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, 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 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Clearing House Association L.L.C. is a non-profit trade group, based in New York City. It has no parent corporation, nor has it issued shares or securities that are publicly traded.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, this brief is respectfully submitted by The Clearing House Association L.L.C. (the "Clearing House") with the consent of all parties.

Interest of *Amicus Curiae*

The Clearing House, an association of leading commercial banks in the United States, frequently appears as *amicus curiae* in appeals that present issues of importance to the commercial banking industry.[1] The importance of this appeal is evident. The supremacy of federal law over state law is a cornerstone of our Constitutional system. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The District Court below has upheld a California state statute that purports to impose a detailed and onerous regulatory regime on the sharing of customer information among financial affiliates. In doing so, the court refused to give effect to federal legislation intended to preempt such regulation, as manifested in the clear language of the federal statute as well as its legislative history.

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[1] The Clearing House members are: Bank of America, National Association; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

The issue of affiliate information sharing arises because, although U.S. financial institutions are now authorized to engage in a virtually unlimited range of financial services without geographic restriction, they still operate through multiple corporate entities as a result of statutory mandates and other factors. For example, for many years individual banks were restricted by statute to a single state, or even a smaller geographic unit, but, even after these restrictions were removed, some banking institutions continue to operate through multiple banks in order to retain customer loyalty. Concerns about safety and soundness, competitive fairness and functional regulation have resulted in statutory requirements that brokerage and insurance be conducted in separate corporate units from an affiliated bank. In this respect, the U.S. financial system is different than systems in most other countries, where all financial services may be provided by a single entity, which helps explain why Congress decided against restricting information sharing among financial service affiliates.

Clearing House banks are affected by the decision below because they have financial services affiliates with which they share information about customers to whom they offer a spectrum of financial products. Their expansion of offerings in recent years has coincided with

Congressional approval of increased affiliation among financial services companies and nationwide rules for information sharing and marketing with those affiliates, without being required to confront a patchwork of overlapping state laws that intrude into what Congress has decreed to be an exclusively federal concern. By its decision the lower court not only significantly disrupted the financial services business in California but raised the spectre of a state-by-state patchwork of regulations across the country that is precisely what Congress sought to ban. Its effect will be to impede consumers from having the choice to obtain a broad range of services from one financial relationship. Thus, the outcome of this case is critical not only to financial firms and consumers in California, but across the nation.

The court below refused to give effect to the federal preemption provision designed by Congress to achieve this uniformity, and failed to bar the imposition of this state statute that clearly fell within the ambit of that provision. In 1996, Congress amended the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "FCRA"), to prohibit, clearly and explicitly, state regulation of the exchange of consumer information among financial institutions and their affiliates:

> "No requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ."

15 U.S.C. § 1681t(b)(2) (the "FCRA Uniformity Provision").

In 2003 the California legislature enacted the California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2 §§ 4050 *et seq.*, known by its legislative name, "SB1". SB1 imposes requirements regarding the form, content and means of transmitting notice, customer election procedures and periods of delay before financial institutions may share consumer information with affiliates.

This statute thereby constitutes a requirement or prohibition within the meaning of the FCRA's express preemption clause. Even the California legislature itself recognized that, unless a so-called sunset provision in the FCRA became effective, SB1's provisions regarding affiliate information sharing would be pre-empted ("[15 U.S.C. § 1681t(b)(2)] clearly preempts [SB1's] opt-out provisions, [but] is scheduled to sunset in January 2004"). Sen. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Feb. 13, 2003, pp. 13-14. In December, 2003, however, after thorough debate, Congress instead amended the FCRA to maintain the FCRA Uniformity Provision in

the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 STAT. 1952 (Dec. 4, 2003) (the "2003 FCRA Amendments"). When the sun did not set on the FCRA Uniformity Provision, it never rose for SB1's bar on sharing information among financial affiliates.

The ruling below deprives both financial institutions and consumers of the benefits of uniform national regulation of information sharing among affiliates. The lower court's decision would impose precisely the costs and inefficiencies that Congress intended to avoid. The sharing of information among affiliates has inherent savings and the potential to facilitate offering an expanded array of products and services to customers.

Of even greater importance than the specific restrictions of SB1 is the general threat to uniform regulation. If the District Court's ruling is upheld, financial institutions no longer will be able to rely on a national rule that specifies what information sharing is permitted, what is not and what disclosure is required. Rather, they will confront a patchwork of state, and potentially municipal, regulations such as California's that almost inevitably will be inconsistent and even conflicting. As Congress determined in enacting the FCRA, financial product and service offerings are often nationwide in scope, and there is a direct correlation between the complexity

of local rules and the expense and inconvenience of financial services for consumers.

In the FCRA as amended in 1996 and again in 2003 to make permanent the preemption of state law, Congress made the decision that it was in the best interests of consumers that information sharing be permitted among affiliates. In the Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 STAT. 1338 (Nov. 12, 1999) (the "GLBA"), in particular Title V, Subtitle A, 15 U.S.C. §§ 6801 *et seq.*, Congress limited such sharing only with non-affiliated third parties. Once Congress made that distinction, the states had no ability to adopt a different conclusion.

The GLBA, which permitted bank holding companies to own securities and insurance affiliates, was intended in part to offer a customer of one financial services company enhanced access to other financial products from its affiliates. A primary purpose of the statute was:

> "[T]o enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers, and for other purposes. . . ."

H.R. Conf. Rep. No. 106-434, at 1 (1999). It is paradoxical to conclude, as did the lower court, that the GLBA regulates and curtails affiliate information sharing when it does nothing of the kind, as the California

legislature recognized when considering SB1. ("The privacy provisions of the GLB Act restrict only the sharing of information between financial institutions and non-affiliated third parties, . . . ") Assem. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 11; ("The GLB Act does not restrict the sharing of nonpublic customer information between affiliates.") Sen. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Feb. 13, 2003, p. 1.

The choice to receive information about and to use this expanded array of services of course is the consumer's, but Congress made a rational decision when enacting the 1996 amendments to the FCRA otherwise to allow affiliates to share customer information.[2]

Issue Presented for Review

Did the court below err in ruling that the FCRA Uniformity Provision, 15 U.S.C. § 1681t(b)(2), does not preempt SB1, despite the clear

2 The lower court's remark (Op. at 9, n. 5), that the FCRA was not intended to increase private institutions' commercial revenue, was misguided. The rules that Congress enacted would have the effect of lowering companies' costs and increasing consumer choice. This statutory scheme benefits both companies and consumers. The ruling below ignores that reality, Congressional intent and the statutory language that Congress used.

language of the federal preemptive statute and Congress' evident and reconfirmed purpose to establish a nationwide rule regarding sharing customer information among corporate affiliates?

Summary of Argument

From 1996 to 2003, Congress enacted the GLBA, legislation that expanded the ability of bank holding companies more easily to affiliate with other companies in different financial areas such as insurance or securities brokerage, and established federal rules regarding the ability of institutions to share consumer information with their affiliates, including an explicit rule that preempted state statutes seeking to regulate this area. When these federal rules originally were enacted in 1996, Congress established an expiration date of January 1, 2004 for state preemption but, with several additional years' experience under the exclusive federal regimen, in December 2003 Congress made the ban permanent.

Throughout this period, Congress consistently distinguished between standards for sharing consumer information among non-affiliated third parties and among affiliates. For the former, there were both federal substantive rules and no preemption of state law; for the latter, Congress envisioned different and uniform treatment and precluded the states from acting.

The ruling below was entirely contrary to the federal statutory scheme that establishes national standards concerning the exchange of consumer information among financial industry affiliates. To reach the result below, the District Court ignored the plain language of the FCRA, misinterpreted the scope of the GLBA, ignored the confirmation of federal preemption in the 2003 FCRA Amendments, misapplied a presumption that favored state law over federal preemption, and never mentioned legislative history for both the GLBA and SB1 that contradicted its conclusions. For these reasons, the ruling below should be reversed.

Argument

I. THE FAIR CREDIT REPORTING ACT PREEMPTS STATE REGULATION OF SHARING OF CONSUMER FINANCIAL INFORMATION AMONG AFFILIATES.

The lower court's ruling was incorrect. It ignored both the clear language and the history of federal legislation concerning affiliate sharing of information, and applied erroneous statutory analysis to justify upholding SB1. It threatens the uniform system that Congress has developed.

A. The Language and Evolution of Federal Law Regarding Sharing of Consumer Financial Information Between Financial Institutions and Their Affiliates Demonstrates Congress' Decision to Preempt State Legislation In This Area.

This case involves a conflict between, on the one hand, SB1 and, on the other hand, three federal laws that establish a clear distinction in Congressional policy -- in terms both of substance and federal primacy -- between sharing consumer financial information among affiliates and with non-affiliated third parties:

(1) Congress amended the Fair Credit Reporting Act on September 30, 1996 (Pub. L. No. 104-208). Since 1970, 15 U.S.C. § 1681t(a) had stated that the FCRA did not affect the laws of any State "with respect to the collection, distribution or use of any information on consumers", but the 1996 amendments created new exceptions in subsections (b) and (c). Subsection (b) preempts state laws in several areas including, in the FCRA Uniformity Provision, a clearly stated preemption of any state law with respect to information sharing by affiliates: "No requirement or prohibition may be imposed under the laws of any State ... (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, ..." (§ 1681t(b)(2)). This provision had a sunset or expiration date of January 1, 2004. The

preemption language in the immediately preceding subparagraph (b)(1) is more limited because its bar on state legislation is specifically restricted to consumer reports and consumer reporting agencies. In marked contrast, subparagraph (b)(2) is not limited to consumer reports or consumer reporting agencies.

(2) Three years later, the Gramm-Leach-Bliley Act of 1999 (Pub. L. No. 106-102) greatly expanded the scope of permissible affiliations among financial institutions. In connection with this expansion, the GLBA also addressed the disclosure of nonpublic personal customer information, and established a balanced approach. First, all financial institutions are required to disclose their policies regarding information sharing with both affiliated and non-affiliated companies (15 U.S.C. § 6803), with specific categories of disclosure required about disclosure to non-affiliates (§ 6803(b)(1)). Second, with respect to the distribution of such information to non-affiliated third parties, Section 6802 imposes a series of substantive obligations, including a specific opt-out provision, allowing consumers to prevent non-affiliate information sharing (§ 6802(b)). Third, there are no similar obligations with respect to information sharing with affiliates.

The legislative history of the GLBA itself demonstrates that Congress intended to restrict financial institution disclosure of personal information to non-affiliated third parties. H.R. Conf. Rep. No. 106-434, at 171 (1999). No restriction on affiliate sharing is mentioned, or provided.

A similar dichotomy was drawn with respect to federal preemption. Congress took great care to ensure that, although the GLBA itself did not preempt state law regarding information sharing with nonaffiliated third parties, the preemption in the FCRA of state statutes affecting information sharing among affiliates would be preserved. The GLBA explicitly provides that "nothing in this title should be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act, . . ." (§ 6806), which by 1999 included the 1996 amendments that preempted state statutes addressing information sharing among affiliates. Further, the anti-preemption provision in the GLBA (§ 6807) is carefully limited to "this subtitle and the amendments made by this subtitle," language that consistently has been found by the courts not to affect the preemptive nature of other federal statutes. *See, e.g.*, *Bank of America v. City & County of San Franciso*, 309 F.3d 551, 565 (9th Cir. 2002).

(3) California's SB1 was enacted in August 2003, creating restrictions on information sharing among financial affiliates. Its effective date was purposefully established as six months after the January 1, 2004 expiration date for the FCRA's preemption of state laws regarding information sharing among affiliates, on the assumption that by July, 2004 the FCRA sunset provision would apply to terminate the FCRA's preemptive impact.

In fact, SB1's legislative history reveals that the California legislature expected that SB1 would be preempted if the sunset provision were rescinded. After quoting the FCRA Uniformity Provision, one California Senate analysis states:

> This language, which clearly preempts the bill's opt-out provisions, is scheduled to sunset in January 2004. Because the bill'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. Sen. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Feb. 13, 2003, pp. 13-14.

Both houses of the California legislature also recognized that the preemption analysis was crucial because the GLBA did not restrict information sharing among affiliates:

> The GLB Act does not restrict the sharing of nonpublic customer information between affiliates. Sen. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.), as amended Feb. 13, 2003, p.1.

and

> The privacy provisions of the GLB Act restrict only the sharing of information between financial institutions and non-affiliated third parties, providing no protection for the disclosure of information between the newly affiliated companies. The GLB Act provides for an opt-out with regard to the sharing of nonpublic personal information by a financial institution with nonaffiliated third parties. Assem. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 11.

The California legislature also recognized that the argument that the affiliate sharing provisions would be preempted was "strengthened by the decision in *Bank of America* v. *Daly City*." Assem. Comm. on Banking and Finance, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 12. *Bank of America* v. *City of Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003), held that the GLBA did not regulate information sharing among affiliates and that the FCRA preempted such state regulation. The court below in the instant case disagreed, saying

without analysis that the *Daly City* opinion was incorrect and that the GLBA did regulate information sharing among financial affiliates.[3]

(4) In December 2003, after substantial debate, Congress amended the FCRA to eliminate the January 1, 2004 sunset date for the FCRA Uniformity Provision, thereby making preemption permanent.

When the 2003 FCRA Amendments were debated in Congress, both Senators from California opposed it, because they recognized that the elimination of the sunset provision would mean that the recently enacted SB1 would be preempted. *See* 149 Cong. Rec. S13848, S13860, S13873,

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[3] The court below gave short shrift to the opinion in *Daly City*, asserting simply that "its reasoning is faulty" and its determinations "incorrect[]". Op. at 12, n.9. The court below justified its disregard for *Daly City*, which carefully reviewed the actual language of the two statutes, 279 F. Supp. 2d at 1123-1127, because the opinion subsequently was vacated as moot by order of May 14, 2004 (No. 03-16689) after an appeal was filed, citing as authority *Durning* v. *Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991). The opinion in *Daly City* should not be treated so cavalierly. The appeal was filed by the winning party, solely because the lower court had declined also to preempt the same ordinances under additional authority. The opinion was vacated after the local authorities repealed their ordinances. It is hard to justify the lower court's treatment of *Daly City* under these circumstances. Rulings against authorities whose ordinances were barred in the District Court and then gave up on appeal should not be in worse regard than rulings never appealed.

In any event, the *Daly City* decision is persuasive for the force of its legal analysis, whatever its procedural status may be.

S13874 (Nov. 4, 2003). The amendments nonetheless were enacted, and SB1 indeed was preempted in accordance with Congressional intent. Congress continued to recognize that there are benefits, both to business and to consumers, from allowing corporate affiliates to share customer information and offer customers a wider array of services on a more efficient and cost-effective basis, provided that there is appropriate disclosure. Having made this determination, Congress also found that uniformity in affiliate information sharing rules was essential to achieve these benefits, and preempted state statutes such as SB1.

B. The Decision Below Misread The Statutes At Issue and Misapplied Principles of Statutory Analysis.

In ruling that the FCRA does not preempt the affiliate-sharing provisions of SB1, the District Court concluded that the purpose of the FCRA is solely to protect consumers from unfair or inaccurate credit reporting, and that information not constituting a consumer report is not governed by the FCRA. Op. at 9, 11, 14. The ruling should be overturned because the language of the FCRA is explicit, unambiguous and broader -- state laws are preempted by the FCRA from regulating the exchange of information among financial affiliates. Moreover, subsequent federal legislation confirms that the plain meaning of the statute was clearly intended by Congress.

In analyzing the amendments to the FCRA, the District Court correctly acknowledged that discerning legislative intent is the key to preemption analysis, but the court failed to honor the clear direction of the Supreme Court that the language of the statute itself, when clear, is determinative of legislative intent.

The "task of statutory construction must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002), quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The District Court correctly recognized that a state regulation is preempted where Congress has "explicitly defined the extent to which its enactments displace state law," *English* v. *Gen. Elect. Co.*, 496 U.S. 72, 78-79 (1990), but then ignored Congress' broad and express preemption language in the FCRA Uniformity Provision, § 1681t(b)(2), as well as legislative history. The court did not attempt to argue that the plain language of the FRCA Uniformity Provision was limited to consumer reports because there is no basis for such an argument. Instead, the court applied its own analysis of "context" and held that the preemption language in subsection (b)(2) was limited by context to

consumer reports and consumer reporting agencies, Op. at 11, n. 8, despite the absence of any such language in the provision.

The court's "context" argument is contrary not only to fundamental rules of statutory construction (*Sprietsma* v. *Mercury Marine*, *supra*, 537 U.S. at 62-63), but also to the actual context of the FCRA Uniformity Provision. The court ignored the salient fact that when Congress wanted to limit the preemptive impact of the FCRA to consumer reports, it did so explicitly, as in § 1681t(b)(1).

As the Supreme Court has noted, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (citation omitted), *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The distinction in Congressional language in different sections of the same statute is the truly significant context, but the court below simply ignored the point.

The court below also attempted to support its context argument with the contention that the GLBA, rather than the FCRA, governs information sharing among affiliates. That contention, however, is directly contradicted by the terms of the GLBA itself. Having decided that there

should be no restrictions on information sharing among affiliates beyond disclosure, Congress wanted to insure that this balance was not upset by the states. It did not need to enact a new preemption provision to accomplish this objective because it was already in existence in the FCRA. In order to remove any doubt, Congress explicitly stated that the GLBA does not modify, limit or supersede the FCRA (15 U.S.C. § 6806). This statutory pattern was fully recognized by both houses of the California legislature in enacting SB1. Sen. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Feb. 13, 2003, p. 1; Assem. Comm. on Judiciary, Analysis of Sen. Bill No. SB1 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 11.

Any possible question on this issue is eliminated by the 2003 FCRA Amendments. Congress there made permanent the preemption of state legislation relating to the exchange of consumer information among affiliates by eliminating the January 1, 2004 sunset provision. Surprisingly, the court below ignored the significance of this amendment which, after debate, confirmed that Congress has recognized the benefits that flow from a freer exchange of consumer information among financial affiliates. As was the case with the context of the FCRA itself, the overall statutory plan

supports rather than contravenes the plain meaning of the FCRA Uniformity Provision -- that it expressly preempts and thus invalidates SB1's restrictions on affiliate information sharing.

II. CALIFORNIA'S POLICE POWER DOES NOT WARRANT CIRCUMVENTING THE FCRA.

The court below concluded that because the subject matter of the California legislation relates to consumer protection, the legislation falls under the State's police powers. Op. at 6-7. As such, the court reasoned that a heightened presumption against preemption exists, thereby requiring a narrow interpretation of the FCRA. *Id.* at 6.

In attempting to make this argument, the court failed to recognize that the presumption against preemption is not triggered when there has been a significant federal presence in the area the State is attempting to regulate. *See United States* v. *Locke*, 529 U.S. 89, 108 (2000). The FCRA and scores of other federal statutes regulate the financial services industry and financial institutions, arguably an industry with the highest level of federal involvement imaginable. *See Bank of America* v. *City and County of San Francisco*, *supra*, 309 F.3d at 558 ("Because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable.") Even more specifically,

the District Court ignored the fact that Congress intended to create uniform national standards addressing the exchange of financial information among financial institutions and their affiliates when it enacted the FCRA and its amendments. Fundamental statutory construction and interpretation dictate reversal of the lower court's decision.

III. THE SAVINGS CLAUSE IN TITLE V, SUBTITLE A OF THE GRAMM-LEACH-BLILEY ACT DOES NOT SAVE SB1 FROM PREEMPTION BY THE FCRA.

The savings clause in Title V, Subtitle A of the GLBA (§ 6807), provides:

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

The plain language of this provision shows that Congress did not intend the GLBA to expand the application of state law to areas where such state law previously had been federally preempted. The savings

provision specifically limits its anti-preemptive effect to "this subtitle." It does not in any way foreclose the possibility that some other federal law may have a preemptive effect.

Stated differently, for the GLBA savings provision to avoid preemption it must extend beyond the terms of the GLBA itself. It is not sufficient to maintain that the GLBA itself does not preempt state law. Because the FCRA by its terms preempts state law seeking to regulate sharing consumer information among financial affiliates, appellees must successfully argue here that the GLBA savings provision salvages state laws, such as SB1, that Congress has previously preempted under a different federal law, the FCRA. This would not constitute preservation but resurrection. This approach lacks any basis in statutory language or legislative history.

It also has been consistently rejected by the courts. In *Bank of America* v. *City & County of San Francisco*, *supra*, the court held that an almost identical savings provision in the Electronic Funds Transfer Act (EFTA)[4] did not save state laws regulating ATM fees "against preemption

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[4] The EFTA savings provision at issue states, in pertinent part, that "[t]his subchapter does not annul, alter, or affect the laws of any State (continued)

by the [Home Owners Loan Act] and the National Bank Act." 309 F. 3d at 565. *See also Bank One* v. *Guttau*, 190 F.3d 844, 850 (8th Cir. 1999); *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132, 146 (D. Conn. 1999) (noting that the EFTA "does not contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws"). Faced with a similar savings provision in the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §§ 1602(aa), 1610, 1939, 1640 ("HOEPA"),[5] the court in *Ill. Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002), held that HOEPA and its savings provision "[did] not alter the preemptive effect of other statutes," 308 F.3d at 766, including a 1992 federal law that concerned the same subject matter. 308 F.3d at 764.

(continued)

with respect to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." 15 U.S.C. § 1693q.

5 The HOEPA savings provision at issue states, in pertinent part, that "the provisions of [15 U.S.C. § 1639] do not annul, alter, or affect the applicability of the laws of any state or exempt any person subject to [15 U.S.C. § 1639] from complying with the laws of any State … except to the extent that those state laws are inconsistent with any provision of [15 U.S.C. § 1639], and then only to the extent of the inconsistency". 15 U.S.C. § 1610(b).

Indeed, the argument against extending a statute-specific anti-preemption provision to all federal statutes is even stronger in this case than the statutes and cases cited in the preceding paragraph. In the GLBA, Congress explicitly and specifically confirmed that "nothing in this title shall be construed to modify, limit, or supersede the operation of the [FCRA]" (15 U.S.C. § 6806).

The GLBA savings provision speaks for itself and in a limiting fashion. It prohibits only preemption of state law by federal law that is embedded in Title V, Subtitle A of the GLBA; any other federal law that otherwise preempted state regulation is not overridden. As noted above, both houses of the California legislature clearly recognized that only the later-withdrawn sunset provision of the FCRA, not the GLBA savings provision, would have cleared the way for SB1. Accordingly, the GLBA savings provision offers no support for the proposition that SB1 is not preempted by federal law.

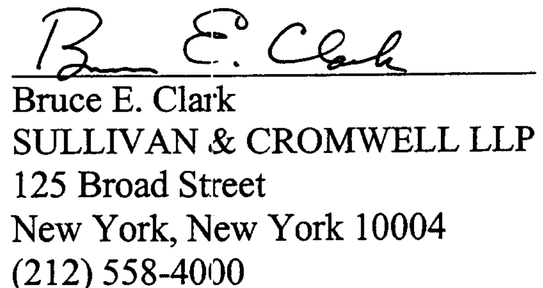
CONCLUSION

The District Court's ruling renders meaningless Congress' uniform nationwide standards for managing the exchange of financial information among affiliates. By enacting the FCRA amendments, Congress intended to provide consumers with the benefits of better access to financial products and services offered by affiliated financial firms. California's SB1 impermissibly imposes a burden on that access, and thwarts Congressional intent.

For the foregoing reasons, we respectfully request that the Court reverse the ruling of the court below and order that judgment be entered for the Appellants.

Dated: August 9, 2004
New York, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

I, Bruce E. Clark, hereby certify that this Brief of The Clearing House Association L.L.C. complies with the type-volume limitations of Federal 14-point Times New Roman font, a proportionally spaced, serif typeface. According to the word count of the word processing program that was used to prepare it, this brief contains 5,095 words, exclusive of the Table of Contents, Table of Authorities, and Certificates of Service and Compliance.

Dated: New York, New York
August 9, 2004

Bruce E. Clark

Certificate of Service

DAVID LIEBOV, member of the bar of the State of New York and an associate with the law firm of Sullivan & Cromwell LLP, attorneys for the New York Clearing House Association L.L.C. certifies that on the 9th day of August, 2004, he served two true copies of the attached Brief of the Clearing House Association L.L.C. As *Amicus Curiae* In Support of Plaintiffs-Appellants by Federal Express, overnight delivery, and by e-mail addressed to the following:

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