19 n.3, that should be ignored by this Court, citing *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). However, in *Solid Waste*, the Supreme Court

properly refused to infer any legislative intent from a bill that was never enacted. *Id.* at 170. Here, by contrast, Congress broadened the scope of the preemption clause that **was** enacted, and the congressional committee reports cited by ACB explained the consequence of that change. This is persuasive legislative history. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 100-01 (1993) ("We are directed by th[e] words [of the enacted statute], and not by the discarded draft."). The 1992 "discarded draft" would have limited preemption to "state credit reporting laws";[5] however, the enacted 1996 preemption clause extends to all consumer "information."

The California Defendants cite the 1993 Senate Report, *e.g.*, DOC30-31, but it explained that "the Committee intends that this [preemption] provision **will be applied** to the modifications made by section 101 of the Committee bill . . . pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates." 1993 Senate Report, at 27-28 (emphasis added). The legislative history could not be clearer: Congress intended that the affiliate-sharing preemption clause "will be applied" to those provisions in the Act that "permit . . . the sharing of information among

---

[5] The states have no answer to the legislative history, so they ignore it and argue that § 1681t(b)(2) only preempts "state credit reporting laws," just as though the "discarded" 1992 bill had been enacted. States' Br. 9.

affiliates." The California Defendants' argument that the affiliate-sharing preemption clause does not apply to the provisions of the FCRA that permit such sharing, but instead applies only to provisions that regulate consumer reports, is entirely at odds with the Act's legislative history.

C. The CAAG's Invocation of the "Absurd Results" Doctrine To Justify the District Court's Decision In Fact Condemns That Decision.

As the Supreme Court held in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), "the plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,'" *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Here, the intent of Congress in the 1996 FCRA Amendments, as expressed in the language of the statute and its legislative history, clearly was to allow affiliates to exchange consumer information, subject only to the regulation established in the 1996 FCRA Amendments. Far from being "absurd," it was perfectly logical for Congress at that time to ensure that states would not interfere with such affiliate sharing by enacting laws like SB1.

Indeed, it would have been "absurd" for Congress to limit the affiliate-sharing preemption clause to "consumer reports." The whole point of the 1996 FCRA Amendments was to allow affiliate sharing of consumer information

by removing such shared information from the definition of a "consumer report." But under the California Defendants' theory, the preemption clause would apply only to shared information that is a "consumer report," making the clause meaningless. Congress could not have intended this result. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative").[6]

Finally, the California Defendants' argument that the FCRA affiliate-sharing preemption clause only prevents states from regulating "consumer reports," *see* CAAG21, DOC31; *see also* States' Br. 9, would, in still another way, render § 1681t(b)(2) a dead letter. Under this approach, a state could escape the preemption of § 1681t(b)(2) by the simple device of relabeling it statutes as "privacy," instead of "credit reporting" laws. Congress could not have intended this absurd result.

---

[6] Like the district court (ER89 n.7), the California Defendants point to two sections of a pre-1996 Vermont statute, which address "credit reports," that are saved from preemption under § 1681t(b)(2). CAAG6; DOC32-33. This in no way supports their construction of the preemption clause. Because § 1681t(b)(2) preempts state laws with respect to information exchanged among affiliates, it necessarily extends to "credit reports," which are one, limited form of "information." The fact that Congress saved the Vermont statute certainly does not mean that "information" is only limited to "consumer reports." It only means that "information" includes "consumer reports."

D. The Presumption Against Preemption Cannot Overcome The Clear Preemption Imposed by §1681t(b)(2)

The CAAG argues that the "presumption against pre-emption" "requires a 'narrow reading of [§ 1681t(b)(2)].'" CAAG13 (quoting *Cipollone*, 505 U.S. at 518).[7] But, as the Supreme Court has recently held, even in "areas of traditional state regulation," the Court "ha[s] not hesitated to find" that the "presumption can be overcome where, as here, Congress has made clear its desire for pre-emption." *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (citation omitted).

Indeed, the very cases upon which the California Defendants rely show that the presumption against preemption can be overcome by Congress's "clear . . . desire" for preemption, as is the case here in the light of § 1681t(b)(2)'s language and legislative history. For example, in *Cipollone* (cited CAAG14, 25; DOC13), the Supreme Court refused to narrow the scope of a preemption clause similar to the one at issue here, finding that the preemption phrase "[n]o requirement or prohibition" based on smoking and health "with respect to advertising or promotion" of cigarettes "sweeps broadly." 505 U.S. at 520-21.

---

[7] Also citing *Cipollone*, E-Loan, Br. 6, makes the unsupportable assertion that the "presumption is practically irrebutable."

Thus, the Court held that state common-law damages actions based on advertising and promotion were preempted. *Id.*

Similarly, in *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000) (cited CAAG14), this Court held that the presumption against preemption must yield to "the most reasonable reading of" the federal law at issue, *id.* at 1081. *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-85 (1992) (cited OpBr36) (rejecting state's argument that the presumption against preemption warranted a narrowing construction of a broadly worded federal statute expressly preempting all state laws "relating to" airline rates to save a state consumer protection statute).[8]

---

[8] None of the other cases upon which the CAAG relies (Br. 27-32) justify his narrow reading of "information" in §1681t(b)(2) to mean only "consumer reports." In *Department of Rev. of Or. v. ACF Industries*, 510 U.S. 332 (1994), as the CAAG argues (Br. 28), "nothing . . . suggested that [in preempting discriminating state tax laws] Congress had any particular concern with [the] property tax exemptions" that the Court held were not preempted. Here, the plain language and legislative history not only suggest – they compel – the conclusion that Congress intended to permit affiliate exchange of consumer information, subject only to FCRA regulation, while preempting state requirements or prohibitions with respect to such exchange of that information.

In *Shell Oil v. Iowa Dept. of Rev.*, 488 U.S. 19 (1988), the Court held that a provision of the Outer Continental Shelf Lands Act that preempted application of state law to such lands was intended only to ensure that coastal states adjacent to the outer continental shelf did not extend their law there. The Court therefore rejected Shell's argument that an Iowa statute apportioning some of Shell's outer-continental-shelf-related income to that state was preempted.

Finally, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), construed the term "employee" as used in Title VII, to include former as well as current employees,

(continued...)

Moreover, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), cited at CAAG14; DOC15, the Court noted that the presumption applies "particularly . . . in a field which the States have traditionally occupied," quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[9] But the Commissioners concede that this case involves an area "where there has been a history of significant federal presence," DOC15, citing *United States v. Locke*, 529 U.S. 89, 108 (2000), and *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002), *cert. denied*, 538 U.S. 1069 (2003). In such cases, "the presumption [against preemption] is 'not triggered . . . .'" *Bank of America*, 309 F.3d at 558, *quoting Locke*, 529 U.S. at 108.

Finally, the CAAG argues that the "purpose and effect of SB1 are to protect consumers' fundamental right to privacy, and not to ban affiliate sharing." CAAG15. But where, as here, there is a conflict between the terms of a federal

---

(footnote continued)

which was perfectly consistent with the plain meaning of the term "employee." Here, by contrast, the California Defendants seek narrow construction of "information" that defies the plain meaning of that term.

[9] The argument that this case involves "consumer protection," CAAG14-15, DOC16; States' Br. 1; EPIC7 n.10, expands that term beyond its historic bounds. *Medtronic*, which dealt with defective goods, is a classic "consumer protection" case, unlike California's newfound interest in "privacy" for customers of affiliated financial institutions. The federal government, through laws like FCRA, has long regulated in this area.

statute and state law, a court "cannot resolve conflicts of authority by [its] judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful [the state's] policy . . ., it must give way to the contrary federal policy." *Franklin National Bank v. New York*, 347 U.S. 373, 378-79 (1954) (citations omitted). Accordingly, the policy arguments of the California Defendants, as well as their amici, States' Br. 19-30; EPIC8-12, 16-22, cannot thwart the application here of the preemption clause and contradict the policy choice made by Congress in the FCRA for the nation as a whole.[10]

II. THE CALIFORNIA DEFENDANTS' ARGUMENTS THAT THE FCRA DOES NOT REGULATE THE "INFORMATION" THAT FINANCIAL INSTITUTIONS WERE AUTHORIZED TO SHARE BY THE 1996 FCRA AMENDMENTS IS BOTH IRRELEVANT AND WRONG

The entire premise of the district court's holding and the California Defendants' arguments – that it "makes . . . sense" for Congress to preempt state law only if federal law regulates conduct (ER89) – is profoundly mistaken.

---

[10] The parade of horribles advanced by the states as to the need for additional state regulation (pp. 26-30) (*see also* EPIC16-22) ignores the fact that the affiliate-sharing regime of the 1996 FCRA was in place for seven years when Congress adopted the 2003 Amendments which expanded and made permanent FCRA preemption, *see infra* pp. 16-19, after full consideration of all such policy arguments, including the very ones the states now argue to this Court, *see infra* p. 26.

Congress can – and does – preempt state law to ensure that an activity is free from both federal and state regulation.

Bank of America v. San Francisco, 309 F.3d 551, is a perfect example of such preemption: In that case, this Court held that the National Bank Act and a regulation issued by the Office of the Comptroller of the Currency ("OCC") under that Act preempted state or local prohibitions of ATM fees. Those fees, however, were simply permitted by federal law. Indeed, the OCC regulation provides that such national banks' fees are "business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2). *See also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (federal statute that permitted, but did not regulate, national bank activity preempted state law that restricted that activity). Thus, *Bank of America* requires rejection of the district court's premise that preemption is proper only when federal law regulates the conduct protected by a preemption clause.

Moreover, the FCRA does regulate the consumer information exchanged among affiliates. *See* OpBr27-32 (discussing 15 U.S.C. § 1681a(d)(2)(A)). The 1996 and 2003 FCRA Amendments, for instance, impose notice and opt-out obligations on financial institutions before affiliates can share consumer information. *See* OpBr27-33. This is a form of regulation.

The CAAG is forced to acknowledge these FCRA regulatory provisions. *See* CAAG39-40 ("the sole purpose of each [FCRA provision cited by the Associations and their amici] is to subject the disclosure to the provisions of the FCRA.").[11] This concession that the FCRA *does* "subject" information sharing by affiliates to the FCRA undermines the California Defendants' argument that the FCRA does not regulate information sharing among affiliates.[12] It also forces the CAAG to resort to an argument that cannot even generously be described as disingenuous.

The CAAG argues that "since the [regulatory FCRA] provisions cited, in substance and purpose, occur within the context of consumer reporting ..., they cannot serve as a basis for the broad reading of the FCRA preemption provision posited by the Associations and amici." CAAG43. The CAAG's observations about the "substance and purpose" of the affiliate-sharing provisions being within "the context of consumer reporting," however, ignores what these provisions do:

---

[11] The states are not as candid. *See* States' Br. 9 ("FCRA . . . affects only the regulation of 'consumer reports' and 'consumer reporting agencies.'").

[12] The CAAG now argues that "the FCRA, **as a whole**, does not regulate communication of information among affiliates," pointing to various FCRA provisions that apply only to consumer reports. CAAG49 (emphasis added). To the extent this argument suggests that there is not *enough* regulation of exchanged information to justify preemption, it is even weaker than the CAAG's position in the district court that the absence of federal regulation means that there should be no preemption of state law. *See supra* pp. 13-14.

They **remove** the information shared among affiliates from the definition of "consumer reports" to facilitate sharing and their adoption explains why, in 1993 and thereafter, Congress did not limit the preemption clause to "consumer reports." *See supra* pp. 6-8; OpBr30-31; ACB3; CAAG19 n.3. Moreover, neither the Associations nor their amici are seeking a "broad reading" of §1681t(b)(2). They instead rely on the plain language of that provision as applying to all consumer "information."

III. THE 2003 FCRA AMENDMENTS CONFIRM PREEMPTION OF STATE LAWS, LIKE SB1

Having conceded, as shown above, pp. 14-15, that the 2003 FCRA Amendments regulate information that is not a consumer report – among other ways, through requirements for notice and opt-out for marketing use of shared consumer information – the California Defendants now argue that "section 1681s-3 [which imposes that notice and opt-out requirement] is applicable only to the *use* of shared information for marketing purposes," DOC35, and not the sharing of that information. *See also* CAAG42 & n.6. But, the 2003 FCRA Amendments also *do* apply to the sharing of information among affiliates.

As the Associations showed in their opening brief (p. 11 n.5) – and the California Defendants do not dispute – in 2003 Congress amended FCRA § 1681a(d)(2)(A) to provide that before a financial institution can share information with affiliates, it must first comply with the notice and marketing opt-

out requirements of § 1681s-3 to avoid "consumer report" regulation that would otherwise prevent such sharing. *See* FACT Act § 214(c)(1) (amending 15 U.S.C. § 1681a(d)(2)(A)); OpBr11 n.5 (explaining this amendment). This is clearly regulation of the sharing of information that is not a consumer report,[13] again defeating the California Defendants' argument that the FCRA does not regulate such information.

Moreover, the 2003 FCRA Amendments demonstrate that Congress intended to preempt state laws – and SB1 in particular – that impose requirements and prohibitions on affiliate sharing. The California Defendants are simply wrong when they contend that "[t]he FACT Act [*i.e.*, the 2003 FCRA Amendments] did not impact the FCRA preemption provision," CAAG50, DOC9, 34-36. *See also* States' Br. 11 (2003 Amendments "did not alter the preemption provision"). They ignore – because they have no explanation for – § 1681s-3(c) which broadened the scope of preemption by § 1681t(b)(2). Section 1681s-3(c) expressly provides that § 1681t(b)(2) shall apply to preempt state "use" restrictions on information shared

---

[13] As the federal agencies also point out in their amicus brief, the 2003 FCRA Amendments provide that "medical information," which is also not a "consumer report," can be shared among affiliates only for the specific purposes outlined in the FCRA, 15 U.S.C. § 1681b(g)(3). *See also* 15 U.S.C. § 1681a(d)(3); FedAmici 18 n.16. The FCRA's regulation of medical information sharing among affiliates further rebuts the Attorney General's statement that the FCRA's "statutory scheme . . . deals exclusively with consumer reporting . . . ." CAAG17.

by affiliates even though the statute provides that such information is not a consumer report. *See also* OpBr33.[14] The **only** way in which Congress' 2003 expansion of § 1681t(b)(2) can be understood is that it applies, as written, to all "information" shared by affiliates, not just "consumer reports."

When a subsequent Congress alters an existing statutory scheme, as Congress did in 2003, the legislative history of those later amendments is "entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("And while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." (citations omitted)). Here, as we have shown above, pp. 6-8, the intent of the 1996 Congress was clear, not obscure, and in 2003 Congress confirmed that earlier intent by amendments that can only be understood on the premise that § 1681t(b)(2) broadly preempts state laws with respect to information sharing among affiliates. *See also SEC v. Clark*, 915 F.2d 439, 451 (9th Cir. 1990) (relying on congressional committee reports of later Congresses that enacted "legislation affecting the [earlier] scheme of which section 10(b) and Rule 10b-5

---

[14] The states' brief (pp. 16-17) is even worse: In detailing the ways in which the 2003 Amendments "added to the scope of the preemptive reach," they list four separate measures, including making § 1681t(b)(2) permanent, but omit the expansion of that clause in § 1681s-3(c) to include use restrictions.

are a part."); *Yamaguchi v. State Farm Mut. Auto. Ins. Co.*, 706 F.2d 940, 951 (9th Cir. 1983) ("While a statement concerning an earlier statute by members of a subsequent legislature is of course not conclusive evidence of the meaning of the earlier statute, the later interpretation may be accorded some deference where the subsequent legislative commentary accompanies the enactment of an amendment to the earlier law.").

The 2003 legislative history reflects unanimous recognition in the Senate and House debates of the broad preemption of § 1681t(b)(2). *See* OpBr34-35. The California Defendants have no answer to this legislative history, except misleadingly to contend that it represented only the views of opponents of the legislation. CAAG54-55. This ignores the statements of the chairs of both Senate and House committees with jurisdiction over the 2003 FCRA Amendments who recognized that SB1 would be preempted, *see* FedAmici 20-21, as well as the similar views of the Ranking Democrat on the House committee and 55 Representatives from California. *See* ICI/SIA Br. 27-28. Every member of Congress who addressed the issue recognized that SB1 was preempted.

IV. THE CALIFORNIA DEFENDANTS' ARGUMENTS CONCEDE GLBA'S IRRELEVANCE IN THIS CASE

The Associations' opening brief showed that this Court's decision in *Bank of America*, 309 F.3d at 565, and the Supreme Court's decision in *Locke*, 529 U.S. at 106, condemn reliance on GLBA's savings clause in 15 U.S.C. § 6807, to

avoid preemption under the FCRA. *See* OpBr37-40. GLBA's savings clause provision by its express terms is limited to "this subchapter" and cannot overcome preemption of state requirements or prohibitions on affiliate sharing by an entirely separate federal statute, like FCRA. *See id.*[15]

Because the California Defendants cannot overcome *Bank of America* and *Locke*, they "do not contend . . . that the GLBA preemption/state law savings clause overrides the FCRA preemption provision," DOC18-19, and maintain that "the [district] court did not . . . conclude that GLBA savings clause permits states to avoid preemption by the FCRA," CAAG70. Clearly, they concede that FCRA § 1681t(b)(2) is not affected by GLBA.

Nevertheless, the Commissioners argue that GLBA's savings clause in 15 U.S.C. § 6807 provides states a "specific grant of authority" to "enact more stringent privacy protections," DOC5; *see also id.* at 6, 10, 16, 17, 20 – implausibly suggesting, in spite of their concessions, that GLBA authorizes state laws and thus somehow immunizes them from preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 n.22 (1983), unanimously rejected the comparable proposition that state employment laws, which were saved from preemption by

---

[15] The Associations also showed in their opening brief (p. 10), that "GLBA permits states, for example, to bar sharing with nonaffiliated third parties, but it does not change or limit the FCRA's preemption of state laws regulating or prohibiting affiliate sharing."

Title VII's savings clause, 42 U.S.C. § 2000h-4, should be accorded "federal law" status. Nothing in GLBA grants any federal authority to the states to enact requirements or prohibitions on financial institutions' sharing of information with affiliates; instead, as in *Shaw*, it merely saves certain state laws from preemption by GLBA.

Even though he has abandoned his GLBA argument, the CAAG still attempts to confuse the Court about that statute: "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." CAAG63 (emphasis added). But "the federal statute" of course is GLBA, and the Associations have never claimed that GLBA preempts SB1. "[T]he federal statute" cannot be the FCRA, both because the CAAG concedes that GLBA's savings clause does not affect preemption by FCRA, and because GLBA expressly provides in 15 U.S.C. § 6806 that GLBA does not affect the FCRA.[16]

---

[16] The California Defendants' concessions make it unnecessary to discuss their contortions in trying to overcome the straight-forward command of 15 U.S.C. § 6806, that GLBA "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]." *See* OpBr37 (quoting 15 U.S.C. § 6806). We do note, however, that the CAAG's reliance on *Trans Union LLC v. FTC*, 295 F.3d 42, 48-49 (D.C. Cir. 2002), to argue that § 6806 "does not limit the state-law savings clause [§ 6807]," CAAG67, is unsupportable: *Trans Union* had nothing to do with GLBA's state-law savings clause, but instead concerned only whether a consumer reporting agency could be regulated *under GLBA*.

The California Defendants also continue to rely on GLBA's 1999 legislative history as a basis for narrowly construing Congress's 1996 enactment of the FCRA's affiliate-sharing preemption provision. This shows that their arguments lack coherence and consistency.[17] They invite the Court to rely on subsequent legislative observations that do not even mention the FCRA when enacting GLBA, a statute that expressly preserves the FCRA, CAAG62-68, DOC19-22, yet simultaneously argue that it would be improper for the Court to rely on the legislative history of the 2003 FCRA Amendments, *e.g.*, CAAG52-54, DOC37-38, which expanded the scope of the FCRA preemption clause.[18] The California Defendants have got it exactly backwards: GLBA's legislative history is irrelevant to the FCRA because GLBA explicitly does not modify the 1996 Act. The 2003 Amendments' history is relevant because it modified the 1996 scheme. *See supra* pp. 16-18.

---

[17] It also shows their misuse of that history. CAAG7-8 quotes a GLBA House Commerce Committee Report that noted "the importance" of giving a consumer an opt-out right with respect to information shared with affiliates, citing H.R. Rep. No. 106-74, pt. 3 at 107 (1999) (CAAG Add. 58). However, the CAAG fails to report that the version of the bill under consideration in that Report contained such an opt-out provision (CAAG Add 59), which was later rejected in the version of the bill Congress enacted as GLBA.

[18] The California Defendants ignore the only GLBA legislative history that refers to the FCRA preemption clause, which was quoted at length at page 41 of the Associations' opening brief – a colloquy on the Senate floor involving the Senate sponsor of the bill – that clearly recites GLBA does not in any way affect the FCRA's affiliate-sharing preemption clause.

V. THE FEDERAL AGENCIES CONFIRM THAT THE FCRA'S AFFILIATE-SHARING PREEMPTION CLAUSE APPLIES TO ALL CONSUMER INFORMATION

The six federal agencies that submitted an amicus brief in support of the Associations' preemption argument have rulemaking authority to interpret, implement, and enforce the FCRA, including its 2003 Amendments, as well as GLBA. FedAmici 1. This Court "give[s] 'great weight' to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement." *Bank of America*, 309 F.3d at 563 (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987)). "[A]n agency's position in an *amicus* brief is not 'unworthy of deference' where '[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment of the matter in question.'" *Id.* at 563 n.7 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

The California Defendants have diverging arguments for disregarding the agencies' position set forth in their amicus brief. The Commissioners argue that "Congress has directly spoken to the precise question at issue," and thus, "the Court's inquiry ends because the Court, as well as the agency, 'must give effect to the unambiguously expressed intent of Congress.'" DOC39 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Coun.*, 467 U.S. 837, 842-43 (1984)). The Associations could not agree more, but the Commissioners do not abide by this

fleeting concession. They instead argue that the unambiguous term "information" in § 1681t(b)(2) means something much less – *i.e.*, only "consumer reports." The agencies' views help correct that mistake.

The CAAG agrees that the agencies are entitled to deference regarding the "substantive meaning of a statute," but not "the preemptive effect of a statute." CAAG60-61 (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996)). *Smiley* supports deference to the agencies here. In *Smiley*, the parties contested only the interpretation of the term "interest" in 12 U.S.C. § 85 (debating whether "interest" includes late fees), not § 85's preemptive effect. 517 U.S. at 739. Here, we have the same situation: Does "information," as used in the preemption clause, mean all consumer information or only consumer reports? There is no dispute that § 1681t(b)(2) preempts SB1 if the statute applies, as written, to all information about consumers. Just as the Supreme Court deferred to the agency's construction of "interest" in *Smiley*, this Court should defer to the agencies' construction of "information" in this case.

The Associations will not attempt to summarize all of the agencies' brief, but they do want to call the Court's attention to the agencies' discussion of the 2003 congressional hearings, which determined whether to allow the FCRA affiliate-sharing preemption provision to sunset. As the agencies' brief recounts, these hearings showed that "[a]mong the benefits of a uniform national standard

. . . were reduced costs of credit, greater credit availability to underserved consumers, and the resulting increases in economic activity," *id.* 13-14 (citations omitted); and that "Congress acted 'to ensure the operational efficiency of [the] national credit system by creating a number of preemptive national standards,'" *id.* at 14 (quoting H.R. Conf. Rep. No. 108-396, at 66 (2003)). Moreover, the agencies stress that Congress intended "to eliminate the regulatory burden and confusion caused by multiple state laws in this area . . . ." *Id.* at 12. *See also id.* at 14 ("district court's decision . . . could encourage other states to enact . . . unique notice requirements, or other limitations on" affiliate sharing).[19]

The states' argument (Br. 22-30) that "States need the ability to enact more protective legislation like SB1,"[20] which then discusses all the purported

---

[19] The importance of national uniformity was even acknowledged by the Conference of State Bank Supervisors (of which Defendant-Appellee Gould is a board member), whose witness testified in the 2003 House hearings that it "support[ed] the permanent extension of the 1996 FCRA preemptions" because of "the benefits of uniformity to our credit granting system . . . ." *Id.* at 14 n.14 (quoting *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearings Before the House Subcommittee on Financial Institutions and Consumer Credit of the Financial Services Committee*, 108th Cong., 13-14 (Statement of Joseph Smith, North Carolina Commissioner of Banks on behalf of CSBS)).

[20] Citing existing Vermont laws, the states leave the misimpression that these statutes and regulations (cited at p. 19) impose opt-in requirements on affiliate-sharing. In fact, each of those laws applies only to the sharing of consumer information with nonaffiliated third parties that are not within the scope of the FCRA affiliate-sharing preemption clause and thus are not part of this case.

shortcomings of the FCRA (and GLBA), reveals the multi-state patchwork to which the district court's decision would lead.

This policy argument also shows the states' unwillingness to abide by Congress's judgment on these matters. These last nine pages of the states' brief, as well as others, are an almost verbatim copy of the 2003 testimony that the brief's principal author gave to the Senate Banking Committee, where she urged Congress to allow the FCRA preemption clause to expire. *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 263 (2003) (Statement of Julie Brill, Vermont Assistant Attorney General).[21]

Clearly, the agencies' interpretation of § 1681t(b)(2) in accordance with its plain meaning, and of the 2003 Amendments, is reasonable. Their "fair and considered judgment" confirms the district court's misreading of the FCRA.

---

[21] Available at www.access.gpo.gov/congress/senate/pdf/108hrg/95254.pdf.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the Associations' opening brief, the Court should reverse the judgment and render judgment for the Associations. The California Defendants do not contest the Associations' additional request that, if the Court agrees that SB1's affiliate-sharing provisions are preempted, it should direct the district court to declare the affiliate-sharing provisions of SB1 (including, as they relate to affiliate-sharing, Cal. Fin. Code §§ 4053, 4053.5, 4054, 4054.6, 4056, 4056.5, 4057) invalid, null, void, and without effect, as well as enter a permanent injunction against Defendants-Appellees' enforcement of those provisions against any financial institution.

Respectfully submitted,

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Attorneys for Plaintiffs-Appellants

Dated: September 15, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, counsel for Appellants certifies that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,486 words.

Keith A. Noreika

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the Reply Brief of Plaintiffs-Appellants to be served this 15th day of September, 2004, by Federal Express, next business day delivery as follows:

SUSAN HENRICHSEN, ESQ.
CATHERINE YSREAL, ESQ.
Department of Justice
110 West A Street
Suite 1100
San Diego, California 92101
Telephone: 619-645-2081
Telecopy: 619-645-2062

KIMBERLY GAUTHIER, ESQ.
JUDITH A. CARLSON, ESQ.
Department of Corporations
1515 K Street, Suite 200
Sacramento, California 95814-4052
Telephone: 916-327-1626
Telecopy: 213-576-7181

NANCY L. PERKINS, ESQ.
Arnold & Porter LLP
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: 202-942-5065
Telecopy: 202-942-5999

BRUCE E. CLARK, ESQ.
Sullivan & Cromwell
125 Broad Street
New York, NY 10004
Telephone: 212-558-4000
Telecopy: 212-558-3588

WILLIAM H. JORDAN, ESQ.
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: 404-881-7000
Telecopy: 404-881-7777

L. RICHARD FISCHER, ESQ.
Morrison & Forrester LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: 202-887-1500
Telecopy: 202-887-0763

THOMAS J. SEGAL, ESQ.
Office of Thrift Supervision
Office of the Chief Counsel
Litigation Division
1700 G Street, N.W.
Washington, D.C. 20552
Telephone: 202-906-7230
Telecopy: 202-906-6353

HORACE G. SNEED, ESQ.
The Office of the Comptroller of the Currency
250 E Street, N.W.
Washington, D.C. 20219
Telephone: 202-874-5280
Telecopy: 202-874-5279

KATHRYN R. NORCROSS, ESQ.
Federal Deposit Insurance
Corporation
Room H-2044
550 17th Street, N.W.
Washington, D.C. 20219
Telephone: 202-736-0124
Telecopy: 202-736-0821

HATTIE M. ULAN, ESQ.
National Credit Union
Administration
1775 Duke Street
Alexandria, VA 22314
Telephone: 703-518-6540
Telecopy: 703-518-6569

CHRIS JAY HOOFNAGLE, ESQ.
Electronic Privacy Information
Center
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
Telephone: 202-483-1140 x108
Telecopy: 202-483-1248

JULIE BRILL, ESQ.
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
Telephone: 802-828-3658
Telecopy: 802-828-2154

RICHARD M. ASHTON, ESQ.
Board of Governors of the Federal
Reserve System
20th & C Streets, N.W.
Washington, D.C. 20551
Telephone: 202-452-3750
Telecopy: 202-452-3101

JOHN F. DALY, ESQ.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H 582
Washington, D.C. 20580
Telephone: 202-326-2244
Telecopy: 202-326-2477

SCOTT D. MCKINLAY, ESQ.
E-Loan, Inc.
6230 Stoneridge Mall Road
Pleasanton, CA 94588
Telephone: 925-847-6154
Telecopy: 925-520-6122

Keith A. Noreika