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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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June 9, 2009

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The United States agrees with Petitioners that the Ninth Circuit's decision is flatly incorrect and that "the California Act's provisions regulating affiliates' information-sharing are preempted *in their entirety*." U.S. Br. 8 (emphasis added). Moreover, the United States recognizes that the Ninth Circuit, by misconstruing the term "information" in the affiliate-sharing preemption provision of the Fair Credit Reporting Act (FCRA), "has reversed Congress's effort to clarify the law so as to remove disincentives on affiliates' sharing of consumer information." *Id.* at 13.

The United States nonetheless recommends against review on the ground that the decision has not been shown to have caused serious harm to the banking industry as of yet. That reason for opposing review is wholly unpersuasive. As the United States acknowledges, the Ninth Circuit's decision "return[s] financial entities to the very quandary from which [the FCRA] tried to extricate them." *Id.* There is thus no basis for waiting to determine whether the very harms Congress sought to avoid will in fact come to pass. Indeed, six federal agencies told the Ninth Circuit that the question presented is of "enormous practical significance" to financial institutions. Federal Agencies Amicus Brief, 2004 WL 3830731, at *13. Review should occur before rather than after serious harm occurs, and that is particularly true in the context of a decision that so plainly misinterprets Congress's mandate.

1. Petitioners and the United States agree that the FCRA expressly preempts state law restrictions on the sharing among affiliates of any information on

consumers. *See* U.S. Br. 10-16; Pet. 17-31; C.A. Pet. Reply Br. 3 n.2 (Oct. 13, 2004) ("Obviously, the 'information' referred to * * * in [Section] 1681t(b)(2)'s express preemption clause is 'information on consumers.'"). The United States therefore agrees with Petitioners that the Ninth Circuit's decision "improperly constricted FCRA's preemptive scope." U.S. Br. 9. Under the correct legal analysis, the United States explains, SB1's "provisions regulating affiliates' information-sharing are preempted in their entirety." *Id.* at 8. According to the United States, the Ninth Circuit's failure to afford full preemptive effect to the FCRA "disserves Congress's objectives in enacting the 1996 Amendments." *Id.* at 11.

a. The United States faults the Ninth Circuit for "constru[ing] the term 'information' in [the affiliate-sharing preemption provision] as limited to communications falling within the basic definition of 'consumer report' contained in [15 U.S.C. §] 1681a(d)(1)." U.S. Br. 11. The United States explains that the Ninth Circuit's reliance on the definition of "consumer report" "was misplaced" because that definition, which contains limitations on what constitutes a "consumer report," presupposes that the term "information" is broader than a "consumer report." Otherwise, the United States notes, Congress would have found it unnecessary to specify the *types* of information that qualify as a "consumer report." *Id.* at 12. The United States explains that the Ninth Circuit's reliance on the exclusions from the definition of "consumer report" found in 15 U.S.C. § 1681a(d)(2) is misplaced for similar reasons. "Nothing in those

provisions logically suggests . . . that communications falling outside the scope of the exclusions do not contain 'information.'" U.S. Br. 12.

b. The United States further concludes that the Ninth Circuit's erroneous interpretation of the term "information" "disserves an important purpose of the 1996 [FCRA] Amendments and of the FACT Act." *Id.* The United States explains that "Congress sought to lessen disincentives on information sharing among affiliates by reducing uncertainty about whether particular communications to affiliates would constitute 'consumer reports.'" *Id.* at 12-13. Congress achieved that objective by "broadly exclud[ing] inter-affiliate communications from the definition of 'consumer report.'" *Id.* at 13. As the United States observes, "[t]he court of appeals' decision would return financial entities to the very quandary from which this legislation tried to extricate them," because it requires them to determine "whether particular communications fall within the basic FCRA definition of 'consumer report'" in order to avoid potential liability for violating SB1. *Id.* By requiring financial institutions to engage in precisely the same burdensome and uncertain analysis that the FCRA sought to eliminate, the Ninth Circuit's decision, in the view of the United States, "reversed Congress's effort to clarify the law so as to remove disincentives on affiliates' sharing of consumer information." *Id.*[1]

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[1] Although the United States suggests that its interpretation differs from that of Petitioners (*see* U.S. Br. 10), it notes that Petitioners have proposed exactly the same interpretation. *See* U.S. Br. 10 n.4 (quoting C.A. Pet. Reply Br. 3 n.2 (Oct. 13, 2004) (...continued)

2. Having concluded that the Ninth Circuit's decision is both erroneous and inimical to an important objective Congress sought to achieve in enacting and amending the FCRA—namely, establishing a uniform standard designed to encourage information-sharing among affiliated financial institutions—the United States nevertheless suggests (Br. 16-22) that further review is unwarranted at this time. The United States identifies no sound basis for denying review of the Ninth Circuit's flatly erroneous decision.

a. The court of appeals' decision merits further review because it badly misinterprets a federal statute in a manner that prevents the federal regime for affiliate information-sharing from operating as "the national uniform standard." (U.S. Br. 17 (quoting S. Rep. No. 104-185 (1995)). Congress adopted a uniform standard because it recognized that "credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers." *Id.* By enacting the affiliate-sharing preemption provision, Congress sought to protect this uniform federal regime and the important goals it promotes from state interference. The Ninth Circuit's erroneous interpretation of the preemption provision creates the very "disuniformity" (*id.* at 17) that Congress sought to avoid and thereby frustrates the

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("Obviously, the 'information' referred to in * * * [Section] 1681t(2)'s express preemption clause is 'information on consumers.'"). As the United States recognizes, moreover, the FCRA deals solely with information on consumers.

goals that Congress aimed to achieve through its national uniform standard. Where a court of appeals' decision substantially undermines the administration of a federal regime, this Court has granted review even in the absence of a circuit conflict. *See, e.g.*, *United States v. Locke*, 529 U.S. 89 (2000) (granting certiorari to address Ninth Circuit decision that upheld state requirements that frustrated congressional intent to establish a uniform federal regime for the design of oil tankers); *Central Trust Co. v. Official Creditors' Committee of Geiger Enters., Inc.*, 454 U.S. 354 (1982) (granting certiorari to address Second Circuit decision that misconstrued bankruptcy code provision and thereby negated congressional intent); E. Gressman et al., *Supreme Court Practice* § 4.13, at 267-68 (9th ed. 2007) (discussing cases in which the Court granted review to resolve important federal statutory issues, including "the serious hindrance to effective administration of the law caused by the lower court decision"). The Court should do so here, where the Ninth Circuit "has reversed Congress's effort to clarify the law so as to remove disincentives on affiliates' sharing of consumer information." U.S. Br. 13.[2]

b. The United States suggests that review of the question should wait until the appellate courts have

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[2] As the United States points out, the Fourth Circuit upheld a determination by the OCC that a provision of the West Virginia Insurance Sales Consumer Protection Act restricting the sharing of a customer's insurance information among affiliates was entirely preempted by the FCRA. *Cline v. Hawke*, 51 Fed. App'x. 392 (2002), *cert. denied*, 540 U.S. 813 (2003).

an opportunity to "sharpen a number of factual and legal issues in this area." U.S. Br. 18. The United States, however, did not need additional data points to determine that the Ninth Circuit's interpretation of the affiliate-sharing preemption clause is wrong, that it eliminates the uniform national standard, and that it "disserves" the very goals Congress sought to achieve through that standard. Nor does this Court.

The United States argues that, even though Congress sought to prevent affiliated financial institutions from having to comply with state laws on information sharing, the adverse effects of having to do so may not be sufficiently clear and "far-reaching" (U.S. Br. 22) to justify restoring the uniform federal regime. That is a decision for Congress, however, and Congress viewed those adverse effects as sufficiently important to justify federal legislation designed to avert them. As Petitioners have already explained, moreover, *see* Pet. 25-28; Pet. Rep. Br. 10-11, the impact of the decision on financial institutions is real and significant.

In an amicus brief filed in the Ninth Circuit in this case, six federal agencies took the position that the question presented is "of enormous practical significance to the financial institutions." Federal Agencies Amicus Brief, 2004 WL 3830731, at *13. The United States does not retract its view that affiliate information sharing is of enormous practical significance to financial institutions, a view that Congress clearly shares. The United States instead observes that, at the time the statement was made, the district court had held that SB1 was not preempted at all, whereas the Ninth Circuit has now held SB1 partially preempted. U.S. Br. 19.

Congress, however, sought to preempt SB1 "in [its] entirety," *id.* at 8, and the Ninth Circuit's contrary conclusion has substantial practical consequences.

First, it can be extremely difficult in practice to distinguish "consumer reports" from other information, since the definition of "consumer report" depends on the use or intended use of the information. As the United States observes, a key purpose of Congress's decision to exclude inter-affiliate communications from the definition of "consumer report" was precisely to free financial institutions from having to draw such difficult distinctions. *Id.* at 12-13. Yet, as the United States observes, the Ninth Circuit's ruling "return[s] financial entities to the very quandary from which [the FCRA] tried to extricate them," *id.*, because they now must make such determinations to avoid SB1's severe penalties. To avoid that quandary and those penalties, the United States recognizes that "many entities may choose to comply with [SB1's] affiliate information-sharing provisions *even with respect to information that arguably falls within the FCRA definition of 'consumer report.'*" *Id.* at 22 (emphasis added); *see also* Pet. App. 47a (district court concluding that leaving any portion of SB1 in place creates "the untenable situation of forcing California financial institutions to either risk violation of SB1 or comply therewith whether or not the information is for an FCRA authorized purpose"). Given the government's recognition that the Ninth Circuit's ruling frustrates a core purpose of the FCRA's affiliate-information-sharing regime and may cause financial institutions to comply with SB1 to an even greater degree than the Ninth Circuit's decision

requires, the skepticism it expresses about the significance of the question presented is not persuasive.

The United States suggests (*id.* at 20-21) that having to comply with SB1's notice and opt-out requirements may not be especially burdensome because federal law already imposes such requirements, at least for non-experience information. But complying with SB1's requirements poses substantial problems for financial institutions and consumers alike. The notice provisions of SB1 specify a standard-form notice to consumers allowing a consumer to opt-out of affiliate-sharing of any of their "personal and financial information." Cal. Fin. Code § 4053(d)(2). Under the Ninth Circuit's decision, the standard-form's reference to "personal and financial information" cannot include the most sensitive types of consumer information that consumers would expect to be off-limits for sharing with affiliates if they check the box that contains this statutorily prescribed language.[3] In addition, as the United States points out, "problems could arise . . . if the specific forms of notice required by California officials frustrate the purpose of the federal notice by creating confusion about the rules governing

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[3] Moreover, any notice other than the statutorily prescribed standard-form notice must be easy to read and must avoid "legal terminology, and highly technical terminology, whenever possible." Cal. Fin. Code § 4053(d)(1). Respondents have not suggested that the notice required by SB1 could be rewritten to exclude federally protected information while meeting the "clear and understandable" test that gives consumers "a simple opt-out mechanism." *Id.* § 4051.5(b)(3).

information-sharing and opt out." U.S. Br. 21. The United States further notes that some financial institutions may be unable to adapt their information-sharing systems to comply with the California scheme. *Id.* The burdens on financial institutions of attempting to comply with SB1's requirements in accordance with a flawed construction of federal law, and the confusion among consumers that will surely arise from such attempted compliance provide an additional basis for further review.

Finally, the United States contends that further review is unwarranted because the "disuniformity" created by the Ninth Circuit's decision "likely will be confined to California." *Id.* at 17. As Petitioners have noted before, however, numerous states, including five within the Ninth Circuit, have represented that they "need" to enact legislation like SB1. *See* Pet. 32 (quoting States Amicus Brief). Moreover, regardless of what steps other states may take, the practical impact on financial institutions and consumers alike of the Ninth Circuit's decision requiring financial institutions to comply with California's information-sharing regime is significant enough to justify further review. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (granting certiorari to preserve the Clean Air Act's uniform application and preemption scheme in the face of a Ninth Circuit decision upholding a California statute that interfered with the federal regime). California is the most populous state in the Union and its banking industry accounts for almost 11 percent of all money deposited in

financial institutions throughout the United States. *See* Pet. 32.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] At a minimum, the Court may wish to consider granting the petition, vacating the Ninth Circuit decision, and remanding for further consideration in the light of the Solicitor General's brief and interpretation of the statute. The government has not previously explained its disagreement with the Ninth Circuit's mistaken conclusion that "information" means "consumer report information." *See, e.g., Raquel v. Educ. Mgmt. Corp.*, 531 U.S. 952 (2000) (granting the petition for certiorari, vacating the judgment, and remanding to the court of appeals "for further consideration in light of the position asserted by the Solicitor General in his brief for the United States, as *amicus curiae*"); *Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993) (same); *Oberly v. Baltimore & Ohio R.R. Co.*, 479 U.S. 980 (1986) (same).