No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

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

BRIEF OF *AMICI CURIAE* INVESTMENT COMPANY INSTITUTE, SECURITIES INDUSTRY ASSOCIATION, INVESTMENT COUNSEL ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AMERICAN COUNCIL OF LIFE INSURERS, AND THE NATIONAL BUSINESS COALITION ON E-COMMERCE AND PRIVACY IN SUPPORT OF APPELLANTS

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

FEDERAL CONSTITUTIONAL PROVISION, STATUTES, LEGISLATIVE MATERIALS, AND RULES

STATE STATUTE

III. CORPORATE DISCLOSURE STATEMENT

The Investment Company Institute is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

The Securities Industry Association is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

The Investment Counsel Association of America is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

The American Council of Life Insurers is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

The American Insurance Association is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

The National Business Coalition on E-Commerce and Privacy is a non-profit trade group. It has no parent corporation, nor has it issued shares or securities that are publically traded.

IV. INTERESTS OF *AMICI CURIAE*[1]

Each of the *Amici* Associations submitting this Brief is composed of members that are subject to the national, uniform affiliate-sharing and opt-out provisions established by Congress in the 1996 and 2003 amendments to the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.* They submit this Brief in support of Appellants and urge this Court to reverse the decision of the district court, which found that California's regulation of affiliate-sharing through the Financial Information Privacy Act, Cal. Fin. Code § 4050, *et seq.*, was not preempted by federal law. *Amici* submit that, if not reversed, the district court's decision will thwart Congress' intent to develop a single national system for information sharing among their member institutions' affiliates, create an unworkable hodgepodge of inconsistent state and local regulatory regimes, and deprive their members and consumers of the benefits and efficiencies of a single uniform system to govern affiliate-sharing.

The specific associations submitting this *Amici* Brief are:

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[1] This brief is filed with the consent of all parties.

A. The Investment Company Institute

The Investment Company Institute ("ICI") is the national association of the United States investment company industry. Founded in 1940, its membership includes approximately 8,605 mutual funds, 630 closed-end funds, 135 exchange-traded funds, and 5 sponsors of unit investment trusts. Its mutual fund members represent 86.6 million individual shareholders and manage approximately $7.4 trillion in investor assets. For 60 years, the mutual fund industry has grown to become a vital part of the U.S. economy. Legislation and litigation that affects the operation of the mutual fund industry impacts the investments of nearly a quarter of the American public.

B. The Securities Industry Association

The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 780,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry

generated an estimated $209 billion in domestic revenue and $278 billion in global revenues.

C. The Investment Counsel Association of America

The Investment Counsel Association of America ("ICAA") is an association that exclusively represents the interests of Securities and Eschange Commission registered investment advisers. Founded in 1937, the Association's membership today consists of approximately 350 investment advisory firms that collectively manage in excess of $4 trillion for a wide variety of institutional and individual clients. ICAA members have multi-state, national, and international businesses.

D. The American Insurance Association

The American Insurance Association ("AIA") is a national trade association representing more than 450 companies writing property and casualty insurance in every state and jurisdiction of the United States. In 2003, AIA member companies wrote approximately $115 billion in premiums in the United States. AIA promotes the economic, legislative and public standing of its members; provides a forum for discussion of policy problems of common concern to its members and the insurance industry; keeps members informed of regulatory and legislative developments; and serves the public interest through appropriate activities, including the promotion of safety and security of persons and property.

E. American Council of Life Insurers

The American Council of Life Insurers ("ACLI") is the largest life insurance trade association in the United States. ACLI represents 368 legal reserve life insurance companies operating in the United States. These companies account for 69 percent of the life insurance premiums, 76 percent of annuity considerations, 53 percent of the disability income insurance premiums, and 72 percent of long-term care insurance premiums in the country among legal reserve life insurance companies. ACLI member company assets account for 71 percent of legal reserve life company total assets.

F. The National Business Coalition on E-Commerce and Privacy

Founded in February 2000, the National Business Coalition on E-Commerce and Privacy (the "Coalition") advocates on behalf of mainstream major American businesses in the areas of electronic commerce and privacy. The Coalition includes businesses from diverse economic sectors and represents business interests with policymakers at the state, federal and international levels. The Coalition is committed to achieving a reasonable and practical balance between legitimate consumer expectations of privacy and the needs of the business community in using information to improve the quality, efficiency and cost-effectiveness of products and services.

V. SUMMARY

Amici and their members are strongly dedicated to the protection of their investors' and customers' privacy as well as to the privacy of personal information regarding the citizens of the United States as a whole. They each support the national uniform privacy protections set forth in the 1996 amendments to the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA" or "1996 FCRA Amendments"), and its 2003 amendments, contained in the Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 §§ 214, 711(3) (2003) ("2003 FCRA Amendments" or "2003 Act"). *Amici* submit this brief in support of Appellants because the provisions of California's Financial Information Privacy Act, Cal. Fin. Code. § 4050 *et seq.* ("SB1") that regulate the sharing of information with affiliates, if not preempted, would thwart the national uniform system of affiliate-sharing and privacy protections that Congress specifically and deliberately crafted in the 1996 FCRA Amendments and carefully preserved in the 2003 Act.

With the 1996 FCRA Amendments, Congress created a system that allows financial institutions: (1) to share freely among affiliates information from their own interaction with their customers ("transaction and experience information") and (2) to share, provided consumers are provided notice and an opportunity to opt-out, "non-experience" information among their affiliates derived from "other

information," such as loan applications or other sources provided by the customer. *See* 15 U.S.C. § 1681a(d)(2)(A)(i)-(iii). In the 2003 FCRA Amendments, Congress further enhanced its regulation of affiliate-sharing by providing that consumers must be provided notice and an opportunity to opt-out before shared customer information may be used for certain marketing purposes. *See* 15 U.S.C. § 1681s-3(a).[2]

Floor statements by Members of Congress noted the public policy rationale underlying the need for a uniform federal standard. For example, Senator John Sununu (R-NH) stated: "We want to avoid having 50 States adopting 50 different standards in each of the areas that have been discussed — whether it is enforcement, access for consumers to credit reports, ***information sharing***, or whatever the issue. We don't want to have 50 different systems for each of these areas." 108 Cong. Rec. S13855-56 (daily ed. Nov. 4, 2003) (emphasis added). Indeed, Senator Sununu described as a "Pandora's box" the prospect of each states "impos[ing] their own privacy rules." *Id.* at S13856.

With the enactment of SB1, compounded by the district court's ruling, the California legislature threatens to open Pandora's box and to turn Congress'

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[2] In this Brief, the regime that Congress created in FCRA for information sharing among affiliates, including the notice and opt-out provisions, is referred to as "information sharing," "affiliate-sharing," or "affiliate-sharing and consumer opt-out."

carefully crafted, national uniform system for information sharing among affiliates, including consumer notice and opt-out rights, into a hodgepodge of inconsistent state (as well as local) regulatory regimes. Such an onerous collection of ever-changing state and local laws would hinder the efficient delivery of financial services that financial institutions provide to their customers.

The district court even conceded that the plain and unambiguous language of the affiliate-sharing preemption provision in the 1996 FCRA Amendments and the 2003 Act 15 U.S.C. § 1681t(b)(2) "indicate[s] on its face" that it would preempt SB1. ER 000070 (Op. 9). Nonetheless, the district court found that the plain terms of the statute should not control because doing so would contravene FCRA's "stated purpose and scope" when it was enacted in 1970 — over a quarter-century before the 1996 FCRA Amendments that implemented the national regime for affiliate information sharing and consumer opt-out were passed. ER 000068 (Op. 7).

Appellants' Brief persuasively discusses the plain language argument and *Amici* incorporate by reference Appellants' arguments and Statement of Facts in their Brief. *Amici*'s Brief focuses on three specific areas of legislative history. ***First***, *Amici* examine the legislative history of the 1996 FCRA Amendments, which is replete with references to Congress' intent to create a uniform regime for the regulation of information sharing by affiliates by exempting such sharing from

the requirements FCRA imposes on "consumer reports" and by preempting state and local laws like SB1. ***Second***, *Amici* demonstrate that the California legislature, when considering whether to pass SB1, specifically and unmistakably understood that § 1681t(b)(2), if not allowed to sunset on January 1, 2004, would preempt SB1's affiliate-sharing provisions. *See* Calif. Rep. Sen. Bill 1. ***Third***, *Amici* show that both proponents and opponents of the 2003 Act in Congress, including California senators and representatives, specifically contemplated that, if the 2003 Act passed and removed the sunset provision from § 1681t(b)(2), it would preempt SB1's affiliate-sharing provisions.[3]

Amici join with Appellants and respectfully request that this Court reverse the decision of the district court and find that § 1681t(b)(2) of FCRA preempts SB1's affiliate-sharing provisions. In order to promote the efficient delivery of financial services and to uphold the national provisions for affiliate-sharing and consumer opt-out crafted by Congress, *Amici* further ask this Court to direct that the district court issue a broad injunction enjoining California from enforcing

[3] In fact, some Members believed that SB1 was preempted *ab initio* because it was passed while the affiliate-sharing language of the 1996 FCRA Amendments controlled the regulatory landscape, even though SB1 was designed to become effective only after that language was scheduled to sunset. *See* Statement of Representative Spencer Bachus (R-AL), 108 Cong. Rec. H8147 (daily ed. Sept. 10, 2003) (noting that SB1 "had no effect" because § 1681t(b)(2) of the FCRA preempted it when it was passed).

SB1's affiliate sharing provisions against the financial services industry generally, including *Amici*'s member entities.

VI. ARGUMENT AND CITATION OF AUTHORITIES

A. The Plain Language of FCRA Preempts SB1

Appellants cogently argue in their Opening Brief that the plain and unambiguous language of the affiliate-sharing preemption provision contained in 15 U.S.C. § 1681t(b)(2) should govern the outcome of this appeal and preempt SB1. *See* App. Br. 23; *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001). It is axiomatic that to determine whether a federal statute preempts state law, a court must look first to congressional intent. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996) ("[The preemption] question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?"); *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992) ("'[T]he purpose of Congress is the ultimate touchstone" of pre-emption analysis"). The inquiry is two-fold. A court must first determine whether the federal statute contains a clear indication of Congress' intent to preempt state law. *See Barnett*, 517 U.S. at 31. Second, as here, where the federal statute contains such an express preemption clause, the court must then determine the scope of the preemption. *See Cipollone*, 505 U.S. at 517 (noting that because the federal statute in question contains an express preemption clause, the only task for the Court was to "identify the domain expressly pre-empted" by the federal statute).

Congressional intent is determined, first and foremost, from the plain language of the preemption clause and the statutory framework surrounding it. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). As articulated in Appellants' Opening Brief, the plain language of FCRA's preemption provision demonstrates conclusively and unambiguously that it preempts laws, such as SB1, that attempt to impose "requirements and prohibitions" on information sharing among affiliates beyond those established by FCRA.

Where the plain language of a statute is unambiguous, a district court's inquiry is complete. *See* App. Br. at 23; *see also Price v. United States Tr. (In re Price)*, 353 F.3d 1135, 1141 (9th Cir. 2004). Only if a statute is ambiguous is there a need to consult legislative history. *Merkel v. Comm'r*, 192 F.3d 844, 848 (9th Cir. 1999). Indeed, the district court recognized that § 1681t(b)(2) of FCRA "indicate[s] on its face" that it would preempt SB1's affiliate-sharing provisions. ER 00070 (Op. 9). Despite this conclusion, the district court did not stop its analysis with the unambiguous language of § 1681t(b)(2) and instead erroneously narrowed the scope of § 1681t(b)(2) to include only "consumer reports" based upon its flawed understanding of FCRA's structure and legislative history. *Id.*

The legislative history of FCRA, contrary to the district court's opinion, shows that Congress undeniably sought to preempt state and local laws that regulate affiliate-sharing and consumer opt-out. While noting that the plain

language of the statute should be outcome-determinative, Appellants have appropriately cited to relevant parts of the legislative history — that the district court ignored — to support their preemption argument. *See* App. Br. at 33-35; *Bank of Am., N.A. v. City of Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003) (vacated on other grounds); *see also Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 398-99 (9th Cir. 2002) (looking to legislative history to determine whether Congress intended to create complete preemption); *AGG Enters. v. Washington County*, 281 F.3d 1324, 1329 (9th Cir. 2002) (relying on legislative history to gain "insight into the intent of Congress on the scope of preemption"). *Amici* supplement that excellent discussion with the legislative history and argument below.

B. The Legislative History of the 1996 FCRA Amendments Demonstrates That Congress Intended Broadly To Preempt State Laws Like SB1

The district court disregarded the plain meaning of the 1996 FCRA Amendments and focused instead on what it viewed to be the purpose of FCRA as set forth by Congress over a quarter-century earlier, when it first passed FCRA. In 1996, however, following extensive hearings and debate that occurred over the course of several years, Congress significantly changed not only the way states could regulate the use of consumer information by credit reporting entities, but also

the way participants in the financial services industry could share consumer information with their affiliates.

The structure of the 1996 FCRA Amendments demonstrates that Congress fully intended to occupy the field regarding information sharing by affiliates. First, because FCRA imposes a variety of restrictions on the use and disclosure of "consumer reports," Congress freed financial institutions to share customer information with their affiliates (subject to an opt-out provision for certain types of "non-experience" information) by exempting broad categories of information from FCRA's definition of "consumer reports."[4] *See* 15 U.S.C. §§ 1681d, 1681f, 1681g. In particular, Congress specifically excluded: (i) information that a financial institution obtains directly from dealing with its customers and then shares with its affiliates (so-called "transaction and experience information"); and (ii) any other ("non-experience") information that a financial institution shares with its affiliates so long as the customer is provided with notice and an initial opportunity to opt out of the institution's sharing of the information. *See* 15 U.S.C. §§ 1681a(d)(2)(A)(i)-(ii).

[4] FCRA defines a "consumer report" as "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 . . ." 15 U.S.C. § 1681a(d)(1).

Second, Congress eliminated the 1970 FCRA's state law savings clause and replaced it with the broad affiliate-sharing preemption provision in § 1681t(b)(2). In a compromise to secure its passage, Congress added a January 2004 sunset provision for the affiliate-sharing preemption provision. 15 U.S.C. § 1681t(d)(2). Moreover, and as more fully discussed in Appellants' Brief, the language of the various preemption provisions contained in § 1681t also demonstrates that Congress, when it wanted to limit the preemptive scope of a ***particular provision*** to "consumer reports," said so specifically. *See* App. Br. at 25.

The legislative history of the 1996 FCRA Amendments also shows that Congress knew how to limit the preemptive scope of a provision to "consumer reports" when it chose to do so. The December 14, 1995 Report on FCRA by the Senate Committee on Banking, Housing, and Urban Affairs ("Senate Banking Committee") discusses the effect of FCRA's various preemption provisions. S. Rep. No. 104-185 at 55 (1995). Significantly, the Report, like the text of the 1996 Amendments, carefully delineates those instances in which preemption is limited to information found in "consumer reports."

When the Report discusses the affiliate-sharing preemption provision in §1681t(b)(2), the Committee carefully avoided using language limiting the affiliate-sharing preemption provision to "consumer reports." The Report states, "[i]n addition, section 624 [now §1681t(b)(2)] preempts any state or local law with

respect to the ***exchange of information*** among affiliated persons and preempts any state or local law with respect to the form and content of any disclosures required to be made under section 609(c) [now § 1681g(c)]." *Id.* (emphasis added).

Yet when the Report discusses other preemption provisions, it notes that they are more narrowly limited to "consumer reports." For example, it states that "section 624 [now § 1681t(b)(1)(D)] preempts any state or local provision relating to section 615(d) [now § 1681m(d)], regarding the duties of a person who uses a ***consumer report*** in connection with any credit or insurance transaction that is not initiated by the consumer . . ." *Id.* at 54 (emphasis added). Likewise, it states that "section 624 [now § 1681t(b)(1)(E)] preempts any state or local provision relating to the subject matter of section 605 [now § 1681c] relating to ***information contained in consumer reports***, except that such preemption does not apply to any state law in effect on the date of enactment of this Act" *Id.* (emphasis added).

Other Senate Reports support this conclusion as well. In the Report on the Consumer Reporting Reform Act of 1994 ("1994 CCRA") in the 103rd Congress, which was the predecessor legislation to what became the 1996 FCRA Amendments in the 104th Congress, the Senate Banking Committee again

recognized the importance of exempting information sharing among affiliates from FCRA's definition of "consumer report":[5]

> 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. No. 103-209, at *5, § D. Similarly, the Report recognized the broad scope of the affiliate-sharing preemption provision:

> Section 116 [which has language nearly identical to that ultimately included in § 1681t(b)(2)] 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 section 101 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.

Id. at *27, § 116(2).

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[5] The 1994 CCRA's language regarding the affiliate-sharing preemption provision and the bill's exemption of information sharing among affiliates from the definition of "consumer report" is nearly identical to what Congress later passed in the 1996 FCRA Amendments.

Thus, both the plain language and the legislative history of the affiliate-sharing preemption provision in the 1996 FCRA Amendments show that it serves to preempt contrary state laws like SB1's affiliate-sharing provisions.

C. The Legislative History of SB1 Demonstrates That the California Legislature Understood That FCRA Preempted The Affiliate-Sharing Provisions of SB1

Against the backdrop of the FCRA's broad preemption of affiliate-sharing regulation by states, as well as its impending sunset on January 1, 2004, California passed SB1 to affirmatively impose a different regime to regulate the sharing of information among affiliates following the anticipated expiration of § 1681t(b)(2). But even the California legislature recognized that § 1681t(b)(2) would preempt SB1's opt-out provisions.

The California legislature's Senate Committee on the Judiciary, the committee with jurisdiction over SB1, issued a Committee Report that stated that § 1681t(b)(2) "clearly preempts" SB1 if Congress allowed it to remain in effect. *See* Committee Report for the 2003 California Senate Bill No. 1 (Feb. 18, 2003). In the section on "Preemption," the Committee Report unambiguously concludes:

> [Section 1681t(b)(2)], which ***clearly preempts*** [SB1]'s opt-out provisions, is scheduled to sunset in January 2004. Because [SB1]'s effective date is well beyond this sunset date, preemption concerns are likely minimal, ***unless and until it appears that Congress may renew the provision.***

Comm. Rep. CA S.B. 1, Reg. Sess., at § 9 (emphasis added).

The Committee Report went on to note that the preemptive force of the 1996 FCRA Amendments, even if allowed to sunset, could preempt SB1 because it was passed while § 1681t(b)(2) was operative and since the federal Office of the Comptroller of the Currency ("OCC") had issued an opinion that arguably indicated that FCRA preempted any state law affecting affiliate information sharing enacted before January 2004.[6] Ultimately, the Committee Report determined that, because the plain language of § 1681t(b)(2) did not prevent a state from "enacting or enforcing" a law during the operative period of the preemption provision, it was unlikely that a court would find SB1, which would not become effective until July 2004, preempted based merely upon an OCC opinion. Nonetheless, the Committee Report conclusively shows that the California legislature contemplated that SB1's regulatory regime applicable to affiliate-sharing would be doomed if Congress removed the sunset provision — which, of course, it did in the 2003 FCRA Amendments.

The Committee Report also demonstrates that the California legislature understood, contrary to the district court's opinion and Defendants-Appellees' argument, that provisions in the 1999 Gramm-Leach-Bliley Act ("GLB Act"),

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[6] *See* O.C.C., Preemption Opinion, 66 Fed. Reg. 51502 (Oct. 9, 2001) (finding that FCRA preempted West Virginia laws that regulated information-sharing among affiliated insurance entities).

15 U.S.C. § 6801, *et seq.*, expressly allowed states to regulate some sharing of information by financial institutions — but not the sharing of information among affiliates, which is governed by FCRA.[7] In particular, the GLB Act created a number of new privacy protections for consumers and regulates the "disclos[ure of] nonpublic personal information to a ***nonaffiliated third party***." 15 U.S.C. § 6802(b)(1) (emphasis added). Congress, however, expressly provided that the GLB Act "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]." 15 U.S.C. § 6806. *See* App. Br. 37-41. The California Senate Judiciary Committee understood that the GLB Act could not save the affiliate-sharing provisions of SB1 from preemption by FCRA, and stated so unambiguously: "[The] GLB Act does not restrict the sharing of nonpublic customer information ***between affiliates***." Comm. Rep. CA S.B. 1, at § 16 (emphasis added).[8]

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[7] The GLB Act requires that financial institutions provide consumers with notice of their privacy policies and affiliate-sharing practices, *see* 15 U.S.C. § 6803, but specifically preserves the regime created to regulate affiliate-sharing established by FCRA. *See* 15 U.S.C. § 6806.

[8] The Congressional Research Service ("CRS") of the Library of Congress has also recognized the inapplicability of the GLB Act to the regulation of information-sharing among affiliates of a financial institution. *See* M. Maureen Murphy, CRS Report for Congress, Financial Privacy Laws Affecting Sharing of Customer Information Among Affiliated Institutions (Feb. 21, 2003), available at http://www.epic.org/privacy/fera/RS21427.pdf. In that report, the CRS states: "[The GLB Act] . . . contains no prohibition on sharing of customer information among affiliates." *Id.* at 2. It continues in a later paragraph:

D. The 2003 FCRA Amendments Demonstrate That Congress Intended to Preempt SB1

Congress' reaction to the passage of SB1 in August 2003 was swift and unmistakable. Just three months after the California legislature passed SB1 (during a congressional recess), Congress enacted the 2003 FCRA Amendments in the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, which made permanent FCRA's preemption of state laws that govern the sharing of information with affiliates. *See* Pub. L. No. 108-159, 117 Stat. 1952, § 711(3) (repealing former 15 U.S.C. § 1681t(d)(2), the sunset clause). Inexplicably, the district court relegates consideration of the substantial impact of the 2003 Act and

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> [The GLB Act]'s prohibitions deal only with sharing of nonpublic personal information by financial institutions with nonaffiliated third parties. There is no direct authorization of sharing such information among affiliated financial institutions. In essence, therefore, [the GLB Act] indirectly authorizes interaffiliate sharing of information by a provision disavowing an intent to supercede the FCRA. It, therefore, preserves the conditions placed upon interaffiliate sharing of information in the FCRA . . . . This preservation of the FCRA runs counter to [the GLB Act]'s general preemption provision under which [the GLB Act] preempts state laws only to the extent that they provide less protection than [the GLB Act].

Id. at 4. Accordingly, by its express terms, the GLB Act regulates information sharing with ***non-affiliates***, but expressly preserves the affiliate-sharing and consumer opt-out regime in FCRA, including FCRA's state law preemption provision. Accordingly, the GLB Act does not and cannot save SB1 from preemption by FCRA.

its accompanying legislative history to a two-sentence footnote where it clung to the patently incorrect notion that information sharing among affiliates was regulated by the GLB Act and erroneously concluded that, through FCRA, Congress did not purport to regulate affiliate-sharing. ER 000074 (Op. at 13 n.9).

Even a cursory reading of the legislative history of the 2003 Act shows that both proponents and opponents of the affiliate-sharing preemption provision understood that it would preempt SB1, enacted only weeks earlier. For example, on September 10, 2003, Representatives Barbara Lee and Brad Sherman, both from California, proposed an amendment to the 2003 Act that would have specifically exempted SB1 from the preemptive scope of § 1681t(b)(2). 108 Cong. Rec. H8145 (daily 3d. Sept. 10, 2003) ("Subsections (b) and (c) [of 15 U.S.C. § 1681t—FCRA's affiliate-sharing preemption provision] shall not apply to the California Financial Information Privacy Act (division 1.2 of the California Financial Code...)."). In support of the amendment, Representative Sherman stated:

> [SB1] was passed while this Congress was in recess last month. There are several provisions of that bill that are not preempted by Federal law and that will do an outstanding job protecting Californians . . . ***One of those [SB1] provisions, however, would be preempted. That is what is called the opt-out provision dealing with affiliate information sharing.***

Id. At H8146 (emphasis added).

Representative Spencer Bachus (R-AL) responded by noting that the ***existing*** language of the 1996 FCRA Amendments preempted SB1 and that the 2003 FCRA Amendments merely extended this language by removing the sunset provision. Thus, he argued, SB1 had been preempted from the day it was first passed so a "carve out" amendment would not save SB1's affiliate-sharing provisions:

> There is only one thing and one thing alone that this legislation "preempts" [in California's SB1], and that is the required opt-out for affiliate sharing, and ***that is also the present law***. So what was passed in California, as far as the required opt-out for affiliate sharing, the citizens of California did not get anything because the national law ***today*** preempts that. It had no effect.

Id. at H8147 (emphasis supplied). Representative Sam Farr from California also agreed, noting that "[a]s written, this bill [the 2003 Act's removal of the sunset language for FCRA's affiliate sharing preemption provision] would preemptively cancel out the effects of California's SB1." *Id.* Ranking Member Barney Frank (D-MA) also noted that SB1 would be preempted:

> I do note that . . . after this bill passed through committee, the State of California did adopt additional legislation in the area of privacy. Much of that legislation is unaffected by what we do today. One section out of that legislation [the affiliate-sharing provisions of SB1] would be affected by what we do today . . . . With all of that, the basic point to me is that we have a bill today that continues the preemptions, which I believe help the market function at its most efficient.

Id. at H8120. Similarly, Representative Bachus (D-CA) stated that "What this amendment does, first of all, it addresses two things: one is SB1 that was just passed in California. And as to affiliate-sharing, that is what is preempted by this legislation. . . . So SB1 as to affiliate-sharing, you cannot do that today in California. You would be, if FCRA was not renewed." *Id.* at H8143.

So unanimous and bipartisan was the understanding among Representatives that FCRA's affiliate-sharing preemption clause affirmatively preempts SB1 that Representative Lee stated:

> When the Committee rises and we are in the full House, I intend to submit for the RECORD a letter signed by 55 Democrats and Republicans from California discussing the fact that this law, if passed, would preempt California law, SB1.

Id. at H8149.

The Senate similarly understood that FCRA, even before the 2003 Act, preempted SB1, and that the 2003 FCRA Amendments merely made the affiliate-sharing preemption provision permanent. Proponents of the extension of the affiliate-sharing preemption provision recognized its beneficial purpose:

> We need federal preemption in this area. I think it would be a mistake to let States and localities all try to impose their own privacy rules . . . . But if we fail to pass this bill, we open a Pandora's box of States and localities writing their own rules.
>
> [W]e cannot ignore the fact that credit rules and markets and money are all part of a broader, national economy that requires a unified, Federal approach. To let States undermine that would be a recipe for disaster.

108 Cong. Rec. S13856 (daily ed. Nov. 4, 2003) (Statement of Sen. Bunning (R-KY)).

Opponents of the extension, such as Senator Dianne Feinstein (D-CA), also recognized that the language of the 2003 Act would preempt SB1. To that end, she proposed an amendment that would effectively have written SB1's affiliate-sharing regulations into the 2003 Act. 108 Cong. Rec. S13860. No such amendment would have been necessary, of course, if § 1681t(b)(2) did not already preempt SB1's affiliate-sharing provisions.[9] Senate Banking Committee Chairman, Senator Richard Shelby (R-AL), acknowledged both this fact and that the limited authority preserved to the states under the GLB Act did not apply to affiliate-sharing:

> Gramm-Leach-Bliley made it permissible for California and all other States to pass legislation that regulates third-party sharing activity. This bill would not affect those provisions in the California law that come because of Gramm-Leach-Bliley. With respect to the part of SB1 that conflicts with the Fair Credit Reporting Act, ***the California law was preempted, making it unenforceable when it was enacted.*** This bill [the 2003 Act] does not change or alter that fact in any way.

Id. at S13873 (emphasis added).

The floor debates in both the House and the Senate unmistakably demonstrate that Congress not only considered the question of whether FCRA's affiliate sharing provisions preempted SB1, but members from both parties

[9] This amendment was soundly rejected in a 70-24 vote. Roll Call Vote no. 434, 108th Cong. 1st Sess.

definitively concluded that it did. Such clear and dispositive legislative history evidences Congress' intent that § 1681t(b)(2) preempt SB1's affiliate-sharing provisions.

E. CONCLUSION

Appellants have correctly argued that the district court's decision should be reversed because the plain language of FCRA demonstrates that SB1's provisions regulating affiliate-sharing are preempted. Appellants and, by this Brief, *Amici* have also conclusively demonstrated that the legislative history of the 1996 and 2003 FCRA Amendments shows Congress' unmistakable intent to preempt state laws regulating the sharing of information among affiliates. In addition, even the California legislature itself recognized, when it passed SB1, that the language in FCRA, if not allowed to sunset (which it was not), would preempt SB1's affiliate-sharing provisions. For the foregoing reasons and with the authorities cited above, this Court should recognize Congress' unambiguous intent to create a national, uniform standard for the efficient delivery of financial services by creating an affiliate-sharing and consumer opt-out regime in the 1996 and 2003 FCRA Amendments. Accordingly, this Court should reverse the district court and direct it to issue an injunction enjoining California from enforcing SB1's affiliate-sharing provisions on the ground that they are preempted by § 1681t(b)(2) of FCRA.

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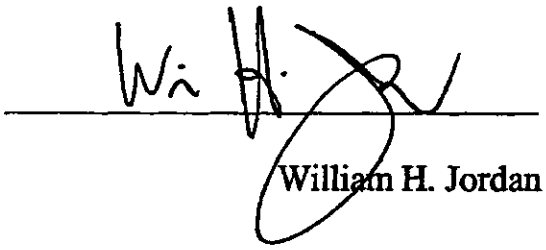
CERTIFICATE OF COMPLIANCE

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 proportionally spaced, has a typeface of 14 points or more, and contains 5,453 words.



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CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the Brief of Amici Curiae in Support of Appellants to be served this Ninth day of August, by United Parcel Service, next business day delivery, as follows:

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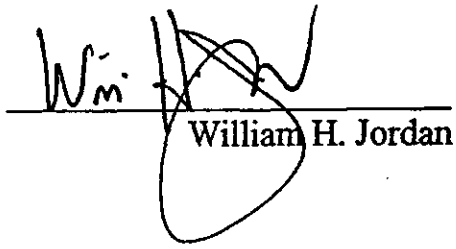

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