No. 08-730

IN THE
Supreme Court of the United States

AMERICAN BANKERS ASSOCIATION, ET AL.,
Petitioners,

v.

EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Altria Group, Inc. v. Good,
129 S. Ct. 538 (2008) 6

Chamber of Commerce v. Brown,
128 S. Ct. 2408 (2008) 11

City of Columbus v. Ours Garage and Wrecker Service,
536 U.S. 424 (2002) 4

Engine Manufacturers Ass'n v. South Coast Air Quality Management District,
541 U.S. 246 (2004) 2, 6

Field v. Mans,
516 U.S. 59 (1995) 4

Russello v. United States,
464 U.S. 16 (1983) 4

Salinas v. United States,
522 U.S. 52 (1997) 9

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) 8

STATUTES

15 U.S.C. § 1681(b) 6

15 U.S.C. § 1681a(d)(1) 3, 8, 11

15 U.S.C. § 1681a(f) 8

15 U.S.C. § 1681t(a) 7

15 U.S.C. § 1681t(b)(1) 5

15 U.S.C. § 1681t(b)(2) ..... *passim*

15 U.S.C. § 6801 *et seq.* 9

OTHER AUTHORITIES

S. Rep. No. 104-185 (1995) 9, 10

REPLY BRIEF FOR PETITIONERS

In defending the Ninth Circuit's decision, Respondents, like the Ninth Circuit, ignore the views of six federal agencies charged with enforcing the Fair Credit Reporting Act (FCRA).[1] Those federal agencies agree with Petitioners that the affiliate-sharing preemption provision of the FCRA preempts SB1's restrictions on affiliate information sharing, and that the Ninth Circuit's contrary interpretation of that provision "is of enormous practical significance" and will have serious detrimental effects on financial institutions and their customers if left uncorrected. Federal Agencies Amicus Brief, 2004 WL 3830731, at *13. These detrimental effects are particularly troublesome in the midst of the current financial crisis.

Instead of addressing the federal agencies' conclusions, Respondents advance several contentions, none of which has merit. First, they assert (Opp. 9-26) that the Ninth Circuit applied settled statutory construction principles and adopted a reasonable interpretation of the FCRA's affiliate-sharing preemption provision. This ignores the plain language of that provision and basic canons of statutory construction. Second, Respondents'

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[1] Amicus Curiae Brief of the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and the Federal Trade Commission in Support of Appellants American Bankers Association, et al., *American Bankers Association, et al. v. Bill Lockyer, et al.*, No. 04-16334, 2004 WL 3830731 (Federal Agencies Amicus Brief).

contention (Opp. 26-28) that complying with SB1's requirements will not unduly burden financial institutions is incorrect and ignores the potentially enormous penalties imposed by SB1 even for unintentional violations. Finally, Respondents' contention (Opp. 28-30) that the Court should not determine the scope of the affiliate-sharing preemption provision until financial institutions are further hamstrung by an even more intricate patchwork of state privacy laws simply puts off an issue that ought to be addressed now. *See* Pet. 11 n.4.[2]

1. The Ninth Circuit's statutory construction is anything but principled. It ignores the plain meaning of "information" in the FCRA's affiliate-sharing preemption provision, 15 U.S.C. § 1681t(b)(2), and instead gives the word a "restricted" meaning, just as the Ninth Circuit interpreted the word "standard" in the Clean Air Act's preemption provision in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). *See* Pet. 30-31.

Respondents contend (Opp. 9) that the Ninth Circuit's restricted interpretation of the word "information" makes sense when the term is considered in the broader context of the entire FCRA. But Respondents offer no reason why the statute supports anything but a plain-meaning

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[2] Pursuant to Rule 29.6, petitioner states that the corporate disclosure statement in its petition (Pet. ii) remains current.

interpretation of the word "information" in Section 1681t(b)(2). App. 77a.[3]

Respondents' argument that the Ninth Circuit simply "g[ave] the word 'information' in the preemption provision the same meaning as the word 'information' in the definition of a 'consumer report,'" Opp. 12, is implausible on its face. In Section 1681a(d)(1), Congress circumscribed the word "information" by defining a "consumer report" as "*information . . . bearing upon*" certain specified subjects that is "*used or expected to be used or collected*" for certain specified purposes. App. 65a. (emphasis added). Section 1681t(b)(2), by contrast, does not limit the word "information" in these ways. It prohibits states from enacting any "requirement or prohibition . . . with respect to the exchange of information" among affiliates. App. 77a. The federal agencies agree with Petitioners' plain-language reading of the statute. The agencies explained that "[t]he type of information covered by the preemption provision was not limited to 'consumer report' information," and the provision "makes no reference to 'consumer report'" and does not "even hint[] that its scope is limited only to state laws regulating consumer reports." Federal Agencies Amicus Brief, 2004 WL 3830731, at **6, 17, 18.

The unqualified reference to "information" in the affiliate-sharing preemption provision is in stark contrast to other preemption provisions in the FCRA

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[3] In fact, after setting forth their arguments in support of the Ninth Circuit's decision, Respondents note that they actually believe the Ninth Circuit's decision is wrong. Opp. 16 n.2.

that refer directly to "consumer reports" or "information contained in consumer reports." *See* Pet. 18-19; App. 76a-77a. On this point, Respondents acknowledge (Opp. 14) the general principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act," courts presume that Congress intended that omission, *Russello v. United States*, 464 U.S. 16, 23 (1983), and simply note that applying this canon is not always appropriate. But Respondents offer no reason why this basic principle of statutory construction should not apply to the preemption provisions in Section 1681t.[4]

In a final effort to explain away this disparate drafting, Respondents assert that Congress could not have referred to the subject matter of the affiliate-sharing preemption provision, as it did in other express preemption provisions in Section 1681t(b)(1), "because the FCRA, as a whole, does not regulate communication of information among affiliates."

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[4] Neither of the cases cited by Respondents (Opp. 14) justifies a narrow reading of "information" in Section 1681t(b)(2), App. 77a. In *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002), this Court read the word "State" in a saving clause when not followed by the phrase "or political subdivision of a state" (as it was in other parts of a preemption provision) to include the subsequent phrase because the term "State" is generally understood to include local political subdivisions. *Id.* at 432. Similarly, in *Field v. Mans*, 516 U.S. 59 (1995), this Court gave the term "reasonable reliance" its meaning widely understood in the common law. *Id.* at 69-70. Here, the Ninth Circuit did not give the word "information" its widely understood meaning; it arbitrarily restricted the meaning of the word.

Opp. 15. This is incorrect: Section 1681(a)(d)(2)(A)(ii) permits the free exchange of experience information, while Section 1681(a)(d)(2)(A)(iii) requires notice and an opportunity to opt out of the sharing of non-experience information. Clearly, this is "regulat[ion]."

Respondents' argument also makes no sense. Congress easily could have drafted Section 1681t(b)(2) in the same way that it drafted the consumer report-specific preemption provisions in Section 1681t(b)(1). For example, the affiliate-sharing preemption provision *could* have said: "No requirement or prohibition may be imposed under the laws of any State . . . with respect to Section 1681a(d)(2)(A), relating to affiliate-sharing of information contained in consumer reports." But that is not what Congress did. It prohibited states from enacting laws that require or prohibit the exchange of *information* among affiliates. As the federal agencies argued to the Ninth Circuit, "[c]learly, Congress knew how to draft a preemption provision with limited scope; clearly, that, too, is *not* what it did here." Federal Agencies Amicus Brief, 2004 WL 3830731, at *19.

Unable to harmonize the restricted meaning that the Ninth Circuit assigned the word "information" in the FCRA's affiliate-sharing preemption provision with the rest of the statute, Respondents turn to the FCRA's purpose, which they contend is to "protect consumers from unfair or inaccurate consumer reporting." Opp. 12-13. But the "purpose" section Respondents cite makes clear that the FCRA has a *dual purpose* of "meeting the needs of commerce for consumer credit, personnel, insurance, *and other*

information," 15 U.S.C. § 1681(b) (emphasis added), while also ensuring that such information sharing is accomplished in a way that is "fair and equitable to the consumer." Opp. 12 (quoting Section 1681(b)). It is entirely consistent with this dual purpose for Congress to have allowed the free flow of experience information among affiliated entities, while placing notice and opt out restrictions on disclosure of consumer information that is non-experience information. It is equally consistent with this dual purpose for Congress to have prevented states from restricting affiliate sharing of "consumer credit . . . , and other information" regardless of whether that information is in a "consumer report."

The presumption against preemption (Opp. 10-11) does not save the Ninth Circuit's decision. This Court has held that the presumption "makes no difference" where Congress makes its desire for preemption clear. *Engine Mfrs.*, 541 U.S. at 256. *See Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) ("[W]hen the text of a pre-emption clause *is susceptible of more than one plausible reading*, courts ordinarily accept the reading that disfavors pre-emption.") (quotations omitted) (emphasis added). The FCRA's affiliate-sharing preemption provision is not susceptible to the Ninth Circuit's reading. Under Respondents' approach, states cannot restrict sharing of the kind of sensitive customer information that is encompassed within Congress's definition of "consumer report," such as a customer's "general reputation," "personal characteristics," "credit worthiness," and "mode of living," but they are free

to impose more onerous requirements on the sharing of *less* sensitive information. *See* Pet. 22 & n.7.[5]

The "absurd" results doctrine (Opp. 16-18) does not justify the Ninth Circuit's decision. Respondents' contention that a plain-meaning interpretation of the affiliate-sharing preemption provision would invite entities to share consumer information in industries as far removed from financial institutions as law firms, schools, and video stores is far-fetched. Respondents – again ignoring the plain text of the FCRA – fail to acknowledge that the affiliate-sharing preemption provision is limited to corporate affiliates. 15 U.S.C. § 1681t(b)(2), App. 77a. Respondents also ignore another textual limitation built into the preemption provision: the FCRA limits the reach of its preemptive effect to "person[s] subject to the provisions of this subchapter." *See id.* § 1681t(a) ("Except as provided in subsections (b) and (c)," the FCRA does not exempt "any person subject to the provisions of this subchapter" from complying with state information-sharing laws), App. 76a. Financial institutions are "[p]ersons subject to the provisions of [the FCRA]" and are therefore entitled to take advantage of the express preemption provisions provided in Section 1681t(b) and (c).

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[5] Respondents do not dispute that California stands ready to impose enormous penalties on financial institutions that share with their affiliates routine consumer information, such as a person's name, address, and telephone number. *See* Pet. 26-27 (citing Brief of Appellants California Attorney General Bill Lockyer and California Insurance Commissioner John Garamendi, *American Bankers Association, et al. v. Bill Lockyer, et al.*, Nos. 05-17206, 05-17163, 2006 WL 2630142, at **16-20.)

In any event, if a law firm, school or video store were "regularly engage[d] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers" for the purpose of furnishing such information to third parties for "monetary fees, dues, or on a cooperative nonprofit basis" (15 U.S.C. § 1681a(f)) such that it became a "[p]erson[] subject to the provisions of [the FCRA]" and had to comply with the FCRA's attendant burdens, it would not be "absurd" for Congress to exempt these entities from state regulations on affiliate information sharing pursuant to Section 1681t(b)(2). If there were any "absurdity" in this result, it would also arise under the Ninth Circuit's opinion, which holds that states cannot restrict sharing among affiliates of the kind of sensitive customer information within Congress's definition of a "consumer report," including information about a customer's "character," "general reputation," "personal characteristics," "credit worthiness," and "mode of living." *Id.* § 1681a(d)(1), App. 65a; *see* App. 12a-13a.

To the extent that an "absurd result" ever justifies departure from the plain meaning of legislation, it would have to be the "rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). That the affiliate-sharing preemption provision allows financial institutions to share information beyond what would constitute a "consumer report" is not "demonstrably at odds with

the intentions of its drafters." As the federal agencies explained, Congress added the affiliate-sharing preemption provision to ensure that the FCRA's affiliate-information-sharing regime would serve as a "uniform nationwide standard[]" that would "'promote[] operational efficiency for industry[] and competitive prices for consumers.'" Federal Agencies Amicus Brief, 2004 WL 3830731, at *2 (quoting S. Rep. No. 104-185, at 55 (1995)). Far from being "absurd," it was perfectly logical for Congress to ensure that states would not interfere with affiliate sharing by enacting laws like SB1.

Finally, Respondents resort to legislative history.[6] But only the "most extraordinary showing of contrary intentions" in legislative history could justify departure from the statute's plain language. *Salinas v. United States*, 522 U.S. 52, 57 (1997). The limited legislative history Respondents choose to acknowledge does not come close to making such an "extraordinary showing," and Respondents' attempt to rewrite the legislative history is unpersuasive.

Respondents cite (Opp. 22-23) a 1993 Senate Report stating that the preemption provision was intended to apply to the proposed exclusions from the "consumer report" definition. This citation simply

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[6] Respondents suggestion (Opp. 2-4) that the Gramm-Leach-Bliley Act (GLBA) supports the Ninth Circuit's interpretation must be rejected. GLBA not only leaves affiliated companies free to share customer information among themselves, *see* 15 U.S.C. § 6801 *et seq*, but also includes an explicit provision that GLBA does not "modify, limit, or supersede the operation of the [FCRA]." *Id.* § 6806, App. 78a. Even the Ninth Circuit recognized GLBA's inapplicability here. App. 13a.

begs the question; it does not show that Congress wanted the preemption provision to extend *only* this far. A later 1995 Senate Banking Committee report indicates that Congress sought to go farther, because it states that Congress intended to create a "national uniform standard" for affiliate information sharing that would promote "operational efficiency for industry, and competitive prices for customers." S. Rep. No. 104-185, at 55.

Respondents say nothing about the fact that, in the course of debating the 2003 amendment that made the affiliate-sharing preemption clause permanent, both California senators explicitly recognized that the 2003 amendment would preempt SB1 and offered a separate amendment that would have made SB1's information-sharing requirements the national standard. Pet. 24. Congress resoundingly rejected this amendment. *Id.* As the federal agencies observed, "the legislative history of the [2003 amendment] unambiguously supports the conclusion that the FCRA preemption provision . . . is intended to preempt state laws limiting the sharing of information among affiliates, not just state laws dealing with 'consumer reports.'" Federal Agencies Amicus Brief, 2004 WL 3830731, at *20.

2. Respondents argue that complying with SB1 will not be burdensome to financial institutions because the FCRA already requires financial institutions to track and categorize various types of information. Opp. 26-28. But the fact that the FCRA may require financial institutions to categorize medical and marketing information that they wish to share with affiliates does not mean that financial institutions track more broadly the

"purpose" for collecting, using, or intending to use customer information to ensure that such information is not a "consumer report." *See* § 1681a(d)(1), App. 65a. By carving out affiliate information sharing from the FCRA's regulation of consumer reports, Congress relieved financial institutions from tracking the type and purpose of such information when they are sharing it among affiliates. Pet. 25-30.

Federal regulators have determined that a refusal to preempt SB1 in its entirety "could increase costs for institutions and consumers, promote inefficiency, expose institutions to uncertain civil liabilities, and undermine Congress' objective of achieving uniformity." Federal Agencies Amicus Brief, 2004 WL 3830731, at *15. Congress sought to exempt financial institutions from engaging in the complex exercise of determining whether information sought to be shared with affiliates is subject to state regulation. The district court here concluded that this exercise and the uncertainty attending it would force financial institutions to comply with SB1, even with respect to information that is protected under federal law, in order to avoid the risk of severe penalties imposed by California. *See* App. 47a; *see also Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2417 (2008) (citation omitted) (striking down as preempted California statute barring use of state funds to support or oppose union organizing because statute's costly recordkeeping requirements and substantial penalties for violations "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of the [National Labor Relations Act]").

3. Respondents assert (Opp. 28-29) that the Court should wait for a patchwork of state regulations before reviewing the preemptive scope of Section 1681t(b)(2), App. 77a. The federal agencies warned that a dual system of regulation will "driv[e] up the costs of financial services" and "harm[] both financial institutions and consumers." Fed. Agencies Amicus Brief, 2004 WL 3830731, at *15. Especially in the current economic environment, the Ninth Circuit's decision warrants immediate review.

Essentially all major financial institutions do business in California. SB1 requires financial institutions to divert resources in an effort to comply with burdensome state regulation and to avoid enormous state penalties at a time when operational efficiency is critical to their safety and soundness. Moreover, the eight other states in the Ninth Circuit are now free to add to this patchwork without creating a circuit split, and twenty-eight states—including five states in the Ninth Circuit—and the District of Columbia had said they "need" a privacy statute if SB1 is upheld. Pet. 32 & n.4. Adding these twenty-nine jurisdictions could wreak havoc on financial institutions.

Unlike the Ninth Circuit, the federal agencies think that the statute should be construed according to its plain language. Federal Agencies Amicus Brief, 2004 WL 3830731, at **6, 17-19. Unlike the Ninth Circuit, the federal agencies think this construction accords with Congress's purpose to create a uniform standard of regulation. *Id.* at **2, 20. And unlike the Ninth Circuit, the federal agencies think that this interpretation is necessary

to maximize efficiency in the financial markets. *Id.* at *15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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